



Office of the Integrity Commissioner -
Ontario Public Service

Bureau du commissaire à l'intégrité -
Fonction publique de l'Ontario

Review of Government Response to the Disclosure of Wrongdoing filed in relation to the Niagara Parks Commission

Protecting the Identity of Those Involved with Disclosures of Wrongdoing

In this unusual case, the Discloser has spoken publicly about his complaint and this process. In consideration of his decision to speak publicly, my Office has publicly confirmed receipt of his disclosure and I am taking the additional step of releasing a public statement about the outcome of my review of the Government Response.

However, for the reasons described below, I am limited in the type of information I can comment on publicly. Section 112 of the *Public Service of Ontario Act, 2006* (the “Act”) requires me to carry out my functions in a manner that protects the identities of persons involved with disclosures of wrongdoing, including persons who make disclosures, witnesses and persons alleged to be responsible for wrongdoing. It is for this reason that the Government Response is not to be made available to the public. Protecting the identities of those involved with the Disclosure of Wrongdoing process is important because it provides necessary assurance to public servants that they can come forward. The discreet nature of the process allows for full information before any judgment is passed.

Procedural History and Description of Complaint

On July 31, 2008, a public servant filed a disclosure of potential wrongdoing with the Office of the Integrity Commissioner under Part VI of the *Act*.

Under the Disclosure of Wrongdoing framework in the *Act*, I am assigned the responsibility to receive disclosures of potential wrongdoing from public servants. The type of conduct that a public servant can make a disclosure about is termed “wrongdoing” and is defined as follows:

“wrongdoing” means,

(a) a contravention by a public servant, a minister or parliamentary assistant of an Act of the Assembly or of the Parliament of Canada, or of a regulation made under such an Act,

(b) an act or omission of a public servant, a minister or parliamentary assistant that creates a grave danger to the life, health or safety of persons or to the

environment, where the danger is unreasonable having regard to his or her duties, powers and functions and any other relevant circumstance,

(c) gross mismanagement by a public servant, a minister or parliamentary assistant in the work of the public service of Ontario,

(d) directing or counselling wrongdoing within the meaning of clauses (a) to (c) by a public servant, a minister or parliamentary assistant. 2006, c. 35, Sched. A, s. 108 (1).

The primary purpose of the Disclosure of Wrongdoing framework is to provide public servants with an avenue to disclose potential wrongdoing within the Ontario Public Service without violating the duty of loyalty owed to their employer and to provide protection in case of reprisal. These objectives are achieved by first creating a safe place for public servants to make disclosures either to a senior official such as a Deputy Minister or, if that is not appropriate, to the Integrity Commissioner and, second, through express anti-reprisal provisions (see sections 139 to 142 of the *Act*).

After an initial assessment of the information received from the Discloser, I determined that the Disclosure of Wrongdoing could be received and that section 117 of the *Act* did not restrict me from dealing with the matter.¹

Contrary to some public statements, upon receipt of a disclosure of potential wrongdoing my first step is not to commence an investigation. Rather, I am required by section 118 of the *Act* to refer any matter I receive that is within my jurisdiction to an appropriate senior official within the Government to cause an investigation. The types of officials I can refer a matter to include: the Chairs of public bodies, Deputy Ministers, and the Secretary of Cabinet.

When I refer a matter under section 118, the person to whom I have referred the matter is required to provide me with a Report after Referral pursuant to section 120 of the *Act*, which contains:

- A summary of the subject matter of the disclosure.
- A description of the steps taken in the investigation conducted by the person to whom the referral is made.
- A summary of the evidence obtained during the investigation.
- A statement of the findings resulting from the investigation of the disclosure, including a statement about any wrongdoing that was discovered.

¹ Section 117 of the *Act* precludes me from dealing with a matter if certain circumstances apply. For example, I cannot deal with a matter if the subject matter of the disclosure is “an employment or labour relations matter that could be dealt with through a dispute resolution mechanism, including a grievance procedure, established under this or any other Act, under a collective agreement or under an agreement of another kind.”

