MISFIRE:

THE 2012 MINISTRY OF HEALTH EMPLOYMENT TERMINATIONS AND RELATED MATTERS

The Office of the Ombudsperson
B.C.'s Independent Voice For Fairness

Referral Report No. 1 | April 2017
to the Legislative Assembly of British Columbia

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April 2017

The Honourable Linda Reid
Speaker of the Legislative Assembly
Parliament Buildings, Room 207
Victoria BC V8V 1X4

Dear Madam Speaker,

On July 29, 2015 the Select Standing Committee on Finance and Government Services ("the Committee") referred the 2012 Ministry of Health employee termination matter to me for investigation and report under section 10(3) of the *Ombudsperson Act* ("the Act"). On September 9, 2015 the Committee issued Special Directions under section 10(4)(a) of the Act related to their referral.

In accordance with section 10(4)(b) of the Act and paragraph 7(c) of the Special Directions I have the honour to present my report into this matter.

Yours sincerely,

Jay Chalke
Ombudsperson
Province of British Columbia

EXECUTIVE SUMMARY

In July 2015 the Select Standing Committee on Finance and Government Services passed a motion to

> *"... refer the Ministry of Health terminations file to the Ombudsperson for investigation and report as the Ombudsperson may see fit; including events leading up to the decision to terminate the employees; the decision to terminate itself; the actions taken by government following the terminations and any other matters the Ombudsperson may deem worthy of investigation. The Committee trusts that his investigation can conclude in a timely manner."*

The Committee subsequently issued Special Directions on September 9, 2015 that outlined the subject matter of the investigation. This report is the result of that referral from the Committee.

INVESTIGATIVE APPROACH

This investigation marked the first time in the history of the Ombudsperson that we have conducted an investigation under section 10(3) of the *Ombudsperson Act*. The breadth and complexity of the subject matter of the referral required a thorough and careful investigative approach.

We obtained millions of records from many different provincial government ministries and agencies, as well as records from other public bodies and individuals. From these records, we identified and reviewed those which were relevant to our investigation. We summonsed 130 witnesses who provided evidence to us under oath.

We assessed both the documentary records and sworn testimony to develop a draft report. Each individual and authority the Ombudsperson determined may be adversely affected by the report was then given the opportunity to make representations with regard to the portion of our draft report that related to them. We took these representations into account in determining the content of the final report.

ANALYTICAL FRAMEWORK

In the Special Directions the committee set out its expectation that we would investigate:

> *the events leading up to the terminations, the terminations themselves, decisions to suspend and/or reinstate data access and actions taken by Government following the terminations*

and in doing so, make findings about the involvement of various government ministries, agencies and members of the executive council in those decisions. We interpreted these Special Directions as broadly as necessary to enable us to obtain a full understanding of the relevant issues set out by the committee, and any additional matters that we determined in the course of our investigation were necessary to examine.

When assessing and drawing conclusions about government conduct we relied on the terms of the Special Directions which allow the Ombudsperson to make the findings and recommendations he considers appropriate. Our investigation was fact-finding in nature, and this is reflected in the conclusions we reached.

When we assessed the investigations and the decisions about employee conduct, we looked to the existing case law which describes the factors that should be considered when determining whether it is appropriate to dismiss an employee for just cause. Where necessary, we also made reference to existing government policy such as the Standards of Conduct for public service employees, the Public Service Agency's Executive Accountability Framework and the Core Policy and Procedures Manual.

While the report contains a significant focus on the actions of individuals in determining what happened and why, it is important to emphasize that no individual decision and no single person is responsible for what occurred. This investigation uncovered a number of systemic problems, many of which contributed to the outcomes that occurred. Ultimately, the purpose of this report is not to lay blame. It is to provide an accounting of the facts as we found them, to identify the systemic factors that we believe contributed to the events that unfolded in 2012 and subsequently and, where appropriate, to make recommendations for redress, improvement and reconciliation.

STRUCTURE OF REPORT

This report is primarily focused on factual matters - the "who, what, when and why" of the investigations and the decision-making process. It often refers to evidence we obtained under oath from witnesses who participated in the various investigations and the decision-making processes that resulted from those investigations. In many cases, we decided that it was best to let the witnesses' evidence speak for itself.

Consistent with the Ombudsperson's role, we have also analysed the evidence and drawn conclusions about the conduct we describe. Key findings can be found at the end of Chapters 5 through 17. Based on the report and findings, 41 recommendations are made.

UNDERSTANDING THE MINISTRY OF HEALTH IN 2012: BACKGROUND AND CONTEXT

We describe the development of the Pharmaceutical Services Division (PSD) at the Ministry of Health and outline what we understand to be the broader policy rationale for that division's focus, up to 2012, on evidence-based research on pharmaceuticals and evaluation of pharmaceutical policy. We describe how PSD was structured to achieve these policy goals, and the extent to which these goals relied on the use of administrative health data. We describe some specific research initiatives that PSD supported and set out the history and evolution of the Therapeutics Initiative.

We then describe three existing organizational factors at the Ministry of Health that, in our view, contributed to the way in which the investigation into employee conduct unfolded. These factors include a chronic lack of clear policy direction around data use that helped foster a risk-averse approach to sharing administrative health data; a culture of suspicion about the propriety of contracting practices that emerged following an instance some years before of a criminal act in the eHealth area; and a significant number of personnel changes at the executive level in the span of two years that had a detrimental impact on the ministry's institutional memory.

THE COMPLAINT

The Ministry of Health's review of the allegations of employee misconduct began at the end of March 2012 when it received a copy of a complaint that had been made to the Auditor General. The complainant had a sincere belief in relation to the allegations she made, but she was uninformed and mistaken about the facts. She named specific employees and external contractors who were alleged to have engaged in wrongdoing in relation to contracting and data practices.

Although this complaint was almost entirely inaccurate, the ministry did not assess its factual validity at the outset. Instead, the ministry asked a fairly inexperienced employee to conduct an initial review of the complaint. The complainant then became deeply embedded in this initial review and expanded the scope of her original complaint. The purpose of the review was to better explain the complainant's concern, but it was not necessarily well understood by others that the initial review did not analyze or validate the complaint.

MINISTRY OF HEALTH INVESTIGATION ESTABLISHMENT AND COMPOSITION

Following the work of the initial review, Ministry of Health executives concluded that an investigation was necessary. That work began at the end of May 2012, when three Assistant Deputy Ministers in the ministry approved the terms of reference appointing a lead investigator who was then a director of privacy investigations on the staff of the Chief Information Officer, and other members of an investigation team.

The terms of reference for the investigation did not clearly define its scope, and it quickly expanded beyond the original purposes for which it was established. The terms of reference contemplated a one month investigation completed by the end of June 2012. The investigation continued for approximately 16 months during which time numerous individuals joined and left the investigation team. This included an investigator from the BC Public Service Agency and staff from the Ministry of Health. While the investigation was represented as being external to the Ministry of Health, functionally this was not the case.

MINISTRY OF HEALTH INVESTIGATION THROUGH THE FIRST EMPLOYMENT SUSPENSIONS: JUNE AND JULY 2012

One week after the investigation began, the Ministry of Health suspended data access for individuals identified in the original complaint. These suspensions were unrelated to the suspected privacy breaches that the Ministry of Health reported to the Information and Privacy Commissioner later that summer.

Five of the initial data suspensions were not based on any evidence of improper data use that would support a valid suspicion. Before making the decision to suspend data access, the decision-makers did not properly assess and document whether, in relation to each individual whose data access was suspended, there was any evidence which, if true, posed a risk of improper use of data. The ministry did not give the individuals adequate explanations about the basis for the data access suspensions.

Some of the people who had their data access suspended were ministry contractors. The ministry delayed its investigation into the actions of the contractors and, as a result, their suspensions remained in place for over a year.

Following the initial data access suspensions, the investigators continued to gather evidence, and they conducted informal interviews and reviewed emails and contracts. The investigators' evidence-gathering process was undisciplined and suffered from a lack of organization, effective senior management oversight, clear policy guidance and subject matter expertise.

The investigators undertook a mass review of email and categorized emails they viewed as suspicious into categories of wrongdoing. The investigators' approach to reviewing emails was ineffective and it appeared they were focused on trying to build a case and were not engaged in a neutral fact-finding exercise. The investigators did not approach this part of their investigative work with suitably open minds and an understanding of the relevant program areas and this impaired the reliability of their work.

In early July 2012 the investigators created a first draft of an Internal Review report describing the wrongdoing they believed they had uncovered. This draft report itemized a series of conclusions which were unsupported by evidence. Many of the report's purported findings merely reiterated several of the complainant's allegations and did not reflect the outcome of robust investigation or clear analysis. The draft Internal Review report also listed a series of recommendations related to contracting practices, data use, and the conduct of employees, but these recommendations did not arise from a careful assessment of the evidence.

The draft report was amended periodically, but it continued to reflect the influence of the complainant's perspectives and the investigation team's unsupported belief that there was widespread misconduct within the ministry. Officials in the ministry interpreted the early reports in a variety of ways, many of which did not reflect the true stage of the investigation at that time. The conclusions set out in the drafts of the Internal Review report influenced the direction of the investigation. These same report drafts, including one that contained a "relationship web", were used to brief senior executives within the ministry, the Comptroller General and the RCMP. They were also used to support the employment and contract terminations that followed.

At the end of June 2012, the Ministry of Health, with the advice of the B.C. Public Service Agency (PSA), decided to suspend three employees, Dr. Malcolm Maclure, Dr. Rebecca Warburton and Mr. Ron Mattson. On July 17, 2012 these employees were notified that they were suspended without pay pending investigation.

The PSA's recommendation and the Ministry of Health's decision to suspend the employment of Dr. Maclure, Dr. R. Warburton and Mr. Mattson were made without an evidentiary basis and without clear consideration of whether lesser measures were available to mitigate any perceived risks. Further, the Ministry of Health lacked the contractual or statutory authority to suspend excluded employees without pay, and as such, the suspensions were contrary to law. At the time, PSA had a long-standing practice to suspend excluded employees without pay, but this practice ran contrary to legal advice it had received.

Following his suspension, Dr. Maclure asserted that the Ministry of Health had constructively dismissed him from his employment and as a result, the ministry did not formally terminate his employment. Dr. Maclure ought not to have been constructively dismissed.

MINISTRY OF HEALTH INVESTIGATION CONTINUES THROUGH THE EMPLOYMENT TERMINATIONS: AUGUST-OCTOBER 2012

In August and September 2012, the investigators uncovered three suspected privacy breaches and later reported them to the Information and Privacy Commissioner.

At the end of July 2012, the Ministry of Health suspended data access for Ramsay Hamdi. The Ministry of Health acted reasonably when it suspended Mr. Hamdi's data access while it made further inquiries.

Throughout August 2012, the Ministry of Health suspended more employees without pay on the recommendation of the Public Service Agency. Ramsay Hamdi and David Scott were suspended at the beginning of August without pay. A few weeks later Robert Hart and Roderick MacIsaac were also suspended without pay. The decisions to suspend each of these four employees resulted from a procedurally flawed and improper process.

Mr. MacIsaac, Mr. Hamdi and Mr. Scott all worked in bargaining unit positions and thus were members of the BC Government and Service Employees' Union. We reviewed the basis on which these employees were suspended. The Ministry of Health did not have valid grounds to conclude that these employees posed a serious risk and their suspensions were improper. Contrary to appropriate labour relations practices, the Public Service Agency did not consider whether lesser measures than suspensions could address any perceived risk to the ministry.

The Public Service Agency and the Ministry of Health did not have a sufficient basis to conclude that the suspension of Mr. Hart was warranted. As with the three excluded employees suspended in July, Mr. Hart's suspension without pay pending investigation was not authorized by a term of his employment contract or the *Public Service Act* and was contrary to law.

In August 2012, then-Deputy Minister of Health, Graham Whitmarsh, assumed a greater role in respect of the investigation. He briefed John Dyble, Deputy Minister to the Premier and Michael de Jong, Minister of Health. He also started to meet with the investigation team on a weekly basis to receive progress reports about the investigation.

Throughout August 2012, a significant part of the work conducted by the Ministry of Health investigation team was interviewing the employees under investigation as well as other employees in the ministry. These interviews were conducted primarily by the lead investigator and the PSA's investigator, with contributions from two other members of the investigation team. We reviewed the records of these interviews and spoke with the members of the investigation team as well as some of the people who were interviewed.

In conducting many of the interviews, the Ministry of Health investigation team:

- provided insufficient notice of the allegations made against employees
- did not provide employees under investigation with adequate particulars of the case against them, including in relation to appropriate document disclosure, contrary to legal advice
- did not display a suitably open mind
- did not appropriately consider the evidence the witnesses provided
- did not accurately characterize the information they gave to witnesses in interviews

From listening to the recordings of those interviews, we found that the employees who were dismissed were generally co-operative and responsive in the interviews.

While the conduct of the interviews themselves was the responsibility of the investigators, executives at the Ministry of Health and the Public Service Agency who were responsible for the conduct of the investigators did not ensure that the interviews were conducted fairly. The Ministry of Health did not provide the investigation team with a structure for conducting the interviews, or take substantive action when concerns about the interviews were brought to their attention.

In addition, the Public Service Agency did not provide their staff members adequate training or policies to guide the way in which the interviews were conducted.

At the end of August 2012, the lead investigator and the Director of the Investigations and Forensics Unit of the office of the Comptroller General contacted the RCMP about the ongoing Ministry of Health investigation. When they met on August 27, 2012 the RCMP told them they would not make a decision about whether to investigate until they received a final report from the government investigators and in light of the RCMP's capacity at the time the report was received.

EMPLOYEE DISMISSAL DECISIONS AND PUBLIC ANNOUNCEMENT

Beginning on September 6, 2012, the Ministry of Health terminated the employment of six public servants, asserting that it had just cause. The decisions to terminate the employment of Dr. R. Warburton, Mr. Mattson, Mr. Hart, Mr. Hamdi, Mr. Scott and Mr. MacIsaac were made by Deputy Minister Whitmarsh as the statutory decision-maker under section 22(2) of the *Public Service Act*.

The ministry did not have sufficient evidentiary basis to dismiss any of the employees for just cause. We determined that none of the dismissed employees engaged in conduct sufficient to support their terminations. Furthermore, in deciding whether to dismiss any of the employees,

the ministry gave inadequate consideration to whether their conduct had been condoned.

The process by which human resources advice was to be provided by PSA broke down and this contributed to the problems with the dismissal decisions. An investigative report was not prepared and separate advice about the appropriate consequences of the investigation was not provided. Furthermore, the weekly meetings comprised of many senior officials of the Ministry of Health and PSA effectively sidelined the PSA investigator and human resources specialist and disrupted the regular process. There was no good reason for the process to be as rushed as it was.

There was confusion about the provision of legal advice regarding the dismissals. Ministry of Justice lawyers had reviewed the dismissal letters of the excluded employees, but had not been asked by PSA or Ministry of Health to provide legal opinions on the question of just cause for dismissal for any of the dismissed employees. The Deputy Minister of Health was aware of the lawyer's review of the letters and had a mistaken belief that legal advice on just cause had been provided.

On September 6, 2012, the Ministry of Health issued a news release announcing the existence of an investigation of inappropriate conduct, contracting and data management practices in the ministry. The news release announced the four dismissals that had taken place and that three other individuals had been suspended. While the news release did not contain individuals' names, the identity of the fired and suspended employees soon became known publicly.

The news release stated the fact that the RCMP had been asked to investigate and were provided with interim results of the investigation. The decision to include the reference to the RCMP was debated by the ministry, Government Communications and Public Engagement, and Ministry of Justice up until the final moments before the public announcement was made, but Minister MacDiarmid was not told about this debate or about the legal advice the ministry received before making the announcement.

Including this reference to the RCMP was misleading because the RCMP had advised the ministry that they would not even make a decision about whether to investigate until a final report was received from the ministry investigation.

THE MINISTRY OF HEALTH'S RESPONSE TO THREE SUSPECTED PRIVACY BREACHES

As the Ministry of Health investigation continued, the investigation team discovered three suspected privacy breaches involving personally-identifiable administrative health data. The ministry believed that administrative health data had been shared improperly with three separate individuals: Mr. Mark Isaacs, a contractor who ran a company called Quantum Analytics, Dr. William Warburton and Mr. Roderick MacIsaac. These alleged breaches were subsequently reported to the Office of the Information and Privacy Commissioner in August and September 2012. We investigated the ministry's understanding of these privacy breaches because they were relevant to three of the termination decisions and how the ministry handled the contract with Mr. Isaacs.

The Information and Privacy Commissioner found that the three privacy breaches occurred because the ministry failed to translate privacy and security policies into meaningful business practices.

The focus of the Information and Privacy Commissioner's report was on whether the person providing the information committed a privacy breach. The recipient of the information in one of the first privacy breaches was Mr. Isaacs and he acted appropriately.

In the privacy breach involving Mr. MacIsaac, he was improperly provided with the information but was authorized to receive the information and did so in his capacity as a ministry employee. He was also a PhD student who intended to obtain and use an anonymized dataset for his PhD thesis, but that was to take place at a future time.

MINISTRY OF HEALTH INVESTIGATION INTO EMPLOYEES CONTINUES AFTER THE TERMINATIONS: SEPTEMBER 2012 – OCTOBER 2013

The Ministry of Health investigation continued after the dismissal decisions in September 2012. The scope of the investigation expanded to focus on additional public servants who were subjected to interviews. Many of the interviews were conducted in an unfair manner similar to what had occurred with the earlier interviews.

In June and September 2013, government and the BCGEU settled the grievances that had been filed by Mr. Hamdi, Mr. Scott and Mr. MacIsaac following their terminations. The grievances were settled on the basis of information provided by the province to the BCGEU before the Public Service Agency recognized the significant flaws in the investigation process. As such, these employees did not have a fair opportunity to have their claims fully considered on the merits.

Between September 2012 and July 2013, the lead investigator maintained regular contact with the RCMP and provided them with material that the investigation team had compiled. This included providing the RCMP with a set of discs containing personally-identifiable federal health data that the ministry held in accordance with an agreement with Statistics Canada. The ministry was, at the time, under no legal obligation to provide this information. The Ministry of Health's decision to voluntarily provide the federal health information to the RCMP was improper and contrary to legal advice.

MINISTRY OF HEALTH INVESTIGATION INTO CONTRACTORS AND EXTERNAL RESEARCHERS

While its investigation continued, the Ministry of Health conducted a parallel investigation into contractors and external researchers who were linked in some way to employees already suspected of wrongdoing. This led the ministry to make more decisions to both suspend the researchers' individual data access and suspend and cancel a number of health research contracts.

In most cases the decision to suspend access to administrative health data was made in the absence of any evidence of inappropriate conduct and based on suspicion alone. The data access suspensions caused the individuals to be unable to carry out employment or other obligations.

The ministry's decisions to suspend the contracts with the University of British Columbia and the University of Victoria that related to the work of the Therapeutics Initiative, the Education for Quality Improvement in Patient Care (EQIP) initiative and the Alzheimer's Drug Therapy Initiative (ADTI), were made without any evidence of wrongdoing and were arbitrary. Despite the investigators' suspicions the ministry never had, or obtained, any evidence that Dr. Colin Dormuth engaged in misconduct of any sort. The same was true for the ministry's decision to suspend and effectively terminate its contract with Blue Thorn Research and Analysis Group Inc.

Neither the investigators, nor the senior executives who made the suspension decisions, gave adequate consideration to the impacts of those suspensions on health research, ministry objectives and the livelihoods and reputations of those they targeted. In addition, the ministry unduly delayed its investigation into the concerns that led it to make the suspension decisions, thereby increasing individual and organizational harms.

In 2012, the ministry had a contract with Quantum Analytics Inc. (QA) for an information tool called Quantum Analyzer, which used administrative health data to display, graph, compare and download health information in anonymized and summary form. QA was owned and operated by Mr. Isaacs. The ministry suspended and then terminated its contract with QA following the data breach in which Mr. Isaacs was involved, despite Mr. Isaacs having done nothing wrong and, in fact, having acted completely appropriately when he discovered that he was improperly provided personal health information. The ministry inappropriately continued to use his Quantum Analyzer software after purporting to suspend the contract.

WINDING UP THE MINISTRY OF HEALTH INVESTIGATION AND SETTLING THE LITIGATION

In June 2013 Stephen Brown was appointed Deputy Minister of Health. Shortly after his appointment he was briefed on the investigation and began to question the usefulness of continuing the investigation. By October 2013 he had directed the investigators to discontinue the investigation. At the same time, Mr. Brown received legal advice from government's outside counsel about the best approach to dealing with the lawsuits brought by the dismissed employees and Dr. W. Warburton. On the basis of that advice, the ministry instructed its lawyers to try to settle the lawsuits. Settlements were subsequently reached in all of the lawsuits and government's lawyer provided opinions supporting the settlement in all of the cases.

By late 2013 government had sufficient information (notwithstanding the outstanding Comptroller General report and some of the ongoing litigation) to raise serious questions about whether the ministry's investigation had been

fair. The ministry did not initiate a comprehensive review and reassessment at that time to determine whether people had been treated unfairly.

When employees were suspended in July and August 2012, their personal effects were boxed up and some of the employees' belongings were lost. The Ministry of Health did not ensure that the fired employees and one contractor had adequate opportunity to identify personal belongings from their offices.

OFFICE OF THE COMPTROLLER GENERAL INVESTIGATION AND REPORT

Before its formal investigation began, the Ministry of Health contacted the Office of the Comptroller General to advise it of the complaint it had received. The Investigations and Forensics Unit (IU) of the OCG began to monitor the Ministry of Health investigation and in October 2012 commenced a formal investigation of its own to "confirm or dispel" the allegations in the original complaint. At the beginning of its investigation, the IU adopted a collaborative approach with the Ministry of Health investigation team.

In April 2015 the IU produced a draft report on the matters it had investigated, which it then provided to the RCMP. The RCMP reviewed the report but declined to conduct a criminal investigation. The IU finalized its report on June 25, 2015.

Overall, the IU did not satisfy the objectives set out in its investigation terms of reference. The absence of guidelines or a protocol between the IU and the ministry investigation team created objectivity risks when the two collaborated. The IU investigation also suffered from a number of gaps in its investigation process that undermined the accuracy of the conclusions contained in its report.

Prior to finalizing the report, the IU did engage in a quality control process but it was not sufficiently robust. In any event, the quality control reviewer indicated the IU report was more in the nature of a summary working paper than a final report.

In April 2015 the IU had provided a copy of the draft report to the Ministry of Health. The ministry failed to comment on the report before it was finalized in June 2015. This was a missed opportunity for both the IU and the ministry to identify and rectify issues with the report before it was finalized. In July 2015, after the report had been finalized and the assignment wound up, the Office of the Comptroller General was told that the Ministry of Health had concerns the IU report contained inaccuracies, based on legal advice the ministry received from its counsel that the report contained statements that were untrue, and warned of the risk of defamation if the report were to be released. The IU report was subsequently leaked to the media. After the completion of the IU's investigation, the Ministry of Finance hired KPMG to conduct a "strategic initiatives review" of the IU. KPMG has recommended a number of steps to improve the IU. The KPMG report highlighted many of the same internal process gaps we identified. The Ministry of Finance has taken steps to begin implementing the KPMG recommendations.

GOVERNMENT'S INTERACTIONS WITH THE FAMILY OF RODERICK MACISAAC

Mr. MacIsaac died four months after he was fired from his co-op position with the Ministry of Health. He never had the opportunity to truly understand why he was fired, and after his death his family continued to search for answers.

The BC Coroners Service investigated Mr. MacIsaac's death and took possession of Mr. MacIsaac's personal laptop. The Coroners Service obtained specialized computer recovery assistance from the RCMP who located a document written by Mr. MacIsaac that described his experience during the Ministry of Health investigation. The Coroners Service made Mr. MacIsaac's family aware of the document but did not provide it to them. Instead, they read a redacted version of the document to them over the phone. When the laptop was returned to the family, they could not find the document until they used specialized software and wondered whether it had been deliberately deleted. We concluded neither the Coroners Service nor the RCMP deleted the document.

On September 30, 2014, Mr. MacIsaac's sister Ms. Linda Kayfish held a press conference calling for government to apologize and explain the reasons for her brother's firing. In the days that followed, Premier Clark, Minister Lake and Deputy Minister Brown apologized for the manner in which Mr. MacIsaac had been treated.

MCNEIL REVIEW AND REPORT

On October 3, 2014, government announced that it had asked Marcia McNeil to conduct a review of the public service response to the allegations against the Ministry of Health employees who were fired in 2012. The resulting report was credible and highlighted many of the same investigative process problems that we have found in our own investigation. However, the hurried manner in which the terms of reference of Ms. McNeil's review were developed meant they needed to be amended shortly thereafter. That created confusion about the purpose of the review which was compounded by public statements by the Premier and Minister of Health that were over-broad in expressing the purpose and anticipated outcome of the review.

Ms. McNeil's review resulted in the Public Service Agency making a number of improvements to its investigative and advisory processes.

IMPACT ON MINISTRY OF HEALTH STAFF AND HEALTH RESEARCHERS

The impacts on individuals arising from the investigations conducted by the Ministry of Health and the Office of the Comptroller General were widespread.

For those most directly involved, the investigations, together with the announcement of an RCMP investigation, resulted in fear, anxiety, loss of income and financial uncertainty, harm to reputation and careers, harm to relationships and, in some cases, health problems.

The investigations also had negative organizational impacts within the Ministry of Health, some of which still exist. We recount how some employees thought the investigation and the events which followed caused a loss of productivity, morale and engagement within the ministry.

The investigations also impacted public health research, evaluation, educational initiatives and analysis that the Ministry of Health was supporting in 2012. Research projects conducted within the ministry and by outside researchers were delayed or ended due to the inability to access data.

RECOMMENDATIONS

Forty-one recommendations to address the findings and conclusions are set out in this report. Those recommendations fall under two broad categories: individual and systemic.

INDIVIDUAL RECOMMENDATIONS

The individual harms caused by the events described in this report are not easily remedied. Nonetheless, government can and should take further steps to provide remedies to these individuals. Apologies to individuals affected by government's investigations and decisions are recommended, in addition to making an overall public apology. In recognition that its conduct has caused harm to identifiable individuals *ex gratia* payments to several people are recommended.

Two steps to honour the memory of Mr. Roderick MacIsaac are recommended:

- an endowment for a scholarship for doctoral students at the University of Victoria be funded, and
- an annual Ministry of Health staff award for excellence in training, mentoring and supporting co-op students be established.

SYSTEMIC RECOMMENDATIONS

Recommendations that relate to the systemic issues encountered in this matter are made. Many of these systemic recommendations are aimed at preventing the events described in this report from recurring, and as such they relate to:

- standards for the conduct of public service investigations
- employment standards of conduct
- data access suspensions
- public service employment suspension and dismissal decisions
- obtaining and responding to legal advice
- BC Coroners Service policy.

In addition, some of these systemic recommendations are aimed at remedying some of the broader impacts of the investigation. They include:

- public interest disclosure legislation
- organizational reconciliation in the Ministry of Health
- evidence based research, evaluation and decision making

CONCLUSION

The Select Standing Committee referred this investigation to our office in July 2015 with the expectation that we would be able to answer many of the significant questions that remained about the 2012 Ministry of Health investigation and subsequent events. This report describes, in significant detail, our understanding of when, why and how these events unfolded as they did. While our report has focused on a particular series of events, the circumstances of this case offer important lessons for the B.C. public service as a whole.

OVERVIEW

1994
Therapeutics Initiative established.

1995
Reference Drug Program introduced.

MAR 2006
Office of the Auditor General releases Managing Pharmacare report.

JUN 2006
National Pharmaceuticals Strategy Progress Report co-chaired by Minister of Health George Abbott.

APR 2008
Pharmaceutical Task Force Report released.

JUL 6, 2012
Ministry of Health investigation team completes first draft of Internal Review report.

JUL 16, 2012
Dr. W. Warburton's contract with Ministry of Health terminated.

JUL 16, 2012
Government Communications and Public Engagement prepares information note with key holding messages.

JUL 17, 2012
Dr. Maclure, Dr. R. Warburton and Mr. Mattson suspended from employment.

JUL 18, 2012
Ministry of Health investigation team completes second draft of Internal Review report.

JUL 27, 2012
Ramsay Hamdi's data access suspended.

AUG 1, 2012
Mr. Hamdi and David Scott are suspended from employment.

AUG 3, 2012
Deputy Minister Graham Whitmarsh briefs Minister of Health Michael de Jong.

SEP 13, 2012
Ministry of Health suspends contract with Blue Thorn Research and Analysis Group.

SEP 17, 2012
Ministry of Health investigation team discovers third possible data breach.

SEP 19, 2012
Ministry of Health directs universities to suspend all work on Therapeutics Initiative and Alzheimer's Drug Therapy Initiative contracts.

SEP 19, 2012
Ministry of Health suspends contract with Quantum Analytics.

NOV 6, 2012
Ministry of Health terminates contract with Resonate Solutions Inc.

OCT 30, 31 & NOV 5, 2012
Ministry of Health sends data demand letters to former employees, contractors and external researchers.

OCT 25, 2012
RCMP notes indicate no information yet received from Ministry of Health.

OCT 22, 2012
Dr. Rebecca Warburton is dismissed.

OCT 3, 2012
Comptroller General signs terms of reference to begin the Investigation and Forensic Unit investigation.

OCT 2013
Ministry of Health investigation ends.

OCT 4, 2013
Final draft of Internal Review report completed.

FEB 25, 2014
Mr. Hart and the province settle litigation.

JUN 12, 2014
Dr. Maclure and the province settle litigation.

AUG 25, 2014
Mr. Mattson and the province litigation settlement announced.

OCT 8, 2014
In the legislature, Premier Christy Clark apologises on behalf of government to Mr. MacIsaac's family.

OCT 3, 2014
Marcia McNeil review announced.

OCT 3, 2014
Minister of Health Terry Lake apologises publicly on behalf of government.

SEP 30, 2014
Mr. MacIsaac's sister holds news conference seeking an apology and explanation for her brother's firing.

- 9 / EMPLOYEE DISMISSAL DECISIONS AND PUBLIC ANNOUNCEMENT
- 10 / THE MINISTRY OF HEALTH'S RESPONSE TO THREE SUSPECTED PRIVACY BREACHES
- 11 / MINISTRY OF HEALTH INVESTIGATION INTO EMPLOYEES CONTINUES AFTER THE TERMINATIONS: SEPTEMBER 2012 TO OCTOBER 2013
- 12 / MINISTRY OF HEALTH INVESTIGATION INTO CONTRACTORS AND EXTERNAL RESEARCHERS
- 13 / WINDING UP THE MINISTRY OF HEALTH INVESTIGATION AND SETTLING THE LITIGATION
- 14 / OFFICE OF THE COMPTROLLER GENERAL INVESTIGATION AND REPORT
- 15 / GOVERNMENT'S INTERACTIONS WITH THE FAMILY OF RODERICK MACISAAC
- 16 / MCNEIL REVIEW AND REPORT

JUL 2009
Ministry of Finance releases report on procurement and contract management practices in the Ministry of Health.

MAR 21, 2012
Office of the Auditor General receives anonymous complaint alleging wrongdoing in the Ministry of Health.

MAR 30, 2012
Ministry of Health complaint reviewer begins gathering information.

MAY 16, 2012
Ministry of Health Assistant Deputy Minister contacts Comptroller General about complaint.

MAY 31, 2012
Terms of reference for Ministry of Health investigation team approved.

JUN 7, 2012
Data access and signing authority suspended for Dr. Malcolm Maclure, Dr. Rebecca Warburton and Ron Mattson. Data access suspended for Dr. Colin Dormuth.

JUN 11, 2012
Data access suspended for Dr. William Warburton.

AUG 3, 2012
Lead investigator discovers possible data breach. Second possible data breach discovered soon thereafter.

AUG 15, 2012
Mr. Whitmarsh briefs Deputy Minister to the Premier John Dyble.

AUG 27, 2012
Lead investigator and Investigation and Forensic Unit Director of the Office of the Comptroller General meet with RCMP.

AUG 28, 2012
Co-op student Roderick MacIsaac suspended from employment.

AUG 31, 2012
Robert Hart suspended from employment.

AUG 31, 2012
Education for Quality Improvement in Patient Care contract expires.

SEP 6, 2012
Mr. Mattson, Mr. Hamdi, Mr. Scott and Mr. MacIsaac dismissed.

SEP 6, 2012
Public announcement of referral to RCMP and terminations.

SEP 13, 2012
Robert Hart dismissed.

FEB 14, 2013
Lead investigator provides RCMP with emails.

JAN 14, 2013
Government issues news release about data breaches.

JAN 8, 2013
Mr. MacIsaac is found dead. Coroners Service investigates.

DEC 10, 2012
Ministry of Health provides Canadian Community Health Survey data to RCMP.

FEB 21, 2013
Ministry of Health terminates contract with Quantum Analytics.

FEB 25, 2013
Final Ministry of Health investigation team interview of Ministry of Health employee.

JUN 25, 2013
Mr. MacIsaac's and Mr. Scott's grievances settle.

JUL 17, 2013 & AUG 14, 2013
Lead investigator provides university records to RCMP.

AUG TO SEP 2013
Ministry of Health begins process to reinstate data access privileges to individuals whose data had been suspended.

SEP 10, 2013
Mr. Hamdi's grievance settles.

FEB 2016
The government learns the Investigations and Forensic Unit report was leaked to the media.

DEC 29, 2015
Drs. R. and W. Warburton and the province litigation settlement announced.

JUNE 25, 2015
Final report by the Investigations and Forensic Unit provided to Comptroller General.

DEC 19, 2014
Ms. McNeil's report is made public.

1.0 / INTRODUCTION

At about 2:30 p.m. on September 6, 2012, newly appointed Minister of Health Margaret MacDiarmid held a news conference to announce that her ministry had "asked the RCMP to investigate allegations of inappropriate conduct, contracting and data-management practices involving ministry employees and drug researchers."[1] The minister announced that an internal investigation had resulted in four employees being fired and three more being suspended.[2] In addition, the contracts of two contractors were suspended and later cancelled. All access to data and research on drug and evidence development in the Pharmaceutical Services Division of the Ministry of Health were suspended, pending the outcome of the investigation.[3] Government indicated this was a serious situation that had been uncovered through an internal investigation. The minister stated that she was "profoundly disappointed" to be dealing with this "very concerning set of circumstances."[4]

In the more than four years since that announcement, the individuals impacted by these decisions, including their families and colleagues, suffered significantly. Although government settled all legal proceedings with the fired employees, significant questions about the firings remained. Without clear information about why the firings occurred or about who made those decisions, various theories have emerged in the public discourse.

There have been reports issued related to certain aspects of the matter. A report released by the Information and Privacy Commissioner in June 2013 detailed apparent data breaches that had been reported to that office by the Ministry of Health.[5] A review report by outside lawyer Marcia McNeil, delivered to the government in December 2014, shed some light on the internal investigation that led to the employee termination decisions, pointing to a process that was "flawed from the outset, as it was embarked upon with a pre-conceived theory of employee misconduct."[6]

1 Ministry of Health, "Ministry of Health taking immediate steps to respond to investigation," news release, 6 September 2012.

2 Two of the three suspended employees were fired soon after. A third commenced litigation for constructive dismissal, which lawsuit was eventually settled.

3 Ministry of Health, "Ministry of Health taking immediate steps to respond to investigation," news release, 6 September 2012.

4 Andrew MacLeod, "Research Stopped by Ministry Might Have Cut Big Pharma Profits," *The Tyee*, 8 September 2012.

5 Office of the Information and Privacy Commissioner, *Investigation Report F13-02: Ministry of Health*, 2013 BCIPC No. 14, 26 June 2013.

6 Marcia McNeil, Investigatory Process Review: *2012 Investigation into Employee Conduct in the Ministry of Health*, 19 December 2014, 34.

Ms. McNeil's report did not, however, answer lingering questions about who made the termination decisions and whether the investigation and the resulting firings were justified. News reports in March 2016 about a leaked 2015 report completed by the Office of the Comptroller General raised further questions about why the government had settled with these individuals when this internal report had, perhaps, found wrongdoing after all.

These and other questions prompted the Select Standing Committee on Finance and Government Services to refer this matter to the Ombudsperson in the following motion passed on July 29, 2015:

> *… refer the Ministry of Health terminations file to the Ombudsperson for investigation and report as the Ombudsperson may see fit; including events leading up to the decision to terminate the employees; the decision to terminate itself; the actions taken by government following the terminations and any other matters the Ombudsperson may deem worthy of investigation. The Committee trusts that his investigation can conclude in a timely manner.*[7]

This report starts out by situating the 2012 Ministry of Health investigation in context. It describes the work of the Pharmaceutical Services Division and highlights underlying organizational cultural factors within the ministry that affected the investigation from the outset. It describes and assesses the events that led to employee and contractor suspensions and terminations, including the complaint that triggered the ministry's internal investigation and the investigation itself. Suspensions of data access are described. The subsequent investigation conducted by the Office of the Comptroller General is also examined. Finally, this report describes the impacts of the investigations: on the individuals directly affected, on the public service and on the ability of the Ministry of Health and external researchers to carry out work in the public interest.

What happened in 2012 and after does not lend itself to a straightforward narrative. Problems were encountered during multiple stages of various investigations and resulting government actions. There were key points where, had different decisions been made, certain outcomes would have changed. However, there is no single failing in public administration that made the events unfold as they did. It would be simplistic to say that had any one event not happened that the matter would have ended then and there. Rather, one problem often built on another.

Consistent with the lack of a single cause of the events that transpired, our investigation revealed multiple opportunities for improvement in public administration. It is to this end, along with redress for the individuals impacted, that the Ombudsperson's recommendations are directed.

While many of the findings in this report are specific to a particular government ministry or agency, the conclusions and recommendations in this report hold important lessons for the public service as a whole.

7 The investigation is described in Chapter 2.

2.0 / SCOPE AND MANDATE OF THE OMBUDSPERSON'S INVESTIGATION

2.1 INTRODUCTION

The scope of our investigation is defined by the *Ombudsperson Act* and the referral issued by the Select Standing Committee on Finance and Government Services (the Committee) pursuant to section 10(3) of the *Ombudsperson Act* on July 29, 2015.

2.2 INVESTIGATIVE MANDATE

Section 10(3) of the *Ombudsperson Act* provides that "the Legislative Assembly or any of its committees may at any time refer a matter to the Ombudsperson for investigation and report."

On July 29, 2015, the Select Standing Committee on Finance and Government Services (the Committee), a committee of the Legislative Assembly consisting of members from both elected parties, adopted a motion under section 10(3) of the *Ombudsperson Act* to:

> *… refer the Ministry of Health terminations file to the Ombudsperson for investigation and report as the Ombudsperson may see fit; including events leading up to the decision to terminate the employees; the decision to terminate itself; the actions taken by government following the terminations and any other matters the Ombudsperson may deem worthy of investigation …*

Section 10(4) states that the Ombudsperson "must investigate the matter referred under subsection (3), so far as it is within the Ombudsperson's jurisdiction and subject to any special directions, and report back as the Ombudsperson thinks fit."

On September 9, 2015, the Committee unanimously issued Special Directions Regarding Referral to Ombudsperson (the Special Directions).

While defining in significant detail the terms on which the Committee expected the investigation to proceed, the Special Directions expressly provided that they are not intended to limit "the matters the Ombudsperson considers appropriate to investigate arising from the Committee's referral." The Special Directions also recognize the Ombudsperson's right to "control his process, develop an investigation plan and carry out his procedures in the fashion he considers necessary or appropriate."

2.3 OMBUDSPERSON ACT

The *Ombudsperson Act* defines the legal parameters of our investigation that outline:

- our requirement to maintain confidentiality unless disclosure of information is permitted by the Act[1]
- our information-gathering powers, including the ability to summon and examine individuals under oath[2]
- our requirement to provide notice to adversely affected individuals and authorities, and provide an opportunity to respond, before we finalize our report and recommendations[3]

The *Ombudsperson Act* provides that the "Ombudsperson may receive and obtain information from the persons and in the manner the Ombudsperson considers appropriate."[4] The evidentiary rules that apply to our investigative process are different from those of a judicial process. We may receive and accept evidence that would not be admissible in a court, and the Ombudsperson may determine his own procedures for staff to exercise the powers contained in the Act.

This report makes findings of fact and draws conclusions about government and individual conduct. However, because the evidentiary rules that apply to our investigations are different from what would apply to a court, none of these findings can or should be taken as findings of criminal or civil liability. Thus, our findings of fact are not necessarily the same as what a court would find.[5] Nor do the Ombudsperson's opinions about legal issues have the same legal effect as a finding of law made by a court or adjudicative body. An Ombudsperson's function is unique, and has been broadly articulated by the Supreme Court of Canada:

> *… [the Ombudsperson's] powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed. The Ombudsman "can bring the lamp of scrutiny*

1 *Ombudsperson Act*, R.S.B.C. 1996, c. 340, s. 9.

2 *Ombudsperson Act*, R.S.B.C. 1996, c. 340, s. 15.

3 *Ombudsperson Act*, R.S.B.C. 1996, c. 340, s. 17.

4 *Ombudsperson Act*, R.S.B.C. 1996, c. 340, s. 15(1).

5 A similar caveat applies to public inquiry reports: see *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada)*, [1997] 3 S.C.R. 440.

> *to otherwise dark places, even over the resistance of those who would draw the blinds" … the powers granted to the Ombudsman allow him to address administrative problems that the courts, the legislature and the executive cannot effectively resolve.*[6]

As part of the ordinary course of the Ombudsperson's work, section 23 of the *Ombudsperson Act* articulates the standards on which the Ombudsperson reviews, assesses and draws conclusions about a matter under investigation. As described by the Supreme Court of Canada, the powers of the Ombudsperson include but go beyond assessing whether government action was contrary to law. The Supreme Court of Canada has recognised that section 23 of the Act "speaks of determinations by the Ombudsman that something the government did was 'unjust,' 'oppressive,' 'based in whole or in part on a mistake,' brought about through 'arbitrary, unreasonable or unfair procedures' or 'otherwise wrong.'"[7] Section 23 also empowers the Ombudsperson to determine that something occurred because "there was unreasonable delay in dealing with the subject matter of the investigation." These assessments necessarily require the Ombudsperson to make value judgments about whether actions taken reflected sound public administration. Their purpose is precisely to allow the Ombudsperson to address the kinds of "maladministration, abuse of authority and official insensitivity" that may not be readily amenable to identification in a court of law: *British Columbia (Development Corp.) v. British Columbia (Ombudsperson)*, [1984] 2 S.C.R. 447 at 459. As the Supreme Court of Canada stated in that case:

> *Read as a whole, the* Ombudsman Act *of British Columbia provides an efficient procedure through which complaints may be investigated, bureaucratic errors and abuses brought to light and corrective action initiated. It represents the paradigm of remedial legislation. It should therefore receive a broad, purposive interpretation consistent with the unique role the Ombudsman is intended to fulfil.*[8]

Consistent with this, the Ombudsperson upholds and applies a broader conception of the principles of "fairness" than might be applied by a court. Courts, which are often concerned with defining minimum legal standards of due process, may not provide recourse to individuals for all "bureaucratic errors and abuses" that might arise from government action. Similarly, where court remedies exist they may not fully identify or resolve the root causes of administrative unfairness or provide avenues for corrective action. This further supports the role of the Ombudsperson to go beyond assessing whether government actions might be defensible in a court action, or finding that if government acted appropriately simply because its actions did not violate the law. It also means this report does not shrink from making a recommendation merely because a court might not order the same result. Consistent with the Act and the Ombudsperson's remedial role the Ombudsperson is entitled to provide an assessment of the fairness of government's conduct in this case and make recommendations for individual remedies and for corrective action to improve public administration as a whole.

To the trained legal mind, all this evokes dangers of uncertainty and even subjectivity. But the legislators who created Ombudsperson offices in various jurisdictions recognized in their wisdom that appointing an individual familiar with government, and entrusting that individual to conduct these broad assessments and make the recommendations that flow from them, is an essential part of our complex public administration. As recognized by the Supreme Court of Canada, the Ombudsperson function ensures that citizens have access to an independent officer who looks at government more broadly than a court would do, and can assess its behaviour and make recommendations so as to encourage, on an ongoing basis, a "more humane system of government."

In short, an Ombudsperson is a unique officer, with a unique function. He is not a court or an adjudicator. His role is to offer his opinions on government actions, including but going beyond whether those actions were contrary to law, and to make recommendations with the prospect

6 *British Columbia Development Corporation v. Friedmann (Ombudsman)*, [1984] 2 S.C.R. 447 at 461.

7 *British Columbia Development Corporation v. Friedmann (Ombudsman)*, [1984] 2 S.C.R. 447 at 468. In other jurisdictions, these standards form part of the broader concept often described as "maladministration."

8 *British Columbia Development Corp. v. Friedmann (Ombudsman)*, [1984] 2 S.C.R. 447 at 463.

that if those recommendations are accepted, the result will be better both for government and for those it serves.

Section 10(5) of the *Ombudsperson Act* provides that sections 23 to 26 of the Act *do not* apply to an investigation that is referred to our office under section 10(3) by the Legislature or one of its committees. Section 10(5) recognizes that where a legislative committee initiates an investigation, and the Ombudsperson is reporting back directly to the committee, our usual statutory procedure – a procedure that involves reporting directly to a particular authority (s. 23), asking the authority to report back (s. 24) and then potentially taking the matter up with Cabinet and the Legislative Assembly only if we are not satisfied with a response (ss. 25, 26) – is not applicable.

