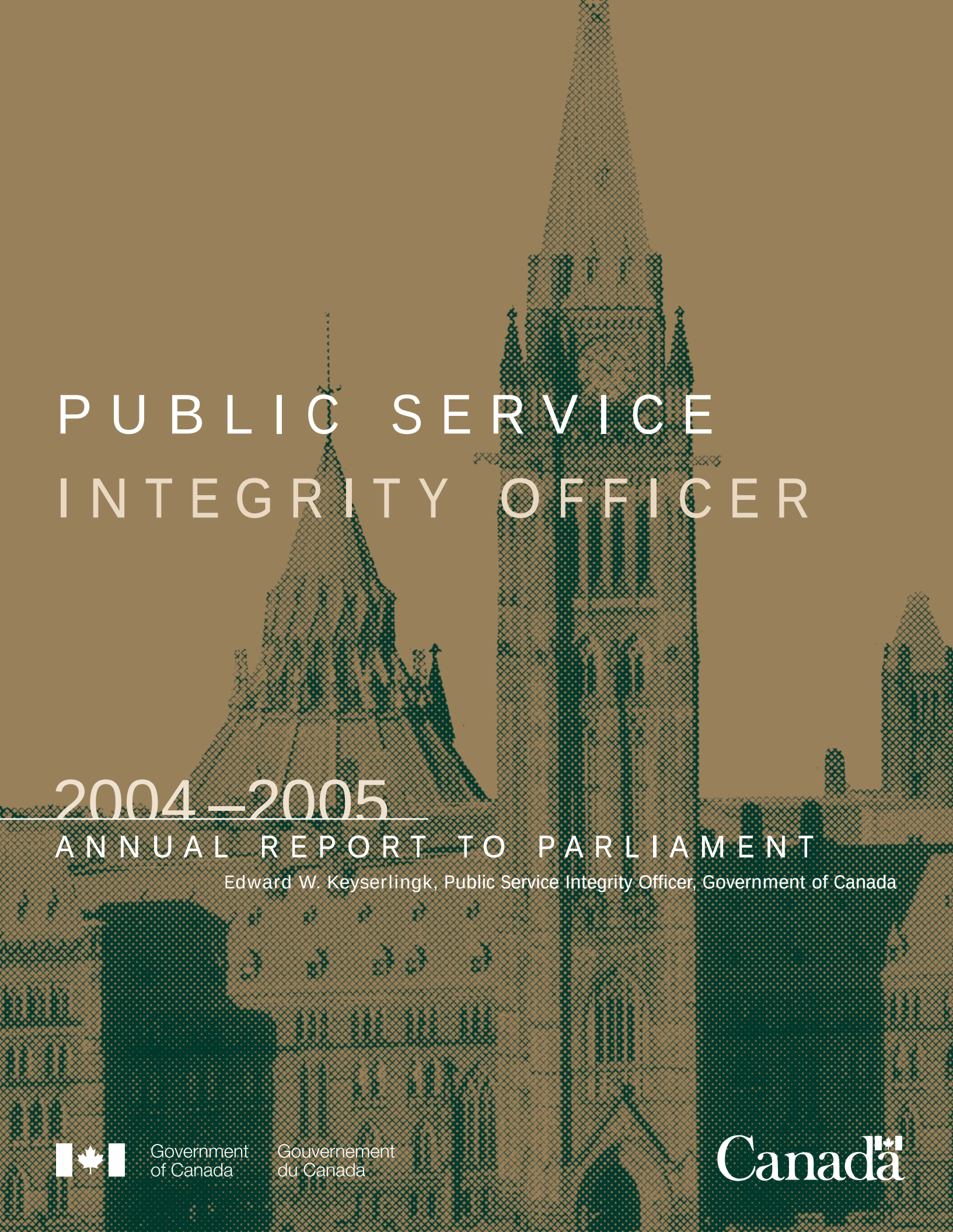

PUBLIC SERVICE INTEGRITY OFFICER

2004–2005

ANNUAL REPORT TO PARLIAMENT

Edward W. Keyserlingk, Public Service Integrity Officer, Government of Canada

Government of Canada
Gouvernement du Canada

Canada

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April 2006

The Honourable Michael Chong
President of the Queen's Privy Council for Canada
Minister of Intergovernmental Affairs
House of Commons
Ottawa, Ontario
K1A OA6

Dear Minister:

Pursuant to the Treasury Board *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*, it is my pleasure to transmit the 2004–2005 Annual Report of the Public Service Integrity Officer for tabling in Parliament. The dissolution of the 38th Parliament on November 29, 2005 prevented earlier tabling.

Part I of this Report provides an overview of the operations of my Office from April 1, 2004 to March 31, 2005. Under the different headings of wrongdoing specified in the *Disclosure Policy*, this part includes both the relevant statistics and brief descriptions and outcomes of completed cases.

Part II of the Report provides my comments on a number of persistent challenges. *The Public Servants Disclosure Protection Act*, which received Royal Assent on November 25, 2005 and has yet to come into force, provides for many of the elements that I, along with many others, have been advocating for some time. Chief among those elements is of course that the new Public Sector Integrity Commissioner will be an agent of Parliament.

While in my opinion the legislation is an achievement worthy of support, there are nevertheless some remaining issues. I have commented on those matters in Part II of the Report, and proposed what I consider to be viable solutions. Some of the other comments in Part II touch upon matters that are unrelated to legislation but concern a number of attitudes and practices worthy of reflection in order to make a disclosure of wrongdoing regime more effective.

It is my hope that this Annual Report will make an important contribution to the ongoing debate on the disclosure of wrongdoing in the public sector.

Yours sincerely,

Edward W. Keyserlingk
Public Service Integrity Officer
Government of Canada

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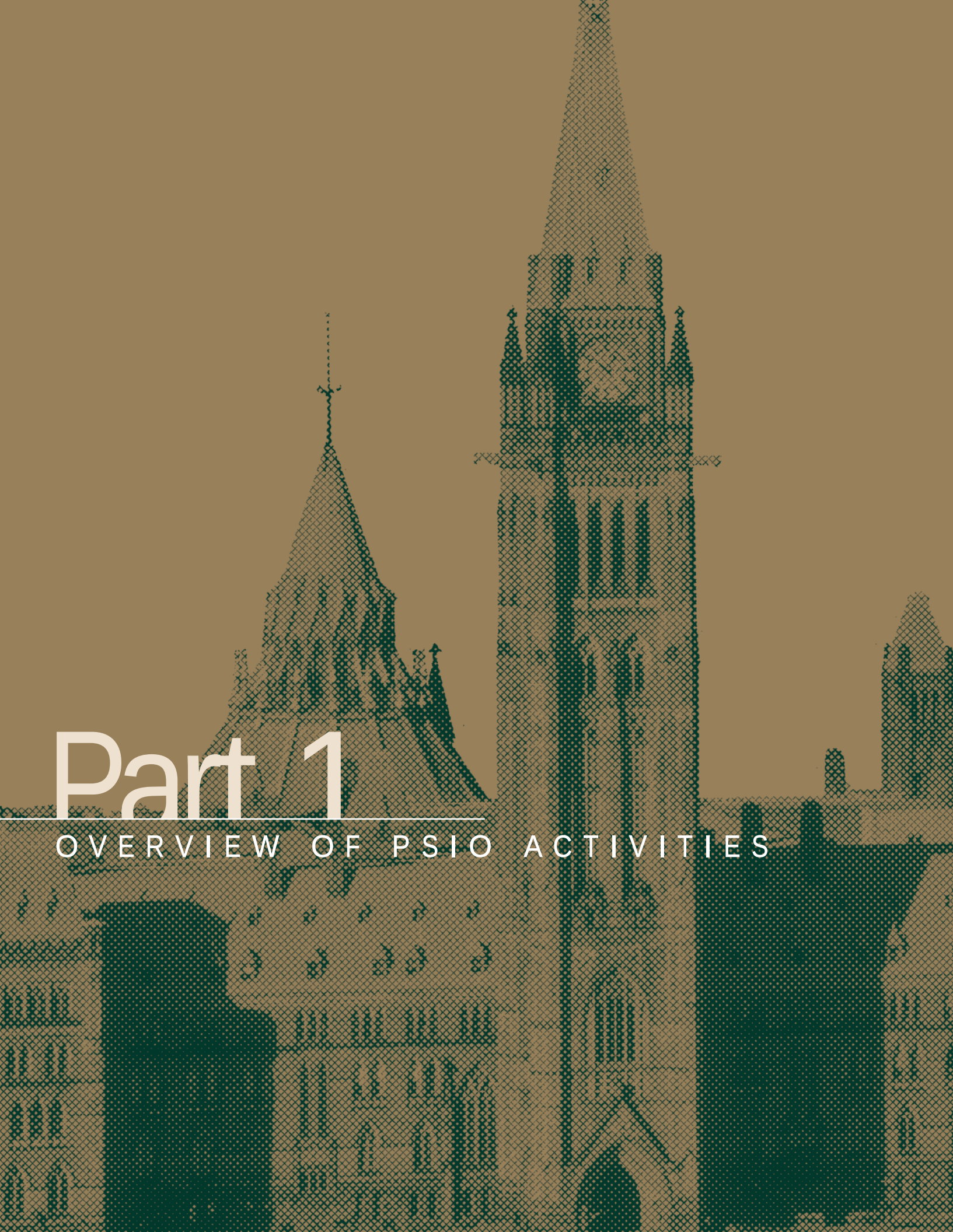
Part I of the Public Service Integrity Officer Annual Report to Parliament describes the activities of the Public Service Integrity Office (PSIO) for the 2004–2005 fiscal year. As in previous years, the annual report focuses on the PSIO's investigation of internal disclosures of wrongdoing made by public service employees.

