



Findings of the Public Sector Integrity Commissioner in the Matter of an Investigation into a Disclosure of Wrongdoing

Canadian International Development Agency

Case Report

February 2013

Office of the Public Sector
Integrity Commissioner
of Canada



Commissariat à l'intégrité
du secteur public
du Canada

The generic masculine has been used in this report to protect the identity of those concerned.

The Report is available on our Web site at: www.psic-ispc.gc.ca

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The Honourable Noël A. Kinsella
Speaker of the Senate
The Senate
Ottawa, Ontario K1A 0A4

Dear Mr. Speaker:

I have the honour of presenting you with the Office of the Public Sector Integrity Commissioner of Canada's Case Report of Findings in the Matter of an Investigation into a Disclosure of Wrongdoing, which is to be laid before the Senate in accordance with the provisions of subsection 38 (3.3) of the *Public Servants Disclosure Protection Act*.

The report contains the findings of wrongdoing; the recommendations made to the chief executive; my opinion as to whether the chief executive's response to the recommendations is satisfactory; and the chief executive's written comments.

Yours sincerely,

Mario Dion
Public Sector Integrity Commissioner
OTTAWA, February 2013

The Honourable Andrew Scheer, M.P.
Speaker of the House of Commons
House of Commons
Ottawa, Ontario K1A 0A6

Dear Mr. Speaker:

I have the honour of presenting you with the Office of the Public Sector Integrity Commissioner of Canada's Case Report of Findings in the Matter of an Investigation into a Disclosure of Wrongdoing, which is to be laid before the House of Commons in accordance with the provisions of subsection 38 (3.3) of the *Public Servants Disclosure Protection Act*.

The report contains the findings of wrongdoing; the recommendations made to the chief executive; my opinion as to whether the chief executive's response to the recommendations is satisfactory; and the chief executive's written comments.

Yours sincerely,

Mario Dion
Public Sector Integrity Commissioner
OTTAWA, February 2013

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Foreword

I am pleased to present you with the third case report of founded wrongdoing tabled in Parliament as provided for in the *Public Servants Disclosure Protection Act* (the *Act*).

The *Act* was created to provide a confidential whistleblowing mechanism in the public sector to respond to the need to address and prevent cases of wrongdoing. The disclosure regime established under this *Act* is meant not only to stop these actions from continuing and to take corrective action, but also to act as a general deterrent throughout the federal public sector. This is the reason why founded cases of wrongdoing are required by the *Act* to be reported to Parliament, which is a powerful tool of transparency and public accountability.

This third case report further demonstrates the breadth of the definition of wrongdoing under the section 8 of the *Act*, as it includes the first founded allegation of a serious breach of a code of conduct.

Since the coming into force of the *Act*, my Office has been pressed to define what would constitute a serious breach of a code of conduct in order to make a determination of wrongdoing. You will find in the Summary of Findings section of this report the key defining elements of such a determination.

I anticipate that several case reports will be tabled during the current session of Parliament as our work is progressing on some forty active investigations at this time.

Mario Dion, Public Sector Integrity Commissioner

Mandate

The Office of the Public Sector Integrity Commissioner of Canada is an independent body created in 2007 to establish a safe and confidential mechanism for public servants or members of the public to disclose wrongdoing in, or relating to, the federal public sector. Specifically, my Office has the mandate to investigate disclosures of alleged wrongdoing and complaints of reprisal in the public sector.

Section 8 of the *Public Servants Disclosure Protection Act*, S.C., 2005, c.46 (the *Act*) defines wrongdoing as:

- (a) a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act, other than a contravention of section 19 of this Act;
- (b) a misuse of public funds or a public asset;
- (c) a gross mismanagement in the public sector;
- (d) 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 a public servant;
- (e) a serious breach of a code of conduct established under section 5 or 6; and
- (f) knowingly directing or counselling a person to commit a wrongdoing set out in any of paragraphs (a) to (e).

The purpose of investigations into disclosures is, according to the *Act*, to bring the findings of wrongdoing to the attention of the organization's chief executive and to make recommendations for corrective action.

Under subsection 38 (3.3) of the *Act*, I must report to Parliament founded cases of wrongdoing within sixty days after the conclusion of my investigation. This Case Report addresses one such investigation and the findings related to the disclosure of wrongdoing brought forward to my Office.