Nonetheless, the content of the review standards set out in section 23 provides a relevant and useful framework within which to identify and articulate wrongs when they arise. This was expressly referenced in the Special Directions, where the Committee recognized the Ombudsperson's independent mandate "to make the findings and recommendations he considers appropriate *in accordance with his usual review standards*" [emphasis added]. As such, throughout this report, when making findings about government conduct, we have used the content of section 23 to inform the standards applied to our assessments of the information reviewed. Incorporating section 23 into the analytical framework has enabled us to rely upon and maintain consistency with our existing standards of review, as articulated in the Office of the Ombudsperson's 2003 *Administrative Code of Justice*. Thus, in the context of this report, the language of section 23 is used when describing the instances of maladministration set out in this report.

All this having been said, the Special Directions issued by the Committee make it clear that the Ombudsperson's role is to investigate and report on the events in this case broadly. Consequently, in order to report fully on the matter referred by the Committee we have applied a more inclusive approach that has enabled this report to recognize those instances when government and individuals have acted reasonably and appropriately, and when they have fallen short of the standards we would have expected them to apply.

2.4 CHRONOLOGY GIVING RISE TO THIS REFERRAL

On July 3, 2015, Minister of Health Terry Lake wrote to Scott Hamilton, Chair of the Select Standing Committee on Finance and Government Services, requesting that the Committee refer the 2012 Ministry of Health terminations to the Ombudsperson under section 10(3) of the *Ombudsperson Act*.

On July 7, 2015, the Ombudsperson wrote to the Committee identifying a number of matters related to his investigative powers that needed to be addressed before the matter is referred to the Ombudsperson.

On July 8, 2015, Attorney General Suzanne Anton wrote to the Committee with some observations regarding the July 7, 2015 Letter.

On July 15, 2015, The Deputy Attorney General Richard Fyfe and the Ombudsperson attended separately before the Select Standing Committee to answer questions about the potential referral.

On July 16, 2015, Attorney General Anton wrote to the Committee to confirm that work was underway on a proposed amendment to section 19(2) of the *Ombudsperson Act* as identified in the Ombudsperson's July 7, 2015 letter to the Committee.

On July 21, 2015, the *Ombudsperson Amendment Act*, S.B.C. 2015, c. 30 received royal assent (to be brought into force by regulation).

On July 27, 2015, Ramsay Hamdi, Dr. William Warburton, Dr. Rebecca Warburton, David Scott, Dr. Malcolm Maclure, Linda Kayfish, Ron Mattson and Robert Hart made a written submission to the Committee with a list of questions that should be considered.

On July 29, 2015, on division, the Committee resolved to:

> *. . . refer the Ministry of Health terminations file to the Ombudsperson for investigation and report as the Ombudsperson may see fit; including events leading up to the decision to terminate the employees; the decision to terminate itself; the actions taken by government following the terminations and any other matters the Ombudsperson may deem worthy of investigation. The*

Committee trusts that his investigation can conclude in a timely manner.

On September 9, 2015, the Committee unanimously resolved to issue Special Directions to the Ombudsperson. These special directions:

- describe the actions to be completed by government to facilitate the Ombudsperson's investigation;
- outline the scope of the investigation, subject to the Ombudsperson's discretion;
- describe the expected reporting process for the Ombudsperson's final report[9]

On September 10, 2015, the *Ombudsperson Amendment Act, 2015*, S.B.C. 2015, c. 30 was brought into force by B.C. Regulation 170/2015.

On February 23, 2016, Government issued a legal fee indemnity available to (1) individuals summonsed to attend an interview with the office of the Ombudsperson and (2) individuals who receive a notice under section 17 of the *Ombudsperson Act* that there may be sufficient grounds for making a report or recommendation that may adversely affect that individual.

2.5 THE SPECIAL DIRECTIONS

The Special Directions issued by the Committee on September 9, 2015, complement the investigative framework set out in the *Ombudsperson Act* by establishing the parameters of this investigation. Section 4 of the Special Directions describes certain matters that we were required to consider (subsections 4(a), (b), (c) and (e)), and additional matters that we had the discretion to consider, if we determined they were related to the rest of the investigation (subsection 4(d)).

The content of the Special Directions meant that the primary focus of our investigation was on determining how, and why, the terminations occurred. We examined the role of government in events leading up to the terminations, the reasons for and evidence underlying the termination decisions, and steps taken by government following the terminations. We investigated government's decision to refer the matter to the RCMP, and the decision to announce that fact publicly. We investigated government's decisions to suspend and reinstate data access for employees and for external researchers. We determined that certain aspects of government's involvement with both the Alzheimer's Drug Therapy Initiative and the Therapeutics Initiative were related to the primary issues under investigation, and, to the extent relevant, we included the Ministry of Health's treatment of these programs in our investigation.

On July 27, 2015, before the Committee referred this matter to our office, Ramsay Hamdi, Robert Hart, Linda Kayfish, Dr. Malcolm Maclure, Ron Mattson, David Scott, Dr. Rebecca Warburton and Dr. William Warburton wrote to the committee members.[10] Their letter outlined the matters they believed should be the subject of inquiry. Many of the questions listed in the letter are encompassed within the Special Directions that were later established by the Committee.

2.6 THE GOVERNMENT ACTIONS OUTLINED IN THE SPECIAL DIRECTIONS

The Special Directions issued by the Committee listed six conditions on which its referral to our office was predicated. These six steps were collectively described as the "government actions." Those actions were implemented by government as detailed in the following table:

9 See Appendix A for the complete Special Directions.

10 This letter can found on the Legislative Assembly website at <https://www.leg.bc.ca/content/CommitteeDocuments/40th-parliament/4th-session/fgs/documents/2015-07-29/Joint-Submission-2015-07-29.pdf>.

TABLE A: SPECIAL DIRECTIONS ISSUED BY THE COMMITTEE

Special Directions	Government Action
3(a) Proclaim into force the *Ombudsperson Amendment Act, 2015*, S.B.C. 2015, c. 30	*Ombudsperson Amendment Act, 2015*, brought into force by B.C. Reg 170/2015, effective September 10, 2015
3(b) Provide the Ombudsperson with complete access to all required and relevant information, without limitation, in accordance with established protocols	Provided access to all requested records, as described in section **2.8**
3(c) Apply the Protocol Agreement between the Ombudsperson and the Government of British Columbia (2011), covering written and electronic records described in s. 18 of the *Ombudsperson Act*, to all matters covered by s. 18 including oral statements	Disclosure Agreement (Cabinet Privilege – Oral Statements) between Ombudsperson and Government of British Columbia signed October 15, 2015; see section **2.8.2.1.2**
3(d) Apply the existing Memorandum of Understanding between the Ombudsperson and the Government of British Columbia relating to legal advice, to ensure that the Ombudsperson has access to all relevant legal advice provided to Government in relation to the subject matter of this referral	See sections **2.8.2.1.1** and **2.11**
3(e) Release terminated employees and contractors from any confidentiality provisions including those entered into as part of the resolution of any litigation, in order to support their full participation in the investigation	Completed January 2016
3(f) Approve the budget recommended by the Committee arising from this referral	Completed for fiscal years 2015/16 and 2016/17

2.7 WHY WAS THIS INVESTIGATION CONDUCTED IN PRIVATE?

At the most basic level, this investigation was conducted in private because the law, as set out in section 9(6) of the *Ombudsperson Act*, required that this investigation be conducted in private. The private nature of an Ombudsperson investigation is a central feature that distinguishes an Ombudsperson investigation from a process such as a civil trial or a public inquiry. The requirement to conduct investigations in private is not only a central feature of the B.C. statute, it is a common feature of Ombudsperson legislation across Canada.[11]

Section 9(6) of the *Ombudsperson Act* allows the Ombudsperson to make an exception to the privacy of an investigation where he considers that "there are special circumstances in which public knowledge is essential in order to further the investigation." Importantly, under this statutory test, public knowledge must be essential to further the investigation. This provision is not appropriately used to turn a private investigation into a public inquiry because some would prefer to see the investigation taking place in real time. Where and to the extent that public knowledge is not necessary to further the investigation itself, as was the case here, the *Ombudsperson Act* requires that privacy of the investigation must prevail.

What are some of the benefits of a private investigation as compared with adjudicative or public inquiry processes? As the Supreme Court of Canada has recognized in the leading decision regarding Ombudsperson investigations, "litigation can be costly and slow."[12] Further, because the Ombudsperson "often operates informally, [the Ombudsperson's] investigations do not impede the normal processes of government."[13]

The privacy of investigations also serves other interests, including the interconnected interests of witness privacy and the investigation's ability to collect reliable evidence.

From a privacy perspective, the Ombudsperson's investigative process protects all witnesses from having to give their evidence in the public spotlight, which in today's world includes the potential for that person's image or evidence to be broadcast in real time, and recorded for all time, in both broadcast and social media.[14] Instead of allowing for indiscriminate publicity during the information-gathering process, the Ombudsperson model allows the Ombudsperson to make more balanced, fully informed decisions about who should be named in the final report under s. 10(3) and what information needs to be highlighted with regard to a particular person's involvement.

From an investigative integrity perspective, the Ombudsperson model also rejects the view that the only way to obtain reliable information is in an adversarial context, with rooms full of lawyers cross-examining witnesses in the public spotlight. The Ombudsperson model proceeds on the premise, confirmed by experience, that witnesses are just as – if not more – likely to provide full and reliable information when they are doing so in a setting that is private, less formal and less threatening. A private investigation, being an investigation, also allows an Ombudsperson to follow the evidence wherever it leads. As described by the Ombudsman of New South Wales, by conducting an investigation in private, the Ombudsperson can "refine (and enlarge) the scope of an investigation as it proceeds, in response to the issues being raised by the parties and the information being analysed."[15]

Finally, a private investigation is best aligned with the Ombudsperson's fundamental purpose, which is not to adjudicate issues of liability or legal fault, but to assess government conduct and make recommendations under

11 For example, the Ontario Ombudsman Act, R.S.O. 1990, c.0.6, s. 18(2), *Manitoba Ombudsman Act*, C.C.S.M. c. O45, s. 26, and *Alberta Ombudsman Act*, R.S.A. 2000, c. O-8, s. 17(1), contain identical provisions, stating, "every investigation by the Ombudsman under this Act shall be conducted in private."

12 *British Columbia Development Corporation v. Friedmann (Ombudsman)*, [1984] 2 S.C.R. 447 at 460.

13 *British Columbia Development Corporation v. Friedmann (Ombudsman)*, [1984] 2 S.C.R. 447 at 461.

14 See Eltis, The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context (2011), 56 McGill L.J. 289; Saskatchewan Information and Privacy Commissioner, Administrative Tribunals, Privacy and the Net <http://www.oipc.sk.ca/Resources/Administrative%20Tribunals.pdf>.

15 New South Wales Ombudsman, *Operation Prospect*, Volume 1 (Sydney, NSW: NSW Ombudsman, December 2016), iii.

the basic standards of government decency provided for in section 23 of the *Ombudsperson Act*.

The drafters of the Act clearly believed that a private investigation, together with a power to make public recommendations (instead of orders), was the best way for the Ombudsperson to engage government and to elicit positive systemic reform.

2.8 OBTAINING AND REVIEWING DOCUMENTARY RECORDS

The *Ombudsperson Act* provides broad powers to obtain records that relate to an investigation. The Ombudsperson can obtain records that are in a person's possession or control, "whether or not that person is a past or present member or employee of an authority and whether or not the document or thing is in the custody or under the control of an authority" (*Ombudsperson Act*, s. 15).

In this investigation, the vast majority of the records came from the provincial government, as described below. A smaller number of records came from other sources. Given the huge volume of records received, we used a specialized records management program to assist in categorizing and searching through the records. This process is described in greater detail below.

2.8.1 SOURCES AND VOLUME OF RECORDS

2.8.1.1 PROVINCIAL GOVERNMENT

During the preliminary stages of the referral process in August 2015, government officials advised that they had compiled roughly 100,000 documents related to the Ministry of Health investigation for the purpose of responding to requests under the *Freedom of Information and Protection of Privacy Act*. They also told us that there were approximately 100,000 more documents that had been provided to Marcia McNeil during her review. They further advised that approximately 60 file boxes of hard copy documents, as well as electronic media, related to the Ministry of Health's internal investigation were being stored securely and would be made available to us. In these discussions, it became clear that an unknown number of additional documents would likely be relevant to our investigation.

We concluded shortly after work began that an independent investigation into these matters could not be limited to the documents that government had determined were relevant. A thorough and impartial examination of how the Ministry of Health's investigation had been conducted would require, at a minimum, access to all of the material that the 2012 investigation team had obtained for their own purposes. We would also require similar disclosure from other involved agencies, including the Public Service Agency, the Office of the Comptroller General, and the Ministry of Justice. Access to email records and electronic drives and folders would also be required.

It became apparent that this investigation would involve a volume of records that was, for this office, unprecedented. As a result, one of our earliest priorities was to identify and secure the resources necessary to effectively process and review this volume of records. We also had to ensure that the confidentiality and impartiality of our investigation would not be compromised.

To determine the proper approach to this challenge, we reviewed the tools and approaches used in major public inquiries and large-scale litigation and investigations, and the best practices that have been established in those fields. Leading software tools available were identified, and we engaged with several companies to evaluate the suitability of the available options, as well as the infrastructure and technical expertise that would be required to use the selected software tools at their full capacity while protecting the integrity and confidentiality of the data.

We determined that we would need software and hardware capable of processing and making available for our review not only a massive volume of files and data, but a broad range of file types, including proprietary database formats and forensic images, as well as large numbers of email records. To minimize the time necessary to review the records, reliable automated tools were required to identify and eliminate duplicate files, screen out large volumes of system and data files that were irrelevant to our investigation, organize documents for analysis, and provide an interface that would allow us to efficiently search and review the records. Data processing software and an electronic discovery platform for review and analytics were selected.

By the end of December 2015, the procurement and contracting process was complete. The initial set of files was loaded into the database and ready for use in February 2016.

While we were working on putting these electronic document review tools in place, we were also requesting and obtaining records from government. During the course of the investigation, records were requested and received from the following provincial government sources:

- Ministry of Health
- Public Service Agency
- Ministry of Finance
- Government Communications and Public Engagement
- Ministry of Justice
- BC Coroners Service
- Ministry of Education (records related to Research Relationships Tool Kit)
- Ministry of Technology, Innovation and Citizens' Services
- Office of the Premier
- Office of the Minister of Health
- Office of the Minister of Finance
- Office of the Deputy Minister to the Premier

In some cases, multiple requests for records were made to the same government ministry or agency. These multiple requests arose as an understanding of the issues underlying the investigation developed. We received both electronic and paper records during the investigation. With the exception of our initial access to solicitor-client privileged records, described in greater detail below, we did not encounter any significant difficulties in accessing government records. On occasion we had to clarify with government officials the Ombudsperson's legislative authority to obtain records, but once that was done we were provided with full access to relevant materials.

By far the largest set of records obtained was the electronic records set collected by the Ministry of Health's internal investigation team. These electronic records, received in mid-December 2015, contained millions of documents. Also in December 2015, we received a smaller subset of electronic records that included the material provided to Ms. McNeil for her review, and records compiled for the then-Deputy Minister of Corporate Initiatives in the Office of the Deputy Minister to the Premier for her review. Together, these electronic records encompassed the entire contents of several network drives, local drives on individuals' computers, forensic images, databases in various formats, and numerous individual email accounts. The records included multiple versions of the same drive or email account saved on different dates. These electronic records totalled about five terabytes (TB) of data.

The use of sophisticated technology assisted the investigation to identify the records for further examination in detail. Document management tools quickly separated volumes of irrelevant file types, and duplicate files. They enabled keyword searches, identifying near duplicates and organizing email threads.

The same tools were applied to additional records collected throughout the investigation. This included email folders for 144 different individuals and 87 file boxes containing 129,000 pages of paper documents. In total, we collected over 6.4 TB of data. By the end of the investigation, the document management database contained just under 4.7 million separated files.

2.8.1.2 DUPLICATE RECORDS

Many of the nearly 4.7 million files in the database were duplicates, even though we put the database as a whole through a de-duplication process. Those duplicates were retained because they contained unique metadata, were attached to or otherwise linked with other files in the database, such as emails, or were scanned from paper documents.

2.8.1.2.1 DIFFERENT SOURCES

A significant number of the duplicate documents in the database were emails. A primary reason for the large volume of duplicate emails retained was the fact that the same email would come from different PSTs (files that contain all the contents of an Outlook email account have the file extension ".pst"). We received multiple copies of the same email from different individuals. One back-and-forth exchange between two individuals, for example, generates four separate documents – both the sender's

and the receiver's copies of the original message, and again both copies of the reply. If other people were copied on the email, or it was forwarded to others later, those versions of the email were also retained in the database. Streamlining the document count by removing all duplicates in the database would therefore have come at the expense of retaining a complete picture of when, where and how an email was shared.

Another source of duplication arose from the records themselves. The Ministry of Health internal investigation, the Comptroller General's investigation, and Ms. McNeil's review shared and drew upon much of the same source material. The Legal Services Branch of the Ministry of Justice also had copies of much of this same material for their own files. A single document might therefore exist in multiple places. We were able to use analytical tools to determine the specific source of each document and to therefore identify who had custody or possession of it.

The central task of this investigation was to understand what the various reviews and investigations knew; what evidence led to the actions taken against various individuals and institutions, and thus what documents had been collected, accessed and reviewed in support of those actions. Much of the same core material was encountered multiple times, but this was in itself useful information, as it assisted in determining what the various individuals involved knew or should have known.

2.8.1.2.2 DIFFERENT FORMATS

As noted above, the investigation obtained paper records from the Ministry of Health internal investigation, the Comptroller General's IU investigation, and lawyers in the Legal Services Branch that duplicated much of the electronic material we received separately. Again, both electronic and scanned versions of the paper documents were maintained so as to ensure as complete a picture as possible of the records government used and accessed in its investigations and decision making.

2.8.1.3 ORGANIZING AND SEARCHING EMAIL THREADS

The value of the database and its filtering, threading and search capabilities quickly became apparent during review of the large volume of records.

The database has an analytics function that removes much of the duplication, and groups and threads emails together, allowing one to see the multiple branches of a particular email tree. Typically, these email threads would involve multiple individuals and dozens of responses over multiple days or even weeks. We were able to filter these email threads to review particular "threads" of a conversation or the email thread in its entirety.

By organizing the numerous duplicates of each message, conversations could be reviewed in their full context. Particularly important messages or sub-threads could be tagged and categorized by subject within the database, printed out and collated in their native format, or saved for later review. Over time, we collected subsets of useful or relevant files. Using these approaches smaller groups of documents requiring more detailed review and analysis could be isolated. This allowed us to methodically and efficiently identify the documents that were used during in-person interviews.

2.8.1.4 OTHER PUBLIC BODIES

Records were requested and received from the University of British Columbia and the University of Victoria. This included correspondence with the Comptroller General and the Ministry of Health, copies of contracts with the Ministry of Health, copies of policies, and financial information, including extracts from payroll and general accounting ledgers provided by both universities to the government in 2013.

Records were requested and received from the Royal Canadian Mounted Police. These records related to government's decision to refer matters arising from its internal investigations (the Ministry of Health investigation and the Comptroller General investigation) to the RCMP.

2.8.1.5 INDIVIDUALS AND THE BCGEU

In addition to government records, 130 individuals were summonsed to attend interviews and produce any relevant documents in their possession or control. This resulted in additional records being obtained, including witnesses' emails, notes, documents related to court proceedings and meeting minutes. Some witnesses also made written submissions on matters related to the investigation generally or to their individual circumstances.

Records were also requested and received from the BC Government and Service Employees' Union related to the

conduct of the grievances resulting from the Ministry of Health investigation.

2.8.2 CHALLENGES IN OBTAINING RECORDS

When the Committee referred this investigation to the Ombudsperson in 2015, it expected that we would have "complete access to all required and relevant information, without limitation, in accordance with established protocols."

The investigation was planned in the expectation that we would have complete access to all relevant government records, including privileged records. While the process of obtaining these documents was not without its challenges (as described below), it was valuable to our investigation that government provided unfettered access to this material. This facilitated witness interviews and fostered a better understanding of government's actions during the relevant time frame.

The enactment and proclamation of the *Ombudsperson Amendment Act, 2015* reassured witnesses, where applicable, that their confidentiality obligations under other legislation did not prevent them from speaking with us. Moreover, it allowed us to obtain records that we might not have otherwise been able to access.

2.8.2.1 PRIVILEGED RECORDS

2.8.2.1.1 RECORDS PROTECTED BY SOLICITOR-CLIENT PRIVILEGE

The most significant challenge encountered early in the investigation related to access to government records protected by solicitor-client privilege and litigation privilege. The Special Directions set out the Committee's expectation that government would:

> *. . . apply the existing Memorandum of Understanding between the Ombudsperson and the Government of British Columbia related to legal advice, to ensure that the Ombudsperson has access to all relevant legal advice provided to Government in relation to the subject matter of this referral.*

The existing Memorandum of Understanding referred to in the Special Directions was established in 1991. Thus, we expected that we would have full access to all relevant government documents, including those protected by solicitor-client privilege, without delay, and the 1991 arrangement would apply to that access. Unfortunately, however, this was not immediately the case at the beginning of the investigation. Early on, we attempted to obtain binders of information collected by the Investigation and Forensic Unit of the Comptroller General's office. We were informed that we could not take the binders until they were vetted for solicitor-client privilege.

We immediately raised with the Ministry of Justice a concern about this response and our need to have full access to the records from the Legal Services Branch and elsewhere in government.

In December 2015, government agreed to a temporary arrangement until March 31, 2016, whereby information subject to privilege was to be provided to us on the basis of a limited waiver of privilege.

As government complied fully with this temporary arrangement, we were able to obtain the privileged material we required. The temporary arrangement was not replaced after March 31, 2016. Instead, from that point until the end of the investigation we relied on the terms of the 1991 Memorandum of Understanding to obtain and use privileged information as contemplated by the Special Directions. The process for disclosing that information in this report is described in section 2.11.1.

2.8.2.1.2 RECORDS PROTECTED BY EXECUTIVE PRIVILEGE

On February 10, 2011, the Ombudsperson signed a protocol with the province that set out a process by which this office would obtain documents or information related to the deliberations of Cabinet or any of its committees. The protocol also set out a process through which the Ombudsperson could make reference to Cabinet records in a public report issued under the *Ombudsperson Act*. The purpose of this protocol is to balance the Ombudsperson's interest in conducting thorough and complete investigations with government's interest in preserving the confidentiality of Cabinet discussions.

The Special Directions set out the Committee's expectation that government would apply this agreement to written and electronic records but also to oral statements to which the 2011 protocol did not, on its face, apply.

Because we anticipated a significant number of interviews in this investigation, and that some of those interviews could involve disclosure of material protected by executive

privilege, in the early stages of planning this investigation the Ombudsperson signed a further protocol with government, relating to Cabinet information disclosed in interviews. This protocol, signed on October 15, 2015, confirmed that witnesses had government authorization to disclose executive-privileged information, and required us to notify witnesses of this authorization. The protocol confirmed that any such witness disclosure did not constitute a waiver of any privilege attaching to the information.

With these protocols in place, we did not encounter any difficulties in obtaining Cabinet records or information as requested in the course of our investigation, whether that information was provided through an interview or otherwise.

2.8.2.2 OUR USE OF BACKUP TAPES

Early in this investigation, we required the Deputy Ministers of each of the government ministries listed in the Special Directions to confirm in writing that they would take steps to require their staff to maintain, and not destroy, any records that could be relevant to the investigation.

We made thorough and comprehensive requests for records throughout our investigation. This was aided by the fact that government had – for reasons unrelated to this investigation – maintained backup tapes containing email records for all of government that covered the time period in question. This meant we were able to obtain email records that might otherwise have been destroyed in accordance with normal records-destruction protocols.

We found no evidence that material records relevant to this investigation were deliberately destroyed. In fact, each witness was asked, under oath, whether they had destroyed relevant records or knew of any relevant records that had been destroyed by others. Many witnesses gave evidence that they deleted emails that they considered to be transitory records in accordance with government records-management practices. Because government maintained backup tapes of email records, as described above, we were able to recover some of these records.

However, the fact that this investigation concerned matters that took place many years previous, meant that there were inevitable gaps in the documentary records. For that reason and others, we conducted extensive interviews.

2.9 INTERVIEWS

Prior to interviews, we met with 17 individuals on an informal basis. The purpose of these informal meetings was to obtain either an orientation and initial understanding of those individuals' involvement in the matters under investigation, or general background information. The informal meetings included meeting with three of the individuals named in the Special Directions and four other individuals whose work had been impacted by the Ministry of Health investigation.

On January 25, 2016, we met with most of the individuals named in the Special Directions, as well as other affected individuals, to discuss our investigation process and to invite them to provide their perspectives.

Once government issued its indemnity for witnesses in February 2016, the interview process was finalized. Formal interviews began in March 2016 and continued to mid-December 2016.

The Ombudsperson decided to issue a summons to all witnesses who were part of the formal interview process and obtain their evidence under oath or affirmation, as permitted by section 15 of the *Ombudsperson Act*. The Ombudsperson determined that this approach was necessary due to the breadth and complexity of the investigation and the importance of ensuring that witnesses understood the serious consequences of failing to provide truthful information. Each summons also required each witness to furnish us with any records that they had in their possession. Each interview was audio recorded.

We prepared a Witness Information Package that was made publicly available on our website and that was provided to all witnesses in advance of their interview. All witnesses were given an opportunity to review relevant documents in advance of their interview so as to refresh their memories and allow them to better provide evidence. Most witnesses took advantage of this opportunity. Where witnesses identified other documents that they believed would assist them in answering questions, we made every effort to locate those documents and make them available for the interview.

As noted earlier, witness interviews were conducted privately. We did not require witnesses to inform anyone that

they had been asked to attend an interview and it was made clear to each that they need not disclose that they had received a summons to their employer or any other person. Each witness was also asked to disclose whether they had been subject to any adverse treatment as a result of their participation, to ensure that there had been no breaches of section 16 of the *Ombudsperson Act*, which states that "a person must not discharge, suspend, expel, intimidate, coerce, evict, impose any pecuniary or other penalty on or otherwise discriminate against a person because that person complains, gives evidence or otherwise assists in the investigation, inquiry or reporting of a complaint or other proceeding under this Act."

Collectively, 130 individuals were interviewed under oath in 158 interviews; some conducted over multiple days. The result was just over 537 hours of recorded interview time.

As noted earlier, the Ombudsperson made the decision not to name every individual that was interviewed, because the privacy interest of every witness did not need to be affected in order to properly report on this matter. However, it is important to note that some of the witnesses we interviewed under oath included current and former:

- members of the Executive Council, including Premier Christy Clark, Minister of Health Terry Lake and Minister of Finance Michael de Jong
- Deputy Ministers and Assistant Deputy Ministers, including Deputy Ministers to the Premier
- staff in the Office of the Premier
- public servants from:
  - the Ministry of Health, Ministry of Finance and Ministry of Technology, Innovation and Citizens' Services
  - the Public Service Agency
  - the BC Coroners Service
  - Government Communications and Public Engagement
  - the Office of the Deputy Minister to the Premier
- lawyers from the Legal Services Branch
- members of the Royal Canadian Mounted Police
- government contractors and associates or employees of government contractors
- external researchers
- university employees and faculty members

The majority of interviews were conducted in Victoria and Vancouver. Four interviews were conducted by video connection because the witness was located outside Victoria and, based on the anticipated length of the interview, it was not necessary for the witness to travel to our office or for us to travel to the witness' location. In such circumstances, the Ombudsperson nonetheless issued a summons requiring the witness' appearance and required them to swear an oath or make a solemn affirmation at the outset of the interview.

We would like to acknowledge and thank each of the 130 individuals who participated in interviews as part of this investigation. Witnesses approached what was, for some, a difficult and emotional process with professionalism, candour and a willingness to assist our investigation. We could not have completed our investigation without such cooperation.

2.9.1 UNAVAILABLE OR UNWILLING WITNESSES

Throughout our investigation, we invited Ramsay Hamdi, David Scott and Linda Kayfish, through their common legal counsel, and Robert Hart to interviews. However, despite multiple invitations, none of these individuals wished to be interviewed as part of this investigation.

The Ombudsperson was prepared, if it was essential, to compel any of these individuals to give evidence by issuing a summons notwithstanding their reluctance. However, in light of their experience with the Ministry of Health investigation, and the evidence we obtained from other sources, the Ombudsperson chose not to issue summonses to these individuals. For some of these individuals their legal counsel had indicated that any summons would be met with a court challenge, and thus the cost and delay arising from such litigation had to be weighed against the benefits to the investigation to be derived. Based on all of the other information that was available, the Ombudsperson is comfortable about the conclusions reached in

this report concerning these individuals, despite the fact that they did not participate.

Some other people who were more peripherally affected by the investigation were reluctant to participate in an interview. In each such case, before deciding to issue a summons, consideration was given to whether that person's evidence was necessary to determining a material fact at issue in the investigation.

2.10 CONSIDERING THE EVIDENCE

Throughout this report, reference is made to information or evidence that we reviewed or received. In this investigation, the evidence included oral testimony, provided to us under oath by witnesses, and documentary evidence, which included the records received from the various sources described above.

Much of the evidence on key investigative issues was direct, in the form of witness testimony about something that happened with which the witness was directly involved. For example, direct evidence was received from multiple witnesses about who made the decision to dismiss each of the Ministry of Health employees and about their personal involvement (or non-involvement) in those decisions.

Circumstantial evidence was also considered. For example, when attempting to determine a date on which a particular event occurred, email records and witness evidence allowed us to draw the appropriate inference on the issue.

In assessing what happened with regard to the matters under investigation, the question was whether a particular fact was "more probable than not," giving consideration to all of the investigative evidence relating to that fact.

2.11 DISCLOSING SOLICITOR-CLIENT PRIVILEGED INFORMATION IN THIS REPORT

The Special Directions were based in part on government taking certain steps to facilitate this investigation. As noted above, one was to ensure that we had access to all of the relevant legal advice that government received in relation to the subject matter of our investigation.

Government upheld its disclosure commitments, and thus our investigation reviewed extensive information that is protected by solicitor-client privilege, including letters, emails, memoranda, notes and other documents. Additionally, as part of the interviews, witnesses regularly disclosed solicitor-client privileged information relating to legal advice that they received or provided in connection with the subject matter of our investigation. It is important to note that government maintains that it has not waived solicitor-client privilege over the information that it provided in response to our requests and that we have disclosed in this report.

In accordance with the terms of the 1991 Memorandum of Understanding, the Ombudsperson gave the Legal Services Branch of the Ministry of Justice an opportunity to review and make representations about the privileged information we planned to disclose. The Ombudsperson took these representations into account in determining what solicitor-client information to include in this report.

This report contains a substantial amount of information that is subject to solicitor-client privilege. In this regard, the report provides a unique and perhaps unprecedented window into the relationship between government and its lawyers, including how and when government seeks and receives legal advice, how that advice is communicated, whether it is followed and how the advice it receives may influence its conduct.

The Ombudsperson has determined that the disclosure of solicitor-client privileged information is necessary both to fulfill the Committee's directions that our report describe the nature and the extent of the involvement of the Ministry of Justice in the events around the 2012 terminations, and to explain the actions of other government actors who sought or received legal advice during the events we investigated. These interactions point to the importance of having a government that seeks, receives and follows appropriate legal advice. As will be seen, there were a number of occasions in the events investigated where the public would have been better served if legal advice had been sought or followed or the scope of the advice that was provided was better understood.

There is and must be a special relationship of trust between lawyer and client. Solicitor-client privilege is vigorously protected in our system because it allows for a full

and candid exchange of information, which in turn enables counsel to represent and advise its clients effectively. In deciding how much solicitor-client information to disclose in this report, the Ombudsperson has been mindful of the need to avoid publishing extraneous, gratuitous or unnecessary privileged information. Only as much information as is necessary to provide context for the findings and recommendations made in this report is included.

It is important to note that this report does not assess whether any particular lawyer's advice was substantively correct or whether the acts of those lawyers were appropriate. The Ombudsperson brought this issue to the attention of the Committee in July 2015, noting that the law prevents the Ombudsperson from investigating the decisions, recommendations, acts or omissions of an authority's lawyer:

> *11 (1) This Act does not authorize the Ombudsperson to investigate a decision, recommendation, act or omission*
>
> > *(b) of a person acting as a solicitor for an authority or acting as counsel to an authority in relation to a proceeding.*

As the Ombudsperson told the Committee:

> *I cite this provision to make it clear that the effect of this section is that the Ombudsperson is precluded from investigating the conduct of lawyers acting as solicitor or counsel for the government.*
>
> *I hasten to add that this section does would not prevent the Ombudsperson from obtaining the legal advice that has been given to government officials. This may be essential in order to determine whether legal advice was obtained concerning a matter, and if obtained, whether it was considered and followed. In this regard, I note that my office does have a standing Memorandum of Understanding with the Ministry of Justice for this purpose generally.*

2.12 SECTION 17 PROCESS

Section 17 of the *Ombudsperson Act* states as follows:

> *If it appears to the Ombudsperson that there may be sufficient grounds for making a report or recommendation under this Act that may adversely affect an authority or person, the Ombudsperson must, before deciding the matter,*
>
> > *(a) inform the authority or person of the grounds, and*
> >
> > *(b) give the authority or person the opportunity to make representations, either orally or in writing at the discretion of the Ombudsperson.*

The *Ombudsperson Act* does not define when an authority or person may be "adversely affected."

In an investigation such as this one, that assessment is not always straightforward. The Ombudsperson made that assessment having regard to the purposes of section 17 and the particulars of this investigation. Based on that assessment, the Ombudsperson did not issue a section 17 report to a person or authority where, when viewed from an overall perspective, the report and recommendations about the person or authority were positive. The Ombudsperson did, however, identify a number of authorities and persons who should receive a section 17 notice.

The requirement in section 17 to provide persons or authorities with the "grounds" can be satisfied by providing a letter setting out key points and potential adverse comments, and giving them an opportunity to make written or oral representations. In this case, however, the Ombudsperson determined that it would be helpful to provide persons and authorities with a confidential draft of the section of the report applicable to them for their response if they were prepared to sign an appropriate confidentiality undertaking.

Once an initial draft of the report was complete, we notified these authorities and individuals that they may be adversely affected. Because individuals receiving section 17 notices were entitled to apply for coverage under government's legal fee indemnity, we also provided potentially adversely affected individuals with advance notice so that they could consider whether to apply for coverage and, if so, contact the Coverage Administrator to confirm their eligibility.

The draft report excerpts provided to both individuals and authorities contained preliminary and tentative views. Most, but not all, individuals receiving a section 17 notice made representations as provided under the

Ombudsperson Act. The Ombudsperson carefully reviewed and considered each of the representations and took them into account in determining the content of this final report.

2.13 IDENTIFYING INDIVIDUALS BY NAME IN THIS REPORT

One issue that arises when preparing a public report arising from a private investigation carried out under the *Ombudsperson Act* involves the identification of individuals.

In the interest of transparency, we have in this report identified a number of individuals by name. Generally, members of the Executive Council, Deputy Ministers and Assistant Deputy Ministers are identified by name. This is because they are in positions of decision-making authority including their name is not an indication or suggestion of any issue with their conduct.

We have not identified by name most individuals below the level of Assistant Deputy Minister. We generally identify such individuals by role. We appreciate that this may make the report more laborious to read and some may say it is less transparent for doing so. However, many of those individuals were acting in a support role and thus there is no reason to name those individuals. There are some individuals below the rank of Assistant Deputy Minister who had more significant roles. However, we see no principled basis on which to name such individuals. To do so would exaggerate their involvement in comparison to the involvement of others. Most importantly it would be inconsistent with the remedial focus of an Ombudsperson report. We have identified by name the individuals named in the Special Directions where necessary to properly discharge the referral from the Committee.

In striking the above balance one thing is clear. An individual's purported involvement in this matter having been previously reported in the media is not determinative or even relevant to the question of whether they are identified by name in this report. It may be suggested that prior publicity or notoriety should set aside the considerations identified above. However, on a principled basis, such prior publicity is irrelevant.[16]

We have decided in this report to limit references to the intimate emotional, health and other personal details of individuals except as necessary to establish material facts. This includes details disclosed to us by individuals named in the Special Directions and those who investigated various events. The Ombudsperson's view is that it is not necessary to disclose that information in order to issue a proper report in this matter.

2.14 ISSUES RAISED BEFORE THE COMMITTEE

2.14.1 LEGAL FEES FOR PARTICIPANTS

In addition to the issues addressed in the Special Directions, various other matters arose before the Committee. One issue that was raised in the fall of 2015 related to public funding for legal fees for individual participants (i.e. not public authorities) in our investigation. The Ombudsperson made clear to the Committee that it was not our office's practice to pay the legal fees of individuals who are witnesses attending or otherwise involved in an Ombudsperson investigation. The Ombudsperson indicated that departing from that regular practice was not supported because of the precedent that would set and the lack of statutory authority to do so. However, the Ombudsperson agreed to raise the issue with government to determine whether government would publicly fund legal fees of individuals involved in this investigation.

We made two points clear to government as it considered whether to establish a legal fee indemnity. First, all persons ought to be treated equally by any legal indemnity. We advised government that eligibility should depend only on the individual's role in this investigation (i.e. *all* witnesses or *all* section 17 notice recipients) rather than on issues such as whether the person was a public servant. Second, rules regarding the indemnity should not interfere with our obligation to conduct the investigation in private as required by section 9 of the *Ombudsperson Act*.

In February 2016, government advised the Committee that it had established a legal fee indemnity system for

16 Additional policy considerations related to public interest disclosure (also known as "whistleblowing") preclude the disclosure of the identity of the person making the original complaint in this matter. These additional considerations outweigh the view that prior publicity about the individual justifies disclosure of that person's identity. In Chapter 5 we provide further details about the role of the complainant.

this investigation. Government's indemnity allowed witnesses and persons receiving notices under section 17 of the *Ombudsperson Act* to apply for coverage under the indemnity. The indemnity provided for the reimbursement of legal fees subject to limits related to hourly rates charged by lawyers and total amounts charged. The maximum payable under the indemnity for legal fees incurred by witnesses seeking advice about their participation in an interview was $1,000 and for legal fees incurred by a person in responding to a section 17 notice was $25,000.

The Ombudsperson's role under government's indemnity was to designate the Coverage Administrator, and in this regard, Howard Kushner, a Vancouver lawyer was named. Mr. Kushner previously held the position of Chief Legal Officer of the Law Society of British Columbia and from 1999 to 2006 was the Ombudsman of British Columbia. During this investigation, witnesses and section 17 notice recipients were advised of the indemnity and how to contact the Coverage Administrator for more information. Mr. Kushner administered the indemnity separately from both our office and government. In fact, we do not know which witnesses or section 17 notice recipients accessed the indemnity.

2.14.2 PRIOR ROLE IN 2012

Another issue raised at the Committee related to my previous role as a senior official at the Ministry of Justice prior to my appointment as Ombudsperson.[17] In July 2015, I advised the Committee that my role in the Ministry of Justice did not include providing legal advice to line ministries. However, during the investigation we came across a document indicating that when was I acting in place of the Deputy Attorney General while he was on vacation, the matter had briefly come to my attention in that capacity.

Upon learning of this, I advised the Chair and Deputy Chair of the Committee, and advised the Committee of this development at the next opportunity when appearing before them. I advised the Committee, and confirm in this report, that I did not, in either July 2015 or when advising the Committee in November 2016, recall that involvement and indicated that in the interest of transparency any details would be provided in this report. What follows is based on the documentary records obtained in our investigation.

The details are that on the morning of December 5, 2012, I was at the Vancouver Cabinet office. John Dyble, Deputy Minister to the Premier, was also present. I was there to attend Cabinet as required on behalf of the Deputy Attorney General, who was at that time on vacation. Based on the records I have reviewed, it appears that Mr. Dyble orally asked me whether government had exercised due diligence on one of the employment terminations because there was a story about resulting litigation in the media that day. I contacted the Acting Assistant Deputy Attorney General (Legal Services Branch) about the matter. Information was also obtained about the view of the Head of the Public Service Agency, Lynda Tarras, although it is not clear how those views were obtained. I then included the issue in a written list of items for the Deputy Attorney General upon his return from vacation on December 10, 2012. The part of the list related to this issue is as follows:

- *Former MOH employee involved in pharmaceutical firings has sued the province and held a press conference.*
- *John Dyble wants some assurance about the legal position of HMTQ.*
- *Some difference in story: [the Acting Assistant Deputy Attorney General, Legal Services Branch] is concerned firings occurred without legal advice whereas Lynda Tarras indicates this is not true and said that DM Health and [sic] called you and that there was advice before firing and throughout.*
- *This will need to be investigated further (by [the Acting Assistant Deputy Attorney General, Legal Services Branch]) and a meeting with (or memo) to John Dyble held.*

This memorandum, which updated the Deputy Attorney General on his return from vacation, completed my involvement in the matter. There is no indication in the records or otherwise of any other involvement.

On learning of this information in the fall of 2016, I sought advice from former Ombudsperson Stephen Owen and from two senior legal counsel. All were of the view that the information that was discovered about my temporary and extremely limited interaction with this file did not

17 In this section the Ombudsperson is referred to in the first person for purposes of clarity on the issue of his previous role.

affect my ability to complete the investigation as Ombudsperson, and I have proceeded in accordance with this advice.

2.14.3 ANTICIPATED DURATION OF INVESTIGATION

The other issue about which the Committee expressed interest involved the expected duration of this investigation. The July 29, 2015, motion passed by the Committee referring the matter to our office expressed the hope that the "investigation can conclude in a timely manner." In a public statement that day the Ombudsperson stated, "We understand the desire for answers in this matter and the wish that we complete this report in a timely manner. However, speed is not our first goal – a thorough, high quality investigation is our primary objective."

The Ombudsperson advised the Committee in the fall of 2015 that a demanding schedule would put us in a position to report within about a year of commencing the investigation. However, the Ombudsperson noted that there were many things that could interfere with that estimate and that completing a thorough investigation was the priority, rather than working to an arbitrary deadline set at the outset with imperfect information.

The estimated one-year duration of this investigation was based on various assumptions, including document volume estimates provided by government shortly after the referral. That estimate was in the range of 200,000 documents. As described in section 2.8, above, more than 4.6 million files were obtained. This, and other issues, required more time to complete the investigation. The Ombudsperson updated the Committee on this discrepancy in the volume of records in November 2016 and advised that as a result, this investigation would take roughly four to five months longer than the original estimate.

2.15 MATTERS NOT ADDRESSED IN THE REPORT

2.15.1 BRITISH COLUMBIA CENTRE FOR EXCELLENCE IN HIV/AIDS

The Special Directions directed the Ombudsperson to consider the extent to which the employment or contract terminations of the individuals named in the Special Directions related to provincial government involvement with research organizations including the British Columbia Centre for Excellence in HIV/AIDS (BC-CfE).

Early in this investigation, we contacted the BC-CfE to seek its comment on whether, and to what extent, its operations had been affected by the 2012 terminations. In response, the BC-CfE advised that it had not been affected by the Ministry of Health investigation, contract or employment terminations, or data access suspensions. We did not find information to suggest that there was a link between matters related to the Ministry of Health investigation and terminations and the BC-CfE. As a result, this report does not comment on the British Columbia Centre for Excellence in HIV/AIDS.

2.15.2 GOVERNMENT'S INVESTIGATION INTO LEAK OF IU REPORT

The Investigation and Forensics Unit of the Comptroller General's office completed a report into this matter in June 2015, which is discussed in chapter 14 of this report.

Media reports published in March 2016 indicated that an unauthorized disclosure of that report had occurred. This report speaks to the impact of that disclosure on the individuals involved.

On March 15, 2016, our office was notified that government initiated an investigation into the unauthorized disclosure of the IU report. That investigation was carried out by the Privacy, Compliance and Training Branch Investigations Unit (PCT), within the Ministry of Finance. The PCT advised us on March 10, 2017 that it had concluded its investigation into the unauthorized disclosure and had prepared a report.

Under paragraph 5(a) of the Special Directions, the Ombudsperson may limit the scope of his investigation where it would unnecessarily duplicate a process within the mandate of another Officer of the Legislature.

The Ombudsperson has determined that, in the event that any review or follow-up is required into the PCT report, that any review or follow-up is within the mandate of and best addressed by the Information and Privacy Commissioner. The Ombudsperson has made no finding or recommendation as to whether that is or is not necessary.

2.15.3 THE ROLE OF THE RCMP

The Special Directions provide that this investigation is to include government's statements regarding the Royal Canadian Mounted Police (RCMP) in relation to the terminations. That issue is addressed in the report. To properly understand the involvement of the RCMP before and after government's public statements, evidence was obtained from the RCMP including interviews under oath. However, the Ombudsperson wishes to be clear that this investigation did not encompass the conduct or decisions of the RCMP as that is outside the Ombudsperson's jurisdiction by virtue of section 72 of the *Police Act*.

2.15.4 OTHER OFFICERS OF THE LEGISLATURE

Two officers of the legislature, namely the Auditor General and the Information and Privacy Commissioner, had some involvement in the matters encompassed in the Committee's referral to the Ombudsperson. The Auditor General received the original anonymous complaint and brought this to the attention of officials at the Ministry of Health. The Information and Privacy Commissioner issued a report about three alleged privacy breaches reported to that office by the Ministry of Health as well as the information practices in the ministry more generally.

Neither officer of the legislature is specified in the Special Directions as a public body about which the Ombudsperson was to describe involvement. Furthermore neither is a public authority within the meaning of the *Ombudsperson Act*.

