



We speak up for fairness

Northwest Territories Ombud

INVESTIGATION REPORT

COMPLAINT ABOUT A SAFE DISCLOSURE MATTER

RAPPORT D'ENQUÊTE

**PLAINTÉ LIÉE À UNE QUESTION DE DIVULGATION
SÉCURITAIRE**

Le présent document contient la traduction française du résumé.

March 2025

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Summary

This investigation came about as the result of a complaint by Mr. Smith, who had concerns about how a safe disclosure and a complaint of reprisal that he made as a public service employee were handled by the Department of Finance.

Safe disclosure policies, often also called “public interest disclosure” or “whistleblowing” policies, provide a confidential and protected avenue for government employees to speak out about wrongdoings, and are vital for maintaining the integrity of the public sector.

In this report, we set out Mr. Smith’s complaint, what we looked at in our investigation, and recommendations that we made to the Department to ensure administrative fairness in the safe disclosure process. This is especially necessary when in cases like this one the final outcome was a decision not to investigate.

We found that the decision in Mr. Smith’s case was made in accordance with a fair process and followed the requirements under the applicable policy. We also found that he was given a meaningful opportunity to present information in relation to his matter. However, we found issues of unfairness in respect of communicating the reasons for decision and the right to appeal to Mr. Smith.

Our recommendations include providing a clear and understandable explanation of the grounds for a decision not to investigate, and confirming that the employee is aware of their right to appeal. This will help to promote a fair and transparent process, ensuring that employees in Mr. Smith’s position have everything they need to make an informed decision about whether or not to appeal the outcome in their matter.

Lastly, we have made a recommendation in respect of ensuring the structural independence of the whistleblowing process, as keeping it completely separate from any human resource or labour relations procedures is essential to avoid potential issues with bias, conflict of interest, and/or confusion between the different processes.

Résumé

L'enquête a fait suite à une plainte déposée par M. Smith, inquiet de la manière dont le ministère des Finances a géré le processus de divulgation sécuritaire qu'il a suivi et la plainte de représailles qu'il a présentée à titre de fonctionnaire.

Les politiques de divulgation sécuritaire, aussi connues sous le nom de politiques de dénonciation ou de divulgation faite d'intérêt public, offrent aux fonctionnaires un moyen confidentiel et sûr de dénoncer des actes répréhensibles; elles sont essentielles au maintien de l'intégrité du secteur public.

Dans le présent rapport, nous présentons la plainte de M. Smith, les éléments que nous avons examinés au cours de notre enquête et les recommandations que nous avons formulées au Ministère pour garantir l'équité administrative lors du processus de divulgation sécuritaire. Cette démarche est d'autant plus nécessaire quand, dans des cas comme celui-ci, la décision définitive a été de ne pas ouvrir d'enquête.

Nous avons constaté que la décision prise dans le cas de l'affaire de M. Smith était conforme aux principes de processus équitable et respectait les exigences de la politique en vigueur. Nous avons également constaté qu'il avait eu l'ample possibilité de présenter des éléments liés à son dossier. Toutefois, nous avons constaté des lacunes en ce qui concerne la communication à M. Smith des motifs de la décision et de son droit de faire appel.

Nous avons recommandé de fournir une explication claire et compréhensible des motifs de la décision de ne pas enquêter et de confirmer que l'employé a connaissance de son droit de faire appel. Ainsi, le processus sera équitable et transparent, et les employés dans une situation semblable à celle de M. Smith disposeront de tous les éléments nécessaires pour déterminer en toute connaissance de cause s'ils doivent ou non faire appel de la décision prise.

Enfin, nous avons formulé une recommandation visant à garantir l'indépendance structurelle du processus de dénonciation, car il est essentiel de le séparer complètement des processus relatifs aux ressources humaines ou aux relations de travail afin d'éviter tout risque de partialité, de conflit d'intérêts ou de confusion entre les différents processus.

Principles of Administrative Fairness

The Ombud has a mandate to investigate “maladministration”, or “administrative unfairness”. Guidance on the principles of administrative fairness comes from the *Ombud Act*¹, administrative law, and from standards that legislative ombuds have developed together.

