

2005–2006

PUBLIC SERVICE INTEGRITY OFFICER

Annual Report to Parliament



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



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of Canada

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du Canada

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November 2006

The Honourable Michael Chong
President of the Queen's Privy Council for Canada
Minister of Intergovernmental Affairs
House of Commons
Ottawa ON K1A 0A6

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 for tabling in Parliament my 2005–2006 Annual Report as the Public Service Integrity Officer.

This Report will be my last since my five-year term in this position is rapidly coming to an end. At about the same time, this presently policy-based Office will very likely become radically transformed on the basis of legislation, specifically the *Public Servants Disclosure Protection Act*. That is a very welcome prospect, one that I have been advocating since my first Report to Parliament. The result will be the establishment of a Public Sector Integrity Commissioner as an independent agent of Parliament with robust investigative powers, and a regime able to make findings, apply remedies and protect whistleblowers from reprisal more decisively and effectively.

Part One of this Report provides a summary of the operations of my Office from April 1, 2005 to March 31, 2006. This part of the Report provides the relevant statistics for the period in question, including brief descriptions and outcomes of completed cases.

Part Two of the Report contains my reflections on a number of issues. The first has to do with the various contributions of my Office to the legislation to establish the role and office of the new Public Sector Integrity Commissioner. Another such issue concerns the time and efforts devoted by my Office to transition planning for the expected new regime. In the Report, I also indicate the many positive features of the new legislation, and point to a number of aspects that could be improved. As well, I reflect on the remaining realities and challenges that will endure despite even the best regime and legislation.

In a final section of Part Two, I express my sincere thanks to all the staff members of my Office for their exemplary and professional expertise and support during my five years in this position. They are all a credit to the Public Service and the new Commissioner will be fortunate indeed to inherit them as the nucleus of his or her Office.

Yours Sincerely,

A handwritten signature in black ink that reads "Edward W. Keyserlingk". The signature is written in a cursive style and is underlined with a single horizontal stroke.

Edward W. Keyserlingk
Public Service Integrity Officer

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Part One of the Public Service Integrity Officer Annual Report to Parliament describes the activities of the Public Service Integrity Office (PSIO) for the 2005–2006 fiscal year. As in previous years, the annual report focuses on the Public Service Integrity Officer’s investigation of internal disclosures of wrongdoing made by public service employees.

Also described in Part One are the Public Service Integrity Officer’s mandate and case management practices, as well as the challenges and accomplishments of the past year. These are supplemented by case statistics and analysis. Finally, Part One contains brief descriptions of completed cases—under the different headings of wrongdoing—and their outcomes.

In Part Two, the Public Service Integrity Officer reflects on and analyses his five 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-2 and the proposed amendments to the *Public Servants Disclosure Protection Act* and the establishment of the Public Sector Integrity Commissioner.

PART ONE

OVERVIEW OF ACTIVITIES



PART ONE

OVERVIEW OF ACTIVITIES



EDWARD W. 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 under the purview of the 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
- a substantial and specific danger to the life, health and safety of Canadians or the environment

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.

The PSIO treats complaints of reprisal separately from the investigation of the disclosure and as such these are included in the total number of cases under review.

...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

1.1.2 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 against whom an allegation of wrongdoing or reprisal is made 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.

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, three investigators, an office manager and an intake coordinator.

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 in these areas are presented in Appendix B.

When proposed amendments to the *Public Servants Disclosure Act* under Bill C-2, the *Federal Accountability Act*, become law and a coming into force date is set, the PSIO will undergo substantial changes to become the Office of the Public Sector Integrity Commissioner. In anticipation of these changes, the PSIO is examining the organizational requirements, taking into account expanded jurisdiction and legal obligations.

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, bargaining agents and heads of agencies and departments. As much attention during the year was devoted to the development and passage of legislation, these information activities by the PSIO were somewhat less extensive and frequent than in previous years.

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. Examples include exchanges with a representative of the US Office of Special Counsel, an address at the Annual Conference of the Council on Governmental Ethics Laws (COGEL) held in Boston and participation at events organized by the Ethics Practitioners Association of Canada. The PSIO had the pleasure of a visit by the Nova Scotia Ombudsman and of hosting delegations from the People's Republic of China and the Republic of Korea.

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.

