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**Statutory Review of Part VI of the
Public Service of Ontario Act, 2006,
Disclosing and Investigating Wrongdoing**

Final Report

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HR Policy and Planning Branch
Corporate Policy and Agency Coordination Division
Ministry of Government Services



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Executive Summary

This review of the Ontario Public Service (OPS) disclosure of wrongdoing framework was conducted pursuant to section 149 of the *Public Service of Ontario Act, 2006* (PSOA). This section requires that five years after the PSOA comes into force, a review of the administration and operation of the disclosure of wrongdoing provisions be carried out and a report tabled in the Legislative Assembly by the responsible minister.

Part VI of the PSOA, Disclosing and Investigating Wrongdoing, enables public servants to raise concerns about wrongdoing with protection from reprisal. The administrative requirements for disclosures of wrongdoing are outlined in two directives – one for employees in a ministry or minister's office and one for employees and appointees in public bodies.

The following issues were considered in the review:

- Ontario's policy and legislative framework
- general organizational understanding and experience
- making, receiving and addressing disclosures
- reporting findings to the discloser and alleged wrongdoer
- reprisal protections
- documentation.

Review Methodology

The review findings were informed by the following:

- survey feedback from 2,800 public servants
- questionnaire feedback from 40 key stakeholders including ministry ethics executives and their executive assistants, audit directors, legal directors, strategic business unit (human resources) directors including the Ontario Provincial Police, ethics executives of select public bodies and Commission public bodies, and one bargaining agent
- consultation feedback and 20 recommendations from the Office of the Integrity Commissioner
- disclosure of wrongdoing information from five Integrity Commissioner annual reports (2007-08, 2008-09, 2009-10, 2010-11, 2011-12)
- data pertaining to 48 disclosures of wrongdoing reported by ministries since 2007
- "*Considerations for Investigating Alleged Disclosure of Wrongdoing Referrals from the Integrity Commissioner*" report prepared by the Ontario Internal Audit Division

- an extensive review of academic literature, policy and legislative resources from other Canadian and international jurisdictions including the Ontario broader public sector.

Overview of Findings

The findings are presented according to the issues that were considered in the review.

Ontario's Policy and Legislative Framework

- Ontario's policy and legislative framework to address disclosure of wrongdoing is sound.

General Organizational Understanding and Experience

- The OPS has limited experience in applying the disclosure of wrongdoing processes outlined in the PSOA and directives.
- A majority of employees do not have knowledge of the disclosure of wrongdoing provisions in the PSOA, including how to report wrongdoing and what happens after a disclosure is filed. There is confusion as to what constitutes "wrongdoing" under the PSOA.
- Some stakeholders indicated that there is a negative perception associated with the disclosure of wrongdoing process.

Making, receiving and addressing disclosures

- Employees would favour an option to disclose wrongdoing to a lower level (e.g. manager, director or assistant deputy minister) or another independent body.
- The referral-first mechanism gives rise to scepticism on the part of some public servants who wish to make a disclosure. (Ontario requires the Integrity Commissioner to refer disclosures of wrongdoing to an ethics executive for action before she investigates).
- Employees lack confidence in disclosure of wrongdoing processes.

Reporting findings to the discloser and alleged wrongdoer

- Ethics executives are fulfilling their responsibility to notify disclosers and alleged wrongdoers of how disclosures of wrongdoing are handled.

Reprisal Protections

- Among employees, the fear of reprisal is a deterrent for making a disclosure of wrongdoing.

Documentation

- Disclosures of wrongdoing are being documented as required but opportunities exist to enhance documentation, data collection processes, and the dissemination of disclosure of wrongdoing information.

Conclusion and Recommendations

The review revealed a solid policy and legislative framework that incorporates all of the elements of a best practice “whistleblowing” complaint mechanism. However, there may be a gap with respect to employee understanding of what constitutes wrongdoing under the PSOA and related disclosure and investigative processes. As a result, many of the recommendations focus on the development of tools, resources and enhanced communication for employees.

Nineteen recommendations are presented in the report, summarized as follows:

- Strengthen the organization’s knowledge of the disclosure of wrongdoing framework with an emphasis on what constitutes “wrongdoing” under the PSOA and clarify the roles and responsibilities of those involved in handling disclosures.
- Improve stakeholder understanding of the mechanics of the internal disclosure process (to ethics executives), the external disclosure process (to the Integrity Commissioner), and the investigative process in order to increase employee trust in the disclosure of wrongdoing framework.
- Increase consistency and transparency in the reporting process by developing a protocol and/or guidelines to assist ethics executives with reporting back to disclosers and alleged wrongdoers about investigative outcomes.
- Raise employee understanding of reprisal protections and related penalties through enhanced communication and education.
- Enhance the documentation and reporting of disclosure of wrongdoing activity in order to create confidence in related processes.

Introduction and Background

Policy Context

The *Public Service of Ontario Act, 2006* was enacted in 2007 and established employment and ethical frameworks for the public service. These frameworks were designed to maintain a high standard of ethical conduct in the OPS and provide guidance and direction to public servants to better enable them to do their jobs.

The employment framework sets out the mandatory requirements for managing public service employment in ministries and Commission public bodies. The ethical framework includes rules governing conflict of interest, oaths of office and allegiance, political activity and the disclosure of wrongdoing for all public servants. Together they form the foundation of an accountable and transparent public service.

This review focussed on Part VI of the PSOA - Disclosing and Investigating Wrongdoing, which enables all public servants to raise concerns about wrongdoing with protection from reprisal. The review was carried out pursuant to section 149 of the PSOA which requires that a review of the administration and operation of Part VI be carried out five-years after it comes into force. It also requires that a report setting out the findings from the review be prepared and delivered by the Minister of Government Services to the Speaker of the Assembly for tabling before the Assembly.

The PSOA sets out the types of wrongdoing that may be disclosed:

- a contravention of an Act (federal or provincial) or regulation
- creation of grave danger to life, health or safety of persons, or to the environment by an action or failure to act
- gross mismanagement (e.g. gross waste of money, abuse of authority, abuse of public assets)
- direction to or counsel of someone to commit one of the above.

Disclosures of wrongdoing that are not accepted include situations where:

- the subject matter:
 - is already being dealt with through another process
 - is an employment or labour relations matter that could be dealt with through a dispute resolution mechanism including a grievance process
 - could be dealt with under Part V of the *Police Services Act* (an Ontario Provincial Police internal review mechanism)
 - relates to an adjudicative decision (courts or tribunals, and includes deliberations)
 - relates to prosecutorial discretion such as plea bargains
 - relates solely to a public policy decision

- there has been substantial delay such that pursuing the matter would serve no useful purpose
- the disclosure is frivolous, vexatious or made in bad faith
- there are other valid reasons.

Any public servant who acts in accordance with the PSOA's disclosure of wrongdoing provisions, including but not limited to seeking advice, making a disclosure or otherwise complying with Part VI of the Act is protected from reprisal.

A reprisal is any measure taken against a public servant that adversely affects his or her employment or appointment. It includes, but is not limited to:

- ending or threatening to end the employment of a public servant
- disciplining or suspending a public servant, or threatening to do so
- imposing or threatening to impose a penalty related to a public servant's employment
- intimidating, or coercing a public servant in relation to his or her employment.

Administrative Requirements

The administrative requirements for disclosures of wrongdoing are prescribed in two directives. The Disclosure of Wrongdoing Directive, issued by the Public Service Commission on August 20, 2007, applies to current ministry employees (appointed under s. 32 of the PSOA), former ministry employees, and current and former ministers' office staff (appointed under s. 47 of the PSOA).¹ The Disclosure of Wrongdoing Directive issued by Management Board of Cabinet, also on August 20, 2007, applies to current public servants working in public bodies and former public servants who worked in public bodies.^{2&3}

The directives set out nearly identical disclosure of wrongdoing processes which include:

- making, receiving and addressing a disclosure
- reporting to the discloser and alleged wrongdoer
- reprisal protections
- documentation.

