



Coming Forward When Something is Wrong

Why is it so hard to do the right thing?

Association of Certified Fraud Examiners
March 6, 2018 – Edmonton, AB

Tell us.
You are protected.

Office of the Public Sector
Integrity Commissioner
of Canada



Commissariat à l'intégrité
du secteur public
du Canada

Federal Whistleblowing Regime

- *Public Servants Disclosure Protection Act (2007)*: disclosure and reprisal regime for the federal public sector.
- Approximately 400,000 public servants across the country.
- Disclosure of wrongdoing is defined broadly and can be made internally or externally to the Public Sector Integrity Commissioner, an independent Agent of Parliament.
- Reprisal is linked to a disclosure: actions taken against you “because” you made a disclosure or “because” you cooperated in an investigation.
- The disclosure does not have to result in a finding of wrongdoing in order for the discloser to be protected.

Protection - Federal Whistleblowing Regime

Protection - What does it mean?

- Confidentiality is protected “to the extent possible”
 - The identity of the discloser is never revealed to anyone in the course of dealing with or investigating a disclosure.
- “Reasonable grounds to believe” a reprisal took place = referral to a Tribunal of judges who make a final determination and have disciplinary and remedial power, including:
 - reinstatement
 - payment of lost wages
 - \$10,000 for pain and suffering
- Committing reprisal is a criminal offence.

Reprisals - Federal Whistleblowing Regime

- 128 disclosure and 75 reprisal investigations launched (as of January 31/18).
- 14 reprisal cases have settled by conciliation before a referral to the Tribunal (during our investigation).
- 8 cases have been referred to the Tribunal after investigation (6 have settled before a Tribunal hearing: 3 by mediation offered by the Tribunal, 3 by the parties themselves).
- 1 formal Tribunal finding to date / 1 currently awaiting a hearing.

Focus Group Tests

- The Office of the Public Sector Integrity Commissioner of Canada (PSIC) conducted two focus group tests: 2011 and 2015.
- 10 groups in total (two in each city):
 - 2011
 - Halifax, Ottawa, Toronto, Montreal, Vancouver.
 - 2015
 - Ottawa, Winnipeg, Regina, Quebec City and Moncton
- Executives (EX-01 and higher) and non-executives.
- Purpose: to explore the culture of whistleblowing and gain understanding about the fear of reprisal.

Focus Group Tests (cont'd)

- Potential reprisal was the most commonly identified issue that comes to mind when participants thought about whistleblowing.
- Ostracism, “blacklisting”, re-assignment or transfer, harassment, poor performance evaluation, micro-management are examples of what reprisals may look like.
- Other issues:
 - negative repercussions on the workplace (a consequence of whistleblowing rather than a direct and deliberate retaliation)
 - clarity around procedures and processes
 - extent of evidence needed to prove wrongdoing
 - confidentiality

Focus Group Tests (cont'd)

- While most described a positive attitude toward whistleblowing (associations with courage, professionalism, integrity), there were also nuanced responses, in which negative associations were evident, including:
 - concerns about supporting whistleblowers;
 - more buy-in needed from upper management; and
 - clearer understanding of processes and risks

*fear of reprisal + concern about anything being done =
powerful disincentive*

Focus Group Tests (cont'd)

Reduce the Fear → Increase Reporting (theory)

- Requires a “cultural change”:
 - buy-in from management = zero-tolerance policy regarding wrongdoing and reprisal;
 - greater interaction with employees, including guidance and training on issues related to reporting wrongdoing; and
 - better recruitment of senior managers.
- Agreement that the fear of reprisal cannot be eliminated completely but the goal is to reduce it to the point where it does not prevent whistleblowing.

Focus Group Tests (cont'd)

Notable developments between 2011 and 2015 focus group results:

- Perceptions about whistleblowing were more positive, including more awareness and openness to discussing it (although skepticism remains).
- Managers were unanimous in saying they had a responsibility to lead by example by reporting wrongdoing when they saw it, in addition to providing information and support to employees who want to know about disclosing or who want to disclose to them.

*Focus groups provide qualitative data, not quantitative. As such, the results provide an indication of participants' views and cannot be generalized to the full population of public servants.

Research Paper - 2017

- “The Sound of Silence: Whistleblowing and the Fear of Reprisal” by Craig Dowden, PhD
- Commissioned by PSIC to explore the key disincentive to disclosing wrongdoing and to make recommendations to diminish the fear of reprisal within federal public sector.
- “The fact is that most of the biggest catastrophes that we have witnessed rarely come from information that is secret or hidden. It comes from information that is freely available...but what we are wilfully blind to because we cannot handle the conflict that it provokes” – *Margaret Heffernan (TED Talk – Dare to Disagree)*.

The Sound of Silence

- Public Service Employee Survey (2012): 54% of respondents said they did not speak up when they encountered inappropriate behaviours because they felt their disclosure would not make a difference; 45% said they remained silent because of fear of reprisal.
- Consistent with the qualitative information gathered by the focus group tests and with research outside the public sector.