- A description of any corrective action that has been taken or that is proposed to be taken as a result of the investigation.

In this instance, the Discloser provided a number of specific examples of conduct of the Chair of the Niagara Parks Commission (“NPC”) that were alleged to, as a whole, constitute gross mismanagement. In summary the alleged conduct included² that:

- the Chair of the NPC prevented NPC Commissioners (referred to herein collectively as the Board) from fulfilling their duties, including discouraging frank debate and probing questions by Commissioners and unilaterally reversing decisions made by the Board;
- the Chair failed to disclose to the Board information that is material to the business of the NPC including informing the Board about interest received from a company, first expressed by letter in January 2008 (the “January 2008 Letter”), to provide the boat tourist attraction services at the base of Niagara Falls;
- the Chair caused the Board to conclude discussions and vote on the renewal of the Maid of the Mist lease: (a) without holding a previously agreed to special meeting; and, (b) with information that one Commissioner had been “lobbying” another Commissioner.

On August 28, 2008, pursuant to section 118 of the *Act*, I referred this matter to the Secretary of Cabinet³ and directed her to cause an investigation into the matter and Report to me pursuant to the *Act* within 30 days. In making my referral pursuant to the *Act* I stated, *inter alia*:

In this case, it may be of some assistance to you to be aware of some of the issues I have considered when assessing this file. This disclosure of a potential wrongdoing appears to require consideration of applicable and/or appropriate governance practices for the NPC, an Operational Enterprise Agency of the Government of Ontario. In this regard, it seems to me that consideration ought to be paid to the following:

1. The NPC’s compliance (or not) with best practices for agency governance, including those standards referred to by the Auditor General of Ontario on pages 31-33 of the 2007 Annual Report of the Office of the Auditor General of Ontario.
2. The applicable and/or appropriate level of information disclosure required by the NPC staff (through the Chair) to the Commission.
3. The applicable and/or appropriate rules for procurement at the NPC in relation to a lease like the lease with Maid of the Mist Corporation.
4. The applicable and/or appropriate rules for procurement at the NPC in relation to the development of [another attraction].

² While the Government Investigation addressed all of the specific conduct brought forward by the Discloser – and I have reviewed the Government Response in respect to each – I have not described them specifically as a consequence of my obligations under section 112 of the *Act*.

³ I initially referred this matter for investigation to the then Deputy Minister of Tourism. I was subsequently advised that the then Deputy Minister of Tourism had prior dealings with the Discloser and in the interests of avoiding any perception that the investigation was not neutral, I determined that the best alternative person to cause an investigation was the Secretary of Cabinet.

The Secretary of Cabinet delegated executive oversight of this matter to the then Deputy Minister of Intergovernmental Affairs and Associate Secretary of the Cabinet.⁴ In September 2008, I was advised that the Associate Secretary of Cabinet had directed the Forensic Investigation Team of the Ontario Internal Audit Division of the Ministry of Finance to coordinate the investigation of the allegations.

Further to my referral, I received a request from the Associate Secretary of Cabinet to extend the statutory time limit to provide me with a Report after Referral. On the basis of the information provided to me by the Associate Secretary of Cabinet about the status of the investigation (i.e. description of the interviews and document review underway) I granted the Associate Secretary of Cabinet's request for an extension until November 2008. Prior to the expiry of the requested extension, I received a second request for a brief extension, which I granted. On December 15, 2008 I received a Report after Referral.

I determined that I required additional context and information to assess the Report after Referral. I therefore requested a meeting with the Secretary of Cabinet, which occurred in the first week of January 2009. As a result of our meeting, the Secretary of Cabinet filed a revised Report after Referral with me in mid-January 2009.