¹ All later references to ministry employees and minister's office staff include former ministry employees and former ministers' office staff.

² For the purpose of this report, the term "public servant" includes all of the abovementioned employee groups unless otherwise specified.

³ The terms "public body" and "public bodies" includes Commission public bodies unless otherwise specified.

Making a disclosure

Any current or former ministry employee, public body employee or appointee and ministers' staff may make a disclosure of wrongdoing. A current or former public servant, minister or parliamentary assistant can be named as an alleged wrongdoer.

Employees can make a disclosure of wrongdoing to their ethics executives⁴. Enough information about the alleged wrongdoing must be provided so that an assessment of the disclosure can determine the best course of action. In most instances the ethics executive is the deputy minister of a ministry, or the chair or chief executive officer of a public body. If an employee makes a disclosure of wrongdoing to a manager, the manager is obligated to refer the disclosure to the ethics executive. The ethics executive is the only person who can make decisions regarding disclosures.

If a public servant believes that it is not appropriate to approach the ethics executive, or if they have concerns that after disclosing to the ethics executive initially, the matter is not being dealt with appropriately, they may disclose alleged wrongdoing externally to the Integrity Commissioner. The Integrity Commissioner is an independent third party with specific responsibilities under the PSOA to receive and assess allegations of wrongdoing from Ontario public servants.

Receiving a disclosure

Ethics executives are responsible for assessing every disclosure to determine whether there is enough information to address the issue, and if so, whether the allegation should be addressed through this process or in a different forum. For example, a situation might better be addressed under a corporate policy dealing with workplace discrimination and harassment.

Addressing a disclosure

While addressing and resolving disclosures, ethics executives, and any others involved in conducting and administering the process, must ensure that the process is fair, timely, and as confidential as is appropriate. Confidentiality is to be maintained and the identities of people involved in disclosures of wrongdoing to be protected except in those situations where the interest of fairness requires that a person's identify be provided to one or more persons.

Where an ethics executive determines that an allegation of wrongdoing is to be investigated, the ethics executive is accountable for the process, including ensuring that the matter is dealt with in a timely manner. Typically, legal counsel, internal auditors,

⁴ See Appendix 2 for a flow chart depiction of the disclosure process.

human resources, and sometimes external investigators are called upon to advise on and/or investigate a disclosure, depending on circumstances.

When a disclosure of alleged wrongdoing is received by the Integrity Commissioner, it is referred to the appropriate senior official in government and a report-back is required within 30 days or another timeline agreed upon by both parties (s. 118 of the PSOA). This is commonly referred to as the "referral-first" mechanism. The Integrity Commissioner may initiate an investigation of a disclosure of wrongdoing if they are not satisfied with the report received from an ethics executive, if the person who received the referral has referred it back, or if the report is not delivered within the prescribed timeline.

After receiving the report back from the ethics executive, the Integrity Commissioner may also refer the matter to a more appropriate investigative body, such as law enforcement, if it is felt this would be more appropriate than initiating an investigation.

Since 2007, 23 matters have been referred by the Integrity Commissioner to an appropriate senior official (in a ministry or public body) or were investigated by the Integrity Commissioner.⁵

Throughout the investigative process certain types of privileged information continue to be privileged. This includes Cabinet privilege, solicitor-client privilege (including litigation) and information relating to the detection, investigation or prosecution of offence.

Reporting to the discloser and alleged wrongdoer

The ethics executive is responsible for informing the discloser if the disclosure was not accepted, accepted but not investigated, or investigated. When a disclosure is accepted, the ethics executive is also responsible for informing the alleged wrongdoer about how the disclosure was dealt with. The ethics executive may provide information regarding the investigation and findings as he/she considers appropriate. Disclosers who are not satisfied with an ethics executive's report and who feel the matter is not being dealt with appropriately can take the matter to the Integrity Commissioner.

Reprisal protections

The PSOA prohibits any person from taking action that adversely affects the employment, including working conditions, of an employee because the employee has made a disclosure of wrongdoing internally or to the Integrity Commissioner. Other

⁵ As reported in the Integrity Commissioner's 2007-08, 2008-09, 2009-10, 2010-2011 and 2011-12 annual reports.

public servants, including those involved in an investigation of wrongdoing (e.g., witnesses), are also protected against reprisal.

If it is found that a reprisal took place, remedies could include compensation for damages incurred as a result of the reprisal (e.g., compensating for loss of remuneration). Any public servant found responsible for the reprisal is subject to disciplinary measures, including suspension or dismissal. In addition, a person found guilty of reprisal, where a board (such as the Ontario Labour Relations Board) has made such a finding, may be prosecuted.

Documentation

Ethics executives must keep well-documented records of disclosures of wrongdoing and the results of each disclosure. The Disclosure of Wrongdoing Directives require that the following data should be available each quarter:

- number of disclosures
- number of disclosures per ground
- number of files open
- outcome of disclosures (no wrongdoing found, referral to another forum, corrective action taken).

Scope and Timing of the Review

A review of the administrative and operational requirements outlined in the PSOA and supporting disclosure of wrongdoing directives was carried out from April to September, 2012. It was led by the Corporate Policy and Agency Coordination Division (formerly the HR Management and Corporate Policy Division) of the Ministry of Government Services. The review focused on evaluating the effectiveness of existing OPS processes and identifying gaps, possible operational barriers and opportunities for improvement. Specifically the review examined:

- the disclosure of wrongdoing-related knowledge, experiences and perceptions of potential and actual disclosers of wrongdoing (public servants) in the OPS
- the roles, responsibilities and experiences of OPS stakeholders involved in receiving, addressing, investigating and reporting the outcome of disclosures under the existing framework.

To help inform the review, disclosure of wrongdoing complaint mechanisms, practices and protections in other jurisdictions were also considered along with related academic findings. An in depth comparison and analysis of Ontario's legislation to that of other jurisdictions was not within scope.

Review Methodology

The disclosure of wrongdoing framework applies to public servants in ministries and public bodies. Evaluation activities, however, focussed primarily on the experiences of ministries.

Consultation Survey

To gauge the knowledge, experiences and perceptions of potential and actual disclosers of wrongdoing, an electronic survey was distributed to approximately 63,000 public servants in ministries and public bodies through an OPS Weekly email. The email was first distributed on June 13, 2012 and a follow-up reminder was sent on July 4, 2012. The survey closed on July 6, 2012 and over 2,800 anonymous responses were received.

Survey results are statistically valid, with a confidence interval of +/-1.8% at a confidence level of 95%⁶. A summary of survey responses is included in Appendix 3.

Questionnaire

Using targeted questionnaires designed to gather input about specific roles and responsibilities in the administration of disclosure of wrongdoing processes, feedback was solicited from key ministry stakeholders. Ethics executives and their executive assistants, and legal, audit and strategic business unit directors all received questionnaires since they are typically involved in addressing disclosures of wrongdoing. A questionnaire was also sent to the ethics executives of 16 public bodies of varying sizes and interests, and eight bargaining agents.

The project plan also allowed for supplemental face-to-face meetings as required for clarification purposes or upon request.

From June to July 2012, 40 stakeholders representing 19 ministries, the Ontario Provincial Police Career Development Bureau, five public bodies and one bargaining agent responded to questionnaires.

Integrity Commissioner Consultation and Annual Reports

The Office of the Integrity Commissioner was consulted as part of the review. On May 22, 2012 representatives from the Ministry of Government Services met with the Office to discuss their overall experience with Ontario's disclosure of wrongdoing framework and processes, and their response to five multi-part questions addressing specific issues. Afterwards, the Office provided extensive written feedback which expanded on the information provided during the meeting and included 20 specific recommendations.