The 2022 Canadian Council of Parliamentary Ombudsman publication, *Fairness by Design: An Administrative Fairness Guide*, groups standards of administrative fairness into three categories:

- Fair decisions (what was decided?) – fair decisions follow the applicable rules, consider individual circumstances and case, are well reasoned, and reflect a fair exercise of discretion. The reasoning and chain of analysis used to make the decision should be clear, so that the decision can be understood by those impacted by it.
- Fair process (how was it decided?) – fair process includes meeting the duty of procedural fairness by giving those directly impacted by a decision the opportunity to understand and meaningfully participate and be heard in the decision-making process; and having an unbiased decision-maker who has not prejudged the decision they must make.
- Fair service (how was the person treated?) – fair service includes providing respectful, accessible and responsive service and being accountable to the public.²

Background

Introduction to whistleblowing

“Whistleblowing” policies facilitate public interest disclosures by government employees, and are a vital part of ensuring the integrity, openness and transparency of the public sector. A robust public interest disclosure process supports the disclosure and investigation of serious wrongdoing, protects employees who make a disclosure, and enhances employee and public confidence.

All of the Canadian provinces and the Yukon have legislation which sets out the process for public interest disclosure within government organizations, and which establishes an independent statutory office as a final level of review or appeal.³

¹ S.N.W.T. 2018, c. 19, ss. 33(1).

² [Fairness by Design-June17-900 2022.pdf \(nwtombud.ca\)](#), page 2.

³ *Public Interest Disclosure (Whistleblower Protection) Act*, SA 2012, c. P-39.5 (Alberta); *Public Interest Disclosure Act*, S.B.C. 2018, c.22 (British Columbia); *The Public Interest Disclosure (Whistleblower Protection) Act*, 2006 C.C.S.M. c.P217 (Manitoba), , *Public Interest Disclosure and Whistleblower Protection Act*, S.N.L. 2014, c.P-37.2(Newfoundland); R.S.N.B. 2012 c. 112 (New Brunswick), *Public Interest Disclosure of Wrongdoing Act*, S.N.S. 2010, c. 42 (Nova Scotia); *Public Service of Ontario Act*, 2005, S.O. 2006, c.35; *Public Interest Disclosure and Whistleblower Protection Act*, R.S.P.E.I. 1988, c. P-31.01 *An Act to Facilitate the Disclosure of Wrongdoings Related to Public Bodies*, C.Q.L.R. c. D-11.1, *The Public Disclosure Act* S.S. 2011, c. P-38.1 (Saskatchewan), *Public Interest Disclosure of Wrongdoing Act* S.Y. 2014, c. 19 (Yukon), *Public Servants Disclosure Protection Act*, SC 2005, c. 46 (Canada)

The Northwest Territories does not have legislation of this kind. However, employees who are members of the bargaining unit have access to a process for disclosures that is set out in a December 14, 2012 Memorandum of Understanding on the safe disclosure of information between the Government of the Northwest Territories and the Union of Northern Workers (the “MOU”), which forms part of the Collective Agreement.

As there are different terms used for the whistleblowing process in different jurisdictions, the term “whistleblowing” will be used in this report when discussing the general principles that apply to all such policies, while the term “safe disclosure” , which is used in the MOU, will be used when discussing the specific provisions that apply in the NWT and the complaint.

Kinds of wrongdoing covered by whistleblowing

Whistleblower processes are designed for serious matters that an employee believes may be unlawful, dangerous to the public, or injurious to the public interest. They are not intended to apply to every kind of wrongdoing that may happen in the workplace; for example, minor misconduct or negligence that can be addressed by internal disciplinary or code of conduct proceedings. In addition, because of the requirement to have a public interest component, the whistleblower process isn’t considered to be the appropriate venue for concerns that primarily involve personal wrongs, such as individual harassment complaints, interpersonal disputes, or individual workplace grievances with management.

For a whistleblower policy to be administratively fair, it should set out a clear definition of what types of wrongdoing are covered that can be easily understood by employees and those responsible for handling disclosures. In the Northwest Territories, the kind of wrongdoing that are covered by the MOU is similar to that found in the statutes across Canada. It is defined in section 1 of the MOU as follows:

“Wrongdoing” means any of the following and includes alleged wrongdoings: (1) an illegal act, (ii) gross mismanagement of public money or of a public asset, (iii) a substantial and specific danger to health, safety, and/or the environment; or (iv) counselling or directing any one of the above.

Roles and responsibilities in the whistleblower process

The whistleblower statutes across Canada require government organizations to appoint one of their staff members to act as the designated officer for disclosures within the organization. The designated officer provides advice to employees about making a disclosure; receives and handles disclosures; manages investigations, and maintains communications about the status and outcome of the disclosure.

