

**LEGISLATIVE ASSEMBLY
OF
YUKON**
First Session of the
33rd Legislative Assembly
BILL NO 101
DISCLOSURE PROTECTION ACT

First Reading: Dec. 8, 2011 58.

Second reading:

Committee of the Whole:

Third Reading:

Assented to:

DISCLOSURE PROTECTION ACT

EXPLANATORY NOTE

This bill protects employees by facilitating the disclosure and investigation of significant and serious matters relating to the public service that are potentially unlawful, dangerous to the public or harmful to the public interest, and by establishing a sound and thorough regime of protection from reprisal for employees who do make disclosures.

BILL NO.

33rd Legislative Assembly

First Session

Disclosure Protection Act

The Commissioner of Yukon, by and with the advice and consent of the Legislative Assembly, enacts as follows:

PART 1

PURPOSE AND DEFINITIONS

Purpose of this Act

1 The purpose of this Act is

- (a) to facilitate the disclosure and investigation of significant and serious matters in or relating to the public service, that are potentially unlawful, dangerous to the public or injurious to the public interest; and
- (b) to protect persons who make those disclosures.

Definitions

2 The following definitions apply in this Act.

"board" means

(a) in relation to employees within the meaning of the *Public Service Act*, the Yukon Public Service Labour Relations Board established under section 6 of the *Public Service Labour Relations Act*

(b) in relation to employees within the meaning of the *Education Labour Relations Act*, the Yukon Teachers Labour Relations Board established under section 4 of the *Education Labour Relations Act*.

"chief executive" means

(a) in relation to a department, the deputy minister of that department;

(b) in relation to a government body, the chief executive officer of that body; and

(c) in relation to an office, the officer of the Legislative Assembly in charge of that office.

"department" means a department of the government.

"designated officer" means the senior official designated under section 6 to receive and deal with disclosures under this Act.

"disclosure" means a disclosure made in good faith by an employee in accordance with this Act.

"employee" means an employee or officer of a department, government body or office.

"government body" means

(a) a government agency as defined in the *Financial Administration Act*;

(b) a designated public body as defined in the *Access to Information and Protection of Privacy Act* ,

(c) any other body designated as a government body in the regulations.

"office" means

(a) the office of the Chief Electoral Officer;

(b) the office of the Child and Youth Advocate;

(c) the office of the Yukon Human Rights Commission;

(d) the office of the Information and Privacy Commissioner; and

(d) the office of the Ombudsman.

"Ombudsman" means the Ombudsman appointed under the *Ombudsman Act*.

"public service" means departments, government bodies and offices.

"reprisal" means any of the following measures taken against an employee because the employee has, in good faith, sought advice about making a disclosure, made a disclosure, or co-operated in an investigation under this Act:

- (a) a disciplinary measure;
- (b) a demotion;
- (c) termination of employment;
- (d) any measure that adversely affects his or her employment or working conditions;
- (e) a threat to take any of the measures referred to in clauses (a) to (d).

"wrongdoing" means a wrongdoing referred to in section 3.

PART 2

DISCLOSURES OF WRONGDOING

WRONGDOINGS

Wrongdoings to which this Act applies

3 This Act applies to the following wrongdoings in or relating to the public service:

- (a) an act or omission constituting an offence under an Act of the Yukon Legislative Assembly or the Parliament of Canada, or a regulation made under an Act;
- (b) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of an employee;
- (c) gross mismanagement, including of public funds or a public asset;
- (d) knowingly directing or counseling a person to commit a wrongdoing described in clauses (a) to (c).

Discipline for wrongdoing

4 An employee who commits a wrongdoing is subject to appropriate disciplinary action, including termination of employment, in addition to and apart from any penalty provided for by law.

PROCEDURES

Procedures to manage disclosures

5(1) Every chief executive must establish procedures to manage disclosures by employees of the department, government body or office for which the chief executive is responsible.

5(2) The procedures established under subsection (1) must include procedures

- (a) for receiving and reviewing disclosures, including setting time periods for action;
- (b) for investigating disclosures in accordance with the principles of procedural fairness and natural justice;
- (c) respecting the confidentiality of information collected in relation to disclosures and investigations;
- (d) for protecting the identity of persons involved in the disclosure process, subject to any other Act and to the principles of procedural fairness and natural justice;
- (e) for reporting the outcomes of investigations; and
- (f) respecting any other matter specified in the regulations.

