

# INTERNAL DISCLOSURE PROCESSES FOR THE CANADIAN ARMED FORCES AND THE DEPARTMENT OF NATIONAL DEFENCE – PROCEDURES MANUAL

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## Chapter 1 – Legislative Framework

### Authorities

1. This manual contains the procedures for implementing the *Public Servants Disclosure Protection Act* (PSDPA), SC 2005, c 46 which came into force on 15 April 2007. The PSDPA made public sector Chief Executives responsible for establishing procedures to manage disclosures of wrongdoing made under the PSDPA. The Chief Executive for the Department of National Defence (DND) is the Deputy Minister (DM).
2. The Canadian Armed Forces (CAF) are not part of the public sector, and CAF members are not subject to the PSDPA. Section 52 of the PSDPA requires that the CAF Chief Executive establish procedures, applicable to the CAF, for the disclosure of wrongdoing, and the protection of persons who disclose wrongdoing. Those procedures must be similar to those set out in the PSDPA. The Chief Executive for the CAF is the Chief of the Defence Staff (CDS). The *Canadian Armed Forces Disclosure Process* (CAF DP) came into force on 1 April 2013.
3. The DM and CDS have designated the Assistant Deputy Minister (Review Services) (ADM(RS)) as the Senior Officer for Internal Disclosure (SOID) responsible for implementation of the PSDPA and the CAF DP in each of their respective organizations. It cannot be overemphasised that ADM(RS) has been designated SOID for two separate organizations. ADM(RS) reports matters separately to the two different Chief Executives. Matters pertaining to the CAF will only be communicated to the CDS. Matters pertaining to the DND will only be communicated to the DM. In exceptional cases of wrongdoing, situational awareness may be required of both the DM and CDS.
4. This manual contains the procedures developed for the intake, assessment, and investigation of protected disclosures (by DND employees and CAF members), complaints of reprisal (by members of the CAF) and for making adequate information available to the public about founded wrongdoing in accordance with the obligations set out at sections 10 and 11 of the PSDPA.

## **DND Employees Are Subject to the PSDPA**

5. Public sector employees of DND can submit protected disclosures of wrongdoing to either the ADM(RS) or to the Public Sector Integrity Commissioner (PSIC) for assessment and possible investigation. Reprisal complaints by DND employees can only be submitted to PSIC, which is the only organization authorized to receive and consider reprisal complaints from public servants.

## **CAF Members Are Subject to the CAF DP**

6. CAF members can submit protected disclosures of wrongdoing to ADM(RS) when the respondent or alleged wrongdoer is a member of the CAF. ADM(RS) is also responsible for investigating complaints of reprisal alleged by a member of the CAF. A CAF member may disclose to ADM(RS) or to PSIC allegations of wrongdoing when the alleged wrongdoer is a public servant.

## **What is a Wrongdoing?**

7. The PSDPA defines wrongdoing as follows:

- (a) a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act, other than a contravention of section 19 of this Act;*
- (b) a misuse of public funds or a public asset;*
- (c) gross mismanagement in the public sector;*
- (d) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant;*
- (e) a serious breach of a code of conduct established under section 5 or 6; and*
- (f) knowingly directing or counselling a person to commit a wrongdoing set out in any of paragraphs (a) to (e).*

8. The definition of wrongdoing under the CAF DP is as follows:

- (a) any serious breach of the Code of Service Discipline;*
- (b) any other contravention of an Act of Parliament or of the legislature of a province, or any regulations made under any such act;*
- (c) A misuse of public property or non-public property;*
- (d) A gross mismanagement;*
- (e) An act or omission that creates a substantial and specific danger to the life, health, or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a person; or*

*(e) knowingly directing or counselling a person to commit a wrongdoing set out in any of subparagraphs (a) to (e)*

The PSDPA provides for the voluntary disclosure of wrongdoing by public servants. However, CAF members have an obligation to report wrongdoing to the proper authority. The SOID, ADM(RS), has been set up to receive protected disclosures of wrongdoing to help CAF members fulfill this obligation. Under the Queen's Regulations and Orders (QR&O) articles 4.02 *General Responsibilities of Officers* and 5.01 *General Responsibilities of Non-Commissioned Members*, CAF members are obliged to report to the appropriate authority, any infringement of pertinent statutes, regulations, rules, orders, and instructions governing the conduct of any person subject to the *Code of Service Discipline*.

