

PROFESSIONAL DEVELOPMENT INSTITUTE

**PDI NATIONAL
SECURITY PROGRAM
BRIEFING NOTE**



DISCLOSURE OF SENSITIVE INFORMATION

ISSUE

In recent weeks the Canadian media, primarily the Globe & Mail, has published a series of articles referring to leaked unredacted CSIS documents in an exposé of the Foreign Interference activities of the People's Republic of China directed at influencing the political direction of the Canadian democracy.

BACKGROUND

The central content of this exposé is a leak of unredacted classified CSIS documents that raise alarm over the threat to Canada posed by these foreign influence operations. The revelation of this leaked classified CSIS information is presented as being in the public interest due to the alleged inaction of the Trudeau government to counter these threats including informing the Canadian public. The leaker, in an open letter, claims a moral duty to leak the information to protect Canada and Canadians. The media has stated the source has been given anonymity as a journalistic source to avoid prosecution.

DISCUSSION

This is a very complex issue with many serious implications. The Government of Canada has stated that it takes foreign interference seriously and investigations are underway to identify the leaker and to stop further such leaks. Canadians have questions about what laws apply to prevent such leaks. Is the leaker a “whistleblower” who believes that these secrets should be publicly revealed to protect the greater good or is it simply a case of a trusted public servant who has sworn an oath to protect Canada’s secrets leaking the documents for personal gain or a grudge? And, what exactly is a “whistleblower”?

This PDI NS Briefing Note will present the laws at play and provide context and legal analysis with regard to this specific issue. This note is prepared by National Security practitioners at uOttawa PDI, Alan Jones and Dan Stanton and features legal analysis by Gerry Normand L.LL, former General Counsel with the federal Department of Justice legal counsel who has decades of experience and leadership in National Security law including the drafting of related legislation. Gerry Normand teaches a course on national security at the uOttawa Faculty of Civil Law and an instructor in the uOttawa PDI National Security program. Of course, uOttawa PDI does not any stance on the related political issues. This note is for educational purposes only.

THE LAWS AT PLAY

Protecting Classified Information

The Security of Information Act (SOIA) became law in December of 2001 with the passing of the Anti-Terrorism Act thereby replacing the former Official Secrets Act. The purpose of this legislation was to essentially strengthen the offences as they relate to the unauthorized disclosure of information that the Government is taking measures to protect. The statute also created offences that deal with “espionage”, as well as “foreign influenced threats or violence” related offences. The focus of the unauthorized disclosure offences is with respect to persons permanently bound to secrecy (PPBS) and special operational information (SOI), the most sensitive information of the Government. Both are new concepts. These offences only capture PPBS disclosing SOI without authorization. The rationale was that leakers over the last many decades had historically been from people “in the know”, those most trusted with very sensitive information within the Government.

The Security of Information Act (SOIA) is publicly available legislation, sections 13 and 14 state that an unauthorized disclosure of “special operational information” by a “person permanently bound to secrecy” is an offence.

- Special operational information is defined as covering the most sensitive informative of the government, such as information on targets of intelligence investigations.
- Person permanently bound to secrecy covers, for example, persons appearing in the schedule to the Act (CSIS employees, NSIRA, NSICOP, specific DOJ counsel, etc).
- The disclosure of special operational information by a person bound to secrecy to anyone, including to the media, without authorization is an offence under the SOIA; the further disclosure of this type of information to the public is a separate illegal disclosure.
- The RCMP has primary responsibility to investigate offences under the SOIA;
- Evidence that sensitive information has been leaked, i.e. unauthorized disclosure, is normally sufficient for the RCMP to open an investigation.
- Subsection 487.014(2) of the Criminal Code permits, in the context of an investigation, on application by a peace officer, for a judge or justice to issue a production order where satisfied that there are reasonable grounds to believe that (1) an offence has been or will be committed; (2) the document or data is in the person's possession or control; and (3) the document or data will afford evidence respecting the commission of the offence.

If the application for a production order relates to an object, document or data relating to or in the possession of a journalist, the application must be made to a judge of a superior court of criminal jurisdiction. Section 488.01 et al provide for a special regime in such cases.

Public Interest in Disclosing

The statute provides for the possibility for a PPBS charged under either section 13 or 14 to avail himself/herself of a defence, in certain circumstances. If the PPBS wishes to disclose an offence committed by a person working within the Government and it is in the public interest to do so, the law stipulates that a public interest defence could be raised. However, in order to do so, the PPBS will need to first disclose this information internally, to his/her deputy head or to the Deputy AG and if no response is received in a reasonable time, to the NSIRA. In other words, if the above conditions are not present or met, no public interest defence will be available.

- The SOIA provides for instances where a person could avail him/herself of a defence if prosecuted pursuant to sections 13 or 14 of the SOIA.
- Section 15 stipulates that a person may raise a public interest defence to a prosecution pursuant to those sections if the person can establish that the purpose of his/her disclosure was to disclose an offence under an Act of Parliament that had been, was being or was about to be committed by another person in the purported performance of that person's duties and functions for, or on behalf of, the Government of Canada.
- However, in order to be able to prevail him/herself of a public interest defence, the person must first have followed a process of disclosing this information internally to the authorities, as provided for in subsection 15(5) of the Act.
 - The person must establish that he/she (1) has brought his or her concern to his or her deputy head or to the Deputy Attorney General of Canada, and did not receive a response within a reasonable time; and (2) then brought his or her concern to the National Security and Intelligence Review Agency, and did not receive a response from that Agency within a reasonable time.