While the designated officer is a staff member of the government organization, to carry out their roles and responsibilities under the legislation they are required to have the autonomy to carry out their role unimpeded and uninfluenced by others in the organization.

The public interest disclosure statutes across Canada also establish the role of a public interest disclosure commissioner. Unlike the designated officer who is internal to the government organization, the commissioner is an independent statutory office, similar to the Ombud or the Information and Privacy Commissioner. The role of a public interest commissioner is to act as the second level of review or appeal if a person is not satisfied with how the government organization handled their disclosure. In addition, the public interest commissioner handles any disclosures about the highest levels within the organization, and all employee complaints about reprisals being taken against them for having made a disclosure.

In the Northwest Territories, the MOU defines the position of “Safe Disclosure Coordinator” , a role that is very similar to the designated officer created by statute elsewhere in Canada. The Safe Disclosure Coordinator is a person appointed by the employer whose role is to provide information about the disclosure process; assist supervisors and deputy heads with disclosures; receive disclosures, and investigate disclosures. Since the MOU came into effect in 2012, the appointments for the Safe Disclosure Coordinator have always gone to a regional Superintendent for Management and Recruitment Services, a position within the Department of Finance.

In the Northwest Territories, the MOU establishes the Safe Disclosure Panel, as a two person panel to consist of one member appointed by the employer and one appointed by the union. The Safe Disclosure Panel (the “Panel”) has a role similar to that of the commissioner in other jurisdictions. The Panel can investigate disclosures directly in certain circumstances, including cases of urgency or allegations involving the Deputy Head; or if they have previously made their disclosure through the regular process but an investigation was not completed, or if the matter was not resolved within the required time periods.

In addition, the MOU provides that the Panel shall handle all complaints of reprisal, as well as serving as an appeal body for any final decisions made on a disclosure by the SDC or a Deputy Head.

Provision for alternate resolutions

The general purpose of whistleblower legislation is to ensure that wrongdoing is brought to the attention of organizational heads so that corrective measures can be taken.

The various whistleblower statutes in Canada recognize that an investigation may not always be the most efficient or effective way to achieve that objective. For this reason, they provide for discretion to the designated officer as well as the public interest commissioner to take alternate

steps to an investigation, in circumstances where a more appropriate way to resolve the matter is available.

Alternative remedies can include resolving the matter informally; making a referral to an alternate internal mechanism (such as a workplace harassment policy or disciplinary proceedings under a code of conduct policy), or making a referral to a more appropriate authority under another statute (such as the police, the Information and Privacy Commissioner, the Human Rights Commission, etc.). Determining whether or not the matter is better resolved by an alternate process or whether it requires investigation is part of the initial analysis carried out by the designated officer under the various whistleblower statutes.

In the Northwest Territories, once the Safe Disclosure Coordinator (the “SDC”) receives a disclosure, either directly from a person or through a referral from the person’s direct supervisor or Deputy Head, the SDC must carry out a similar analysis to determine whether an alternate resolution would be more appropriate or whether an investigation is required.

The Panel also has the discretion under the MOU not to conduct an investigation in appropriate circumstances, by taking any steps they consider appropriate to help resolve the matter within the department, including the use of alternative dispute resolution mechanisms, like mediation.

Investigations

In cases where the designated officer determines that an investigation is required, the designated officer is responsible for choosing, mandating and managing an investigator. A whistleblower investigation must conform with the principles of procedural fairness and natural justice.

These principles require an impartial decision maker who is free from bias, and who provides adequate reasons for their decision. They also require an absence of unreasonable delay and following the legitimate expectations established by the whistleblower policy. In addition, the principles of natural justice require that those who are accused of wrongdoing have the right to know the allegations and evidence against them and have a meaningful opportunity to respond.

In the Northwest Territories, the MOU provides that investigations must respect the right to procedural fairness both in regards to the individual who made the complaint and any individuals who are alleged to have committed wrongdoing. Investigations are to be conducted as informally as possible and a report is to be completed within 120 days after the matter has been referred to investigation; a one-time extension of no more than 45 days may be invoked.

Confidentiality

Confidentiality is essential to ensure people feel safe to come forward with concerns and for people who participate as a witness in an investigation. It is also an aspect of procedural fairness for a person who has alleged to have committed wrongdoing.