⁶ Sample size methodology and calculation from Macorr Research Solutions, www.macorr.com

The disclosure of wrongdoing-related information included in the Integrity Commissioner's last five annual reports was also considered during the review process. The reports considered were for the years 2007-08, 2008-09, 2009-10, 2010-11, and 2011-12.

Quarterly Disclosure of Wrongdoing Statistics

Ethics executives are required to keep well-documented records of disclosures of wrongdoing and an analysis of the data available from ministry ethics executives was carried out. According to the disclosure of wrongdoing directives, the following should be available each quarter:

- number of disclosures
- number of disclosures per ground
- number of files open
- outcome of disclosures (no wrongdoing found, referral to another forum, corrective action taken).

From October 2007 to March 31, 2012 ministries reported quarterly to the Ministry of Government Services on disclosure of wrongdoing activity. In total, 48 disclosures were reported by ministries during this time. In their reporting, ministries indicated that 17 of the disclosures were "external", therefore a referral from the Integrity Commissioner.

A centralized record of disclosure of wrongdoing activity within public bodies was not available since unlike ministries, public bodies have not been asked to report to the Ministry of Government Services.

Ontario Internal Audit Division

Complementary work carried out by the Ontario Internal Audit Division (OIAD) helped inform the review.

The Enterprise Wide Audit Service Team (EWAST), part of the OIAD, focuses on key business processes and risks across the OPS. Their reports focus on identifying systematic issues across ministries, best practices and ways to improve corporate support to ministries.

In the summer of 2012, the team reported on "*Considerations for Investigating Alleged Disclosure of Wrongdoing Referrals from the Integrity Commissioner*". This work built on 2010 reporting by OIAD's Forensic Investigation Team. The Forensic Investigation Team has extensive experience in disclosure of wrongdoing investigations.

The OAID document provides guidance intended to help ethics executives manage disclosure of wrongdoing investigations and specifically investigative processes related to referrals from the Integrity Commissioner. It includes a one-page checklist of key

considerations ethics executives should make as they work through the disclosure of wrongdoing process as required by the Disclosure of Wrongdoing Directive(s). It also provides direction with respect to reporting to the Integrity Commissioner.

In developing their considerations, the Enterprise Wide Audit Service Team consulted with various corporate stakeholders, including a disclosure of wrongdoing working group consisting of staff with operational experience in PSOA investigations, and OIAD's Forensic Investigation Team. Representatives from three ministries (Community Safety and Correctional Services, Environment, and Transportation), including chief administrative officers, strategic business unit (human resources) directors, and legal branches also provided feedback on the subject matter. In addition, best practices derived through public and private sector jurisdictional research were included.

The considerations were shared with the Corporate Audit Committee, a committee of deputy ministers, in September 2012.

External Research

The findings outlined in this report were also informed by an extensive review of information on disclosure of wrongdoing from resources outside of the OPS. This included academic literature as well as policy and legislative resources from the Ontario broader public sector and other Canadian and international jurisdictions. Key research resources are listed in Appendix 4.

Findings and Analysis

Policy and Legislative Framework

Finding: Ontario's policy and legislative framework to address alleged disclosure of wrongdoing is sound.

Jurisdictional research revealed that disclosure of wrongdoing (i.e. whistleblowing), protections are becoming more common and come in many forms. Some jurisdictions have stand-alone legislation and policies, while others have protections that are adopted through other statutes such as labour or environmental laws, or through employment rules.

Whatever form they may take, disclosure of wrongdoing frameworks are designed to enable employees to bring legitimate allegations of significant wrongdoing to those who are in a position to take action. Like the PSOA, frameworks in other jurisdictions typically include a description of what is considered to be "wrongdoing", a process by which allegations of wrongdoing may be made and investigated, reprisal protections and reporting. Research did not reveal any gaps in Ontario's disclosure of wrongdoing policy framework when compared to other jurisdictions.

General Organizational Understanding and Experience

Finding: The OPS has limited organizational experience in applying the disclosure of wrongdoing processes outlined in the PSOA and directives.

With only 48 disclosures of wrongdoing reported from ministries since 2007, the OPS has limited experience in dealing with disclosures of wrongdoing and in applying the processes outlined in the PSOA and directives.

Survey and questionnaire feedback indicated that despite their limited experience, all ministry stakeholders take disclosure of wrongdoing matters seriously. However, there continues to be a learning curve for both employees and those involved in handling disclosures. This was reiterated by the Office of the Integrity Commissioner who recommended that education efforts be a key component of the disclosure of wrongdoing framework.

"Training is definitely needed for current and new hired staff on this issue. I have worked in the OPS for four years, but I've only heard about 'disclosure of wrongdoing' recently in a formal context."

- OPS Employee

To put the OPS data into perspective, the Ministry of Labour has received the greatest number of internal disclosures since 2007 at only six. Many ministries reported no direct experience handling disclosures of wrongdoing; likewise for all five of the public body ethics executives who responded to the questionnaire.⁷

Research revealed that data pertaining to the number of disclosures of wrongdoing in other jurisdictions is not always readily available. For example, a direct inquiry made to British Columbia revealed that the government does not report on the number of disclosures of wrongdoing.

Where comparable data was available, it revealed that other jurisdictions also have limited experience in dealing with disclosures of wrongdoing. As an example, the Government of Manitoba which is approximately one quarter the size of the OPS reported zero disclosures of wrongdoing between 2007 and 2011.⁸

When comparing jurisdictions, it was not always possible to draw direct parallels between disclosure of wrongdoing activity reported by Ontario ministries and activity elsewhere. This was due to differences in: reporting paths (i.e. internal and external options for reporting complaints); the group covered by the disclosure of wrongdoing framework; and who authored the reports that were examined.

For example, the Office of the Public Sector Integrity Commissioner of Canada reports annually on disclosures and complaints of reprisal made under the *Public Servants Disclosure Protection Act*. The federal public service is over three times the size of the OPS and from 2007 to 2011 the Office reported 242⁹ new disclosures of wrongdoing. This figure does not address internal disclosures made within the federal public sector and therefore can most closely be compared with the level of activity reported by Ontario's Integrity Commissioner. In Ontario alleged wrongdoing may only be disclosed by public servants, whereas federally potential wrongdoing in the public sector may be disclosed by public servants or members of the public.

⁷ Ethics executives from the following public bodies responded to the questionnaire: Cancer Care Ontario, Metrolinx, Ontario Clean Water Agency, Public Service Grievance Board and the Social Justice Tribunals Ontario.

⁸ As reported in the Manitoba Civil Service Commission Annual reports 2007-2008, 2008-2009, 2009-2010 and 2010-2011.

⁹ As reported in the Office of the Public Sector Integrity Commissioner of Canada Annual Reports 2007-2008, 2008-2009, 2009-2010 and 2010-11.

Finding: A majority of employees do not have knowledge of the disclosure of wrongdoing provisions in the PSOA, including how to report wrongdoing and what happens after a disclosure is filed. There is confusion as to what constitutes “wrongdoing” under the PSOA.

Consultation feedback consistently indicated that there is a lack of knowledge across the organization as to what constitutes “wrongdoing” under the PSOA. Many employees are also unclear on how to report legitimate wrongdoing and what happens after a disclosure of wrongdoing is filed.

This knowledge gap was made evident through the survey responses. In the open-ended comment fields, public servants regularly described scenarios that they considered to be “wrongdoing” but that would be appropriately addressed through other complaint mechanisms. For example, grievances, conflict of interest and workplace discrimination and harassment.

Survey results revealed: 59 per cent of respondents did not know that there were disclosure of wrongdoing provisions under the PSOA; 91 per cent of respondents did not know how to file a disclosure of wrongdoing; and 75 per cent of respondents were not aware that disclosure of wrongdoing information is available on the MyOPS corporate intranet site.