Also described in Part I are the PSIO's mandate and case management practices, as well as the PSIO's challenges and accomplishments of the past year. These are supplemented by case statistics and analysis. Finally, Part 1 contains brief descriptions of completed cases—under the different headings of wrongdoing—and their outcomes.

In Part II, the Public Service Integrity Officer reflects on, and analyses, his four years of working with the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*. He also presents his views on Bill C-11, the soon-to-be-enacted *Public Servants Disclosure Protection Act*.



Part 1

OVERVIEW OF PSIO ACTIVITIES

Part 1

OVERVIEW OF PSIO ACTIVITIES

Edward Keyserlingk
Public Service Integrity Officer

1.1 Mandate and Jurisdiction

The Public Service Integrity Office (PSIO) was established by the Treasury Board's *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace* (hereafter identified as the *Disclosure Policy*). Both the *Disclosure Policy* and the PSIO became effective on November 30, 2001. The *Disclosure Policy* sets out PSIO's mandate (summarized in Appendix A) and its general procedures.

The jurisdiction of, and access to, the PSIO extends to the nearly 180,000 public service employees who work in the departments and agencies listed in Schedule 1, Part 1, of the *Public Service Staff Relations Act*. This means that the PSIO covers all departments and agencies under the purview of Treasury Board as the employer. The remaining 280,000 public sector employees—those who work for separate agencies and Crown Corporations such as the Canada Revenue Agency and the Canada Post Corporation, as well as the Canadian Forces—are excluded from the purview of the PSIO.

The mandate of the Public Service Integrity Officer is to act as a neutral entity on matters of internal disclosure of wrongdoing. Specifically, the Public Service Integrity Officer assists employees who:

- believe their issue cannot be disclosed within their own department; or
- raised their disclosure issue(s) in good faith through departmental mechanisms but believe that the disclosure was not appropriately addressed.

The PSIO was created as an alternative to the departmental process—also established by the *Disclosure Policy*—for the reporting, review and investigation of wrongdoing in the public interest. Through the departmental process, managers must not only promote openness in their interaction with employees, they are required to act promptly when information concerning wrongdoing is brought to their attention. The *Disclosure Policy* also sets out a role for a designated departmental senior officer who is appointed by, and reports to, the Deputy Head of the department (or agency). This designated senior officer is responsible for addressing disclosures from within the department, initiating investigations and making recommendations as appropriate.

The *Disclosure Policy* defines wrongdoing as an act or omission concerning:

- a violation of any law or regulation;
- a breach of the *Values and Ethics Code for the Public Service;*
- misuse of public funds or assets;
- gross mismanagement; and/or
- a substantial and specific danger to the life, health and safety of Canadians or the environment.

Pierre Martel
Executive Director

… no employee shall be subject to any reprisal for having made a good faith disclosure in accordance with this policy, or in the course of a parliamentary proceeding or an inquiry under Part I of the *Inquiries Act* related to the 2003 Report of the Auditor General of Canada. This includes employees who may have been called as witnesses. Reprisal may include any administrative and disciplinary measures.

Disclosure Policy

1.1.1 Protection from Reprisal

In addition to investigating and reporting on disclosures of wrongdoing, the PSIO protects from reprisal those employees who disclose information concerning wrongdoing. The fear of job reprisal and retaliation is widely considered to be the largest obstacle to employees making disclosures of wrongdoing.

In the past year, disclosures of wrongdoing included an increased number of complaints of reprisal. As a result, the PSIO will treat future complaints of reprisal separately from the investigation of the disclosure.

Jean-Daniel Bélanger
Senior Counsel/
Investigator

1.1.2 Confidentiality and Information Protection

The PSIO does its utmost to protect the identities of those who make disclosures of wrongdoing and of other parties involved in the case. Clearly, the expectation of confidentiality is a high priority for all parties.

However, the PSIO is subject to both the *Access to Information Act* and the *Privacy Act*. As a result, it must respond to requests for information accordingly. The PSIO must also comply with the rules of natural justice, allowing individuals accused of wrongdoing or reprisal to know who made the allegations. Consequently, the PSIO can give public service employees only qualified assurances that their identity—and the information they provide—will be held in confidence.

Personal information can be withheld only in limited circumstances, as prescribed by law. For example, personal information can be withheld when a person's identity needs to be protected for safety reasons or if disclosing his or her identity would be injurious to the conduct of an ongoing investigation.

Martine Nantel
Senior Counsel/
Investigator

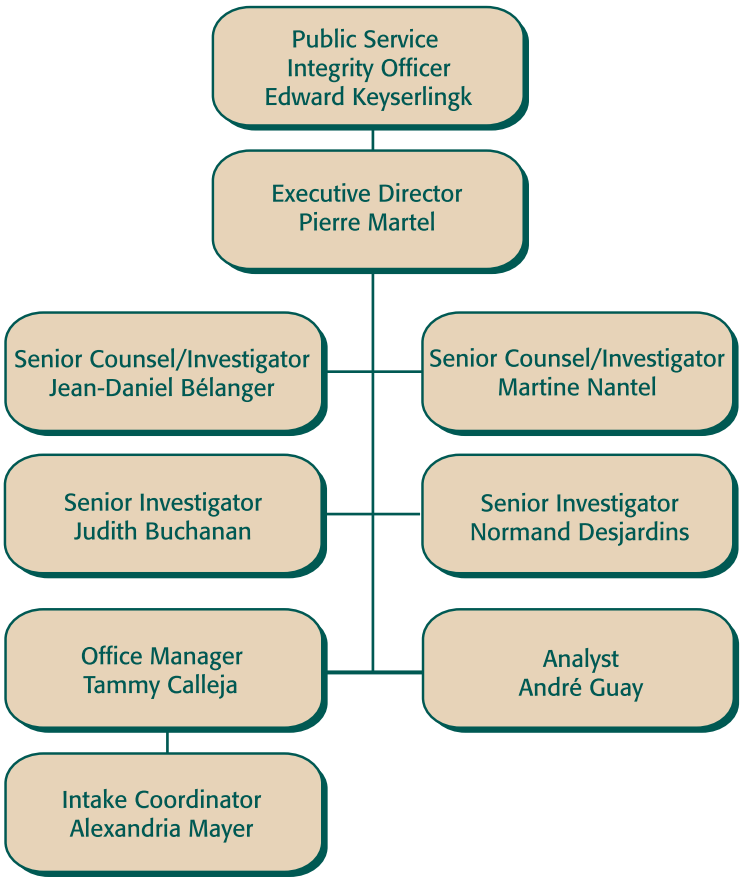
1.2 The Structure of the PSIO

The PSIO office complement remains mostly unchanged. Supporting the Public Service Integrity Officer are an executive director, two legal advisors, two senior investigators, an office manager and an intake coordinator. The previous year's articling law student has since joined the PSIO as an analyst.

While the PSIO continues to operate independently in its investigations, it relies to some extent on other government departments and agencies or contractual arrangements for corporate administration and technical services. Expenditures incurred are presented in Appendix B.

Bill C-11, the *Public Servants Disclosure Act*, is expected to become law later this fiscal year. This will bring substantial change to the PSIO. In anticipation of these changes, the PSIO is studying possible organizational requirements, taking into account expanded jurisdiction and legal obligations.

Public Service Integrity Office Organisation Chart



1.3 Publicizing and Reaching the PSIO

As in previous years, the Public Service Integrity Officer and Office staff participated at various events to promote the work of the PSIO and to inform various communities of public service employees—such as staff relations, financial management, auditing, comptrollership and security—about the work of the PSIO.

The PSIO was pleased to host an investigator with the Nova Scotia Office of the Ombudsman. She spent a week at the PSIO, working with staff to learn more about the *Disclosure Policy* and the PSIO experience. Nova Scotia is implementing a similar legislated initiative.

PSIO representatives attended a number of events outside the public service to talk about the *Disclosure Policy* and the PSIO's experience under that regime.

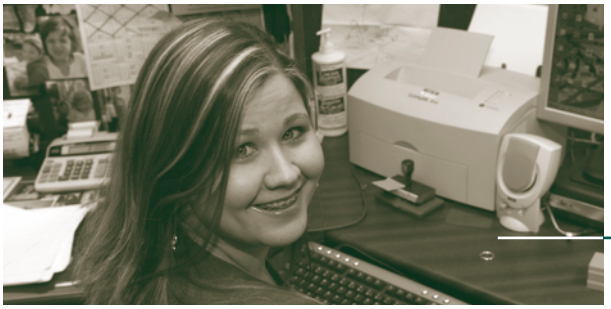
These included:

- The VIIIth International Ombudsman Institute Conference, hosted by *Le Protecteur du citoyen du Québec*. Opened by Her Excellency, the Governor General of Canada, the conference attracted more than 700 participants from five continents.
- Workshops in Calgary and Edmonton on "Ethics, Integrity and Trust in the Public Sector," organized by the Sheldon Chumir Foundation and the Alberta Branch of the Ethics Practitioners of Canada with the support of the Office of the Ethics Commissioner of Alberta.
- The Privacy and Effective Investigations Conference in Toronto.
- A symposium on public sector ethics at St-Paul's University.

The disclosure of wrongdoing is also an emerging field of study in Canadian universities. During the past year, the Public Service Integrity Officer and a legal advisor addressed third year law students at the University of Ottawa and at Western University, Ontario. The Public Service Integrity Officer was a lecturer, and presided over special seminars on ethics and whistleblowing, at the University of Victoria. The Public Service Integrity Officer also participated in an expert panel on public service values and ethics, hosted by the Professional Institute of the Public Service of Canada.

PSIO staff met with representatives of other countries, notably Brazil, Switzerland, Australia and the United States, to discuss similar experiences and practices. Staff also participated in inter-departmental work relating to international conventions to combat corruption, notably the Organization for Economic Co-operation and Development and the United Nations.