For this reason, whistleblower legislation requires organizations to ensure the confidentiality of information received and collected in a disclosure. This includes protecting the identity of the person making the disclosure, any potential witnesses, and the person alleged to have committed wrongdoing, to the extent that is reasonably possible.

In the Northwest Territories, the MOU provides that each disclosure must be maintained in a separate file in a secure manner and location, and must be treated as strictly confidential. Care must be taken at all times to protect the identity of the disclosing employee, any witnesses and the alleged wrongdoer.

Protection from reprisals

Protection against reprisals is one of the most essential features of any whistleblower policy. All of the whistleblower statutes in Canada prohibit retaliation against an employee for reasons related to a disclosure. They make it an offence to take, direct or counsel a reprisal against an employee.

The various Canadian statutes also all provide that allegations of reprisal should be made directly to the independent statutory office of the public interest disclosure commissioner, rather than starting out within the organization. They provide that only the public disclosure commissioner, not the government organization, can investigate reprisals.

In the Northwest Territories, the MOU prohibits reprisals against a person who has sought out advice about making a disclosure; made a disclosure; cooperated in an investigation of a disclosure; or declined to participate in a wrongdoing. A reprisal is defined as any measure that adversely affects an employee's employment or working conditions.

The MOU has a separate Form B that employees can use to make a complaint of reprisal. Under section 28 of the MOU, all complaints of reprisal are to be made directly to the Safe Disclosure Panel for the Panel to manage and investigate.

Avenue for review

Finally, there needs to be an avenue for employees to take if they are dissatisfied with the outcome of their disclosure from the organization, or if they do not believe the organization has properly handled their disclosure. Having the opportunity to receive an unbiased and objective second review of a decision is an important aspect of process fairness.

The various public interest disclosure statutes in Canada all provide that employees in those circumstances may apply to the external, independent public interest commissioner for a review.

In the Northwest Territories, the MOU provides that an employee who is dissatisfied with the final decision of the Safe Disclosure Coordinator or a Deputy Head may appeal the decision to the Panel within 30 days of receiving the final decision.

The MOU also provides that an employee who made a disclosure may bring the matter directly to the Panel if an investigation in respect of the disclosure was not completed, or if the matter was not resolved within the required time periods of the MOU.

There is an additional recourse in the Northwest Territories for employees covered by the MOU. Due to the fact that it is part of the Collective Agreement, an employee who takes issue with how their matter was handled under the MOU would also have the option to file a labour relations grievance.

The Complaint

Mr. Smith, an employee with the GNWT's Department of Finance, sent two forms under the MOU to the Department of Finance (the "Department") on December 11, 2020. The first was a Form "A", Disclosure of Wrongdoing Form. Mr. Smith indicated on Form A that his disclosure related to "gross mismanagement of public money or a public asset" and "knowingly counselling or directing someone to do any of the above". The second was a Form "B", Complaint of Reprisal Form. In that form, Mr. Smith set out disciplinary actions which he alleged had been taken against him as retaliation for having raised his safe disclosure concerns.

The Department forwarded Mr. Smith's two forms to the Safe Disclosure Panel (the "Panel") the same day, December 11, 2020. On May 26, 2021, the Panel interviewed Mr. Smith by telephone. On June 29, 2021, the Panel sent its Findings and Decision Report in the matter to Mr. Smith and to the Department. The Panel concluded it did not have jurisdiction to look at the matters under paragraph 17.1 of the MOU, and referred them back to the Department, saying:

"The Panel suggests that this Disclosure should be investigated, as provided in the MOA. If the Employer has a concern about a conflict of interest, the investigation should be conducted by persons who are not in the same department as Mr. [Smith]."

In July of 2021, Mr. Smith contacted the Ombud Office; as we are an office of last resort and he had not yet received a final decision on his disclosure, we referred him to continue the process with the Department. Following this, the Safe Disclosure Coordinator (the "SDC") and Mr. Smith had at least one meeting to discuss his safe disclosure matter. The SDC sought more clarification and details from Mr. Smith to try and establish the scope of the safe disclosure and researched different options for resolution.

