

Government Response to Ombudsperson “Misfire” Report Recommendation 23
updated: April 26, 2018

In his *Misfire* Report, the Ombudsperson expressed concern that the decision-making structure for reporting a non-emergency matter involving employee misconduct to the police was inadequate. The reporting of allegations to the police, and the public announcement of such reporting, associated with the Ministry of Health terminations had serious and negative impacts on numerous individuals. As the report outlines, these individuals feared they were the subject of a police investigation, became the subject of significant rumour and innuendo in their workplaces and communities, and worried about the impact of a potential police investigation on their families.

In addition to recommending government develop a policy to ensure it does not publically announce that the conduct of a public servant has been reported to the police, except in extraordinary circumstances (Recommendation 29), the Ombudsperson recommended that his concern regarding police referrals be addressed through the development of a procedure regarding reporting employee misconduct to the police in non-emergency situations. In this recommendation, the Ombudsperson noted that a balance must be struck between avoiding the creation of an overly high threshold for reporting (such that appropriate cases would not be reported), and building in safeguards to avoid unnecessary, excessive and potentially damaging reporting. The Ombudsperson also noted the requirement to ensure that authorities are provided with evidence that would be admissible at a potential future criminal trial, in cases where charges are laid. These concerns are the focus of Recommendation 23, which reads as follows:

By March 31, 2018, the Ministry of Justice develop:

- a. for approval by the Head of the Public Service, a new procedure regarding reporting employee misconduct in non-emergency situations to the police,*
- b. and implement training for public service investigators who, as part of their duties, report potential crimes to the police. This training should focus on:*
 - i. the factors to consider in determining whether to report a potential crime to the police, and*
 - ii. what information is appropriately shared with the police, particularly in the absence of a legal requirement to do so.*

This document outlines government’s response to the above recommendations.

This document does not address investigation procedures generally, only the issue of when and how to report potential criminal misconduct by employees to police in non-emergency circumstances, whether these arise from allegations or complaints, or during the course of a broader investigation.

Circumstances when government may comment publically on personnel matters or when a matter has been referred to the police have been developed separately and are available [online](#). They should be reviewed by anyone who is using these procedures.

This document was developed in consultation with representatives from four investigations Units (IU) responsible for conducting internal investigations within government:

- The Public Service Agency (PSA);

- The Investigations Unit, Corporate Information and Records Management Office (CIRMO);
- The Security Investigation and Forensic Unit, Office of the Chief Information Officer (OCIO); and
- The Investigation and Forensic Unit Branch, Office of the Comptroller General (OCG).

Part A of this document addresses Recommendation 23(a), whereas Part B addresses Recommendation 23(b).

In developing these procedures, government has considered the balance referred to by the Ombudsperson between avoiding an overly high threshold to reporting employee misconduct to the police, and developing safeguards to prevent unnecessary or unsupported reporting. Government is mindful of the serious harm that a premature, unsupported or unnecessary report to the police can cause individuals, their families, and the public service.

Part A: Procedure for reporting employee misconduct in non-emergency situations to the police

1. Application and Definition of “Non-Emergency”

This procedure addresses the reporting, by government, of alleged employee misconduct in non-emergency situations to the police.

The *Standards of Conduct for Public Service Employees* requires employees to report any non-emergency situation, involving potential misconduct by an employee, that they believe contravenes the law, misuses public funds or assets, or represents a danger to public health and safety or a significant danger to the environment.

A “non-emergency” is a situation where a failure to report an allegation of employee misconduct to the police would NOT:

- Negatively impact the safety of the public or government employees;
- Provide an opportunity for the destruction of evidence that can only be obtained by the police and which, if secured, could support a criminal investigation; or
- Allow a matter that is criminal in nature to continue.