As a result the Ombudsperson did not investigate any act, omission, or recommendation of these Officers of the Legislature. To the extent that the matters we investigated overlapped with the matters reported to or by those officers we have made our own findings except where we state otherwise.

3.0 / THE STANDARDS APPLICABLE TO GOVERNMENT CONDUCT

3.1 INTRODUCTION

The previous chapter discussed in a general way the standards the Ombudsperson applies when assessing the actions of government. This chapter sets out in more detail the standards we applied, and why we applied them, in specific areas of the government conduct we reviewed.

3.2 THE EMPLOYMENT CONTEXT

This report focuses primarily on the process and outcome of two government investigations into alleged employee misconduct: the investigation conducted in the Ministry of Health in 2012 and 2013, and the investigation conducted by the Investigations and Forensic Unit of the Office of the Comptroller General from 2012 to 2015. These investigations took place in an employment context where government made decisions to fire some employees, to discipline others, and to suspend and terminate government contracts and data access for external researchers.[1]

Canadian law has long recognized the importance of employment to a person's sense of identity. The Supreme Court of Canada has emphasised the importance of work in peoples' lives in numerous wrongful dismissal cases. In *Reference re Public Service Employee Relations Act*, the court wrote:

> *Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being … In exploring the personal meaning of employment, Professor David M. Beatty, in his article "Labour is Not a Commodity," in* Studies in Contract Law *(1980), has described it as follows, at p. 324:*
>
> > *As a vehicle which admits a person to the status of a contributing, productive, member of society, employment is seen as providing recognition of the individual's being engaged in something worthwhile. It gives the individual a sense of significance. By realizing our capabilities and contributing in ways society determines to be useful, employment comes to represent the means by which most members of our community can lay claim to an equal right of respect and of concern from others. It is this institution through which most of us secure much of our self-respect and self-esteem.*[2]

In this report we are not commenting on government's ability to dismiss individuals without cause. Government, like any employer, has the ability to organize its workforce in the way it wishes, providing it follows the rules and processes set out in collective agreements, legislation and policy.[3] The Supreme Court of Canada in *Dunsmuir* was clear that the employer owes no duty of fairness when terminating an employee without cause where it otherwise satisfies the common law's requirements of severance pay or pay in lieu of notice.[4]

However, in this case, when government decided to terminate individuals' employment *for cause* it did so in a highly public way that has attracted significant scrutiny. When government made its public announcement about the terminations it also implicated the fired individuals in potential criminal conduct. Having done so, it was in our opinion incumbent on government to have reached its conclusions after an administratively fair and competent investigative process.

There are three main reasons why, even if there is no legal duty to do so, it is important for government to adopt and implement administratively fair processes for investigations into allegations of employee misconduct.

First, conducting a fair investigation is about treating public servants respectfully. As the Minister of Health acknowledged in 2014, when discussing Marcia McNeil's review, "we want to make sure that members of the public service are treated with respect, are treated appropriately when there are human resource implications involved with

1 The Office of the Comptroller General investigation occurred primarily after the employment suspension and termination decisions, although the office was involved in "monitoring" the Ministry of Health investigation beginning in the summer of 2012.

2 *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at para 91.

3 In addition, provincial government ministries can only spend the amounts that are authorized by the Legislative Assembly in approving the budget. Therefore they need to be able to downsize or reallocate their workforce as required to meet their budgetary requirements.

4 *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

their work."[5] Typically this means giving employees a fair opportunity to hear and respond to the allegations against them. It also means listening to what those employees have to say, or providing employees with an opportunity to have that say. It also means that government should not rush to judgement, but instead make its decisions only after careful consideration. When government specifically promised the employees it suspended that they would have the "opportunity to respond to the findings of the investigation and any recommendation regarding your employment,"[6] a moral expectation of fair treatment was reinforced.

Second, conducting a fair investigation ensures that more reliable conclusions are reached. Public servants conducting workplace investigations should be expected to do so in a manner that ensures they obtain the necessary labour relations advice in order to reach reliable and accurate conclusions and recommendations. Incorporating principles of administrative fairness into the investigative process helps to ensure investigators avoid unjust outcomes that arise from a misapprehension of the facts or evidence. A fair process guards against the risk of investigators developing tunnel vision.

Third, conducting a fair investigation minimizes the legal and financial risk to government and, thereby, the taxpayer. While fair investigation is not a legal requirement before firing an employee, and an unfair investigation does not vitiate a valid dismissal for just cause, it may make it more difficult for an employer to later establish that it did in fact have cause to dismiss an employee. For example, an employer who does not provide an employee with a reasonable opportunity to respond to allegations of wrongdoing may be unable to meet the burden of establishing cause.[7] Further, an inadequate and unfair investigation that does not properly assess the validity of allegations against an employee exposes the employer to potential claims for increased damages for breaching its implied obligation of good faith and fair dealing in the manner of termination.[8]

As the Supreme Court of Canada has described, the manner in which employees are dismissed is of particular importance to those individuals:

> *… the manner in which employment can be terminated is equally important to an individual's identity as the work itself … By way of expanding upon this statement, I note that the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal …*[9]

In the employment context, ensuring the fair conduct of investigations into allegations of employee misconduct will serve to insulate government against these risks. It also fosters greater confidence in the administration of the public service and helps ensure government makes its decisions based on the evidence.

In conducting our analysis, we considered the broader legal principles articulated by the courts in relation to employment investigations that result in terminations for just cause. For example, the Supreme Court of Canada has confirmed that in order to dismiss an employee for just cause, the employer must prove that the employee's misconduct justified termination because the misconduct was incompatible with maintaining the employee's ongoing employment. The courts have emphasised that the burden of proof rests with the employer to prove the alleged misconduct on a balance of probabilities. This means the employee does not have to prove that they did not engage in misconduct. The courts have also confirmed that the employee's alleged misconduct must be assessed contextually. This means the court will not consider the employee's conduct in isolation, but will instead consider

5 Minister Terry Lake, British Columbia Legislative Assembly, Hansard, 7 October 2014, 4541 <https://www.leg.bc.ca/documents-data/debate-transcripts/40th-parliament/3rd-session/20141007pm-Hansard-v15n3#4541>.

6 As set out in the suspension letters sent to each of the excluded employees. This opportunity was not afforded to those employees.

7 *van Woerkens v. Marriott Hotels of Canada Ltd.*, 2009 BCSC 73 at para 150, 71 C.C.E.L. (3d) 87.

8 *van Woerkens v. Marriott Hotels of Canada Ltd.,* 2009 BCSC 73, at para 152, 71 C.C.E.L. (3d) 87.

9 *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 742 at para 95

the surrounding facts and circumstances before determining whether termination for just cause was warranted.[10]

This law makes clear that it is important that investigators, advisors and decision-makers consider all additional mitigating factors that relate to the employee's individual employment circumstances. In other words, a comprehensive investigation into allegations of employee misconduct should include the employer's broader assessment of factors such as the employee's length of service, their disciplinary history, the seriousness of the alleged misconduct, the employer's awareness of the organizational culture, the presence or absence of clearly defined policies, processes or similar circumstances that influenced the employee's actions. The employer should also consider whether the proposed discipline or termination is consistent with the employer's prior responses to similar incidents, or takes into account organizational problems or policy and process gaps that it was aware of but had not addressed.

When a public authority is investigating allegations against employees, therefore, we expect that authority to have:

- a transparent and consistently applied standard against which to weigh the evidence gathered
- a clearly developed understanding of their onus to demonstrate, on a balance of probabilities, whether or not there was misconduct by the individuals it was investigating
- a clearly developed understanding of the context in which the alleged misconduct occurred, including the employee's actual role and duties in the organization and the relevant practices and culture in the workplace

Having described why the workplace investigations required administrative fairness, it is appropriate to turn next to the standard against which employee conduct should have been evaluated by the investigators and decision-makers. In the B.C. public service, this standard is set out in the Standards of Conduct for public service employees. We describe two important ways in which investigators and decision-makers should consider whether employee conduct has been condoned and, therefore, not subject to discipline.

3.2.1 STANDARDS OF CONDUCT FOR PUBLIC SERVICE EMPLOYEES

The Public Service Agency (PSA) has established Standards of Conduct for public service employees. The rationale for these standards is to help ensure that all public servants "exhibit the highest standards of conduct."[11] Employees are expected to comply with the Standards of Conduct as a condition of their employment, and to check with their supervisor if they are uncertain about how the standards apply in a particular circumstance. The Standards of Conduct cover issues such as an employee's duty of loyalty, confidentiality, impartiality, workplace behaviour, conflicts of interest, reporting allegations of wrongdoing, working relationships, and outside remunerative or volunteer work.[12]

The head of the PSA is responsible for providing advice about the application of the Standards of Conduct, guidance on how to appropriately respond to violations of the standards, and promoting awareness of the standards.[13] Deputy Ministers, in turn, are responsible for advising employees of the required standards, dealing with breaches "in a timely manner, taking the appropriate action based upon the facts and circumstances," waiving the provisions on working relationships in specified circumstances, and

10 *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161.

11 Public Service Agency, *Standards of Conduct for Public Service Employees* <http://www2.gov.bc.ca/gov/content/careers-myhr/about-the-bc-public-service/standards-of-conduct>.

12 Public Service Agency, *Standards of Conduct for Public Service Employees* <http://www2.gov.bc.ca/gov/content/careers-myhr/about-the-bc-public-service/standards-of-conduct>.

13 Public Service Agency, *Standards of Conduct for Public Service Employees* <http://www2.gov.bc.ca/gov/content/careers-myhr/about-the-bc-public-service/standards-of-conduct>.

delegating authority and responsibility to apply the standards within their organization.[14]

In each of the investigations conducted by the Ministry of Health and the Office of the Comptroller General the investigation teams made specific findings of fact that some of the employees breached the Standards of Conduct. In particular, each investigation concluded that several employees had impermissible conflicts of interest. Because the Standards of Conduct outline the test for determining whether conflicts of interest exist for public servants, it is this standard that should have been applied throughout those investigations. In the following section, we describe how, in our view, conflicts of interest should be assessed.[15]

3.2.1.1 CONFLICTS OF INTEREST

Generally, in the employment context, conflicts of interest may arise in circumstances where an employee's private interests conflict with, impair, or are incompatible with the performance of their employment duties. Ensuring that employees carry out their work in accordance with the public interest, without regard for their own private interests, is central to the notion of a fair and impartial public service.

The Standards of Conduct provide the following definition of "conflict of interest":

> *A conflict of interest occurs when an employee's private affairs or financial interests are in conflict, or could result in a perception of conflict, with the employee's duties or responsibilities in such a way that:*
>
> - *the employee's ability to act in the public interest could be impaired; or*
> - *the employee's actions or conduct could undermine or compromise:*
>   - *the public's confidence in the employee's ability to discharge work responsibilities; or*
>   - *the trust that the public places in the BC Public Service.*[16]

The Standards of Conduct make employees responsible for arranging their affairs in a way such that conflicts of interest do not arise. Employees who find themselves in an actual, perceived or potential conflict of interest are required to disclose that conflict to their manager, supervisor or ethics advisor.[17] There is no set procedure outlining what happens once a conflict of interest is disclosed by the employee to his or her manager. According to the PSA, it is up to each manager to decide how to document, manage and conduct a conflict of interest discussion.

Based on the Standards of Conduct, we would expect an analysis of a conflict of interest to first assess the nature of the employee's duties in question. Second, we would expect the analysis to consider what "private affairs or financial interests" are in actual or perceived conflict with those duties such that the employee's ability to act in the public interest could be impaired or the employee's actions or conduct could undermine or compromise the public's confidence in the employee's ability to do his or her job, or the public's trust in the public service.

Given the size of the public service and the wide range of activities in which government engages, it is not surprising that public servants may find themselves in an actual or perceived conflict of interest position from time to time. While the Standards of Conduct make it clear that public servants are required to take steps to remove these conflicts, the standards make it equally clear that

14 Public Service Agency, *Standards of Conduct for Public Service Employees*, "Responsibilities – Deputy Ministers" <http://www2.gov.bc.ca/gov/content/careers-myhr/about-the-bc-public-service/standards-of-conduct>.

15 We discuss the adequacy of the existing standard as a tool for evaluating employee conduct in the Findings and Recommendations chapter (Chapter 18) of this report.

16 Public Service Agency, *Standards of Conduct for Public Service Employees*, "Conflicts of Interest" <http://www2.gov.bc.ca/gov/content/careers-myhr/about-the-bc-public-service/standards-of-conduct>.

17 The Standards of Conduct include examples of conduct that could constitute a conflict of interest, including using government property or affiliation to pursue personal interests, giving preferential treatment to an entity in which the employee has an interest, benefiting from the use of information obtained solely by reason of one's employment, benefiting from a government transaction over which the employee can influence decisions, and accepting a benefit for the performance of duties beyond the nominal exchange of gifts. See Public Service Agency, *Standards of Conduct for Public Service Employees*, "Conflicts of Interest" <http://www2.gov.bc.ca/gov/content/careers-myhr/about-the-bc-public-service/standards-of-conduct>.

any assessment of a potential conflict of interest situation requires a proper contextual assessment of the real or perceived impact on the person's public service role. As written, the Standards of Conduct lack clarity about whether a potential conflict of interest concern will be allowed to persist once it has been disclosed. We note that some conflicts of interest will be so serious and direct that the conflict must be eliminated if the individual is to remain in the public service. In other situations the Standards of Conduct recognize that sometimes an actual or potential conflict can be mitigated following disclosure. It is readily apparent that any finding of conflict requires careful analysis.

3.2.1.2 CONDONATION

Another common theme throughout our investigation is the question of whether the employee conduct under investigation was known of, approved, and therefore condoned by the employer. As a matter of law and principle, if an employee engages in misconduct sufficient to justify termination for cause, but the employer overlooks or approves the employee's conduct, the employer cannot later rely on that conduct to dismiss the employee. Similarly, if an employee acts in a way that was consistent with the directions of the employer, but the employer later changed its mind about the appropriateness of its own prior directions, the employer cannot "move the goal posts" to characterize what the employee did before he or she received the new directions as misconduct. The question of condonation can arise in different contexts; two are particularly relevant to our investigation.

First, individual employees should not be singled out for discipline where their conduct is part of a generally accepted and widespread practice throughout the workplace. This is particularly true where there is an absence of clear policy direction guiding the conduct of the employee. Similarly, individual employees should not be disciplined for actions where the employer knew of their conduct but did not object and may, in fact, have encouraged it. This does not mean that because a particular practice was generally accepted in the past, it cannot be changed. It does mean, however, that if the employer is going to change the practice for the future, it has to give fair warning by providing appropriate clarity in the workplace.

Second, individual employees should not be disciplined for matters that are formally within the scope of their job duties and are therefore part of how they are expected to carry out their employment. For example, if an employer expressly and knowingly placed its employee in a dual role, that employee cannot then be disciplined for occupying that role. It is generally appropriate for the employer to question or change the policy decisions that led to a particular structure or business process, and then to change that structure or process, but it is not appropriate to single an employee out for discipline who was expressly placed by his or her employer in that structure or process.

Throughout our report, therefore, we assess whether the investigators appropriately considered the issue of condonation in investigating allegations against public service employees.

3.2.2 CONTENT OF AN ADEQUATE AND FAIR INVESTIGATION

As described above, applying principles of administrative fairness to the investigative process can help investigators demonstrate that they have reached findings of fact that are reliable and supported by the evidence. The principles of administrative fairness inform the basis of the standard of review we apply when investigating and drawing conclusions about government conduct.

While not intended to be exhaustive, a reasonable and administratively fair investigative approach used by the public service should include the following:

- there is a clear understanding of the nature and extent of the investigative body's authority
- the purpose, scope and time frame of the investigation is established in writing
- the investigators familiarize themselves with the subject matter of the investigation
- objective, documented standards are used to measure the conduct or issue being investigated
- the burden of proof that must be met to reach conclusions is clearly articulated
- the investigators understand and have been trained in how to gather, review and assess evidence, weigh

conflicting evidence and determine whether they have met the applicable burden of proof

- the investigators consider both inculpatory and exculpatory evidence in making determinations of fact, and base factual findings on a reasonable assessment of all the evidence
- the investigators understand and apply the principles of administrative fairness throughout the interview process, including:
  - conducting the investigation with an open mind and drawing conclusions based on the evidence
  - providing individuals affected with an appropriate opportunity to be heard before any conclusions are made
  - providing individuals with notice of the allegations against them in advance of any interview
  - providing individuals with disclosure and particulars about the allegations against them in advance of any interview, except in the rare case where there are clear and compelling reasons not to do so
  - conducting the interviews using a fact-finding approach, including using open-ended questions as much as possible, providing individuals with appropriate time to review any documentary evidence they will be asked about, and listening to what they have to say
  - treating all witnesses with respect

Moreover, each investigation should be informed by current best practices and the relevant legal principles that are appropriate to the facts of the specific investigation being conducted.

Within public service human resources investigations context, it is equally important to ensure that the division of roles remains clear between public service investigators, labour relations advisors, and the ultimate statutory decision-makers. While the principles described above apply to the investigative function, a similar yet distinct set of principles apply to the provision of human resources advice to ensure that human resources advisors fulfill their role in an administratively sound way. These principles include:

- ensuring the advisory function is kept separate from the investigative function
- ensuring that advice on the ultimate disciplinary decision should not be provided until after all of the relevant evidence has been gathered and assessed
- ensuring the human resources advice is based on an objective and thorough examination of the evidence and all of the circumstances of the case, including the applicable mitigating factors
- ensuring that, where a termination for cause is put forward as an option, senior labour relations advice or legal advice regarding the existence of just cause has been provided
- recognition that human resources advice must be based on a complete understanding of the applicable terms and conditions of employment, collective agreement language, legislation and jurisprudence
- human resources advice should be provided by a qualified professional with a level of experience and training commensurate with the nature and complexity of the investigation

Careful implementation of the investigative and advisory functions in accordance with these principles is important to ensure that the ultimate decision-makers will have confidence both that the recommendations they receive are based on a sound assessment of the facts under investigation and that they can rely on the advice they receive. Maintaining a clear division of the roles between the investigative, advisory and decision-making functions protects the integrity of the employer's ultimate decision in response to allegations of employee misconduct. Consistent with the other two components of an administratively sound investigation, the steps taken by the decision-makers should also be guided by a clear set of principles, which include:

- disciplinary decisions should only be made after receiving appropriate labour relations and/or legal advice
- the decision-maker must critically examine the information in support of the decision, including the investigation report findings and the labour relations and/or legal advice received

- any disciplinary decision should take into account the applicable jurisprudence and be based on all of the circumstances of the case
- the briefing materials supporting the disciplinary decision must be properly documented

If the decision-maker disagrees with the advice provided, the decision should not be made until the dispute is identified and an opportunity for resolution is afforded (including escalation where applicable) and the decision to not follow the advice is documented. Since allegations of employee misconduct include a wide variety of conduct, it is not enough for investigators, labour relations advisors and the ultimate decision-makers to be merely aware of these principles. They must be applied in practice. Moreover they must be applied within a rigorous structure and with sufficient consistency to ensure that they can serve as the core of an effective and fair investigatory, advisory and decision-making process.

These principles are the basis upon which we assessed government conduct throughout this report.

3.2.3 EXECUTIVE ACCOUNTABILITY

3.2.3.1 HUMAN RESOURCE MATTERS

Executives in any organization are responsible for the management of human resource matters.

Under the *Public Service Act*, only Deputy Ministers, the head of the Public Service Agency or an individual delegated authority under the Act can make a decision to dismiss an employee for just cause.[18] Disciplinary decisions short of termination can be made by executives or supervisors in accordance with their delegated authorities. Deputy Ministers have a particular responsibility to ensure that human resource decisions and practices within their ministries are carried out effectively. The PSA has established a formal "accountability framework" for Deputy Ministers that makes those leaders accountable for, among other things:

- ensuring that human resource management responsibilities that directly flow to them through legislation or labour contracts are discharged
- ensuring that human resource management responsibilities are carried out in a manner consistent with applicable legislation, collective agreements, terms and conditions of employment, and the Corporate Human Resource Management Policy Framework[19]

While Deputy Ministers may assign certain human resource responsibilities to staff, and may receive advice from that staff, they still maintain overall accountability for decision making within their organization.[20] As noted above, Deputy Ministers are also responsible for ensuring that their organizations respond appropriately and in a timely way to allegations of violations of the Standards of Conduct. In their roles, they may receive complaints alleging wrongdoing, and they have a duty to respond in accordance with the provisions of the Standards of Conduct and any applicable collective agreement.[21]

More generally, Deputy Ministers are responsible for supporting and upholding government's core human resource policy objective of "promoting a safe and healthy workplace that supports the well-being of employees."[22] Part of this involves fostering a work environment that treats all employees with respect and dignity, by ensuring that all members of their organization carry out their work in a way that is consistent with these goals. Employee terminations, ongoing workplace investigations and widespread suspensions can be devastating to employees' sense of

18 *Public Service Act*, R.S.B.C. 1996, c. 385, s. 22(1).

19 Government of British Columbia, *Accountability Framework for Human Resource Management*, "Accountability of Deputy Ministers and Senior Officials" <http://www2.gov.bc.ca/gov/content/careers-myhr/managers-supervisors/employee-labour-relations/conditions-agreements/accountability-framework>.

20 Government of British Columbia, *Accountability Framework for Human Resource Management*, "Delegation to Staff and Accountability" <http://www2.gov.bc.ca/gov/content/careers-myhr/managers-supervisors/employee-labour-relations/conditions-agreements/accountability-framework>.

21 See Public Service Agency, *Standards of Conduct for Public Service Employees*, "Allegations of Wrongdoing" <http://www2.gov.bc.ca/gov/content/careers-myhr/about-the-bc-public-service/standards-of-conduct>.

22 Government of British Columbia, "Core Policy Objectives & Human Resources Policies" <http://www2.gov.bc.ca/gov/content/careers-myhr/managers-supervisors/employee-labour-relations/conditions-agreements/policy>.

a respectful and productive workplace. It is the job of Deputy Ministers and senior executives to recognize the broader impacts of their decisions and find early and effective ways to address these impacts when they arise.

Moreover, as the leader of an organization, the Deputy Minister has a clear responsibility to ensure that those acting at his or her direction: [23]

- understand the scope of their role and duties
- are carrying out their duties in a fair, respectful and objective manner, in accordance with the principles outlined above
- can demonstrate that they have properly documented the rationale for the directions they give to staff and the decisions they make

Where investigations within their ministries take place, executives can assist in this process by ensuring that investigative terms of reference explicitly refer to the applicable principles of administrative fairness, setting clear expectations about how those principles are applied and by providing appropriate oversight throughout the investigative process.

In this way, the Deputy Minister can be seen as the "guardian of the administrative order," demonstrating the "ability to do the work of the government expertly and to do it according to explicit, objective standards rather than to personal or party or other obligations and loyalties."[24]

The above principles are also applicable to other senior leaders within an organization, such as Assistant Deputy Ministers, who may have similar responsibilities for managing and making decisions about human resource matters. Although they may rely on advice from staff, they have a responsibility to ensure that the staff doing the work understand their role, carry out their duties fairly, and provide a clear rationale and, where applicable, supporting documentation for the advice they provide.

3.2.3.2 OTHER DECISION MAKING

As we have described above, the Ministry of Health investigation resulted not only in suspensions, terminations and disciplinary decisions but also in data access suspensions for external researchers, and the suspension and termination of contracts between the Ministry of Health and contractors including the University of British Columbia and the University of Victoria. As we will outline in this report, these decisions were made by senior executives in the Ministry of Health at the recommendation of the Ministry of Health investigation team.

Although such decisions are discretionary, and there is normally no legal duty to follow any particular process unless it is set out in the contract, sound administration in my view supports the expectation that a decision-maker follows an administratively fair and appropriate process in coming to a decision. At a minimum, this means that:

- if the decision relates to a contractual relationship, it is consistent with what is permitted under the terms of that contract
- the decision-maker receives and reviews the relevant information before making a decision
- the decision-maker informs himself or herself as to the potential impact of the decision on ministry objectives, including by consulting with external stakeholders or internal subject matter experts as required
- the decision and rationale are clearly documented
- any parties affected by the decision receive notice and reasons sufficient to understand the basis for the decision

A decision-maker who does not follow the above steps runs the risk of arbitrary and unreasonable decision making.

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23 This is consistent with government's Core Policy Objective that "public service employees understand their roles [and] how their work contributes to achieving the goals of government." See Government of British Columbia, "Core Policy Objectives & Human Resources Policies" <http://www2.gov.bc.ca/gov/content/careers-myhr/managers-supervisors/employee-labour-relations/conditions-agreements/policy>.

24 Jacques Bourgault and Christopher Dunn, "Conclusion," in *Deputy Ministers in Canada: Comparative and Jurisdictional Perspectives*, ed. Jacques Bourgault and Christopher Dunn (Toronto: University of Toronto Press, 2014), 431.

3.3 SYSTEMIC FACTORS AND INDIVIDUAL RESPONSIBILITY

Throughout this report we highlight factors that we believe contributed to flawed reviews and investigations that, in turn, led to wrong and unjust decisions with far-reaching consequences. Our analysis identifies and describes the actions of specific individuals, as this is necessary to isolate the key events and tell the story of what happened.

When viewed as a whole, we do not believe that any individual process, action, person or organization was the cause of the gaps and failures we observed. The events described in this report arose from a sequence of events that undermined the regular human resource processes that normally would have applied. By themselves, none of the investigators, the senior management, nor any other person or organization individually caused the multiple events described in this report. To focus exclusively on any one individual event would have caused us to overlook the numerous factors that led to the employment, data and contract suspensions and terminations. Such a narrow perspective would have excluded opportunities to prevent similar failures from occurring in the future.

In our analysis, we drew inspiration from a report issued by the Institute of Medicine in the United States, which discusses the importance of focusing on issues from a systemic perspective as a way of preventing future errors and improving critical outcomes:

> *Building safety into processes of care is a more effective way to reduce errors than blaming individuals … The focus must shift from blaming individuals for past errors to a focus on preventing future errors by designing safety into the system. This does not mean that individuals can be careless. People must still be vigilant and held responsible for their actions. But when an error occurs, blaming an individual does little to make the system safer and prevent someone else from committing the same error … even apparently single events or errors are due most often to the convergence of multiple contributing factors. Blaming an individual does not change these factors and the same error is likely to recur. Preventing errors and improving safety for patients require a systems approach in order to modify the conditions that contribute to errors.*[25]

At the same time, it would be unfair to distribute responsibility for the failures so broadly as to render any analysis meaningless. The decisions to conduct the investigations and to suspend and terminate contracts, employment and data access were made by individuals whose powers to do so were enshrined in their public service positions. These individuals did not make their decisions in isolation and frequently relied on the advice and guidance of others. Nevertheless, decision-makers also had the responsibility to ensure that their choices were supported by an objective, impartial, evidence-based analysis. Throughout the course of our review we saw occasions where decision-makers failed to adequately question the factual basis of the analysis and recommendations they received. Too frequently they also did not take steps to test or even ask to see supporting evidence. On some occasions, assumptions were made about what had been determined in the course of the investigation. At other times, decision-makers did not adequately heed the cautions of those providing advice. In our view it was important to understand how and why the decision-makers failed to take such steps.

Although we have identified a number of issues with how individuals carried out their responsibilities in investigating this matter, we are not recommending employment discipline for them. No doubt there are some people who would view such discipline as the appropriate step. We do not take this view. With the release of this report, we believe the time for assigning blame through further individual discipline has passed. It is important for the Ministry of Health and the broader public service to begin the difficult work of reconciliation, not inflict more pain or engage in scapegoating. For nearly five years no one has had a clear understanding of what happened and why. Reconciliation cannot happen without a common basis of

25 Linda T. Kohn, Janet M. Corrigan, and Molla S. Donaldson, ed., "Executive Summary," in *To Err Is Human: Building a Safer Health System* (Washington, DC: National Academy Press, 2000), 5 and 49.

understanding on which to move forward. By describing what happened and in making the recommendations in this report, we hope to provide a basis for government, public servants and the affected individuals to focus on reconciliation.

We believe that a commitment to reconciliation would be the most important outcome of our investigative work. Due to the secrecy that has surrounded this matter, there is still much work to do to repair the damage done by the events that began five years ago. This report seeks to bring this secrecy to an end by shining a light that illustrates what happened and illuminates a path upon which to move forward.

4.0 / UNDERSTANDING THE MINISTRY OF HEALTH IN 2012: BACKGROUND AND CONTEXT

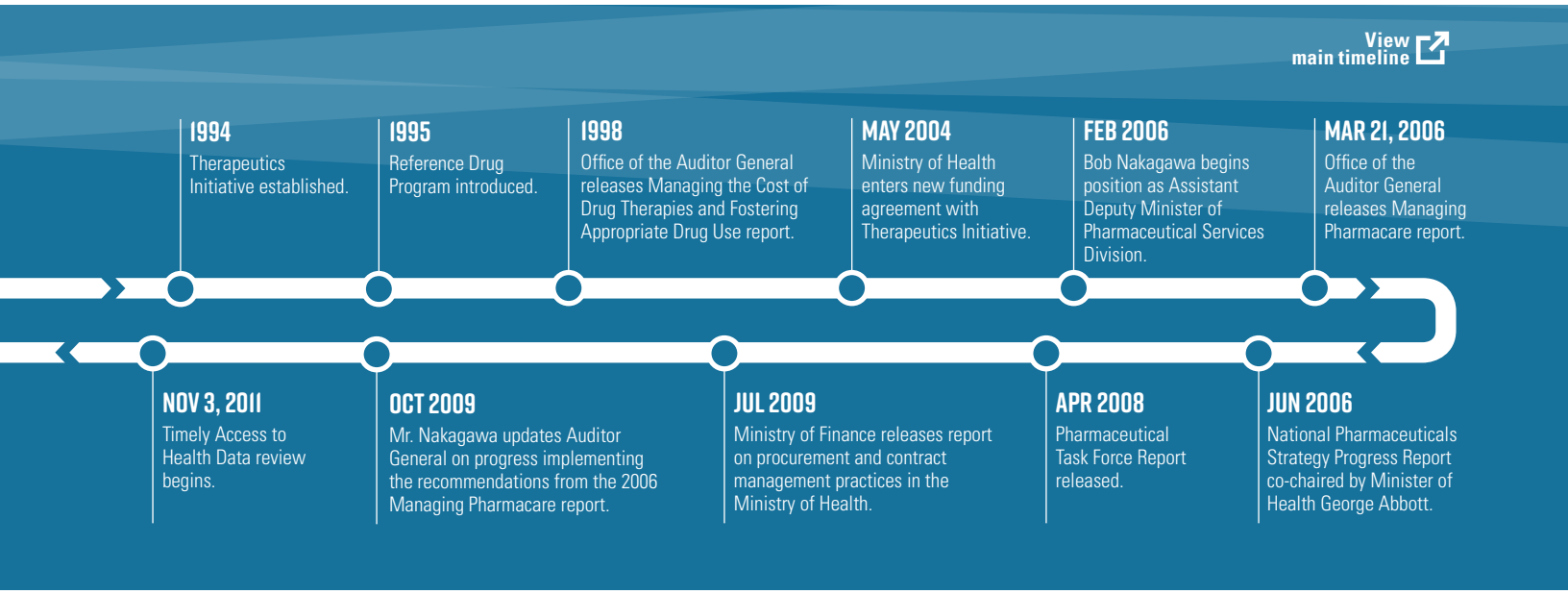
4.1 INTRODUCTION

The purpose of this chapter is to provide the necessary background and context for the rest of the report. This chapter contains three distinct parts.

The investigation conducted by the Ministry of Health in 2012 focused initially on the Pharmaceutical Services Division (PSD) of the Ministry of Health. In the first part of this chapter, we therefore describe the development of PSD in terms of both the ministry's role in administering a publicly funded pharmaceutical insurance program and the increasing recognition, over the last 20 years, of the value of evidence-based policy making in this area. We describe the way in which, beginning in 2006, PSD was structured to emphasize evidence-based policies on pharmaceuticals. We describe how access to administrative health data is a key part of this work. We also discuss the range of PSD's evidence-based research programs including the relationship between the Therapeutics Initiative and the Ministry of Health; and public health epidemiological work which, although not part of PSD, also used administrative health data to support and inform ministry decision making.

Second, we identify some important elements of the organizational culture at the Ministry of Health in 2012 that, in our view, contributed to the way in which the investigation unfolded. We describe the Danderfer case, which caused some public servants to be suspicious of contracting practices in the Ministry of Health generally. We discuss the tensions within the Ministry of Health regarding administrative health data in the years leading up to the 2012 investigation, and describe a review beginning in 2011 that attempted to identify and address some of the issues caused by this long standing problem. We also describe some changes in key personnel at the executive level in the Ministry of Health in 2011 and 2012.

Third, we provide a brief overview of five other government bodies in addition to the Ministry of Health that were involved in the 2012 investigation or subsequent events.



4.2 THE MINISTRY OF HEALTH AND PHARMACEUTICAL POLICY: HISTORICAL PERSPECTIVE

The Ministry of Health is responsible for ensuring the "quality, appropriate, cost effective and timely" delivery of health services to British Columbians.[1] It administers provincial legislation related to health care and directly manages provincial health care programs and services. These include the Medical Services Plan, PharmaCare and the British Columbia Vital Statistics Agency. The ministry oversees the five regional health authorities and the Provincial Health Services Authority, which are responsible for the direct delivery of health services.[2] The Minister of Health also has responsibility for the legislation pertaining to self-governing health professions such as doctors, pharmacists, nurses and allied health professionals.

4.2.1 ROLE OF PHARMACARE

While responsibility for reviewing and approving drugs for sale in Canada rests with the federal government, decisions about whether to publicly fund the costs of particular drugs are largely made by the provincial governments. In 2015, public drug program spending across 10 jurisdictions (all provinces except Quebec, and the First Nations and Inuit Health Branch of Health Canada) was almost $8.8 billion.[3] In British Columbia, the provincial government's role as a large-scale public insurer of pharmaceuticals began in 1974.[4] Under current policy, the province covers eligible prescription drugs for British Columbians through several drug plans administered under the umbrella of PharmaCare. These include Fair PharmaCare, which reimburses prescription drug costs based on a person's individual or

1 Ministry of Health, *2016/17–2018/19 Service Plan*, February 2016, 5 <http://www.bcbudget.gov.bc.ca/2016/sp/pdf/ministry/hlth.pdf#page=5>.

2 Ministry of Health, *2016/17–2018/19 Service Plan*, February 2016, 5 <http://www.bcbudget.gov.bc.ca/2016/sp/pdf/ministry/hlth.pdf#page=5>.

3 Canadian Institute for Health Information, *Prescribed Drug Spending in Canada, 2016: A Focus on Public Drug Programs* (Ottawa: Canadian Institute for Health Information, 2016), 6 <https://secure.cihi.ca/estore/productFamily.htm?locale=en&pf=PFC3333&lang=en>.

4 Ministry of Health, Medical Beneficiary and Pharmaceutical Services Division, *PharmaCare Trends 2014/15*, "PharmaCare History," 6 <www2.gov.bc.ca/assets/gov/...drug-coverage/pharmacare/pcaretrends2014-15.pdf>.

family income, and plans that reimburse prescription drug costs for specific groups of British Columbians.[5]

PharmaCare only reimburses the costs of those drugs that are listed on the provincial formulary. Publicly funded coverage for other drugs not included in the formulary may be obtained through a person's medical practitioner by requesting a special authority approval. For these case-specific requests, the Ministry of Health assesses whether covering the drug is appropriate.[6]

The proliferation of new pharmaceuticals in recent decades has required government to constantly consider whether, and to what extent, public funds should be expended on a particular drug – whether by listing on the formulary or through the special authority process. As the number of new drugs has increased and as their costs have escalated, individual patients, patient advocacy groups and industry have exerted considerable pressure on the Ministry of Health to approve coverage for new drugs as they come to market.

As described in a 2006 *National Pharmaceuticals Strategy Progress Report*, "drugs are a vital part of the Canadian health system. Appropriate use of safe and effective drugs can prevent, treat and cure diseases, improve quality of life and lengthen and save lives."[7] However, as with the rest of government, the amount of money that the Ministry of Health can spend on prescription coverage is limited by both the overall size of its budget and how that budget is allocated to all the services it provides. Since not all drug therapies can be funded, one key consideration in funding is a drug's cost-effectiveness. This is determined by comparing the extent to which a drug contributes to health with its monetary cost.[8] For example, a drug that has a high cost but very little discernible benefit when compared with less expensive alternatives is unlikely to be covered. Conversely, a drug that has a high cost but is the only drug on the market with therapeutic benefit for a serious condition or disease may be more likely to be covered.

Before a new drug can be listed on PharmaCare's formulary, it must go through several steps.[9] If a drug is not listed on the formulary, that does not mean it is not available to the public. Rather, it means that, subject to special approval in a particular case, the cost of that drug will not be publicly funded.

4.2.2 EVALUATING PHARMACEUTICAL USE, SAFETY AND EFFECTIVENESS

Once a drug is listed in the formulary, the provincial government does not commit to assessing its ongoing effectiveness. Yet ongoing questions around pharmaceutical use, safety and effectiveness often arise, particularly with new classes of drugs. These questions include:

- How often is a drug prescribed, and for what purpose? It is known, for example, that some drugs are prescribed "off label" – that is, not for their approved purpose.
- In what ways are patient health outcomes assessed when a drug is prescribed to vulnerable populations, including children, seniors and pregnant women?
- In what ways are patients' health affected by adverse side effects of specific drug treatments?
- How do different drugs interact when prescribed in combination with other drugs?
- To what extent do health outcomes improve or deteriorate from drug treatments over the long term?

5 These include permanent residents of residential care facilities, recipients of income assistance, children in the At Home program, and recipients of palliative care. This list is not exhaustive. Source: Ministry of Health, "PharmaCare for B.C. Residents: Who We Cover" <http://www2.gov.bc.ca/gov/content/health/health-drug-coverage/pharmacare-for-bc-residents/who-we-cover>.

6 This is done through the Special Authority Process. See Ministry of Health, "PharmaCare for B.C. Residents: What We Cover" <http://www2.gov.bc.ca/gov/content/health/health-drug-coverage/pharmacare-for-bc-residents/what-we-cover/drug-coverage>.

7 Federal/Provincial/Territorial Ministerial Task Force on the National Pharmaceuticals Strategy. *National Pharmaceuticals Strategy Progress Report* (Ottawa: Health Canada, June 2006), 18 <http://www.hc-sc.gc.ca/hcs-sss/alt_formats/hpb-dgps/pdf/pubs/2006-nps-snpp/2006-nps-snpp-eng.pdf>.

8 Jennifer D. Cape et al., "Introduction to Cost-Effectiveness Analysis for Clinicians," *University of Toronto Medical Journal*, Vol. 90, No. 3, March 2013 <healtheconomics.utoronto.ca/wp-content/uploads/1493-2720-2-PB3.pdf>.

9 This basic process has been in place since 2008. See Ministry of Health, *The Drug Review Process in B.C. – Detailed* <http://www2.gov.bc.ca/assets/gov/health/health-drug-coverage/pharmacare/drugrevproc.pdf>.

Such questions have led to increasing calls for governments to take an active role in supporting efforts to assess the impacts of drug therapy over the longer term from a "real-world" perspective. These calls are not new. For example, the 1991 Royal Commission on Health Care and Costs recommended that the drug approval process be extended to include "post-market surveillance" in order to evaluate the effects of drugs on populations not typically included in pre-approval trials, including children, the elderly, pregnant women and people with multiple illnesses.[10]

Similarly, the 2002 report of the Commission on the Future of Health Care in Canada (popularly known as the Romanow Report) discussed the "growing importance" of assessing health technologies, including pharmaceuticals.[11] It also described the need to conduct "a comprehensive and systematic assessment of the conditions for and the consequences of using health care technology."[12] These assessments provide decision-makers with information about a technology's "safety, economic efficiency, clinical effectiveness, as well as the social, legal and ethical implications of using new and existing technologies … [so that] health policymakers, providers, and especially, health organization managers [can] make decisions about whether to purchase and use new technologies, whether to replace old technologies with new ones, and what benefits they can expect to see."[13] Romanow criticized the "lack of relevant research on the relationship between health technologies and overall improvements in health outcomes" and a tendency for decisions to be made about buying new health technology "without knowing the impact of that technology on addressing population health needs."[14]

The 2006 *National Pharmaceuticals Strategy Progress Report* of the Federal/Provincial/Territorial Ministerial Task Force made a series of recommendations for a strategy aimed at addressing "the challenges and opportunities across the drug lifecycle using an integrated, collaborative, multi-pronged approach to pharmaceuticals within the health care system" as a whole.[15] George Abbott, then British Columbia's Minister of Health, co-chaired the task force. The Progress Report recognized the limits of what individual jurisdictions could achieve on their own and identified a corresponding need for jurisdictions to work together.[16] The report also identified pharmaceutical safety, effectiveness and appropriate use as a key issue and opportunity in the area of pharmaceutical management, stating:

> *The majority of evidence regarding pharmaceutical therapies is gathered through clinical trials in highly controlled environments in the pre-market phase. This limits the ability to predict a drug's performance in the "real world." Evidence from pre-market testing also provides little basis for gauging the benefits and risks of new medications relative to existing drugs or non-drug therapies.*
>
> *These challenges can be met by working together to enhance and focus research capacity so that*

10 British Columbia Royal Commission on Health Care and Costs, *Closer to Home: Summary of the Report of the British Columbia Royal Commission on Health Care and Costs*, Vol. 1, 1991, 30.

11 Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada – Final Report* (Ottawa: Commission on the Future of Health Care in Canada, 2002), 83.

12 Health technologies are defined by the International Network of Agencies for Health Technology Assessment as including "pharmaceuticals, devices, procedures and organizational systems used in health care." International Network of Agencies for Health Technology Assessment, "What is Health Technology Assessment (HTA)?" <http://www.inahta.org/>.

13 Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada – Final Report* (Ottawa: Commission on the Future of Health Care in Canada, 2002), 83.

14 Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada – Final Report* (Ottawa: Commission on the Future of Health Care in Canada, 2002), 84.

15 Federal/Provincial/Territorial Ministerial Task Force on the National Pharmaceuticals Strategy. *National Pharmaceuticals Strategy Progress Report* (Ottawa: Health Canada, June 2006), 6 <http://www.hc-sc.gc.ca/hcs-sss/alt_formats/hpb-dgps/pdf/pubs/2006-nps-snpp/2006-nps-snpp-eng.pdf>.

16 Federal/Provincial/Territorial Ministerial Task Force on the National Pharmaceuticals Strategy. *National Pharmaceuticals Strategy Progress Report* (Ottawa: Health Canada, June 2006), 6 <http://www.hc-sc.gc.ca/hcs-sss/alt_formats/hpb-dgps/pdf/pubs/2006-nps-snpp/2006-nps-snpp-eng.pdf>.

> *decision-makers have the information they need to make optimal treatment and reimbursement decisions. By collaborating with academic experts, health care institutions, health care professionals and the public, governments can coordinate existing activities, support synchronized evidence standards and encourage evidence-based treatment, utilization and prescribing decisions.*[17]

More recently, the Citizens' Reference Panel on Pharmacare in Canada recommended that any drugs covered by a national pharmaceutical strategy should "continue to be proven effective and safe through impartial clinical studies."[18]

4.2.3 USING ADMINISTRATIVE HEALTH DATA TO EVALUATE PHARMACEUTICAL USE, SAFETY AND EFFECTIVENESS

British Columbia is well positioned to undertake ongoing "real-world" pharmaceutical assessments because it has a rich trove of administrative health data from many sources, including PharmaNet, Medical Services Plan, hospitals, and mental health and addictions services.[19] Since January 1, 1996, one of these sources, PharmaNet, has contained a record of all prescriptions dispensed to individuals by community pharmacies anywhere in the province. PharmaNet may also contain records of drugs provided while a person is in a hospital or designated mental health centre if this information is entered by an emergency department physician. In addition to prescription records, PharmaNet contains demographic information, including the name, Personal Health Number, address and date of birth of the people who obtain prescription medications.[20]

PharmaNet information, when used with other sources of administrative health data such as hospital admissions, vital statistics or Medical Services Plan records, can provide valuable and statistically relevant insights on the health outcomes of pharmaceuticals from a population-level perspective. Administrative health data can also be used to develop educational programs for health care practitioners through the monitoring and assessment of their prescribing practices with a view to helping them make better health care decisions (such as which drugs to prescribe and when). In addition, this data may be used to monitor and evaluate the cost-effectiveness of various policy initiatives. As described in a recent report:

> *The volume and variety of data relevant to research have increased exponentially in recent years. Each patient interaction with a physician, a pharmacist, a laboratory technician, or hospital staff generates data. Social and environmental data are highly relevant to health research because they are vital for providing a complete picture about factors that affect the lives and health of Canadians. The research community, including health system innovators in hospital and government offices as well as academic researchers and clinicians, views these data as a critical resource. It recognizes the enormous potential of using health and health-related data in privacy-sensitive ways to reveal factors that can affect health and well-being, and discover interventions that can improve health outcomes.*[21]

Simply put, access to and analysis of administrative health data by qualified researchers can help save lives. Using administrative health data to conduct research and

17 Federal/Provincial/Territorial Ministerial Task Force on the National Pharmaceuticals Strategy. *National Pharmaceuticals Strategy Progress Report* (Ottawa: Health Canada, June 2006), 7 <http://www.hc-sc.gc.ca/hcs-sss/alt_formats/hpb-dgps/pdf/pubs/2006-nps-snpp/2006-nps-snpp-eng.pdf>.