At this meeting, the SDC and Mr. Smith also discussed having the safe disclosure investigated by the GNWT's Internal Audit Bureau. The SDC says she understood Mr. Smith to have refused this option. Mr. Smith says that he did express his concerns that it would be more appropriate to refer the matter for investigation outside of the Department because of the potential for conflict of interest. However, he says that he never refused the option of the

Internal Audit Bureau, and was not aware until receipt of this letter that this assumption had been made. He says that if he had been asked, he would have preferred to have the Internal Audit Bureau investigate his safe disclosure rather than no investigation at all.

In February of 2022, the SDC asked Mr. Smith if he would be willing to attend a session with a third-party, independent mediator. The intent was to have the mediator help them come to an agreement as to the process that would be used to address Mr. Smith's safe disclosure concerns. Mr. Smith initially agreed to mediation, but after speaking with the mediator, felt that the scope of the mediation was too narrow to be of any use, and declined to sign the terms of reference. The mediator terminated the mediation on April 4, 2022 without the parties having come to any agreement, advising both parties that she had formed the opinion that her further involvement would not be helpful.

On April 28, 2022, the Department wrote Mr. Smith a closing letter on both his matters. The letter stated that several avenues had been explored to investigate his safe disclosure, including investigation by the Internal Audit Bureau and the Safe Disclosure Panel and hiring an independent mediator. The letter went on to say that after these had failed to address his concerns and he refused to sign the terms of reference or continue participating in mediation, his safe disclosure file was closed.

In terms of the complaint of reprisal, the letter advised that because Mr. Smith had indicated on the form that these allegations were already being investigated through the grievance procedures of the Collective Agreement, no investigation of the complaint reprisal was required through the Safe Disclosure MOU.

The Investigation

What we investigated

We investigated the administrative fairness of the Department of Finance's response to Mr. Smith's safe disclosure after it was referred back to the Department by the Safe Disclosure Panel.

What we did not investigate

We did not investigate the allegations made by Mr. Smith in his safe disclosure nor his complaint of reprisal, as these are not matters of administration and therefore do not fall under the Ombud's jurisdiction.

Investigation Process

We interviewed the complainant and the Safe Disclosure Coordinator for the government of the Northwest Territories (the "GNWT"). We reviewed emails and other documents from Mr. Smith's file and the December 14, 2012 Memorandum of Agreement between the GNWT and the UNW.

We also reviewed whistleblower procedures in other jurisdictions, as well as information and guidance materials for handling public interest disclosures that have been developed in other jurisdictions for use by public sector organizations. A list of the materials we reviewed is listed in the "References" section at the end of this report.

Analysis

There are several issues related to administrative fairness raised in this case, as will be discussed below.

Issue One: Handling of the reprisal complaint

An initial question that arises is whether the Department should have handled the complaint of reprisal, given that paragraph 28 of the MOU provides for complaints of reprisal to be made directly to, and investigated by, the Safe Disclosure Panel. This is also consistent with the general principle found in whistleblower legislation across Canada that complaints of reprisal should not be handled by the government organization.

The Department acted correctly in referring the complaint of reprisal directly to the Safe Disclosure Panel in the first instance in this case, as it should always do for any complaints of reprisal that are received. The Department did not take up the reprisal complaint at its own initiative, but only after it was referred back to the Department by the Panel. Under the MOU,

the Panel has the discretion to resolve matters by taking any steps it considers appropriate to resolve a matter within the Department, and in any event, the decision of the Panel falls outside of the jurisdiction of the Ombud.

Finding # 1

The MOU provides for complaints of reprisal to be handled by the Safe Disclosure Panel. However, the Department correctly referred Mr. Smith's reprisal complaint to the Panel immediately upon receipt, and only took it up again after it was expressly directed to do so by the Panel.

Issue Two: Grounds for refusing investigation

All whistleblower policies allow for the discretion to decide not to investigate in appropriate circumstances. However, to be administratively fair, discretion must be exercised consistently with the provisions of the policy; independently based on the merits of the particular case; in good faith; and based on relevant considerations.

Some of the reasons listed in the MOU on the basis of which either the Safe Disclosure Coordinator or the Panel can exercise the discretion to decide not to investigate a matter include cases where it is determined that:

- The matter could be resolved by means of any existing internal mechanisms or processes within the Department;
- The matter is already under investigation, or could more appropriately be referred to a third-party investigative body;
- The matter could more appropriately be dealt with according to a procedure provided under another statute, or by proceedings under the Collective Agreement;
- The disclosure is frivolous or vexatious, or not in good faith;
- The disclosure does not deal with a wrongdoing as it is defined for the purposes of the MOU;
- The disclosure relates to a decision, action or matter that is based on a public policy or financial policy or directive; or
- The disclosure does not provide adequate particulars about the wrongdoing such as to permit the conduct of a fair and effective investigation.