Designated officer

6 Every chief executive must designate a senior official to be the designated officer for the purposes of this Act, to receive and deal with disclosures by employees in the department, government body or office for which the chief executive is responsible.

Chief executive to be designated officer

7(1) Sections 5 and 6 do not apply to a chief executive who determines in consultation with the Ombudsman that it is not practical to apply those sections given the size of the department, government body or office for which the chief executive is responsible.

7(2) If no designation is made under section 6, the chief executive is the designated officer for the purposes of this Act.

Information about Act to be communicated

8 The chief executive must ensure that information about this Act and the disclosure procedures is widely communicated to the employees of the department, government body or office for which the chief executive is responsible.

MAKING A DISCLOSURE

Request for advice

9(1) An employee who is considering making a disclosure may request advice from the designated officer or the Ombudsman.

9(2) The designated officer or Ombudsman may require the request for advice to be in writing.

Disclosure by employee

10 If an employee reasonably believes that he or she has information that could show that a wrongdoing has been committed or is about to be committed, the employee may make a disclosure to

- (a) the employee's supervisor;
- (b) the employee's designated officer; or
- (c) the Ombudsman.

Disclosure to Human Rights Commission

11 If an employee of the office of the Ombudsman is seeking advice or making a disclosure regarding that office, the advice may be sought from, or the disclosure made to, the Yukon Human Rights Commission. If a disclosure is made, the Yukon Human Rights Commission must carry out the responsibilities of the Ombudsman under this Act in relation to that disclosure.

Content of disclosure

12 A disclosure made under section 10 or 11 must be in writing and must include the following information, if known:

- (a) a description of the wrongdoing;
- (b) the name of the person or persons alleged to
 - (i) have committed the wrongdoing, or
 - (ii) be about to commit the wrongdoing;
- (c) the date of the wrongdoing;
- (d) whether the wrongdoing has already been disclosed and a response received.

Ombudsman to facilitate resolution

13 When an employee makes a disclosure to the Ombudsman, the Ombudsman may take any steps he or she considers appropriate to help resolve the matter within the department, government body or office.

MAKING A DISCLOSURE ABOUT AN URGENT MATTER

Public disclosure if situation is urgent

14(1) If an employee reasonably believes that a matter constitutes an imminent risk of a substantial and specific danger to the life, health or safety of persons, or to the environment, such that there is insufficient time to make a disclosure under section 10, the employee may make a disclosure to the public

(a) if the employee has first made the disclosure to an appropriate law enforcement agency or, in the case of a health-related matter, the chief medical officer of health; and

(b) subject to any direction that the agency or officer considers necessary in the public interest.

14(2) Immediately after a disclosure is made under subsection (1), the employee must also make a disclosure about the matter to his or her supervisor or designated officer.

TYPES OF INFORMATION THAT CAN BE DISCLOSED

Disclosure despite other Acts

15 Subject to section 16, an employee may make a disclosure under this Act, even if a provision in another Act or regulation prohibits or restricts disclosure of the information.

Disclosure restrictions

16(1) Nothing in this Act authorizes the disclosure of

(a) information described in subsection 15(1) of the *Access to Information and Protection of Privacy Act* (Cabinet confidences), except in circumstances mentioned in subsection 15(2) of that Act;

(b) information that is protected by solicitor-client privilege;

(c) in the case of a disclosure to the public under subsection 14(1), information that is subject to any restriction created by or under an Act of the Yukon Legislative Assembly or the Parliament of Canada, or a regulation made under an Act.

16(2) If the disclosure involves personal information or confidential information, the employee must take reasonable precautions to ensure that no more information is disclosed than is necessary to make the disclosure.

Obligations to report

17 Nothing in this Act relating to the making of a disclosure is to be construed as affecting an employee's obligation under any other Act or regulation to disclose, report or otherwise give notice of any matter.

ANNUAL REPORT ABOUT DISCLOSURES

Report about disclosures

18(1) Each year, a chief executive must prepare a report on any disclosures of wrongdoing that have been made to a supervisor or designated officer of the department, government body or office for which the chief executive is responsible.