18 Citizens' Reference Panel on Pharmacare in Canada, *Necessary Medicines: Recommendations of the Citizens' Reference Panel on Pharmacare in Canada* (Vancouver: Pharmaceutical Policy Research Collaboration, UBC, 2016), 26.

19 Administrative health data is health data generated through the routine administration of health care programs. Examples of administrative health data include that from physician visits, hospitals' discharge abstracts, personal care homes, home care, and pharmaceutical prescriptions. Source: Manitoba Centre for Health Policy, "Term: Administrative Health Data,"8 July 2013 <http://mchp-appserv.cpe.umanitoba.ca/viewDefinition.php?definitionID=102210>.

20 Ministry of Health, "What information is stored on PharmaNet?" <http://www2.gov.bc.ca/gov/content/health/health-drug-coverage/pharmacare-for-bc-residents/pharmanet>.

21 Council of Canadian Academies, *Accessing Health and Health-Related Data in Canada: Expert Panel on Timely Access to Health and Social Data for Health Research and Health System Innovation* (Ottawa: Council of Canadian Academies, 2015), xiii.

evaluations to inform policy development is a key part of an "evidence-based" or "evidence-informed" policy approach.[22] One of the principles underlying government support for research on the effectiveness of drugs, the effectiveness of pharmaceutical policies, and the education of physicians and pharmacists is that policy decisions should be based on – or at the very least informed by – the best available scientific evidence. Comments about the value of evidence-based policy making appeared in the 1991 Royal Commission report:

> *The focus of the health care system must be on providing those services which improve health outcomes. These outcomes must be defined, measurable, subject to analysis and be able to be independently evaluated. Services which cannot be shown to improve health outcomes should not be funded by the health care system.*[23]

4.2.4 EVIDENCE-BASED POLICY MAKING: REFERENCE DRUG PROGRAM

Over the past 20 years, British Columbia has shown leadership in developing an evidence-based approach that makes use of administrative health data when developing, implementing and evaluating pharmaceutical policy decisions. An important example is the province's Reference Drug Program (RDP). The RDP was an early step toward addressing the challenge of ensuring that British Columbians have access to proven and effective drug therapies at a price government can afford.[24]

The Ministry of Health introduced the RDP in 1995 to help address rapid increases to the costs of drug therapies. The RDP is premised on the rationale that in the absence of evidence that newer or more expensive drugs provide a therapeutic advantage over other equally effective treatments, the ministry should pay for the less expensive alternative, unless the higher-priced or newer alternative is medically necessary.

Implementing a reference-based pricing model requires policy-makers to have evidence about the effectiveness of pharmaceutical therapies in order to determine whether newer or higher-cost drug therapies provide clear benefits to patients that other drug therapies do not. While there was (and continues to be) significant resistance to the government's reference pricing model from the pharmaceutical industry[25] and from some patient and medical professional advocacy groups,[26] independent studies have concluded that the RDP has played a role in containing the rising costs of pharmaceuticals in British Columbia, particularly in the first years after it came into effect, with no "severe negative effects" on patient health.[27]

As will be discussed in more detail below, the RDP was one of several ways the Ministry of Health sought to incorporate evidence of therapeutic outcomes into its policy decisions. Moreover, the emphasis on evidence-based

22 In general, evidence-based decision making is premised on the idea that the best available evidence is at the core of properly developed decisions (as opposed to opinion-based decision making, which relies on selective use of evidence and untested views of individuals or groups, often inspired by ideological perspectives, superstition, non-scientific prejudices, and so on). Particularly in the health care field, there is a strong perception that "evidence-based" means only accepting evidence from randomized controlled trials or meta-analysis as relevant to decision making. In this sense, "evidence-based" has been criticized for turning practitioners into technicians rather than creative problem-solvers. As a result of the criticism, many groups and individuals have begun using the term "evidence-informed" decision making as a way of broadening the kinds of evidence that can be considered useful in decision making (meaning, the gold standard evidence is not always necessary to make an evidence-based decision). It is a more pragmatic approach to decision making which can take into account stakeholder perspectives and clinical experience and judgment. See, for example, Donna Ciliska, *Introduction to Evidence-Informed Decision Making*, Canadian Institutes of Health Research <http://www.cihr-irsc.gc.ca/e/45245.html>.

23 British Columbia Royal Commission on Health Care and Costs, *Closer to Home: Summary of the Report of the British Columbia Royal Commission on Health Care and Costs*, Vol. 1, 1991, 6.

24 The Reference Drug Program continues today and, according to the Ministry of Health, "helps PharmaCare save millions of dollars each year," which is then "used to fund drugs for which fewer treatment options exist." See Ministry of Health, "Reference Drug Program" <http://www2.gov.bc.ca/gov/content/health/practitioner-professional-resources/pharmacare/prescribers/reference-drug-program#WhoBenefits?>.

25 As described in Steve Morgan and Colleen Cunningham, "The Effect of Evidence-Based Drug Coverage Policies on Pharmaceutical R&D: A Case Study from British Columbia," *Healthcare Policy*, 3(3) (February 2008).

26 See, for example, Gail Attara, "Reference Drug Program Changes Mean Less Choice for B.C. Patients," *Huffpost British Columbia*, 17 February 2016 <http://www.huffingtonpost.ca/gail-attara/reference-drug-program-changes_b_9240162.html>.

27 Sebastian Schneeweiss. "Reference drug programs: Effectiveness and policy implications," *Health Policy,* 81(1) (April 2007): 17-28.

policy making was not limited only to the Pharmaceutical Services Division. Program areas throughout the ministry implemented similar evidence-based policy structures to address their own unique policy environments. This work often overlapped with similar work being done at the provincial health authorities and other ministries within government.

4.2.5 AUDITOR GENERAL REPORTS ON EVIDENCE-BASED POLICY MAKING

The Auditor General recognized the potential value to the Ministry of Health of implementing an evidence-based policy-making model. In reports released in 1999 and 2006, the Auditor General reviewed how the ministry was managing its PharmaCare program and paid particular attention to the steps the ministry could take to manage drug costs by establishing systems to more fully evaluate the therapeutic effectiveness of pharmaceuticals for patients.[28]

In its 2006 report, the Auditor General emphasized the need for the ministry to focus on a results-based approach to meet its objectives. For example, the Auditor General noted that academic evaluations obtained by the ministry had suggested "that drug costs have risen more slowly in British Columbia since PharmaCare has focused drug coverage decisions on evidence of positive patient outcomes (often it is the older drugs that are able to provide a history of success)."[29] The report noted, however, that the ministry was prevented from developing a more comprehensive approach to planning, monitoring and reporting due to its focus on other priorities. Overall, the report noted, "the issues themselves have become more compelling and PharmaCare's momentum to move on them constrained by regular turnover of PharmaCare's top management and chronic understaffing."[30] The Auditor General's 2006 report found that:

- drugs initially undergo rigorous review for cost-effectiveness but limited review later to assess continued cost-effectiveness[31]
- more should be done to inform physicians about best practices in drug prescribing and enhance access to PharmaNet[32]

The Auditor General's recommendations included developing a process to systemically assess cost-effectiveness of already funded drugs; "significantly increas[ing]" support for "PharmaCare sponsored programs that encourage appropriate drug use through physician best practices in prescribing"; using PharmaNet to identify trends in prescribing practices and to inform physicians that their own prescribing practices followed currently recognized clinical best practices.[33] The message from the Auditor General was clear: change was needed to effectively manage PharmaCare.

4.2.6 CREATION OF PHARMACEUTICAL SERVICES DIVISION

The same year the Auditor General issued his 2006 report and the federal-provincial Ministerial Task Force issued its call for greater collaboration on pharmaceutical research and policy making, Bob Nakagawa became the Assistant Deputy Minister in charge of the newly created Pharmaceutical Services Division (PSD), a position he held from February 2006 until March 2012. Mr. Nakagawa played a central role in the development of PSD during that time. He was responsible for both conceiving and implementing the division's management structure. He also largely devised and oversaw the implementation of the key strategic pillars for PSD's research direction throughout this period.

28 Office of the Auditor General, *Managing the Cost of Drug Therapies and Fostering Appropriate Drug Use (Report; 1998/1999: 2)*, and Office of the Auditor General, *Managing PharmaCare (Report; 2005/2006: 8)*.

29 Office of the Auditor General, *Managing PharmaCare (Report; 2005/2006: 8)*, 4.

30 Office of the Auditor General, *Managing PharmaCare (Report; 2005/2006: 8)*, 3.

31 Office of the Auditor General, *Managing PharmaCare (Report; 2005/2006: 8)*, 5-6.

32 As good examples of such programs that were already in operation, the Auditor General pointed to drug information letters and workshops for doctors and pharmacists conducted by the Therapeutics Initiative, and academic drug detailing with doctors on the North Shore (which later expanded into the province-wide program, Provincial Academic Detailing). Office of the Auditor General, *Managing PharmaCare (Report; 2005/2006: 8)*, 6.

33 Office of the Auditor General, *Managing PharmaCare (Report; 2005/2006: 8)*, 8-9.

Both then-Minister of Health George Abbott (2005–2009) and then-Deputy Minister of Health Gord Macatee (2006–2009), told us they had expressly approved Mr. Nakagawa's formal strategy framework for PSD that Mr. Nakagawa initiated in 2006.[34]

4.2.6.1 PHILOSOPHICAL APPROACHES

In his interview with our office, Mr. Nakagawa described the different philosophical approaches he encountered in the ministry regarding the role of government in administering a publicly funded pharmaceutical program. Mr. Nakagawa indicated that these differing viewpoints split generally into two broad camps and the ministry's approach has shifted back and forth over time. One approach views government's primary responsibility as that of an insurer, focused primarily on paying for those drugs listed in the formulary. Within this approach, the ministry makes an initial decision about which drugs will be covered, determines whether any limitations need to be imposed through the special authority process and ensures individuals are properly reimbursed in accordance with PharmaCare rules. The Auditor General criticized aspects of this approach in his 2006 report.[35]

The second approach goes beyond the insurance model to envision a broader role for the ministry. In this approach, the ministry takes additional steps to encourage the cost-effective use of public money by understanding the use and effectiveness of approved drug therapies. As well, the ministry proactively supports ongoing assessments of drug therapies and research and evaluation projects that take population health outcomes into account when decisions are made about which drugs to fund and to continue funding. This model also includes stakeholder engagement with patient groups, doctors and pharmacists by promoting the adoption of educational and best-practices initiatives related to prescribing and dispensing drugs. The model proceeds on the basis that government's role is to ensure that public resources are directed to drugs that are – according to independent scientific evidence – effective against the condition they are intended to treat and do not result in adverse health outcomes for patients. The premise of this more expansive model is that it will, if properly administered, help government save money on drug costs, improve health outcomes and reduce other health system expenditures.

Mr. Nakagawa's appointment coincided with the release of the recommendations in the Auditor General's report, and part of Mr. Nakagawa's mandate was to implement its recommendations.[36] He saw his role at PSD as an opportunity to focus on pharmaceuticals in a comprehensive way, and thus his approach favoured the second approach described above. This is reflected in a 2006 PSD Annual Performance report which stated, "our division's work does not end when a drug is available to the public." Rather, PSD's focus was on supporting "optimal drug therapy for all British Columbians."[37]

Mr. Nakagawa's approach was also influenced by the recognition that the ministry's pharmaceutical budget had increased significantly over the preceding decade. For example, his 2006 Pharmaceutical Strategy Framework noted that total spending for drug therapies paid through PharmaCare and the BC Cancer Agency and for HIV/AIDS nearly doubled between fiscal years 1999/2000 to 2006/2007 from under $600 million to over $1 billion.[38] Moreover, projected costs were expected to reach $1.2

34 Bob Nakagawa, *A Pharmaceutical Strategy Framework for British Columbia: A structure for advancing the quality of prescription drug use*, June 2006.

35 The Auditor General stated in *Managing Pharmacare:* "…once new drugs are added to the official list of covered drugs (known as the "formulary"), PharmaCare does not have a process in place to assess their continuing cost-effectiveness. As well, because many of these drugs were added to the formulary before such rigorous reviews were carried out, there is a risk that some may have outlived their usefulness and should not necessarily be covered any longer." Office of the Auditor General, *Managing PharmaCare* (Report; 2005/2006: 8), 5.

36 Bob Nakagawa, *A Pharmaceutical Strategy Framework for British Columbia: a structure for advancing the quality of prescription drug use,* June 2006. The Auditor General's report was one of the sources the Pharmaceutical Services Division used to establish its objectives. See: Ministry of Health, Pharmaceutical Services Division, *2007/2008 Divisional Plan,* 6.

37 Ministry of Health, Pharmaceutical Services Division, *Annual Performance Report 2006*, i.

38 Bob Nakagawa, *A Pharmaceutical Strategy Framework for British Columbia: A structure for advancing the quality of prescription drug use*, June 2006, 4 (fig. 7).

billion by the 2008/2009 fiscal year.[39] Faced with these challenges, Mr. Nakagawa told us he was expected to oversee and implement a multi-pronged strategy to address these rising costs while also ensuring British Columbians had access to the effective drug therapies they required.

As described above, both the Minister of Health and the Deputy Minister at the time expressly approved the plan Mr. Nakagawa developed. During our interview with former Minister Abbott, he called evidence-based research the "gold standard" for policy decisions. He confirmed he was aware of Mr. Nakagawa's work and said he expected his Deputy Minister and all of his Assistant Deputy Ministers to be "creative" and "innovative" in addressing the myriad issues facing the ministry. Similarly, when we spoke with former Deputy Minister of Health Gord Macatee, he referred specifically to Mr. Nakagawa's June 2006 strategy document and said he fully supported the steps Mr. Nakagawa took to integrate evidence-based research and policy making into pharmaceutical funding and approval decisions. Importantly, Mr. Macatee told us he was not just supportive of the plan Mr. Nakagawa had developed, but that both he and Minister Abbott fully expected Mr. Nakagawa to implement the plan in order to address impacts of the ever-increasing costs of drug therapies on the PharmaCare budget.

At the time, the need to begin to address drug costs was a priority for government because the ministry's budget continued to increase and consume a larger share of the government's overall budget when other ministries were being asked to reduce spending. Mr. Macatee also said he knew implementing the plan would not be easy because the ministry's attempts to manage drug costs brought it into conflict with the pharmaceutical industry, which would regularly pressure government to fund newer and more expensive drugs.

The senior executives and government Ministers we spoke with were keenly aware of the ways in which pharmaceutical companies seek to influence government decision making. For example, one described an interaction with a lobbyist who was expressing his strong disapproval of a recent listing decision. At the same time, however, these decision-makers were quick to emphasize that government is well aware of the perspective of the pharmaceutical companies. They pointed out that government has often taken a hard line with pharmaceutical companies – for example, when negotiating the price government will pay for a particular drug.

4.2.6.2 DEVELOPMENT OF A PHARMACEUTICAL MANAGEMENT STRATEGY

To achieve his goals, Mr. Nakagawa established what he called a "comprehensive pharmaceutical management strategy" with five distinct pieces designed to focus on the development of the best policies, the best prescribing, the best environment, the best drugs and the best deals.[40] With the support of the Minister and Deputy Minister, as described above, Mr. Nakagawa organized the structure of PSD around these goals and created new operational branches within the division to carry the plan forward.

- The Drug Intelligence Branch would base PharmaCare coverage decisions on a critical assessment of the available clinical evidence.
- The Drug Use Optimization Branch would "review patterns of drug use and compare them with evidence-based best practices to design programs and initiatives that will facilitate improved patient outcomes in a fiscally-responsible manner. Educational programs and initiatives will target prescribers, other health care professionals, patients and/or the public."
- The Policy Outcomes, Evaluation and Research Branch was "dedicated to excellence in evidence-based pharmaceutical policy for British Columbians" by researching, measuring and reporting the effect of policy initiatives on health outcomes. This branch was intended to support other branches in PSD by providing advice and assistance through research and analysis.[41]

39 Bob Nakagawa, *A Pharmaceutical Strategy Framework for British Columbia: A structure for advancing the quality of prescription drug use,* June 2006, 4 (fig. 7).

40 Pharmaceutical Services Division, Ministry of Health, *Annual Performance Report 2006*, 2.

41 Pharmaceutical Services Division, Ministry of Health, *Annual Performance Report 2006*, 9.

Three years later, in October 2009, PSD reported its progress in implementing the recommendations from the Auditor General's 2006 report.[42] In this update, PSD reported that it had "fully or substantially implemented" all of the 15 recommendations made in that report. The update highlighted work done to develop a process to systematically assess drug cost-effectiveness. For example, the Policy Outcomes, Evaluation and Research Branch was structured to support evaluations of new and existing drugs, and entered into a contract with the University of British Columbia (UBC) to support this work.[43] The update further highlighted that the Director of Research and Evidence Development position within the Policy Outcomes, Evaluation and Research Branch was "now shared by two half-time academic researchers," Dr. Malcolm Maclure and Dr. Rebecca Warburton, and described their credentials and experience.[44] PSD highlighted this, along with other collaborations with external initiatives such as the Drug Safety and Effectiveness Network, as significant pieces of the work it had done to implement the Auditor General's recommendations.

In the view of those at PSD, evidence-based policy making required them to develop new ways of thinking about the work of government that did not necessarily fit into traditional structures. Individuals such as Dr. Malcolm Maclure and Dr. Rebecca Warburton straddled the world of government and academia, using their knowledge to better inform both research and policy-making. Under Mr. Nakagawa's leadership the ministry's attempts to bridge the worlds and work cultures of PSD staff and the academic research community was done purposefully, as it was viewed as an important aspect of PSD's strategic framework for establishing a therapeutically oriented pharmaceutical management strategy. With the approval of the Minister and Deputy Minister, Mr. Nakagawa saw linkages between the ministry and the research community as a "synergistic" relationship that benefited all parties. At the time, the ministry was aware of the novelty of Mr. Nakagawa's bridging approach and its impact on government decision making. The novelty of these synergistic relationships, however, may have unintentionally made this approach more vulnerable to subsequent criticism from those who misunderstood, were unaware of or disagreed with its objectives.

4.3 EVIDENCE-BASED INITIATIVES IN THE PHARMACEUTICAL SERVICES DIVISION

As part of its evidence-based approach, the ministry's Pharmaceutical Services Division undertook a series of programs, policy initiatives, research and evaluation related to its delivery of pharmaceutical health services. A number of these involved external stakeholders, such as the regulated health professions, patient groups, external researchers, pharmaceutical companies or the federal government, and were the result of complex policy development processes.

Broadly speaking, the initiatives can be grouped into one or more of the following categories:

- "coverage with evidence development," which is research to help government assess whether it should provide ongoing PharmaCare coverage for a particular drug or class of drugs (Alzheimer's Drug Therapy Initiative)
- educational initiatives aimed at doctors and pharmacists and related to prescribing or dispensing practices (Education for Quality Improvement in Patient Care [EQIP]; Provincial Academic Detailing [PAD]; Medication Management Program [MMP])
- grants to external bodies to promote evidence-based research on pharmaceutical service

42 Response from the Ministry of Health Services, as published in Office of the Auditor General, *Follow-up Report: Updates on the implementation of recommendations from recent reports*, October 2009, 83.

43 Response from the Ministry of Health Services, as published in Office of the Auditor General, *Follow-up Report: Updates on the implementation of recommendations from recent reports*, October 2009, 90.

44 Response from the Ministry of Health Services, as published in Office of the Auditor General, *Follow-up Report: Updates on the implementation of recommendations from recent reports*, October 2009, 91.

delivery (Pharmaceutical Outlook Research Special Authority ePrescribing and eEducation [PhORSEE])[45]

- evaluations of the effectiveness of policy initiatives, aimed at determining whether the policy was achieving its expected goals, such as a change in prescribing practices, drug expenditures or patient health outcomes (Academic Detailing Evaluation Partnership Team [ADEPT]; Medication Management Program [MMP]; smoking cessation evaluation)
- research on the real-world safety and effectiveness of drugs (Drug Safety and Effectiveness Network [DSEN]; Atypical Antipsychotics Research)[46]

In addition to these initiatives, the Ministry of Health maintained its ongoing relationship with the Therapeutics Initiative at UBC. The ministry's relationship with UBC and the Therapeutics Initiative represents one of its longest standing attempts to formally incorporate evidence-based decision making into its administration of the PharmaCare program.

4.3.1 ALZHEIMER'S DRUG THERAPY INITIATIVE (ADTI)

As the preceding discussion makes clear, the provincial government is constantly assessing how to respond to requests from patient groups, drug companies, doctors and other stakeholders to fund new drugs for diseases. Ideally, the funding decision should consider whether a particular new drug is effective. However, such evidence is not always readily available, or is incomplete.

The province's decision to fund a new class of Alzheimer's drugs called "cholinesterase inhibitors" while also funding a study into their effectiveness can be seen as an attempt to navigate a line between these two, sometimes conflicting, priorities. In the early 2000s the Ministry of Health was under increasing pressure from patient groups to cover a group of cholinesterase inhibitors for Alzheimer's treatment. Although Health Canada had approved this class of drugs for Alzheimer's treatment in 1997, the ministry did not fund these drugs under PharmaCare at the time. Earlier studies supported the ministry's decision and the prevailing scientific consensus was that there was "insufficient clinical evidence to demonstrate that these medications are effective treatments for Alzheimer's disease."[47]

Nevertheless, the ministry continued to face pressure to cover the drugs in large part because all other provinces in Canada provided some form of coverage for them, and British Columbia was therefore seen as an outlier. Furthermore, advocates in favour of covering these drugs argued that previous clinical studies were incomplete because they had focused on the drugs' ability to improve patients' cognitive abilities rather than whether they assisted with improving day-to-day functioning.[48] Some anecdotal evidence suggested that certain patients could benefit from the treatment, but it remained unclear which patients might benefit from using these drugs.

Needing to address the concerns of its stakeholders, the ministry continued to work with patient groups, the pharmaceutical industry and Alzheimer's disease researchers to develop a response. In July 2006, PSD hosted a forum at which the ministry and various stakeholders agreed in principle to conduct a research study to address concerns about gaps in the scientific evidence for these drugs. PSD committed to develop a research protocol to advance the initiative and by January 2007 it had drafted "A Framework for the Development of a British Columbia Study to Determine the Effectiveness and Appropriate use of Alzheimer's Drug." The ministry also hired a consultant to

45 In B.C., the Ministry of Health was focused on using information technology to provide the best possible patient care and implementing electronic prescribing through B.C.'s "E-Health" program. As well, the funding to the College of Pharmacists was in line with a pan-Canadian focus on electronic prescribing. The National Pharmaceuticals Strategy had identified electronic prescribing as a means to strengthen the safety, effectiveness and appropriate use of pharmaceuticals. Federal/Provincial/Territorial Ministerial Task Force on the National Pharmaceuticals Strategy. *National Pharmaceuticals Strategy Progress Report* (Ottawa: Health Canada, June 2006) <http://www.hc-sc.gc.ca/hcs-sss/alt_formats/hpb-dgps/pdf/pubs/2006-nps-snpp/2006-nps-snpp-eng.pdf>.

46 This research was not limited to PSD. For example, the contract for research on atypical antipsychotics was held by the Primary Care Division of the Ministry of Health, not PSD.

47 Ministry of Health, Pharmaceutical Services Division, *Annual Performance Report 2006*, 3.

48 Ministry of Health, Pharmaceutical Services Division, *Annual Performance Report 2006*, 3.

work with stakeholders to develop a study protocol that incorporated their varying perspectives.[49]

Simultaneously, PSD struck several committees including a project advisory committee and a study design committee to provide recommendations to government and work with researchers to develop the research components of the study. The project advisory and study design committees were made up of ministry staff and representatives from the Alzheimer Society of British Columbia, the University of British Columbia (UBC), the University of Victoria (UVic), the health authorities, specialists in geriatric medicine and Alzheimer's disease researchers. Due to the high profile and political sensitivity of this work the Minister of Health was briefed on both the development of the research protocol and on the proposed membership of the committees advancing the work.[50]

By July 2007, both the ministry and the stakeholders groups had agreed on the basic structure of the ADTI study design. At the end of July, PSD Assistant Deputy Minister Bob Nakagawa approved the initial proposed budget of approximately $70 million. Of this total proposed budget, approximately $64.3 million was earmarked to pay for the drugs for the targeted patient groups. Approximately $2.8 million represented the budgeted costs of the ADTI research itself, with the balance intended to cover education and administrative costs.

At the time, the ministry's goal was that the research component would provide PSD with the information needed to make an informed listing decision.[51] At this point, the ministry was committed to getting the study underway as quickly as possible. Years of work and engagement between the ministry and its stakeholders culminated on October 4, 2007, when then-Premier Gordon Campbell announced that the province would fund coverage of three cholinesterase inhibitors for participants in the ADTI study.[52]

To work effectively, the ADTI study needed to be carefully planned in terms of both the study parameters and contractual relationships under which the research would occur. It also required specific policy direction that allowed data to be shared for the study in a way that would also protect the personal information of patients. The main ADTI agreement began with an initial commitment of approximately $25,000 to enable completion and approval of the required research ethics application and study design proposal. Obtaining ethics approval for the study design was necessary to ensure the overall project could proceed in accordance with accepted standards of scientific research and to enable the Ministry to publish the study results to increase awareness of its Alzheimer's research, which was one of the key goals of the ADTI.

Once the ethics approval was received, the ministry approved the amendment of the main ADTI agreement with UVic to formally implement the study design. Simultaneously, the amendment approved the required budget increase to approximately $2.3 million, which was consistent with the ministry's pre-approved research budget allocation for this part of the initiative. This contract change was also consistent with the ministry's plan to divide the preparatory phase of the research project into smaller segments to try to avoid anticipated delays in the early stages of the study roll-out.

The ADTI involved a collaboration between the ministry, drug companies, the Alzheimer Society of British Columbia, and a team of researchers from UVic and UBC who were responsible for conducting the study. The research was expected to last up to three years and involve more than 25,000 British Columbians diagnosed with mild to moderate Alzheimer's disease.[53]The study itself was made up of several related projects, each of which addressed an aspect of Alzheimer's disease treatment that the ministry wanted to investigate as part of its core goal to assess the use and effectiveness of cholinesterase inhibitor drugs.

49 Ministry of Health, Pharmaceutical Services Division. "A Framework for the Development of a British Columbia Study to Determine the Effectiveness and Appropriate use of Alzheimer's Drug," January 2007.

50 Ministry of Health, "Minister's Meeting with the Alzheimer Society of British Columbia (BC)," information briefing document, 29 December 2006.

51 Ministry of Health, "Minister's Meeting with Minister July 30, 2007 re Alzheimer Study", information briefing document, 23 July 2007.

52 Ministry of Health, "B.C. Commits $70 Million to Alzheimer's Drug Study," news release, 4 October 2007.

53 Ministry of Health, "B.C. Commits $70 Million to Alzheimer's Drug Study," news release, 4 October 2007.

For example, the main ADTI research initiative included five different studies under its umbrella. In brief, these studies were:

- Utilization of Cost Project: cost effectiveness of prescribing cholinesterase inhibitors
- Clinical Epidemiological Project: who benefits from treatment
- Seniors' Medication Study: studying patients and caregivers in their first year of taking cholinesterase inhibitors and decisions to stop, switch or continue medication when no beneficial response is apparent
- Clinical Meaningfulness in Alzheimer Disease Treatment (CLIMAT) Scale: testing a new way to measure patients' responses to the treatment
- Caregiver Studies: studies on how cholinesterase inhibitors affected the quality of life of informal caregivers supporting family members and friends with memory loss including dementia, and caregivers' opinions and experiences of the impact of cholinesterase inhibitors on the quality of life of patients.[54]

In support of the ministry's wide ranging interest in issues related to Alzheimer's disease treatment and its hands-on engagement in the project, the ADTI was not limited to these five sub-studies under the main part of the project led by UVic. For example, at the outset of the project, the ministry contracted with UBC to investigate the state of knowledge of Alzheimer's disease issues amongst doctors and to conduct various educational initiatives and workshops to increase knowledge and awareness of these issues for front-line clinicians. In another example, as the ADTI progressed, the ministry augmented the educational component of the ADTI by contracting with UBC to deliver ongoing professional development and education to physicians (both general practitioners and specialists) to enhance their capacity to treat the disease.[55]

The collaborative nature of the ADTI was also reflected in the leadership role government played in securing the participation of the pharmaceutical industry. Engaging with the pharmaceutical industry was necessary both to secure industry's support for the "coverage with evidence development" research model and to address the anticipated drug costs. The ministry approved ADTI budgets highlighted the fact that over 90 per cent of the anticipated project costs would come from covering the drug costs for the study participants. To help address these cost concerns, the ministry and the drug manufacturers agreed that industry would fund part of the drug costs to reduce the cost burden to government.

From the time a comprehensive Alzheimer's study was contemplated in the early 2000s until the completion of the ADTI final report in 2015, the ministry's involvement was central to both building the required stakeholder consensus and steering the project toward completion. After the ADTI was formally announced by Premier Campbell in 2007, the ministry maintained an overall leadership role in respect of the initiative and its employees continued to engage with industry, the researchers, doctors and patient groups to try to achieve the goals of this ambitious study. The ministry's role was not merely to contract with the researchers and wait for their report to be delivered; rather, the responsible senior executives and staff were consistently engaged with all of the stakeholders to help the project move forward and address issues as they arose.

4.3.2 EDUCATION FOR QUALITY IMPROVEMENT IN PATIENT CARE (EQIP)

As we describe in Chapter 12, EQIP was launched in 2006 as a partnership between the Ministry of Health, the BC Medical Association (now Doctors of BC), UBC and UVic. It was part of PSD's strategy to optimize physician use of prescription drugs and, as a result, maintain and improve the health of British Columbians. The EQIP agreement was the basis for a multifaceted and collaborative initiative involving multiple people over many years. Its genesis was

54 A more in depth description of these studies can be found at University of Victoria, "Alzheimer Drug Therapy Initiative: General Information," <http://web.uvic.ca/~nlc/alzheimer.htm>.

55 Ministry of Health and the University of British Columbia, UBC-ADTI-2008 Transfer Under Agreement, 15 September 2007; Ministry of Health and the University of British Columbia UBC-ADTI-EDU-2010 Transfer Under Agreement, 1 October 2010.

in the late 1990s through The Better Prescribing Project funded by the federal government.[56]

The EQIP initiative provided family physicians with personalized computer-generated prescribing portraits for a particular disease or health topic with educational messages and case studies that "encourage reflection on practice." These portraits were a "snapshot" of an individual physician's prescribing practices created by PFIA, one of the EQIP subcontractors, using de-identified administrative data. After the portraits were sent to the doctors, they were returned to researchers and scientifically evaluated to assess the impact of the portraits on physicians' prescribing practices.

The ministry's engagement in this initiative was consistent with its mandate to support patient care and a cost-effective health system. For example, the first drugs chosen for EQIP portraits were anti-hypertensive and statin drugs for blood cholesterol. The portraits included information related to the therapeutic value of each drug and information about the relative cost-effectiveness of the drugs. The project goal was to inform physicians about the therapeutic value and the relative cost of each drug, so they could make prescribing decisions informed by both sets of facts.

Within the EQIP initiative, a working group was established made up of representatives from a number of stakeholders including the B.C. Medical Association, universities and the self-governing health professional colleges. As a group, they provided a "forum for planning, designing, implementing and evaluating best practice initiatives and tools with an aim to expand opportunities for addressing utilization management of prescription drugs while ensuring best prescribing practices that meet patient needs."[57] The working group decided on a specific pharmaceutical topic to address, and a focus group then determined what information to include in the prescribing portrait. The initiative was also contained an evaluation component that would permit future effectiveness studies of the prescribing portraits in order to assess the overall effectiveness of the initiative.[58]

4.3.3 MEDICATION MANAGEMENT PROJECT (MMP)

"Medication management" is the term pharmacists use to identify, resolve and take responsibility for the medication-related issues of individual patients in order to optimize their health outcomes as they relate to pharmaceutical drug therapy. The BC Medication Management Project (MMP) was a collaboration between the PSD and the BC Pharmacy Association (BCPA) whereby the BCPA agreed to implement certain changes to generic drug pricing and the fees charged by pharmacists for their dispensing practices. The resulting savings were used to pay for MMP. The project was intended to support specific changes to dispensing practices and pharmacists' reviews of patient medications, in order to evaluate specific impacts of patient prescription adaptation (renewing a prescription, changing the dosage, or making a drug substitution) and the costs to pharmacies of providing patient consultations related to prescription adaptation, and develop demonstration projects for medication management and review. MMP was established initially as a pilot project with up to $8 million obtained from the anticipated savings generated by the program.

The main goal of MMP was to save money and improve patient care, health outcomes and sustainability of the health care system by having pharmacists provide medication management services to promote the safe and effective use of medications. These goals were broadly consistent with the ministry's mandate to promote cost-effective use of health services. The ministry also expected that MMP would increase patients' engagement in managing their own health concerns and assist them with achieving their targeted medication therapy outcomes. In providing this service to patients, pharmacists were expected to conduct

56 The Health Transition Fund was a $150 million fund which from 1997-2001 supported 140 projects across Canada to test and evaluate innovative ways to deliver health care services. See Health Canada, "Health Transition Fund," <http://www.hc-sc.gc.ca/hcs-sss/ehealth-esante/infostructure/finance/htf-fass/index-eng.php>.

57 Ministry of Health and the University of British Columbia, "Appendix 1: EQIP Working Group Draft of Revised Terms of Reference," EQIP-2010 Transfer Under Agreement, 29 May 2009.

58 Using delayed control groups. One group of physicians received a portrait a year before the second group. The ministry could use the second group as a "control" allowing the ministry to evaluate in a methodologically sound way whether and how the portraits had affected the first group's prescribing practices.

thorough assessments of their patients' medications and medication history to identify, and then resolve, actual or potential medication management issues. In turn, this would help pharmacists identify the existence of potential prescribing problems, such as whether patients were on a drug unnecessarily, were receiving the incorrect dosage or were at risk of experiencing adverse drug reactions.[59] At the end of the project, an evaluation team was expected to analyze the data gathered to determine the project's health impacts and cost-effectiveness.

As of January 2011, 288 pharmacists at 117 pharmacies were participating in the project. In July 2010 the ministry entered into another agreement with the BCPA and others to replace the 2008 interim agreement. After this agreement was completed the government brought in new legislation, the *Pharmaceutical Services Act*, that both related to and replaced the contractual terms governing the pricing for drugs, pharmacists' dispensing fees and some of the services portion contained in the ministry's agreements. Although this legislative change did not specifically address MMP, it effectively ended the contractual agreements. Nevertheless, the interim agreement had generated the anticipated cost savings and the original interim agreement stipulated how the parties would distribute the funds after the agreement expired. The government continued to hold the savings generated by the interim agreement.

4.3.4 PROVINCIAL ACADEMIC DETAILING (PAD) AND THE ACADEMIC DETAILING EVALUATION PARTNERSHIP TEAM (ADEPT)

Academic detailing is "a method of continuing education in which a trained health care professional meets with a prescriber in their practice setting to provide objective, evidence-based information to influence changes in prescribing practices to improve patient outcomes.[60]

In 2003, six provinces developed a Canadian Academic Detailing Collaboration (CADC) to represent the academic detailers of Canada in order to promote academic detailing in Canada, collaborate in developing evidence-informed educational approaches, and facilitate research and evaluation of academic detailing.[61] The CADC, in turn, formed the Academic Detailing Evaluation Partnership Team (ADEPT) in 2008 to evaluate how academic detailing in Canada had affected real-world physician prescribing patterns.[62] This research was supported primarily by a grant from the Canadian Institutes of Health Research (CIHR).[63] Provincial health research agencies, including the BC Ministry of Health and the Michael Smith Foundation also made contributions.[64]

In 2012, British Columbia's Provincial Academic Detailing (PAD) program was one of only three province-wide government funded academic detailing programs in Canada. Originating in an academic detailing program established in 1993 for physicians in North Vancouver and West Vancouver, PAD was established province-wide in 2008 and is now delivered through academic detailers employed

59 Under MMP various categories were established including: whether a drug is needed, unnecessary, or suboptimal; whether a dose is too high or low; and whether the drug has caused an adverse reaction or issues with adherence or patient self-management. See Ministry of Health, "BC Medication Management Project," fact sheet, 25 January 2011.

60 Margaret Jin et al., "A brief overview of academic detailing in Canada: Another role for pharmacists," *Canadian Pharmacists Journal* 145(3) (May 2012): 142.

61 Margaret Jin et al., "A brief overview of academic detailing in Canada: Another role for pharmacists," *Canadian Pharmacists Journal* 145(3) (May 2012): 143.

62 Margaret Jin et al., "A brief overview of academic detailing in Canada: Another role for pharmacists," *Canadian Pharmacists Journal* 145(3) (May 2012): 143.; Malcolm Maclure et al., "Evaluation of the Impact of Canadian Academic Detailing (AD) Programs on Physician Prescribing Practices and Attitudes," CIHR Partnerships for Health System Improvement Grant, 30 September 2015.

63 Ministry of Health Services, "Academic Detailing Evaluation Partnership Team Funding Request," 1 November 2010.

64 Margaret Jin et al., "A brief overview of academic detailing in Canada: Another role for pharmacists," *Canadian Pharmacists Journal* 145(3) (May 2012): 143.; Malcolm Maclure et al., "Evaluation of the Impact of Canadian Academic Detailing (AD) Programs on Physician Prescribing Practices and Attitudes," CIHR Partnerships for Health System Improvement Grant, 30 September 2015.

by one of the five regional health authorities.[65] The government has described PAD as an "innovative" program that, in the words of then-Minister of Health George Abbott, "leads to more effective use of prescription drugs across the health system, which leads to improved health outcomes and also helps the Province to contain drug spending."[66]

The similar nature of the ADEPT initiative and the provincial PAD program created opportunity for the ministry to pursue its broader policy goals in academic detailing. Through grant funding, the ministry supported an external evaluation project of PAD. PAD was expected to cost the ministry over 11 million dollars over a five year period and the ministry wanted to assess whether PAD was effective so that it could consider alternative policy approaches. This kind of evaluation was consistent with the ministry's practice of regularly evaluating its policy decisions. PSD's decision-makers believed the province would benefit from the quality improvement that was likely to result from ADEPT's pan-Canadian, external evaluation of the PAD program.[67]

4.3.5 PHARMACEUTICAL OUTLOOK RESEARCH ON SPECIAL AUTHORITY (PHORSEE)

In March 2008, PSD granted $2.1 million to the College of Pharmacists of British Columbia to improve patient safety through evidence-based research on pharmaceutical services delivery in the province. The funds were granted to the College to support research on trends and innovations in the use of PharmaNet and other areas. The granting of funds furthered the College's legislative mandate to protect the public. At the time, the College was heavily involved in enhancing patient safety through upgrades to the PharmaNet system. The College intended that the research would help inform enhancements to PharmaNet to improve work flow for pharmacists that would in turn enhance public safety.

Prior to the PhORSEE initiative, the College did not typically serve as a funding agency for research. To administer the grant, the College established the PhORSEE Advisory Committee to advise the Registrar of the College on how to disperse the grant funds as laid out in its terms of reference. The PhORSEE Advisory Committee included the Registrar of the College and two other representatives, including the Deputy Registrar, who was the committee's chair, four representatives from PSD, and a representative of the research community selected by the committee. [68] The role of the advisory committee necessitated the need for a structured decision-making apparatus to enable the Registrar to make funding decisions that were consistent with the objective of the grant and that advanced the interests of both the College and the stakeholders.

Under its terms of reference, the advisory committee's mandate was to provide strategic advice and recommendations to the College's Registrar and to researchers who had submitted grant proposals to conduct research consistent with the purposes of the grant. The advisory committee was specifically authorized to receive, review and evaluate grant proposals and make funding recommendations to the Registrar. The advisory committee had the overall responsibility to make recommendations to align any granting decisions with the College's objectives. The final decisions on which grants to award rested with the Registrar.

While the initiative was underway, the College took steps to attract proposals by developing a broad competitive process to alert researchers that grant funds were available. The ministry's involvement in the initiative was interrupted by its 2012 investigation. This meant that some of the original grant funds were not distributed by the College for a period of time. The College informed the ministry of the unallocated funds, which remained on its books for several years. The College eventually received new proposals that enabled it to grant the research funds

65 Ministry of Health, "PAD Service - About Provincial Academic Detailing," <http://www2.gov.bc.ca/gov/content/health/practitioner-professional-resources/pad-service/about-provincial-academic-detailing-pad>.

66 Ministry of Health, "Province Promotes Best Practices for Drug Prescribing," news release, 25 March 2008.

67 Ministry of Health, "Cliff# 851490 - Academic Detailing Evaluation Partnership Team Funding Request," decision briefing document, 19 October 2010, signed 1 November 2010.

68 See Pharmaceutical Outlook Research on Safety, e-Drug and e-Education, "PhORSEE Advisory Committee – Terms of Reference," undated. The representatives from the Pharmaceutical Services Division were the executive directors of POER, DUO and DI, as well as the Co-Directors of Research, Dr. Malcolm Maclure and Dr. Rebecca Warburton.

to advance studies consistent with the purposes outlined in the original grant.

4.4 GOVERNMENT'S RELATIONSHIPS WITH UNIVERSITIES - THE RESEARCH RELATIONSHIPS TOOLKIT

The Research Relationships Toolkit was created by the Working Group on Provincial Government-University Research Agreements in 2008 as an outcome of work undertaken by representatives from various provincial government ministries and BC universities.[69] The working group produced a final report that recognized that research relationships between the province and universities are "designed to serve the public interest" and can provide substantial benefits to researchers, universities, the province and society as a whole.[70] The working group developed the toolkit as a way to encourage these collaborative relationships while recognizing that universities and the province have different organizational structures and reasons for entering into research agreements.[71] This initial toolkit was approved by the Ministry of Advanced Education, Legal Services Branch, the Intellectual Property Program and Risk Management Branch.[72]

The toolkit provided a series of sample agreements and reference documents intended to help facilitate negotiations between the province and public universities, reduce the time and effort required to secure an agreement and provide educational material and examples of best practices.[73] The types of agreements covered by the toolkit included grants, sponsored research agreements and general service agreements.

The toolkit's creation demonstrated that entering into research agreements directly with universities was a common and accepted part of how government operated in relation to these institutions. Use of the toolkit was not limited to the Pharmaceutical Services Division or the Ministry of Health. Moreover, the toolkit demonstrated that the procurement relationships between the province and universities contained unique aspects that distinguished them from other kinds of procurement relationship agreements that the province had the authority to enter. For example, the toolkit reinforced governments pre-existing policy that enabled the universities to be treated in the same way as other parts of government for procurement purposes. Among other things, this meant government could enter into specified agreements with the universities directly without having to tender the contracts through a competitive process. The approved template agreements also ensured that government had the authority to ensure the agreements were administered appropriately through the agreed upon audit and oversight provisions.

The toolkit template agreements also reflect the role the universities have both conducting research in the public interest and their own interest in publishing the results. As such, the toolkit template agreements also incorporated terms intended to enable university researchers' ability to publish, to preserve academic independence, and addressed the how intellectual property rights would be addressed between government and the universities.[74]

4.5 THERAPEUTICS INITIATIVE

4.5.1 ESTABLISHMENT AND EVOLVING ROLE

The Therapeutics Initiative (TI) was established at UBC in 1994 through cooperation between the Department of Pharmacology and Therapeutics and the Department of Family Practice. As an entity housed within UBC, the TI is funded through earmarked grants from the Ministry of Health to the university. To maintain its independence, the TI does not accept funding from the pharmaceutical industry and all individuals associated with the TI are

69 Research Relationships Between the Province of British Columbia and British Columbia's Universities, Final Report, January 2008, 1.

70 Research Relationships Between the Province of British Columbia and British Columbia's Universities, Final Report, January 2008, 1.

71 Research Relationships Between the Province of British Columbia and British Columbia's Universities, Final Report, January 2008, 1.

72 Research Relationships Between the Province of British Columbia and British Columbia's Universities, Final Report, January 2008, 1.

73 Research Relationships Toolkit, i.

74 The toolkit has been updated periodically. The 2010 toolkit which was the then-current document in 2012 is set out in Appendix C. The toolkit was updated and republished in 2014.

required to disclose any potential conflicts of interest. The ministry's affiliation with the TI and UBC provided the ministry with access to high-quality researchers who could provide information to inform the ministry's decisions about whether to list drugs on the formulary and independent advice about the safety and effectiveness of drugs already listed.

Currently, the TI's work is divided into four main areas, each with its own dedicated working group: the Drug Assessment Working Group (DAWG), the Education Working Group (EWG), the Therapeutics Letter Working Group (TLWG) and the PharmacoEpidemiology Working Group (PEG). Collectively the TI works to provide physicians, pharmacists and Ministry of Health policy-makers with up-to-date, evidence-based, practical information on prescription drug therapy.

A decade after it was established, the TI entered a new funding agreement with the ministry in May 2004. Although the ministry made several subsequent amendments, the 2004 agreement formed the centrepiece of the ministry's relationship with the TI until March 2012. Under the 2004 contribution agreement, the ministry provided $1 million in annual funding for the TI for an initial three-year term.