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 regular 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 seeking information, clarification and advice, the PSIO recorded 39 contacts in 2005–2006. In 60 per cent 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 2004–2005 ⁽¹⁾	14
FILES OPENED IN 2005–2006 ⁽²⁾	15
TOTAL FILES FOR REVIEW AND INVESTIGATION IN 2005–2006	29
Files closed after intake or preliminary review stage	9
• Files closed after referral	0
• Files closed: no jurisdiction ⁽³⁾	8
• Files closed: allegations found to be not substantiated	1
Files closed after research, review and investigation	15
• Files closed after referral	8
• Files closed: no jurisdiction ⁽³⁾	0
• Files closed: allegations found to be not substantiated	5
• Files where allegations were founded	2
INVESTIGATIONS ONGOING AS OF MARCH 31, 2006	5

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

After extensive investigations and interactions with the parties concerned, the PSIO found wrongdoing in two of those 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.

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

⁽¹⁾ Fiscal year 2004–2005, from April 1, 2004 to March 31, 2005

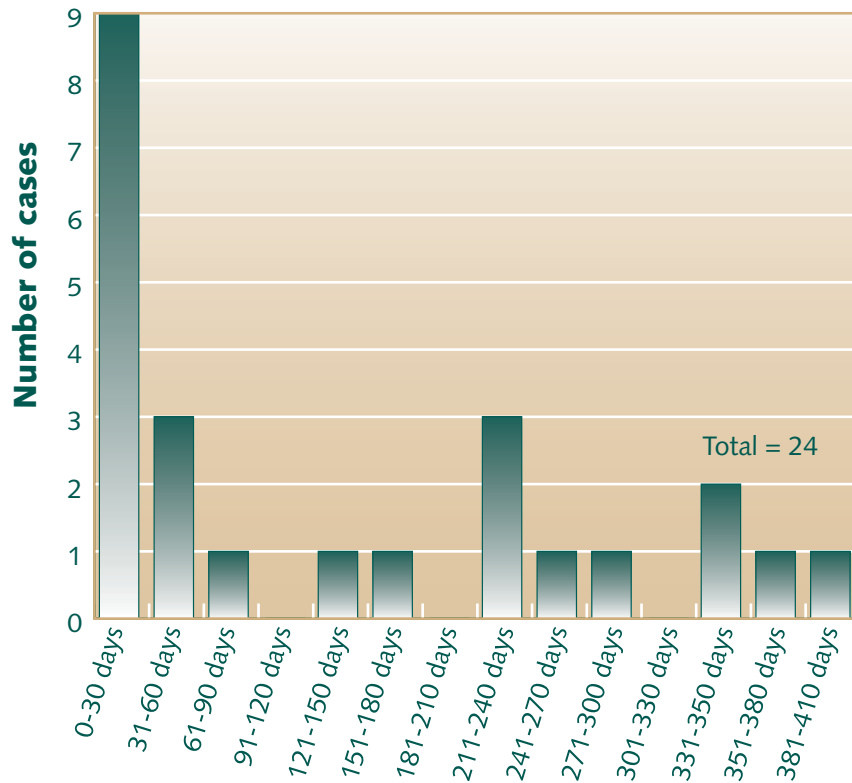
⁽²⁾ Fiscal year 2005–2006, from April 1, 2005 to March 31, 2006

⁽³⁾ “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.

FILES BY CATEGORY OF WRONGDOING

Violation of Law or Regulation	9
Breach of the Values and Ethics Code for the Public Service	4
Misuse of Public Funds or Assets	5
Gross Mismanagement	6
A Substantial and Specific Danger to the Life, Health and Safety of Canadians or the Environment	0
Reprisal for making an allegation of wrongdoing ¹	3
Conflict of Interest	0
Harassment, Abuse of Authority, Interpersonal Conflict	2
Others	0
TOTAL	29

ELAPSED TIME TO DISPOSE OF CASES AS OF MARCH 31, 2006



¹ As of January 1, 2005, complaints of reprisal are recorded as distinct from the disclosure of wrongdoing.

1.6 CASE HIGHLIGHTS (BY CATEGORY OF WRONGDOING)

Violation of Law or Regulation (Nine cases)

In 2005–2006, the PSIO concluded the review of nine cases in which the allegations related to the violation of a law or regulation.

Of the nine cases, after some review and research to establish whether it was a matter for the PSIO to deal with, three were closed when it was determined that the PSIO did not have jurisdiction.

Of the remainder, four cases were investigated by the PSIO and resulted in a report to the concerned department. Of these, three allegations were unfounded and one case was founded.