The Sound of Silence (cont'd)

- “If we start with the premise that whistleblowing is the right thing to do, my job is to figure out why it is so hard for people to do the right thing”.
- Cultural/socialized roots? “Rat”, “Tattletale”, “Mole”, “Snitch”
- UK research by Public Concern at Work found that the number of employees claiming to be mistreated as a result of speaking up increased tenfold between 1999-2009.

The Sound of Silence (cont'd)

- Value of blowing the whistle: Australian research concluded it was the best method to uncover wrongdoing – more effective than all other strategies, including internal audits.
- Fairness vs. loyalty: whistleblowing is the ultimate act of justice, serving to right a wrong vs. the ultimate breach and a grave betrayal (2015 study).
- Competing motivations to come forward and to remain silent.

The Sound of Silence (cont'd)

- “Bystander effect”:
 - People are less likely to come forward when surrounded by other people, as they presume someone else will do it.
 - Someone is less likely to step in if others appear to think nothing is wrong – collective silence interpreted as acceptance.
 - Embarrassment or shame associated with intervening unnecessarily.
- If only one bystander is present, they bear the entire responsibility to respond.
- More people = diluted responsibility

The Sound of Silence (cont'd)

Higher Levels of Reporting when the individual:

- is more experienced
- is a high performer
- is more of an extrovert
- has an 'internal locus of control'

The Sound of Silence - Recommendations

1. Increase psychological safety (Dr. Amy Edmondson)

- Frame work as learning problems vs. execution problems
 - When work is framed as an executional problem, it can lead to silence within teams because it may seem their input is neither valued nor required.
- Lead with humility.
- Model curiosity by asking questions.

The Sound of Silence – Recommendations (cont'd)

2. Promote Clarity and Communication

Evidence shows clarity re: channels/process encourages reporting and discourages going outside the organization:

- Give as much information as possible about criteria for appropriate cases as well as information about process.
- Leverage experience and incorporate information in “onboarding”.

The Sound of Silence – Recommendations (cont'd)

3. Focus on Fairness

- Research suggests focusing on fairness rather than loyalty to a group/organization = increased reporting.
- Public service example: focus on the “greater good”, the “larger loyalty”.
- Negative associations with not coming forward (perception of others).
- Supportive leaders can sometimes = low reporting – employees want to protect leader; not risk a change in style or leadership.

The Sound of Silence – Recommendations (cont'd)

4. Incentives

- “There is as yet no empirical evidence of incentives leading to an increase in the number or quality of disclosures received by the regulators” – *Financial Incentives for Whistleblowers (Bank of England)*.
- 2008 study – paying blood donors had either a null effect or actually decreased interest in donation.

The Sound of Silence – Recommendations (cont'd)

5. Hold People Accountable

- “Effective treatment includes corrective steps to remedy the consequences of reported wrongdoing and adequate punishment for culprits, regardless of their job title and their relevance for business success. The entire organization is watching....”
- “Internal justice, rewards and punishments provide a set of criteria for employees to measure just how ethical their organization is and act accordingly”.

- M. Kleinhempel - Effective Executive (July 2011)

The Sound of Silence – Recommendations (cont'd)

6. Walk the Talk

- Active solicitation of input (Burris, Detert & Harrison, Filene Institute study – 2010).
- Open-door policy puts the emphasis on the employee to take action; pro-active engagement puts the emphasis on the manager.
- “Creating a safe environment is not an annual event. It is lived and promoted every single day”.

PROPOSED LEGISLATIVE AMENDMENTS

Supporting Whistleblowing

- Broaden the definition of “supervisor”
- **Provide authority to request and use evidence obtained outside the public sector**
- **Remove the “good faith” requirement in making a disclosure of wrongdoing**
- Expand authority under section 33 of the Act
- Clarify confidentiality provisions to include any records created for the purpose of making a disclosure under the Act

PROPOSED LEGISLATIVE AMENDMENTS (cont'd)

Strengthening Reprisal Protection

- Clarify confidentiality provisions for reprisal investigations
- **Establish a reverse onus at the Tribunal (burden of proof)**
- **Provide the Tribunal with the authority to award interim remedies**
- **Increase the maximum amount awarded for pain and suffering**
- **Provide the Tribunal with the authority to award legal fees to the complainant**
- Expand the definition of “reprisal”
- Enable former public servants to request legal advice
- Clarify the concept of employer respondent

PROPOSED LEGISLATIVE AMENDMENTS (cont'd)

Enhancing Flexibility

- **Provide the President of the Treasury Board with the authority to increase the maximum monetary limit for legal advice**
- Provide authority for the Commissioner to delegate decision-making power to an external ad hoc Commissioner in appropriate circumstances
- Provide the full authorities of the Commissioner to the Auditor General of Canada when investigating PSIC

Conclusion /Questions

- What does “cultural change” mean and how is it achieved? Can it be changed from within?
- Can a single program or initiative make a difference? How do you define your role in a crowded landscape of oversight bodies?
- How do you build confidence in the face of fear and cynicism?
- How do you measure success? The number of founded cases? of disclosures? of investigations?

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