Similar grounds not to investigate are found in the whistleblower statutes across Canada.

Process for deciding whether to investigate

The designated toolkit from Alberta sets out a list of the reasoning that a designated officer should go through in analyzing a disclosure, in order to ensure the decision whether to investigate is made according to a fair process:

1. Are there grounds to decline to pursue the matter under the whistleblower policy?
2. Should the matter more appropriately be referred to another internal process for resolution?
3. Should the matter more appropriately be referred to another external authority?
4. If the answer to all three of the above questions is no, then the matter must be investigated.⁴

The employee should be advised at this stage about the determination that has been made upon their disclosure and the reasons why. If the decision was made that there are grounds not to pursue the matter, or that it is more appropriately handled by another internal process or external authority, the employee should also be advised of their right to appeal if they disagree with this outcome.

Reasons for not investigating the complaint of reprisal

The April 28, 2022 letter advised Mr. Smith that his reprisal allegations were not being investigated because they were already being addressed through the grievance procedures of the Collective Agreement. The MOU expressly provides that an investigation is not required if the disclosure relates to a matter that “could more appropriately be dealt with according to procedures under the Collective Agreement”. Therefore, this was a reasonable basis for declining to investigate the reprisal, and it was clearly communicated in the letter.

Reasons for not investigating the disclosure

The April 28, 2022 letter said that the safe disclosure file was closed after Mr. Smith did not accept the proposal to have the Internal Audit Bureau investigate his matter, and after he refused to participate in mediation. However, this does not make it clear exactly why it was determined that an investigation of Mr. Smith’s safe disclosure was not required.

⁴ www.yourvoiceprotected.ca/chief-designated-officers/training-materials

A basic principle of whistleblower processes is that the designated officer handling the disclosure must determine whether or not an investigation is required according to the type of analysis set out above. If the designated officer finds that the matter falls under the whistleblower policy and that it would not be more appropriate to refer it to alternative internal or external avenues for resolution, then an investigation must be carried out. It is for the designated officer to choose an appropriate investigator, and to mandate and manage the conduct of the investigation.

Whether an employee refuses to agree to the proposed investigator or to participate in a proposed process is irrelevant to this determination. The employee's recourse if they disagree with the means by which an investigation is carried out is to appeal the designated officer's decision.

The evidence in the investigation showed that while it may not have been clear from the letter alone, the SDC did carry out a proper analysis and made the decision not to investigate on the basis of grounds from the MOU. The SDC concluded that the main allegation in Mr. Smith's disclosure was his disagreement with a new system that the Department had implemented and his difference of opinion as to the costs and benefits of this change, rather than being a question of wrongdoing as it is defined for the purposes of falling under the MOU. The SDC concluded that the other allegations were too broad or lacked sufficient detail for investigation.

We found that the proposal of mediation was a good faith attempt to give Mr. Smith a full opportunity to be heard, and to remain open minded to whether there might be any additional information on the basis of which to reconsider the decision not to investigate. When the mediation did not take place, the file was closed because no additional information had changed the determination that an investigation was not required.

Finding #2

The Safe Disclosure Coordinator followed a fair process for making the decision in this case and based the decision on grounds from the MOU. The Safe Disclosure Coordinator also offered Mr. Smith a meaningful opportunity to provide information in support of his case.

However, it was unfair that the reasons provided in the April 28, 2022 letter did not make the reasons for the decision not to investigate the safe disclosure sufficiently clear for Mr. Smith to be able to fully understand the grounds for the outcome, or make an informed decision about whether to appeal.

Issue Three: Notice of further recourse

Appeal rights under the MOU are not limited to situations where an investigation takes place. Under paragraph 17.1 of the MOU, an employee has the right to apply directly to the Safe Disclosure Panel in any case where they have made a disclosure and an investigation has not been completed in accordance with its procedures. In addition, under paragraph 22.1 of the MOU, an employee who is dissatisfied with any final decision of the Safe Disclosure Coordinator – which could include a decision not to investigate - can appeal that decision to the Panel.