The first case, which was a review of a departmental internal disclosure investigation, dealt with allegations that Agriculture and Agri-Food Canada: 1) violated the provisions of the *Public Servants Inventions Act* by not recognizing the employee's ownership of an intellectual property that he developed; 2) did not award the employee financial compensation under the Act for the exploitation of the invention which was commercially licensed by the Department; and, 3) failed to enforce the contractual provisions of the licensing agreements and collect royalties. The departmental senior officer (for internal disclosures) investigated the matter and produced a detailed report finding that the allegations were unfounded. The report explained that the department had the authority and was justified in its decision respecting the licensing agreements. Regarding the application of the *Public Servants Inventions Act*, although the invention had been properly assigned to the Crown there were strong differences of opinion between the employee and the department as to how the intellectual property was exploited. Since the Act allows a public servant to apply to the Minister to resolve issues surrounding their invention and eligibility for awards, the PSIO referred the disclosing employee to that mechanism. The PSIO review of the departmental senior officer's investigation file and the ensuing report concluded that no wrongdoing was found.

In a similar case involving the Department of National Defence, an employee alleged that the department did not properly manage his intellectual property by not adequately commercializing the invention. The PSIO review noted that the allegations, although plausible, were based on the employee's beliefs and not supported by any evidence, whereas the department provided explanations and documentary evidence for its decisions regarding the commercialization of the intellectual property. The PSIO concluded that the allegations were unfounded.

The PSIO also investigated an allegation relating to a violation of the *Income Tax Act* at the Department of Veteran Affairs. The allegation centered on the hiring of specialised expertise through contractors who were working as employees, thus creating an employee-employer relationships. The department acknowledged that a number of contractors were hired to perform duties similar to those of employees and explained that it was attempting to manage both scarcity of resources and an increased workload in some of its offices. The department reassured the PSIO that it was aware of the requirements of the *Income Tax Act* and that it was monitoring the matter closely so that no employer-employee relationships would be created with its contractors.

The PSIO investigated an allegation that some Immigration and Refugee Board Members were not writing their own decisions in five cases and that there were numerous instances of reprisal against the employee. This case was investigated first by the department who did find wrongdoing in one case and who responded to remedy the matter. The PSIO's investigation concluded that wrongdoing was found in a second case. In regards to the reprisal complaint, the PSIO concluded that there were no reprisals against the employee for making an internal disclosure of wrongdoing.

An application for judicial review has been made to the Federal Court. The Court has granted the PSIO permission to make a submission as an intervener in order to explain its jurisdiction and the making of its record. The Federal Court heard the matter in October 2006. The outcome of this judicial review will be reported in the next annual report.²

In its previous annual report, the PSIO reported that one of its cases was the subject of a judicial review, which resulted in the Court allowing the application for judicial review and referring the matter back to the PSIO for reconsideration.³ This new investigation is ongoing.

As of March 31, 2006, two cases remained open and under investigation. These will be covered in the next annual report.

A Breach of the Values and Ethics Code for the Public Service (Four cases)

Of the four cases before the PSIO alleging a breach of the *Values and Ethics Code for the Public Service*, two were referred to other organizations, one was concluded after the PSIO determined that it did not have jurisdiction and the other was investigated.

The PSIO investigated an allegation that Citizenship and Immigration Canada improperly laid-off of a group of determinate employees in an office. The employees submitted that there was a lack of transparency and fairness in doing so and that the situation constituted a serious breach of the *Values and Ethics Code for the Public Service*.

The PSIO reviewed the matter and was informed by the department that in response to budget constraints and operational imperatives, it had decided to stabilize its workforce by offering indeterminate appointments to its most qualified term employees. It was also decided that term employment would not be renewed nor extended when the terms expired. However, each term employee was provided with the opportunity to participate in a number of selection processes for indeterminate employment before the expiry of their term. The PSIO verified the evidence and established that the employees who were making the allegations received equal treatment and had benefited from all possible tools and other supports in preparing for the competitions.

The PSIO concluded that the department's actions did not constitute a breach of the *Values and Ethics Code for the Public Service*.

Misuse of Public Funds or Assets (Five cases)

In 2005–2006, the PSIO considered five cases alleging the misuse of public funds or assets. Three cases were concluded at an early stage when it was determined that the PSIO did not have jurisdiction in one case and referred the employees to their departments in the other two cases.

The fourth case considered and investigated by the PSIO concerned a review of a departmental investigation on a disclosure of wrongdoing. In this case, it was alleged that an employee of the Department of Natural Resources Canada was stock trading during business hours and may have been using departmental confidential information to do so. The PSIO reviewed the departmental senior officer's investigation and findings indicating that the allegations were founded and recommending that disciplinary action be taken. The PSIO concluded that the department's investigation was properly conducted and that its response and actions were fair and reasonable.

As of March 31, 2006, one case in this category remains open and is under investigation.

² Selwyn Pieters v Canada, (Attorney General), FCC, T-1278-05.

³ Chopra et al. v Canada, (Attorney General) 2005 F.C. 595.