On January 26, 2009, further to my review of the revised Report after Referral, I made requests for additional specific information pursuant to sub paragraph 121 (1)(a) of the *Act*. I required this information be provided to me on or before February 4, 2009. A request for extension to respond to my request was made and granted. On February 18, 2009 I received a response to my information requests.

Subsequently, at my request, on February 27, 2009, representatives from this Office met with the Senior Manager, Forensic Investigation Team, Ontario Internal Audit, the Director, Culture and Innovation Audit Team (Ministry of Finance), the Legal Director (Ministry of Tourism), a Senior Consultant in the Tourism Agencies Branch of the Ministry of Tourism, the Assistant Deputy Minister, Tourism Operations and Planning in the Ministry of Tourism, Senior Legal Counsel, Ministry of Government Services and the Executive Assistant to the Deputy Minister, Ministry of Tourism to obtain clarification of various aspects of the response provided to me on February 18, 2009. As a result of the February 27, 2009 meeting additional information was requested. The additional information was received on March 4, 2009.

I will refer collectively to all of the documents, representations and information obtained from the reports and meetings described above as the "Government Response."

⁴ The Secretary of Cabinet has since delegated oversight of this matter to a newly appointed Deputy Minister of Tourism because the Associate Secretary of Cabinet to whom she originally delegated the matter left the Ontario Public Service.

The Jurisdiction of the Integrity Commissioner

When reviewing a Report after Referral I consider the following general issues:

1. Did the Government select a neutral investigator?
2. Did the investigator apply sufficient scrutiny to the evidence?
3. Did the investigator select a sufficient number of sources to ensure that the evidence is reflective of the circumstances?
4. Did the Government come to reasonable conclusions?
5. Have appropriate corrective actions been taken, if necessary?

It is my view that the necessary underlying presumption of the Disclosure of Wrongdoing framework is that the Government wishes to eradicate wrongdoing and that it is in the best position to do so if it is aware of the circumstances. The Disclosure of Wrongdoing framework contains an important safeguard – the Government’s actions are subject to scrutiny by me, as the Integrity Commissioner. If I am not satisfied with the Government’s investigation, I can initiate my own investigation into the circumstances. I can also provide oversight by making recommendations and requiring additional information (section 121 of the *Act*), as I have done in this matter.

The Government Investigation

The Government has responded to this referral meaningfully and in good faith and for the reasons set out below, I have concluded that I am satisfied with their response to this matter and I will not be commencing a further investigation.

The Forensic Investigation Team is a dedicated investigation unit under the Ontario Internal Audit Division of the Ministry of Finance. The Forensic Investigation Team provides fraud and employee conduct investigative services to the Government. Its work is ISO certified. I have been assured and I am satisfied with the assurance provided that all steps were taken to confirm that the work performed by the investigation team in relation to this matter was consistent with the Forensic Investigation Team’s high standards. Specifically, I am advised that the work was carried out in accordance with the Association of Certified Fraud Examiners, Standard Practices for Investigations and the prescribed practices and procedures of the Institute of Internal Auditors.

I am advised that the investigators reviewed electronic records, documents and interviewed over 20 people, including all NPC Commissioners holding tenure during the relevant time period.⁵

The Findings of the Government Investigation

The Government Investigation concluded that in respect of the specific allegations made, the Chair acted in good faith in accordance with policies and procedures in place at the NPC and that

⁵ As noted at the outset, the identity of these persons is confidential and protected pursuant to section 112 of the *Act*.

only one of the specific examples of conduct provided by the Discloser was proven. That is, the Government Investigation found that the Chair had made a unilateral decision to cause the NPC's outside counsel to attend a Board meeting in August 2008. I accept the conclusion of the Government Investigation that this single decision could not constitute gross mismanagement on its own.

The main issue in this disclosure was the April 18, 2008 decision of the Board to approve the renewal of a lease with the Maid of the Mist. What follows are the key facts that were established by the Government Investigation with respect to the lease renewal. I will also address two of the specific allegations: the treatment of the January 2008 Letter containing an expression of interest in providing a boat-related tourist attraction and the alleged lobbying among commissioners.

