

Annual Report

2021-2022

Ethics Officer for the Nunavut Public Service

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Ethics Officer

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It is my honour to submit the seventh Annual Report of the Ethics Officer for the Nunavut Public Service, for the period from April 1, 2021 to March 31, 2022. As I will explain later, I expect that this will be my final annual report.

The Ethics Officer operates under Part 6 of the *Public Service Act*, which came into force on April 1, 2015. I had the honour of being appointed as the first Ethics Officer for a five-year term commencing on January 5, 2015. I was reappointed to a further five-year term in 2020.

As I have in past annual reports, I will:

- Provide an overview of what constitutes wrongdoing and how to make a disclosure
- Describe the protections from reprisal that the Act gives to public servants who make a disclosure of wrongdoing, and
- Provide some statistical information on the number of requests for advice that I received, the number of disclosures of wrongdoing and what became of those disclosures.

I will also take the opportunity to make some observations, gleaned from my experience over the last seven-plus years, on ways in which the Act could be improved to better achieve its objectives and better protect employees and the public.

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How to Disclose Wrongdoing

The role of the Ethics Officer, in a nutshell, is to receive and investigate allegations of wrongdoing in the Nunavut public service. Where wrongdoing is found, he or she makes recommendations to address the wrongdoing. The Ethics Officer provides a safe method for employees in the Nunavut public service to disclose wrongdoing that comes to their attention and provides assurance to them – and to all Nunavummiut – that those disclosures will be investigated and addressed promptly, fairly and effectively.

Wrongdoing is defined in the *Public Service Act*. It means any of the following conduct by an employee acting in his or her public service capacity:

- (a) contravention of an Act of the Legislative Assembly, the Parliament of Canada or the legislature of a province or territory, or of a regulation made under any such Act;
- (b) failure to comply with applicable directives made by the Minister, the Minister responsible for the Financial Administration Act, or the Financial Management Board with respect to management of the public service or public assets for which the employee is responsible;
- (c) misuse of public funds or public property;
- (d) gross mismanagement of public property or resources for which the employee is responsible, including an act or omission showing a reckless or willful disregard for the proper management of public property or resources;
- (e) harassment or verbal or physical abuse of any person other than an employee or violation of the human or contractual rights of any person providing services to or receiving services or information about services of any kind from a department or public body;
- (f) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, to public or private property, or to the natural environment, other than a danger that is inherent in the performance of the duties or functions of an employee;
- (g) a serious breach of the Code of Values and Ethics;
- (h) any act of reprisal against an employee or other person;
- (i) a request, direction or encouragement by a supervisor or senior manager to an employee or by an employee to any other person to commit a wrongdoing set out above.

The *Public Service Act* sets out the process that employees must follow if they wish to disclose possible wrongdoing. They must first make reasonable efforts to report it to appropriate authorities in the public service. This can include:

- their senior manager
- their Deputy Minister or deputy head
- the Deputy Minister of Human Resources
- any other Deputy Minister who they think is appropriate

They can report the wrongdoing to any other person if they have reasonable grounds to believe that doing so is necessary to prevent imminent danger to the life, health or safety of a person or imminent danger to property or the environment.

If, after 30 days of reporting the wrongdoing, they don't think that the authorities in the public service have taken reasonable steps to investigate and correct it, they may then report it to the Ethics Officer. At this point, the Ethics Officer will begin an investigation, usually after making some preliminary inquiries to confirm that the allegations, if proven, would amount to wrongdoing. Alternatively, the Ethics Officer may:

- attempt to resolve the matter informally
- refer the matter to alternative dispute resolution
- after making preliminary inquiries, decide that an investigation is not necessary or appropriate and therefore decline to investigate
- refer the matter to other appropriate authorities.

The Ethics Officer has broad powers to investigate and collect evidence. This includes the power to summon witnesses and require them to give evidence and the power to require documents to be produced. The Ethics Officer may, in the course of an investigation, enter any premises occupied by a department or public body. The Ethics Officer decides whether an investigation will be done in private or in public. A deputy head must cooperate and ensure that his or her employees cooperate in an investigation by the Ethics Officer. Failure to do so is an offence with a fine up to \$10,000. An employee must provide information requested by the Ethics Officer. Failure to do so is an offence with a fine of up to \$5,000.

Protection from Reprisal

It is against the law to penalize a person for making a disclosure of wrongdoing and

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there can be a fine of up to \$10,000. This is called an act of reprisal and includes any action, threat or attempt to suspend, demote, dismiss, discharge, expel, intimidate, coerce, evict, terminate a contract to which the person is a party without cause, commence legal action against, impose a pecuniary or other penalty on or otherwise discriminate against the person because of a disclosure of wrongdoing by that person or because the person assists in the investigation of a disclosure made by another person.