2. Responsibilities of Employees (other than Investigators)

An employee who believes they have information of employee misconduct, or misuse of public funds or assets, that may constitute criminal activity, should not contact the police unless it is an emergency. In a non-emergency situation that may involve criminal activity, the employee must seek advice from the appropriate investigation office within the provincial government, as set out in the table below.

<i>Type</i>	<i>Employee responsibilities</i>	<i>Responsible IU</i>
Information incidents, including privacy breaches .	1. Notify your supervisor 2. Call 250-387-7000 or 1-866-660-0811 and select option 3	CIRMO
Financial improprieties.	1. Notify your supervisor 2. Contact the Office of the Comptroller General	OCG
Technology or cybersecurity issue.	1. Notify your supervisor 2. Call 250-387-7000 or 1-866-660-0811 and select option 3	OCIO
All other alleged misconduct, or where it is unclear who to report to.	1. Notify your supervisor 2. Contact the Public Service Agency (250-952-6000)	PSA

If the alleged misconduct may fall under the responsibility of more than one investigative unit, report the incident to the PSA as per the bottom row in the table above.

If an employee is uncertain whether something constitutes an emergency, the employee should ask his or her supervisor.

3. Responsibilities of Investigators

Where an investigator becomes aware of alleged employee misconduct that may constitute a criminal or other offense in a non-emergency situation, they must notify their IU Branch Head (the Director or Executive Director, as the case may be) before taking any further action in relation to the matter.

4. Responsibilities of the Investigation Unit(s)

- i) Determine who has primary responsibility for making a recommendation regarding a report to the police

Once an IU Branch Head becomes aware of alleged employee misconduct that may constitute a criminal or other offence through either of the methods above, he or she will arrange for an investigator to be assigned. If the alleged misconduct falls under the responsibility of a single IU, that IU will appoint an investigator to have primary responsibility to make the initial recommendation regarding a potential report to the police.

If the alleged misconduct falls under the responsibility of multiple IUs, the units will select one unit to take the lead in determining whether a non-emergent matter should be reported to the police. This determination will be made in accordance with the Public Service's *Investigation Protocol* that applies to multi-agency investigations. That unit will then appoint an investigator to have primarily responsibility to make an initial recommendation regarding a potential report to the police.

The investigator appointed under this procedure will usually be, but is not required to be, the lead investigator assigned to investigate the employee misconduct. Where the investigator appointed is not the lead investigator, the two will regularly provide each other with status updates, as appropriate..

- ii) Determine that the matter is within the scope of this procedure

The investigator appointed above must first confirm that the matter at issue is in fact, a non-emergency, and is therefore within scope.

If the investigator believes the matter qualifies as an emergency, or is otherwise out of scope, the investigator must consult his or her IU Branch Head for further instructions or direction.

- iii) Determine whether a recommendation to report to the police is appropriate

- a) *At the outset of an investigation*

A recommendation to report to the police can be made at any stage of an investigation, including at the initial stages of an investigation. A recommendation to report to the police at the initial stages of the investigation is designed to seek information to assist with a determination of whether an internal

investigation should be conducted at this point, or be held in abeyance pending a possible police investigation. It may also assist to ensure authorities are provided with evidence that would be admissible at a potential future criminal trial, in cases where charges may be laid.

When assessing whether to recommend that a report to the police be made at a very early stage, the investigator should consider the factors set out in section (b), below, to the extent relevant information is available at the early stage. In addition to those factors, the investigator should consider factors such as:

- 1) whether proceeding with an investigation at this time will potentially jeopardize an on-going police investigation; and
- 2) Are there questions about the potential admissibility of evidence gathered during the investigation at a potential future criminal trial (should charges be laid).

An investigator who believes one of the above factors may be relevant should contact the Legal Services Branch for advice before proceeding with either the recommendation to report or with the investigation.

b) At any other stage of an investigation

The investigator designated by his or her IU will gather relevant information needed to prepare an initial recommendation – including conducting the necessary enquiries, interviews and collecting or reviewing documentation.