The letter to Mr. Smith did not advise him that he had the right to appeal the decision not to investigate to the Safe Disclosure Panel. Mr. Smith advised that he did not know that he could have brought this matter back to the Panel, especially given the fact that the Panel had said at the outset that it lacked jurisdiction to hear his complaint.

The fact that the safe disclosure process is part of the Collective Agreement in the NWT means that an employee does have recourse to the union for advice and assistance in respect of the safe disclosure process and their options if they disagree with an outcome, including the appeal process and any other avenues that may be available through the grievance process.

The MOU itself only expressly requires the Department to notify the employee of the process to appeal in the case of an investigation (paragraph 24.1).

That being said, in the spirit of the overall intent of the MOU and its incorporation of the principles of natural justice, the Department should also provide notice to employees of their right to appeal any final decision of the SDC to the Panel, including the decision not to investigate.

Finding # 3

While not expressly required under the MOU, it was unfair that Mr. Smith was not advised in the decision letter of his right to appeal the outcome of his safe disclosure matters to the Safe Disclosure Panel.

Issue Four: Separation of processes

The Public Interest Commissioner of Alberta has cautioned government organisations that it is important to keep whistleblower procedures distinct from human resource policies and codes of conduct as a matter of procedural fairness.⁵ One reason for this is to avoid the potential for confusion on the part of any of the parties involved as to which procedures from which process apply to which issue. The other important reason is to avoid any potential for actual or perceived conflict of interest or bias.

Maintaining this line is even harder in the Northwest Territories, where unlike other jurisdictions the whistleblower process is part of the Collective Agreement, meaning all safe disclosures will therefore also be a labour relations matter between the union and employer. Further, in larger jurisdictions, each government department would have its own designated officer handling disclosures within that department. In the Northwest Territories, however, the Safe Disclosure Coordinators are always staff from the Human Resources division within the Department.

There are some reasons why it makes sense for the Safe Disclosure Coordinator to be a Human Resources employee. The MOU is part of the Collective Agreement, which was negotiated between the Union and the GNWT, and it is staff from Human Resources who are responsible for handling issues under the Collective Agreement on behalf of the Employer. In addition, Human Resources staff have training in workplace investigations, which is essential in order to carry out the role.

However, as discussed above, it is essential as a matter of administrative fairness to keep the whistleblower process separate from any labour relations matters involving the employee. Guidance for selecting officers to handle disclosures in other jurisdictions emphasizes that they must be credible as an autonomous, neutral party with employees, bargaining agents and all levels of management.⁶

In our investigation, we found that the SDC was conscientious about these issues. We did not find any evidence of bias nor any evidence of failure to keep the safe disclosure process separate from any labour relations matters. However, this is clearly a challenging position to be in and has the potential to cause confusion for both the SDC and the employee.

Moreover, no matter what assurances are in place, any employee would likely have concerns about perceived bias or conflict of interest in dealing with the same person on their safe

⁵ Alberta's Public Interest Commissioner (February 2023). *The Risks of Conflating Whistleblower Procedures with Other Policies and Codes of Conduct*. <https://yourvoiceprotected.ca/the-risks-of-conflating-whistleblower-procedures>

⁶ *Supra*; Treasury Board of Canada (April 2009). *Public Servants Disclosure Protection Act – Information on Organizational Disclosure Regimes*. <https://www.canada.ca/en/treasury-board-secretariat/services/values-ethics/disclosure-protection/public-servants-disclosure-protection-act-information-organizational-disclosure-regimes.html>

disclosure matter as on any labour relations disciplinary matters. Such concerns could well inhibit some employees from coming forward with safe disclosures at all.

Finding #4

While there is no evidence it had any impact in this particular case, the failure to ensure the structural independence of the SDC position is unfair.

Issue Five: Time delay

It took almost a year and five months from the date that Mr. Smith first made his disclosure until the date he received the SDC's April 28, 2022 letter advising of the final outcome.

There is no legal test that states exactly when a delay has become unfair; it is generally something that depends on the circumstances. The MOU does not set out a timeline in cases where no investigation is carried out; however, it sets a timeline of 120 days, and one 45 day extension, for completing an investigation (though the MOU also provides that an investigation is not restricted to that time period). In cases where this time period has been passed without an investigation being completed, the employee can make an application to the Panel under paragraph 17.1.2.