Those involved in the administration and operation of disclosure of wrongdoing processes such as ethics executives, legal, audit and human resource directors have a better level of knowledge about the framework. However, this group was strongly in favour of having more guidance materials and resources available to support all levels of the organization.

The Office of the Integrity Commissioner indicated that, to date, about one third of the cases referred back to ministries included allegations of conflict of interest. The Office suggested that the Conflict of Interest Commissioner¹⁰ be added into the PSOA as a senior official to whom a matter can be referred in order to expedite the assessment process.

The Office of the Integrity Commissioner also recommended clarifying for public servants that she is precluded from dealing with any labour or employment matter, and that there is a positive obligation on the part of public servants to cooperate with investigations.

¹⁰ The PSOA explicitly assigns the Conflict of Interest Commissioner responsibility for certain conflict of interest and political activity matters with respect to specified employees of ministries and employees and appointees of public bodies.

Finding: Some stakeholders indicated that there is a negative perception associated with the disclosure of wrongdoing process.

A number of stakeholders, including ethics executives, indicated unease with the terminology being used in relation to disclosures of wrongdoing. These stakeholders indicated that the language in the PSOA and directives suggests a presumption of guilt due to the absence of the term "alleged". Due to a general lack of understanding about the framework and its intent, it was found that the terminology alone can lead to potentially negative perceptions about disclosure of wrongdoing processes and those named as "wrongdoers". Until there is a finding of wrongdoing, use of terms such as "alleged wrongdoing" and "alleged wrongdoer" was suggested.

"The language of the act and directive carry an implication that you are guilty and have to prove your innocence."

- Legal Director

Recommendations

Strengthen the organization's knowledge of the disclosure of wrongdoing framework with an emphasis on what constitutes "wrongdoing" under the PSOA and clarify the roles and responsibilities of those involved in handling disclosures.

1. Communicate regularly to staff at all levels about the disclosure of wrongdoing framework.
2. Develop and implement new tools, resources and training targeting staff at all levels.
3. Develop new tools designed specifically to assist stakeholders in handling investigations.
4. Raise the visibility of disclosure of wrongdoing information, tools and resources on the corporate MyOPS intranet site.
5. Update disclosure of wrongdoing directive(s) to require deputy ministers and chairs of public bodies to ensure that public servants are informed annually of disclosure of wrongdoing process.
6. Change the disclosure of wrongdoing terminology in the PSOA and directive(s) to incorporate the word "alleged" to more accurately reflect the intent of the disclosure of wrongdoing framework. For example, "disclosure of alleged wrongdoing" or "alleged wrongdoer".

7. Clarify that the Integrity Commissioner is precluded from dealing with any labour or employment matter including conflict of interest matters through education and communication.
8. Raise public servant understanding of investigative processes and their potential impacts on the workplace through education and communication.
9. Clarify that there is a positive obligation on the part of public servants to cooperate with investigations through education and communication.
10. Acknowledge that at any stage of the process, the Integrity Commissioner may seek and rely on advice from other Officers of the Legislative Assembly through education and communication.

Making, Receiving and Addressing a Disclosure

Finding: Employees would favour an option to disclose wrongdoing to a lower level (e.g. manager, director or assistant deputy minister) or another independent body.

Stakeholders have suggested that public servants may feel uncomfortable disclosing wrongdoing to their ethics executive or the Integrity Commissioner since these individuals are typically at a much higher level in the organizational hierarchy than potential disclosers.

The survey and questionnaires asked if it would be beneficial to have another person or body to which an employee can submit a disclosure of wrongdoing. Forty-six per cent of survey respondents supported the idea of disclosing to a lower level (e.g., manager, director or assistant deputy minister) or another independent third-party. Other ministry and public body stakeholders were divided on the matter and raised administrative and confidentiality issues.

The Office of the Integrity Commissioner noted that other provinces and the federal government have more elaborate systems for internal reporting whereby middle-level managers may receive and address disclosures of wrongdoing. In Ontario, managers cannot make decisions regarding disclosures of wrongdoing and are obligated to refer any disclosures they receive to their ethics executive.

Finding: The referral-first mechanism gives rise to scepticism on the part of some public servants who wish to make a disclosure.

Ontario is the only Canadian jurisdiction with a “referral-first mechanism”, which requires that the Integrity Commissioner first refer disclosures of wrongdoing to an appropriate senior official within a ministry or public body. This mechanism was established to reinforce the accountability of ethics executives to address allegations of wrongdoing. Feedback from the Office of the Integrity Commissioner, public servants and the Association of Management, Administrative and Professional Crown Employees of Ontario (AMAPCEO) all indicated that this mechanism gives rise to scepticism on the part of some public servants who wish to make a disclosure.

This scepticism arises when an employee wishes to make a disclosure to the Integrity Commissioner rather than their ethics executive because they do not view their ethics executive as the appropriate party to address their allegations. When such a disclosure is then referred back to the employee’s ethics executive, the reasons for this occurring are hard to understand from an employee’s perspective.

The Office of the Integrity Commissioner supports the referral-first mechanism in most instances. The Office recommended that consideration be given to allowing the Integrity Commissioner to move directly to a Commissioner-initiated investigation in appropriate circumstances, such as where a senior official is perceived to have a conflict.

Finding: Employees lack confidence in the disclosure of wrongdoing process.

Survey results indicated that potential and actual disclosers lack confidence in disclosure of wrongdoing processes and specifically in the confidentiality of investigations.

664 employees left comments at the conclusion of the survey. Of these comments, over 300 indicated doubt and uncertainty about disclosure of wrongdoing processes. For example:

- 75 respondents cited reprisal concerns and inadequate whistleblower protections
- 34 respondents revealed that they did not feel appropriate action would be taken if they filed a disclosure
- 27 respondents felt uneasy about disclosing alleged wrongdoing to their ethics executive or the Integrity Commissioner
- 13 respondents cited lack of confidentiality as a concern.

“From what I've seen it just doesn't matter. Nothing comes from any grievances, complaints or issues brought forward to managers. This is just another colossal waste of time.”

- OPS Employee

Thirty-six of the approximately 2,800 consultation survey respondents indicated that they had filed a disclosure of wrongdoing. Of these, 25 respondents indicated they were not at all satisfied with their experience, with several indicating that perceived lack of confidentiality was a concern.

The Office of the Integrity Commissioner also reported that many public servants do not consider their ethics executive to be approachable on disclosure of wrongdoing matters and are not confident that their senior leaders will deal appropriately with allegations of wrongdoing.

Specifically, the Office of the Integrity Commissioner indicated that there is mistrust amongst public servants and bargaining agents of the internal investigation process. In their feedback, the Association of Management, Administrative and Professional Crown Employees of Ontario also raised concern about the preservation of confidentiality in disclosure of wrongdoing processes.

Questionnaire feedback indicates that ethics executives, legal directors and strategic business unit (human resources) directors are aware of staff concerns, but have confidence in the process overall. Those who have been involved in handling disclosures of wrongdoing reported that the process worked well and that they were able to access the information they needed to address the matter.

Recommendations

Improve stakeholder understanding of the mechanics of the internal disclosure process (to ethics executives), the external disclosure process (to the Integrity Commissioner), and the investigative process in order to increase employee trust in the disclosure of wrongdoing framework.

11. Clarify that employees have the ability to disclose alleged wrongdoing to a lower level and that those disclosures must be forwarded immediately to the ethics executive through education and communication.
12. Clarify the intent of PSOA s. 117(3) which relates to restrictions on matters that could be dealt with under the Part V of the *Police Services Act* through education and communication.
13. Amend PSOA s. 117 to clarify the circumstances where it is mandatory that the Integrity Commissioner refuse to deal with a disclosure.

- 14.** Conduct periodic reviews of the amount of compensation the Integrity Commissioner can grant to compensate for costs incurred when filing a disclosure or to compensate a discloser who claims to have suffered a reprisal. The amount is outlined in O. Reg. 385/07.