Gross Mismanagement (Six cases)

Of the six cases in this category, four were dealt with quickly and resulted in referrals to other organizations in two cases and in the other two cases the files were closed when it was determined that the PSIO did not have jurisdiction.

Of the two cases investigated by the PSIO, one case was determined to be unfounded and the other founded.

The PSIO investigated an allegation concerning the reliability of the computer and information management systems of Health Canada. It was alleged that the policy covering the archiving of e-mails was not being respected and that there was no corrective action being taken by the department. The employee contended that this resulted in the department's computer systems being unnecessarily overloaded. He added that combined with the incompatibility of certain software programs, the situation not only constituted mismanagement, but also involved an unacceptable risk to public health and safety, because the system risked crashing or failing in the event of a major public health emergency, when it would be imperative to find information and communicate accurate facts within very tight deadlines.

The department was informed of the nature of the allegations and responded to PSIO inquiries relating to the allegation. The PSIO also interviewed representatives of the Public Health Agency of Canada given its role as a primary user of the referenced network and as the developer of the national health emergency system. After further analysis and review of emergency plans, the PSIO concluded that Health Canada's computer systems are updated regularly according to established plans and norms and that its updates and simulations suggest that the computer systems are able to deal with communications requirements in an emergency situation. As such, the allegations were unfounded.

In another case, it was alleged that the Correctional Service of Canada had grossly mismanaged from the start several formal harassment complaints lodged by an employee. The employee explained that the situation constituted gross mismanagement due to the many errors and inappropriate interventions, along with the department's obvious inability to resolve the situation, which had persisted for some years.

Prior to taking on this case, the PSIO examined the matter closely given that the *Policy on the Prevention and Resolution of Harassment in the Workplace* provides a formal recourse for employees, which is not normally examined by the PSIO. Nevertheless the PSIO decided to investigate the matter and seek a resolution given the seriousness of the allegation, the impasse between the parties and the time taken to resolve the matter.

The PSIO quickly determined that the allegation was founded and the department agreed to resolve the matter. The PSIO investigator then spent considerable time acting as a facilitator to aid the parties in working out a resolution. In the end, the PSIO was informed that sufficient progress was made under this facilitation and that the parties themselves would be able to arrive at an agreement.

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.

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 one complaint of reprisal in the past year. Another two remained from the previous year. The PSIO concluded one case and referred the employee to his department as he had also made a harassment complaint on the same matter.

Two cases remain under investigation.

Anonymous Disclosures

No new anonymous disclosures were received by the PSIO in the past year. Continuing from the previous year, one case was concluded after some research and discussions with the department. In this case, given that the department had demonstrated its own due diligence in reviewing the matter, there was not enough information to justify a further inquiry.

The remaining case from the previous year remains open as the PSIO monitors the department's review and inquiry. This case will be concluded and reported on in the next annual report.

REGIONAL DISTRIBUTION OF CASES

Region	Total
Alberta	2
British Columbia	1
Manitoba	2
New Brunswick	1
National Capital Region	7
Ontario	8
Quebec	6
Unknown	2
Total cases	29

DISTRIBUTION OF CASES BY DEPARTMENT AND AGENCY

Department	Total Cases
Agriculture and Agri-Food Canada	2
Canadian Space Agency	1
Citizenship and Immigration Canada	1
Correctional Service Canada	3
Fisheries and Oceans Canada	2
Health Canada	2
Human Resources and Social Development Canada	2
Immigration and Refugee Board	2
Indian and Northern Affairs Canada	1
Justice Canada	2
National Defence	3
Natural Resources Canada	2
Passport Canada	1
Public Works and Government Services Canada	1
Royal Canadian Mounted Police	1
Transport Canada	2
Veterans Affairs Canada	1
Total cases	29

PART TWO

FINAL REFLECTIONS FROM THE
PUBLIC SERVICE INTEGRITY OFFICER



PART TWO

FINAL REFLECTIONS FROM THE PUBLIC SERVICE INTEGRITY OFFICER



In Part Two of this Annual Report, I offer some reflections on the welcome culmination of my five years as the Public Service Integrity Officer. I also share some thoughts on the imminent creation of an independent agent of Parliament, the Public Sector Integrity Commissioner, and the establishment of a legislated disclosure of wrongdoing regime. Finally, given the equally imminent termination of my already twice-extended mandate, I am pleased to take this opportunity to thank my colleagues at the Public Service Integrity Office (PSIO) for the very best five years of my professional life.

2.1 THE EVOLUTION AND REALIZATION OF LEGISLATION ESTABLISHING THE PUBLIC SECTOR INTEGRITY COMMISSIONER

During the year under review, the PSIO focused mainly on its primary responsibility, the investigation and disposition of credible and good faith allegations of wrongdoing, and the protection of disclosers and witnesses from reprisal. These activities are addressed in Part One of this Annual Report.