The PSIO recognizes that Bill C-11 will necessitate extensive education and outreach activities. In response, the PSIO[1] is planning a new communications program to ensure that public sector employees are aware of the existence and mandate of the new Public Sector Integrity Commissioner.



Tammy Calleja
Office Manager

1.4 The Case Management Approach

Inquiries and disclosures received by the PSIO in the past year arrived by various means, including mail, telephone, e-mail and visits to the office. The PSIO addresses each inquiry promptly, providing referrals as required and seeking clarification and additional information when it appears the matter is within PSIO's mandate.

When screening potential disclosures, the PSIO:

- assesses whether the department involved in the allegation is subject to the *Disclosure Policy*;
- ensures the person making the disclosure is a public service employee; and
- determines whether the allegations fall within the definition of wrongdoing (and no other recourse is prescribed).

The PSIO may reject a disclosure of wrongdoing if it determines that the matter is not credible, is trivial, frivolous or vexatious, or if the disclosure was not made in good faith.

When it is determined that a case does fall within the PSIO mandate, an in-depth review is conducted to determine if a full investigation is required. In such cases, additional information and documentation is obtained from the employee or researched through public sources. This approach ensures that the PSIO investigator is well versed in the subject area related to the alleged wrongdoing and, therefore, well positioned to determine the best course of action.

1 Transition measures added to Bill C-11 confirm that the PSIO will be the basis for the proposed Public Sector Integrity Commissioner.

Alexandria Mayer
Intake Coordinator

Due to the nature of the definition of wrongdoing, and the variety of concerns it may cover within the scope of the federal public service, the PSIO often finds it necessary to conduct extensive research on the subject area of the alleged wrongdoing. A thorough analysis may be required to determine the application of law, regulation, policy or other governing rules. Legal opinions or assessments by various experts, along with consultations, may be needed to learn more about the applicable rules and operational requirements. This may be followed by an assessment of permissible management flexibility, allowable discretion, whether another preferred recourse exists, and a determination of what would constitute wrongdoing.

The PSIO holds weekly staff meetings to discuss cases as they reach key stages. Following the initial screening and review stage, each case assigned to an investigator is presented at the meeting. There, it is discussed and evaluated to determine the next steps. To ensure the greatest possible diversity of perspectives, and to thoroughly review the issues at hand, every member of the PSIO participates and contributes expertise and knowledge to the discussion.

When the PSIO determines that a formal investigation is required, the Public Service Integrity Officer normally informs the Deputy Head and requests the collaboration of the department. The Deputy Head (or a senior departmental representative) and the person making the disclosure are separately informed, in writing, of the nature of the allegations, the issues to be investigated, and the PSIO's general approach to the investigation.

At the onset of each investigation, the investigator contacts the department to obtain an account of events and to secure relevant documentation. As the investigation progresses, the investigator may also seek perspectives from the person making the disclosure, witnesses, the alleged wrongdoer and other concerned parties. All of this information is then reviewed and assessed to determine whether the activity in question constitutes wrongdoing.

All parties are informed of the progress of the investigation and given the opportunity to respond or provide their views.

When a formal investigation is concluded, a preliminary report of findings is provided to the department and to the employee who made the allegation for their comments. A final report is then issued. Where wrongdoing is found, the report includes recommendations for addressing and correcting the matter. Normally, the PSIO will follow up on those recommendations until the matter is resolved.

If a department or agency does not respond appropriately, or in a timely manner, to the PSIO's findings and recommendations, the Public Service Integrity Officer can submit a report to the Clerk of the Privy Council, seeking his or her intervention as the head of the Public Service. No such reports were made in the past year.

The PSIO case management approach is designed to meet the requirements of the *Disclosure Policy*:

- To establish if there are sufficient grounds for further action and review;
- To initiate an investigation when required;
- To review the results of investigations;
- To prepare reports and make recommendations to Deputy Heads on how to address or correct the disclosure; and
- In some special cases, or when the departmental responses are not adequate or timely, to make a report of findings to the Clerk of the Privy Council in his or her role as head of the Public Service.

1.5 Statistics

In addition to receiving hundreds of telephone calls, the PSIO recorded 66 contacts in 2004–2005. In approximately two-thirds of those contacts, the PSIO took no further action because the concerns raised did not fall within the domain of the *Disclosure Policy*.

The following table shows the number of files reviewed and investigated by the PSIO—and their disposition—in the past year:

FILES REMAINING AT END OF 2003–2004[2]	19
FILES OPENED IN 2004–2005[3]	25
TOTAL FILES FOR REVIEW AND INVESTIGATION IN 2004–2005	44
Files closed after intake or preliminary review stage • Files closed after referral • Files closed: no jurisdiction[4] • Files closed: allegations found to be not substantiated	12 6 2 4
Files closed after research, review and investigation • Files closed after referral • Files closed: no jurisdiction[4] • Files closed: allegations found to be not substantiated • Files where allegations were founded	18 6 3 6 3
INVESTIGATIONS ONGOING AS OF MARCH 31, 2005	14

Over the past year, the PSIO completed nine investigation reports. In each case, the PSIO sent its recommendations to the respondent organization.

After extensive investigations and interactions with the parties concerned, the PSIO found no wrongdoing in six of those nine cases. However, even when no wrongdoing was found, the PSIO offered suggestions and recommendations for improving departmental procedures, communications and interactions with employees, and the program clientele. This approach elicited full co-operation from all departments concerned.

[2] Fiscal year 2003-2004, from April 1, 2003 to March 31, 2004

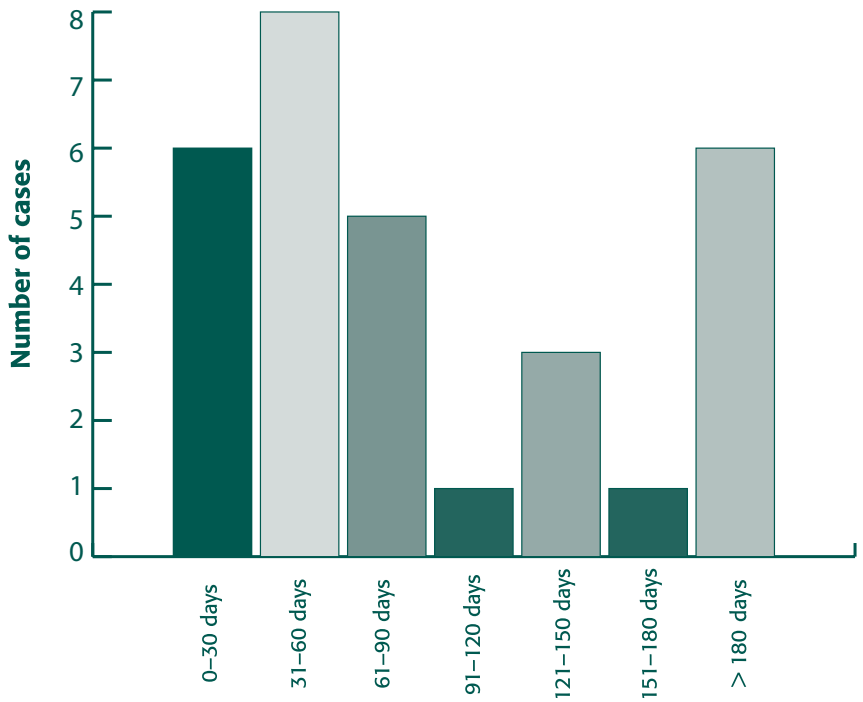
[3] Fiscal year 2004-2005, from April 1, 2004 to March 31, 2005

[4] "No jurisdiction" refers to circumstances where it turned out that the PSIO did not have a mandate to continue to investigate such as: the person or disclosure did not qualify under the terms of the Disclosure Policy; the wrongdoing alleged took place too long before the Disclosure Policy came into effect; it was not in the public interest to investigate; or, the allegations had been considered or would be dealt with better by another federal board, tribunal or court.

In the three cases where the PSIO found wrongdoing, the parties were provided with recommendations for addressing the matter.

FILES BY CATEGORY OF WRONGDOING	
Violation of Laws or Regulations	10
Breach of the Values and Ethics Code for the Public Service	1
Misuse of Public Funds or Assets	6
Gross Mismanagement	15
A Substantial and Specific Danger to the Life, Health and Safety of Canadians or the Environment	0
Reprisal for making an allegation of wrongdoing[5]	2
Conflict of Interest	1
Harassment, Abuse of Authority, Interpersonal Conflict	7
Others	2
TOTAL	44

Elapsed time to Dispose of Cases as of March 31, 2005



Total: 30

[5] As of January 1, 2005, it was decided to record internal disclosures separately from complaints of reprisal and open distinct files.

1.6 Case Highlights (by category of wrongdoing)

Violation of Law or Regulation (10 cases)

In 2004–2005, the PSIO concluded its review of 10 cases in which the allegations related to the violation of a law or regulation.

Of the 10 cases, three were referred to another agency. In each of these cases—including allegations relating to the *Canadian Human Rights Act* and the *Public Service Employment Act*—another appeal or recourse mechanism was available to the employee.

Of the remaining seven cases investigated by the PSIO, one involved a review of a departmental investigation. Specifically, it dealt with allegations that Transport Canada had failed to enforce regulatory provisions against a pilot and an airline company and that it did not properly implement a recommendation of the Canadian Transportation Safety Board (CTSB).

After reviewing the investigation, the PSIO agreed with the departmental senior officer's conclusion that there was no wrongdoing. The senior officer did find that the department did not act quickly enough to revoke the pilot's licence after concluding that he was largely responsible for a plane crash. However, although the pilot had a history of offences in other regions of the country, this information was not readily available, or nationally accessible, to the department before the accident. In any event, due to the broad discretion available to the department in the enforcement of the regulation, the PSIO could not conclude that there was wrongdoing. Nevertheless, the PSIO did suggest that the department develop and implement a system to track the record of pilots with repeated offences.