Although the later amendments to the 2004 agreement extended the TI's contract term and significantly expanded its funding, the three core pillars of the TI's relationship with the ministry remained intact throughout this period:

- *The TI must continue to remain at arms-length from both government and the pharmaceutical industry and to use proven professional education principles in its educational outreach program.*
- *The TI must act as a source of unbiased therapeutic information for the ministry and must educate physicians and pharmacists. As part of this role, the TI conducted evaluations of its own educational techniques to ensure their ongoing effectiveness. The ministry's goal in funding the TI was to facilitate practitioners obtaining the information they needed to optimize doctors' prescribing practices.*
- *The TI must continue to conduct evidence reviews and provide the PharmaCare program with concrete recommendations about managing prescription drug use in the province.*[75]

The scope of the 2004 agreement was intended to be flexible, and this was reflected in the specific deliverables set out in the contract. The ministry, UBC and the TI all viewed their relationship as collaborative. Although the TI was expected to remain at arms-length from government, it was empowered to make suggestions to the ministry about a range of topics crucial to ministry policy-makers, including addressing questions about allowable drug costs, making recommendations to list drugs on (or de-list drugs from) the provincial formulary, and making suggestions about appropriate prescribing practices and other innovative drug utilization management opportunities.

Between May 2004 and March 2012, the ministry's agreement with UBC was amended several times. The first amendment occurred on December 14, 2006. At that time, UBC and the ministry agreed to secure a longer term role for the TI by extending the term from three to eight years (ending in 2012). This term extension also expanded the TI's deliverables and opened the door for further funding increases over time. On January 15, 2007, the ministry and UBC amended the agreement again. This time, the ministry increased the TI's funding by an additional $300,000 to enable it to provide a report to the ministry on the effects of a specific class of drugs. Two more amendments and expansions of the agreement occurred in January and July 2007, when the ministry asked the TI to conduct specific portions of the research related to the Alzheimer's Drug Therapy Initiative.

4.5.2 PHARMACEUTICAL TASK FORCE REPORT (2008)

It is clear that senior Pharmaceutical Services Division (PSD) executives valued the contributions the TI made to the Ministry of Health's operation. Over time, however, a number of voices began to criticize the TI's role, in both its advisory capacity and its impact on the ministry's drug listing decisions. For example, some other health researchers in the province complained to the ministry that the TI had become a favoured destination for ministry research

75 Ministry of Health and University of British Columbia, TI-2004 Contribution Agreement, 5 May 2004.

projects and research funds in a way that unfairly excluded other groups from obtaining ministry work. Further, the pharmaceutical industry and some patient groups argued that the TI's role in the drug listing process restricted patient access to a broader range of drug therapies.

In November 2007, the ministry formed the nine-member Pharmaceutical Task Force to examine pharmaceutical policy and provide government with advice about how the ministry could achieve progress in several areas, including optimization of the drug listing process, procurement options for pharmaceuticals, and the effectiveness, transparency and future role of the TI in the drug listing process.[76]

In its final report, the task force was highly critical of the then-existing drug review and approval process in which the TI had a significant role. The task force heard from some senior health authority representatives who suggested that the TI had "been insulated from robust peer review expected of academic organizations and from the rigours of competitive funding models."[77] The task force criticized the ministry's evidence-based review process for listing pharmaceutical products as being "cumbersome, unnecessarily insular and less efficient than it should be in providing patients with timely access to coverage."[78] One of the main criticisms the task force consistently heard about the drug review processes, and the dominant role of the TI in it, was that it confined drug reviews to a relatively small group of experts and thus limited the pool of expertise that could potentially be assessing the merits of drug listing submissions.[79] The task force concluded that most stakeholders outside of the ministry viewed the TI as "narrow, insular and resistant to meaningful stakeholder engagement."[80]

As a result, the task force recommended that the ministry establish a new Drug Review Resource Committee to perform the drug submission review role then being conducted by the TI; and suggested that this new review committee create a registry of experts to broaden the pool of researchers available to provide recommendations to ministry decision-makers.[81] The task force also recommended that the ministry, at a minimum, end the TI's role in the drug listing process and transfer its public education function back to the ministry.[82]

4.5.3 THERAPEUTICS INITIATIVE REACTION TO REPORT

From the TI's perspective, the creation of the task force and its final report represented another attempt by the pharmaceutical industry to attack the TI's independent, evidence-based advice to the ministry about its drug listing decisions. Since its inception, both the ministry and the TI had been aware that the TI's work put it in opposition to the pharmaceutical industry, especially when the TI concluded that certain drugs should not be approved for coverage within the formulary. As a result, the TI was highly critical of both the task force and its conclusions, and felt they had been unfairly singled out for criticism.[83]"

Moreover, members of the TI believed that the task force's membership was too closely aligned with the pharmaceutical industry through the work a majority of members had done with industry.[84] Because the TI strictly forbids pharmaceutical industry involvement in its own work, it remains concerned about the impact of the industry on the development of the ministry's pharmaceutical policies.

76 The Pharmaceutical Task Force, *The Report of the Pharmaceutical Task Force*, April 2008.

77 The Pharmaceutical Task Force, *The Report of the Pharmaceutical Task Force*, April 2008, 8, fn 15.

78 The Pharmaceutical Task Force, *The Report of the Pharmaceutical Task Force*, April 2008, 6.

79 The Pharmaceutical Task Force, *The Report of the Pharmaceutical Task Force*, April 2008, 11.

80 The Pharmaceutical Task Force, *The Report of the Pharmaceutical Task Force*, April 2008, 25.

81 The Pharmaceutical Task Force, *The Report of the Pharmaceutical Task Force*, April 2008, 27.

82 The Pharmaceutical Task Force, *The Report of the Pharmaceutical Task Force*, April 2008, 29.

83 Andrew MacLeod, "Life Saving Drug Watchdog May Be Scrapped," *The Tyee*, 23 May 2008.

84 Andrew MacLeod, "Health minister Falcon comfortable with drug advisor's new role with Pfizer," *The Tyee*, 19 November 2009. See also Andrew MacLeod, "Drug Firms' Sway over BC's New PharmaCare Task Force," *The Tyee,* 28 November 2007.

4.5.4 ROLE OF THE THERAPEUTICS INITIATIVE IN 2012

By May 2008, the government had accepted all of the recommendations from the Pharmaceutical Task Force report, including those specifically about the role of the TI.[85] Implementing the recommendations raised a number of complex challenges for the ministry because it was still implementing the Auditor General's 2006 recommendations, which advocated for a wider role for the TI. Also, having developed a long-standing relationship with the TI, some senior managers in PSD valued the TI's past contributions and remained supportive of its future role providing advice to the ministry. Further, the ministry's existing contribution agreement with UBC was not set to expire until March 2012, and the ministry would have to negotiate with UBC to alter the existing agreement if it wanted to implement the task force's recommendations. This meant the ministry needed to find a way to balance the implementation of the task force's recommendations with the need to ensure the ministry continued to receive independent advice while it transitioned the TI's role. The ministry also confronted additional pressure from critics who opposed the task force's conclusions and believed the TI's existing role should be preserved.

In response to the task force's recommendations, the ministry decided to end the TI's exclusive role providing clinical evidence reviews and to open this work up to competition from other researchers. Once it did so, the ministry then needed to change its existing agreement with the TI to reduce the funding previously allocated for these reviews while still confirming a ministry commitment to fund other aspects of the TI's work.

A key step toward implementing the task force's recommendations was the creation of an open tendering (RFP) process for the TI's former role conducting clinical evidence reviews. Through this process, the ministry ultimately awarded five individual contracts to fulfil the clinical evidence review role. With their long history providing these reviews to the ministry, several members of the TI successfully responded to the RFP and won back some of the work they had lost, such that three of the five individual contracts were awarded to TI researchers.

The changes to the TI's clinical evidence role also necessitated amendments to the main TI contract to reflect the changed deliverables and the corresponding budget reduction. It took the ministry several months to sort out these issues, between the autumn of 2011 and March 31, 2012 – the expiration date of the then-existing TI contract.

The new 2012 amended agreement significantly reduced the scope of the TI's deliverables and diminished the level of autonomy it previously had to conduct research on the ministry's behalf. As a result of the amendments, by 2012 the TI's existing working groups were both reduced and consolidated.

4.6 PUBLIC HEALTH EPIDEMIOLOGY AND ANALYSIS

The Ministry of Health's Population and Public Health Branch engages in epidemiological surveillance and research using continuously updated administrative health data contained in various provincial databases. The ministry relies on administrative health datasets to estimate the prevalence of diseases and other health conditions across the population – estimates that can then be used to inform and advise public decision-makers on how to best support public health.

When seeking answers to questions about the prevalence of specific medical conditions within a population, epidemiological teams first determine what administrative health datasets contain key indicators of that condition. Once a subset of a population is identified, epidemiologists are then able to look for patterns and trends in the medical records that may help identify what data-based indicators provide warning signs of the condition. This can then inform decision-makers about what portion of the remaining population is at risk for developing the disease in the future. Any number of public policy and budgetary decisions may be informed by using this method of data analysis.

As such, administrative health datasets can, when used by experts who possess the technical and analytical skill sets necessary to work with the data, play an important role in informing public policy decision-makers on the health of

85 Ministry of Health, "Government Accepts Drug Plan Recommendations," news release, 21 May 2008.

the populations they serve. Epidemiological surveillance and research using administrative health data can only occur, however, when publicly held data sets are made available to those experts. The challenges that both government and private researchers experienced obtaining, using and reporting on this data, and the parallel challenges that the ministry experienced administering the data, form the backdrop against which many of the events discussed in this report played out.

In 2012, the Ministry of Health did not employ the data-handling experts necessary to support the work of its own epidemiologists. Rather, it contracted with a private firm called Blue Thorn Research and Analysis Group. As explained to us by the Assistant Deputy Minister of Population and Public Health, Arlene Paton, "we were almost completely dependent on Blue Thorn staff who understood how to pull those datasets together, run the algorithms and support us to be able to create those [chronic disease] registries, the flu surveillance and any number of other projects. We just did not have the technical capacity within the ministry."

4.7 THE MINISTRY OF HEALTH IN 2012: ORGANIZATIONAL CULTURE

The above sections have described the history of the Ministry of Health's approach to evidence-based policy making in the years prior to 2012 and the specific steps that the ministry took to implement that approach. By 2012, the expansive and evidence-based approach to policy development and decision making, as reflected by the structure of the Pharmaceutical Services Division (PSD) and its relationships with external researchers, was still firmly in place.

In addition to the commitment to evidence-based decision-making, a number of other important factors were influencing the organizational culture at the Ministry of Health. We identified three underlying systemic or cultural factors that, in our view, contributed to the way in which the 2012 investigation unfolded. These factors are described below.

4.7.1 THE DANDERFER CASE

Ron Danderfer, a former Assistant Deputy Minister in the Ministry of Health, had chaired the eHealth Steering Committee, part of a national initiative to create electronic health records. Also on the eHealth Steering Committee was Dr. Jonathan Burns, a practising physician who ran a health information technology company.

In April 2005, Dr. Burns won an RFP competition for a contract with the Ministry of Health to provide services related to electronic health records. Mr. Danderfer oversaw the administration of this contract. In return for increasing Dr. Burns' contractor rate and total amount of the contract, and approving the resulting bills that averaged $60,000 per month, Mr. Danderfer received personal benefits from Dr. Burns for himself and his family.[86]

In July 2007, then-Deputy Minister of Health Gord Macatee announced that he was asking the Ministry of Finance's Internal Audit and Advisory Services (IAAS) to investigate after receiving "information about the possible actions of a senior staff person at the Ministry of Health which require answers."[87] Mr. Danderfer and his wife, also a government employee, were suspended with pay that month and later suspended without pay in September 2007. They both retired from the public service in October 2007.

The RCMP began an investigation and Mr. Danderfer was charged with four counts of accepting a reward, advantage or benefit from a person dealing with the government. He eventually pleaded guilty to accepting improper benefits as a government official and was sentenced to two years' probation and fined $3,690.[88]

The IAAS' initial review of this case led it to conduct a more thorough review of Ministry of Health procurement and contract management practices by assessing

86 Vaughn Palmer, "Whistleblowers crucial for control," *Vancouver Sun*, 9 October 2009; Andrew MacLeod, "RCMP search warrant alleges B.C. health ministry fraud," *The Tyee*, 8 October 2009.

87 Ministry of Health. Statement from Gordon Macatee, Deputy Minister, 20 July 2007.

88 "Former minister sentenced over corruption conviction," *Globe and Mail,* 15 July 2011.

85 contracts.[89] The review concluded that "while some good practices are consistently applied by the many staff in the ministry who are involved in procurement and contract management, improvement is needed for a number of other practices. There were indications that the former Knowledge Management and Technology Division's practices were particularly in need of improvement."[90]

This case, and the resulting IAAS review, led to greater emphasis in the Ministry of Health on contract management and following procurement rules. For example, the ministry introduced mandatory training for all contract managers. Certain types of contracts were required to be reviewed through the central contract management office in the ministry (previously, individual program areas had authority to enter into those arrangements without external approval). According to the ministry's Executive Financial Officer, however, the case was an outlier and not reflective of problems with the system generally. He told us he had not "seen anything that leaves me to think that there's a systemic problem of people doing [things contrary to policy] intentionally."

4.7.2 DATA CULTURE: UNRESOLVED CONCERNS ABOUT ACCESS TO HEALTH INFORMATION

As we have described above, health care providers – including those at hospitals, pharmacies and doctors' offices – collect a large volume of health information from patients who interact with our health system. This administrative health data is then held and used by the Ministry of Health in administering health care in British Columbia. While the primary purpose of collecting data is to account for and support financial and administrative decisions of the ministry or to support patient care, that same data is also used to conduct health research. In fact, the purposes are not mutually exclusive. When operating in an evidence-based decision-making model, the ministry uses health research to inform its own policies. Health research can be performed internally by ministry employees, it can be contracted out directly to entities like the Therapeutics Initiative (TI), it can be funded and directed through external funding entities, and it can be performed completely independently from the ministry at hospitals and universities.

The ministry holds this data in personally identifiable form, but when it is used for health research, the data may or may not be personally identifiable, depending on the need of the research. If an analyst or researcher is using only one database for the research, data can be anonymized or de-identified by, for example, taking out names, addresses and exact birth dates. Data may need to be personally identifiable in order to link records from one database with records from another. Even so, this sometimes can be done by giving each record a unique but anonymous identifier so that the databases can be linked before providing the linked dataset to the researcher without providing, for example, a Personal Health Number.

British Columbia has robust privacy legislation providing rules for the collection, use and disclosure of personal information held by public bodies, including administrative health data. The *Freedom of Information and Protection of Privacy Act* is the principal statute guiding the ministry in this respect. Also applicable, depending on the type of data in question, are the *E-Health Act*, the *Medicare Protection Act*, the *Ministry of Health Act* and, in 2012, the *Pharmacy Operations and Drug Scheduling Act*, amongst others.[91] Adhering to the complex matrix of legislation guiding the protection, disclosure and use of sensitive data requires careful consideration and reasonable legal interpretation by public bodies and their employees.

While these statutes established a legal foundation for the use and disclosure of information, they were complex and required that discretion be used in assessing individual circumstances where data was being requested. In this situation policy is an important tool for sound public administration. A policy is an internal document, ideally created after receiving legal advice, that is designed to assist public servants in interpreting and applying complex

89 Internal Audit and Advisory Services, Ministry of Finance, *Project No.: 026101 – Report on Procurement and Contract Management Practices, Ministry of Health Services*, July 2009, 5.

90 Internal Audit and Advisory Services, Ministry of Finance, *Project No.: 026101 – Report on Procurement and Contract Management Practices, Ministry of Health Services*, July 2009, 1.

91 Parts of the *Pharmacy Operations and Drug Scheduling Act* relevant to this discussion were repealed and replaced by the *Pharmaceutical Services Act* on May 31, 2012.

legislation where that legislation is ambiguous or calls for the exercise of judgment and discretion. While policy is not binding, it can helpfully articulate a set of consistent principles to apply to particular types of applications and decisions, as well as to new problems, arising under the governing legislation. While policies cannot foresee every potential problem, they can be modified and updated on an ongoing basis to respond to new situations and challenges in a principled fashion, and can assist the people administering the statute with avoiding idiosyncratic decision-making and ensuring that similar cases receive similar treatment. When policies are made public, which should normally be the case, they can also assist the public in understanding government decisions and in knowing what to expect in the future.

While administrative health data is invaluable for public health policy making, it contains sensitive information that, if improperly used or accessed, could harm those who entrust their personal information to government.

In an effort to facilitate the use of administrative health data by researchers and public health officials while simultaneously mitigating the risks of sharing it, the Ministry of Health developed organizational structures and policies about access to and use of its health data. As the events described throughout this report illustrate however, the structures and policies that existed in 2012 were problematic in many respects. Without adequate policy direction in a highly complex legislative environment, employees had inconsistent and incompatible interpretations of the governing legislation. As described above, decisions needed to be made about the form of the disclosure and use – for example, whether it would be personally identifiable or not, whether it could be linked to other data, and what the data would include. In practice, it was often unclear what office or position was responsible for making those decisions. Together, these systemic factors contributed to the environment in which the complaint that we describe in Chapter 5 was made in March 2012.

In 2012, the primary policy relied on by the ministry to interpret legislation relevant to data access was 13 years old. Developed in 1999, the ministry's Data Access Policy did not provide any guidance on interpreting legislation. Rather, it delegated the ability to make such interpretations to key positions within the ministry. By early 2012, most delegated authority in this respect lay with the ministry's Chief Data Steward and the office he oversaw.

Also in 2012, the Information Management and Knowledge Services (IMKS) Branch was the steward of administrative health data collected and held by the Ministry of Health.[92] This branch was responsible for ensuring that any access to personal information contained in administrative health data occurred in accordance with relevant privacy legislation. A section of this branch, called Data Access, Research and Stewardship (DARS), was responsible for reviewing and approving requests for data access by outside researchers and the information sharing agreements the ministry entered into with other public bodies.[93] Overseeing IMKS, and by extension DARS, was the ministry's Chief Data Steward.

While the Chief Data Steward had authority to approve or deny internal and external access to the ministry's administrative health databases, the practical control of much of that data was scattered across multiple offices. There was confusion between those offices about who "owned" specific datasets and how the information they contained could be shared internally and externally. Additionally, there was confusion within the ministry over what constituted personally identifiable information and whether any data, personally identifiable or not, could be shared externally without approval from the Chief Data Steward.

One database that became the focus of the investigators' attention illustrates these issues. The ministry had a Canadian Community Health Survey (CCHS) database that included personally identifiable administrative health data collected by the federal government and shared with the province. This database had, at one point, its own

92 In 2012, this group was known as the Office of the Chief Data Steward and the Information Management and Knowledge Services Branch. Previously, the group was known as Strategic Policy, Information Management and Data Stewardship (SPIMDS). It was a branch of the Health Sector Information Management/Information Technology Division.

93 The Ministry of Health has undergone organizational change since 2012, including in the branches and divisions responsible for data stewardship. As of January 2017, the data stewards responsible for reviewing data access requests and drafting information sharing agreements are in the Access, Audits and Agreements section of the Data Management and Stewardship Branch of the Health Section Information, Analysis and Reporting Division.

dedicated ministry steward who oversaw all aspects of CCHS data, including who was granted access to it – namely, both ministry personnel and external contractors working alongside ministry staff. When the CCHS steward left the ministry, a replacement was never appointed and no practical steps were taken to transition the stewardship responsibilities elsewhere. Without a dedicated CCHS data steward or clear direction on how to proceed in his absence, nobody in the ministry had clear responsibility for handling this data.

Despite the organizational challenges, there were three key mechanisms designed to guide the ministry in approving the disclosure of data. As a matter of processes, administrative health data was commonly shared by one of three methods.

1. Academic researchers were provided data through Data Access Requests (DAR) which were reviewed and approved by the Chief Data Steward
2. Public bodies outside the ministry, including service providers to the ministry, were granted data access through information sharing agreements (ISAs) facilitated through the approval of the Chief Data Steward
3. Ministry of Health employees and contracted service providers were authorized to receive data by the ministry's Data Access Services (DAS) office

Academic researchers wishing to use ministry data began their requests by applying through the pan-provincial platform for accessing provincial data, Population Data BC (PopData BC), which assesses applications in the context of legislative requirements and works with researchers and ministries to facilitate data sharing agreements and contracts. Applying for data access through PopData BC can be costly and time consuming. Ultimately administrative health data is only shared with outside researchers once the ministry's Office of the Chief Data Steward is satisfied that all legal requirements are met.

An ISA sets out the terms and conditions under which the ministry releases administrative health data to other public bodies or to an external agency. It is meant to describe the responsibilities of the parties in relation to the shared data, including a variety of security measures and steps required of the receiving party. An ISA includes the provisions listed in a Privacy Impact Assessment (PIA) developed by government. PIAs are used to "evaluate and manage privacy impacts and to ensure compliance with privacy protection rules and responsibilities."[94] Under the *Freedom of Information and Protection of Privacy Act*, PIAs must be completed with respect to any proposed "enactment, system, project, program or activity."[95] They are designed to ensure that any disclosures are made in compliance with the provisions of the *Freedom of Information and Protection of Privacy Act* and other applicable legislation that protects the privacy of personal health information.

Many of PSD's research and evaluation projects required PIAs and ISAs, as did projects in other divisions of the ministry. Health authorities needing data access required a PIA and an ISA in the form of a Health Authority Agreement (HAA).

Providing administrative health data to ministry staff required a less rigorous process than that for DARs or ISAs. Oaths of confidentiality taken by ministry employees permitted them to receive sensitive personal information contained in the ministry's administrative health databases. Ministry practice dictates that employees can only be provided the minimum amount and detail of data that they require to do their jobs.[96] Over time, however, some ministry employees had accumulated access to multiple databases that they had at one time required for their employment. The ministry had no clear process for reassessing an employee's need to maintain access to these databases on a regular basis. As such, some employees retained access to data they had no ongoing need to access.

All three of the above processes were based on the foundational principles of "least privilege" and "need to know," which together are intended to limit information sharing to only the information that individuals require to accomplish the work they are approved and required to

94 Government of British Columbia, "Privacy Impact Assessments" <http://www2.gov.bc.ca/gov/content/governments/services-for-government/information-management-technology/privacy/privacy-impact-assessments>.

95 *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 69(5).

96 This "need to know" principle is established in the *Freedom of Information and Protection of Privacy Act* R.S.B.C. 1996 c. 165, s. 33(1)(e)(i)

do.[97] How these principles were interpreted was, however, unguided by policy.

Because of the lack of ministry policy direction on data access, when questions arose, there were few resources available to inform staff in their decision-making processes. Similarly, supervisors were not able to point to clear policies to assist them in resolving different interpretations of the legislative and policy framework. This resulted in practices developing and decisions being made on an *ad hoc* basis. The absence of adequate direction inevitably placed staff in vulnerable positions, whether they were making decisions about data access, using data or trying to obtain data for their program areas.

4.7.2.1 CHALLENGES EXPERIENCED BY IMKS/DARS AND THE CHIEF DATA STEWARD

As described above, nearly all data access by individuals and organizations outside the Ministry of Health, and even some individuals working directly for the ministry in a contract capacity, was approved by the Chief Data Steward with the support of those who reported to him. It was here, in the small circle of stewards and analysts – one of whom was the March 2012 complainant to the Auditor General – that the lack of clear direction and policy on fundamental questions of data provision was most consequential to the events that began unfolding in the spring of 2012.

Well before the allegations that led to the 2012 investigation, some DARS employees, along with a few individuals from other areas of the Information Management and Information Technology Division, had raised questions about how the ministry's administrative health data should and could be used both internally (by other program areas within the ministry) and externally (primarily by researchers interested in using the data to analyze public health issues and conduct public health research). Some of these employees held strong views about how this data should be used. Some employees had a particularly conservative approach to data sharing and believed that there was an inherent risk to any data sharing and that in many cases the risk was simply unacceptable. As a result, they interpreted the guiding principles of "least privilege" and "need to know," very restrictively.

The "fundamental legal duties" of data stewards to protect confidentiality when dealing with personal information guide their conduct in dealing with data. However, those duties can result in "cautious and conservative interpretations" of what access is permitted "when a complementary mandate to enable access to data for research is not made explicit."[98] The data stewards at the Ministry of Health saw their primary mandate as that of protecting personal information. They did not have effective policy guidance to balance that interest against the benefits that may arise from access to the data for public interest research purposes, even though this is a use that is explicitly permitted under legislation. The cautious approach to the release of data containing personal information – or data that could be "re-identified" – is not unique to British Columbia. As described in a recent report that examined access to health data across Canada:

> *… data custodians often face an asymmetry – there are clear sanctions if there is a data breach when they are in charge, but no benefit to them if their release of data for* bona fide *research generates important public benefits.*[99]

We heard evidence that some of the employees' risk aversion may have stemmed from a "punitive" approach that the ministry had taken in the past to the inadvertent unauthorized release of data. One Assistant Deputy Minister told us:

> *… it was easier for people to not take risks. Because they didn't want to be punished, or … chastised for making errors. So to me, that was more of the sense of risk aversion was not so much they were protecting privacy, not that people didn't*

97 Ministry of Finance, *Core Policy and Procedures Manual*, "Information Management and Information Technology Management – Personal Information Management," Section 12.3.3. An individual's "need to know" is an assessment of how necessary access to certain information is for them to perform their intended task. The principle of "least privilege" means giving that individual the minimum amount of access to that information necessary for him or her to perform that task.

98 Council of Canadian Academies, *Accessing Health and Health-Related Data in Canada: Expert Panel on Timely Access to Health and Social Data for Health Research and Health System Innovation* (Ottawa: Council of Canadian Academies, 2015), 76.

99 Council of Canadian Academies, *Accessing Health and Health-Related Data in Canada: Expert Panel on Timely Access to Health and Social Data for Health Research and Health System Innovation* (Ottawa: Council of Canadian Academies, 2015), xx.

care about privacy, but because they didn't want to be – because the ministry was punitive at times.

This asymmetrical approach by data stewards in the Ministry of Health meant that unless a recipient of data could provide something close to a complete guarantee that data would be appropriately safeguarded, the data would not be released. This placed an extremely high burden on individuals seeking access to the data.

Some DARS staff responsible for drafting information sharing agreements simply refused to complete them for contracts that had already been signed by specific program areas within the ministry. These data stewards questioned the legal and financial basis of these signed contracts that had gone through both a legal and financial review in the other areas of the ministry. In some instances these individuals viewed themselves as exercising due diligence on contractual and legal issues, despite their Executive Director cautioning them that this was not their role. One person who worked on information sharing agreements told us that that she could not sign off on such agreements until she knew "where the money flowed" for the research so that the ministry could know precisely who could potentially access its data. This individual complained that many of the programs were "murky" in that sources of research funding were not always clear. These concerns were inconsistent with the fact that an ISA limits data access to the agreed-upon individuals or group; data access does not automatically flow to every person involved in a project.

Another individual from that area of the ministry gave evidence that she questioned the value of the research being done and believed she was qualified to do so as part of her work. She said:

> *… some of the projects that have been funded have been, to my mind, more experimental than actually valid. It's experimenting on a population, probably a vulnerable population with no certain outcome that will benefit them … I mean, those kinds of things, just because the researcher says that they're doing good work, we've got no other way to validate or confirm that.*[100]

That data steward's concerns persisted despite clear contractual prohibitions on sharing data and the fact that much of the data was released to researchers in a de-identified form. Her concerns also appeared to be based on misinformation about particular projects and how health research is conducted generally.

Further, some of the employees drafting ISAs for the ministry had a fundamental misunderstanding about both their own role, and the purpose of an ISA. As described by the Chief Privacy Officer at the time, it is at the Privacy Impact Assessment (PIA) drafting stage that the ministry determines the relevant statutory provisions for disclosing any requested data. Therefore, the ISA needs only to articulate those same provisions for the benefit of the parties to the agreement. However, the data stewards drafting the ISAs would instead take months to do something that in many cases had already been done and that was, in any event, not their role to do. As the ministry's former Chief Privacy Officer told us:

> *So what should happen in the cycle is that there is a privacy impact assessment that says you have the legal authority and you're going to put the protections in place. And that's why if it's a system, you need that implementation, one, to make sure that they did actually implement it properly, and then you get the information sharing agreement. Because the privacy impact assessment is what determines the legislative authorities that are being relied upon for the information sharing. So it should be PIA then ISA.*
>
> *And that was one of the issues that we had during the time period that we're talking about with this investigation, and that was when the centralization happened with the PIAs. But the information sharing agreements didn't, SPIMDS [IMKS] started doing that privacy analysis, when really that was not their function or their – within their parameters.*

Some employees from the Information Management and Information Technology Division who held these risk-averse views raised their concerns directly or indirectly with their supervisors and ministry executives. The Chief

100 The evidence we reviewed in our investigation made it clear that none of the research at issue consisted of "experimenting" on a population in the way that this witness characterized her concerns.

Data Steward and other Directors and Executive Directors became involved when matters could not be resolved at a lower level. Some of the employees claim that the executives told them to continue with their work despite the employees' views that the contracts to conduct research using ministry data were contrary to law or not in the best interests of the ministry. The former Chief Privacy Officer described to us what she had seen amongst staff in the data area:

> *I had some real concerns about some of the staff there, and they're in the emails, who were actually taking it upon themselves to Google people who were named as receiving the data, Google fellow staff people, and start creating potential relationships and potential conflict of interest … I said no, you've got to remember who you are, when you're doing a privacy impact assessment, when you ask a question, the program area thinks it is in relationship to our area of authority, and that it is a valid question. You do not ask them questions that are of interest to you as a comment on PIA.*

This created a situation where executives in the data area had to continually remind their employees that the contracting decisions of other divisions of the ministry were an issue between those program areas and the people responsible for contracts – not with the data stewards. Some employees, however, interpreted these comments as an attempt to hide data practices that were inconsistent with governing legislation and policy. Together, the concerns about data privacy (and, in some cases, the outright refusal to complete ISAs) and the data stewards' ultimate responsibility for deciding whether or not to release data, created significant delays in the ministry's release of information, including to those who were under contract to the ministry to conduct research, evaluation and analysis. This resulted in significant frustration by those who were trying to access data and by ministry employees in the program areas whose job it was to facilitate and assist in getting these contractors' work underway.

The tension between the data area and the program areas was evident in many of the records we reviewed from this time period. Both external researchers and ministry employees complained about the delays. For example, the Deputy Director of Knowledge Creation Programs at the Canadian Institutes of Health Research wrote to the Executive Director of PopData BC in March 2011, stating, "if applicants continue to experience long delays in gaining data access, peer review committees will need to take this into account when they rate the feasibility of proposals."[101]

In another example, in 2010, the Office of the Chief Data Steward for the ministry, at the behest of some of its employees, required the designated Canadian Network for Observational Drug Effect Studies (CNODES) researcher for British Columbia to apply for data access as an external researcher.[102] At the time, PSD believed that the data should be made available to this researcher through an internal mechanism because CNODES was part of the province's commitment to contribute to national research on drug safety and effectiveness, and part of this commitment involved providing access to PharmaNet data. This data access issue arose again in 2012 because the researcher was unable to access ministry data to contribute to CNODES in a timely way.[103]

In addition to the delays that arose from their perspective on allowing access to data, the IMKS branch was also experiencing a number of staffing challenges, including general under-resourcing and positions remaining empty while staff members took extended leaves of absence, some of which were due to workplace stress. The branch was overworked and struggling to keep on top of the huge data access application and ISA backlogs and increasing

101 Letter from Knowledge Creation Program, Canadian Institutes of Health Research, 8 March 2011.

102 The Canadian Network for Observational Drug Effect Studies (CNODES) is a pan-Canadian collaboration of researchers that was created as part of the Drug and Safety Effectiveness Network (DSEN) to coordinate and harness the information contained in various health care databases across multiple jurisdictions. This allows for greater evaluation and more precise estimates of drug safety and effectiveness because it is based on larger population datasets across all participating provinces and territories. Canadian Network for Observational Drug Effect Studies, "About CNODES" <https://www.cnodes.ca/about-cnodes/>.

103 In April 2012, Ms. Kislock supported the effort to resolve the data access problem for the researcher to participate in DSEN as part of the overall mission of the government to improve access. Steps for a potential alternative option for the researcher's data access were provided to PSD.

demands from both inside and outside the ministry. The ministry also lacked clear policies for some of its data access processes, in particular for ministry projects and internal data analysis, as was highlighted in the data review that led to the Timely Access report described below. These additional factors contributed to the systemic delays experienced by analysts and researchers in accessing health data.

The consequences of the systemic delays in accessing data manifested in different ways. Some individuals accused researchers who had agreements with the ministry for direct access to data of being recipients of "preferential treatment" because they were able to carry out their research while other projects remained delayed. At the same time, program area employees desperate to get their research programs off the ground put greater pressure on the data stewards to complete the work that would allow their research to proceed. This in turn created greater suspicion amongst some data stewards that the data was being provided for some improper purpose.

4.7.2.2 DATA REVIEW AND TIMELY ACCESS REPORT

In 2011, Lindsay Kislock became Assistant Deputy Minister responsible for, among other things, stewardship of ministry data. Mr. Nakagawa told us he had heard concerns from researchers about delays in accessing data and had spoken with Ms. Kislock about the problems soon after she started as Assistant Deputy Minister in 2011. He said that from his perspective, researchers could be trusted to treat data with "the utmost of care" given that it would be "career-limiting" for them to be identified as breaching their obligation of confidentiality in access to data.

Aware of the significant concerns about delay, Ms. Kislock initiated a review of access to data. This review was led by the then-Director of Privacy Investigations at the Office of the Chief Information Officer in the Ministry of Labour, Citizens' Services and Open Government. In May 2012 the same individual would become the lead investigator of the Ministry of Health investigation. As it relates to the Timely Access report, in order to avoid confusion we refer to that individual as the "report author."

The report author told us that when she started her data access review in November 2011, she was surprised to learn that the ministry did not have a comprehensive guide on the applicable legislation to assist data stewards in assessing data access requests and drafting data access or information sharing agreements. Consequently, one of her first tasks in conducting the review was to contact the Ministry of Justice's Legal Services Branch to request a section-by-section breakdown of the relevant legislation.

The report author and her employee then conducted interviews in late February and early March 2012 with various stakeholders, including ministry staff and external researchers, in an attempt to understand the causes of the delays. Not surprisingly, their review and resulting draft report, titled *Timely Access to B.C. Health Data: A Review of the Processes and Recommendations for Change*, recognized a number of the issues described above.

When we spoke with her, the report author said she was also "surprised" to learn during the work on the Timely Access report that the Ministry of Health did not have more centralized processes and procedures for data access. She said, "there was a lack of knowledge, I thought, about who has what data where and what processes are in place for accessing it." She said, "if I was requesting data I would have been very frustrated because there was a lack of communication … [Applicants were] not understanding why this is taking so long." The report author also told us that she learned that internal access to data by ministry employees also had some challenges unique to the ministry:

> *… you're assigned access based on your position to what you need access for, where this gets challenging … is some of the systems at health are old, really old, right? So we have the old systems and we have new systems and … sometimes you can't pull data, someone has to do it for you because the system is so old, so some of the rules and how you access, and the controls are different based on the data you actually have access to … so if you needed certain data sometimes from legacy systems, for example if you were doing a project and needed to know X, if that was on the legacy system it would have to be pulled for you sometimes.*

The Timely Access report, a draft of which was completed on July 25, 2012, pointed to lack of guiding principles and processes around the use of data as contributing to the

conflict between data staff and program area staff. In this respect, the report stated, "the staff and directors of [DARS] … have historically operated in an environment that lacked clear information governance structures and therefore differing opinions on who actually owns and is responsible for MoH data (i.e. the ministry as a whole, the individual business areas or SPIMDS)."[104]

Further, the draft report recognized the risk-averse culture made it almost impossible for the ministry's data stewards to agree in a timely manner to the release of data: "the interpretation and subsequent application of" the principles of least privilege and need to know "serve as the foundation for many barriers to timely data access due to excessive risk aversion."[105] The draft report ultimately concluded that there was "excessively risk-averse bureaucratic practices wherein 'no data sharing is considered the best data sharing'" and that "data requestors, whether internal or external to the ministry, are subject to disproportionate scrutiny on their justifications for needing to access data."[106] The report also stated that "many data requestors have a sense that they are not trusted and that request processes ask too many unnecessary questions."[107]

Both ministry staff and researchers were hopeful that the internal review and the Timely Access report would be able to provide direction to help resolve the seemingly intractable debate between data stewards and ministry program areas. Unfortunately this was not the case. The internal investigation that began in March 2012 overtook the process initiated by the Timely Access review. The investigation ultimately led to the suspension of data access, cancelled research contracts and the firing of seven individuals. The Timely Access report itself was never finalized and remained in draft format.

In many respects the concerns that led to the investigation grew out of this years-long conflict between data stewards and the program areas in the Ministry of Health about data access processes. The complaint to the Office of the Auditor General made in March 2012 emerged from this context just at a time when the steps initiated by Ms. Kislock and the resulting draft Timely Access report looked to be providing a path to resolve the concerns.

4.7.3 CHANGES AT THE EXECUTIVE LEVEL

4.7.3.1 DEPUTY MINISTER AND ASSISTANT DEPUTY MINISTERS

In 2012, the Ministry of Health had several senior executives who were relatively new to their roles at the ministry. The Deputy Minister, Graham Whitmarsh, was appointed effective March 14, 2011. Mr. Whitmarsh had previously been the Deputy Minister of Finance.

Ms. Kislock, Assistant Deputy Minister of Health Services Information Management and Information Technology, was appointed to her role effective July 15, 2011, from a position in the Ministry of Agriculture. In her new position, she was responsible for Data Access and Research Services, the group that reviewed and approved applications for access to administrative health data.

At the end of March 2012, Mr. Nakagawa retired from the ministry. His successor as Assistant Deputy Minister of PSD, Barbara Walman, began her tenure on May 22, 2012.

Sandra Carroll began as Associate Deputy Minister and Chief Operating Officer on May 28, 2012, having moved to the Ministry of Health from her previous role in the Ministry of International Trade. Both Ms. Kislock and Ms. Walman reported to Ms. Carroll.

The changeover in senior executive leadership in the Ministry of Health meant that there was limited institutional memory at this level. While many of the Executive Directors in the program areas had been in their positions for years, we were told during our investigation that the senior executive did not always seek out or trust the knowledge and expertise of the Executive Directors. This meant that certain senior executives came to rely heavily on the Ministry of Health's investigation team for their understanding of programs, structures and employee roles in the ministry.

104 *Timely Access to B.C. Health Data: A Review of the Processes and Recommendations for Change,* draft for discussion, September 2012, 7.

105 *Timely Access to B.C. Health Data: A Review of the Processes and Recommendations for Change,* draft for discussion, September 2012, ii.

106 *Timely Access to B.C. Health Data: A Review of the Processes and Recommendations for Change,* draft for discussion, September 2012, 7.

107 *Timely Access to B.C. Health Data: A Review of the Processes and Recommendations for Change,* draft for discussion, September 2012, 3.

TABLE A: NEW EXECUTIVE APPOINTMENTS AT MINISTRY OF HEALTH – 2011-2012

Graham Whitmarsh	Deputy Minister, Ministry of Health – March 14, 2011
Lindsay Kislock	Assistant Deputy Minister, Health Services Information Management and Information Technology – June 30, 2011
Arlene Paton	Assistant Deputy Minister, Population and Public Health – August 18, 2011
Elaine McKnight	Associate Deputy Minister and Chief Administrative Officer – February 10, 2012
Nicola Manning	Assistant Deputy Minister, Medical Services and Health Human Resources Division – May 16, 2012
Barbara Walman	Assistant Deputy Minister, Pharmaceutical Services Division – May 22, 2012
Sandra Carroll	Associate Deputy Minister and Chief Operating Officer – May 28, 2012

4.7.3.2 CHIEF DATA STEWARD

Also in early 2012, there was a significant change at the Executive Director level in the Data Access, Research and Stewardship section. As the Timely Access report had described, data requests to the ministry were severely delayed. In March 2012, the Chief Data Steward left his position and Ms. Kislock sought to have the Timely Access author (and future lead investigator) transferred to the role.

Ms. Kislock sought approval to transfer the report author from her position at the Office of the Chief Information Officer to that of the newly vacated Executive Director position. On March 27, 2012, she wrote to her Manager of Divisional Operations, "… [She] has the education and experience to help leverage our data holdings, improve research and support the Data Stewardship Committee. I imagine a form or business case needs to be completed I have checked her references – so I know what I am getting. Can you please work to make this happen for me."

However, a lateral transfer could not be done as the new position was at a higher level, which meant there had to be a competition for the job. At the same time, the future lead investigator was establishing the Ministry of Health investigation team, which received its terms of reference on May 31, 2012, later in the month.

The evidence shows that Ms. Kislock took several steps in favour of the lead investigator's candidacy for the position. Ms. Kislock sought the lead investigator's input on the position description before the competition began and asked for her input on who would sit on the hiring panel. The resulting panel included Ms. Walman and the Ministry of Health human resources employee with whom the lead investigator had worked on the job description. The lead investigator was the successful candidate when the competition was complete. When we asked Ms. Kislock about these hiring practices, she conceded that in retrospect it was "probably not" the best human resources practice.

Somewhat paradoxically, the lead investigator would raise similar questions about hiring practices of two of the terminated employees. As we discuss in Chapter 6, the events leading to the lead investigator's hiring also caused confusion inside the ministry and the OCIO about her reporting relationships and who bore responsibility for the lead investigator's work while the Ministry of Health

investigation was underway and whether the investigation was independent from the ministry.

4.8 OTHER GOVERNMENT ENTITIES INVOLVED

Government's response to the 2012 complaint to the Auditor General involved a number of other government entities. Below we provide a brief description of the role of each of these bodies in advising or assisting the rest of government.

4.8.1 MINISTRY OF FINANCE, OFFICE OF THE COMPTROLLER GENERAL

In accordance with the *Financial Administration Act* (FAA) the Comptroller General has the legislative authority to examine financial improprieties within government and may delegate that authority to individuals working within the office. The Comptroller General's duties include providing ministries with direction on loss management (including fraud), investigating a loss incident where appropriate, monitoring loss investigations, and providing ministries with guidance and tools for the prevention, detection, reporting and mitigation of losses.[108] Also, at the direction of the Treasury Board, the Comptroller General may examine and report on "any or all of the financial and accounting operations of a government corporation."[109] The Comptroller General's work is guided by the policy direction on financial management set out in the Core Policy and Procedures Manual for the Public Service, which government describes as the "first point of reference" for procurement rules and guidelines that all government ministries are expected to follow.[110]

Under the *FAA*, the Office of the Comptroller General has broad powers to obtain information in order to carry out its financial oversight role. The office has access at all times to all ministries and branches of government and their records.[111] The office's staff may examine any person about a matter that comes within the office's jurisdiction to check, examine or control.[112] When examining individuals, the Comptroller General can issue an order compelling a person to answer questions or to produce a record or thing in his or her possession or control.[113] As well, the office's staff may, at the direction of the Treasury Board, require an officer or employee of a public body to provide information or explanations necessary to enable the Comptroller General to determine whether public money disbursed or spent by government has been applied for the purpose for which it was appropriated.[114]

The Comptroller General must report annually to the Auditor General and the Treasury Board on matters such as unauthorized payments that have not been recovered, unauthorized expenditures or payments, and "the circumstances in which an expenditure or payment has been made that in his or her opinion is in any other way materially irregular or unlawful."[115] This dual reporting obligation means that the Comptroller General is directly responsible to government's central financial decision-making entity (Treasury Board) and an independent external oversight agency (Office of the Auditor General).

4.8.2 PUBLIC SERVICE AGENCY

Under the authority of the *Public Service Act*, the Public Service Agency provides human resources advice to core government. This includes providing direction, advice and assistance to ministries "in the conduct of personnel policies, standards, regulations and procedures"[116]; advising

108 *Financial Administration Act*, R.S.B.C. 1996, c. 138, s. 9.

109 *Financial Administration Act*, R.S.B.C. 1996, c. 138, s. 8(2)(c)(ii).

110 Government of British Columbia, "Core Policy" <http://www2.gov.bc.ca/gov/content/governments/services-for-government/bc-bid-resources/reference-resources/corporate-requirements-and-guidelines/core-policy>.

111 *Financial Administration Act*, R.S.B.C. 1996, c. 138, s. 8(2)(a).

112 *Financial Administration Act*, R.S.B.C. 1996, c. 138, s. 8.

113 *Financial Administration Act*, R.S.B.C. 1996, c. 138, s. 8.1.

114 *Financial Administration Act*, R.S.B.C. 1996, c. 138, s. 8(2)(c)(i).

115 *Financial Administration Act*, R.S.B.C. 1996, c. 138, s. 35.

116 *Public Service Act*, R.S.B.C. 1996, c. 385, s. 5(3)(a).

on the application of the Standards of Conduct for public service employees; and providing assistance in responding to and investigating allegations that employees have breached those standards.

In 2012, if a ministry sought the assistance of the Public Service Agency in conducting an investigation into employee misconduct, the PSA would provide an investigator to assist the ministry in fact finding. That investigator would conduct interviews and review other relevant evidence through a human resources perspective. At the conclusion of the investigation, the investigator would provide a report to an Employee Relations Specialist (also an employee of the Public Service Agency) who, after reviewing the report, would provide a disciplinary recommendation to the ministry. Disciplinary recommendations would be based on the investigation report, the severity of the conduct, the individual's employment history and sometimes legal advice.

4.8.3 GOVERNMENT COMMUNICATIONS AND PUBLIC ENGAGEMENT

Government Communications and Public Engagement (GCPE) is the central agency responsible for all government communications matters. Staff of GCPE work with ministry staff to develop communications messaging, draft news releases and information bulletins, respond to media requests and organize news conferences.