In summary, the Government Investigation found:

- In November 2004, staff at the NPC began meeting with the Maid of the Mist for preliminary discussions regarding the potential for a renewal of the lease.
- The Board was informed through a Directors Report tabled at the December 13, 2006 meeting that the Maid of the Mist lease had a provision to open renewal discussions prior to the November 2009 expiry date. The Board was informed that a report would be brought back to the Board with respect to the Maid of the Mist's requests for amendments.
- At a February 16, 2007 Board meeting, a document titled "Report to the Commission Re: Maid of the Mist – Lease Extension" was provided to the Board. The February 16, 2007 Report recommended that NPC staff be directed to conclude negotiations with the Maid of the Mist. During the Board meeting, a number of specific modifications and additions to the existing lease agreement were discussed and the Board was advised that when efforts to renegotiate a new agreement were completed staff would report back to the Board to seek authority to request an Order-in-Council approval from the Lieutenant Governor in Council. Subsequently, the staff at the NPC took steps to conclude negotiations with the Maid of the Mist.
- In March 2008 the Board was presented with a written progress report on the status of negotiations with the Maid of the Mist and the complete renegotiated lease for consideration. Although it was anticipated that the Board would vote on the lease on March 14, 2008 the Board agreed to defer the vote "until it can be reviewed in full detail by the members of the Commission."
- A special meeting was scheduled for the detailed review but it did not occur; however, the debate and discussion about the lease amendment occurred during the April 18, 2008 Board meeting.
- Prior to the April 18, 2008 Board meeting the Discloser circulated to the Board the January 2008 Letter referred to above.
- At the April 18, 2008 meeting the Commissioners were aware and debated the fact that a third party had expressed an interest in operating a similar tourist attraction. In fact, a document titled, "Report to the Commission re: Maid of the Mist – Amending Lease Agreement" was provided to the Board. This document contained a discussion and

analysis of the possibility that the NPC could consider an alternative operator or to acquire necessary assets and operate the boat tourist attraction itself. The document also contained information about the history between the Maid of the Mist and the NPC, discussion about the term of the lease, discussion about the financial model underpinning the lease renewal, discussion about the form of the lease, discussion about the remedies available to the NPC if the Maid of the Mist failed to perform and a discussion about the Maid of the Mist's quality as a partner to the NPC. Nine of eleven commissioners present voted to approve the lease renewal on April 18, 2008.

- The lease is presently awaiting Ministry review so that the Ministry can advise the Minister of Tourism as to whether it should be taken to Cabinet for approval. The Ministry review assesses the business case and determines whether the NPC has breached any of its policies in approving the lease renewal. The Government has not identified any policy breaches with respect to the lease renewal.
- The transaction with the Maid of the Mist is not to provide goods or services to the NPC. It is not a transaction that requires the NPC to spend any money.
- The Government refers to this type of transaction as a "Revenue Generating Opportunity" and in this case, it is in the form of a lease.
- The NPC does not have a written policy for Revenue Generating Opportunities, nor does it have a specific lease policy. However, because it is a transaction of some significance and because a lease of Crown land requires approval by the Cabinet, it is subject to Board approval. In this way, the Board is a control mechanism.

The decision not to entertain alternatives for the provision of a boat-related tourist attraction was that of the Board. The Board implicitly made this decision in December 2006 when it received the Report that the NPC staff would be commencing negotiations with the Maid of the Mist and again in February 2007 when it received the report that the staff were working toward concluding negotiations with the Maid of the Mist. It could be said that the Board explicitly chose not to entertain alternative proposals on April 18, 2008 when it voted to approve the lease after consideration of an actual expression of interest from a third party.