Note: Please refer to the above QR&Os for the latest guidance.

## **Obligations Imposed by the Treasury Board**

9. As required under the PSDPA, the Treasury Board has established the *Values and Ethics Code for the Public Sector*. Under this Code, the Chief Executive and the SOID of every organization have the following duties:

### **Chief Executive**

*Chief executives of public sector organizations have specific responsibilities under the PSDPA, including establishing a code of conduct for their organization and an overall responsibility for fostering a positive culture of values and ethics in their organization. They ensure that employees are aware of their obligations under this Code and their specific organizational code of conduct. They also ensure that employees can obtain appropriate advice within their organization on ethical issues, including possible conflicts of interest.*

*Chief executives ensure that this Code, their organizational code of conduct, and their internal disclosure procedures are implemented effectively in their organization, and that they are regularly monitored and evaluated.*

*Chief executives are responsible for ensuring the non-partisan provision of programs and services by their organizations.*

### **Senior Officer for Internal Disclosure (SOID)**

*The senior officer for disclosure helps promote a positive environment for disclosing wrongdoing and deals with disclosures of wrongdoing made by public servants of their organization. Senior officers are responsible for supporting the chief executive in meeting the requirements of the PSDPA.*

*The senior officer's duties and powers within his or her organization also include the following, in accordance with the internal disclosure procedures established under the PSDPA:*

*Provide information, advice and guidance to public servants regarding the organization's internal disclosure procedures, including the making of disclosures, the conduct of investigations into disclosures, and the handling of disclosures made to supervisors.*

*Receive and record disclosures and review them to establish whether there are sufficient grounds for further action under the PSDPA.*

*Manage investigations into disclosures, including determining whether to deal with a disclosure under the PSDPA, initiate an investigation or cease an investigation.*

*Coordinate handling of a disclosure with the senior officer of another federal public sector organization, if a disclosure or an investigation into a disclosure involves that other organization.*

*Notify the person(s) who made a disclosure in writing of the outcome of any review and/or investigation into the disclosure and on the status of actions taken on the disclosure, as appropriate.*

*Report the findings of investigations, as well as any systemic problems that may give rise to wrongdoing, directly to his or her chief executive, with recommendations for corrective action, if any.*

[Ref: https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=25049#ftn3](https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=25049#ftn3)

## **Protection of Identities, Procedural Fairness, and Information to be Made Available to the Public**

10. Section 11 of the PSPDA requires the following:

*S.11 (1) Each Chief Executive must*

*(a) subject to paragraph (c) and any other Act of Parliament and to the principles of procedural fairness and natural justice, protect the identity of persons involved in the disclosure process, including that of persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings;*

*(b) establish procedures to ensure the confidentiality of information collected in relation to disclosures of wrongdoings; and*

11. It is important to note that identity protection cannot be guaranteed. Subject to the principles of procedural fairness and natural justice, the identities of disclosers and witnesses may have to be disclosed to the respondent. All parties should be made aware of this risk.