Each ministry of the provincial government has communications staff who are part of GCPE. The GCPE Directors in each ministry report to GCPE Assistant Deputy Ministers and through them to the Deputy Minister of GCPE, and also report regularly to the Deputy Minister and other executives within their client ministry. In 2012, the most senior GCPE employee within the Ministry of Health was a Director of Communications. Reporting to the Director were two Managers of Communications: one focused on proactive communications and one focused on issues management. Each of these managers had public affairs staff reporting to them. GCPE staff we spoke with described a "collaborative approach" to developing communications materials. Drafts would be shared back and forth amongst GCPE staff and ministry contacts to ensure both accuracy and a consistent communications message.

4.8.4 OFFICE OF THE CHIEF INFORMATION OFFICER

In 2012, the Office of the Chief Information Officer (OCIO) was part of the Ministry of Labour, Citizens' Services and Open Government. Its mandate included development of government-wide policies for responding to "information incidents" that "threaten information privacy or security."[117] Information incidents were defined as events that threatened privacy or information security, including disclosure of information without authorization. Within this broader category, the OCIO also developed policy for responding to privacy breaches, where personal information was collected, stored, used, disclosed, accessed, disposed of or stored in a way that was not authorized by the *Freedom of Information and Protection of Privacy Act*.

In addition to developing a policy framework for responding to privacy breaches, the OCIO was responsible for investigating and responding to such breaches. All government employees were required to immediately report actual or suspected breaches to the OCIO. In turn, the OCIO would liaise with the independent Office of the Information and Privacy Commissioner as necessary.[118] The policies developed by the OCIO set out step by step how to report and respond to privacy breaches.

The OCIO included a unit that contained staff with expertise in managing privacy breaches. Employees in this unit led government's response to privacy breaches by providing breach management advice to ministries.[119]

4.8.5 MINISTRY OF JUSTICE, LEGAL SERVICES BRANCH

The *Attorney General Act* establishes the Attorney General's role as legal advisor to government.[120] The lawyers within the Legal Services Branch of the Ministry of Justice provide advice to the various ministries within government. The branch is organized into a number of divisions,

117 Office of the Chief Information Officer, Ministry of Citizens' Services, "Information Incident Management Process," 29 April 2010, 5.

118 Office of the Chief Information Officer, Ministry of Citizens' Services, "Information Incident Management Process," 29 April 2010, 5.

119 Office of the Chief Information Officer, Ministry of Citizens' Services, "Implementing Effective Recommendations Process," undated.

120 *Attorney General Act*, R.S.B.C. 1996, c. 22. Section 2 of the Act sets out the duties and powers of the Attorney General.

and within the solicitors division, groups of lawyers with particular expertise serve particular client ministries. The following teams in the Legal Services Branch were involved in the matters we investigated:

- The Ministry of Health generally seeks legal advice from the lawyers in the Health and Social Services (HSS) group of the Legal Services Branch. Several lawyers from the HSS group were consulted at different times and to varying degrees during the ministry's internal investigation. Throughout this report, we refer to these lawyers as the "health lawyer" or "HSS lawyer."
- The ministry also sought the advice of a lawyer from the Constitutional and Administrative Law group who had expertise in privacy law. We refer to that individual as the "privacy lawyer."
- The Public Service Agency generally seeks legal advice from solicitors in the Labour, Employment and Human Rights (LEHR) group of the Legal Services Branch. Within this group are lawyers with expertise in employment issues arising in a unionized and a non-unionized context. Lawyers from this group were also involved at varying times in the Ministry of Health's investigation, and we refer to them as the "employment lawyers."
- When the Office of the Comptroller General seeks legal advice from the Legal Services Branch, it does so through the lawyers in the Finance, Commercial and Transportation group. We refer to this lawyer as the "finance lawyer."

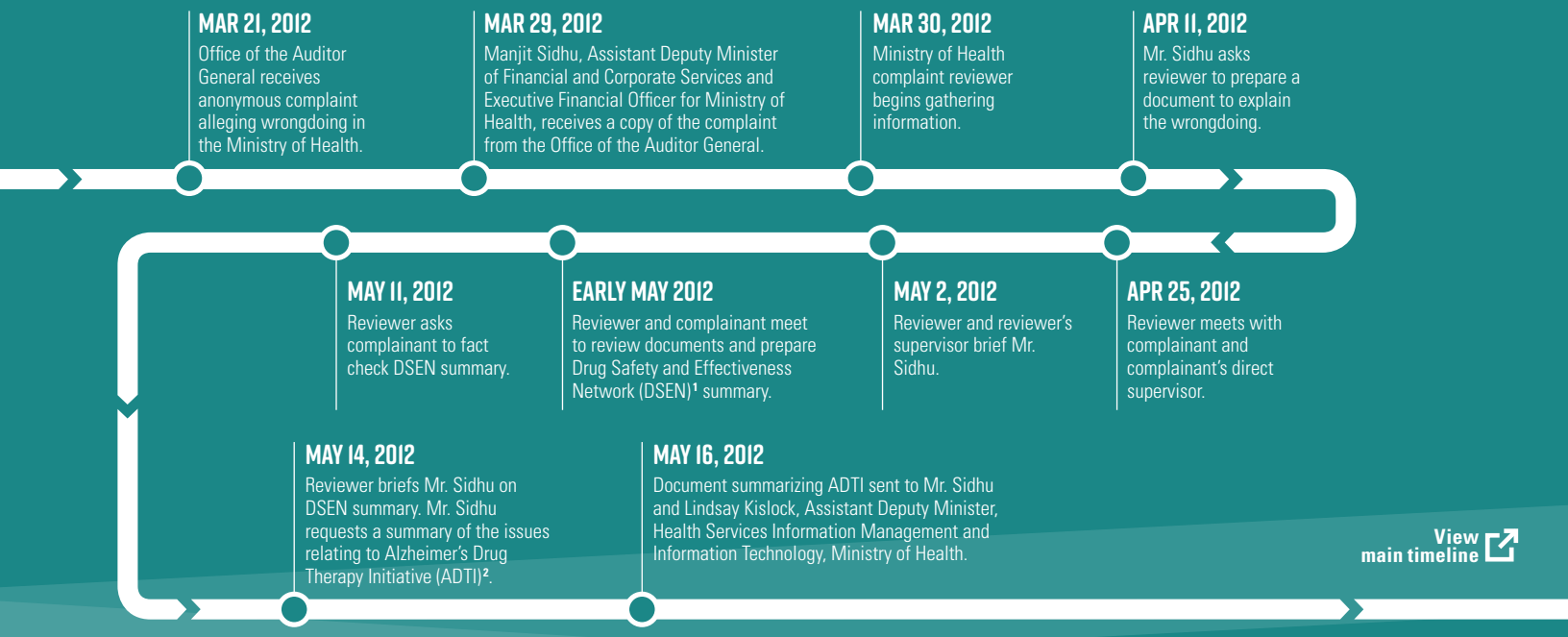
The Legal Services Branch charges client ministries for the time spent providing legal advice. This means that the branch recovers the cost of the lawyers' salaries and other expenses from client ministries.

5.0 / THE COMPLAINT

5.1 INTRODUCTION

In this chapter of the report, we describe the complaint that led to the Ministry of Health's investigation into employees, contractors and external researchers. This account covers the period from March 21, 2012 until the end of May 2012. First, we set out the content of the complaint. Second, we describe the complainant's work with the Ministry of Health and the evidence we received from her about her reasons for making the complaint to the Office of the Auditor General. Third, we describe the initial steps the Ministry of Health took to review the complaint.

Because this section is not written in a strict chronology, we have provided a brief timeline of key events between March and May 2012:



View main timeline

1 DSEN was established by the Canadian Institutes of Health Research, in collaboration with Health Canada and other stakeholders, to increase evidence on drug safety and effectiveness available to the public and policy-makers, and to increase capacity to undertake research in Canada in this area. Source: Government of Canada, Canadian Institutes of Health Research, "Drug Safety and Effectiveness Network" <http://www.cihr-irsc.gc.ca/e/40269.html>. See Chapter 4 for a more detailed description of DSEN and B.C.'s role in the network.

2 See Chapter 12 and Chapter 4 for detailed descriptions of the ADTI project.

5.2 THE COMPLAINT

The catalyst for the Ministry of Health's investigation was an anonymous, one-paragraph email complaint that the Office of the Auditor General received through its website complaint form on March 21, 2012.

THE COMPLAINT STATED:

*The Ministry of Health has three staff members, Rebecca Warburton, Bill Warburton and Malcolm Maclure. All three also work at either UVic or UBC and are related to each other. The ministry has numerous agreements under which it pays these individuals to do research. In a number of instances the individuals are negotiating and even writing the agreement between the ministry and themselves or on behalf of one of the other two – their relatives. They are doing some $1 contracts, under which they do research work for the ministry and the ministry "pays" them in data (data and intellectual property rights are valuable). They are involved in some of the Therapeutic Initiative work out of the UBC Faculty of Medicine, with their friend Colin Dormoth [*sic*], a former ministry employee. [An] executive director at the ministry, says that she does not require TI to submit invoices for any of the work they do for the ministry, nor do they have deliverables. She says the ministry is just nice and regularly gives them money, trusting they are doing good work. To get around rules against direct awards they have, on paper, split up projects into multiple parts. For example, PEG [PharmacoEpidemiology working group] at UBC has been divided on paper into many projects and agreements. They have had UVic take money from the ministry and immediately transfer the money to UBC, saying that UVic is subcontracting UBC, to make it look like they were not doing another direct award. Some employees have raised concerns about this and been told to keep quiet because these individuals are friends with ADMs and DMs.*

5.3 THE COMPLAINANT'S HISTORY WITH THE MINISTRY OF HEALTH

The complaint was made anonymously.[3] It was later confirmed that it was made by an employee in the Data Access, Research and Stewardship section of the Health Sector Information Management and Information Technology Division of the Ministry of Health. The complainant was one of the data stewards whose role we described in Chapter 4.[4] The complainant told us that she was the sole author of the complaint. The complainant had been with the ministry since December 2010 in a position that supported the drafting and review of information sharing agreements. She had a legal background, but had no prior experience with the legislative framework under which ministry data was accessed or shared with researchers before beginning her employment with the ministry. The complainant was not working as a lawyer in her position with the Ministry of Health.

Soon after beginning her employment with the ministry, the complainant began to raise what she believed were significant concerns about the release of administrative health data to external public bodies through the projects for which she was required to complete information sharing agreements. In her interview with us, she said, "it became clear to me that every project I touched pretty much was a problem project." During our investigation, we reviewed hundreds of internal emails in which she had detailed her concerns.

The complainant had raised questions about the ministry's authority to release administrative health data to most, if not all, of the projects on which she was working. She focused on what she saw as a key difference between external research and internal evaluation. In her view, external projects were being improperly characterized as "evaluation" solely to facilitate data access.

Throughout her tenure with the Ministry of Health, the complainant voiced concerns about the need to safeguard the privacy of personal health information and restrict access to the administrative health data collected by the ministry. In her view, the legislation then in effect did not authorize the collection, use, or disclosure of personal information in the way that the Ministry of Health was doing at the time. As a result she believed several ministry employees and researchers were breaking the law. She was also concerned that personal information was being sent to the United States for research purposes contrary to the prohibitions against this established by legislation. The complainant was also concerned that researchers were taking advantage of the ministry by "giving themselves" intellectual property rights to which they were not entitled as part of the data contracting process. She also told us that she had concerns about whether researchers were able to use their data access to identify individuals, despite the fact that much of the administrative health information was supposed to be de-identified before researchers could access it. She expressed concerns that the ministry had insufficient controls in place to ensure it could protect individual privacy when the ministry's data was used for research.

When viewed as a whole, the content of the complainant's internal emails, notes and her statements to us indicate that she believed there was widespread "misfeasance" in the ministry's handling of health data, and she told us she believed that many of her co-workers at the ministry, including ministry executives, employees and external researchers, were engaged in wrongdoing.

Although the complainant believed strongly in the validity of her concerns, she had no prior experience with the legislation or policies that guided access to administrative health data, and no training or expertise in procurement, intellectual property issues or contracting. Further, when

3 As described in Chapter 2, individuals below the rank of Assistant Deputy Minister are not named in this report. There is an additional reason not to name the person who made the complaint. Public interest disclosure policy protects the identity of people who disclose allegations of wrongdoing. While there may be limited circumstances where such identity may be disclosed, it is generally contrary to good public interest disclosure practice. The question of whether the identity of a person who makes a public interest disclosure ought to be revealed does not generally depend on whether the underlying complaint had merit.

4 The complainant reported to the Director of Data Access, Research and Stewardship, who in turn reported to the Chief Data Steward and Executive Director of Strategic Policy, Information Management and Data Stewardship. Beginning in July 2011, the Assistant Deputy Minister responsible for the Health Sector Information Management and Information Technology Division was Lindsay Kislock.

she began her job in the ministry, she received no specific training to carry out her roles and responsibilities. As described in Chapter 4, access to administrative health data is governed by a complex legislative framework and, by 2012, the ministry did not have clear policies or guidelines to help its employees apply that legislation.

When we asked the complainant how she had developed her understanding of the programs in order to raise the concerns she had, she confirmed that she had only intended to identify potential concerns based on a combination of information she obtained from speaking with co-workers, reading other people's emails and reading select sections of contracts to which she had access. Despite having made efforts to obtain the relevant information, she told us she did not have specific evidence to support many of her concerns, nor did she know the history or context for the development of the projects she criticized.

Many of the complainant's co-workers with more direct knowledge of the programs and the legislative framework (including legal counsel) had, at various times, attempted to allay her concerns and respond to her questions. The complainant remained sceptical of the answers she received. For example, she told us that when she raised concerns:

> *… they would get very upset with me, they would bring [legal counsel] over and say, basically like, 'explain to her why this is fine,' and [legal counsel's] explanation – like, we butted heads a fair bit, and – because [legal counsel] never really convinced me it was fine.*

Although the complainant did not have access to most of the information that would have addressed her concerns, she also identified areas where legitimate gaps existed in the ministry's practices. This led to some improvements in the ministry's processes. However, the majority of her concerns arose in areas about which she had minimal knowledge or context. The complainant asserted that her superiors were becoming increasingly angry at her for bringing her concerns to light. For example, she told us about an incident where another employee yelled at her for an hour in his office because he was getting "freaked out" that she was putting people's jobs in jeopardy.

A former Chief Data Steward recalled that "she took a very strict read of the provisions" of the *Freedom of Information and Protection of Privacy Act*, and that they had had discussions about how to interpret its provisions. This supervisor said that they had to remind the complainant on several occasions that although she had legal training, she had not been hired to provide legal advice. He told us that she tended to return to an issue several times, and that:

> *… we would finally say to her … you need to move from that … she was not being asked to sign off. She was being asked to make [an] assessment, provide information, and – at the end of the day give me a recommendation, or – or not. But at the end of the day, it was my decision.*

Before the complainant made her complaint to the Office of the Auditor General, the then-Acting Chief Data Steward and Executive Director of the Information Management and Knowledge Services (IMKS) Branch expressed concerns about the amount of time the complainant and some of her colleagues spent independently investigating individuals who had submitted data access requests and questioning the value of the research being conducted. The Executive Director told us she thought these questions were inappropriate and negatively impacted the data area's productivity in responding to requests. The Executive Director said she had tried to address this concern with her staff directly.

As we described in Chapter 4, there was pressure on the ministry's data stewards due to delays in data access. These delays created tension between the ministry's data area and the program areas that needed data access to facilitate their various contracts and initiatives. Some of the information sharing agreements that the data stewards were working on had taken more than two years to complete. The complainant was often in communication with staff in the Pharmaceutical Services Division, particularly Dr. Rebecca Warburton, who was dealing with pressures from her own division to finalize data access. It was in this context that the complainant raised her concerns about data access and contracting.

5.4 RATIONALE FOR MAKING THE COMPLAINT

The complainant's complaint to the Office of the Auditor General followed this sometimes tense relationship between the data stewards and program areas within the Ministry of Health. She told us that she submitted her complaint to the Office of the Auditor General because she did not know where else to go. She asserted that when she had complained to individuals at executive levels within the Ministry of Health and the Office of the Chief Information Officer at the Ministry of Technology, Innovation and Citizens' Services, she had been "told just to shut up and go away." She believed that Ministry of Health Assistant Deputy Ministers were dismissing her concerns.

We reviewed with the complainant each of the statements made in her complaint to the Office of the Auditor General quoted in section 5.2. When the complainant reread the complaint during our interview, she described that she wrote it at a time when she was "a little bit scared" of things that she thought were going on in the ministry, which is why she made the complaint anonymously. She said her main concern was "how to mention enough things to get people looking at the proper steps so somebody can actually look into this and make sure things are okay."

She expected that those within the ministry who had access to the facts would look into the matters outlined in her complaint and take appropriate action. Her main objective was for the ministry to focus on the systemic problems that she thought she had uncovered. She told us she was bringing to light matters that someone else, with more knowledge, should follow up. That characterization, however, is difficult to reconcile with the circumstances that gave rise to the complaint. It is clear that in the weeks leading up to her complaint, the complainant had repeatedly expressed the view that government employees were both violating the law and threatening her for revealing those alleged violations.

The complainant told us she decided to name specific individuals in her complaint so that the recipient of the complaint would not be focused at such a high level as to miss the substantive issues. When asked why she named specific individuals, she said:

> *Because specifically I wanted those situations to be looked at, because whoever is making the decisions to allow that to all happen – like this is the problem situation, government people are somehow allowing all of this to happen, so somebody should probably look at this and make sure is this actually a problem? Because, like I kept saying, there could be stuff out there that somehow explains this and makes this fine … I might not know everything, I only get to see the bits, and people keep all sorts of stuff from me, so there might be something out there where this is totally okay.*

Through her work with the ministry, the complainant knew that Dr. Malcolm Maclure and Dr. Rebecca Warburton were employees of the Ministry of Health and that Dr. William Warburton had a contract with the ministry for one dollar. Except for these uncontroverted facts, she had no direct knowledge of any of the other matters described in her complaint. The complainant confirmed in our interview with us that she did not have any specific evidence of improper activities.

5.5 ANALYSIS OF COMPLAINT TO AUDITOR GENERAL

Once the ministry was alerted to the complaint it did preliminary work about the issues she raised. However, the ministry never fully assessed the original complaint on its merits.

The following table, which we created based on our investigation, shows that most of the assertions underlying the complaint are incorrect.

TABLE A: ORIGINAL COMPLAINT DECONSTRUCTED

Auditor General Complaint	Analysis
The Ministry of Health has three staff members, Rebecca Warburton, Bill Warburton and Malcolm Maclure. All three also work at either UVic or UBC and are related to each other.	This statement is **partially correct**. At the time the complaint was submitted Dr. R. Warburton and Dr. Maclure were each employed part-time as Co-Directors of Research and Evidence Development in the Pharmaceutical Services Division of the Ministry of Health and were also employed part-time at a university (Dr. Maclure by UBC and Dr. R. Warburton by UVic).[5] Dr. W. Warburton was a contractor with the Primary Care Branch of the Medical Services and Health Human Resources Division of the Ministry of Health. He was not an employee of the Ministry of Health. Dr. R. Warburton and Dr. W. Warburton are married, and Dr. Maclure is Dr. W. Warburton's second cousin.
The ministry has numerous agreements under which it pays these individuals to do research.	This statement is **factually incorrect**. Apart from Dr. Maclure and Dr. R. Warburton's employment agreements, the *only* other agreement between the ministry and any of these individuals was a contract between Dr. W. Warburton and the Primary Care Branch of the Medical Services and Health Human Resources Division of the Ministry of Health, for him to conduct research related to atypical antipsychotic drugs using Ministry of Health administrative health data. The ministry had no research or service agreements with its employees, Dr. R. Warburton and Dr. Maclure in which it paid them to do research.

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5 As described in Chapter 4, hiring academics who maintained their connections with universities was part of the plan of former Pharmaceutical Services Division Assistant Deputy Minister Bob Nakagawa supported by senior ministry leadership to create linkages between policy-makers in the Ministry of Health to improve the quality of decision making in the division. Mr. Nakagawa had featured Dr. Maclure's and Dr. R. Warburton's roles in his report to the Office of the Auditor General in 2009.

Auditor General Complaint	Analysis
In a number of instances the individuals are negotiating and even writing the agreement between the ministry and themselves or on behalf of one of the other two – their relatives. They are doing some $1 contracts, under which they do research work for the ministry and the ministry "pays" them in data (data and intellectual property rights are valuable).	This statement is **factually incorrect**. Dr. Maclure was not involved in negotiating or writing Dr. W. Warburton's agreement. With the knowledge of her employer, Dr. R. Warburton suggested to Dr. W. Warburton that he request new language in his contract that would allow him to publish his research, consistent with the intent of the parties.[6] That contract was approved after review by the Legal Services Branch and the new provision was part of a standard template used by government. Dr. R. Warburton was not, however, involved in negotiating or writing the agreement. Dr. W. Warburton's agreement was with a separate division of the Ministry of Health from that in which Dr. R. Warburton was employed. Dr. W. Warburton was not paid "in data." He obtained data access as part of his agreement with the ministry, as does any contractor where data access is a term of the contract and is needed to carry out the deliverables for the ministry. That was the case here. As described in Chapter 4, the Ministry of Health had a longstanding interest in having researchers publish their work – ideally in a peer-reviewed forum – as a way of supporting specific or general ministry goals.[7] Researchers accessing data through a contract, including in some cases minimal cost contracts, supported this approach by the ministry.
They are involved in some of the Therapeutic Initiative work out of the UBC Faculty of Medicine, with their friend Colin Dormoth [sic], a former ministry employee.	This statement is mostly **factually incorrect**. Dr. Maclure or Dr. R. Warburton had some involvement with the Therapeutics Initiative (TI) as Co-Directors of Research and Evidence Development in PSD. This involvement was known to executives in the division. In these roles, they were not responsible for, or involved in, the data access supporting the TI contract. Neither Dr. Maclure nor Dr. R. Warburton worked for the TI in an advisory role or any other capacity.

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6 This incident is discussed in Chapter 9.

7 The ministry's rationale for supporting such evidence-based approaches is described in Chapter 4.

Auditor General Complaint	Analysis
	Dr. Maclure had participated as an unpaid co-investigator on grant proposals submitted by British Columbia researchers who wished to have his assistance on questions of methodology. In this capacity, he had been involved in grant proposals submitted by Dr. Colin Dormuth. He did not receive any income from any of the grants that Dr. Dormuth or other members of the TI obtained. Dr. W. Warburton had no involvement in the TI. Dr. Dormuth is a former ministry employee and professional associate of these three individuals. Dr. Dormuth is a faculty member at UBC and his position with the TI and the TI's contract with the Ministry of Health were longstanding and independent of any involvement of Dr. Maclure and Dr. R. Warburton. The complainant had no knowledge of the nature of their relationships.
[An] executive director at the ministry, says that she does not require TI to submit invoices for any of the work they do for the ministry, nor do they have deliverables. She says the ministry is just nice and regularly gives them money, trusting they are doing good work.	This statement is **incorrect** in that it was taken out of context, attributed to the wrong person, and did not accurately reflect the ministry's payment practices with the TI. A statement similar to this one was made *to* the executive director by an individual who worked in the Ministry of Health's Finance Division in a 2012 email. This executive director had suggested that the ministry request an invoice from the TI. Until 2012, the ministry paid the TI quarterly, in accordance with the terms of the contract. The TI's deliverables are clearly listed in its contract with the ministry. Evidence showed that the TI met these deliverables. Further, executives in PSD believed the TI's work was valuable and used the work of the TI in making drug coverage and policy decisions.

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Auditor General Complaint	Analysis
To get around rules against direct awards they have, on paper, split up projects into multiple parts. For example, PEG at UBC has been divided on paper into many projects and agreements. They have had UVic take money from the ministry and immediately transfer the money to UBC, saying that UVic is subcontracting UBC, to make it look like they were not doing another direct award.	This statement is **factually incorrect**. The project was not split up to get around rules governing direct awards. Rather, the nature of the project meant that there were multiple parts carried out by different entities. The contracts reflected these arrangements. At the time, government's Core Policy and Procedures Manual, which sets out the rules for direct contract awards, allowed the ministry to issue contracts to universities directly because they were treated as other government organizations, irrespective of dollar amount.[8] This means that whether the projects were split or not is irrelevant to the question of whether a direct award was permitted.
Some employees have raised concerns about this and been told to keep quiet because these individuals are friends with ADMs and DMs.	It was **correct** to state that the complainant and some of her colleagues had raised concerns about PSD. **However**, we could not corroborate the complainant's assertions that she or other employees were told to keep quiet. The complainant had no direct knowledge of the relationships between any of the people she mentioned in her complaint and executives in the Ministry of Health. During our investigation we did not identify any instances in which benefits were bestowed or improper conduct ignored by virtue of any relationship with senior executives.

8 Ministry of Finance, "Section 6.3.3 Contract Award – all procurement," *Core Policy and Procedures Manual* <http://www.fin.gov.bc.ca/ocg/fmb/manuals/CPM/06_Procurement.htm#1633>.

5.6 THE MINISTRY OF HEALTH RECEIVES THE COMPLAINT

On March 29, 2012, during a regularly scheduled meeting, a representative from the Office of the Auditor General provided a copy of the complaint to Manjit Sidhu, the Ministry of Health Assistant Deputy Minister for Finance and Corporate Services and Executive Financial Officer. According to Mr. Sidhu, the Auditor General's representative asked him to "do some checking into it and get back to them."

Mr. Sidhu told us it was infrequent, but not unheard of, for anonymous complaints about financial issues to be brought to his attention. When they arose, complaints could come from the Office of the Auditor General or be raised through internal channels.

When Mr. Sidhu received the complaint, he was very busy preparing for both the fiscal year-end financial work and for Budget Estimates and he did not, therefore, assess the details of the complaint himself. He told us that when he first read the complaint, it "wasn't really clear … what was going on here." He knew, however, that he could not ignore it – particularly because it had come from the Office of the Auditor General.

Mr. Sidhu informed Elaine McKnight, the Associate Deputy Minister of Health and his direct supervisor, about the complaint. She told us, "it would be consistent for Manjit to say, 'we have a concern that's been raised by the Auditor General.' Given, you know, Manjit's credibility, he would have said to me any kind of complaint you take seriously, to look at it." She did not recall the allegations being a "really large, critical kind of thing" at the outset, and thought that Mr. Sidhu would have "tried to keep [the review] as simple as you could." She told us she was surprised that there were complaints about contracts, because so much work had been done with the Office of the Comptroller General on contract policies following the Danderfer case.

However, Ms. McKnight also told us that, given that the Office of the Auditor General had taken the time to provide the complaint to the ministry, "it's something that you have to respond to appropriately." When asked what it meant that the complaint came from the Office of the Auditor General, Ms. McKnight said, "that it would be serious enough that they would feel that they needed to bring it to us … I thought it was very unusual."

5.7 INITIAL REVIEW OF THE COMPLAINT

The ministry responded to the complaint by taking immediate steps to gather information about the individuals and agreements mentioned, and the allegations made. At the outset Mr. Sidhu wanted to understand the process the ministry had followed to establish the contracts described in the complaint. He was not concerned about the allegation about the one dollar contract, because he understood such contracts were possible, but was more concerned with the possibility that ministry employees had given contracts to family and friends.

In March 2012 Mr. Sidhu asked a junior auditor from his division (we refer to her as "the reviewer" here) to "pull the contracts and just try and gather some background and get back to us … and, you know, not to do too much beyond that."

The reviewer told us the first step she took was to "verify some of the facts," such as whether the individuals named were indeed employees. Then she began to look into some of the contracts. To do this, she worked with a manager in the ministry who oversaw contract administration. She also conducted some corporate searches with the assistance of a Legal Services Branch lawyer.

In early April Mr. Sidhu asked the reviewer to put some documents together to help him better understand the complaint. The complainant learned about the reviewer's work indirectly through Ministry of Health employees who were assisting the reviewer. At the time, the complainant was continuing to raise her concerns with her supervisor and others in her branch. On April 25, 2012, the reviewer met with the complainant and her direct supervisor. At this meeting, the two presented the reviewer with a written statement outlining their concerns together with three supporting emails. This was the first time the reviewer met with the complainant.

On April 26, 2012, the complainant emailed the reviewer to ask for another meeting and provided her with a note summarizing an earlier meeting about the ministry's involvement with Drug Safety Effectiveness Network

(DSEN). This email contained additional information about the complainant's concerns about contracting practices. Soon after her meeting with the reviewer, the complainant told the reviewer that she was the one who had made the complaint to the Auditor General. The reviewer told Mr. Sidhu about the complainant's admission when they met in early May.

Over the next several days, the complainant and a colleague who shared her concerns, gathered emails for the review. The complainant communicated frequently with the reviewer, both in person and through email, and presented the reviewer with a folder of documents to support her concerns. The reviewer worked with the complainant to review these documents, and to obtain further information on the contracts. As the reviewer described to us:

> *[The complainant] and I start reviewing all of the documentation that she has … so [the complainant] would say, for example, you should look into this contract. So I would go to [the contract manager] and pull that contract. And then I would ask [the complainant], like, is this the right contract? Like, we were working together trying to figure out what was going on.*

During her interview the reviewer told us that she was concerned about the wide scope and seriousness of the allegations brought to her by the complainant. She also told us that she felt overwhelmed by what the complainant told her, and the documents she provided, in which the complainant made serious allegations of widespread misconduct within the Ministry of Health. The way in which the complainant presented the allegations made it appear as though she had uncovered a broad scandal with potentially criminal consequences. For example, some of the complainant's allegations included:

1. The complainant's November 11, 2011, "note to file" summarizing a discussion the complainant said she had with her supervisor about the ADTI. It contained prejudicial language about certain individuals and, amongst other allegations, accused a specific senior public servant of "misfeasance."
2. The complainant's April 3, 2012, "note to file" summarizing a meeting the complainant said she had with her supervisor and other staff about a research project. In this note the complainant suggested that certain individuals may be breaching the *Criminal Code*, the *Financial Administration Act*, *Procurement Services Act* and the *Copyright Act*.
3. An undated written summary by the complainant titled "Requirements of Government Contracts and Agreements"[9] that stated, in part, that the ministry "has not complied with Conflict of Interest provisions on numerous and significant contracts … MoH did not comply with legislation and government policy on disclosure of potential Conflict of Interest in these instances."

The document also referred to the Danderfer case, which the complainant said had been brought to her attention by a co-worker:

> *It may be tempting to dismiss these as relatively insignificant and technical, however we should recall a number of government officials, including some at the MoH, were investigated for their involvement in or knowledge with undisclosed Conflicts of Interests in the past.*

This reference was followed by a summary that listed responsibility of employees and contractors to report suspected fraud, and a statement that the ministry had not complied with various pieces of legislation and that "a number of contracts" are "vulnerable to allegations of potential Conflicts of Interest." The document also summarized 11 allegations of impropriety on "large and high profile contracts."[10]

Assistant Deputy Minister Lindsay Kislock told us that around this time Mr. Sidhu told her about the complaint. She told us she recalled attending a meeting in which she learned about some of the steps that were being taken "to try and kind of have [the complainant] articulate what she

9 The complainant enclosed this document in an email to her supervisor on April 19, 2012. In the covering email the complainant qualified the statements in her summary by explaining that she was not an expert and did not have complete information and so might be mistaken in her concerns. This covering email containing the cautionary statements was not provided to the reviewer.

10 When we asked the complainant about allegations contained in the summary, she told us that she had at the time no evidence to back up the allegations. She described the allegations in an offhanded way, as concerns that she thought should be looked into further.

thinks are the problems." Ms. Kislock recalled that at the time the complainant's acting supervisor was supporting the complainant through this process. She also recalled learning that the decision had been made to give the complainant and her supervisor a week to 10 days to put down on paper what their issues were, but she recalled them needing longer to complete the task.

On May 2, 2012 Mr. Sidhu met with the reviewer and another employee so that he could be briefed about the concerns. Mr. Sidhu told us that he believed this was approximately the time that he learned the identity of the complainant. He also learned that the complainant claimed to have previously raised her concerns internally and believed she had not received an adequate response. Mr. Sidhu asked the reviewer to work with the complainant to bring clarity to her concerns by preparing a document illustrating an example, such as DSEN.

During the first week of May 2012, the reviewer spent a significant amount of time reviewing documents with the complainant and one of the complainant's colleagues to prepare the summary on DSEN to brief Mr. Sidhu. The reviewer told us she relied primarily on the complainant because, as the reviewer put it, the complainant "knows" and "I at this point don't know."

Throughout that month, the reviewer received numerous emails with attachments from the complainant about DSEN. Some of these emails were not from the complainant's own email but ones she had obtained from a mailbox of a colleague. The complainant was able to obtain these emails because she had received prior permission from her supervisor to access one of her co-worker's work email account in order to do her work. Since the complainant continued to have access to her co-worker's email account box she used it to search for documents relevant to DSEN for the purpose of the review.

The complainant also directed the reviewer's requests for which contracts she would need to gather from the finance division for review – a list that expanded over time. For example, in an email from the reviewer to another ministry employee on May 9, 2012, the reviewer asked, "… is it possible to compile a list of the 254 contracts so that [the complainant] can review them to decide which ones need to be pulled?" This had the effect of expanding the scope of the review rather than clarifying the complaint.

With significant assistance from the complainant, on May 10, 2012, the reviewer created a draft "master" summary document that contained summaries of emails the reviewer obtained from the complainant – rather than a written statement articulating the concerns alleged about the DSEN initiative. The reviewer explained to us that when she created the document she summarized the information that she read in the emails, and categorized and inserted headings as descriptors of the complaint. For example, the first section of the draft "master" summary was titled "Unauthorized release of data/information." The information under this heading included summaries of emails, provided by the complainant, discussing concerns the complainant had about the ministry's data practices. The first email referred to under this heading was a summary of the complainant's own email which stated that she was "struggling to find the legal authority for MoH to collect/disclose personal data." At the time, the reviewer had not been asked to analyze the information the complainant provided. In fact, the reviewer had no substantive knowledge of the legal framework to collect or disclose data, or whether the Ministry of Health had released data as part of the DSEN initiative.

On May 11, 2012, the reviewer emailed the draft "master" summary document for DSEN to the complainant so that she could fact-check it. Three days later, on May 14, 2012, the reviewer briefed Mr. Sidhu on the DSEN summary document. This was followed by a larger meeting that afternoon, which included the complainant, her supervisor, the Acting Chief Data Steward and Mr. Sidhu. At this second meeting, the complainant and her supervisor raised more concerns about other ministry initiatives, including the Alzheimer's Drug Therapy Initiative (ADTI). Still lacking a clear picture of the complainant's concerns, Mr. Sidhu asked the complainant and her superiors to prepare a written statement to clarify their concerns.

Several people who attended the May 14 meeting described it as "heated." Mr. Sidhu told us that the complainant was upset the ministry was reviewing her allegations because she believed she alone knew what needed to be done to address them. Another person who attended the meeting said that the complainant was clear "she was not making allegations. She was bringing forward concerns about whether or not … the contracting and the financial

structures were appropriate." Mr. Sidhu said he told the complainant, "if there's been some wrongdoing, we need to get to the bottom of it."

In an email later that month, Mr. Sidhu described the view of the complainant that the matter should be investigated by someone outside the ministry:

> *I had my staff do some work on this, and we also met with staff from IM/IT to discuss some of the issues raised in the complaint document. Our purpose was not to do an audit, but to try and understand what wrong-doing (if any) was being alleged because this was not very clear from the complaint document. As part of this, we asked the staff in IM/IT (who incidentally, are likely the ones who authored the original complaint document to the OAG), to lay out for us a concrete example of where they believed some wrong-doing had occurred, and exactly what that wrong-doing was. The staff were very reluctant to provide this information as they felt quite strongly that this matter should only be looked into by someone from outside the Ministry, but in the end they agreed to comply.*

Following the May 14 meeting, the complainant and her superiors prepared a document called "Alzheimer's Drug Therapy Initiative Chronology of Events" describing the various concerns about the ADTI held by some of the data stewards. We reviewed the document with the benefit of our knowledge of the ADTI that we gained through our investigation. We concluded that many of the concerns articulated in the document were based on mistakes of fact, including the mistaken belief that the DSEN initiative was part of ADTI and that Dr. Maclure was being paid as an external researcher to perform ADTI work.[11]

After Mr. Sidhu received the ADTI chronology of events he met with the group and gave them feedback on the format of the document. He did not comment on or challenge the substance of their conclusions. Although he had some prior awareness of the purpose of the ADTI, his only involvement with the program was tied to reviewing the budget allocation on behalf of PharmaCare. He told us he was not an expert about the ADTI project and as a result did not know whether many of the facts contained in the document were accurate. Although he did not receive any underlying evidence to support or contradict the allegations detailed in the ADTI chronology document, he believed that more investigative work was required. As he told us:

> *… one thing was clear to me was that we needed to move forward with an in-depth review*
>
> *…*
>
> *Well, it was just the nature of the allegations, you know. I'd asked them to lay out specifically what they thought the wrongdoing was. And when I read that, you know, the relationships and the blurring of roles here, you know, it was clear that there was potential conflicts of interest and … people potentially benefiting from these conflicts of interest, you know. All these allegations of preferential treatment and so on … in my mind meant, you know, we need to do more work on this.*

At the end of May and following receipt of the DSEN "master" summary document and the ADTI Chronology of Events, Mr. Sidhu took steps to initiate a more formal investigation. He told us that he informed the deputy minister about the complaint and felt he also needed to involve the Assistant Deputy Ministers responsible for IMIT (Lindsay Kislock), and the Pharmaceutical Services Division (Barbara Walman) because the complainant and her group worked in the IMIT division and the details of the concerns he received fell under their respective divisions. This investigation is described in more detail in the following chapters.

5.8 LACK OF INFORMATION FROM PROGRAM AREAS

Prior to the creation of the terms of reference that led to the ministry's subsequent investigation, the initial complaint the ministry received from the Office of the Auditor General was never assessed on its merits. The reviewer's initial examination of the complaint relied heavily on information provided by the complainant herself. The

11 Ministry of Health investigators, decision-makers and the Office of the Comptroller General's Investigation and Forensic Unit often repeated this mistaken belief that Dr. Maclure was being paid as an external researcher to do ADTI work.

reviewer did not gather information from staff in the program areas of Pharmaceutical Services Division or Primary Care Branch of the Medical Services and Health Human Resources Division. Not gathering information from the program areas proved to be a missed opportunity. Program areas could have provided relevant factual and contextual information that would have addressed the concerns raised in the complaint. This additional information would have helped clarify the details of the complaints for Mr. Sidhu, as he had initially hoped would occur.

The failure to engage with program area staff had additional consequences. At the time, the ministry did not have a centralized repository for its information regarding its research initiatives and contracts. Instead, information pertaining to the ministry's contracts and research initiatives was filed across several different divisions within the ministry depending on the nature of the information, the type of contract and the responsibility for the initiative. For example, all service contracts were assigned to staff within the ministry's financial division for review. Conversely, the ministry's records supporting the grants, or contribution agreements (including transfer under agreements), were held elsewhere. As a result, ministry finance staff would have had some documents pertaining to Dr. W. Warburton's one-dollar service contract, which the complainant had flagged, but they would not necessarily have had documentation about the TI or the ADTI, which were both funded by contribution agreements.

The IMKS division, where the complainant worked, would have had access to some of the contract documentation, but this documentation would have been incomplete because that division was only provided with enough information to facilitate their roles and responsibilities as data stewards. At the time, this structure seemed to make sense because ministry staff responsible for vetting data access and approving the data sharing agreements were not expected to offer opinions about the non-data related features of the ministry's contracts, despite what many of the data stewards believed. Thus, the data group did not have full access to the large volume of additional information held by the program areas that was relevant to gain a complete understanding of the particular contracts or research initiatives in question. For example, the program area documents frequently included the briefing notes, information notes, planning documents and divisional plans that explained how and why a particular initiative was developed, approved by the executive management, and implemented.

Furthermore, the timing of the complaint to the Office of the Auditor General coincided with a significant turnover of the senior leadership within the ministry. At the time both the Assistant Deputy Minister of the Pharmaceutical Services Division and its Chief Data Steward were new to their roles, which meant the ministry had lost a significant amount of its prior institutional knowledge about the people, relationships, research initiatives and the contracts identified in the initial complaint. The loss of institutional knowledge was important because after the complaint was received many of the new senior executives did not know how many of the relationships, research initiatives and contracts had been established, nor did they appear to understand that much of this work had been established deliberately under the aegis of a formalized structure implemented by the previous Assistant Deputy Minister of the Pharmaceutical Services Division, Bob Nakagawa.

Mr. Nakagawa had left the ministry at the end of March 2012 after six years as the Assistant Deputy Minister. As we discussed in Chapter 4, he developed and implemented a formal framework to incorporate the principles of evidence-based policy making into PSD's drug policy development and its drug listing decisions. One component of this structure relied heavily on using the ministry's administrative health data to support research and evaluation of both drug therapies and PSD's own pharmaceutical policy initiatives to improve the ministry's drug listing decision and policy development systems. During our interview Mr. Nakagawa told us that he believed his background as a pharmacist helped him bring a strong scientific perspective to his leadership role at PSD. He told us that he based his formal framework for PSD on his prior work in the hospital setting where he had tried to leverage knowledge from multiple sources to improve public health outcomes. One key aspect of his framework was its openness to enabling cross-appointments, or dual roles of employees also holding academic or research positions, in situations where such appointments were synergistic to the ministry's goals of achieving improved public health outcomes. Within this

framework dual roles could be utilized when they were perceived to benefit government by building bridges between researchers and ministry policy makers. Near the beginning of his tenure, Mr. Nakagawa's framework was outlined in a written policy proposal that described the objectives he believed his model could achieve. This model was formally approved by the Deputy Minister at the time.

During our investigation, we learned that the framework Mr. Nakagawa created years earlier was, in 2012, unfamiliar to some of the more recently appointed officials within the ministry. Moreover, some of its features, like the encouragement of cross-appointments were perceived as inappropriate for a public service setting. As a result, some of the recipients of the initial complaint became concerned when they learned that employees might be occupying dual roles as researchers and employees or held employment in two different areas of the public service, as Dr. Maclure and Dr. R. Warburton did (within the ministry and at a university). There was considerable information contained in the ministry's files documenting that their dual roles had been expressly approved by the ministry. Moreover the information about their role in the ministry's approach to research initiatives was, as noted, not held in a place or in a form that made it readily available to the initial reviewer and the ministry's senior leadership. Had it been more available, or made widely known, this information would have addressed many of the concerns raised in the initial complaint, and demonstrated the steps the ministry had taken to implement the contracts and research programs that formed the basis for the complainant's concerns.

Mr. Nakagawa's departure from the ministry left PSD without a senior executive who had years of experience in the pharmaceuticals services area, as well as an understanding of the corporate history and strategic approach employed in the myriad programs the division had undertaken. Therefore, when these programs were questioned by the complainant, the PSD's ability to defend or explain the programs was diminished at a pivotal time. However, while the departure of Mr. Nakagawa was unfortunate in relation to the timing of the complaint, there remained experienced senior employees with in-depth knowledge of its subject matter who could have filled in the knowledge gaps or directed the reviewer to the documents outlining how the relationships, research initiatives and contracts operated.

Those tasked with responding to the complaint did not bring those employees with subject matter knowledge into the review process. Mr. Sidhu told us he was concerned about doing so in this situation where there were allegations of impropriety levelled against employees that included allegations against the executive in the program area. Moreover, because he had only asked the reviewer to conduct a brief review in order to clarify the scope of the complaint he did not expect the reviewer to conduct a full analysis or to conduct interviews of program area staff or the people named in the complaint.

5.9 CONCLUSION: INITIAL REVIEW OF COMPLAINT

When the ministry received a copy of the complaint from the Office of the Auditor General on March 29, 2012, executives felt they needed to give it serious attention. Between the end of March and the end of May 2012, under Mr. Sidhu's direction the ministry tried to clarify the complaint and the complainant's additional concerns in order to determine whether the complaint warranted further investigation.

Ministry executives acted promptly in response to the complaint by immediately assigning an employee to review it and gather additional documents. During the course of the review the ministry soon learned both the identity of the complainant and about her broader concerns. The ministry continued to treat the complainant and her concerns seriously, in part, because some of the complainant's colleagues also believed that wrongdoing was occurring inside the ministry. At the same time the complainant's supervisors supported attempts to clarify the scope of her concerns through the creation of written summaries that highlighted potential problems with two of the ministry's research initiatives. In our view it was an appropriate response for Mr. Sidhu to meet with the complainant and provide her the opportunity to clarify the concerns in writing. It was also appropriate for him to bring the complainant's concerns to the attention of the other Assistant Deputy Ministers and the Deputy Minister because the complaints spanned multiple divisions within

the ministry and, if true, represented a serious potential problem.

However, there were problems with the steps the ministry took in reviewing the complaint. Through no fault of her own, the reviewer was ill-equipped to deal with the scope of the issues brought forward by the complainant. By virtue of assisting the reviewer in gathering supplemental information, the complainant became embedded in this initial review phase. This had the effect of expanding rather than clarifying the complainant's original allegations. Due to the decentralized nature of record keeping and transition in the executive ranks in the ministry, important information was not included in the review.

Both Mr. Sidhu and the reviewer were of the view that the purpose of the review was to bring clarity to the original complaint rather than to assess the validity or accuracy of the complaint. Significantly however, this was not clear to others. It is therefore not surprising that when the initial review was completed, some believed that the original complaint, together with the information that the reviewer gathered over the course of the two months, highlighted a potentially serious issue within the Ministry of Health. Faced with an expanded set of concerns, the issue gained momentum and the ministry decided to initiate a more in-depth investigation.