As for the allegation that Transport Canada did not properly implement the CTSB's recommendation, the PSIO referred the employee to the CTSB itself, since it is legally obligated to follow up on its recommendations. Finally, the PSIO suggested to the department that if the employee who made the original disclosure had been better informed about the senior officer's findings, the resulting frustration with the process could have been avoided. The PSIO felt that this was a reasonable suggestion, given that the *Disclosure Policy* requires a certain level of transparency.

As of March 31, 2005, five cases remained open and under investigation. These will be covered in the next annual report.

In its previous annual report, the PSIO reported that one of its cases was the subject of a judicial review. The Federal Court heard the matter in November 2004. Appearing as an intervenor, the PSIO explained its jurisdiction and the making of its record. On April 29, 2005, the Court allowed the application for judicial review and referred the matter back to the PSIO for reconsideration.[6]

A Breach of the Values and Ethics Code for the Public Service (one case)

In the one case reported in this category, the PSIO determined that the allegation was unfounded. The allegation concerned an employee's belief that the Department of National Defence misrepresented the rationale in awarding a contract. Although there was some media criticism of the decision to award the contract to a firm outside of Canada, the PSIO determined that there was no misrepresentation of information.

Misuse of Public Funds or Assets (six cases)

In 2004–2005, the PSIO considered six cases alleging the misuse of public funds or assets. Of these, three were outstanding from the previous fiscal year.

[6] Chopra et al. v Canada, (Attorney General) 2005 F.C. 595.

In one case, after conducting preliminary research about contracts and procurement, the PSIO determined that another process was better adapted to address the issue. It referred the employee to the Canadian International Trade Tribunal.

Two cases involved procurement and contracting of goods and services. Both were fully investigated.

In the first case, involving Health Canada and the procurement of computer software, the PSIO found that the contracts were split to bypass Public Works and Government Services Canada for authorization for the standing offer. The PSIO is satisfied that the department has taken the necessary steps to prevent a recurrence of this wrongdoing. Also, staff in the Division involved was required to undergo further training in the area of procurement.

In the other case, a number of contracts were reviewed to determine whether contracting rules were followed within a sector at the former Human Resources Development Canada. In this case, there was no evidence of contract splitting or other contracting irregularities.

In yet another case, an employee of the Canadian Space Agency alleged a misuse of funds and gross mismanagement in the agency's management of a harassment complaint. The PSIO concluded that there was no misuse of funds or gross mismanagement on the part of the agency. It found that the agency dealt with the harassment complaint according to applicable policy.

As of March 31, 2005, two cases in this category remain open and under investigation.

Judith Buchanan
Senior Investigator

Gross Mismanagement (15 cases)

Of the 15 cases in this category, three were initiated in the previous year. Due to the complex nature of this category of wrongdoing, the 12 new cases required considerable research and investigation on the part of the PSIO. Many of the cases related to how departments address the management of employees. Most allegations were determined to be unfounded. In the other cases, employees were advised to refer the matter to the grievance process.

Four cases were concluded after an investigation. Of these, three were determined to be unfounded. One of the three was an allegation of gross mismanagement on the part of the Department of Foreign Affairs and International Trade in responding to allegations of theft and fraud at a Canadian mission. The PSIO found that the department acted appropriately in its response to, and investigation of, instances of theft and fraud by a foreign employee working at a Canadian mission. It concluded that the department had taken the necessary administrative and legal action, and initiated appropriate measures, to mitigate the possibility of further occurrences.

In the second case, Citizenship and Immigration was accused of gross mismanagement after an employee's pay equity entitlement was miscalculated. The employee maintained that by trying to recoup the overpayment through salary deduction over a very short period, the department had put the employee in financial difficulties. After obtaining additional information from Citizenship and Immigration, the PSIO successfully brought the parties to a mutually agreeable solution to recover the overpayment.

In the third case, an employee alleged gross mismanagement on the part of Correctional Service Canada regarding a longstanding harassment complaint. Although the complaint was determined to be founded three years earlier, it had never been resolved. After reviewing the matter, the PSIO recommended that the employee be reassigned so he/she would no longer be under the supervision of the respondent. The department agreed with the suggested remedy and transferred the employee to another facility.

As of March 31, 2005, eight cases in this category remained open and under investigation.

A Substantial and Specific Danger to the Life, Health and Safety of Canadians or the Environment (no cases)

No cases were reported in this category.

Normand Desjardins
Senior Investigator

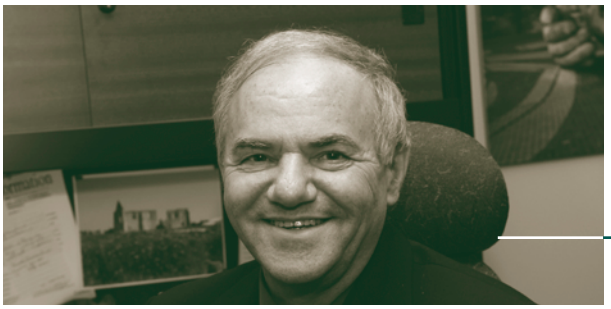
Complaints of Reprisal

The PSIO continues to be guided by the *Disclosure Policy* in assessing what constitutes an act of reprisal. The PSIO first considers whether the employee made the internal disclosure of wrongdoing to a supervisor or other manager, to the departmental senior officer or to the Public Service Integrity Officer. Next, the PSIO investigates and evaluates whether there is a link between the alleged act of reprisal and the original internal disclosure of wrongdoing.

The PSIO received four complaints of reprisal in the past year. Another four remained from the previous year. The PSIO did not investigate one complaint because, one, the alleged acts of reprisal predated the internal disclosure and, two, were included in a grievance covering additional items that the department was investigating.

The PSIO completed its investigation into the remaining three complaints of reprisal. In each case, it concluded that the circumstances did not constitute acts of reprisal. The PSIO found that the events cited either predated the internal disclosure or that there was no link between the internal disclosure and the alleged act of reprisal. In one case, the PSIO went even further, pointing out that making an internal disclosure does not provide an employee immunity to disciplinary actions unrelated to a disclosure.

Four cases remain under investigation.



André Guay
Analyst

Anonymous Disclosures

Three anonymous disclosures were received by the PSIO in the past year. Another two remained open from the previous year.

In most cases, there was sufficient supporting material to justify a review by the PSIO. In all cases, the departments were informed of the allegations. In two cases, it was agreed that the departments could undertake their own investigations and provide the results to the PSIO. Of these, one case remains open. In the other case, the department provided the PSIO with a report of its investigation and findings. Although no wrongdoing was found, concerns were expressed about the management of the unit in question. Acting on a recommendation from the PSIO, the department remedied the concern. Two cases were closed after they were referred to the concerned department for action.

The final case is still in the preliminary review stage. The PSIO is researching the standards and policy requirements which will form the basis of its investigation plan as well as the subsequent assessment and analysis of its findings.

Regional Distribution of Cases

Region	Total
Alberta	3
British Columbia	2
Manitoba	0
N/A	1
New Brunswick	1
National Capital Region	11
Nova Scotia	0
Ontario	10
Prince Edward Island	0
Quebec	16
Saskatchewan	0
Total cases	44

Distribution of cases by department and agency

Department	Total Cases
Agriculture and Agri-Food Canada	1
Atlantic Canada Opportunities Agency	1
Canada Border Services Agency	1
Canada Industrial Relations Board	4
Canadian Space Agency	1
Citizenship and Immigration Canada	2
Communication Canada	1
Correctional Service Canada	8
Courts Administration Service	1
Environment Canada	1
Fisheries and Oceans Canada	3
Foreign Affairs and International Trade Canada	1
Health Canada	3
Human Resources Development Canada	2
Immigration and Refugee Board	1
Indian and Northern Affairs Canada	1
National Defence	2
Natural Resources Canada	2
Passport Canada	1
Public Works and Government Services Canada	1
Royal Canadian Mounted Police	1
Transport Canada	3
Treasury Board of Canada Secretariat	1
Veterans Affairs Canada	1
Total cases	44

Part 2

REFLECTIONS

Part 2

REFLECTIONS

In this part of the 2004–2005 Public Service Integrity Officer Annual Report to Parliament, I address a number of persistent issues and challenges that I believe will require continual and serious reflection. That will remain the case once the new legislation comes into force and the Public Service Integrity Commissioner is in place. Even with the best possible legislated disclosure of wrongdoing regime, given the ethical and legal complexities and challenges presented by whistleblowing, some issues will quite appropriately continue to be disputed and in need of continued reflection and evolution.

As in any human enterprise, some of those enduring realities in this field cannot be foreseen or entirely regulated by legislation. They are more appropriately addressed by the wise application of ethical judgment, legitimate scope for discretion and tested practice. On the other hand, some problems may be created, exacerbated or left in place by missing or inadequate provisions in a law.

My views regarding the matters addressed below are based upon almost five years of experience as the Public Service Integrity Officer. My term in that capacity, already twice extended at the government's request in order to assist with the transition to a new legislated framework, is about to conclude. At the point in time in which this is being written, I am hopeful the already enacted legislation, whether or not it will be further revised now or later, will come into force in the near future. This seems to me a welcome opportunity to share some reflections and concerns. I hope they will be of some interest and usefulness to my successor, and to those reading this report.

2.1 A New Public Servants Disclosure Protection Act and Public Sector Integrity Commissioner

Over the past four years, a significant portion of my time, and the resources of the Public Service Integrity Office (PSIO) have been devoted to advocating for disclosure of wrongdoing (whistleblowing) legislation and the creation of an independent Public Sector Integrity Commissioner (PSIC) reporting directly to Parliament.