During that same period, as well as in subsequent months, the PSIO contributed considerable time and effort to the evolution and realization of legislation providing for a Public Sector Integrity Commissioner (PSIC). The new Commissioner will report to Parliament as an independent agent, will have robust investigative powers, will be legally empowered to protect from reprisal public servants who disclose or witness wrongdoing, and will be accessible to almost everyone in the federal public sector.

Although the present PSIO staff will serve as the nucleus of the new agency, the Commissioner, and his or her Office, will replace the Public Service Integrity Office. As a result of its greatly enhanced and legislated powers, protections and independence, the PSIC will undoubtedly will be more credible and effective than the policy-based PSIO.

The legislation creating the PSIC—the *Public Servants Disclosure Protection Act* (PSDPA)—received Royal Assent in November 2005. In reporting on that milestone in my 2004–2005 Annual Report, I commented on some of the provisions of that legislation. While it was enacted with all-party support in both Houses of Parliament, no date was set for the PSDPA to come into force. Shortly afterwards, before it came into force, an election was called.

In April 2006, the new government introduced Bill C-2, the *Federal Accountability Act* (FAA). It proposed a significant number of amendments to many federal statutes, including the PSDPA. After extensive hearings before the House of Commons Legislative Committee on Bill C-2, and debate in the House of Commons, the amended FAA was referred to the Senate before the 2006 summer recess. As this Annual Report was being completed (September 2006), the FAA was the subject of hearings before the Senate Committee on Legal and Constitutional Affairs. In my view the amended *Federal Accountability Act* passed in the House of Commons would, for the most part, make an already strong PSDPA even more effective.

2.2 PSIO CONTRIBUTIONS TO ESTABLISHING THE ROLE AND OFFICE OF THE PUBLIC SECTOR INTEGRITY COMMISSIONER—LEGISLATIVE PROPOSALS AND TRANSITION PLANNING

Additional PSIO activities during the year in review, as well as in subsequent months, took two distinct forms. The first of these was the development of legislative analyses and provisions regarding amendments to the PSDPA proposed in the *Federal Accountability Act*. Those amendments and proposals were made in testimony before the House of Commons Legislative Committee on Bill C-2. The May 2006 written submission is available on the PSIO website at www.integritas.gc.ca

The general point of the analyses and proposals to the Legislative Committee was straightforward—most of the proposed FAA amendments would improve the PSDPA and the effectiveness of the PSIC. It was, for the most part, worthy of passage. Nevertheless, my submission did propose a number of amendments. The submission was well received, and a number of proposals contained in the submission led to questions and discussion by committee members. However, those proposed amendments were not adopted by the Legislative Committee or subsequently by the House of Commons. I refer to several of these proposed amendments in Section 2.4.

In September 2006, while this Annual Report was being completed, I was invited to testify before the Senate Standing Committee on Legal and Constitutional Affairs, the committee considering the FAA. The opening statement is also available on the PSIO website.

The second form of activity undertaken by the PSIO in regard to the establishment of the Office of the PSIC was that of transition planning. That important mandate flowed from the PSDPA itself in that members of the PSIO are to form the nucleus of the Office of the PSIC. It was also acknowledged by other government branches with whom we are collaborating in transition planning. While some of this planning began during the year under review, it has expanded and intensified considerably in recent months.

The reason for this is the realistic hope that the amended FAA will be passed by Parliament in the fall of 2006. It would then receive Royal Assent, followed by a coming into force date. Hopefully, that will be in late 2006 or early 2007. Once that effective date is established, the activities to establish the Office of the PSIC will intensify to ensure a smooth and effective transition from the PSIO to PSIC.

Transition planning has involved and continues to involve all the members of the PSIO in one capacity or another. Some reorganization within the PSIO was required to ensure that each area of future PSIC activity has a transitional head and section focused on preparing for those activities. Planning has had to take into account a number of new realities. Among those is the fact that the staff of the Office of the PSIC will be larger than that of the PSIO. This is because the Commissioner's wider mandate covers almost the entire federal public sector.

Another set of realities involves the far more robust and complex mechanisms, powers, protections and responsibilities assigned by legislation to the PSIC. They will include, for example, new investigative powers, new and extensive reporting to Parliament, the provision of legal advice to prospective disclosers, a conciliation role for complaints of reprisal, and interaction with the new Public Servants Disclosure Protection Tribunal (in cases not resolved by the Commissioner, the tribunal will make the final rulings).