FINDINGS

F 1 The complainant had a sincere belief in relation to the allegations she made. The complainant was uninformed and her assertions were mostly wrong.

F 2 The ministry's decision to conduct an initial review of the complaint was appropriate.

F 3 The complainant was deeply involved in and heavily influenced the initial review.

F 4 The initial reviewer was overwhelmed by the task and ill-equipped to address the complex issues raised by the complainant.

6.0 / MINISTRY OF HEALTH INVESTIGATION: ESTABLISHMENT AND COMPOSITION

6.1 INTRODUCTION

In this chapter of the report we describe the steps the Ministry of Health took at the end of May 2012 to establish an investigation team to examine the allegations in the complaint made to the Office of the Auditor General. We outline the intended purpose of the investigation, as set out in the team's terms of reference, and describe the composition of the team. We describe the role of the lead investigator and her various reporting relationships over the course of the investigation. We then describe the roles and responsibilities of different team members throughout the entire investigation, from May 2012 to the fall of 2013.

View main timeline

MAY 16, 2012
Manjit Sidhu, Assistant Deputy Minister of Finance and Corporate Services and Executive Financial Officer for Ministry of Health, contacts Comptroller General about complaint.

MAY 22, 2012
Barbara Walman begins position as Assistant Deputy Minister of Pharmaceutical Services Division.

MAY 23, 2012
Ministry of Health Deputy Minister Graham Whitmarsh and Ms. Walman learn of March 2012 complaint submitted to the Auditor General.

MAY 24, 2012
Lindsay Kislock, Assistant Deputy Minister of Health Sector Information Management and Information Technology, asks the Director of Privacy Investigations for Office of the Chief Information Officer about her availability to lead an investigation.

MAY 31, 2012
Ms. Kislock and Ms. Walman approve terms of reference for the Ministry of Health investigation team. Mr. Sidhu approves terms of reference later.

AROUND JUN 6, 2012
Employee who worked with the lead investigator on the Timely Access report joins investigation team.

AROUND JUN 21, 2012
Public Service Agency investigator joins the investigation team.

JUL 2, 2012
The lead investigator wins competition for position of Chief Data Steward and Executive Director, Information Management and Knowledge Services, but does not assume this new role.

JUL 13, 2012
The initial reviewer leaves investigation team.

AUG 22, 2012
Mr. Whitmarsh confirms the plan to have the lead investigator report to the Office of the Chief Information Officer.

END OF AUG 2012
Three additional members join investigation team.

OCT 9, 2012
Mr. Whitmarsh writes to Office of the Chief Information Officer to confirm arrangements about the lead investigator's reporting relationship.

OCT 2013
Ministry of Health investigation ends.

MAR & APR 2013
Project manager, analyst and administrative assistant join investigation team to help manage records and respond to freedom of information requests.

MAR 2013
Five contract employees begin working for investigation team from New Westminster.

6.2 FROM REVIEW TO INVESTIGATION

In May 2012, Manjit Sidhu, Assistant Deputy Minister, Finance and Corporate Services, and Executive Financial Officer for the Ministry of Health, contacted several people about the complaint and the work that the initial reviewer was doing.

On May 16, 2012, Mr. Sidhu contacted the Comptroller General because he believed the Office of the Comptroller General had the expertise to deal with the financial component of the allegations. He followed up on May 23, 2012 with an email to the Comptroller General that attached the Alzheimer's Drug Therapy Initiative (ADTI) summary document.

Also on May 23, 2012, Mr. Sidhu emailed Deputy Minister of Health Graham Whitmarsh to alert him to the allegations. A copy of the complaint to the Auditor General as well as the ADTI summary were attached to the email. Mr. Whitmarsh recalled that he challenged Mr. Sidhu about how allegations like these could have arisen in the ministry again in light of the contracting practices review completed in the Ministry of Health after the Danderfer case.

During our investigation, we learned that the post-Danderfer review did not include Pharmaceutical Services Division (PSD) contracts or the types of grants that were encompassed in the new allegations. Mr. Sidhu did not recall this discussion with Mr. Whitmarsh.

In his May 23, 2012 email to Mr. Whitmarsh, Mr. Sidhu suggested that the Office of the Comptroller General's Internal Audit could look into the matter further, "not because we have any evidence of serious wrongdoing, but because there are some issues that warrant further investigation and [the Office of the Auditor General] will likely insist on this anyway." Mr. Whitmarsh directed Mr. Sidhu to brief Barbara Walman, Assistant Deputy Minister of the Pharmaceutical Services Division, and to ask the Office of the Comptroller General to assist, "but with timelines to allow us to react and make decisions as and when they have information." Thereafter, Mr. Whitmarsh did not have direct involvement in the investigation until he began conducting weekly meetings in August 2012 with the investigation team and others.

Ms. Walman began her job as Assistant Deputy Minister of the Pharmaceutical Services Division on May 22, 2012, and learned about the complaint the next day. Ms. Walman did not have a background in pharmaceuticals or with the Ministry of Health. Because she learned about the complaint almost immediately after assuming her new role, she had a very limited opportunity to familiarize herself with the work of her division before hearing the complaints made about her staff. Ms. Walman told us that she did not speak with her predecessor, Bob Nakagawa, to get his perspective about how he viewed the Assistant Deputy Minister role at PSD, or to ask him about PSD programs and contracts that were under investigation. She told us that to do so could raise privacy concerns since Mr. Nakagawa was no longer employed by the provincial government. As a result, she was put in an unenviable position when advised of the complaint on her second day of work at PSD as she had not yet had the opportunity to gain complete knowledge about the programs within her division or about the roles of the employees identified in the initial complaint.

By the end of May 2012, Lindsay Kislock, Assistant Deputy Minister of Health Sector Information Management and Information Technology, Mr. Sidhu and Ms. Walman agreed to initiate a broader investigation into the matters the complaint raised. When we spoke with Mr. Sidhu, he said that although he was confused about the extent of the concerns after he had reviewed the initial complaint, he thought the nature of the allegations, particularly the issues around conflict of interest, required further investigation. As Mr. Sidhu told us:

> *So once I'd got that document [the ADTI review], I looked at it, and, again, you know, it wasn't absolutely clear again to me because, you know, I'm not an expert on this. But one thing was clear to me was that we needed to move forward with an in-depth review.*

When asked why he felt this was the case, he said:

> *… well, it was just the nature of the allegations, you know. I'd asked them to lay out specifically what they thought wrongdoing was. And when I read that, you know, the relationships and the blurring of roles here, you know, it was clear that there was potential conflicts of interest and potential – people potentially benefitting from those conflicts of interest, you know. All these allegations of preferential treatment and so on, I think they all, you know, in my mind meant, you know, we need to do more work on this.*

Mr. Sidhu told us he wanted the additional work done quickly – by June 30, 2012. Due to what he described as "implied pressure" from the complainant, he felt that the ministry had to demonstrate that it was doing something and that "this was going to be looked into."

On May 24, 2012 Ms. Kislock asked the Director of Privacy Investigations at the Office of the Chief Information Officer – who was conducting the Timely Access review, and was being considered for a position at the ministry – about her availability to begin working on an investigation into the allegations. She agreed to participate and, on May 29, 2012, presented her first draft of the terms of reference for the investigation to Ms. Kislock, Ms. Walman and Mr. Sidhu.[1]

1 As we describe below, we refer to this individual as the lead investigator.

By May 31, 2012 the terms of reference had been finalized and signed off by Ms. Kislock and Ms. Walman.[2]

6.3 PURPOSE OF INVESTIGATION

In the terms of reference, the lead investigator described the allegations to be investigated as follows:

> *. . . inappropriate procurement, contracting irregularities and research grant practices, in the Research and Evidence Development section of the Pharmaceutical Services Division, MOH. In addition, concerns were also alleged regarding inappropriate data access arrangements, intellectual property infringement, and code of conduct conflicts with employee contractor relationships, including preferential treatment.*

The objectives of the review were to "provide all findings and facts relating to allegations being reviewed," and to "identify opportunities to improve government and ministries information contracting, granting, research and data access practices in the Research and Evidence Development section of PSD, MOH."[3]

The wording of the terms of reference suggested that the review would focus primarily on practice improvements from a systemic perspective. At the same time, the background section of the terms of reference refered to the allegations in the original complaint. One of the objectives of the review was to conduct a "review of roles, responsibilities and relationships of 3 employees and 2 contractors that primarily support and [are] involved in the majority of research and evaluation work in the Research and Evidence Development Section, PSD, MOH."[4]

In addition, although "matters pertaining to other business areas of PSD, MOH" were ostensibly "out of scope," in fact, the investigation did include other parts of the ministry. Some of the employees who were eventually dismissed worked for other divisions of the Ministry of Health. The lead investigator told us that the team was concerned with the protection of personal information and, as a result, they looked at areas of the ministry that were outside the investigation team's approved terms of reference.

Consistent with Mr. Sidhu's wish to have the review completed quickly, the terms of reference set a target date of June 30 for the team's report to be finalized.

Although the March 2012 complaint was the catalyst for this investigation, by the time the terms of reference were finalized, the investigation was no longer just about responding to the allegations in that complaint. Due primarily to the significant influence that the complainant exerted in the initial review process up to that point, the focus of the investigation team had expanded significantly. As a result, the investigation team did not return to the claims made in the initial complaint to assess whether they were valid and substantiated.

The terms of reference were not later modified to reflect the expanded scope of the investigation that we describe in the remainder of our report. The lead investigator told us that this was because the investigation was not completed and no final report was prepared.

6.4 MINISTRY OF HEALTH INVESTIGATION TEAM MEMBERS

The composition of the investigation team varied over the course of the investigation. During the first phases of the investigation until the first firings in September 2012, the team had a core group of investigators with different levels of investigative experience. The team would eventually consist of members from the Ministry of Health, the Public Service Agency (PSA) and the Office of the Chief Information Officer (OCIO). There were, at that time, no guidelines or policies for multi-ministry investigations to inform the team's approach to its work. There is now a protocol for coordinating such investigations.

On the whole, the evidence we received demonstrated that the people assigned to the investigation team and

2 Mr. Sidhu's signature on the terms of reference is dated July 27, 2012.

3 "Review Involving the Ministry of Health Pharmaceuticals Division, Research and Evidence Development Section: Terms of Reference, v.2," 31 May 2012, 4.

4 "Review Involving the Ministry of Health Pharmaceuticals Division, Research and Evidence Development Section: Terms of Reference, v.2," 31 May 2012, 4.

those who assisted them believed the work they were doing was important, valuable and necessary. Many worked long hours under significant pressure to meet the goals that had been set for them. Although we are critical of various aspects of the investigation in this report, it is important to recognize that members of the investigation team were – and many still are – hard-working and dedicated public servants.

6.4.1 LEAD INVESTIGATOR

Although the individual who drafted the terms of reference described herself in that document as the "team lead," she told us that she was only in charge of investigating issues related to data access and privacy, and another team member was in charge of examining the contract issues. In our view, her statements on this point were not supported by the documents we reviewed or by evidence from other witnesses. The other investigation team members told us that the team worked hard on a complex and stressful investigation.

We heard similar evidence confirming the team lead's status as the lead investigator from many individuals we spoke with who interacted with her during the investigation. For example, one of the Assistant Deputy Ministers who sponsored the investigation understood that the team lead's role was to "get to the bottom of" all of the allegations – whether they were related to financial, data or contracting matters. To describe her as merely conducting a "data investigation" does not appropriately capture her role. As a result, we refer to the team lead as the lead investigator throughout this report.

6.4.1.1 BACKGROUND

Prior to being awarded the job of Executive Director of Information Management and Knowledge Services at the Ministry of Health in July 2012, the lead investigator was the Director of Privacy Investigations at the OCIO, a division within the then-Ministry of Labour, Citizens' Services and Open Government. She oversaw all privacy investigations conducted by that office and was the lead investigator assigned to some of the investigations; it was her background in conducting privacy investigations that led the Ministry of Health to consider her for this investigation. Several past colleagues and supervisors have described the lead investigator as hard-working and passionate about her work. Her former supervisor at the OCIO made this comment to us about her approach to privacy investigations:

> *Your and my classification of something that would be minor would be different than her classification of something that would be minor … She definitely took the protection of private information very seriously.*

Team members told us that they deferred to the lead investigator's expertise in privacy matters and to her views about the allegations relating to data and privacy breaches.

6.4.1.2 REPORTING RELATIONSHIPS

Based on the evidence we reviewed, the precise oversight the three sponsoring Assistant Deputy Ministers played, as a group, was unclear. According to the project timeline contained in the initial May 2012 Terms of Reference the formal review of the allegations was initially intended to last only one month – the Terms of Reference did not contain any specific provisions detailing how the lead investigator was supposed to provide updates to the three sponsoring Assistant Deputy Ministers. Mr. Sidhu told us that he could not specifically recall whether the Assistant Deputy Ministers ever met with the investigation team as a group.

Rather than providing any collective oversight, the three Assistant Deputy Ministers received periodic updates individually. For example, Mr. Sidhu also told us that he received periodic updates from the contract specialist and was aware that the lead investigator also provided individual updates to the other two Assistant Deputy Ministers. However, from his perspective the Assistant Deputy Ministers for the most part wanted to let the investigation team "do their work, see where they got to, and at least get to a draft report and then move forward from there."

Throughout her work on the investigation – beginning in May 2012 and ending in November 2013 – the lead investigator's role and reporting relationships were unclear.

When she began the investigation, the lead investigator was still the Director of Privacy Investigations with the OCIO. In the terms of reference, she is described as being from the OCIO. At the same time, some members of the investigation team believed they reported through the

lead investigator to the three Assistant Deputy Ministers of Health listed in the terms of reference as sponsors of the investigation.

On July 2, 2012, the lead investigator won a competition for the position of Chief Data Steward in the Ministry of Health, reporting to Ms. Kislock. Although, she never officially assumed this role, as described below, she exercised some of the responsibilities associated with the position. On July 16, Ms. Kislock sent an official announcement to staff welcoming the lead investigator as the new Executive Director of the Information Management and Knowledge Services Branch and Chief Data Steward. The email stated that she would work part-time in that position over the following two weeks while she completed assignments for the OCIO and would occupy the position full-time on July 30, 2012. However, as the weeks passed and the investigation continued, the lead investigator did not fully transition into her new role.

Throughout August 2012, the lead investigator reported on the progress of the investigation to Mr. Whitmarsh. According to our interview with the lead investigator, during this time she also reported on the progress of the investigation to Ms. Kislock and Ms. Walman on a more frequent basis.

In mid-August 2012, Mr. Whitmarsh asked Ms. Kislock to arrange to have the lead investigator transferred back to the OCIO temporarily in an effort to maintain the independence of the investigation from the ministry. Ms. Kislock and Mr. Whitmarsh confirmed these arrangements in writing to the OCIO.

Mr. Whitmarsh told us that from his perspective, it was important to have the lead investigator reporting to the OCIO "because then she has an accountability that's not with us." He described how he had intended to keep both the lead investigator and the PSA investigator (who joined the team on June 21, 2012) "outside of the ministry so that they had independent reporting." He saw the lead investigator as an expert from the OCIO who had been brought in "to figure out how bad" each of the alleged activities was.

However, the lead investigator was never actually transferred back to the OCIO in an official or unofficial capacity. Dave Nikolejsin, then-Chief Information Officer for British Columbia, confirmed that the lead investigator did not report to him in any way with respect to the Ministry of Health investigation. Within the Ministry of Health, Ms. Kislock had announced that the lead investigator would assume her role as the new Chief Data Steward in July 2012. Although she did not officially assume this role, the September 2012 draft of the Timely Access report that the lead investigator wrote stated that it was prepared by the "Executive Director and Chief Data Steward" in the Ministry of Health. Moreover, she was identified as the Chief Data Steward for the ministry to both internal and external individuals, and was involved in the branch's strategic planning, approved data access requests on behalf of the ministry and performed other Executive Director tasks. Mr. Whitmarsh wrote again to the OCIO on October 9, 2012, confirming that the lead investigator would continue to report directly to that office until the investigation was completed.

Throughout the investigation, the lead investigator identified herself to interviewees as a Director of Privacy Investigations at the OCIO. Further, the Ministry of Health's press releases and other public communications referred to the investigation as an OCIO investigation. Despite these statements, the lead investigator did not report to anyone at the OCIO.

In March 2013, the ministry created a new investigative position for the lead investigator in Ms. Walman's division so that the lead investigator could continue her investigation of data issues from outside Ms. Kislock's division. At this point, she still expected to move to the Chief Data Steward position at the Ministry of Health when the investigation was completed.

The ministry's decision to seek the transfer of the lead investigator back to the OCIO was well intentioned, but beyond a correspondence exchange, neither the ministry nor the OCIO took substantive measures to ensure that the lead investigator carried out the investigation independent of the ministry. The uncertain status of her employment did not in itself make it unreasonable for her to carry out this review. However, it was unreasonable for the ministry to represent the investigation as "independent" of the ministry when in substance it was not. The result of this lack of clarity was that the government represented the investigation as being conducted at arm's length when, in

fact, there was no clear accountability to anyone outside the Ministry of Health who could assess the investigation independently.

Significantly, in the absence of clear lines of reporting, no one was effectively supervising or monitoring the lead investigator as she conducted the investigation. While senior leadership of the Ministry of Health received her updates and reports on the investigation, none of these executives believed they were clearly responsible for evaluating the quality of her work or the way in which she carried it out.

When we asked about the lead investigator's ability as an investigator, Mr. Whitmarsh said, "I don't know [her] background but she was able to articulate a level of knowledge … [but] I didn't sort of go through and assess [her]." Mr. Whitmarsh noted that she was already well into the investigation by the time he became involved.

Based on Mr. Whitmarsh's correspondence with the OCIO and his evidence to us, it is clear Mr. Whitmarsh thought that the lead investigator was the responsibility of a different ministry. However, Mr. Nikolejsin disclaimed any role in supervising or evaluating her work. Although we saw some evidence that the lead investigator sometimes described herself as an OCIO employee while the investigation was underway, she told us that she did not report to the OCIO and that she was uncomfortable identifying herself as investigating on behalf of the OCIO because that description was wrong. No one in a position to supervise the lead investigator was critically assessing the work she was doing. The absence of anyone in government taking responsibility for supervising the lead investigator removed an important check on her work.

6.4.2 LOCATION OF THE MINISTRY OF HEALTH VICTORIA INVESTIGATION TEAM

For part of the investigation, the lead investigator used the Chief Data Steward's office in the Information Management and Knowledge Services Division and sought the assistance of people from that branch in the investigation. Between approximately September 2012 and April 2013, when additional members were added to the investigation team, some of the investigators shared the same space in the Ministry of Health building with other ministry employees.

Employees we spoke with in Information Management and Knowledge Services viewed this arrangement as inappropriate because it created an impression that certain Ministry of Health investigation team members were investigating colleagues. One employee described that "it was pretty hard to work each day when you've got your own staff investigating you. They're not telling you what they're working on or you know they can't really say anything."

This co-location created feelings of distrust, resentment and discomfort among some staff. Moreover, the branch was already short-staffed so had little capacity to provide resources to the investigation even on a limited or ad hoc basis.[5]

6.4.3 OTHER TEAM MEMBERS

The terms of reference stated that the team would include the lead investigator and two representatives from the Ministry of Health's Financial and Corporate Services Division, and, as required, representatives from the forensic investigations unit of the OCIO and the investigations unit of the PSA. The individual who had conducted the initial review in April and May 2012, at Mr. Sidhu's request, was also part of the team for the first few weeks until July 13, 2012.

On June 21, 2012, the investigation team asked the PSA for assistance in dealing with the human resources issues that it believed had come up during the investigation. The PSA quickly assigned an investigator and an Employee Relations Specialist to the matter. As we will describe in this report, the Employee Relations Specialist appropriately did not directly participate in the investigative work. At the time, the PSA's investigations unit had only been operating for approximately one year. When the PSA became involved in this investigation, it had not yet developed any formal policies or procedures for conducting human resources investigations. The PSA investigator assigned to the Ministry of Health team had about one year of experience in that role and received limited training prior to her assignment to the investigation. Despite the increasing size and complexity of the investigation, the

5 For staffing challenges pertaining to data access, see Chapter 4.

PSA investigator continued to carry a full caseload of other matters during the course of the investigation. We also learned that she had limited exposure to the Ministry of Health beforehand and did not understand the programs or issues she was tasked to look at. She candidly told us that she felt she was in over her head and said this caused her to be in a subordinate position during the investigation.

The Employee Relations Specialist had only occupied her role for about three months and was still in a probationary period. Like the PSA investigator, the specialist received no training prior to this investigation and the PSA had not yet developed any investigative policies that would have informed her role within the wider investigation team at that time.

In July 2012, a Strategic HR Manager from the Ministry of Health also joined the investigation team. He had worked at the ministry since 2010 and in that role was principally involved in policy and planning issues. He was clear with us that he was not a trained human resources investigator.

Thus, at this stage, the core of the investigation team who conducted the investigative work and interviews from this point until the terminations consisted of:

- Team Lead (the lead investigator)
- Investigator, Public Service Agency
- Contracts specialist, Financial and Corporate Services, Ministry of Health
- Strategic Human Resources Manager, Ministry of Health

In addition to the core investigation members of the team, an employee who had assisted the lead investigator with the earlier Timely Access report also joined the team. He worked out of an office in New Westminster and described his role on the team as "an aggregator of data." He did not participate in the interviews the team conducted. He also told us that when he initially joined the team, the lead investigator assigned him a lot of discrete one-off tasks, which included looking at "research articles" to find out "are these people publishing?" As we describe later in this report, throughout the summer of 2012 other tasks were assigned to him by the lead investigator, including developing drafts of the Internal Review report and creating a document known as the Relationship Web. In June and July 2012, his work also consisted of reviewing people's email histories and cataloguing the emails in spreadsheet format.

At the end of August 2012, another investigator was added to the team to review emails. In addition, a privacy investigator from the OCIO and an administrative assistant also joined the team. These three team members all worked in Victoria. Between the fall of 2012 and the fall of 2013, the lead investigator also brought in additional team members to assist the investigation by reviewing emails and supporting the creation of the storyboards.[6]

In March and April 2013, a project manager, administrative assistant and an analyst were added to the team to help organize the large volume of emails and documents the team compiled, and to help respond to mounting freedom of information requests.

In October 2013, the Ministry of Health ended its investigation by which time most of the employees on the investigation team had returned to their regular duties.

6.5 CONCLUSION: INVESTIGATION TEAM STRUCTURE AND REPORTING RELATIONSHIP

The ministry investigation began by assembling a multi-disciplinary team under the direction of the lead investigator once the terms of reference were finalized. Other than the lead investigator, the team did not have significant prior experience conducting investigations of this type. Although it is clear that the team members worked very hard to conduct the investigation, the team lacked the structure and policy guidance that would have assisted its work. In our view, this lack of structure was one of the factors that hindered the team's ability to fully and accurately assess the information it gathered as the investigation unfolded. It also led to the many procedural

6 "Storyboards" was the name given to a set of litigation support documents that described the allegations against the fired employees, and other information necessary for government's defence of the grievances filed by the terminated bargaining unit employees and the wrongful dismissal lawsuits that had been started by the excluded employees.

problems with the manner in which the interviews were conducted.[7]

It was also apparent that uncertainty existed within the ministry about how the reporting relationships were supposed to function. As noted, we received conflicting evidence about whether the lead investigator was supposed to report to the Ministry of Health or the OCIO throughout the investigation. For her part, the lead investigator also demonstrated this uncertainty when she told us that she felt uncomfortable indicating that she was investigating for the OCIO, while also representing to others, as she conducted the investigation, that she was the OCIO's investigator.

Similarly, both Mr. Whitmarsh and Mr. Nikolejsin indicated that the lead investigator did not report to them. Whatever the formal state of the reporting relationships at the time, from a functional perspective, nobody was effectively supervising the lead investigator or the team, or assessing the quality of their work once the investigation was underway.

As we will discuss later in this report, the absence of effective oversight fostered an environment in which the investigation was allowed to expand well beyond the scope initially described in the terms of reference. While scope changes in an investigation can and do occur, in this case, there was no effective oversight or approval of such changes. Without effective oversight, the focus of the investigation team expanded as the team pursued various allegations and theories of wrongdoing.

Stephen Brown told us that shortly after he became the Deputy Minister of Health, in June 2013, he became very concerned about the lack of oversight of the investigation and the resulting lack of focus.[8] By October 2013, the investigation was discontinued.

FINDINGS

F 5 The planning of the investigation and composition of the Ministry of Health investigation team was procedurally flawed, and therefore improper, in that:

- **a.** The terms of reference for the Ministry of Health investigation did not clearly define its scope.
- **b.** The team lacked effective oversight, and it acted without appropriate policy direction and guidance in the conduct of the investigation.
- **c.** The team included members who were not sufficiently trained for an investigation of this complexity.
- **d.** The investigation was not conducted independently from the Ministry of Health despite being represented as being led on behalf of Office of the Chief Information Officer.

F 6 Situating the investigation amongst employees in the Ministry of Health building was unnecessary and wrong.

7 We describe the problems with how the interviews were conducted later in this report, as did Marcia McNeil in her report, which we describe in Chapter 16.

8 We describe Dr. Brown's concerns in Chapter 13.

7.0 / MINISTRY OF HEALTH INVESTIGATION THROUGH THE FIRST EMPLOYMENT SUSPENSIONS: JUNE AND JULY 2012

7.1 INTRODUCTION

In this chapter of the report, we describe the first steps taken by the Ministry of Health after its investigation team's terms of reference were finalized on May 31, 2012. During this stage, the team consisted of the lead investigator, the Public Service Agency (PSA) investigator (who joined on June 21, 2012), the contracts specialist, and the strategic human resources manager. This core team was assisted by the initial reviewer until July 13, 2012, as well as the employee in New Westminster who described his function as aggregating data.

This chapter covers a time frame from June 1 to approximately the end of July 2012, and focuses on four key developments in the investigation during this period. First, the Ministry of Health decided to suspend data access for three employees and two external contractors. Second, the investigation team began to gather evidence through reviewing contracts and emails, and by conducting some initial interviews. Third, the investigation team completed the first two drafts of its Internal Review report. Fourth, the Ministry of Health suspended the employment of three employees, one of whom later asserted that his suspension amounted to a constructive dismissal.

View main timeline

JUN 7, 2012
Data access and signing authority suspended for Dr. Malcolm Maclure, Dr. Rebecca Warburton and Ron Mattson. Data access suspended for Dr. Colin Dormuth.

JUN 12, 2012
Investigation team begins conducting its initial round of interviews.

JUN 22, 2012
Investigation team meets with Investigation and Forensics Unit of the Office of the Comptroller General.

JUL 6, 2012
Investigation team completes first draft of Internal Review report.

JUL 18, 2012
Investigation team completes second draft of Internal Review report.

JUL 17, 2012
Dr. Maclure, Dr. R. Warburton and Mr. Mattson dismissed. Later, Dr. Maclure takes position he has been constructively dismissed.

JUL 13, 2012
Lead investigator contacts the Office of the Information and Privacy Commissioner to notify of investigation and possible data breach.

7.2 COMMENCEMENT OF INTERNAL REVIEW

There were no investigative plans or other types of planning documents directing the review. We found no documentary record that broke down the matters under review into its specific issues. Instead, the ministry employees commenced the review without narrowing the issues or mapping out the direction of the investigation. Considering the expansive scope of the terms of reference, we found that the lack of an investigative plan contributed to the investigation growing well beyond a manageable scope.

7.3 DATA SUSPENSIONS

One of the first steps that the ministry took in June once it commenced its formal investigation was to suspend data access to several individuals, which we describe in some detail in the next subsection.

While there was no specific allegation of a data breach in the initial complaint to the Auditor General, the complainant had provided additional information during the initial review period showing that she and others in her branch were generally concerned that individuals might be inappropriately accessing and using data, including potentially selling or transferring data outside the jurisdiction.

A data breach means that the collection, use, disclosure, access, disposal or storage of personal information (in this case data), whether accidental or deliberate, was not authorized by the *Freedom of Information and Protection of Privacy Act*. The investigators discovered the three data breaches detailed in the Office of the Information and Privacy Commissioner report after the data suspensions were imposed, while reviewing emails. None of the data breaches they discovered were related to allegations raised by the complainant.

The background to the investigation team's Terms of Reference reflected the additional concerns that the complaint raised "regarding inappropriate data access arrangements." The Terms of Reference did not identify any suspected data breaches for investigation. The ministry had not otherwise articulated that there were any specific suspected data breaches with respect to any of the individuals who had their data access suspended in June 2012. Instead, the decisions to suspend data access were a response to the broad allegations of potential data misuse in relation to those named in the Auditor General complaint.

Placing the data access suspension decisions in their context, in 2012 the ministry lacked proper policies, procedures and documentation in relation to data access and use. This understandably contributed to an overriding concern that data was vulnerable to improper disclosure. In

addition, the investigators and decision-makers in this case lacked knowledge of the factual underpinnings of many of the relevant ministry projects and the data access arrangements in relation to individuals and the ministry's projects. Without this knowledge, but sensitive to the vulnerabilities of data security and the importance of privacy, the ministry adopted a restrictive response to the broad concerns about data by suspending the data access for these employees and contractors.

7.3.1 DECISIONS TO SUSPEND DATA ACCESS

On June 7, 2012, one week after the terms of reference were finalized, Assistant Deputy Minister Barbara Walman signed letters suspending data access and signing authority for invoices, expenses or contract approvals for Mr. Ron Mattson, Dr. Rebecca Warburton and Dr. Malcolm Maclure. On the same day, she also suspended data access for Ministry of Health contractor, and external researcher, Dr. Colin Dormuth. On June 11, the ministry suspended the data access of another contractor, Dr. William Warburton.

None of the employees had signing authority and of the five, only Dr. Dormuth and Dr. W. Warburton had actually used any data access permissions.

The data suspension letters to these individuals described the suspensions as "standard procedure when a complaint was received and a review undertaken." The letters did not otherwise articulate any basis for the data suspensions specific to any of the individuals involved. The letters said:

> *… a concern has been raised with the Ministry of Health with respect to how research and contracts are managed in the Pharmaceuticals Division. In response to this complaint, an internal review has been undertaken … your role … will be included in this process.*

The letter stated that the data suspension was for the duration of the internal review and that the recipient would be contacted for an interview. The letter also stated that no conclusions would be made until the review was completed and all facts gathered and analyzed. Some employees who received the letter believed it was a mistake because they did not have data access. Another individual, with data access, was concerned because the letter did not articulate the basis for the data suspensions and despite his request for information, the ministry did not follow-up with such details.[1]

We asked the decision-makers about their rationale for suspending data access.

Lindsay Kislock told us that, as the Assistant Deputy Minister for the Health Sector Information Management and Information Technology Division of the Ministry of Health, she was ultimately responsible for all of the decisions relating to data. Ms. Kislock did not personally review any direct evidence indicating a risk to data existed, nor did she review the nature of each individual's data access, or lack thereof, prior to suspending data access. Ms. Kislock explained that the investigators saw the suspensions as a proactive measure to ensure none of these individuals could be involved in any further wrongdoing while the investigation was ongoing. She told us that a bare allegation of misuse was sufficient to warrant a data suspension, because, in her view, implementing suspensions was a necessary measure to mitigate any potential risks, even if these risks were not completely identified. As she told us:

> *… my natural inclination would be to suspend data access. Not as … a finding of guilt or not guilt … just to freeze the situation.*

Ms. Kislock also told us she felt it was appropriate to suspend data on a bare allegation because she expected that the allegations would be investigated quickly. Ms. Kislock's perspective was shared by the lead investigator, who told us:

> *… if anyone has any allegations of inappropriate use or just, you know, sharing of data we just suspended until the review's completed.*

The data suspension letters sent to the employees and contractors echoed this view, and described the suspensions as "standard procedure when a complaint such as this is received, and a review undertaken."

Ms. Walman, who signed most of the data access suspension letters, told us that she understood the investigation team had unearthed evidence "that was concerning

1 The ministry did subsequently follow-up with details but not until over a year later.

enough to them, as the experts … to recommend that during the review process that this person or these people that their access be suspended." Ms. Walman also told us that she relied on the lead investigator's recommendation as a privacy expert and that she had received examples of emails to support the recommendation. She agreed that a data access suspension sends "a very strong message to an employee … [it] is serious."

It was difficult for us to understand the rationales for each data suspension decision due to the lack of documentation. The lead investigator did not provide the Assistant Deputy Ministers with any written recommendations to either justify the suspension decision or explain the risk each individual may have posed to the ministry's data security. During our interview Ms. Kislock could not recall why she decided to suspend data access for specific individuals. This is understandable given the passage of time and the absence of documentation about the decisions.

7.3.2 ANALYSIS: DATA SUSPENSIONS

The government has written policies developed by the Office of the Chief Information Officer (OCIO) that provide a framework for employees to follow when responding to situations where there are information incidents, including alleged data breaches. According to its policy:

> *An information incident is a single or a series of unwanted or unexpected events that threaten privacy or information security. Information incidents include the collection, use, disclosure, access, disposal, or storage of information, whether accidental or deliberate, that is not authorized by the business owner of that information.*

The OCIO's Information Incident Management Process guides employees, including supervisors, in how to respond to incidents that threaten information privacy or security.[2] It includes requirements such as documenting the incident in detail and its nature. The OCIO also had written processes for responding to "known or suspected" data breaches.[3] The process sets out seven steps, which include:

- reporting the breach
- containing the breach by taking actions that may include isolating or suspending the activity that led to the breach
- assessing the extent and impact of the breach
- documenting the breach and corrective action taken
- considering notifying affected individuals
- informing other parties (such as the Office of the Information and Privacy Commissioner) as appropriate and preventing future breaches

The written processes do not establish a threshold for determining what constitutes a "suspected" data breach. Nor do they provide a framework to help employees determine whether it is necessary to activate the privacy protocols and the obligations which flow from it. The documents only provide employees with steps to follow *after* having determined that there is a "known or suspected" data breach.

This omission in procedure meant that employees lacked guidance about how to assess whether there was a sufficient basis to suspect a data breach. There was an absence of information about whether a bare allegation unsupported by evidence is sufficient to give rise to a suspected breach and trigger the protocol, or whether the ministry should engage in a preliminary assessment of the allegation to determine whether there were reasonable grounds to believe that data may be at risk.

These policy documents must be read in their proper context. Designed to provide guidance for responding to suspected data breaches, they do not authorize arbitrary action.

One of the Health and Social Services (HSS) lawyers said that he told the lead investigator that if there was reason to believe that an individual was misusing data, then that individual's data access should be cut off. He explained that the underlying rationale for his advice was the importance of government protecting the personal information under its control. The HSS lawyer was not certain of the timeframe or the specific individuals to whom this advice was relayed and we do not know if he gave this advice to the lead investigator as of June 2012. There is also

2 Office of the Chief Information Officer, *Information Incident Management Process,* September 2011.

3 Office of the Chief Information Officer, *Process for Responding to Privacy Breaches*, undated.

no information to indicate that any decision-makers had sought, or were provided with, advice on the threshold question at the time the decisions were made to suspend data in June.

Whether there is reason to believe data is at risk requires some identification of, or at least reference to, evidence that, if proven, could support a conclusion that data may be misused or disclosed improperly. The standard at this stage ought to be low. However, conjecture or mere suspicion, in the absence of any evidence, will not constitute a reason to believe that data is at risk and a resulting data suspension could cause other harms.

Inevitably, circumstances will arise in which a suspected data breach will require a fast response, particularly where the risk to the ministry or the public is high. The Information and Privacy Commissioner said:

> *Personal health information is one of the most sensitive categories of personal information held by public bodies. This level of sensitivity requires an accordingly high level of physical, administrative and technical security measures.*[4]

We do not expect the ministry to conduct an investigation into potential improper use of data before suspending data access. There are cases where the ministry must act quickly to fulfill its responsibilities to protect personal information, and this may require the ministry to suspend data access while it investigates. However, acting without an evidentiary basis can result in arbitrary government action, which in turn can undermine government programs, individuals' livelihoods and public confidence.

The decisions to suspend data were made quickly and applied broadly. While some of the later data access suspensions were justified based on the information the ministry had at the time, we concluded that the ministry often did not appropriately consider and document whether there was any evidence for each individual case that, if true, posed a risk. Without this evidentiary threshold assessment, all of the ministry's June 2012 decisions to suspend data access were arbitrary.

The failure to conduct even a preliminary assessment of the allegations, and then articulate specific concerns in relation to each individual under review, impeded the ministry's ability to properly investigate the individuals' conduct. The investigators ultimately engaged in a mass review of email going back years to see if they could identify anyone who had used data in a manner that might be improper or constitute a data breach. Of the approximately 30 individuals who had their data access suspended, few were involved in the data breaches that were reported to the Office of the Information and Privacy Commissioner.

By the time of the first data access suspensions on June 7, 2012, the ministry had been in possession of the complaint for more than two months and, as discussed in Chapter 5, it had conducted a limited review of the contracts. The ministry had not conducted any review of data issues. This may explain why the ministry sent letters suspending data access to individuals who did not actually have data access. Also, despite engaging with employees of the Information and Knowledge Services Branch during the initial review period, the ministry had not gathered any information about the nature of the data access for the two contractors who did use data before suspending their access. There is no evidence that there was urgency to the matter that would explain the absence of any preliminary assessment.

The failure to establish a reasonable basis for each of the suspensions was particularly problematic for the contractors given the resulting duration of the suspensions. As we discuss later, the investigators were directed to deal with matters relating to employees first, and so the investigation into the contractors did not get underway until 2013.

In the case of Dr. Dormuth and Dr. W. Warburton, the ministry did not seek information from either of these individuals to inquire into the nature of their data access. The lead investigator and contracts specialist did meet with Dr. W. Warburton in early June 2012, but at that meeting did not seek specific information about the nature of his data access and there was no subsequent meeting. No employee of the ministry corresponded further with Dr. W. Warburton about his data access. Other than a data demand letter sent in November 2012, the ministry did not speak with or seek any information from Dr. Dormuth about the nature and extent of his data access for

4 Office of the Information and Privacy Commissioner, *Investigation Report F13-02*: Ministry of Health, 2013 BCIPC No. 14, 26 June 2013, 19.

more than a year following his data suspension.[5] A timely investigation and follow-up with contractors could have mitigated the impacts of the suspensions.

7.4 GATHERING EVIDENCE

Once data access was suspended, the investigative process began. The initial phase of the investigation consisted of a review of emails, informal interviews, and a review of contracts related to the allegations brought forward by the complainant. The team at this time still did not include the PSA investigator. It was during this phase that the first members of the team, including the lead investigator, began to form their views. These views were, in turn, shared with new team members.

The terms of reference directed the team to investigate the following issues: inappropriate procurement, contracting irregularities and research grant practices, inappropriate data access arrangements, intellectual property infringement, code of conduct conflict and favouritism. These were broad concerns that needed to be broken down into their specific issues before they could be appropriately considered and assessed.

7.4.1 EMAIL REVIEW

The team conducted its investigation primarily by reviewing and categorizing emails to identify potential wrongdoing that they then used to frame their interview questions.

In early June, the lead investigator asked and received permission from a Director of the PSA to access Ministry of Health employee and contractor email accounts. Certain members of the investigation team received these emails through the Information and Security Branch (ISB), then part of the Ministry of Labour, Citizens' Services and Open Government. The ISB has the technical and forensic investigation expertise to restore employee email records and LAN drives. The ISB assists internal investigations, primarily those conducted by the PSA, Office of the Comptroller General and Office of the Chief Information Officer. In typical investigations, the ISB provides an initial interpretation of the information it has obtained, to help ensure that the requesting ministry remains focused on the central allegations in question. The ISB did not play its usual role in the Ministry of Health investigation.

Once the investigation team received these records, the lead investigator tasked team members with reviewing emails. The team began reading employee emails looking for evidence of wrongdoing. The team reviewed about 400 emails provided by the complainant. The reviewer, who was asked to support the investigation, had provided the investigation team with a binder of documents, containing mostly emails she had received from the complainant.

Searching through emails broadened the scope of the investigation considerably, as the investigation team identified additional "concerns" of which it was not previously aware. This, in turn, resulted in the team asking for more individuals' emails and LAN drives. The primary task for the investigators at this stage, with respect to the emails, was to review and categorize them. The investigators received a batch of emails and reviewed them for "signs of wrongdoing." One such category was "conflicts of interest." One of the investigators who conducted the email review told us they used no framework or standard within which to assess conflicts of interest (despite what exists in the Standards of Conduct for the public service); thus, they did not know what factors to consider.

By assigning an email to a particular category of wrongdoing, the investigators were, as future events would bear out, effectively reaching a conclusion about that email and the conduct of the employee who had drafted it, but doing so without reference to any standard. The two investigators summarizing and categorizing the emails told us they assumed their work would be substantively reviewed by someone else later.

The investigation team continued to search the emails for potential wrongdoing, flagging any of concern. No one, however, was assigned the task of gathering all of the related information necessary to fully understand and assess the concerns that had been identified.

Apart from the lack of structure during this portion of the investigation, the team did not have the resources or the software tools necessary to conduct a comprehensive review of the emails. The nature of email is that conversations can extend in various directions like the branches of

5 The data demand letter sent to Dr. Dormuth is described in Chapter 12.

a tree. The effect was that the investigators did not know with any degree of certainty whether the emails they were relying on represented the full conversation on an issue.

7.4.2 INITIAL INTERVIEWS

At the same time as they began receiving and reviewing employee email records, the lead investigator and another team member began conducting interviews. These two investigators appear to have conducted nine interviews between June 12 and 21, 2012. They interviewed the individuals named in the complaint as well as others with whom those employees or contractors worked. These initial interviews were not audio recorded, although some notes exist.

From the outset, the investigation focused on Dr. Maclure and Dr. Dormuth as two of the individuals named in the initial complaint to the Office of the Auditor General. Based on the allegations in the complaint, the team had concerns both about the number of academic articles the individuals published and their relationships with academic peers. Further, the team scrutinized their association with Harvard University and Dr. Maclure's role as B.C. Academic Chair in Patient Safety at the University of British Columbia (UBC).

Dr. Maclure cooperated in the early stages of the investigation, met with investigators on June 12, 2012, explained the work he was doing and the various projects he was involved with, and readily provided documents as requested. During this June 12 meeting, Dr. Maclure explained the scope of the Alzheimer's Drug Therapy Initiative (ADTI) research project to the investigators by using a whiteboard to illustrate responsibilities for various aspects of the project. From his perspective, he was explaining a large collaborative research project between the University of Victoria and the Ministry of Health that had developed over years through a complicated process of stakeholder engagement and policy work. He used the same meeting to describe the other research projects in which the Pharmaceutical Services Division (PSD) was involved.

Dr. Maclure's presentation was, however, received far differently than he had intended. The two investigators with whom he was speaking saw what they perceived to be a web of conflicts between researchers and the ministry, with Dr. Maclure at the centre. One of the investigators who was at that meeting, in describing the whiteboard diagram drawn by Dr. Maclure, said:

> *Maclure actually drew up on a whiteboard all of these different contracts … and showed how they all tangled together with each other … it was at that point we were going, "oh, this doesn't look right" … especially when he's wearing two hats … walking out of that meeting, the main concerns we had was that there was conflict – major conflict.*

When we interviewed him, the same investigator was unable to explain the specific contracts or relationships that caused such concern. However, he did recall meeting with Ms. Kislock after the initial round of interviews to explain that the team had concerns and the work needed to continue. For this investigator, that meant looking more closely at the contracts that Dr. Maclure had described.

The two investigators also interviewed Drs. W. and R. Warburton on June 12, 2012. Dr. R. Warburton was not told the meeting could potentially lead to disciplinary action and was not told she could bring a representative with her. Notes of the meeting indicate that during this interview, the investigators received key pieces of information about Dr. R. Warburton's role in the ministry. Dr. R. Warburton gave evidence to us that she found the questioning "hostile" and could not figure out what she was apparently accused of doing.

7.4.3 CONTRACT REVIEW AND INITIAL MEETING WITH THE OFFICE OF THE COMPTROLLER GENERAL

In addition to conducting initial interviews and reviewing the emails, the Ministry of Health investigation team reviewed contracts related to the various projects associated with the complaint.

Manjit Sidhu, Assistant Deputy Minister of Financial and Corporate Services and Executive Financial Officer, made the decision that the matter required the involvement of the Office of the Comptroller General. On June 22, 2012, the investigation team met with the Investigation and Forensic Unit (IU) of that office, to discuss the contracting issues related to the complaint and initial review. Present at the meeting were members of the investigation team, including the team's contracts specialist, as well as the Director and two staff members from the IU. It is likely that

this meeting is the first time the RCMP was mentioned in the context of the investigation. According to evidence from one witness who was at that meeting, in response to the lead investigator's description of the nature of the allegations to the attendees, IU staff questioned why investigators had not already gone to the RCMP.

In the early stage, the IU was involved with the investigation only in a monitoring capacity. It was not actively engaged with the investigation. The IU Director told us that after the June 22, 2012 meeting he sought permission from the Comptroller General to begin an active investigation. As we describe in Chapter 14, in October 2012, the IU commenced an investigation.

The investigation team's contracts specialist eventually concluded that there were no irregularities in the contracts themselves. He concluded that the contracts had been properly signed by individuals with appropriate authority and reviewed by legal counsel, had followed the appropriate internal approval process and were consistent with the government's Core Policy and Procedures Manual.