12. Should an investigation conclude with a finding of wrongdoing, the Chief Executive is obliged to provide the public access to information that adequately describes the wrongdoing and the corrective measures to be applied, typically within 60 days of the finding:

*(c) if wrongdoing is found as a result of a disclosure made under section 12, promptly provide public access to information that*

*(i) describes the wrongdoing, including information that could identify the person found to have committed it if it is necessary to identify the person to adequately describe the wrongdoing, and*

*(ii) sets out the recommendations, if any, set out in any report made to the chief executive in relation to the wrongdoing and the corrective action, if any, taken by the chief executive in relation to the wrongdoing or the reasons why no corrective action was taken.*

## **Opting Out of Providing Public Access to Information that Describes the Wrongdoing**

13. The need to provide public access to information that describes the wrongdoing does not supersede restrictions on disclosure created by or under any Act of Parliament. In particular, the following types of information should be withheld:

- A confidence of the Queen’s Privy Council for Canada in respect of which subsection 39(1) of the [Canada Evidence Act](#) applies;
- Information subject to solicitor-client privilege;
- Special operational information within the meaning of subsection 8(1) of the [Security of Information Act](#);
- Information that could reasonably be expected to cause injury to international relations, national defence or national security, or to the detection, prevention or suppression of criminal, subversive or hostile activities (CDS only);
- Information that could reasonably be expected to cause injury to the privacy interests of an individual (CDS only);
- Information that could reasonably be expected to cause injury to commercial interests (CDS only).

## **Service Standards**

### **Timelines**

14. There is a legislated obligation to perform these investigations *expeditiously* and *informally* as per s. 26 of the PSDPA.

*Informality*

**26. (...)**

**(2)** *The investigations are to be conducted as informally and expeditiously as possible.*

**Note:** Informality implies accessibility and minimal administrative hurdles. Expeditiously means promptly and efficiently, without unnecessary delays.

15. To achieve the goal of expeditious investigations, under normal circumstances a discloser will be informed of the decision to investigate or not investigate the disclosure within 90

calendar days of receipt. It will be endeavoured to complete an investigation within 12 months from an approved Tasking Order.

## **Intake Process**

16. During the analysis phase no witness will be contacted. Analysis will be based on information received from the discloser, advice from subject matter experts such as legal counsel, and with reference to laws, directives, and policies. Consistent with PSIC practice, and in line with s. 24 of the PSDPA, the following criteria may be considered during the analysis phase, and may be cited in any decision to not investigate:

*(a) the subject-matter of the disclosure or the investigation has been adequately dealt with, or could more appropriately be dealt with, according to a procedure provided for under another Act of Parliament;*

*(b) the subject-matter of the disclosure or the investigation is not sufficiently important;*

*(d) the length of time that has elapsed since the date when the subject-matter of the disclosure or the investigation arose is such that dealing with it would serve no useful purpose;*

*(e) the subject-matter of the disclosure or the investigation relates to a matter that results from a balanced and informed decision-making process on a public policy issue; or*

*(f) there is a valid reason for not dealing with the subject-matter of the disclosure or the investigation.*

17. If an investigation is not recommended, only the discloser will be informed of the decision and the reasoning. If it is decided that the matter should be referred to another, more appropriate mechanism, the discloser will be advised to directly communicate with that other mechanism.
18. If investigation is recommended, the Admissibility Assessment will be transferred to the investigative team. Once the file has been transferred to the investigative team, a Tasking Order will be developed by the investigative team for approval by the SOID. An investigation will be completed as expeditiously and usually within 12 months after the signing of the Tasking Order. The investigation will be considered complete once the SOID signs the Final Investigation Report or the Closure Letter.

## **Considering Anonymous Information or Expansion of the Investigation**

19. There may be occasions where, based on information received, it is in the public interest to initiate or expand an investigation into a wrongdoing beyond its original scope. This is consistent with s. 33 of the PSDPA:

*S.33 (1) If, during the course of an investigation or as a result of any information provided to the Commissioner by a person who is not a public servant, the Commissioner has reason*

*to believe that another wrongdoing, or a wrongdoing, as the case may be, has been committed, he or she may, subject to sections 23 and 24, commence an investigation into the wrongdoing if he or she believes on reasonable grounds that the public interest requires an investigation. The provisions of this Act applicable to investigations commenced as the result of a disclosure apply to investigations commenced under this section.*

20. Although information from an anonymous source is not specifically dealt with by the PSDPA, the Office of the PSIC considers this information to be part of *any information provided to the Commissioner by a person who is not a public servant* and may consider investigating it. Our CAF DP is meant to be a parallel system, so it will treat such information likewise. The following is a quote from the PSIC webpage.