As a result, transition planning has focused on increased requirements associated with the new legislated regime. These include defining and writing job descriptions, departmental organization and reporting arrangements, establishing more refined case management and investigational procedures, developing a legal services branch, arranging for appropriate office space, and identifying budget requirements and preparing related submissions.

To their credit, PSIO staff members have pursued these demanding tasks, and continue to do so, without restricting or adversely affecting their primary responsibilities to investigate and report on disclosures of wrongdoing.

2.3 REASONS FOR HIGH EXPECTATIONS OF THE PUBLIC SECTOR INTEGRITY COMMISSIONER AND THE NEW LEGISLATED DISCLOSURE OF WRONGDOING REGIME

There are many excellent reasons for those in the public sector and members of the public to have confidence in, and high expectations of, the new legislated disclosure regime and its Commissioner.

The Commissioner will be an independent agent of Parliament, equipped with significant investigative tools such as the ability to require departments and individuals to produce requested evidentiary documents and testimony. The law provides that the Commissioner's findings and recommendations be acted upon by the relevant government departments and institutions. These findings and recommendations, as well as any action taken as a result, will be reported to Parliament.

The amendments to the PSDPA include significant legal protections and sanctions against reprisal. For example, it will become a criminal offence to take reprisal against good faith whistleblowers or witnesses in an investigation. When established, the Public Servants Disclosure Protection Tribunal, composed of Federal Court and provincial superior court judges, will rule on complaints of reprisal that the Commissioner—after an investigation and unsuccessful attempts at conciliation between the parties—is unable to resolve.

Members of the public who are not public servants will also be allowed to make disclosures of wrongdoing to the Commissioner. In addition, almost everyone in the federal public sector—including those in separate agencies and Crown Corporations—will have access to the Commissioner. These are all very positive features. I and many others have long advocated for most of them. Along with some other positive features, they justify confidence and high expectations.

Experience has demonstrated that pursuing civil litigation in the courts to obtain findings about alleged wrongdoing in the public sector, and to provide appropriate sanctions, remedies and compensation, may be too onerous for the plaintiff. Rather than providing the plaintiff with a meaningful right, court action may actually impose an unfair burden. In practice, especially given what is at stake, resorting to the civil courts to address public sector wrongdoing appears to impose too heavy a burden on individual public servants and too light a burden on the state.

Since the wrongdoing envisaged by disclosure regimes, and certainly by the one proposed, is primarily about activities against the public interest (rather than against private interests), it would be wrong to expect the individual discloser, rather than the state, to incur the significant costs and time involved in bringing these matters to the courts. Furthermore, courts do not investigate: they are limited by the evidence brought before them.

In effect, the new legislated disclosure regime and its Commissioner will take on that burden rather than the disclosing public servant. While that was already the case with the PSIO, it is even more so with the PSIC. Unlike the courts, the Commissioner will be able to undertake comprehensive, independent and objective investigations and findings. In the final analysis, because the PSIC is an independent agent reporting to Parliament, the ultimate responsibility for resolving good faith and credible disclosures of wrongdoing and complaints of reprisal in the public sector will rest where it should—squarely on the shoulders of the government, and ultimately, on those of Parliament.

To those public servants who wonder if the new legislated disclosure of wrongdoing regime will be effective and protective, while reducing the risk of reprisal to a minimum, I do not hesitate to respond in the affirmative.

I would urge those contemplating making a good faith allegation of wrongdoing to consider the many positive features of the new process. First, the public servant decides whether to make a disclosure to the departmental senior officer or to the Commissioner. If he or she chooses the latter, the Commissioner will determine whether the disclosure meets the criteria for investigation. If the Commissioner decides there is to be no investigation, the public servant will receive a written explanation of the Commissioner's decision.

Even before a disclosure of wrongdoing is made, the Commissioner may make an independent lawyer available to the discloser or witness, thereby providing them with greater understanding of the legislation and their rights.

Except in exceptional circumstances, for example, where the rules of natural justice require that the alleged wrongdoer be advised of the discloser's identity to mount a defence, the Commissioner will fully protect the identity of public servants from an access to information request.

Except for Cabinet confidences and documents protected by solicitor-client privilege, the Commissioner will have the power to obtain needed information and evidence from departments and agencies.

While the Commissioner will have recommending powers, he or she must make a report to Parliament when a disclosure of wrongdoing is well-founded. The report to Parliament will include the institution's response as to how it intends to deal with the Commissioner's finding and recommendations. This last stage in the process clearly demonstrates how seriously Parliament considers the matter of wrongdoing in the public sector and the need to address it effectively.