Employees may file a complaint directly with the Ethics Officer if they believe that they are the subject of an act of reprisal; there is no requirement that an internal disclosure of the alleged reprisal be made first. The Ethics Officer must then investigate the complaint in the same way that he or she would investigate a disclosure of wrongdoing.

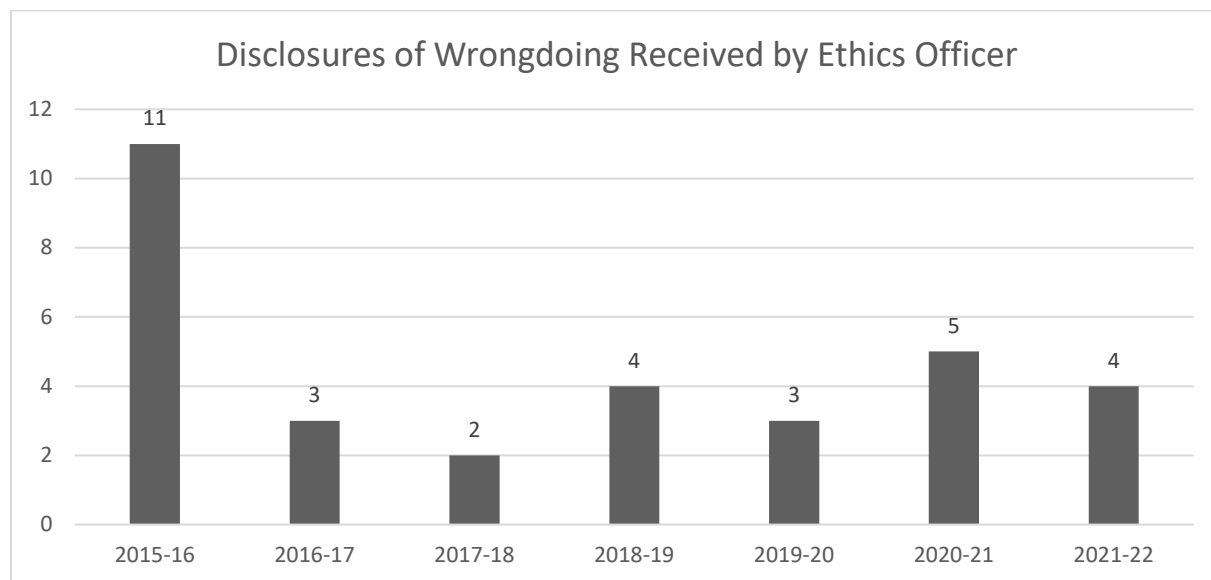
If the Ethics Officer concludes the complaint of reprisal is valid, appropriate disciplinary action must be taken against the person who committed the act of reprisal and other action recommended by the Ethics Officer may be taken to deal with any loss or damage suffered by the person who complained.

Where other actions recommended by the Ethics Officer are not taken, the relevant deputy head and Minister must provide an explanation to the Ethics Officer and must describe what other action, if any, will be taken in response to the recommendations.

Disclosures and Investigations

As noted above, employees must make an internal disclosure of wrongdoing before they can make a disclosure to the Ethics Officer. Departmental officials notify me of these internal disclosures but I have no jurisdiction to investigate until the disclosure is made to me, after at least 30 days have elapsed. During 2021-22, I received notification of one internal disclosure that did not proceed to a disclosure to the Ethics Officer. This compares with one in 2020-21, two in 2019-20, four in 2018-19, one in 2017-18, two in 2016-17 and three in 2015-16.

During 2021-22, I received four disclosures of wrongdoing. The following table shows the comparative numbers for past years, going back to 2015-16, the first year in which making a disclosure of wrongdoing to the Ethics Officer was available to Nunavut public servants.



Two disclosures were carried over from the previous year. In both cases, I determined that wrongdoing had not been proven. The following summarizes the two cases:

- The first discloser made a number of complex and interconnected allegations. In a nutshell, some of the allegations questioned the qualifications and competence of the discloser's supervisor, suggesting that public safety was thereby being endangered. A number of projects

were identified which the discloser suggested could have been handled better and differently. The discloser further alleged that their supervisor, together with human resources staff, regularly refused the discloser's requests for leaves, alternative working arrangements and an apartment, even though similar requests from other employees were approved. The discloser suggested that this was because the supervisor was jealous of their superior abilities. Finally, the discloser alleged that the supervisor had expressed a refusal to hire anyone of a particular national origin and had disparaged other employees. These disclosures came together into an allegation that, in essence, the employer's organization was poorly run.

The employer provided evidence that the supervisor had appropriate qualifications and, where necessary, outside contractors with national or international reputations were engaged. The employer further provided evidence that the denial of requests made by the discloser were done in accordance with policy, reflected operational needs and were not affected by any bias toward the discloser. Finally, the supervisor denied disparaging other employees and denied any discrimination on the basis of national origin, pointing out both that the supervisor lacked the authority to block such employment and that many individuals of that national origin were employed by the organization.