PROTECTION FOR PUBLIC SERVANTS FOR DISCLOSING WRONGDOINGS - “WHISTLEBLOWERS”

Over time, it became clear for the Government that there was a need to protect public servants wanting to release, disclose information of wrongdoings within the Government. The protection was to ensure against possible reprisal actions, from within the Government. Offences were created for the purpose of protecting those public servants as well. The wrongdoings are enumerated in the Act. These persons are often referred to as “whistleblowers”. However, for the protection to take place, the public servants must follow and respect a process. They cannot disclose the information publicly, unless in exceptional circumstances identified in the Act. To be clear, the Act does not provide any protection or defence to a whistleblower from a criminal prosecution perspective. Even in a case where the information would be released publicly under exceptional circumstances, it would offer no defence against a possible criminal charge, if for instance the disclosure of the information is otherwise not permitted by law. The regime would protect that person from reprisal actions however. And if the information at play, that establishes the wrongdoing, is SOI, then the entire protection regime of the Act does not apply. Hence, the whistleblower cannot disclose the SOI to anyone within the process of the Act. Logically, the disclosure must be dealt with by the SOIA, and then only if the persons wanting to disclose or release the information is a PPBS.

- The disclosure of wrongdoings in the public sector is covered by the Public Servants Disclosure Protection Act, (PSDPA) which was enacted in 2005.
- Under that statute, a public servant may disclose wrongdoings to his or her supervisor, or to a designated senior officer designated, as well as to the Public Sector Integrity Commissioner appointed under that Act.
- No reprisal action may be taken against public servants that have disclosed such information.
- A statutory regime that governs the complaints by public servants to the Commissioner in case of reprisal action, investigations in these complaints and the involvement of the Public Servants Disclosure Protection Tribunal in some instances is part of the Act.
- Offences have also been created to protect public servants that have disclose wrongdoings.
- The specific wrongdoings that are covered by the Act, that must be in or relating to the public sector, are:
 - a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act;
 - a misuse of public funds or a public asset;
 - a gross mismanagement in the public sector;
 - 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;
 - a serious breach of a code of conduct; and
 - knowingly directing or counselling a person to commit a wrongdoing set out in any of the preceding paragraphs.

- Exceptionally, a public servant may disclose the wrongdoing to the public but only if there is not sufficient time to make the disclosure in accordance with the Act because the public servant believes on reasonable grounds that the wrongdoing is an act or omission that
 - (a) constitutes a serious offence under an Act of Parliament or of the legislature of a province; or
 - (b) constitutes an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment.
- However, section 17 clearly provides that the regime provided for the PSDPA, including the exception for disclosure to the public, does not apply to special operational information as defined in the SOIA.
- Such a disclosure is governed by section 15 of the SOIA discussed above.
- The Public Servants Disclosure Protection Act does not refer to the term “whistleblower”. However, the term is use colloquially to refer to a public servant who discloses activities that fall under the definition of wrong doings.

ANALYSIS

Security of Information Act

- The provisions of the SOIA discussed above apply to the PPBS. These persons are essentially those who have disclosed (or leaked) sensitive information in the past, which has historically been special operational information.
- The PPBS would be statutory entitled to prevail themselves of a public interest defence in the case of an unauthorized disclosure, and an ensuing prosecution under section 13 or 14 of the Act, only if they have followed the internal reporting process provided for in section 15 of the Act.
- Most importantly, that process must specifically be with respect to a reasonable belief that an offence under an Act of Parliament has been, is being or is about to be committed by another person in the performance of that person's duties and functions for the Government of Canada, and the public interest in the disclosure outweighs the public interest in non-disclosure.
- If the circumstances of the activity that the PPBS wishes to disclose are not in relation to an offence, no public interest defence is available.

Public Servants Disclosure Protection Act

This regime applies only to public servants and is meant to protect them against any form of reprisal if they should choose to disclose specific wrongdoings. It is not intended to provide any immunity from an SOIA prosecution.

- These wrongdoings must first be in or relating to the public service.
- The specific wrongdoings are a (a) contravention of any Act of Parliament, (b) a misuse of public funds or a public, (c) a gross mismanagement in the public, (d) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, (e) a serious breach of a code of conduct established under the Act and (f) knowingly directing or counselling a person to commit a wrongdoing.
- If a wrongdoing does not fall into these categories, the Act does not apply.
- The public servant must disclose the wrongdoing to his/her supervisor, to a designated senior officer designated or to the Public Sector Integrity Commissioner.
- Exceptionally, disclosure can be made by a public servant to the public but only where the wrongdoing constitutes a serious offence under an Act of Parliament or constitutes an imminent risk of a substantial and specific danger, and there would be no time to follow the statutory process.
- However, and most importantly, the Act does not apply to special operational information as defined in the SOIA.

COMMENTS

Security of Information Act

Ultimately, it is important to understand that for a PPBS discloses SOI without authorization, unless a public interest defence is available, there is not much as a means of defence. The PSDPA is of no use to any public servant, which would also happen to be a PPBS, wanting to disclose a wrongdoing as the Act does not apply to SOI. The PSDA does not apply unless a wrongdoing as defined in the Act is present. Finally, the PSDA does not provide for any defence to a whistleblower that would be charged with a criminal offence in relation to the disclosure of a wrongdoing. The regime is solely concerned with protecting the public servant from any reprisal action within or by the Government.

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