The Disclosure

On September 3, 2010, my Office received a protected disclosure of wrongdoing against a Director General (DG) of the Canadian International Development Agency (CIDA). The discloser alleged that the DG was using CIDA time and assets to conduct private business activities, and that members of his administrative support staff were instructed to complete related administrative tasks, including scheduling appointments, transferring calls, printing documents, coordinating travel arrangements and managing the DG's email account. The discloser alleged that the DG committed wrongdoing as defined by paragraphs 8(b) and (e) of the *Act*: namely, a misuse of public funds or a public asset and a serious breach of a code of conduct.

While the discloser did not include paragraph 8(c) of the *Act* in the disclosure, I felt it should be considered given that the time allegedly spent by the DG and the administrative staff on private business activities may also constitute gross mismanagement in the public sector.

The discloser provided my Office with copies of emails between the DG and outside parties. Based on the contents of these emails, it appeared that the DG maintained professional relationships with the outside parties and that he was being remunerated for non-CIDA related activities.

After a detailed analysis of the information provided, I initiated an investigation to determine whether the DG committed wrongdoing as defined by paragraphs 8(b), (c) and (e) of the *Act* by engaging in private business activities and using CIDA assets, time and personnel to conduct related tasks.

Results of the Investigation

The findings of wrongdoing contained in this report are the result of the actions of one DG who demonstrated a serious lack of judgment and disregard for government policies and rules.

The investigation found that:

- **The DG misused public assets by:**
 - Instructing administrative staff to complete tasks related to his private business activities; and
 - Using CIDA's network and property, including the printer, scanner, fax, telephone and email to conduct private business activities.
- **The DG breached the *Values and Ethics Code for the Public Service* by:**

- Placing himself in conflict of interest situations on numerous occasions by engaging in private business activities, and at times, accepting private business contracts with an organization that also deals with the government;
 - Failing to disclose the private business activities to the appropriate supervisor by means of a *Confidential Report* or any other mechanism;
 - Using government property for non-official government use; and
 - Demonstrating wilful disregard for obligations as a public servant, thereby violating the “ethical values” of the *Values and Ethics Code for the Public Service*.¹
- **The DG’s actions constitute gross mismanagement in the public sector by:**
 - The repetitive and persistent nature of his use of CIDA assets, time and personnel to conduct private business activities; and
 - The wilful and deliberate nature of his behaviour.

The information gathered during the course of this investigation does not suggest any systemic issues of wrongdoing at CIDA, nor does it reveal any shortcomings or contributing factors on the part of the organization. Policies were in place and known by the DG who chose not to comply with any such procedures or requirements.

Overview of the Investigation

The investigation, led by Jenny-Lee Harrison of my Office, was initiated on May 13, 2011. It should be noted that several attempts were made to interview the discloser during the fall of 2011 and in the months that followed, but the discloser was unable to meet with my Office until July 2012. The DG left the public service while the investigation was ongoing.

As required under the *Act*, CIDA readily provided access to the necessary facilities and the information requested during the course of the investigation.

It was determined that the initial evidence provided, the information collected during interviews and the review of the DG’s electronic accounts supported the allegations under investigation. In keeping with our obligations under the *Act*, the alleged wrongdoer and the Chief Executive of CIDA were provided with a detailed Preliminary Investigation Report in October 2012 and given the opportunity to provide comments on the preliminary findings and any other matter of concern arising from the investigation.

¹ Replaced by the *Values and Ethics Code for the Public Sector* on April 2, 2012.

In arriving at my findings, I have given due consideration to all of the information received throughout the course of this investigation, including comments on the preliminary findings provided by the DG and Margaret Biggs, President, CIDA.

Summary of Findings

1. *Misuse of public assets*

“Misuse of public assets” includes making inappropriate or unauthorized personal use of government property, and also includes a failure to safeguard such assets.

The investigation found that:

- The DG used CIDA assets and time to conduct private business activities.
- During the interview with my Office on August 28, 2012, the DG acknowledged having asked administrative staff to complete private business related tasks, though reported that such requests for “special favours” were very rare. He also acknowledged having used public assets to conduct private business activities, specifically the printer, scanner, fax, telephone and email.
- The review of the DG’s electronic accounts revealed that there had been several discussions, with many individuals, pertaining to private business matters using a CIDA email address. Additionally, this review revealed that the DG’s administrative staff was often copied on email communications and asked to follow-up, whether it be by scanning or printing documents, and scheduling phone calls or in-person meetings. The email review did not reveal any requests for “special favours” from the administrative staff as claimed by the DG, but rather common and direct requests from their supervisor.
- The *Values and Ethics Code for the Public Service* expressly states that public servants should not directly or indirectly use government property for anything other than officially approved activities. The Treasury Board Secretariat’s *Policy on the Use of Electronic Networks* directly refers to the use of government networks for private business as an unacceptable activity violating the *Conflict of Interest and Post-Employment Code for the Public Service*, which the DG was subject to as an employee of CIDA.