Reporting Findings to the Discloser and Alleged Wrongdoer

Finding: Ethics executives are fulfilling their responsibility to notify disclosers and alleged wrongdoers of how disclosures of wrongdoing are handled.

Ethics executives are responsible for informing disclosers of the result of their disclosure. For example, whether it was not accepted, accepted but not investigated, or accepted and investigated. Where a disclosure is accepted, the ethics executive is also responsible for informing the alleged wrongdoer of how it was dealt with.

Of the employees who indicated they had filed a disclosure of wrongdoing, several expressed a desire for greater transparency in the reporting process. There is no evidence, however, to suggest that reporting responsibilities are not being fulfilled by ethics executives. Feedback indicates that disclosers of wrongdoing and alleged wrongdoers (as appropriate) are notified of how disclosures of wrongdoing are handled although the information provided varies according to the individual circumstances.

Recommendation

- 15.** Increase consistency and transparency in the reporting process by developing a protocol and/or guidelines to assist ethics executives with reporting back to disclosers and alleged wrongdoers about investigative outcomes.

Reprisal Protections

Finding: Among employees, the fear of reprisal is a deterrent for making a disclosure of wrongdoing.

Thirty-three per cent (915) of survey respondents indicated that they had considered filing a disclosure, but chose not to. Of these, 82 per cent indicated that fear of reprisal was their reason for not filing. Of the 36 survey respondents who had filed a disclosure, 75 per cent felt they had suffered a reprisal as a result. A fear of reprisal was also reiterated in open-ended comments in the consultation survey, with 84 respondents

leaving remarks that emphasized reprisal concerns and apprehension about the available protections.

Feedback from the Office of the Integrity Commissioner and external research also highlighted the fear of reprisal as an issue for potential disclosers. According to the Office of the Integrity Commissioner, public servants have told the office that the risk of reprisal is a significant disincentive for making disclosures and participating in the subsequent investigation.

"There is no protection for employees when they wish to disclose a wrongdoing. To think that there are not repercussions is absolutely ridiculous."

- OPS Employee

Similarly, a 2011 analysis of international whistleblowing legislation found that approximately 30 countries have adopted specific whistleblower protections and that the biggest barrier preventing whistleblowing is concern that retaliation will result from the disclosure.¹¹

The views of ethics executives, their assistants, legal directors and strategic business unit (human resources) directors differ from employees and the Office of the Integrity Commissioner on the issue of reprisal. These groups are generally not aware of specific situations where potential or actual disclosers expressed any fear of reprisal.

Stakeholders involved in handling disclosures of wrongdoing also consider the reprisal protections afforded under the PSOA for disclosing employees are adequate. This was reinforced by research which revealed similar reprisal protections in other jurisdictions. Feedback and research pointed to education, training, and improved leadership as ways to address concerns of reprisal.

Recommendation

- 16. Raise employee understanding of reprisal protections and related penalties through enhanced communication and education.**

Documentation

Finding: Disclosures of wrongdoing are being documented as required but opportunities exist to enhance documentation, data collection processes, and the dissemination of disclosure of wrongdoing information.

¹¹ Banisar, David, Whistleblowing: International Standards and Developments (February 1, 2011). CORRUPTION AND TRANSPARENCY: DEBATING THE FRONTIERS BETWEEN STATE, MARKET AND SOCIETY, I. Sandoval, ed., World Bank-Institute for Social Research, UNAM, Washington, D.C., 2011

Ethics executives are required to document disclosure of wrongdoing activity each quarter including the number of disclosures, number of disclosures per ground, number of files open and the outcome of disclosures. Since the legislation was enacted in 2007 until March 31, 2012, Ministries reported a total of 48 disclosures to the Ministry of Government Services.

In an effort to improve the efficiency of the disclosure of wrongdoing reporting process for ministries, the Ministry of Government Services changed ministry reporting requirements from quarterly to annual reporting in June 2012. Ethics executives are still required to update their records each quarter, but ministries will not be asked to report to the Ministry of Government Services again until April 2013. It is anticipated that this change will improve the consistency of data collected and make reporting easier for ministries.

Information about the level of disclosure of wrongdoing activity within ministries and public bodies is not currently reported to public servants or to the public.

The Office of the Integrity Commissioner recommended that the government be required to publicly report internal disclosures. It is the Office's view that it is useful for public servants (and the public) to know that the mechanism is being used and that it is working. It is the Office's view that increased awareness about the use of the disclosure system will create confidence in the system itself. Some other provinces and the federal government require public reporting of internal disclosure of wrongdoing activities.

Recommendations

Enhance the documentation and reporting of disclosure of wrongdoing activity in order to create confidence in related processes.

- 17.** Enhance the existing tools and process used by ethics executives to document and report disclosure of wrongdoing activity to the Ministry of Government Services in order to improve the quality of the data collected.
- 18.** Begin collecting disclosure of wrongdoing data from select public bodies and Commission public bodies to fill a gap in current reporting processes and statistics.
- 19.** Report disclosure of wrongdoing statistics to employees on an annual basis in order to improve transparency and inspire employee confidence in the disclosure of wrongdoing framework.

Conclusion

In summary, this review of the administration and operation of the Ontario Public Service disclosure of wrongdoing processes revealed a solid legislative and policy framework that incorporates all of the elements of a best practice “whistleblowing” complaint mechanism. However, there may be a gap with respect to employee understanding of what constitutes wrongdoing under the PSOA and related disclosure and investigative processes.

Employees commonly learn about policies and processes when they are affected by them and need to learn about them. As a result, employees generally exhibited little knowledge of the disclosure of wrongdoing framework and expressed a desire for increased education and communication to fill this knowledge gap. Despite the protections within the legislation, employees also highlighted a strong fear of reprisal and a lack of confidence in the overall disclosure and investigation process. Based on experience handling disclosures of alleged wrongdoing, the Office of the Integrity Commissioner reiterated these findings.

Ethics executives and stakeholders who are called upon in the assessment and investigation of disclosures of alleged wrongdoing such as audit, legal and human resources directors are better informed than employees. They report that they take alleged disclosures seriously and are meeting their obligations under the PSOA and directives. These stakeholders agree with employees that better education and communication are required, but did not identify reprisals as a significant issue.

The recommendations put forward as a result of this review place an emphasis on educating employees and other stakeholders on the existing framework with a view to improving how it is administered. The intent is not to radically alter what is already in place, but to strengthen communication and operational capacity.

Appendix 1 – Summary of Recommendations

Policy and Legislative Framework, General Organizational Understanding and Experience

1. Communicate regularly to staff at all levels about the disclosure of wrongdoing framework.
2. Develop and implement new tools, resources and training targeting staff at all levels.
3. Develop new tools designed specifically to assist stakeholders in handling investigations.
4. Raise the visibility of disclosure of wrongdoing information, tools and resources on the corporate MyOPS intranet site.
5. Update disclosure of wrongdoing directive(s) to require deputy ministers and chairs of public bodies to ensure that public servants are informed annually of disclosure of wrongdoing process.
6. Change the disclosure of wrongdoing terminology in the PSOA and directive(s) to incorporate the word “alleged” to more accurately reflect the intent of the disclosure of wrongdoing framework. For example, “disclosure of alleged wrongdoing” or “alleged wrongdoer”.
7. Clarify that the Integrity Commissioner is precluded from dealing with any labour or employment matter including conflict of interest matters through education and communication.
8. Raise public servant understanding of investigative processes and their potential impacts on the workplace through education and communication.
9. Clarify that there is a positive obligation on the part of public servants to cooperate with investigations through education and communication.
10. Acknowledge that at any stage of the process, the Integrity Commissioner may seek and rely on advice from other Officers of the Legislative Assembly through education and communication.