In my report, I commented that the process that the *Public Service Act* establishes is intended to provide employees of the Nunavut public service with a safe and effective way to bring serious, harmful conduct (wrongdoing) to light and ensure that it is adequately addressed. It is not intended to be a mechanism to determine whether an employee is doing a good job or could be doing a better job. That is the function of performance appraisal processes undertaken by managers. Similarly, it is not intended to be an appeal mechanism for labour relations or disciplinary processes.

I therefore declined to comment on the allegations with respect to the competence of the supervisor. That is outside the scope of my mandate. However, the allegations that the lack of competence rose to the level of endangering the public were very much within my mandate. However, such a serious allegation must come with credible evidence and I found that that was not presented. The fact that the discloser and the supervisor had different opinions of the best way to proceed with certain projects is not evidence of wrongdoing. There was no evidence that the decisions made by the organization's management amounted to anything approaching gross mismanagement or a danger to the public.

The allegation that the public was endangered because the supervisor lacked certain credentials was speculative at best. Furthermore, the employer appeared to take adequate steps to ensure that appropriate expertise was brought to each project.

I also found that the discloser had not presented adequate evidence that the denials of various leave requests and requests for an apartment were motivated by anything other than the appropriate factors that management must weigh. Finally, I found that the discloser's

allegations about comments made by the supervisor were unproven on a balance of probabilities.

- The second discloser had an employment contract that was renewed for two months; the discloser alleged that similar contracts with other employees had been renewed for a year. However, in the absence of credible evidence of an improper motive or malice, management is entitled to make decisions about whether to keep on an employee and for how long. The discloser did not present such evidence and I therefore found that wrongdoing had not been proven.

The discloser also took issue with a contract awarded to a third-party company. According to the discloser, that work could have been handled internally (by the discloser), the third party's employee handling the project lacked the necessary experience and the employee who would be reviewing the work of the third-party company lacked the knowledge and qualifications to do so. The employer responded that all contracts are awarded in alignment with the *Financial Administration Act* and all other applicable rules and guidelines. It noted that the third-party company has a good national reputation and a long history of providing quality and compliant work. Again, in the absence of credible evidence of improper motive or gross negligence, management is entitled to make informed decisions about the best way to carry out a project. No such evidence was provided and I therefore concluded that wrongdoing had not been proven.

The discloser also alleged that a supervisor had offered them a vacant management position, without following applicable human resource procedures. No credible evidence was offered and the supervisor denied the allegation, noting that they did not have the authority to make such an offer. I concluded that wrongdoing was not proven.

Finally, the discloser alleged that the supervisor had made a negative comment about the performance of another employee. In the absence of other circumstances, I determined that the allegation would not constitute wrongdoing and I declined to investigate further.

Section 42(1) of the *Public Service Act* sets out circumstances in which the Ethics Officer may decline to investigate a matter. I exercised this discretion in respect of one of the disclosures that I received this year:

- The case related to an alleged wrongful termination. The former employee alleged that the Government of Nunavut failed to adequately consider the applicable factors set out in the Human Resources Manual (length of service, past record, the seriousness of the offence and any other pertinent facts). I noted that the Manual also makes clear that the employer retains the

discretion to terminate employment in appropriate cases. This is a judgment call that the employer is entitled to make. The correctness of that judgment call and the issue of entitlement to severance pay are matters for negotiation or legal action. In the absence of evidence of more, such as malice, the exercise of this discretion to terminate does not constitute wrongdoing.

Two of the disclosures received this year were referred to arms-length investigators because of their complexity. This was done with the consent of the individuals who made the disclosure and I have placed my files in abeyance pending the conclusion of those external investigations.

The final disclosure is still under investigation by me.

Reprisals

I received one allegation of reprisal which I determined was unfounded. The following summarizes that case:

- After making two disclosures of wrongdoing, the discloser was subject to several disciplinary proceedings. Two of them resulted in multi-day suspensions. The discloser alleged that the proceedings and suspensions were reprisal for making the disclosures of alleged wrongdoing.

In order to be a “reprisal”, the employer’s actions must have been taken because of the disclosures. The employer stated that, in fact, there had been significant concerns about the individual’s job performance prior to the disclosure and the disciplinary proceedings and suspensions were a response to those concerns. I determined that the evidence supported the employer’s explanation and therefore determined that there had not been reprisal.

Advice

The Ethics Officer is available to provide confidential advice to employees who are considering making a disclosure of wrongdoing. Advice is generally given about whether specific circumstances might constitute wrongdoing and about the process that must be followed to make a disclosure. During 2021-22, I received 29 requests for advice. The following chart shows the trend over the last seven years.