The evidence shows that the length of time to get a final decision in this particular case was not typical of the usual timelines for safe disclosure matters, but was due to a combination of several unique circumstances. First, it was filed during a time period when public health restrictions due to COVID were still causing disruptions to government offices. It is also the case that the matter was in the hands of the Panel for six months out of the total time taken. During this six month period, it was not possible for the Department to take any action on the file. Finally, there were additional stretches of time taken up by the SDC's good faith attempts to research possible options and explore the possibility of mediation.

In all the circumstances, we do not conclude that the delay in this particular case constituted an unfairness. However, it draws attention to the importance to employees of receiving a timely outcome to their disclosures, and of ensuring they are aware of the applicable timelines.

Finding #5

The time period to get a final decision in this particular case was not an unreasonable delay given all the circumstances.

Recommendations

As a result of our investigation, we make the following recommendations.

It is recommended that the Department of Finance immediately:

1. Implement a process to ensure that in cases where the decision has been made not to investigate a safe disclosure, the employee is advised in writing of the reasons why, in addition to being advised of their right to appeal to the Panel if they disagree with this outcome.

Secondly, it is recommended that the Department of Finance shall by January 31, 2026,

2. Develop a plan and measures to ensure the structural independence of the Safe Disclosure Coordinator position, including consideration of moving the position outside of Finance.

Reference Materials.

Alberta's Public Interest Commissioner (February 2023). *The Risks of Conflating Whistleblower Procedures with Other Policies and Codes of Conduct*. <https://yourvoiceprotected.ca/the-risks-of-conflating-whistleblower-procedures>

Alberta's Public Interest Commissioner (n.d.) *Designated Officer Toolkit*. www.yourvoiceprotected.ca/chief-designated-officers/training-materials

British Columbia Ombudsperson (November 2023). *Designated Officer Toolkit for Public Interest Disclosure Investigations*. [PIDA DO-Toolkit WEB.pdf](#)

Canadian Council of Parliamentary Ombudsman (2022). *Fairness by Design*. [Fairness by Design-June17-900 2022.pdf \(nwtombud.ca\)](#)

Government of Yukon (April 2019). *Guidelines to Disclosing Wrongdoing*. https://yukon.ca/sites/yukon.ca/files/psc/pidwa_guidelines.pdf

Treasury Board of Canada (April 2009). *Public Servants Disclosure Protection Act – Information on Organizational Disclosure Regimes*. <https://www.canada.ca/en/treasury-board-secretariat/services/values-ethics/disclosure-protection/public-servants-disclosure-protection-act-information-organizational-disclosure-regimes.html>

New Zealand Office of the Ombudsman (July 2022) *Protected Disclosures: Internal Policies and Procedures*; https://www.ombudsman.parliament.nz/sites/default/files/2023-07/Protected%20disclosures%20-%20internal%20policies%20and%20procedures%20-%20July%202022_0.pdf

Appendix A

Response from the Department of Finance



April 11, 2025

Michelle Staszuk
Northwest Territories Ombud
#5-6 COURTOREILLE STREET
P.O. BOX 4297
HAY RIVER, NT X0E 1G5
admin@nwtombud.ca

Dear Michelle Staszuk:

Re: Investigation Report – Complaint about a Safe Disclosure (Ombud file: 23127)

Thank you for your report on the Ombud office investigation into a complaint about a safe disclosure. I appreciate the effort your office has put into researching the process and the careful consideration of the Department of Finance's earlier feedback.

A response to the recommendations contained in the report follows:

- 1. Implement a process to ensure that in cases where the decision has been made not to investigate a safe disclosure, the employee is advised in writing of the reasons why, in addition to being advised of their right to appeal to the Panel if they disagree with this outcome.**

The Department of Finance commits to ensuring an impacted employee is advised in writing as to why a decision not to investigate a safe disclosure was made and is advised of their right to appeal to the Safe Disclosure Panel if they disagree with this outcome.

- 2. Develop a plan and measures to ensure the structural independence of the Safe Disclosure Coordinator position, including consideration of moving the position outside of Finance.**

The Department of Finance will explore the process and timelines for the enactment of legislation around Public Interest Disclosure as referenced in the 2012 Memorandum of Understanding between the Union of Northern Workers and the Government of the Northwest Territories, as well as other possible approaches to ensure the structural independence of the Safe Disclosure Coordinator.

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The Department of Finance commits to updating you on the progress made by January 31, 2026.

Sincerely,



William MacKay
Deputy Minister, Finance

c. Tara Hunter, Deputy Secretary, Human Resources, Finance