Making, Receiving and Addressing a Disclosure

11. Clarify that employees have the ability to disclose alleged wrongdoing to a lower level and that those disclosures must be forwarded immediately to the ethics executive through education and communication.
12. Clarify the intent of PSOA s. 117(3) which relates to restrictions on matters that could be dealt with under the Part V of the *Police Services Act* through education and communication.
13. Amend PSOA s. 117 to clarify the circumstances where it is mandatory that the Integrity Commissioner refuse to deal with a disclosure.
14. Conduct periodic reviews of the amount of compensation the Integrity Commissioner can grant to compensate for costs incurred when filing a disclosure or to compensate a discloser who claims to have suffered a reprisal. The amount is outlined in O. Reg. 385/07.

Reporting Findings to the Discloser and Alleged Wrongdoer

15. Increase consistency and transparency in the reporting process by developing a protocol and/or guidelines to assist ethics executives with reporting back to disclosers and alleged wrongdoers about investigative outcomes.

Reprisal Protections

16. Raise employee understanding of reprisal protections and related penalties through enhanced communication and education.

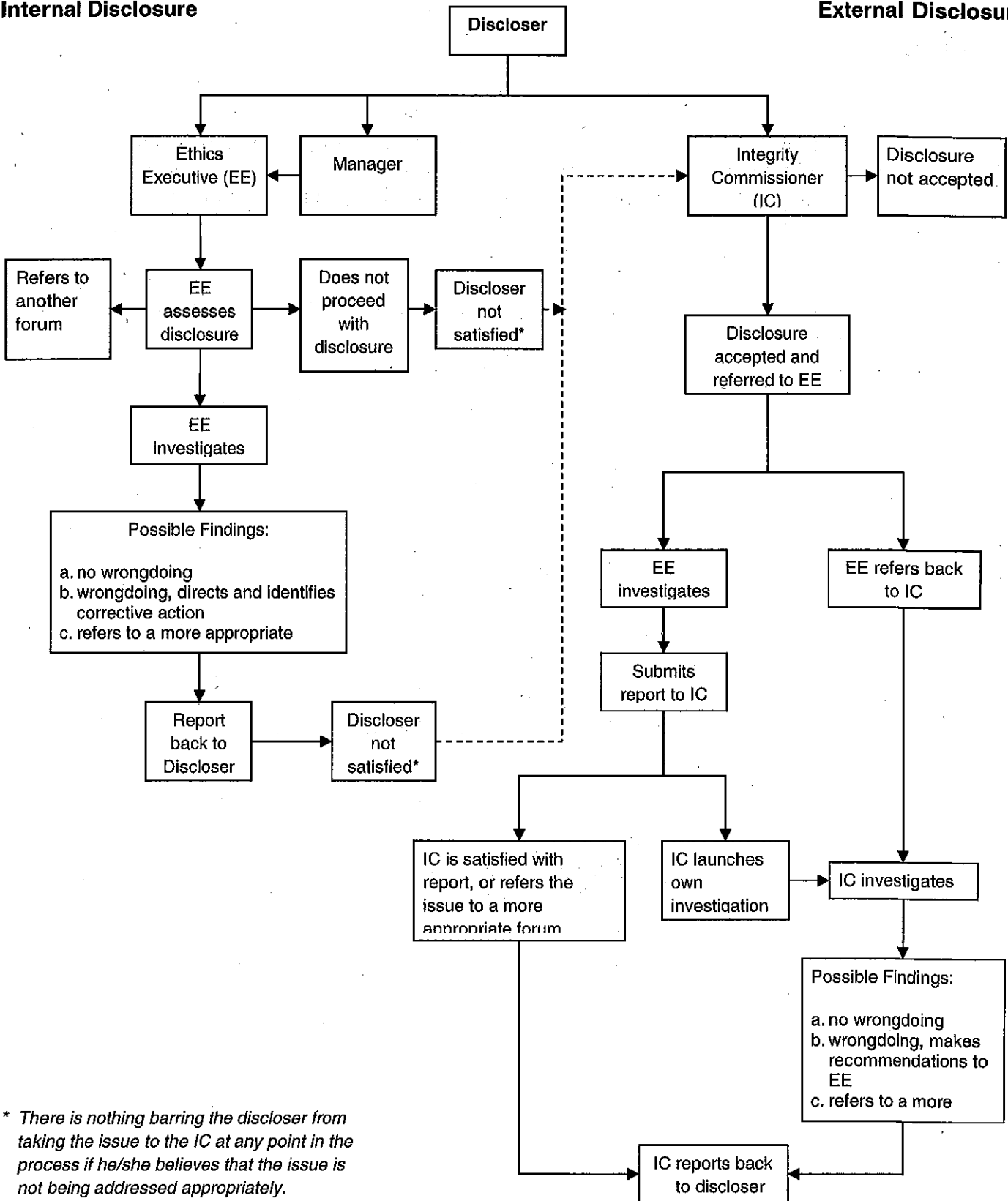
Documentation

17. Enhance the existing tools and process used by ethics executives to document and report disclosure of wrongdoing activity to the Ministry of Government Services in order to improve the quality of the data collected.
18. Begin collecting disclosure of wrongdoing data from select public bodies and Commission public bodies to fill a gap in current reporting processes and statistics.
19. Report disclosure of wrongdoing statistics to employees on an annual basis in order to improve transparency and inspire employee confidence in the disclosure of wrongdoing framework.

Appendix 2 – Disclosure Process

Internal Disclosure

External Disclosure



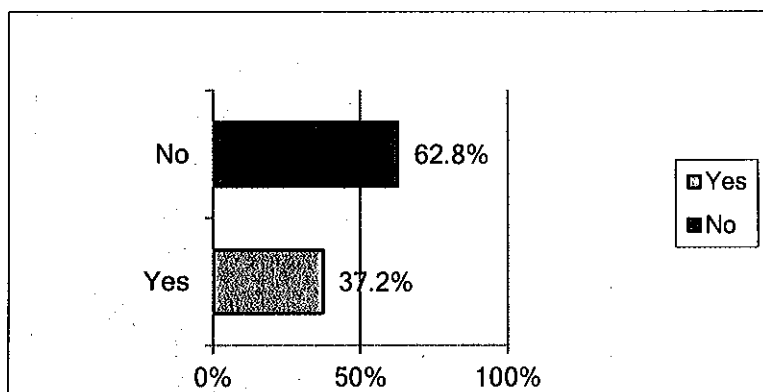
* There is nothing barring the discloser from taking the issue to the IC at any point in the process if he/she believes that the issue is not being addressed appropriately.

Appendix 3 - Summary of Survey Responses

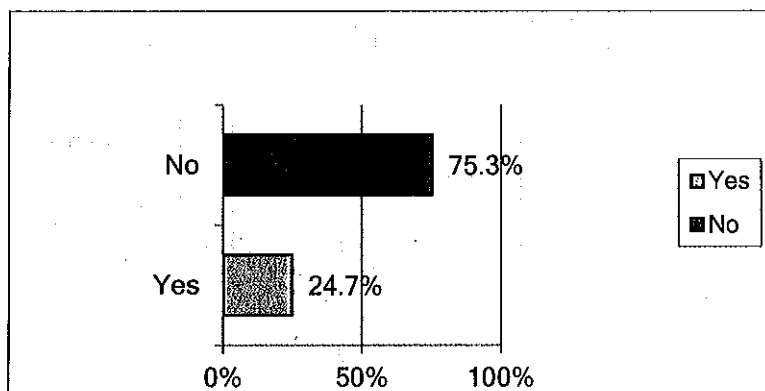
Overview

- 2,807 respondents started and partially completed the survey; 2,708 respondents completed the survey by the July 6, 2012 closing date.
- Open-ended comments were coded by the theme, with similar comments assigned a number to allow for grouping by theme. Not all comments were valid or relevant (e.g., Answering “no” in response to “Do you have any further comments”), and as a result coded comments will not necessarily equal total comments submitted.