In the absence of a written policy with respect to Revenue Generating Opportunities, it is my view that it would have been more transparent if the Board had expressly considered whether it should entertain alternatives for the provision of a boat-related tourist attraction prior to deciding to renew the lease with the Maid of the Mist.

Specific comments about the January 2008 Letter are in order. The Government Investigation found that the Chair did not inform the Board about the January 2008 Letter he received from a third party that (1) requested information about the term of the Maid of the Mist lease and "how another interested party would have the opportunity to bid when the Request for Proposal from the Niagara Parks Commission is issued" and (2) made a request for a copy of the lease pursuant to the *Freedom of Information and Protection of Privacy Act*.

The Government Investigation concluded that "since this was not a specific proposal, the Chair and the General Manager did not believe that it was necessary to share [the expression of interest contained in] the correspondence with the Board, particularly in light of the decision of the

Board to seek a renewal of the lease and the late stage of the process of those negotiations.” In its response the Government points to the *Agency Establishment & Accountability Directive* of the Management Board of Cabinet, which sets out the expectations for agency governance. In reference to the *Directive* the Government states that the Board is responsible for directing the affairs of the agency and ensuring that staff of an agency meets requirements established by the Board. Specifically, the Government Response states,

More importantly, however, the Board is expected to establish its own practices and procedures and can make specific requests for information and directions to the staff of the agency. If the Board is not satisfied that it has sufficient information upon which to make a decision, the Board has the power to defer the decision and request that additional information be provided to address the issues of concern.

The Government Investigation also found that the Chair believed that because the letter contained an access request under the *Freedom of Information and Protection of Privacy Act* that it should not be shared with the Board to protect the identity of the requestor. The investigation did show that the letter was treated as a request under the *Freedom of Information and Protection of Privacy Act*.

The Government Investigation found there were at least three enquiries made to the staff of the NPC from potential competitors of the Maid of the Mist. These enquiries ranged from one line in an email to a short letter similar to the January 2008 Letter.

After careful consideration, I accept the Government’s position that the appropriate level of disclosure required from the staff of a Crown agency to its governing Board is a matter that must be determined by the particular Board and that in any event, the ultimate decision made in each case will always contain an element of discretion. This conclusion, however, presumes that the governance structure in place at any given Crown agency is robust and consistent with best practices. I do wish to emphasize that it is incumbent on the Board to determine for itself the appropriate thresholds of information sharing.

The Ontario Auditor General has consistently reported on the importance of sound agency governance:

Ensuring that Ontarians are well served by these agencies requires that they be governed effectively. Effective governance requires that appropriate mechanisms be established, usually by the boards of directors, to make effective decision-making possible, to clarify accountability for the achievements of objectives and the prudent management of public funds and assets, and to provide for regular review, assessment, and reporting of the performance of management and operations. (Report of the Ontario Auditor General, 2007, pp. 31-32)

It is important to bear in mind that the Niagara Parks Commission is an “Operational Enterprise” Crown agency of the Government of Ontario. It is a self-funded organization that does not

receive any government financing; its programs and services are funded by its revenues. Operational Enterprise agencies have financial and operating authority to carry on a business in competition with other businesses. By design, Operational Enterprise agencies operate with significant autonomy from the Government because the presumption is that the agency is the “subject matter expert” on its business. The Government is not there to second guess business decisions of the agency but it is there to ensure that its processes are consistent with good agency governance.

The circumstances surrounding the January 2008 Letter demonstrate that the threshold of information to be provided to the Board must be clarified and, as described below, the Government intends to take steps to address this important governance issue. I address the possibility that the Board had not established clear guidelines for information sharing through my recommendations below.

Another specific allegation that requires some comment is the allegation relating to the “lobbying” that occurred prior to the vote. The Discloser’s contention was that one commissioner began to attempt to persuade other commissioners to vote in favour of the Maid of the Mist lease renewal after becoming aware that another company was interested. The Government Investigation found that the contact occurred prior to the date that the Commissioner at issue became aware of the interest from another company.