18(2) The report must include the following information:

- (a) the number of disclosures received and the number acted on and not acted on;
- (b) the number of investigations commenced as a result of a disclosure;
- (c) in the case of an investigation that results in a finding of wrongdoing, a description of the wrongdoing and any recommendations or corrective actions taken in relation to the wrongdoing or the reasons why no corrective action was taken.

18(3) The report must be included in the annual report of the department, government body or office if an annual report is made publicly available. Otherwise, the chief executive must make the report available to the public on request.

PART 3

INVESTIGATIONS BY THE OMBUDSMAN

Purpose of investigation

19 The purpose of an investigation into a disclosure of wrongdoing is to bring the wrongdoing to the attention of the appropriate department, government body or office, and to recommend corrective measures that should be taken.

Investigation by Ombudsman

20(1) The Ombudsman is responsible for investigating disclosures that he or she receives under this Act.

20(2) An investigation is to be conducted as informally and expeditiously as possible.

20(3) The Ombudsman must ensure that the right to procedural fairness and natural justice of all persons involved in an investigation is respected, including persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings.

Ombudsman does not investigate

21(1) The Ombudsman is not required to investigate a disclosure — and the Ombudsman may cease an investigation — if he or she is of the opinion that

- (a) the subject matter of the disclosure could more appropriately be dealt with, initially or completely, according to a procedure provided for under another Act;
- (b) the disclosure is frivolous or vexatious, or has not been made in good faith or does not deal with a sufficiently serious subject matter;
- (c) so much time has elapsed between the date when the subject matter of the disclosure arose and the date when the disclosure was made that investigating it would not serve a useful purpose;
- (d) the disclosure relates to a matter that results from a balanced and informed decision-making process on a public policy or operational issue;
- (e) the disclosure does not provide adequate particulars about the wrongdoing as required by section 12;
- (f) the disclosure relates to a matter that could more appropriately be dealt with according to the procedures under a collective agreement or employment agreement;
- (g) there is another valid reason for not investigating the disclosure.

21(2) If the Ombudsman believes that a disclosure made to the Ombudsman would be dealt with more appropriately by the Yukon Human Rights Commission, the Ombudsman may refer the matter to the Yukon Human Rights Commission to be dealt with in accordance with the *Yukon Human Rights Act*.

21(3) If a matter is referred to the Yukon Human Rights Commission under subsection (2), the reprisal protections set out in Part 4 of this Act apply to the employee or former employee who made the disclosure to the Ombudsman.

Conducting an investigation

22 The Ombudsman and persons employed under the Ombudsman have the powers and protections provided for in the *Ombudsman Act* when conducting an investigation of a disclosure under this Act. The relevant sections of that Act apply to the conduct of such an investigation, with necessary changes.

Investigating other wrongdoings

23 If, during an investigation, the Ombudsman has reason to believe that another wrongdoing has been committed, the Ombudsman may investigate that wrongdoing in accordance with this Part.

Ombudsman's report re investigation

24(1) Upon completing an investigation, the Ombudsman must prepare a report containing his or her findings and any recommendations about the disclosure and the wrongdoing.

24(2) The Ombudsman must give a copy of the report to the employee and the chief executive of the appropriate department, government body or office.

24(3) When the matter being investigated involves the chief executive, the Ombudsman must also give a copy of the report,

(a) in the case of a department, to the minister responsible;

(b) in the case of a government body, to the board of directors and the minister responsible;
or

(c) in the case of an office, to the Speaker of the Legislative Assembly.

Department to notify Ombudsman

25(1) When making recommendations, the Ombudsman may request the department, government body or office to notify him or her, within a specified time, of the steps it has taken or proposes to take to give effect to the recommendations.

25(2) If the Ombudsman believes that the department, government body or office has not appropriately followed up on his or her recommendations, or did not co-operate in the Ombudsman's investigation under this Act, the Ombudsman may make a report on the matter

(a) in the case of a department, to the minister responsible;

(b) in the case of a government body, to the board of directors and the minister responsible;
or

(c) in the case of an office, to the Speaker of the Legislative Assembly.

Annual report

26(1) The Ombudsman must make an annual report to the Legislative Assembly on the exercise and performance of his or her functions and duties under this Act, setting out

(a) the number of general inquiries relating to this Act;

(b) the number of disclosures received and the number acted on and not acted on;

(c) the number of investigations commenced under this Act;

(d) the number of recommendations the Ombudsman has made and whether the department, government body or office has complied with the recommendations;

(e) whether, in the opinion of the Ombudsman, there are any systemic problems that give rise to wrongdoings; and

(f) any recommendations for improvement that the Ombudsman considers appropriate.