The investigator should seek advice from the Legal Services Branch as required throughout the process.

While it is not possible to set out an exhaustive list of factors an investigator should consider when making his or her recommendation, relevant factors may include:

- a) the potential harm, if any, to that may result from reporting the matter to the police at this time:
 - i. to the employee(s) involved in the alleged misconduct;
 - ii. the public service;
 - iii. to the potential victims, if any; and
 - iv. to the public interest.
- b) the potential harm, if any, in failing to report the matter to the police to:
 - i. the public interest;
 - ii. the public service;
 - iii. the potential victims, if any; and
 - iv. government.
- c) whether the alleged misconduct may have been authorized by supervisors or legislation;
- d) whether there is credible evidence indicating a criminal offence has likely been committed (which may include consideration of whether there is evidence relating to most or all essential elements of the offence); and
- e) whether there is potential evidence that the IU cannot obtain, but police may be able to (eg. through search warrants).

iv) Content of the Recommendation

The investigator should set out his or her recommendation in writing and discuss the recommendation with the IU Branch Head. The written recommendation should set out the recommendation and supportive reasoning, the factors considered, and the legal advice received. A copy of the actual legal advice received should be attached to the recommendation.

5. The Decision Making Process

i) If the Recommendation is Not to Report to the Police

If the investigator and an IU Branch Head agree the matter should not be reported to the police¹, the decision should be documented and briefing materials should be provided to the IU's ADM and DM, who will in turn advise the reporting ministry ADM and/or DM.

If other IUs are involved in investigating the employee misconduct, they must be advised of the decision not to report.

If the IU Branch Head does not agree with the investigator's recommendation, the IU Branch Head should prepare an accompanying document setting out why he or she disagrees with the recommendation. Both the recommendation and the accompanying document should be presented to the Government Decision Makers (defined below).

ii) If the Recommendation is to Report to the Police

If the investigator's recommendation is to report to the police, the investigator and his or her IU Branch Head should prepare briefing materials for the Government Decision Makers. If the IU Branch Head disagrees with the investigator's recommendation, the IU Branch Head should prepare an accompanying document setting out why he or she disagrees with the recommendation. Both the recommendation and accompanying document should be included in the briefing materials prepared for the Government Decision Makers.

iii) Providing Information to the Government Decision Makers

The Government Decision Makers are the Deputy Minister responsible for the IU, and the Deputy Minister for the ministry where the employee misconduct is alleged to have occurred.²

The Government Decision Makers should both be provided with briefing materials. The IU Branch Head is responsible for ensuring briefing materials are prepared and provided to the Government Decision Makers and is responsible for ensuring legal advice has been received.

iv) Role of the Government Decision Makers

Upon receiving the briefing materials, including the recommendation and legal advice, the Government Decision Makers must provide direction to the IU Branch Head of the IU. These directions may include:

¹ This decision may be revisited if additional, relevant information comes to light.

² Where the lead or sole IU involved is CIRMO, the Deputy Minister of the IU will only have an advisory role, with the ultimate decision resting with the Deputy Minister of the Ministry where the employee misconduct is alleged to have occurred.

- a) A requirement to obtain additional information before a decision can be made;
- b) Report the matter to the police; or
- c) The matter does not warrant being reported to the police.

The Government Decision Makers may consult the Deputy Attorney General if they have any questions, concerns or require further legal advice prior to making their decision.

Once a decision has been made, the Government Decision Makers should document their decision, and the rationale for the decision. This documentation, along with the briefing materials, should be retained as part of the investigative file.

If the Government Decision Makers cannot agree on whether to report, they will consult the Deputy Attorney General. If no consensus is reached after that consultation, they will bring the matter to the Head of the Public Service for resolution.

Once the IU Branch Head of the IU has received the Government Decision Makers' direction, he or she must notify any other IUs involved in the matter, and the investigator, as appropriate.