Public servants who believe they are victims of reprisal as a result of making good faith disclosures of wrongdoing have every reason to have confidence in the process. They will be entitled to bring a complaint of reprisal to the Commissioner, who will then provide a written response within 15 days as to whether an investigation will take place. The Commissioner may refuse to investigate only on the following grounds: the complaint may be better dealt with in another venue, it is beyond the jurisdiction of the Commissioner, or it was not made in good faith.

If the Commissioner does decide to deal with the complaint, any disciplinary measure taken against a public servant, allegedly in reprisal for disclosing the wrongdoing, would normally be suspended during the process. Also, no new disciplinary action may be taken during that period.

After the Commissioner decides to deal with a complaint, it will be assigned to an investigator. The Commissioner may, at any point, choose to refer the complaint to a conciliator. If it is referred to a conciliator, and a settlement is reached, the Commissioner will determine whether the agreement is just in terms of the remedies provided to the complainant, and in the disciplinary sanctions imposed on the person responsible for the reprisal. If the Commissioner rejects the agreement, and is unable to resolve the complaint, he or she may refer the complaint to the Public Servants Disclosure Protection Tribunal. After hearing the matter, the Tribunal will make a final order which can include compensation for moral suffering. It will also determine whether disciplinary sanctions are appropriate.

2.4 REMAINING REALITIES AND CHALLENGES

A number of sobering realities continue to be at play in this area of activity. Some arise from the human condition; others are specific to evidentiary and similar requirements in any credible investigation. Still others result from limitations in the new legislation and disclosure regime.

It will always require courage and commitment to make good faith and credible allegations of wrongdoing concerning one's colleagues or superiors. This is especially true when the alleged wrongdoing is against the public interest rather than the actual discloser. If potential disclosers cannot envisage a personal benefit by way of remedial action if wrongdoing is found, the real or perceived risks of whistleblowing are more likely to dissuade them from stepping forward.

Reporting wrongdoing against the public interest requires a conviction that those in the public sector should be honest and that the public sector should be transparent and accountable in its activities. Luckily, many public servants share that conviction, as well as the requisite courage to speak up when all else fails. However, we should not have unreasonable expectations as to their number. No doubt, through training and by setting positive examples in the areas of leadership, personal responsibility, motivation and a sense of duty and loyalty to the public, it would be possible to increase that number. A protective and effective disclosure of wrongdoing regime is also clearly essential and influential. Nevertheless, for many, averseness to risk will always be the prevailing and decisive reason to remain silent in the face of wrongdoing.

Any credible investigation regime subject to legislated rules that clearly determine procedures, rights and duties may find that those requirements will impose a degree of reality when it comes to expectations. Consider evidentiary requirements. It is sometimes difficult for those who make good faith allegations to distinguish between claims and probative evidence, between real evidence and hearsay, or between suspicion and fact. While the discloser's claims may be correct, without sufficient evidence it would be a violation of the rights of the alleged wrongdoer to find wrongdoing. In some cases, no supporting evidence at all will be uncovered, or, despite a comprehensive and independent investigation, the evidence will be insufficient to make a fair and conclusive finding of wrongdoing.

Another reality is applicable to a legislated regime. At different points in the process, one or more parties will have the right to challenge a decision or procedure. For example, the Commissioner will be entitled to decide which cases he or she will take on and investigate. Nevertheless, if a discloser is told that his or her case was refused because it was not sufficiently credible or serious, he or she may decide to challenge that decision. As the investigation progresses, many matters could be challenged, including the way documentary evidence was evaluated and shared, what witnesses were or were not called, whether the investigation was fair to both sides, and so forth. As to the findings, they, too, could be reviewable.

While the more flexible investigative approach of the PSIO had some advantages in this area, its investigations were also subject to challenge. Some, in fact, were challenged. In the long run, for reasons of reliability and fairness, it is preferable to rigorously respect due process despite the possibility of appeals and consequent delays. This would be achieved through the new legislation and regime.

A number of challenges arise from some remaining limitations in the legislation and the disclosure regime it envisages. In my view, while they do not constitute major flaws in the legislation or the regime, they do, in some respects, weaken them. If not addressed and rectified before the legislation comes into effect, I would strongly recommend that these matters be re-examined at the established five-year mark for the re-evaluation and possible revision of the PSDPA.

One such challenge concerns the access of members of the public to reprisal protection. The *Federal Accountability Act* contains a significant and important initiative in that members of the public who are not public servants are entitled to make disclosures to the Commissioner about wrongdoing by public servants. I have long recommended this initiative. In some instances, only a member of the public who has had dealings with a particular department and public servant may be in a position to know about any wrongdoing. However, unlike public servants, members of the public will not have access to the protection from reprisal mechanisms. The Commissioner will not be able to investigate complaints that they experienced reprisal as a result of their disclosures. Nor will members of the public have access to the Tribunal.