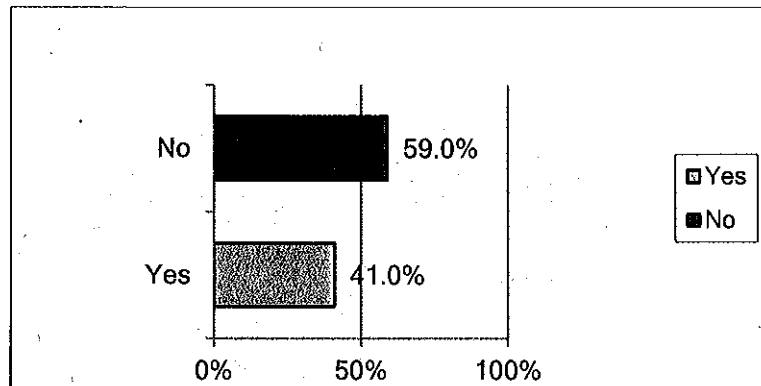
Question 1: Did you know that there is a Public Service of Ontario Act page on MyOPS? (n = 2805)



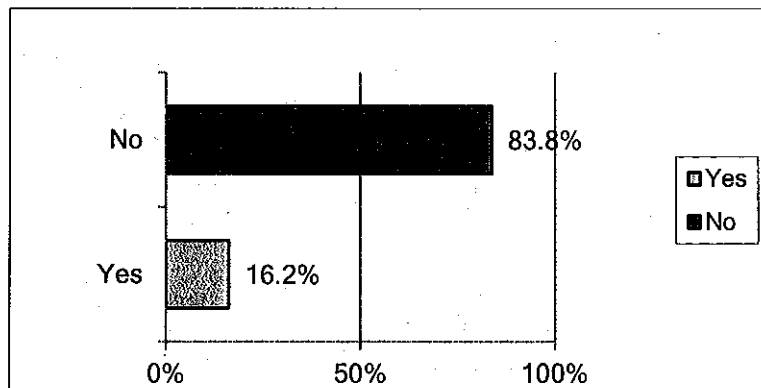
Question 2: Did you know that information on disclosure of wrongdoing is available on MyOPS (including two directives, a fact sheet and FAQs)? (n = 2805)



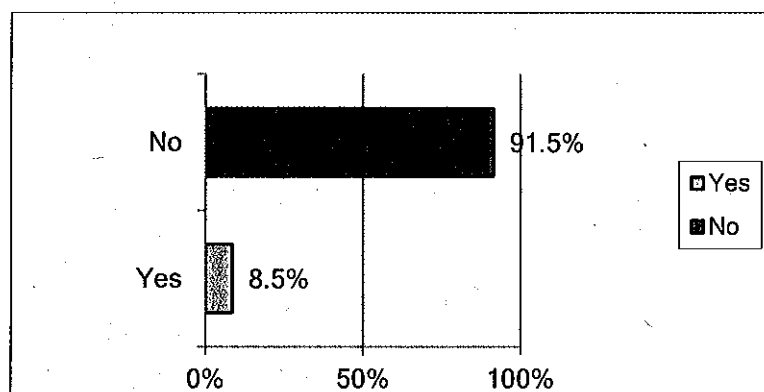
Question 3: Before today, did you know that there are disclosure of wrongdoing provisions under the *Public Service of Ontario Act, 2006*? (n = 2805)



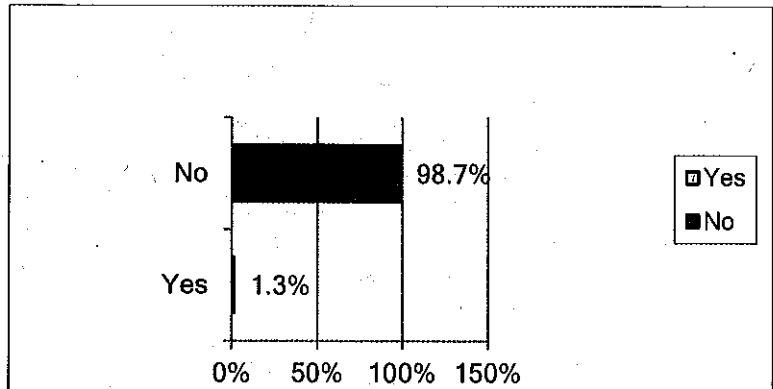
Question 4: Over the last 12 months, do you remember receiving any communications related to disclosure of wrongdoing? (n = 2805)



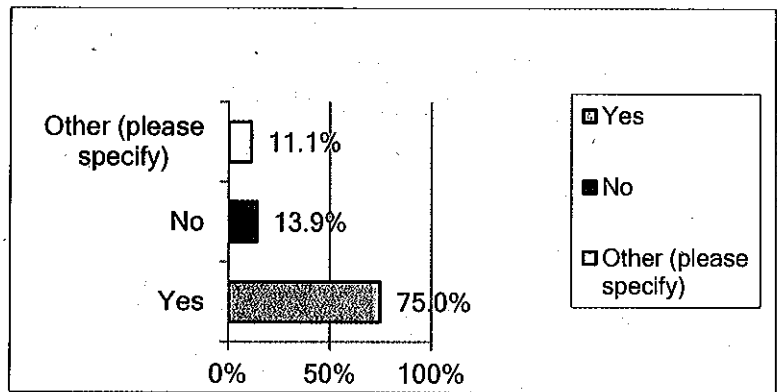
Question 5: Do you know how to file a disclosure of wrongdoing? (n = 2805)



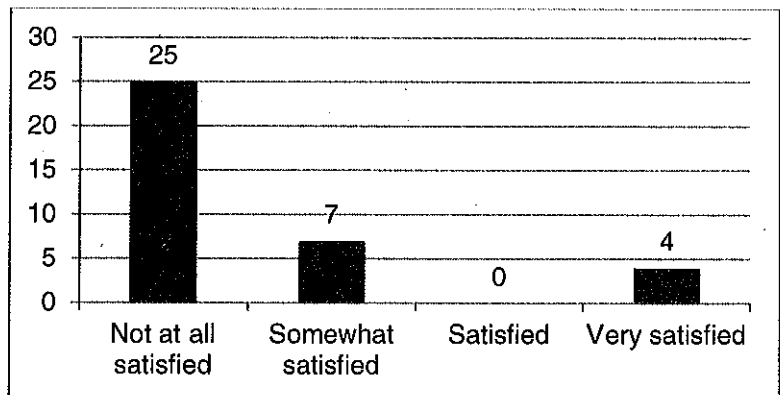
Question 6: Have you ever filed a disclosure of wrongdoing with your ethics executive or the Integrity Commissioner? (n = 2785)



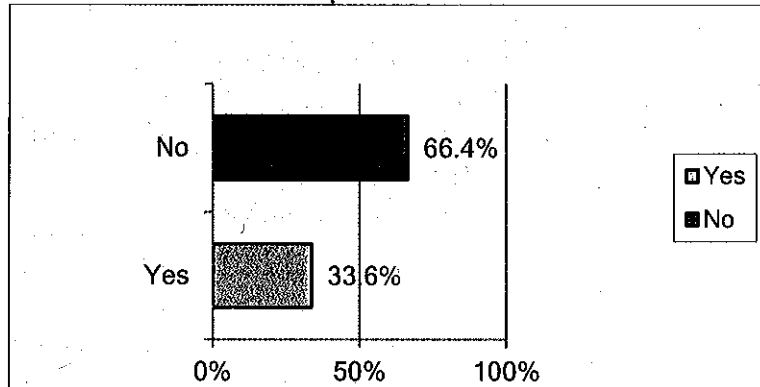
Question 7: Do you feel your employment, including working conditions, was adversely affected as a result of choosing to file a disclosure of wrongdoing? (n = 36)