Government Commitments to Commence Further Reviews, Guidance and Training

As indicated above, the Government has fully acknowledged that it has an important role to play in ensuring that Crown agencies are operating with the benefit of sound agency governance practices. As a result of its Investigation the Government concluded the NPC would benefit from improvements with respect to its governance practices and it has committed to take the following actions:

1. The Ontario Internal Audit Division will conduct a thorough review of the procurement and lease processes to determine whether NPC’s policies and controls are appropriate and consistent with best practices.
2. The Ontario Internal Audit Division will lead an audit of recent procurement practices and prepare a report for the Ministry of Tourism to articulate if there are instances where procurement was not consistent with policy and best practice.
3. The Ministry of Tourism will provide guidance to the NPC to facilitate more open and accountable behaviours with respect to their business decisions.
4. The Ministry of Tourism will ensure that additional Board governance training is delivered to the NPC, which will include detailed information on informed decision-making and conflicts of interest.

In addition, the Ministry of Tourism has independently committed to commence a separate governance review of all of its agencies to examine the relationships and structures needed to achieve good governance by looking at various areas including the transparency and

effectiveness of decision-making processes and performance monitoring and accountability systems. The NPC will be the first agency reviewed.

Recommendations

In the Disclosure of Wrongdoing framework, it is my role to provide oversight and scrutiny to government actions in response to disclosures of potential wrongdoing. I accept the Government's conclusion that no wrongdoing occurred in this case. It is my view that oversight includes making recommendations toward reducing the potential for future wrongdoing. It is on this basis that I make the following recommendations pursuant to paragraph 121 (1) (b) of the *Act*.

Recommendation 1

To instill public confidence in the ability of the Board of the NPC to provide robust transparent oversight in accordance with its mandate, it is my recommendation that the Government commence – on a priority basis – the following reviews, support and training to which it has committed, establishing clear timelines for completion and appropriate public reporting of the timelines, status and outcomes of its work:

1. The Ontario Internal Audit Division will conduct a thorough review of the procurement and lease processes to determine whether NPC's policies and controls are appropriate and consistent with best practices.
2. The Ontario Internal Audit Division will lead an audit of recent procurement practices and prepare a report for the Ministry of Tourism to articulate if there are instances where procurement was not consistent with policy and best practice.
3. The Ministry of Tourism will provide guidance to the NPC to facilitate more open and accountable behaviours with respect to their business decisions.
4. The Ministry of Tourism will ensure that additional Board governance training is delivered to the NPC, which will include detailed information on informed decision-making and conflicts of interest.
5. The Niagara Parks Commission will be the first agency reviewed in the context of the Ministry of Tourism's separate governance review of all of its agencies.

For the sake of clarity, I have taken the Government's commitment to conduct a "thorough review of the procurement and lease processes" to include a review of processes relating to Revenue Generating Opportunities.

Recommendation 2

To instill public confidence in the Board and to dispel any notion that the decision to renew the lease was one made without full information or due process, it is my recommendation that in the course of the Ministry review of the lease renewal, the Ministry provide the Board the opportunity to review its decision with the benefit of knowing the Government's expectations regarding Revenue Generating Opportunities and sound agency governance and with full

knowledge of all the expressions of interest received in relation to the boat-related tourist attraction in Niagara Falls.⁶

In making its decision the Board will be required to weigh numerous business and legal issues and it may be that the Board will make no different decision. However, the public interest in this matter will be better served because the Board will have made its decision with full knowledge of the expectations of the public and the Government in relation to sound agency governance and Revenue Generating Opportunities.

⁶ In making this recommendation I am not saying, and I do not wish to be interpreted as saying, that all expressions of interest, of any degree of sophistication, must be passed on to a Board of a Crown agency in similar circumstances. As noted above, I accept the Government's position that the level of information sharing is to be determined by any given Board.