Some Parting Observations

As I indicated at the outset, I expect that this will be my final annual report. I have advised the Government of Nunavut that I would like them to begin the process of appointing a new Ethics Officer. I will continue with my work until a replacement has been found, ideally by the fall of 2022. I have enjoyed my time as Ethics Officer very much. It has been challenging and satisfying work. I hope that I have helped to contribute to a better working environment for the Nunavut public service and to a greater sense of confidence on the part of Nunavummiut that instances of wrongdoing can be brought forward safely and dealt with effectively. However, for personal reasons, I have decided that the time has come to pass the torch.

This is therefore an opportune time to make some observations based on my experience since I assumed this position in 2015. The legislation, and this position, was new and I have learned much since then.

Anonymity: The process mandated by the *Public Service Act* does not allow employees to make anonymous disclosures. They must first make their disclosure to their supervisor or to a deputy minister. This has resulted in a number of employees who called me for advice about a possible wrongdoing that, on the face of it, seemed credible and concerning deciding not to take the next step and make a formal disclosure. This is unfortunate and, in my view, undermines the very purpose of the legislation.

In most cases, this is because of a fear of reprisal. I appreciate that the Act contains robust protections from reprisal, with substantial penalties, but the fact remains that the employees of the Nunavut public service work in small communities and even smaller workplaces. Making a disclosure takes great courage and entails significant risk both in the workplace and in the

community. The inability to make an anonymous disclosure directly to the Ethics Officer is clearly inhibiting some employees from coming forward.

Most jurisdictions in Canada address this concern by giving employees a choice respecting where they direct their disclosure of wrongdoing. Most jurisdictions allow employees to make an internal disclosure, as is the case in Nunavut, but also allow employees to skip this step and make the disclosure directly to the relevant independent officer (in Nunavut, the Ethics Officer). The independent officer then makes best efforts to protect the identity of the person making the disclosure (although, depending on the circumstances, this may not always be possible).

Adopting such an approach would remove an impediment to employees coming forward. I have suggested in past annual reports that the Legislative Assembly give serious consideration to allowing employees to make disclosures directly to the Ethics Officer and I do so again.

Disclosures from non-employees: I also note that some Canadian jurisdictions allow their equivalent of the Ethics Officer to investigate allegations of wrongdoing within the public service that are made by someone from outside the public service. That is not the case in Nunavut and, when I receive such an inquiry, I am obliged to advise the potential discloser that I have no jurisdiction to look into the matter. If they want to pursue it, they must take their concerns to their MLA, local representatives or the media. I believe the goal of ensuring that wrongdoing within the public service is brought to light and dealt with effectively would be better achieved if the Ethics Officer could receive disclosures from members of the public.

Hamlets: Over the years, I have received a number of inquiries about alleged wrongdoing by employees of hamlets. I have to advise that I have no jurisdiction to look into the matter and can offer no alternatives. Consideration should be given to expanding the jurisdiction of the Ethics Officer to encompass such disclosures of alleged wrongdoing.

Friction in the workplace: A significant number of requests for advice that I have received – perhaps a preponderance – have related to complaints of inappropriate or unprofessional conduct in the workplace that often does not rise to the level of wrongdoing. In some cases, the allegations, if proven, would amount to conduct that should be addressed by management but that does not constitute a serious breach of the Code of Values and Ethics or otherwise meet the definition of wrongdoing. For example, an employee might complain that their supervisor lacks competence and is doing a poor job. While these complaints may or may not be well founded, they do deserve to be given serious consideration. However, the employees who have expressed these concerns to me often also express an unwillingness to bring them to management because they fear reprisals.

It may be beneficial to consider measures to increase the willingness of employees with concerns that do not relate to wrongdoing to come forward. For example, consideration could be given to allowing members of the Nunavut public service who have made a complaint to senior management other than a disclosure of alleged wrongdoing and believe that they have therefore been the subject of reprisal to complain to the Ethics Officer; this would allow the

Ethics Officer to investigate those allegations of reprisal and, if proven, recommend appropriate action.

Conclusion

Each year, I have expressed my appreciation to the National Public Interest Disclosure Group, an informal organization that brings together officials from across Canada who have responsibility for public service ethics and whistleblowing. They are without exception dedicated, collegial public servants whose assistance and advice have been invaluable to me over the years. I cannot overstate my gratitude. I will truly miss our annual meetings.

As I have in the past, I would like to conclude my annual report by thanking the senior staff in the Government of Nunavut's Department of Human Resources (and, before its creation, the Department of Finance). They have taken seriously the importance of ensuring that all members of the Nunavut public service are aware of the process for disclosing wrongdoing and have provided me with the necessary supports to do my work.

It has truly been an honour to serve Nunavummiut as Ethics Officer.

Respectfully submitted,

Jeffrey Schnoor, Q.C.
Ethics Officer