*Can I make a disclosure of wrongdoing anonymously?*

*Yes, but it may limit our response.*

*The [Act](#) does not provide a mechanism to make anonymous disclosures and it is difficult for our Office to determine whether the information is provided by a public servant in good faith. However, our Office may investigate anonymous disclosures if the information concerns ... wrongdoing and appears reliable and sufficient to enable the allegations to be investigated.*

*We encourage anyone who fears identifying himself/herself for the purpose of making a disclosure to [contact our Office](#) to discuss the process and procedures we use and the protections provided by the Act to disclosers.*

## **Remitting Information to the Military Police or to CFNIS**

21. If, after being accepted under the PSDPA or CAF DP, it becomes apparent that the matter should be investigated by the Military Police or by the Canadian Forces National Investigation Service (CFNIS), the case may be transferred to those organizations. After the transfer, a decision will be made on whether to continue the process initiated under PSDPA or CAF DP. This is consistent with s. 35 of the PSDPA.

### **Remitting information**

*35 (1) If the Commissioner has reasonable grounds to suspect that information obtained in the course of an investigation may be used in the investigation or prosecution of an alleged contravention of any Act of Parliament or of the legislature of a province, he or she may, in addition to or in lieu of continuing the investigation, remit the information, at that point in time, to a peace officer having jurisdiction to investigate the alleged contravention or to the Attorney General of Canada.*

....

*(2) To maintain the separation of investigations carried out under this Act and those carried out for law enforcement purposes, after information has been remitted under subsection (1) in relation to any matter, the Commissioner may not — except in accordance with a prior judicial authorization — remit to any peace officer or to the Attorney General of Canada any further information in relation to that matter that the Commissioner obtains in the course of his or her investigation into that matter and in respect of which there is a reasonable expectation of privacy.*

## **Reprisal**

### **Reprisal Complaints - DND Employees**

22. A DND employee who believes they have been the victim of a reprisal, has the right to submit their allegations to the PSIC, which is the sole investigative authority for reprisal allegations made by public servants.

### **Reprisal Complaints - CAF Members**

23. A CAF member who believes they have been the victim of a reprisal for having participated in a protected disclosure process, has the right to submit their allegations to ADM(RS) under the CAF DP. The allegations must be submitted to ADM(RS) within 60 calendar days of the date the CAF member knew or ought to have known of the reprisal.

**Note:** If the SOID, having considered the circumstances, deems it appropriate, allegations may be filed more than 60 calendar days after the reprisal occurred.

24. Reprisal against a CAF member is described as follows:

- (a) Disciplinary action,*
- (b) a career remedial or other administrative action,*
- (c) the demotion of the member,*
- (d) the release, recommendation for release or termination of employment of the member,*
- (e) any measure that adversely affects the service, employment or working conditions of the member, or*
- (f) a threat to take any of the actions referred to in any of paragraphs (a) to (e)*

25. The alleged reprisal must be in response to the complainant participating in a disclosure of wrongdoing, which can be during a procedure established under any Act of Parliament. This is to clarify section 8(a) as defined by the PSDPA/CAF DP.
26. Within 15 calendar days of receiving the reprisal allegation the complainant will be informed of the decision to investigate—or not investigate—the reprisal allegation made under the CAF DP.