The past year was no exception. Our efforts in the period covered by this report include:

- studying other jurisdictions;
- reviewing our own experience;
- formulating and proposing model legislation and recommending amendments to Bill C-11 considered by the 38th Parliament;

- testifying to a House of Commons Standing Committee; and
- holding discussions with public servants, union leaders, members of the public and a wide variety of interested groups.

Considerable care was taken to ensure that advocacy and model law reform work did not interfere with, or curtail, the primary responsibility of my Office: receiving, investigating and reporting on allegations of public service wrongdoing.

In fact, the two activities were closely linked. My conclusions and proposals as to the need for legislation, legal protections and an independent Commissioner reporting to Parliament, are based largely upon lessons learned from the allegations brought to my Office and the resulting investigations.

Presumably, the fact that my Office deals in an independent and extra-departmental manner with the employees who make disclosures, as well as with their managers, enhanced the credibility of the legislative proposals. It means that in addition to theoretical reflection, they are based upon daily experience and practice.

It is of considerable satisfaction to me and my PSIO colleagues that these efforts, along with those of many other individuals and groups, have contributed to the new legislation, the *Public Servants Disclosure Protection Act*, which provides for an independent Public Sector Integrity Commissioner who will report to Parliament.

While the new whistleblowing legislation is not perfect, it is a major step forward. The enhanced powers, protections and independence attached to the PSIC will make that Commissioner far more effective and credible than today's policy-based PSIO.

Once the legislation comes into force, whether or not further amended, Canada will be the only country with a legislated and independent Agent of Parliament established exclusively to receive, investigate and report to Parliament disclosures of information related to wrongdoing in the public sector. Similarly, we will be the only country with a legislated process to protect employees who make disclosures, as well as witnesses, from reprisal for making or testifying about disclosures.

2.2 Witnesses of Wrongdoing Against the Public Interest Rather than Victims

I have long believed that the *Disclosure Policy* assumes employees who come forward to make disclosures of wrongdoing will normally be "witnesses" of the alleged wrongdoing rather than "victims" of it. By victims, I mean those who believe they have a personal interest (as well as a public interest or motive) in making the disclosure and in the outcome of the Public Service Integrity Office investigation because they believe they personally have suffered harm as a result of another's unjustified action or inaction.

There are many other avenues and mechanisms through which employees can have their grievances addressed about employment conditions (such as classification and compensation), discipline, harassment, staffing matters, human rights and the like.

This interpretation applies equally to the new disclosure legislation. While it would have been helpful if both the disclosure policy and the legislation had been more explicit on that point, this interpretation is justified and fundamental.

It should be noted that an allegation of reprisal for having made a disclosure of (normally public interest) wrongdoing is rightly designated by the term "complaint" rather than "disclosure." Complaints of reprisal are taken as seriously by my Office as any allegation of wrongdoing. According to the provisions of the new legislation this will also be the case for the Public Sector Integrity Commissioner.

While a complaint of reprisal is also about a wrong, that wrong is directed more at the employee making the disclosure than it is against the public interest. It is a complaint about a wrongful activity in which the employee making the disclosure is the alleged victim. Normally, and justifiably, that employee has a personal motive and interest in making the complaint and in its resolution.

There is, in other words, an important distinction to be made between allegations about wrongdoing against the public interest—in which the role of the employee making the disclosure is that of a witness—and a subsequent complaint of reprisal—in which that same employee is more a victim than a witness.

Complaints of reprisal are as serious as other forms of wrongdoing. And all forms of it are clearly prohibited in the *Disclosure Policy* and the new legislation. Although the motivation and interest behind such complaints is primarily personal, an important public interest dimension is also present. Clearly, a reprisal for speaking up about wrongdoing is unjust. But in addition, because the fear of reprisal may impede others from stepping forward, some wrongful activities may not be identified and stopped. When that happens, honesty and accountability in the public sector, as well as public confidence in the public service, is compromised.

The subject of reprisal is addressed later in this report.

Support for the fact that the employee making a disclosure of wrongdoing other than reprisal should be characterized as a "witness" can be found in the categories of wrongdoing, those areas specified as legitimate subjects for allegations of wrongdoing. Both the *Disclosure Policy* and the new legislation correctly in effect identify relevant wrongful activities as those which involve serious wrongdoing against the public interest, as opposed to wrongdoing against individuals as victims.

Those listed in the new legislation include:

- contraventions of federal or provincial laws and regulations;
- misuse of public funds or assets;
- gross mismanagement;
- acts or omissions creating dangers to life;
- health or safety of persons or the environment;
- serious breaches of a code of conduct; and
- knowingly directing or counselling a person to commit one of those wrongdoings.

Neither the *Disclosure Policy* nor the new whistleblowing legislation explicitly refer to these activities as constituting wrongdoing activities against the public interest. Yet, apart from taking reprisal, they clearly are. They are not examples of employment or human resource type wrongdoing. The disclosure of wrongdoing regime is therefore not intended to be merely another recourse mechanism for public servants to deal with their personal grievances. The new legislation therefore makes it quite clear that the PSIC may refuse to deal with a disclosure if the subject matter could be more appropriately dealt with by another procedure available under another Act of Parliament.

In view of the above it is reasonable to conclude that it would be wrong to devote a significant portion of the limited resources of a disclosure regime, one designed to address serious public interest wrongdoing, to allegations about personal employment-related matters. This would not only constitute a wasteful duplication, but a distortion of the intent behind both the *Disclosure Policy* and the new legislation.

Despite this, I regret to say that most of the disclosures brought forward to the PSIO during the year under review, as in previous years, can be classified as largely employment-related.

That being said, it should be noted that personal employment-related disclosures can have a public interest dimension. For instance, the alleged wrongful activity could be so widespread within a department or the public sector that it may have become systemic in scope, involving more than a single victim, and therefore worthy of investigation on public interest grounds. Conversely, it is also possible that a disclosure meriting investigation as a serious public interest matter has a personal employment-related dimension. For example, an employee who makes a disclosure of wrongdoing as a witness may also subsequently allege reprisal for having disclosed information related to wrongdoing. I address the matter of reprisals later in this section.

There are, in my view, ways to shift this focus. We can, for example, encourage employees to make disclosures as witnesses rather than victims through the application of stricter tests and by using more discretion to refuse to deal with victim-type employment-related disclosures. I explore this point more fully later in this report.

2.3 Expectations of Findings—Readiness to Challenge Findings that Don't Substantiate Allegations of Wrongdoing

In the Public Service Integrity Office's experience, employees who believe they are victims of wrongdoing are more likely to make disclosures than those who witness wrongdoing but do not feel personally victimized by it. Presumably, this is because the employee who makes a disclosure as a "victim" has a personal stake in the outcome of any investigation. Not surprisingly these employees believe they will personally benefit if the alleged employment-related disclosure is substantiated and remedied as a result of their disclosure.

Witnesses without a personal stake or a foreseeable personal benefit in the results of an investigation are typically and understandably more reluctant to take risks. Many will do so only if the following measures are in place:

- legal protections against reprisal;
- independent extra-departmental investigations by an Agent of Parliament;
- effective investigative powers;
- strong sanctions against those who take reprisal against employees who make a disclosure; and
- a reasonable likelihood that effective action will be taken if wrongdoing is found.

For the past four years, myself and others have advocated for legislation providing all of these measures. Although the new legislation goes a long way in those directions, I do not believe it goes far enough. That was my position in the submission to the Standing Committee on Government Operations and Estimates in the 38th Parliament, and remains my position now.

Unlike employees who make disclosures as victims, those who make disclosures as witnesses generally do not expect to be as directly and personally involved in a subsequent investigation. Also, they are more inclined to accept the findings of a demonstrably comprehensive and fair investigation. If they bring an allegation of wrongdoing to an investigative body in which they have confidence, these witnesses are essentially saying: "I have done my part; I'm not doing this for myself but for the public service or public interest. I think I have witnessed a wrongdoing, the ball is in your court now; it is up to you to investigate or not and I will accept whatever findings you make after a comprehensive and fair investigation."

Although small in number, employees who make disclosures of this type have come forward over the past four years. They made credible allegations of wrongdoing to the PSIO, the cases were fully investigated with the cooperation of management and within the spirit of the *Disclosure Policy*, the findings were reported, both sides accepted the findings, and the recommendations, if any, were acted upon.

However, that picture of relative confidence, detachment and acceptance may be inaccurate. Clearly, in some cases, it is. But experience suggests, at least in relation to employees who make disclosures as victims, that there are important differences in expectations. Certainly, employees who see themselves as victims may also allege serious public interest wrongdoing. However, as these cases proceed, it often appears that their motivation and expectations were driven largely by their perceived victimhood.

Whatever the accuracy of the comparison, in the PSIO experience, employees who make a disclosure as victims generally expect their allegations to be investigated. Some may routinely challenge decisions not to investigate, as well as the result of those investigations that do not substantiate wrongdoing. They are determined to continue no matter what the merits of the case or the monetary and other costs they might incur. That, of course, is their right. No decision, investigation or finding by my Office is infallible or should be immune from challenge. Nonetheless, serious practical implications merit attention.

My Office is relatively small and has limited resources. If allegations of wrongdoing with minimal credibility or public interest were too routinely accepted for investigation—and the findings predictably and routinely challenged—then those resources would be stretched too thin.

The new whistleblowing legislation provides that the Public Sector Integrity Commissioner's mandate covers nearly all of the institutions in the federal public sector. While staff and resources will obviously be enlarged to deal with these additional responsibilities, the PSIC's much wider scope of access will still make it difficult for the Commissioner to deal with these greater demands. As a result, the problem of employees who make disclosures as victims, fully expecting that their allegations of wrongdoing will be substantiated and equally prepared to challenge the PSIC's findings if they are not, is likely to persist.