26(2) The report must be given to the Speaker, who must table a copy of it in the Yukon Legislative Assembly within 15 days after receiving it if the Assembly is sitting or, if it is not, within 15 days after the next sitting begins.

26(3) Where it is in the public interest to do so, the Ombudsman may publish a special report relating to any matter within the scope of the Ombudsman's responsibilities under this Act, including a report referring to and commenting on any particular matter investigated by the Ombudsman.

PART 4

PROTECTION FROM REPRISAL

Protection of employee from reprisal

27 No person shall take a reprisal against an employee or direct that one be taken against an employee because the employee has, in good faith,

(a) sought advice about making a disclosure from his or her supervisor, designated officer or chief executive, or the Ombudsman;

(b) made a disclosure; or

(c) co-operated in an investigation under this Act.

Complaint to Public Service Labour Relations Board

28(1) An employee or former employee within the meaning of the *Public Service Act* who alleges that a reprisal has been taken against him or her may file a written complaint with the Public Service Labour Relations Board (board).

28(2) Sections 77 – 85 of the *Public Service Labour Relations Act* (adjudication of grievances) apply to a complaint filed under subsection (1), with necessary changes.

28(3) If the board determines that a reprisal has been taken against the complainant contrary to section 27, the board may order one or more of the following measures to be taken:

(a) permit the complainant to return to his or her duties;

(b) reinstate the complainant or pay damages to the complainant, if the board considers that the trust relationship between the parties cannot be restored;

(c) pay compensation to the complainant in an amount not greater than the remuneration that the board considers would, but for the reprisal, have been paid to the complainant;

(d) pay an amount to the complainant equal to any expenses and any other financial losses that the complainant has incurred as a direct result of the reprisal;

(e) cease an activity that constitutes the reprisal;

- (f) rectify a situation resulting from the reprisal;
- (g) do or refrain from doing anything in order to remedy any consequence of the reprisal.

28(4) The relevant sections of the *Public Service Labour Relations Act* apply to any proceeding before the Public Service Labour Relations Board under this Act.

Complaint to Yukon Teachers Labour Relations Board

29(1) An employee or former employee within the meaning of the *Education Labour Relations Act* who alleges that a reprisal has been taken against him or her may file a written complaint with the Yukon Teachers Labour Relations Board (board).

29(2) Sections 63 – 76 of the *Education Labour Relations Act* (adjudication of grievances) apply to a complaint filed under subsection (1), with necessary changes.

29(3) If the board determines that a reprisal has been taken against the complainant contrary to section 27, the board may order one or more of the following measures to be taken:

- (a) permit the complainant to return to his or her duties;
- (b) reinstate the complainant or pay damages to the complainant, if the board considers that the trust relationship between the parties cannot be restored;
- (c) pay compensation to the complainant in an amount not greater than the remuneration that the board considers would, but for the reprisal, have been paid to the complainant;
- (d) pay an amount to the complainant equal to any expenses and any other financial losses that the complainant has incurred as a direct result of the reprisal;
- (e) cease an activity that constitutes the reprisal;
- (f) rectify a situation resulting from the reprisal;
- (g) do or refrain from doing anything in order to remedy any consequence of the reprisal.

29(4) The relevant sections of the *Education Labour Relations Act* apply to any proceeding before the Yukon Teachers Labour Relations Board under this Act.

PART 5

GENERAL PROVISIONS

INFORMATION ABOUT WRONGDOING PROVIDED BY PERSONS OUTSIDE THE PUBLIC SERVICE

Disclosure of wrongdoing by others

30(1) If a person who is not an employee reasonably believes that he or she has information that could show that a wrongdoing has been committed or is about to be committed, the person may provide that information to the Ombudsman.

30(2) Information provided to the Ombudsman under subsection (1) must be in writing and must include the following information, if known:

- (a) a description of the wrongdoing;
- (b) the name of the person or persons alleged to
 - (i) have committed the wrongdoing, or
 - (ii) be about to commit the wrongdoing;
- (c) the date of the wrongdoing;
- (d) whether the information has already been provided to the department, government body or office concerned and a response received.