2. Serious breach of a code of conduct

In determining whether an action or omission comprises a “serious” breach of a code of conduct, the following defining elements are taken into consideration:

- the breach represents a significant departure from generally accepted practices within the federal public sector;
- the impact or potential impact of the breach on the organization's employees, clients and the public trust is significant;
- the alleged wrongdoer occupies a position that is of a high level of seniority or trust within the organization;
- there are serious errors which are not debatable among reasonable people;
- the breach of the applicable code(s) of conduct is systemic or endemic;
- there is a repetitive nature to the breaches of the applicable code(s) of conduct or they have occurred over a significant period of time; and
- there is a significant degree of wilfulness or recklessness related to the breach of the applicable code(s) of conduct.

The investigation found that:

- The DG breached the *Values and Ethics Code for the Public Service* (the *Code*) by placing himself in conflict of interest situations on numerous occasions by using government property to conduct tasks related to private business activities.
- The DG clearly demonstrated wilful disregard for his obligations as a public servant, which could have a significant negative impact on the public trust.
- The DG completed a *Confidential Report* during the summer of 2008, outlining participation in certain outside activities at that time and in the months to follow, which confirms his understanding of what a *Confidential Report* is and what purpose it serves. This begs the question of why the DG did not disclose the other outside activities that are the subject of this report, using the same or any other kind of mechanism.
- During the interview with my Office, the DG indicated not having disclosed any additional activities, since they were, in his opinion, “insignificant”. However, he mentioned having discussed a \$25 000 private business contract with a manager in 2010, but it was not recorded in writing, nor could he recall who the manager was.
- Given that the DG had been a CIDA employee for almost ten years, that he only occupied DG level positions within the organization, and that he had reported other outside activities using the *Confidential Report* mechanism in the past, it is difficult to believe that he sincerely deemed a verbal discussion on the matter to be

satisfactory. Likewise, it is difficult to believe the manager would have agreed with this method of disclosure.

- Also during the interview, the DG stated that in an effort to avoid real or apparent conflicts of interest, employees must act in a transparent manner and make all outside activities clear and well known. As such, he knew, or ought to have known, that his outside activities, significant or not, could have created at the very least the appearance of a conflict of interest and therefore should have been disclosed to management.
- *Chapter 2: Conflict of Interest Measures* (*Chapter 2*) of the *Code* that was applicable to public servants at the time of the wrongdoing states that in carrying out their official duties, public servants should arrange their private affairs in a manner that will prevent real, apparent or potential conflicts of interests from arising.
- Also according to *Chapter 2*, public servants may engage in employment outside the public service and take part in outside activities unless the employment or activities are likely to give rise to a real, apparent or potential conflict of interest or would undermine the impartiality of the public service or the objectivity of the public servant. Where outside employment or activities might subject public servants to demands incompatible with their official duties, or cast doubt on their ability to perform their duties or responsibilities in a completely objective manner, employees must submit a *Confidential Report* to their Deputy Head who shall determine whether a real, apparent or potential conflict of interest exists.
- Finally, *Chapter 2* also provides that public servants should not offer any assistance to entities or persons that have dealings with the government, where this assistance is not part of their official duties, without obtaining prior authorization from their designated superior and complying with the conditions for that authorization.

3. Gross mismanagement

The expression “gross mismanagement” is not defined by the *Act*. The factors that my Office considers in investigating an allegation of gross mismanagement under paragraph 8(c) of the *Act* include:

- matters of significant importance;
- serious errors that are not debatable among reasonable people;
- more than *de minimis* wrongdoing or negligence;
- management action or inaction that creates a substantial risk of significant adverse impact upon the ability of an organization, office or unit to carry out its mandate;
- the deliberate nature of the wrongdoing; and

- the systemic nature of the wrongdoing.