Although there will be a new criminal offence and sanctions for taking reprisal against private sector contractors and grant recipients, it is unlikely that the police, given the difficulties of proof and their limited resources, will be inclined to investigate and seek charges under this offence. Also, since it is a criminal offence, the standard of proof is very high and difficult to meet. In the end, while those in the private sector are being invited to come forward with their disclosures, they are being asked to take real or perceived risks when they do so. Clearly, when it comes to protection from reprisal, they are being treated unfairly compared to public servants.

Yet another challenge arising from a limitation in the legislation has to do with confidentiality and access to information. It is not easy to strike the right balance between ensuring confidentiality on the one hand and access to information on the other. To ensure that the disclosure regime is credible, and has the confidence of public servants, it is essential that the identities of persons making disclosures and witnesses be protected from disclosure during and after the investigation. That protection is ensured by the legislation. However, in my view, the amended FAA goes too far. It now states that any information generated in the course of an investigation must remain inaccessible to access to information requests.

Such an absolute exemption surely constitutes an undue restriction on the right of the public to be informed about wrongdoing in the public sector and the duty to be transparent. A more balanced proposal, one I made to the House of Commons Legislative Committee, is to protect against disclosure any information gathered during an investigation only while the investigation is under way. Once the investigation is completed, the provisions of the *Access to Information Act* should apply.

Another limitation in the legislation and disclosure regime prohibits the Commissioner from extending an investigation of alleged wrongdoing by a public servant beyond the public sector. In some instances, there may be credible evidence that an organization or individual outside the federal public sector could contribute to an investigation regarding alleged wrongdoing by a public servant. He or she may even be partially responsible. Prohibiting the Commissioner's investigation from going beyond the public sector could result in an inconclusive investigation. To make a finding about the public servant's responsibility in such circumstances could be grossly unfair since others beyond the public sector may share some or most of the responsibility. Only an investigative regime permitted to follow the evidence wherever it leads merits full confidence and high expectations.

2.5 MY THANKS TO PSIO STAFF MEMBERS

Whatever good things have been done and accomplished during the year under review, and since the establishment of the Public Service Integrity Office five years ago, all are due mainly to the professional skills, dedication and teamwork of each of the staff members.

In this last section of the Annual Report, I want to publicly express my sincere thanks and praise for what they have contributed, individually and collectively, to every area and stage of our administrative, investigative, legal and legislative activities. They have been consistently thorough, patient, fair and respectable in their interactions with all parties involved in cases, as well as creative and constructive in the solutions proposed. Grateful letters in my files clearly testify to their exceptional work.

As the appreciative beneficiary of their thoroughness and expert advice, I was confident that my decisions about the disposition of cases and related matters were always as informed as possible.

When I was appointed to this position in 2001, some suggested that I hire from outside the public service. I decided not to accept that advice. It is a decision I have never regretted. Except for me, all the directing, administrative, investigative and legal members of the PSIO are public servants. In ability, hard work and sense of responsibility, they easily match or surpass those of anyone I have worked with in the university or private sector.

To choose to join the PSIO, especially in the earliest stages when it was unclear how it would evolve, required both a sense of adventure and a commitment to the importance of an extra-departmental and functionally independent disclosure of wrongdoing regime in the public service.

It has been my philosophy from the start that despite, or because of, the onerous and stressful responsibilities that come with being a member of the PSIO, our work environment should, as much as possible, be a happy and trusting one. In my view, that has been very much the case. And for that, every staff member deserves credit, both those who have been with me from the start and those who have signed on more recently. That kind of working environment does not just happen—it requires determination and collaboration by everyone.

When the *Public Servants Disclosure Protection Act* comes into force and the new Public Sector Integrity Commissioner is approved by Parliament and appointed, he or she will be fortunate indeed to inherit these good people—all colleagues and all my friends—as the nucleus of that parliamentary agency. I shall miss them all.

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; or
- a breach of the *Values and Ethics Code for the Public Service*; or
- misuse of public funds or assets; or
- gross mismanagement; 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;

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

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); 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.

APPENDIX B

2005–2006 EXPENDITURES



DESCRIPTION

Personnel

Number of employees	9
Personnel Costs	(\$000)
Salaries	934
Employee benefits	187
Sub-total	1 121

Other operating expenditures

Travel*	40
Communications	37
Printing	23
Training	10
Computer services	46
Other professional/specialized services	24
Materials/supplies	43
Other	22
Levy for administrative services provided by central agencies	54
Sub-total	299
Total	1 420

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 website at www.pso-bifp.gc.ca.