One essential way to address this reality is for the PSIC to widely promote and disseminate his or her specific mandate. Much has been done in this regard by the PSIO during the past four years, but much more remains to be done. The advent of new and robust legislation, and an independent Commissioner as an Agent of Parliament, will provide the opportunity and incentive to continue educating public servants about the specific purpose and scope of the disclosure regime. Hopefully, in time, allegations of wrongdoing will increasingly be about serious issues of public interest.

Given the important educational role to be played by the PSIC, it would be extremely important that he or she be given an explicit mandate in that regard. Also, if such a mandate is to be effectively fulfilled, adequate funds and resources must be supplied and assigned to the task.

An effective disclosure regime is intended to be a safe and effective avenue for public servants to raise credible concerns that they have witnessed a wrongdoing, which will then be investigated, a finding made and the matter resolved. By analogy, it is similar to a citizen reporting an alleged crime to the police. In both cases, the agency is entitled to expect good faith and credible evidence. The discloser is entitled to expect a careful screening for credibility and then if the case is investigated that it will be done in a comprehensive, objective and reliable manner. Public servants, like citizens, should be assured that they are performing a public service by coming forward.

Once a disclosure is made, the Commissioner should drive the process in the public interest, rather than being subject to the say of the employee making the disclosure. Continuing the analogy, the Commissioner should act in a similar fashion to the police and Crown Attorney. For instance, he or she should decide whether to take on an investigation, whether to stop it if it is going nowhere, and, after an investigation, to make or not make findings of wrongdoing (as the Crown decides whether or not to lay charges).

2.4 Exercising Discretion to Refuse Disclosures or Stop Investigations

It is hoped that an independent Public Sector Integrity Commissioner, having the related powers and protections envisaged by the new legislation, will give employees who make disclosures as witnesses the confidence to come forward.

At the same time, it is important that the PSIC exercise his or her discretion to refuse to deal with disclosures that do not meet important tests, and to stop investigations already underway when they fail appropriate tests. In the light of more experience and reflection, my Office has been applying such screening tests more rigorously. That, in part, explains the reduction in number of cases heard by the Public Service Integrity Office since its first year of operation.

The PSIO screening process has four general tests for dealing—or not dealing—with a disclosure. Most of these tests are specified in, or at least consistent with the *Disclosure Policy*. The same four tests have guided my Office in decisions on whether to continue an investigation already underway.

The first of these tests is whether the matter being disclosed is a serious public interest issue, rather than a human resource or employment-related one. In other words, the PSIO determines whether the employee making the disclosure is more a witness than a victim.

The second PSIO test involves determining whether the issue is better addressed by another existing mechanism, such as a grievance avenue.

The third PSIO test is whether the allegation of wrongdoing is sufficiently credible; in other words, likely to have taken place. That judgment includes consideration of whether the employee who made the disclosure was in a position to witness the act or activity in question, whether other witnesses are likely to be available and forthcoming, and whether documentary evidence is likely to exist. Determining these factors with any certainty may be possible only after an investigation has begun, in which case that is the point at which it must be decided to continue or not.

A credibility test is not the same as a good faith test. The two are not necessarily equivalent or mutually inclusive. One is entitled to assume that an employee who makes an allegation of wrongdoing not based on good faith already knows that the disclosure is not credible, and that the alleged wrongdoing did not in fact take place. The very meaning of “bad faith” excludes credibility. On the other hand, a good faith allegation does not necessarily mean it is credible. One may be well motivated but unknowingly wrong about the facts. Or the evidence to support an employee’s allegation may simply be insufficient.

The fourth PSIO screening test is to determine whether the employee who made the disclosure is acting in good faith. It is a difficult test because it is usually impossible to assess and know for certain. Perhaps a degree of self-screening is already in place in that most people realize that if their motive is, for instance, revenge, it will be picked up at an early point in the investigation. In fact, no cases have been identified and rejected by my Office on that basis. In practice, the credibility test is far more useful than a good faith one. The latter is nevertheless a legitimate and important screen in order to discourage vexatious, frivolous or bad faith disclosures. Without evidence to the contrary, the practice at the PSIO is to assume that all allegations are made in good faith.

All of these four general tests should and do apply to whether to initiate an investigation and whether to continue an investigation once it has begun.

As to whether the new disclosure legislation and regime would unduly restrict the discretion of the PSIC to refuse to deal with a disclosure, my view is that it does not. The various tests specified are reasonable, although arguably incomplete. The new legislation lists a number of reasons for the PSIC to refuse to deal with a disclosure of wrongdoing. The legislation does not, for example, explicitly refer to a "credibility" test. It does, on the other hand, acknowledge that the PSIC may refuse to deal with a disclosure or cease an investigation, and provides for the exercise of discretion and judgment. It is, after all, a matter of judgment as to whether a disclosure lacks sufficient public interest, is not sufficiently serious, or lacks sufficient credibility. There is also further indication that the scope for discretion in the new disclosure legislation is adequate. In addition to the other specific reasons for refusing to deal with a disclosure listed, there is another "catch-all" reason, namely, when there is a valid reason for not dealing with the disclosure. In other words, additional justifications are available within the discretion of the PSIC.

2.5 "A Balanced and Informed Decision-Making Process"

The new disclosure legislation provides one more reason why the Public Sector Integrity Commissioner may refuse to deal with a disclosure. The reason in question is that the "disclosure relates to a matter that results from a balanced and informed decision-making process on a public policy issue." This presents an interesting challenge.

The *Disclosure Policy* had a similar provision insofar as it stated in the preamble: "It is recognized that Deputy Heads are responsible for making decisions which involve weighing the risks and benefits of various courses of action and selecting approaches which they consider to be in the best public interest, including some that carry with them a risk. The judgment that results from a balanced and informed decision-making process would not be considered a wrongdoing within the scope of the policy."

Interestingly, the disclosure legislation version is shorter. Nor does it exclude such decisions from the scope of wrongdoing, as, it appears, the *Disclosure Policy* does. The similar but different provision in the legislation provides that the Commissioner "may" refuse to deal with such disclosures. It follows, then, that he or she may also decide to deal with them.

In any case, whether one applies the *Disclosure Policy* version or the new legislation, a policy decision cannot reasonably be shielded from review and investigation by appealing to this provision. It is not enough to simply claim that the policy decision in question resulted from a balanced and informed decision-making process, and that any risk involved in the policy is acceptable because it was presumably decided in the public interest.

The provision and test is an important one, and merits consideration in any investigation in which a public policy is implicated. But without examination, it is seldom, if ever, evident that the test has been met. In the context of an investigation, each of the following elements would be open to investigation:

- Was the decision-making process balanced and informed?
- What standard and considerations apply in determining that the decision-making process was balanced and informed?
- Was the level of risk acceptable in the public interest?
- What constitutes an acceptable risk, given the activity or substance in question and the particular individuals, segment of the population or environment exposed to it?

These are not easy questions to answer. But in an investigation of an allegation of wrongdoing involving a public policy, they are inescapably at issue.

2.6 The Need to Base Findings on Evidence, Not Just Claims

It is often difficult to find evidence of wrongdoing. For example, simply because the Public Service Integrity Office determines that a disclosure is unfounded does not mean that the alleged wrongful activity did not in fact take place.

Even when the employee making the disclosure acts in good faith, the available evidence may convincingly establish that the activity in question did not take place. To the employee, what looked like a wrongdoing may simply have been a misunderstanding. Perhaps the purpose and nature of the activity were poorly communicated, or the activity may have gone badly for reasons beyond anyone's control.

In other cases, determining that an allegation of wrongdoing was unfounded meant only that I could not conclusively conclude that wrongdoing took place. In other words, despite a diligent, thorough and objective investigation and unrestricted access to relevant documentation and other information, no convincing evidence of wrongdoing could be found.

Obviously, for the employee who makes an allegation that is rejected or determined to be unfounded, such a finding would be easier to accept in some cases if my Office had been equipped with fuller investigative powers, including the ability to compel documentary evidence and witnesses.

PSIO investigators normally receive full cooperation and therefore my Office and the discloser are in almost all cases entitled to have full confidence in the comprehensiveness and reliability of the documentary and testimonial evidence in support of findings. There have, however, been exceptions in the matter of cooperation, and when that was the case it has been noted and the finding or conclusion was adjusted accordingly. Occasionally, departments refuse to provide information on the pretext that it has to be protected under the *Privacy Act* or the *Access to Information Act*. That not only complicates the work of the PSIO, but also leaves this Office open to unsatisfactory and incomplete investigation results.

On the other hand, the new disclosure legislation provides for the full range of powers normally available to Agents of Parliament. That should contribute significantly to the reliability of, and confidence in, the Commissioner's findings.

Evidence of wrongdoing, even when there is a strong and credible suspicion that the wrongdoing took place, is not always available. This is true even when the investigating body is armed with the most robust investigative powers. In some cases, public servants are simply unable to provide sufficient specifics to enable an investigation, nothing was written down, materials are no longer available, potential witnesses are unwilling to participate, or there is conflicting testimony.

Given the important and serious implications for alleged wrongdoers and others, findings of wrongdoing can never be arrived at without sufficient evidence. On the other hand, given the often serious harm that public service wrongdoing can inflict on victims, including the public, investigations need to be undertaken diligently, with adequate investigative powers and time.

The PSIO has adopted the following important investigative practice, one that respects the rights and interests of the various parties involved while ensuring accuracy in its final reports.