27. If it is decided that the reprisal will be investigated, an Admissibility Assessment will be transferred to the investigative team. Once the file has been transferred, a Tasking Order will be developed by the investigative team for review and approval by the SOID.
28. The investigation will be completed as expeditiously as possible and normally within 12 months. The investigation will be considered complete once the SOID signs the Reprisal Allegations - Final Investigation Report.
29. If the investigation concludes that there is reasonable ground to believe that reprisal has occurred against a member for having participated in a process of disclosure of wrongdoing, the SOID will provide a report to the CDS explaining the circumstances, which may include recommendations for remedies to address the impact of the reprisal with respect to the complainant.
30. Since taking reprisal action against a member contradicts QR&O 19.15, doing so may be considered a service offence. The option to take disciplinary measures against the person alleged to have taken the reprisal measures will therefore be left to the chain of command.

#### **19.15 - PROHIBITION OF REPRISALS**

(1) In this article, "disclosure of wrongdoing" means the disclosure by a person of any information that the person believes could show that any of the following wrongdoings has been committed or is about to be committed, or that the person has been asked to commit:

(...)

(2) No officer or non-commissioned member shall take any of the following actions, or direct that any be taken, against any person who has, in good faith, reported to a proper authority any infringement of the pertinent statutes, regulations, rules, orders and instructions governing the conduct of any person subject to the Code of Service Discipline, made a disclosure of wrongdoing or cooperated in an investigation carried out in respect of such a report or disclosure:

- a. a disciplinary action;
- b. a career remedial or other administrative action;
- c. the demotion of the person;
- d. the release, recommendation for release or termination of employment of the person;
- e. any measure that adversely affects the service, employment or working conditions of the person; or
- f. a threat to take any of the actions referred to in any of subparagraphs (a) to (e).

**(M) [23 April 2009]**

#### **NOTES**

(A) All officers are required under subparagraph 4.02(1)(e) (*General Responsibilities of Officers*), and all non-commissioned members are required under paragraph 5.01(e) (*General Responsibilities of Non-Commissioned Members*), to report to a proper authority any infringement

of the pertinent statutes, regulations, rules, orders and instructions governing the conduct of any person subject to the Code of Service Discipline.

(B) The proper exercise of responsibilities or authority in respect of the assignment of work, counseling, performance evaluation, discipline, supervision and other leadership functions does not constitute a reprisal under article 19.15 (*Prohibition of Reprisals*).

(C) [23 April 2009]

31. Quoted from the *Public Servants Disclosure Protection Tribunal*, the following is a list of remedies that may be considered:

(a) permit the complainant to return to his or her duties;

(b) reinstate the complainant or pay compensation to the complainant in lieu of reinstatement if, in the Tribunal's opinion, the relationship of trust between the parties cannot be restored;

(c) pay to the complainant compensation in an amount not greater than the amount that, in the Tribunal's opinion, is equivalent to the remuneration that would, but for the reprisal, have been paid to the complainant;

(d) rescind any measure or action, including any disciplinary action, and pay compensation to the complainant in an amount not greater than the amount that, in the Tribunal's opinion, is equivalent to any financial or other penalty imposed on the complainant;

(e) pay to the complainant an amount equal to any expenses and any other financial losses incurred by the complainant as a direct result of the reprisal; or

(f) compensate the complainant, by an amount of not more than \$10,000, for any pain and suffering that the complainant experienced as a result of the reprisal.

## **The Access to Information Act, the Privacy Act, and Identity**

### **Applicable to Disclosures of Wrongdoing Only**

32. Identity protection for persons who participate in a protected disclosure process are enhanced through two acts of Parliament.

The *Privacy Act* states:

*Public Servants Disclosure Protection Act*

22.3 The head of a government institution shall refuse to disclose personal information requested under subsection 12(1) that was created for the purpose of making a disclosure under the *Public Servants Disclosure Protection Act* or in the course of an investigation into a disclosure under that Act.

The *Access to Information Act* states:

*Public Servants Disclosure Protection Act*

*16.5 The head of a government institution shall refuse to disclose any record requested under this Part that contains information created for the purpose of making a disclosure under the Public Servants Disclosure Protection Act or in the course of an investigation into a disclosure under that Act.*

**Note:** These protections and exclusions do not apply to reprisal complaints.