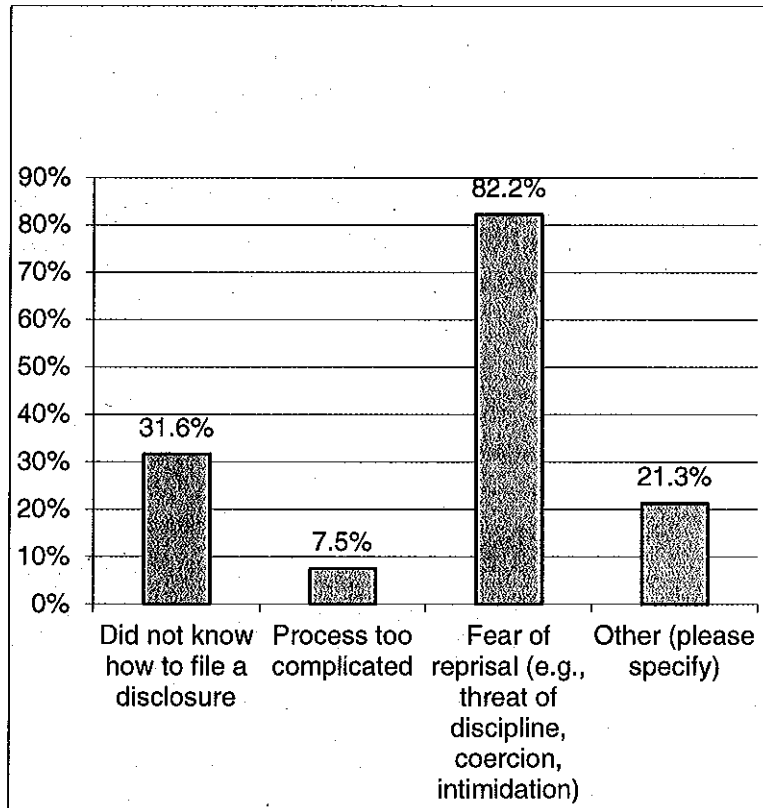
Question 8: Based on your experience filing a disclosure of wrongdoing, please rate your level of satisfaction with how the disclosure was addressed. (n = 36)



Question 9: Were you ever in a position where you wanted to file a disclosure of wrongdoing but chose not to? (n = 2727)

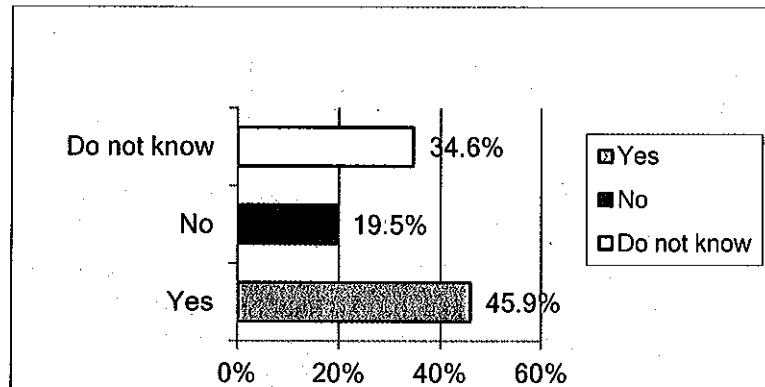


Question 10: If you chose not to file a disclosure of wrongdoing, what was the reason? (n = 914)



Description	Instance
Perception that no action is taken on DoW submissions / nothing will change	33
Fear of reprisal	32
Addressed outside of DoW process	18
Perceived corruption / collusion at upper management levels	15
Lack of support / did not know who to trust	13
Unsure if incident qualifies as "wrongdoing" / Unclear definition of wrongdoing	13
Does not know how to submit a DoW / not aware of process	11
Did not want to cause disruption / trouble for team / coworkers	8
Felt I did not have enough evidence	6
Lack of anonymity / confidentiality	4
Utilized WDHP process	3
Told not to file by manager or higher	3
Thought problem would be resolved through another process	2
Planned to leave work area	2
DoW too strong an action	1
Not my responsibility	1
Filing process too complicated	1
N = 195	
Note: Instances will not equal 195 due to non-answers or answers that were not relevant	

Question 11: In addition to your ethics executive or the Integrity Commissioner, do you feel that it would be beneficial to have another person or body to which an employee can submit a disclosure of wrongdoing? (n = 2710)



Question 11 Coding	
Description	Instances
Lower level reporting (e.g., manager, legal services, HR director, ADM)	46
External 3rd party independent of government	40
Bargaining agent / union / association	36
Ombudsman	24
Neutral / impartial 3rd party	18
Would like support / guidance prior to filing	10
Number of avenues for filing a DoW is appropriate	6

Anonymous phone number / website	5
Filing should only be through Integrity Commissioner	4
A trained peer	4
Regional contact	3
Would like more avenues for filing a DoW	2
Ontario Human Rights Council	2
Employee Assistance Program	1
Secretary of Cabinet	1
N = 252	
Note: Instances will not equal 252 due to non-answers or answers that were not relevant	

Question 12: Are there any other comments you would like to add? (n = 664)

Question 12 Coding	
Description	Instances
Fear of reprisals	75
Need more guidance/support/education/communication	59
Unsure if incident qualifies as "wrongdoing" / Unclear definition of wrongdoing	40
Perception that no action is taken on DoW submissions / nothing will change	34
Not comfortable submitting DoW to DM/Chair/CEO/IC	27
Would like external avenue for filing a DoW	26
Fair hiring complaints / other mismanagement	23
Wants an anonymous process	21
Perceived corruption at upper management levels	18
Does not know how to submit a DoW / not aware of process	15
Would like more avenues for filing a DoW	14
Perceived lack of confidentiality	13
Better protection against vexatious DoW claims	11
Number of avenues for filing a DoW is appropriate	10
Filing process too complicated	10
Commenter experienced reprisals	6
Would like support / guidance prior to filing	6
Desire to have bargaining agent involved in process	5
Wants better "whistle-blower" protection	3
Filing should only be through Integrity Commissioner	1
N = 664	
Note: Instances will not equal 664 due to non-answers or answers that were not relevant	

Appendix 4 – List of Key Resources

- Banisar, D. (2011, February 1). Whistleblowing: International Standards and Developments. *Corruption and Transparency: Debating the Frontiers Between State, Market and Society*, World Bank-Institute for Social Research. Retrieved from <http://ssrn.com/abstract=1753180>
- Cohen-Lyons, J. & Hicks Morley (2012). Whistleblowing in the Public Sector: A Balance of Rights and Interests. *Public Sector Digest* (Spring 2012). Retrieved from http://www.hicksmorley.com/images/Hicks_Morley.pdf
- Government of Canada (2005). *Public Servants Disclosure Protection Act*. Retrieved from <http://laws-lois.justice.gc.ca/PDF/P-31.9.pdf>
- Government of Canada. Whistleblowing Study - Models of Whistleblower Protection. Retrieved from <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01373.html> Web. June 28, 2012.
- Lewis, D., & Vandekerckhove, W., (2011). The Content of Whistleblowing Procedures: A Critical Review of Recent Official Guidelines. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1860393
- Moberly, R., & Lindsey E. W., (2011). An Empirical Study of Whistleblower Policies in United States Corporate Codes of Ethics, in Lewis, D., and Vandekerckhove W.,(eds.) *Whistleblowing and Democratic Values*, p. 27. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998293
- Svensson, G., Wood, G., Singh, J., & Callaghan, M., (2008). Codes of ethics artefacts in Australia, Canada and Sweden: a longitudinal study, in *AMS 2008: Proceedings of the Annual Conference of the Academy of Marketing Science*, Vancouver, B.C., pp. 262-266.