Allegations are, first of all, screened by applying the tests listed above. If an investigation is undertaken it is based upon testimony and documentation provided by and sought from all the interested parties. After a preliminary finding is made, a preliminary report is normally provided to the disclosing employee, the department and individual(s) alleged to be the wrongdoers. The parties are invited to clarify and comment on the preliminary report. Their comments and clarifications are reviewed and considered. This may lead to minor or significant revisions in the final report.

The new disclosure legislation provides for a similar process. For instance, if it appears that a report or recommendation may adversely affect an individual or portion of the public sector, they must be given the opportunity to answer any allegation before the investigation and report are finalized.

On the basis of my Office's experience, it has been found to be extremely important to clearly explain the evidentiary requirements and realities to employees who make a disclosure. This, it has been found, helps considerably to counter unreasonable expectations.

2.7 Lack of Adequate Oversight as a Form of Gross Mismanagement

The "gross mismanagement" category of wrongdoing presents particular problems in terms of definition and application. It is also the form of wrongdoing that I am most often asked to explain.

A recurring question is: "Would the Public Service Integrity Officer consider the lack of adequate oversight by, for instance, a Chief Executive or manager at another level, to be a form of gross mismanagement?" The question is a good one. It is relevant not only to my mandate but to that of other investigative organizations.

It is often assumed that wrongdoing requires positive action, as opposed to inaction. At the least, inaction is seen as less culpable, ethically and legally, than wrongful action. The degree or scale of ethical and legal wrongdoing tends to be represented in the following descending order of seriousness:

- PERSONALLY PROFITING from wrongful activity one does by oneself or in collaboration with another or others;
- having the final or managerial responsibility for a government, a department or a departmental program, and BEING AWARE of wrongdoing within the scope of one's responsibility, but allowing it to continue; and
- having the final or managerial responsibility for a government, a department or departmental program, and NOT BEING AWARE of wrongdoing by failing to exercise due vigilance.

The second and third sorts of activity or inactivity (especially the third) are often thought to be less serious than the first. After all, the manager didn't profit personally. However, that is not necessarily the case. Two points deserve to be made.

First, it is certainly possible that the manager who was aware of wrongdoing but allowed it to continue, or the manager who failed to act with due diligence, did not benefit monetarily. However, it is also possible that they calculated that their inactivity would provide other personal benefits. For instance, they may have wanted to avoid attention being focused on their own management. Such attention, they may have felt, would create an embarrassing issue that they would then have had to fix. Or they may have felt it would adversely affect their careers.

Second, even if they did not profit personally, the harm their inactivity caused to others, to the public interest and to the credibility and effectiveness of the public service, may be equally or more serious. In most cases, that would depend on how high they are in the hierarchy (generally speaking, the greater the responsibility, the more serious the ethical and legal liability of the inactivity). The liability for inactivity, either by allowing it to continue or not knowing of it because of lack of due vigilance, can be determined in part by how serious the consequences would be for others and the public interest.

The ethical and legal basis for that responsibility in the public sector, and for calling it gross mismanagement, is that those with managerial responsibilities have a duty to practice due diligence. This includes being aware of the possibility of wrongdoing and taking due measures to prevent, identify and stop it. Also, the degree of responsibility, should serious wrongdoing and harm result, will normally correspond to how far up the corporate ladder that manager has risen.

While obvious, it should be pointed out that the actual wrongdoer must also be held responsible, not just the manager who was unaware of or who failed to stop the wrongdoing.

2.8 Reprisals for Making Disclosures

The new whistleblowing legislation legally prohibits reprisal against public servants for making disclosures about wrongdoing. That alone is a significant achievement. The prohibition applies to all forms of reprisal.

Nevertheless, problems persist in the area of reprisals. Several merit attention.

The first is that of sanctions for reprisal. The legislation does not provide any specific statutory offence for reprisal. The only measure specified, in section 9 of the Act, states that discipline up to and including termination may be taken against wrongdoers.

This makes the legislation inconsistent with section 425.1 of the *Criminal Code*, section 59 of the *Personal Information Protection and Electronic Documents Act* and section 60 of the *Canadian Human Rights Act*. Some of these statutes provide for a significant monetary penalty for reprisals against whistleblowers.

More importantly, I believe, the absence of such a penalty in the legislation will inevitably send the wrong message to those contemplating making a disclosure about wrongdoing—because reprisal is not strongly repudiated, it is more likely to happen and more likely to be tolerated. No doubt, this was not the intent behind the non-provision of a severe sanction in the legislation. However, I have no doubt that this will be the conclusion of employees contemplating making disclosures as well as those inclined to practice reprisal.

A second and related issue has to do with the role that the legislation assigns to the Public Service Labour Relations Board (PSLRB) and the Canada Industrial Relations Board (CIRB). In the PSIO's 2003–2004 Annual Report, and in my November 30, 2004 presentation to the Standing Committee on Government Operations and Estimates, I took issue with the fact that the new legislation assigns the handling of reprisal complaints to the PSLRB and CIRB, rather than to the PSIC. In my view, this is a matter of fundamental importance. Regrettably, Bill C-11 was not amended accordingly and the disclosure legislation has maintained that divided mandate.

Having addressed the issue at some length in the previous PSIO annual report and in my presentation to the Standing Committee, I will present only a short summary here. For a more complete description of my position, please refer to the documents above at www.integritas.gc.ca.

It has been acknowledged that complaints about reprisal are indeed "complaints." It is also true that reprisal activities generally involve employment-related sanctions. But there are other acts of reprisal, less obvious and more subtle. These are not typically handled by the PSLRB and CIRB. For example, management and/or colleagues can make the workplace untenable for a public servant who makes a disclosure. And they can do so without imposing a disciplinary measure that falls within the terms and conditions of employment, and therefore within the jurisdiction of the PSLRB and CIRB. Not taking into account these subtle types of reprisal, or diminishing their importance, risks reducing the effectiveness of the legislation. It may not be best to deal with reprisals involving this type of harassment under the *Policy on the Prevention and Resolution of Harassment in the Workplace*. In my opinion, it would be far more preferable to allow the PSIC to deal with such situations in the context of the disclosure regime.

As well, although most acts of reprisal are employment-related, there is a distinctive feature in this case; the link between the reprisal complaint and the original disclosure about wrongdoing. Here, the complaint is that the reprisal took place only because of an earlier disclosure about wrongdoing. Given that any complaint will be based on the claim that the disclosure and the reprisal are inextricably linked, surely the same body, namely the Public Sector Integrity Commissioner, should address both.

The PSLRB and CIRB have no experience or mandate to deal with disclosures about wrongdoing. A reprisal is only a reprisal if it can be linked to the disclosure of wrongdoing. Furthermore, the PSLRB and CIRB operate by means of public hearings, and public hearing risks compromising the confidentiality of those who make disclosures about wrongdoing.

The PSIC should be in a position to explain to those who are contemplating making a disclosure, not only what is involved in such an investigation, but how any resulting reprisal complaint would be handled. At the moment, because the PSIC does not manage the reprisal process, he or she cannot offer those explanations or assurances.

Faced with having to deal with a second and unrelated organization should reprisal result, it seems likely that at least some prospective employees considering making a disclosure will decide it is all too complicated and not come forward.

A third issue presents potential complications, those instances when the employer claims that the disciplinary measures applied against an employee who has made a disclosure are unrelated to the disclosure. The employer may insist that the disciplinary measures were merited for other reasons.

On one hand, an employer must retain the right to discipline employees for legitimate reasons. On the other, the fact that a public servant brings an allegation of wrongdoing to the Public Sector Integrity Commissioner in good faith, whether or not the alleged wrongdoing is substantiated, can never be a legitimate reason for overt or subtle discipline. It is a reasonable practice that when discipline is imposed after such a disclosure, the onus is on the employer to establish that it was unrelated to the disclosure. If the employer cannot, it is assumed to be a prohibited act of reprisal.

No time limit should be imposed within which to file a complaint of reprisal. Reprisals can take many forms and it may take time before a reprisal becomes apparent to the person concerned. A one-year presumption should be created, starting at the time the disclosure was made. Such a presumption should state that any action by an employer against an employee will be considered an act of reprisal. This would clearly place the burden on the employer to justify his or her action.

2.9 Protecting Identities and Personal Information

If we are to reduce the risk of reprisal against those who bring allegations of wrongdoing to the Public Sector Integrity Commissioner, legal provisions must be in place to protect the identity of persons involved in the disclosure process.

The Public Service Integrity Office has found that public servants—particularly those still actively employed in the public service—are reluctant to disclose information about wrongdoing because they fear their names could be released through an access to information request.

Over the years, I have received a number of anonymous allegations. In the vast majority of these cases, it is reasonable to assume that the anonymity was motivated by a fear of reprisal. While legitimate, anonymous disclosures are also undesirable, since they allow more scope for malice and frivolity. They are also difficult to investigate, since the person making the disclosure cannot be questioned. As a result, issues raised in the allegation cannot always be completely followed up. This, in turn, may create the incorrect impression that nothing is being done about the allegation.

Therefore, it is my view that the identities of persons making allegations, and the identities of witnesses involved in the disclosure process, should be disclosed only in limited circumstances. The same should be true of any other personal information that might reveal their identities. Exceptions should be made only when the rules of natural justice make it a requirement, or in those rare circumstances when the public interest takes precedence over the privacy rights of the employee who made the disclosure.

While the new legislation does provide for that protection, it does so for only five years. I doubt that this will be sufficient reassurance for those who are still members of the public sector when that five-year period ends. The information should be released only upon consent of the individual concerned.

As for non-personal information, contrary to the five-year protection provided for in the Act, I see no reason why, once the investigation is completed and all subsequent reviews and appeal avenues exhausted, such information should not be made available via an access to information request, provided the information in question is not subject to any disclosure restriction under any Act of Parliament.