6. Reporting Alleged Misconduct to the Police

i) Determining what information can be disclosed to the Police

When direction is provided to report a matter to the police, the IU Branch Head of the responsible IU should seek legal advice from the Legal Services Branch, including lawyers with expertise in disclosure under the *Freedom of Information and Protection of Privacy Act* regarding what information can be provided to the police.

Once the IU Branch Head has received legal advice that the proposed information can be released to the police, the IU Branch Head will report the alleged misconduct to the police. The IU Branch Head may consult a representative of the Ministry of Public Safety and Solicitor General, Policing and Security Branch to seek direction as to the appropriate police agency to notify.

Following the initial report, the IU Branch Head must document the response of the police in the investigation file, including any recommendations of the police regarding internal government investigations and/or of their need for further information (e.g. a final investigative report). The IU Branch Head will also act as the liaison between the police and government, and will provide additional support and information as may be requested by police. Additional information should only be provided to the police after consultation with the Legal Services Branch.

In addition, the IU Branch Head will provide appropriate updates to his or her ministry executive, who will advise the reporting ministry executive, as appropriate. However, the IU Branch Head will not share any information that could negatively impact either a potential police investigation or an ongoing investigation.

7. Government Comment at the End of an Investigation

In the vast majority of circumstances, government policy will prevent any internal or external communication on investigations that potentially could have involved a report of alleged employee

misconduct to the police. However, if the investigation is one where, due to exceptional circumstances, a potential referral to the police was communicated by government, government must consider, at the end of the investigation, whether it can communicate that the matter has now been closed.

The IU should consult with the Legal Services Branch to determine whether there is authority to disclose that the investigation has concluded, and if so, what information can be disclosed.

The IU should then prepare appropriate briefing materials for the Government Decision Makers, including the legal advice received from LSB. The Government Decision Makers will then decide what information will be disclosed regarding the investigation.

In making this decision, the Government Decision Makers will consider the following factors:

- a) the content and nature of any previous government communications on the matter;
- b) the impact on the privacy of impacted individuals of announcing the matter is now closed; and
- c) the amount of information that can be disclosed by law (e.g. is the information that can be disclosed so limited an announcement may fuel speculation instead of calm it).

8. Notification at the Conclusion of the Matter

When government is made aware that a matter referred to the police has been concluded, consideration should be given to whether individuals who were subject of a referral to police can be advised that the matter has concluded. In making this decision, the Government Decision Makers will consider the following factors:

- a) whether the information can be disclosed by law, including but not limited to *FOIPPA*;
- b) whether notification would interfere with a related investigation; and
- c) whether the individual is aware of the referral (i.e. would it be more distressing to the individual to learn this information or not).

Part B: Training regarding the for investigators and others to address Recommendation 23(b)

To address Misfire recommendation 23(b), training is available for investigators who, as part of their duties, may be involved in the reporting of potential crimes to the police.

In addition to investigators, the training will be directed at management representatives from the IUs and executives who, as part of their duties, may be involved in or responsible for determining whether allegations of employee misconduct should be reported to police.

The training materials cover the following components:

1. The factors to consider in determining whether to report a potential crime to the police;
2. What information is appropriate to share with the police; and
3. The procedural steps to be taken (as outlined in Part A of this document).

Training also includes a discussion the serious and negative impacts a premature, unnecessary or unsupported report to the police can have on the employees involved and their families.

Whereas the Ministry of Attorney General is responsible for recommendation 23, the training materials have been developed partnership between the Legal Services Branch (LSB) and the PSA.

LSB developed the training content covering:

- Potential ways an internal investigation can impact a police investigation, including a summary of relevant case law and problems associated with sharing information without authority; and
- What information can be disclosed to police regarding alleged misconduct, once a decision is made to report the matter.

To implement this training, a classroom training course for investigators has made available for registration. Initial sessions will be held:

- April 19, 2018
- April 30, 2018
- May 2, 2018
- May 3, 2018