30(3) Upon receiving information under this section, the Ombudsman may investigate the wrongdoing. In that event, Part 3 applies, other than subsection 21(3) (protection from reprisal).

30(4) The Ombudsman must give a copy of the report of an investigation under this section to the person who provided the information about the wrongdoing.

Protection for private sector employee who provides information

31(1) No employer of a private sector employee shall take any of the measures listed in subsection (2) against an employee by reason only that

- (a) the employee has, in good faith, provided information to the Ombudsman about an alleged wrongdoing; or
- (b) the employer believes that the employee will do so.

31(2) The measures prohibited by subsection (1) are

- (a) a disciplinary measure;
- (b) a demotion;
- (c) termination of employment;
- (d) any measure that adversely affects the employee's employment or working conditions;
and

(e) a threat to take any of the measures referred to in clauses (a) to (d).

31(3) Nothing in this section affects any right of a private sector employee either at law or under a collective agreement or employment contract.

31(4) In this section, "**private sector employee**" means an employee or officer other than an employee or officer of a department, government body or office.

Protection for person contracting with government

32 No person acting or purporting to act on behalf of the government, a government body or an office shall

(a) terminate a contract;

(b) withhold a payment that is due and payable under a contract; or

(c) refuse to enter into a subsequent contract;

by reason only that a party to the contract or a person employed by a party to the contract has, in good faith, provided information to the Ombudsman about an alleged wrongdoing in or relating to the public service.

GENERAL OFFENCES

False or misleading statement

33(1) No person shall — in seeking advice about making a disclosure, in making a disclosure, or during an investigation — knowingly make a false or misleading statement, orally or in writing, to a supervisor, designated officer or chief executive, or the Ombudsman, or to a person acting on behalf of or under the direction of any of them.

Obstruction in performance of duties

33(2) No person shall willfully obstruct a supervisor, designated officer or chief executive, or the Ombudsman, or any person acting on behalf of or under the direction of any of them, in the performance of a duty under this Act.

Destruction, falsification or concealment of documents or things

33(3) No person shall, knowing that a document or thing is likely to be relevant to an investigation under this Act,

(a) destroy, mutilate or alter the document or thing;

(b) falsify the document or make a false document;

(c) conceal the document or thing; or

(d) direct, counsel or cause, in any manner, a person to do anything mentioned in clauses (a) to (c).

Offence and penalty

33(4) A person who contravenes this section or section 27, 31 or 32 is guilty of an offence and is liable on summary conviction to a fine of not more than \$10,000.

Commencement of prosecution

33(5) A prosecution under this Act may not be commenced later than two years after the day the alleged offence was committed.

LEGAL ADVICE

Arranging legal advice

34 If the designated officer or Ombudsman is of the opinion that it is necessary to further the purposes of this Act, he or she may, subject to the regulations, arrange for legal advice to be provided to employees and others involved in any process or proceeding under this Act.

LIABILITY PROTECTION

Protection from liability

35 No action or proceeding may be brought against a supervisor, designated officer or chief executive, or the Ombudsman, or a person acting on behalf of or under the direction of any of them, for anything done or not done, or for any neglect,

(a) in the performance or intended performance of a duty under this Act; or

(b) in the exercise or intended exercise of a power under this Act;

unless the person was acting in bad faith.

REGULATIONS

Regulations

36 The Commissioner in Executive Council may make regulations

(a) designating a public sector body as a government body for the purposes of this Act;

(b) designating an entity that receives all or a substantial part of its operating funding from the government as a government body for the purposes of this Act;

(c) for the purpose of section 5, respecting the procedures to be followed in managing and investigating disclosures and reporting the outcome of investigations, including setting time periods for action;

(d) exempting Acts or regulations from the application of section 15 where the exemption is in the public interest;

(e) respecting the provision of legal advice under section 34, including determining the circumstances under which legal advice may be provided and the amounts that may be paid;

(f) defining any word or phrase used but not defined in this Act;

(g) respecting any other matter that the Commissioner in Council considers necessary or advisable to carry out the purposes of this Act.

MISCELLANEOUS PROVISIONS

Coming into force

37 Subject to subsection (2), this Act comes into force on a day to be fixed by proclamation.