I consider it to be of the utmost importance that the PSIC be as transparent as possible to Parliament and the public. Nevertheless, I believe that non-personal information should be protected from disclosure while the investigation is ongoing. Investigations of wrongdoing are serious and complex, and often unfold in unexpected ways. Attempting to second guess what harm may result from releasing information before an investigation is completed is hazardous at best. It is entirely possible that the investigation, and one or more of the parties involved, could be harmed as a result.

2.10 The Jurisdiction of the Public Sector Integrity Commissioner—a Wider Umbrella but Remaining Restrictions

The new disclosure legislation greatly extends the institutional coverage of the Public Sector Integrity Commissioner compared to that of the Public Service Integrity Officer at present. Almost the entire federal public sector will have access to the PSIC, including departments, agencies, separate employers, Crown Corporations and members of the RCMP. Only the Canadian Forces, the Canadian Security Intelligence Service (CSIS) and the Communications Security Establishment (CSE) will be excluded.

While the extension of access is welcome, I maintain that the Canadian Forces, CSIS and CSE also merit access to the PSIC. Members of those institutions should have access to an extra-departmental and independent investigative body on the same grounds as others in the public sector. Any security issues that arise ought to be, and could be, protected by the PSIC. In any case, such issues would not normally be the subject matter of disclosures. Not all the activities of those institutions are security-related. Like any other government department or agency, they have normal governmental operations and management responsibilities, any of which could become the subject of allegations of wrongdoing within the scope and definitions of the new disclosure legislation.

I previously proposed that no matter what the source, if the allegation of wrongdoing meets the proper criteria, such as credibility, good faith and public interest, the PSIC should be authorized to receive and investigate the allegation. To do otherwise risks remaining unaware of those serious instances of wrongdoing known only to those outside the public service. The new legislation, in a somewhat convoluted manner, appears to make that possible. It states that the PSIC may initiate an investigation on the basis of any information provided "by a person who is not a public servant" if the PSIC "believes on reasonable grounds that the public interest requires an investigation."

I also proposed that the PSIC be allowed to follow the evidence wherever it leads, including beyond the public sector. Not giving the PSIC the ability to do so could result in unfair or incomplete investigations. For example, a public servant may appear to be exclusively responsible for a wrongdoing when in reality others beyond the public service share responsibility. For the same reason, the PSIC should be able to collaborate and exchange information with other appropriate investigative bodies.

The disclosure legislation was not, however, amended to provide for that. It states that when it becomes necessary to obtain information beyond the public sector, the Commissioner "must cease that part of the investigation and he or she may refer the matter to any authority that he or she considers competent to deal with it." That restriction could seriously limit some investigations and, on grounds of fairness to the public servant concerned or other parties, could lead to closing it down.

A related example is equally troubling. How can the PSIC make a finding when it is alleged that the responsibility for the alleged misconduct rests with a member of a tribunal? After all, members of an administrative tribunal are Governor-in-Council appointees, not public servants. In effect, the new legislation prohibits the PSIC from even questioning anyone who is not a public servant. Still more explicitly, the legislation states that when the subject matter of a disclosure relates solely to a decision made in the exercise of an adjudicative function under an Act of Parliament, the investigation must cease. That restriction would presumably and regrettably shut down or prohibit investigations involving a public servant working with a tribunal member.

It is reasonable and correct to prohibit the PSIC from investigating the decisions of such adjudicative bodies. It is not clear, however, if the PSIC would be prohibited from investigating whether that body's procedures or processes met the legal requirements of the applicable statute. Denying the PSIC that authority would prejudice or make impossible a complete and fair investigation when a public servant makes an allegation about wrongdoing by a tribunal member.

If the intent is to exclude from investigation by the PSIC only the adjudicated decisions, and not the tribunal activities, then that should be made explicit in the provision.

Finally, it is worth noting that tribunals with adjudicating functions carried out by Governor-in-Council appointees, comprise a significant segment of the public sector.

The legislation includes the following welcome provision to the list of wrongdoings: "knowingly directing or counseling of a person to commit a wrongdoing." It is conceivable that a Governor-in-Council appointee, or others who are not public servants, could be credibly alleged by a public servant to have done just that. This provision provides further support for permitting the PSIC, at least in some circumstances, to include Governor-in-Council appointees and others beyond the public sector within the scope of an investigation of the alleged wrongdoing activities carried out by a public servant.

2.11 Reporting to Parliament—Numbers Alone?

An obvious advantage of establishing, in law, a Public Sector Integrity Commissioner reporting to Parliament is that it gives the Commissioner the right and the duty to report to Parliament. In effect, this puts into the public domain information about allegations and findings of wrongdoing in the public sector. Also, the public's access to the details about these allegations would be limited only by considerations of confidentiality, privacy and access to information. Reporting numbers and statistics alone would clearly not meet a test of the fullest possible disclosure.

At first glance, it may appear that the new legislation is overly restrictive in what may be reported. However, when considered in full and in context, that does not appear to be the case.

Both the *Disclosure Policy* and the new legislation require that the annual report provide numbers—for example, the number of inquiries, disclosures, cases acted upon and investigations commenced. On the other hand, both allow more open reporting. The *Disclosure Policy* does this by stating that the numbers are "a minimum." This has permitted me to go considerably beyond numbers in my annual reports. While the new legislation calls for numbers to be disclosed in the annual report, it also permits the disclosure of "any other matter that the Commissioner considers necessary."

As well, after listing all the forms of information that cannot be disclosed, it provides some grounds and exceptions for releasing that information, including:

- to refer matters under section 34 (referring matters to other authorities);
- to establish grounds for findings or recommendations in special or annual reports; and
- when the public interest in making the disclosure clearly outweighs the potential harm from the disclosure.

I question why the PSIC should be the one doing the balancing. Preferably the PSIC should provide the fullest possible picture to Parliament so it can decide what needs attention or action on public interest grounds.

Nevertheless, with the degree of latitude and discretion provided, it should be possible for the PSIC's annual and special reports to Parliament to reflect, in an accurate and comprehensive manner, the following:

- the status of disclosures about wrongdoing in the public sector;
- recommendations by the PSIC; and
- what relevant public sector institutions have done or are doing to rectify the wrongdoing and to sanction the wrongdoers.

Conclusion

The observations and concerns discussed above are not intended to suggest that the new disclosure legislation is fatally flawed. It is not. The *Public Servants Disclosure Protection Act* constitutes a major step forward, a vast improvement over the present *Disclosure Policy* and the mandate and powers of the Public Service Integrity Officer.

It should be noted again that some of the concerns I have raised above are beyond and not subject to mere legislative solutions. Even the most theoretically and practically ideal legislation cannot and should not attempt to regulate everything within a sphere of activity. Given the complexities and contentiousness of many of the issues associated with whistleblowing, there will remain, and should remain, a wide latitude for the exercise of wise ethical and practical judgment and the development of tested practice.

Appendices

Appendix A

RESPONSIBILITIES OF THE PUBLIC SERVICE INTEGRITY OFFICER*

The mandate of the Public Service Integrity Officer is to act as a neutral entity on matters of internal disclosure of wrongdoing. In particular, he or she assists employees who:

- believe that their issue cannot be disclosed within their own department; or
- raised their disclosure issue(s) in good faith through the departmental mechanisms but believe that the disclosure was not appropriately addressed.

Disclosure—is defined as information raised within the organization in good faith, based on reasonable belief, by one or more employees concerning a wrongdoing that someone has committed or intends to commit.

Wrongdoing—is defined as an act or omission concerning:

- a violation of any law or regulation;
- a breach of the *Values and Ethics Code for the Public Service*;
- misuse of public funds or assets;
- gross mismanagement; and/or
- a substantial and specific danger to the life, health and safety of Canadians or the environment.

More specifically, the responsibilities of the Public Service Integrity Officer are:

1. to provide advice to employees who are considering making a disclosure;
2. to receive, record and review the disclosures of wrongdoing received from departmental employees and/or the requests for review submitted from departmental employees;
3. to establish if there are sufficient grounds for further action and review;
4. to ensure procedures are in place to manage instances of wrongdoing that require immediate or urgent action;
5. to initiate investigation when required, to review the results of investigations and to prepare reports, and to make recommendations to Deputy Heads on how to address or correct the disclosure;
6. in special cases, or in cases when the departmental responses are not adequate or timely, to make a report of findings to the Clerk of the Privy Council in his or her role as head of the Public Service;
7. to establish adequate procedures to ensure that the protection of the information and the treatment of the files are in accordance with the *Privacy Act* and the *Access to Information Act*;
8. to protect from reprisal employees who disclose information concerning wrongdoing in good faith;
9. to monitor the type and disposition of cases brought to the attention of the Public Service Integrity Officer; and
10. to prepare an Annual Report on his or her activities to the President of the Privy Council for tabling in Parliament.

As a minimum, the Annual Report should cover the number of general inquiries and advice; the number of disclosures received directly from departmental employees and their status (e.g. rejected, accepted, completed without investigation, still under consideration); and the number of disclosures investigated, completed, still under consideration. The same data would be provided in relation to requests for review. The Report could include an analysis of the categories of disclosures and recommendations to improve the processes.

* Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace

Appendix B

2004–2005 EXPENDITURES

Description	
Personnel	
Number of employees	9
Personnel Costs	*($000)*
Salaries	875
Employee Benefits	175
Sub-Total	1 050
Other operating expenditures	
Travel	41
Communications	6
Printing	18
Training	12
Computer services	118
Other professional / Specialised services	49
Materials / supplies	36
Other	37
Levy for administrative services provided by Treasury Board Secretariat	54
Sub-Total	371
Grand Total	1 421

Source: TBS, Financial Report System

In accordance with the policy on the proactive disclosure of travel and hospitality expenses for selected government officials, the PSIO details are available on the PSIO Web site at www.psio-bifp.gc.ca.