In determining that the conduct and actions of the DG were serious enough to constitute gross mismanagement, the following factors were taken into account in this situation:

- The repetitive and persistent nature of the DG's use of CIDA assets, time and personnel to conduct private business activities, as well as the wilful and deliberate nature of his behaviour, which resulted in several breaches of the *Code*.
- The DG acknowledged that, in principle, the use of CIDA assets, time and personnel to conduct private business activities was wrong, but stated believing that the extent of this use was so minimal that it did not represent a significant misuse of resources.
- The *Code* and the *Policy on the Use of Electronic Networks* do not take extent into consideration. Individuals in DG positions know or ought to know that such behaviour is unacceptable. The DG's actions demonstrated wilful disregard for his and his administrative staff's obligations as public servants, as set out in the *Code* and the *Policy on the Use of Electronic Networks*.
- The DG knew that CIDA assets should not have been used to conduct private business activities. This was confirmed by him during the interview with my Office, as well by the review of his electronic accounts which revealed requests pertaining to the use of a personal email address for future correspondence related to certain activities taken during his "private time".
- The DG continued to use the CIDA email account to conduct private business activities and deliberately used other CIDA assets, such as the printer, fax, telephone and office space to conduct related tasks.
- The DG instructed administrative assistants to conduct tasks related to these private business activities, including managing his CIDA email account and scheduling meetings and making travel arrangements.

I have no reason to believe that the DG's actions affected the organization's ability to meet its mandate.

Conclusion

The information gathered during this investigation revealed that the DG committed wrongdoing as defined at paragraphs 8(b), (c) and (e) of the Act by:

- placing himself in real, potential and/or apparent conflict of interest situations by engaging in private business activities;
- not disclosing these private business activities to the appropriate supervisor via a *Confidential Report* or any other mechanism;
- using CIDA assets and time to conduct these private business activities; and,
- instructing other CIDA employees to complete administrative tasks related to these private business activities.

In accordance with section 22(h) of the *Act*, I have made recommendations to Ms. Biggs concerning the measures to be taken to correct the wrongdoing. I am satisfied with Ms. Biggs' response to my recommendations and with the measures taken to date by the Agency to address the wrongdoing identified in this report. My recommendations and the Agency's response follow.

Recommendations and Agency's Responses

As a result of my findings and pursuant to my authority under section 22(h) of the Act, the following recommendations were made to the Agency. The issues on which the recommendations are based were previously discussed with CIDA, and the Agency has already taken measures to address them.

- 1. It is recommended that CIDA establish a mechanism to ensure that the *Values and Ethics Code for the Public Sector* and any code of conduct established by CIDA has been provided to and discussed with all new employees, and that all employees are reminded of their obligations under these codes on a regular and periodic basis.**

The Agency responded that CIDA's new Code of Values and Ethics contains specific and clear examples of the inappropriate use of public assets similar to incidents that arose in the present case. The President of CIDA, has also approved a mechanism to ensure the mandatory acceptance by all CIDA employees of this Code, which includes the full Policy on Conflict of Interest and Post-employment as a condition of their employment. As well, CIDA's Code will be reinforced through semi-annual performance discussions between employees and their managers.

The President of CIDA, will also be exploring other options to further enhance the rigour with which CIDA applies the Policy on Conflict of Interest and Post-employment at the Agency.

- 2. It is recommended that CIDA establish a mechanism to track costs incurred by the organization for personal use of the Agency's communication devices.**

The Agency reported that its policy pertaining to the use of the Agency's communication devices has been in place since 2007, and includes a reimbursement directive for cumulative charges for personal use beyond \$30 over a six-month period. CIDA also reported that employee awareness of the above is periodically reinforced with internal messaging from management and special events.

The procurement, service and support of these tools became the responsibility of Shared Services Canada (SSC), effective August 4, 2011. While CIDA is now dependant on SSC for reporting on usage and costs, their policy remains in place. CIDA has also made SSC aware of the need to continue to support their reimbursement directive with effective monitoring.

Additional Comments Provided by the Agency

The President of CIDA, stated taking great pride in the professionalism and outstanding quality of work of the dedicated employees and managers at the Agency, and is deeply concerned by the actions of one individual who independently decided to “work in the dark” by not reporting or discussing activities with management to advance personal gain, showing a “very serious lack of judgment and an inexcusable disregard for government policies and rules.”

The President also stressed that she takes these incidents of wrongdoing very seriously and that her organization will take every step available to ensure that no similar incidents will arise in the future.