The contracts specialist communicated his assessment to the rest of the team, including the lead investigator, on June 29, 2012. However, a belief that there was wrongdoing continued and led the investigators to assume that the contract irregularities must be found elsewhere than in the contracts themselves.

7.4.4 ANALYSIS: EVIDENCE-GATHERING PROCESS

The initial evidence-gathering process lacked organization. The investigation team's process was inefficient and unstructured such that it both failed to gather relevant information while concurrently expanding its scope of inquiry. The investigation team failed to adequately and appropriately assess the information that it then did obtain in accordance with applicable standards such as the *Standards of Conduct for BC Public Service Employees*.

Some members of the investigation team we interviewed described the evidence-gathering process as "chaotic" or "unorganized." One investigator left the team on July 13, 2012. That individual told us:

> *I didn't like anything where it was going. I knew that it was going to morph into this massive complex problem. I knew that four people should not be preparing a report of this size. And there were just so many different red flags throughout the whole process … there was so much information that I felt we had only got to the tip of an iceberg.*

As with the initial review of the complaint, some of the individuals doing the early work lacked expertise in the applicable laws, standards or policies. No one provided the investigators with an analytical framework to guide their work. When we asked one of the investigators how she knew what to look for when investigating, she responded, "Exactly, how do you know?" She said:

> *… there was so much going on that you didn't even know where to start. You didn't know should we go this one, should we look at this one. It was how do we look at all of them … Yeah, like, just looking at PEG, you need ten people to look at PEG.[6] You need ten people to look at ADTI. Like how – I couldn't just go look at PEG and come back with the answers.*

In the interviews conducted by the two investigators in June 2012, the interviewees provided background information about PSD programs, which could have been a good first step in the investigation process.[7]

6 PEG stands for PharmacoEpidemiology Group. It is a working group of the Therapeutics Initiative and "uses epidemiological methods to analyze linked administrative data in British Columbia from PharmaNet, Medical Services Plan, and hospitals to answer important questions unaddressed in clinical trials. Our work includes evaluation of policies and educational interventions, monitoring of drug utilization, innovations in research methodology, and analysis of prescription drug safety and effectiveness." Therapeutics Initiative, "About the PharmacoEpidemiology Group (PEG)" <http://www.ti.ubc.ca/about-us/working-groups/pharmacoepidemiology-working-group/>. See also Chapter 12 for further details about how PEG relates to the work of the Ministry of Health.

7 For example, in June 2012, one Executive Director, concerned that the investigators lacked relevant knowledge about PSD, referred them to division documents that would help them understand the context within which PSD operated, and offered to answer any follow-up questions the team may have had. The investigation team did not contact that Executive Director again to clarify the programs or provide additional context. Instead, when the investigation team contacted the Executive Director in the fall of 2012, it was to conduct a formal interview in the context of allegations of misconduct against the Executive Director.

Other background information available to the investigation team in 2012 – but not considered – included briefing notes, approvals of programs and contracts by Assistant Deputy Ministers and Deputy Ministers, job descriptions, division plans, PSD annual performance reports, and the Auditor General's 2006 report *Managing Pharmacare* and subsequent updates by Bob Nakagawa, former Assistant Deputy Minister of PSD.

With limited knowledge about PSD's programs, the divisions in the ministry, the ministry's objectives and priorities or the employees' roles, duties, obligations and responsibilities, the investigators drew conclusions based on insufficient evidence and overreliance on the original complainant.

Despite having just worked on the review of data access issues in the ministry, the contents of draft reports produced by the lead investigator and team members during the review did not consider the impact and effects of the data delays on ministry programs that might have provided some alternative explanations of employee conduct. The Timely Access report identified some of the systemic issues that were causing delays in access to data – such as the data stewards' misperceptions about inappropriate data use.[8] The Timely Access report described the history and context of these issues through interviews and information gathered from a variety of stakeholders. The lead investigator described, in her interview with us, her understanding of the systemic data access issues that then existed in the Ministry of Health.

The Timely Access report was being worked on at the same time as the Ministry of Health investigation that resulted in the suspension and termination of ministry employees and contracts. Given that the same people were involved in both the Timely Access report and the Ministry of Health investigation, it is difficult to reconcile the lead investigator's and the Assistant Deputy Minister's knowledge of systemic issues related to data access, as reflected in the Timely Access report, with the suspension and termination decisions that were clearly related to the problems which existed in the ministry. The Timely Access report takes a balanced and reasonable approach to some of the concerns raised by the data access personnel. For example, it acknowledged that the perception of preferential treatment and misuse of data could be based on a misunderstanding of facts and said that "a greater understanding and appreciation of the roles and responsibilities of various actors in the data access processes … may help dispel such perceptions."[9]

The failure to develop a solid understanding throughout the team of the programs and practices within PSD and the broader data access challenges in the ministry meant that investigators were viewing the emails without adequate context. As we discuss in more detail below, most of the emails relied on as supposed evidence of wrongdoing showed only that people were trying to do their jobs in a context where unresolved difficulties with data access were impacting the delivery of ministry objectives.

At least one individual who was interviewed quickly raised concerns about the investigation. This person wrote to the lead investigator and contracts specialist that "… this 'inquiry' has called my entire professional career and personal ethics that are integral to that career, into question. I was and am very upset about this turn of events, all based on a malicious anonymous tip to the Auditor General." The consequences of the investigation team's failure to appropriately assess the evidence it gathered through emails, interviews and the contracts review, became apparent in the Internal Review report drafted at the end of June. In the following section, we describe and analyze the content of the various drafts of the Internal Review report.

7.5 INTERNAL REVIEW REPORT

The initial results of the Ministry of Health's investigation were compiled in a draft report called *Internal Review: Ministry of Health, Pharmaceutical Services Division, Research and Evidence Development*.[10] There are several versions of this report, which was never finalized. Despite remaining in draft format throughout the investigation, the investigation team used the report as a briefing document

8 *Timely Access to B.C. Health Data: A Review of the Processes and Recommendations for Change*, draft report, September 2012.

9 *Timely Access to B.C. Health Data: A Review of the Processes and Recommendations for Change*, draft report, September 2012, 35.

10 These reports were prepared by the Ministry of Health investigation team and are different from the material prepared by the reviewer in April and May 2012.

and shared it with other ministries, the Office of the Auditor General, and the RCMP. Most crucially, the report was shared with decision-makers who, in turn, relied on it to support their decisions about employees and contracts.

The content of the first draft of the Internal Review report was developed in the last week of June and first week of July 2012. The PSA investigator and the Strategic HR manager were not involved in the drafting of the Internal Review Report. The first draft was completed before the first three employees were provided notice of their employment suspensions.

The Internal Review report related primarily to the issues raised by the complainant in her March 2012 complaint to the Office of the Auditor General. The concerns regarding the data issues at this point were around general concerns of data misuse and were not about any specific incidents.

On June 25, 2012, at 9:48 a.m. the lead investigator wrote to her team requesting that they prepare a draft report for 1:00 p.m. that day so she could provide a progress report to the three Assistant Deputy Ministers who were sponsoring the investigation. She asked the investigators to contribute the following content:

1. *Summary of contract/grant findings*
2. *Summary of phone bill/and other purchases …*
3. *Data access info … from what we have so far, i.e. what they have been doing to get access*

The lead investigator explained that she would "write up the specifics per individual." She said she did not need "a lot of detail" but asked the investigators to "include key findings and any attachments as evidence." To this email, the lead investigator attached a short summary of the review activities, meetings and interviews that had occurred to date.

The individual who carried out the initial review of the complaint prepared a two-page summary of the contract and grant findings. About one hour and 45 minutes later, she emailed the summary to the contract specialist for his input, who in turn provided it to the lead investigator. This investigator used information she had gathered from the complainant and relied entirely on the complainant's understanding of PSD's contracting practices when she created the summary. At least one other investigator also relied significantly on the complainant as a source of evidence. The complainant's views were visible in the first draft Internal Review report created by the investigation team: As shown in Table A the wording in the contract and grant summary is similar to, and in some places exactly replicates, the wording in the complainant's document.

7.5.1 JULY 6 AND JULY 18, 2012 DRAFT INTERNAL REVIEW REPORTS

Between July 3, 2012, and July 6, 2012, email records and tracked changes in the documents show that the lead investigator, contracts specialist and the two employees supporting the investigation provided input and edits to the first draft of the Internal Review report. At the end of this process, the investigators produced a draft report dated July 6, 2012.

The lead investigator showed the July 6 report to the three ADM's sponsoring the review, and she told us they understood the interim nature of the report. Mr. Sidhu forwarded the July 18, 2012 version of the report to the Investigation and Forensic Unit of the Office of the Comptroller General on July 19, 2012. The lead investigator forwarded the August 16, 2012 version of the report to the RCMP on August 24, 2012.

The July 6 draft sheds light on what the investigators thought they had found by the date of the employee suspensions. At this stage of the investigation, the investigators set out a series of findings in relation to contracting improprieties, misuse of data, and breaches of the Standards of Conduct by specific employees. The report demonstrates some of the critical flaws in the investigation and provides some understanding as to what went wrong.

The first section of the July 6, 2012 draft described the investigative purpose, approach and process. It stated that by July 6, 2012 the investigation had completed some initial interviews, a review of contracts and grants, and a "forensic examination of email communication."[11] The draft listed legal counsel from the Ministry of Justice, Legal Services Branch (LSB), as having been consulted in the investigation. Around mid-June, LSB was asked to

11 The report offers no explanation of what the "forensic" examination of emails entailed. We received no evidence that it went beyond reading the emails.

assist the Ministry of Health in responding to concerns from the lawyer of a contractor whose data access had been suspended.

When the July 6, 2012 draft report was written, the investigators had only shortly before begun their investigation. However, the language in the draft report is often conclusive. For example, the initial conclusions in the July 6 draft were framed as "findings" and "recommendations," including specific recommendations related to the individuals the ministry decided to suspend. The July 6 draft report stated it "provides an overview of the progress and findings to date from the review of procurement practices, grant awards and contracting, data access and related agreements and intellectual property in the Research and Evidence Development section" of PSD. The draft report then lists specific issues that the investigators found related to standards of conduct for human resources and the public service. The issues listed in the report combined statements of fact with unproven allegations of employee misconduct, which gave the appearance that the allegations were established facts. While only in draft form, the report suggests that the investigation team was quickly coming to conclusions prior to taking the necessary investigative steps and prior to having reviewed sufficient evidence.

The July 6 draft report also parallels some of the language of the complainant in many areas. While the complainant herself did not draft or edit the report, some of the report paraphrased the complainant's submissions as findings without having investigated them yet.

For example, one section of the July 6, 2012 draft described the issues the investigation had identified in relation to contracts and grants. This description contained language sourced directly from the complainant's written submissions to the initial reviewer, as set out in Table A:

TABLE A: COMPARISON OF COMPLAINT AND JULY 6 DRAFT INTERNAL REVIEW REPORT

Text written by complainant and provided to reviewer in April 2012	July 6, 2012, draft Internal Review report
The Ministry of Health is fortunate to have some employees and contractors that also hold positions at universities and are directly involved in health research undertaken there.	Initial findings may suggest that the MoH employs individuals and contractors who also hold dual positions at universities and are directly involved with health research undertaken there.

continued on next page

TABLE A: COMPARISON OF COMPLAINT AND JULY 6 DRAFT INTERNAL REVIEW REPORT

…continued

Text written by complainant and provided to reviewer in April 2012	July 6, 2012, draft Internal Review report
[A]llowing MoH employees/contractors who also work at universities to draft, negotiate the terms of and/or be a signatory to a contract or agreement on behalf of the MoH when: ■ the agreement is with a university where their relative is one of the researchers that will receive MoH data or funding; or ■ the agreement is with a university where the MoH employee/contractor is one of the researchers that will receive MoH data or funding (so that the MoH employee or contractor is, in effect, the other party to the contract with the MoH); ■ the MoH employee/contractor or one of their friends or immediate family members is the other party to an agreement where a Direct Award is being made.	There may be suspicion of these MoH employees/contractors also work at universities to draft, negotiate the terms of and/or be a signatory to a contract or agreement on behalf of MoH when: ■ the agreement is with a university where their relative is one of the researchers that will receive MoH data and or funding; or ■ the agreement is with a university where the MoH employee/contractor is one of the researchers what will receive MoH data or funding; and ■ the MoH employee or one of their family members is the other party to an agreement where a Direct Award is being made.
Some MoH projects have been subdivided into numerous parts, yet there is no documentation of that connection, nor is there an accounting of the combined total scope and cost of the project nor was the necessary authorization sought.	[S]ubdividing MoH projects into numerous parts, yet documentation to account for the combined total scope and cost are difficult to find and piece together.

The report appends a summary of the contracts under review. In that summary it makes reference to a specific contract and identified a problem from "recent emails" that indicate the ministry intended to transfer money without a contract. The "recent emails" used to support this conclusion was an email from the complainant herself speculating about this allegation. It had no other evidence to support a concern that money might be transferring without a contract and the contract itself contained provisions that authorized the transfer of funds. The ministry's financial records show that the funds were never transferred, and the ministry was still holding the funds in relation to that contract.

7.5.1.1 EMAIL SUMMARIES

As we described in the gathering evidence section above, the lead investigator had instructed two individuals on the investigative team to categorize emails. The individuals

told us they were also instructed to create summaries of the emails they had categorized. We reviewed these and found they were not simply summaries as they contained embedded conclusions on issues related to contracting, data access, and the code of conduct.

The email summary document appended to the July 6 draft described the review of emails as "forensic." When we compared the summaries with the source emails, the summaries were often factually incorrect. In other cases, the investigators had misinterpreted the contents of the emails. Some of the emails included in the summary were the complainant's own messages, including ones that she had forwarded to the team. In other cases, the investigators interpreted emails where employees discussed opinions around data access for an individual as "evidence" that employees and contractors were subverting the usual data access process. In many cases, the summaries equated merely discussing an issue or asking a question with wrongdoing.

In compiling the emails for the appendix, the investigators included only emails or portions of an email string that pointed to potential wrongdoing. In so doing, many of the emails were not properly represented in the summaries, or were otherwise improperly categorized. For example:

- An email described as evidence of "suspicious" contracting practices was a conversation between the complainant and another employee about developing the terms of an information sharing agreement.[12] It became clear to us from reading the full email chain in relation to this issue that a valid question about intellectual property rights had arisen through their conversation, but it was subsequently resolved by Legal Services Branch. The full email chain explaining the conversation and resolution was not referenced in the email summary even though both the complainant and the employee were included in the relevant emails.
- A "suspicious email categorized under "contracts" was the complainant's own email stating that she was "struggling to find legal authority" related to an agreement she was working on. Missing from the July 6, 2012 draft was the background evidence of years of effort undertaken by ministry employees to ensure it had authority to collect and disclose personal data for this project.[13]
- A "suspicious" email also categorized under "contracts" was a summary of an email from the complainant where she notified the investigators of a potential issue on which she was ultimately mistaken.[14]
- A summary of a "suspicious" email regarding employee access to a spreadsheet containing PharmaCare data was presented as evidence of "securing MoH Data."[15] The summary ignored the fact that the employees were permitted access to the spreadsheet as part of their employment.

During the review, one of the investigators wrote to the lead investigator notifying her that, in his view, many of the emails they were reviewing were not actually evidence of any impropriety but mostly just allegations and rumour. Nonetheless, as the investigation continued, the emails came to be viewed as the "evidence" of wrongdoing. Later, in the subsequent drafts of the Internal Review report, the appendix of email summaries was either removed or included with a proviso that the email summaries:

> *… provide support (or evidence) of the allegations in the key findings of this review. Please note: discussions in emails about events (such as inappropriate data access) do not necessarily constitute as evidence that the event occurred; only that it was discussed in emails. These email summaries are intended to inform further investigations.*

The investigation team completed the next draft of the Internal Review report on July 18, 2012, the day after the first employee suspensions (see section 7.6). By this time the initial reviewer had left the investigation. The sponsoring Assistant Deputy Ministers reviewed the draft report and provided edits to the draft. For example, the draft versions that Ms. Walman was working on at this

12 *Internal Review: Ministry of Health, Pharmaceutical Services Division, Research and Evidence Development,* draft v. 1, 6 July 2012, 31.

13 *Internal Review: Ministry of Health, Pharmaceutical Services Division, Research and Evidence Development,* draft v. 1, 6 July 2012, 31.

14 *Internal Review: Ministry of Health, Pharmaceutical Services Division, Research and Evidence Development,* draft v. 1, 6 July 2012, 30.

15 *Internal Review: Ministry of Health, Pharmaceutical Services Division, Research and Evidence Development,* draft v. 1, 6 July 2012, 39.

time show that she contributed by adding and removing content to the key findings and preliminary recommendations in the report. The July 18 draft was considerably shorter than the first version. It retained only the executive summary, key findings and preliminary recommendations. To this, the investigators attached four appendices:

1. Terms of Reference for the investigation
2. Relationship Web
3. Glossary of Terms
4. List of Acronyms

The July 18, 2012 draft no longer referred to employees and contractors by name, and the team removed the email summaries from the appendices. However, the investigators maintained the email summaries in a separate document and continued to rely on them as evidence to support the report.

7.5.1.2 RELATIONSHIP WEB

The July 18 draft of the Internal Review report appended the Relationship Web, which was intended to show the various relationships between Ministry of Health employees and external researchers and contractors.

The diagram served as a visual map of relationships of individuals and programs. It was, for the most part, accurate in depicting the various programs and the relationships between one another and how those programs related to the individuals involved. The diagram was a key document because the investigation team used it to brief decision-makers and, in turn, some of those decision-makers used it to brief their colleagues and superiors. This document was the only document used by Deputy Minister of Health, Graham Whitmarsh, to brief Head of the Public Service Agency, Lynda Tarras and Deputy Minister to the Premier, John Dyble in August 2012.

The problem was not the diagram, but rather its use. Few individuals we spoke with, other than those on the investigation team, were able to make sense of the diagram. Some people told us they assumed it depicted wrongdoing rather than depicting program and individual relationships in a complex and multifaceted program area.

7.5.2 EXECUTIVE RELIANCE AND PERSPECTIVES ON THE DRAFTS OF THE INTERNAL REVIEW REPORT

On June 27, 2012 Ms. Walman wrote to the lead investigator asking to see the Internal Review Report prior to making decisions regarding suspensions. She writes,

> *I appreciate all the effort that has gone into this review. At this point I would like to see the Internal Review Report, with supporting documentation before I move to give letters and suspensions to staff. I would like to have some very clearly articulated findings, evidence and contracts to review and then move quickly to the PSA investigation.*

On July 13, 2012, Ms. Walman wrote to an employee of Government Communications and Public Engagement, attaching a memo containing a "high level overview of the review process and our current actions to date" with respect to the Internal Review. Her memo indicated that the executive had relied on the investigation team's findings made in their draft Internal Review report. In her written update she stated:

> *The Internal Review draft report has now provided us with a number of findings and they are drafting final recommendations. In order to be proactive and ensure that were are dealing with these issues and protecting ministry data, immediate action has been taken.*
>
> Immediate Actions taken:
>
> 1. *Data access was suspended for four employees, effective June 7, 2012.*
> 2. *Signing authority for invoices, expenses or contract approval suspended for same four employees, June 7, 2012.*
> 3. *The Public Service (PSA) has been provided with initial findings and will undertake a formal investigation with respect to four staff. This is now underway.*
> 4. *Have met with the Office of the Comptroller General to advise them of findings.*
> 5. *Senior staff will meet with UVic and UBC with respect to the contracts that have been provided to their institutions.*

6. *Staff at the Office of the Information Privacy Commissioner's Office have been advised.*
7. *Data access being reviewed and suspended for all people involved in PSD contracts under review, in government and at UVic and UBC.*
8. *On Monday, July 16, 2013 four staff will be suspended without pay, pending further investigation by the PSA.*

The subsequent July 18, 2012 draft of the Internal Review report was distributed widely. Deputy Minister Graham Whitmarsh, the sponsoring Assistant Deputy Ministers, the Public Service Agency, Government Communications and Public Engagement, the Comptroller General's office, the Legal Services Branch and the Office of the Auditor General all received a copy (although not all necessarily on July 18). For Mr. Whitmarsh, it was the first version he had seen; he received a copy when he returned from vacation at the end of July.

The reactions of the Ministry's Assistant Deputy Ministers varied. Mr. Sidhu met with the lead investigator on July 18, 2012, to discuss this version of the report. He reviewed the draft and, concerned that there was no evidence, asked the lead investigator to include the evidentiary basis for the conclusions made in the draft. He said, "when I looked at it, I said … show me the evidence here, right … we're making all these recommendations and allegations; substantiate that." He was told the evidence was in the emails the team had reviewed. At the time, Mr. Sidhu was not confident the conclusions were supported by the evidence. The lead investigator did not recall Mr. Sidhu making comments regarding substantiating the Internal Review report. She recalled him saying "look into this" with respect to items referred to in the report.

Mr. Sidhu's concern that the investigation lacked evidence was shared by Ms. Elaine McKnight who, at the time, was the Ministry of Health's Chief Administrative Officer and Associate Deputy Minister. As we will describe in the following section, Ms. McKnight directed the investigators to put together the evidence underlying their findings before extending the investigation any further.

Ms. Kislock told us that when she read findings in the report she relied on them as though they were true. Ms. Walman did not agree that including a "finding" in a report meant that it had been shown to be true. She told us that she viewed the findings in the report as follows:

> *So I think what they're saying is that "here are the issues we've identified, that the team has identified."*

Mr. Whitmarsh also received a copy of the July 18, 2012 draft Internal Review report containing the Relationship Web. When we spoke with him about the report, it was clear that he did not have a clear understanding of how it had been developed. Despite this he explained that he was prepared to make decisions based on its conclusions. He told us that he assumed that when the report made "findings," there was evidence underpinning them.

7.5.3 LATER DRAFTS OF THE INTERNAL REVIEW REPORT

The July 18, 2012 draft was the most influential in terms of the investigation and the decisions to terminate employees and contractors.

The investigators completed a further draft of the Internal Review report on August 16, 2012. The August 16 draft contained the July 6, 2012 appendix summarizing emails and made some minor changes to the July 18, 2012 content. In the August 16 draft, the investigators added the disclaimer to the email summary stating that the emails were not evidence that the events occurred. While such a cautionary note was indeed warranted, it is noteworthy that it was first included in a draft of the report at a time when some employees had already been suspended without pay.

Later versions of the report were not completed until the following year: a fourth draft was completed on September 26, 2013, and the last draft (although it was never finalized) was produced on October 4, 2013. This last report focused primarily on summarizing the policy and process steps that had been taken over the preceding year.

7.5.4 ANALYSIS: DRAFT INTERNAL REVIEW REPORTS

The two drafts of the Internal Review report produced in July 2012 had a significant influence on the direction of the Ministry of Health investigation. We identified two risks at this stage. The report drafts were used to brief decision-makers without the investigators first having a

proper understanding of the subject matter or issues they were examining. Many of the drafted conclusions were based on misunderstandings. The second issue was a difference in understanding between the investigation team and the ministry's executives in properly understanding the stage the investigation had reached.

In her December 2014 report on the Ministry of Health internal investigation, Marcia McNeil determined that conclusions of employee wrongdoing were formed at a very early stage.

We concur with Ms. McNeil. The Internal Review Report was presented to the decisions-makers with a clearly developed theory of the information in the form of findings, including about employee misconduct. While it was in draft form, it was demonstrably relied on by members of the investigative team and the decision-makers as representing outcomes of the review.

Ms. McNeil also found that "the Investigation Team had adequate resources to review and understand the complex web of issues which generated its creation." This conclusion was based on her understanding of material, provided to her by government, of the diverse backgrounds of the team members and their access to specialist expertise, legal advice and senior executives within the Public Service Agency (PSA).[16] An internal PSA document prepared in the fall of 2014, which assessed the investigation, concluded that "the investigation was hampered by the investigators' lack of familiarity with the complex and highly specialized matter that they were examining and the significant number of witnesses and materials that they were required to review." What became clear to us in our investigation was that although the team may have had access to sufficient resources to gain an understanding of the issues, it did not effectively utilize those resources when making its initial findings and recommendations.

The drafts demonstrated that the investigators had adopted and expanded on the complainant's theory of wrongdoing. The investigation team presented its report and its "findings" and "recommendations" to decision-makers without sufficient qualifiers as to the stage the investigation was actually at. This led to a misunderstanding that wrong-doing had already been found.

What we heard during our investigation was that there was a different understanding of the state of the investigation. The investigation team believed that the investigation was still in its early stages. On the other hand, a number of ministry executives understood the investigation to have already confirmed a great many of the matters under investigation.

7.6 FIRST THREE EMPLOYMENT SUSPENSION DECISIONS

When the PSA investigator joined the team on June 21, 2012 she was briefed by the lead investigator about the investigation and she made notes of the conversation. Her notes mention that they were trying to interview people and lists concerns that an employee was sending "funding to best friend" and another was "writing proposals" for a university. The PSA investigator recalled her first interaction with the lead investigator as follows:

> *I just remember thinking what am I getting myself into because I [had] no idea. These allegations sound really serious, but my God this going to be a confusing case. So I certainly remember that my head was spinning.*

Around June 22, 2012, the lead investigator and the PSA investigator contacted legal counsel from the Labour, Employment, and Human Rights (LEHR) group, Legal Services Branch (LSB), Ministry of Justice about the investigation, who usually advised the PSA about legal issues arising from the employment of government employees who are excluded from union membership.

On June 25, 2012, that lawyer advised the PSA investigator that he could not act as counsel due to a potential conflict. He referred the PSA investigator to another lawyer within the LEHR group who was based in Vancouver and had considerable experience in labour and employment matters. A significant part of that lawyer's practice was advising the PSA on legal issues relating to unionized employees in the context of grievances and arbitrations.

In this report, we refer to this individual and her colleagues in the LEHR group as the "employment lawyer" or "employment lawyers."

16 Marcia McNeil, *Investigation Process Review: 2012 Investigation into Employee Conduct in the Ministry of Health*, December 2014, 27.

The employment lawyer connected with the PSA investigator later that same day, and was invited to a conference call with the PSA investigator, the lead investigator, the PSA Employee Relations Specialist, Ms. Kislock and Ms. Walman. The employment lawyer requested background materials from the PSA investigator in advance of the call. The PSA investigator informed her that she did not have any background materials aside from her notes and two documents describing Dr. Maclure's PSD job and role as B.C. Academic Chair in Patient Safety. Only those two documents were provided to the lawyer in advance of the call.

The purpose of the conference call was to discuss issues relating to the employees under investigation. The employment lawyer told us that she was not asked for any advice in the course of that call and that it was not clear why she was involved.

Also on June 25, 2012, the lead investigator, the PSA investigator and the Employee Relations Specialist met with Ms. Walman and Ms. Kislock. The PSA investigator told us that she recommended that Dr. R. Warburton, Dr. Maclure and Mr. Mattson should be suspended. Consistent with PSA practice at the time, these suspensions would be without pay.[17]

Despite having been on the file for only four days (two of which were a weekend), the PSA investigator confirmed to us that she gave the advice to suspend without pay. She gave this advice despite having seen no direct evidence of wrongdoing and, as a result, she relied entirely on information from the lead investigator. The PSA investigator explained that a decision to suspend is made when the allegations are so serious that termination is a potential consequence, and that the "person's continued employment puts government or the ministry at risk." The PSA investigator did not obtain sufficient information about the employees to enable her to assess whether they posed a risk to government to support her recommendation to suspend without pay.

The PSA investigator told us that, in her view, Ms. Walman and Ms. Kislock were fully up to speed on the investigation at the meeting, and did not need to be briefed on what had been discovered to date. She described their knowledge as being more advanced than her own at that time. When we asked Ms. Kislock, she had no recollection of the meeting, and told us she was not involved in the decision to suspend employees. Ms. Walman remembered a meeting and specifically remembered an issue regarding the hiring of Dr. R. Warburton, but did not remember the substance of the discussions.

Following this meeting, specific decisions were made to suspend individuals, and suspension letters were drafted by the Employee Relations Specialist of the PSA. The PSA investigator said that she and the Employee Relations Specialist "probably jointly would've both recommended suspension of the employees, that was totally standard." The Employee Relations Specialist agreed that she thought suspensions were appropriate "based on the information I was told."

On June 26, 2012 the Employee Relations Specialist provided the employment lawyer with an unaddressed draft letter in relation to suspensions without pay. The covering email indicated that the attached draft letter was for Dr. Maclure and Dr. R. Warburton, and requested that the employment lawyer reply with any comments or feedback on the draft documents. The employment lawyer reviewed the documents and did not suggest any changes.

The employment lawyer told us that she was not asked for her advice on the merits of the proposed suspensions without pay. She said that she remembered thinking that the suspensions were premature. She said that, at this stage, she had no file or other information on which to base an opinion as to the merits of the suspensions. This is consistent with the records we reviewed.

Around this time, the employment lawyer opened a new file in relation to the investigation, and briefed two of her colleagues in the LEHR group about the matter. One of these two colleagues had significant experience in labour and employment law matters in private practice, and had joined the Ministry of Justice in April 2012. She eventually became the LSB lawyer primarily responsible for matters relating to the terminated employees.

17 The Employee Relations Specialist gave evidence that there was "a lot of conversation" around this question. On June 27, she re-drafted the suspension letters to be "with pay;" this was changed back to "without pay" on July 11.

7.6.1 NOTICE OF EMPLOYMENT SUSPENSION DECISIONS AND RELATED LEGAL ADVICE

On July 17, 2012, the Employee Relations Specialist informed legal counsel at LSB that the notices of suspension without pay had been delivered to the affected employees, and that Dr. R. Warburton had indicated she would be retaining a lawyer if her pay was not reinstated. The three letters were signed by Ms. Walman, Assistant Deputy Minister responsible for PSD. On July 20, 2012, counsel for Dr. R. Warburton wrote to the ministry seeking reinstatement of Dr. R. Warburton's pay on the basis that the province lacked authority to withhold it, and requesting details about the allegations against her. The Employee Relations Specialist provided the letter to the employment lawyers to prepare a reply.

The employment lawyer asked the Employee Relations Specialist to provide copies of the following documents for their file:

- the suspension letters
- documents relating to the misconduct at issue
- PSA policies or memos with respect to the practice of suspensions without pay

The Employee Relations Specialist indicated that she did not have any documents supporting the suspensions without pay, but that she was advised that there "are significant volumes of emails which appear damaging which were gathered by OCIO's office." She also noted that she did not have a "written policy" supporting the suspensions without pay, but that the practice of the PSA was to suspend without pay in circumstances where there are allegations of serious misconduct or potential criminal charges.

The PSA investigator gave evidence that the employment lawyer advised, prior to the suspensions on July 17, 2012, that the PSA should only suspend the excluded employees with pay because suspending them without pay exposed the province to constructive dismissal claims. The PSA investigator gave evidence that legal counsel had given the same advice to the PSA on past files.

On July 25, 2012, the employment lawyer provided the PSA investigator and the Employee Relations Specialist with a draft response to the July 20 letter from Dr. R. Warburton's counsel. The draft letter defended the suspensions without pay. The employment lawyer explained in the covering email that although the draft letter cited the *Public Service Act* and the PSA's practice as the basis for Dr. R. Warburton's suspension without pay, if Dr. R. Warburton brought an action against the province for breach of contract arising out of the suspension without pay she would likely succeed. The employment lawyer explained that, in the absence of a statutory provision or express provision in the employment contract, a suspension without pay was tantamount to a constructive dismissal. She also indicated that, given the suspension without pay and Dr. R. Warburton's personal circumstances, it was important that the PSA complete its investigation quickly.

On July 26, 2012, the Employee Relations Specialist provided the employment lawyer with a letter from counsel for Mr. Mattson for reply. Mr. Mattson's counsel noted that Mr. Mattson supported the ministry's efforts to conduct a detailed review of his work and the work of his department, and indicated that Mr. Mattson was prepared to cooperate fully with the ministry's investigation. With respect to the suspension without pay, Mr. Mattson's lawyer noted that the common law only permitted an employer to suspend an employee without pay where a suspension without pay was authorized by a term of the employment contract. He noted that there was no provision in the employment agreement between Mr. Mattson and the ministry that permitted the ministry to withhold Mr. Mattson's pay. Mr. Mattson's counsel sought immediate back pay for Mr. Mattson and reinstatement of his salary. Mr. Mattson's lawyer also noted that communication of the fact of Mr. Mattson's suspension should be limited to his co-workers that have a need to know, and in doing so the ministry was "likely limiting the damage that defamation by innuendo may be doing to his reputation."

On August 2, 2012, Dr. Maclure's lawyer wrote to the ministry setting out Dr. Maclure's position that the province lacked legal authority to suspend Dr. Maclure without pay and reserved Dr. Maclure's right to assert constructive dismissal.

On August 3, 2012, the employment lawyer contacted the PSA Director by telephone and email. The employment lawyer raised a concern that, if the province was unable to establish just cause to terminate Dr. R. Warburton, she

may have a successful claim for aggravated damages owing to the manner of her termination, and referred to case law wherein an employee was awarded damages in part because she had been suspended without pay prior to her termination. The employment lawyer noted that Dr. R. Warburton's personal circumstances were also a potentially aggravating factor.

Lynda Tarras, then-Head of the Public Service Agency, told us that suspending employees without pay had been PSA's practice for many years: "if there is a determination that a suspension is warranted, then that is without pay." This included both disciplinary suspensions and suspensions pending investigation. The PSA relied on the language of the collective agreement to suspend unionized employees without pay. In the case of excluded employees, Ms. Tarras was concerned about the optics of suspensions with pay, telling us, "there's kind of a philosophy that a suspension with pay is a vacation." She was sensitive to the public scrutiny that might result from suspending employees with pay, and justified this approach on the basis that if there was an "error" in the suspension, the employee would be repaid.

7.6.1.1 INVOLVEMENT OF MINISTRY OF HEALTH EXECUTIVES IN THE SUSPENSIONS

As described above, Ms. Walman made the decision to suspend these employees relying on advice from the PSA and the investigators. She signed the three suspension letters. We found no evidence to indicate that then-Deputy Minister of Health, Graham Whitmarsh, participated in this decision. Mr. Whitmarsh was on vacation from July 14 – 29, 2012 and employees were notified of the suspensions while Mr. Whitmarsh was away. Mr. Whitmarsh told us that one of his Associate Deputy Ministers called him while he was on vacation and informed him of the suspensions after they had occurred.

While Mr. Whitmarsh was away, Ms. McKnight, who was Acting Deputy Minister in Mr. Whitmarsh's absence, met with the lead investigator, the PSA investigator and Ms. Walman to be briefed on the suspension decisions. She told us that "they did a whole kind of walk-through some of the exhibits they had … they showed me a number of emails that where people were starting to circumvent the rules … they gave me the whole kind of background of where they were going." At the same time, however, she was not in a position to judge how the team had arrived at the recommendations to suspend. She said, "I trusted my colleagues, that they had done their homework." She was clear that "they weren't asking for my permission to suspend. They had made that decision already." She understood that the investigators were briefing her so that she was aware of what was happening.

Ms. McKnight said she also told the lead investigator, the PSA investigator, and Ms. Walman that the suspensions should continue for no more than two weeks. The lead investigator told us that she was not present at the meeting. Ms. McKnight told us that the lead investigator was in attendance. Either way, it is clear that the investigation team was aware of Ms. McKnight's direction in this regard.

From Ms. McKnight's perspective, it was clear at this point that the investigation team was working toward terminations. She understood that the investigation team had done a significant amount of work to reach this point. She directed them to put together the evidence against the suspended employees in a manner that would allow a final decision to be made quickly. She said she told them that "if you're going to pull that trigger … you need to be ready." She told us:

> *… the big thing that they needed to do was ensure that they had full packages ready for Graham on his return – if they were going to go down the path of full, you know – they were talking about termination at that point in time. But they didn't have the material and the packages ready. And I said, you have to get your stuff ready.*

Ms. McKnight told us she also instructed the team, in the following days, that they needed to stop doing more interviews and focus on the three individuals whose employment was suspended.

Mr. Whitmarsh told us that the fact the employees had been suspended without pay was a concern for him; however, he did not reverse the decision when he returned to the office:

> *… over the years I've dealt with HR issues and you know I'd never seen a suspension without pay at that point … I don't have to be a lawyer to know that there are serious consequences once*

you start suspending people without pay … [but] I remember being told that this was a PSA policy.

The investigation team did not follow Ms. McKnight's direction to complete the investigation of the suspected employees and bring the results to Mr. Whitmarsh for decision within two weeks. Nor did anyone consider revoking the suspensions when the investigation team was unable to put forward its case within that short time frame. The investigation continued to expand to include the conduct of other employees for reasons described below.

7.6.2 ANALYSIS: SUSPENSION DECISIONS

7.6.2.1 SUSPENSIONS WITHOUT PAY WERE CONTRARY TO LAW

As noted, the Ministry of Health's decision to suspend excluded employees without pay was consistent with the PSA's longstanding practice. As government's lawyers cautioned at the time, however, this decision was not supported by any legislative authority under the *Public Service Act*, nor was it provided for in the employment contracts. No one at any point in the investigation clearly articulated or documented any reasons why the specific suspensions needed to be without pay, other than that it was the PSA's practice.

The PSA knew from legal advice provided to it with prior cases that its practice of suspending excluded employees without pay was likely a breach of the employment contract, and amounted to a constructive dismissal of the suspended employees. It exposed the province to an increased risk that the employees would bring wrongful dismissal lawsuits. When the PSA received specific, written legal advice to that effect in late July 2012, the PSA continued the suspensions without pay of the excluded employees until their terminations, or in the case of Dr. Maclure, until he took the position that the suspension without pay was a breach of contract and a constructive dismissal.

Because the ministry lacked authority under either the *Public Service Act* or the employment contracts to suspend excluded employees without pay, the ministry acted contrary to law in doing so.

PSA had legal advice that the suspensions were unlawful, and proceeded anyway. In our view government must act in a way that is consistent with the rule of law. By ignoring legal advice about suspensions without pay in favour of a longstanding practice, the PSA acted both contrary to legal advice and in a manner contrary to sound public administration.

We received no evidence that Ms. Walman was aware when she signed the suspension letters of this legal issue.

7.6.2.2 SUSPENSIONS WERE NOT BASED ON EVIDENCE

Generally, an employer can suspend an employee pending an investigation into allegations of employee misconduct, provided the suspension is reasonable and justified in the circumstances. Whether these criteria are met can depend on the presence of the following factors:

(1) the suspension must be necessary to protect legitimate business interests;

(2) the employer must be guided by good faith and the duty to act fairly in deciding to impose the suspension;

(3) the suspension must be imposed for a relatively short period that is or can be fixed; and

(4) the suspension must, except in exceptional circumstances, be with pay.[18]

The PSA told us that "proven facts or hard evidence" are not required to sustain a decision to suspend an employee pending a misconduct investigation but that "an employer has an obligation to do some form of preliminary assessment of the allegation to ensure that they are not objectively unreliable."

We do not expect that government conduct a full investigation prior to suspending employees. There may be circumstances where government reasonably concludes that it is necessary to suspend employees pending investigation, where the employee's continued presence in the workplace poses a real risk. However, government must have a reasonable basis to determine that the suspension is necessary to protect its business interests. That means government must have some credible evidence that, if proven, could support a conclusion that a suspension is necessary. One way that government can obtain information to support such a conclusion, and also abide

18 *Cabiakman v. Industrial Alliance Life Insurance Co.*, 2004 SCC 55

by its obligation to act in good faith, is to speak with the employee to obtain their version of the facts before making a decision.

In this case, there was an insufficient evidentiary basis for the suspensions, despite what the investigation team presented to the decision-makers at the time. Ms. McKnight told us that, when she was briefed by the team, "they were clear that they had discussions with the agency … around the support to really get to the point of recommending termination." One thing she thought was "clear at the time" was "that they had enough evidence to be able to make their decisions."

However, the only clear written record of what the investigation team had found at the time of the suspensions was in the form of the draft Internal Review report. As we have described in the section above, the conclusions contained in the draft report were problematic and unsupported by evidence. Some of the conclusions were based on allegations alone, while others were based on unreliable evidence. As we noted above, ministry executives had a different understanding of the degree to which the investigation team's reports and findings represented factual determinations.

Further, neither the ministry nor the PSA considered whether the information obtained prior to the suspensions could support a reasonable basis to conclude the suspended employees posed a risk to government's interests. We obtained no evidence that the PSA or the ministry considered this question or analyzed the information it had at the time to determine whether a suspension was necessary. At this stage, the ministry had already purported to suspend Dr. Maclure and Dr. R. Warburton's data access (as previously described, neither had data access) and their signing authority for invoices, expenses and contract approvals. The ministry had done the same in relation to Mr. Mattson. Leaving aside whether these steps were necessary or had any effect, we saw no evidence that anyone considered whether these steps were sufficient to mitigate any perceived risk to the ministry.

Accordingly, we have concluded the PSA lacked a reasonable basis to recommend suspension of these three employees, and as a result the Ministry of Health did not have a reasonable basis to suspend them. The decision to withhold their pay compounded the unfairness of the suspensions decisions.

7.6.2.3 SUSPENSIONS CREATED PRESSURE THAT CONTRIBUTED TO POOR DECISION MAKING

The decision to suspend employees without pay created significant pressure on the investigation team that manifested in two different ways.

First, as Mr. Whitmarsh told us, it created a "raging fire out of control" that he felt he had to deal with quickly. As the summer wore on, and the investigation continued to gather information through email review and interviews, Mr. Whitmarsh became increasingly concerned about the possibility that news of the suspensions would become public before government was prepared to respond. Moreover, it was not clear that the investigation team had collected the information necessary to support the decisions. Mr. Whitmarsh told us:

> *… the challenge with that, of course, is the fundamentals of the evidence gathering hadn't happened. It was all back to front so, and then having taken those effectively time sensitive decisions to lay people off – and this got even worse once people launched lawsuits because the evidence that would be required to defend a lawsuit for the most part, you know, hadn't been collected …*

Second, the PSA investigator's recommendation of suspensions so early in the investigation had the effect of committing the team to a certain position that became increasingly difficult to back away from. The decision to suspend employees presumably based on the findings in the draft reports, and the information relayed during the briefing of Ms. McKnight show that her understanding was that team was laying the foundation for terminations.

7.7 DR. MACLURE'S EMPLOYMENT SUSPENSION AND CONSTRUCTIVE DISMISSAL

In this section, we analyze the decision to suspend Dr. Maclure because Dr. Maclure was the only one of the suspended excluded employees who asserted that he had been constructively dismissed. We analyze the suspension

and termination decisions for the remaining employees in Chapter 9.

The decision to suspend Dr. Maclure meant that the ministry lost someone who, for the previous two decades, had been a valuable resource and significant contributor to the development of its evidence-based pharmaceutical policies.

In this section we begin by describing the significant history of Dr. Maclure's research experience and employment with the Ministry of Health. We then continue by assessing the reasonableness of the ministry's suspension decision. We conclude that the ministry's decision to suspend Dr. Maclure was not justified. We draw this conclusion based on the broader factors articulated above as well as on our assessment of the specific evidence the investigation team had compiled to support its case against Dr. Maclure.

7.7.1 DR. MACLURE'S BACKGROUND AND ROLE WITH THE MINISTRY OF HEALTH

Dr. Maclure studied biochemistry at Oxford, England, and epidemiology at Harvard University. While teaching at Harvard in the 1980s, he invented the case-crossover study design, an analytical epidemiological tool which is today used by researchers worldwide.

Dr. Maclure left Harvard and started his career as a public servant with the Ministry of Health on September 3, 1991, as a research officer in the Research and Evaluation Branch. Dr. Maclure viewed joining the ministry as an opportunity to apply the scientific method to policy problems and to bridge the gap between the research community and government public policy makers. He believed using the scientific method led to a more rigorous approach to policy development and would result in evidence-based decision making to advance the public good. His goal, as articulated to the ministry, was to increase collaboration and improve linkages between researchers and decision-makers. Both Dr. Maclure's role and his goals were expressly approved of by the senior leadership inside the ministry, including at the Assistant Deputy Minister and Deputy Minister level.

During his tenure with the B.C. public service, Dr. Maclure took several leaves of absence without pay to conduct research work at Harvard, the University of Victoria, and Odense University in Denmark. In 1994, Dr. Maclure, with support from the Ministry of Health, obtained a multi-year, $500,000 grant from Health Canada for what he described in a submission to us as a "collaboration between internal ministry evaluators and external University researchers on evaluating a new PharmaCare policy." From July 1999 to 2001, Dr. Maclure was on a half-time secondment to Harvard "for the purpose of research/investigation to benefit Pharmacare."

On March 1, 2002, Dr. Maclure received the Michael Smith Foundation for Health Research (MSFHR) Distinguished Scholar Award. To allow Dr. Maclure to accept this award, the ministry approved his request for a five-year leave of absence. Because the ministry valued the contribution Dr. Maclure would make to the ministry's own objectives, the then-Deputy Minister of Health granted Dr. Maclure special permission to accept an appointment as an adjunct professor at the University of Victoria without having to resign his job at the ministry.[19] Because a public service employee is usually not permitted to take a leave of absence for remunerative work elsewhere, the Deputy Minister approved a special condition for Dr. Maclure's leave that enabled him to maintain his employment with the ministry provided his work aligned with ministry objectives. The then-Deputy Minister of Health turned her mind to the benefits the ministry would gain by allowing Dr. Maclure to accept and pursue research under the Michael Smith Foundation grant.

Dr. Maclure's expertise and value to the ministry was widely recognized within the ministry's senior leadership at the time. In a letter of support asking the Deputy Minister to approve Dr. Maclure's request, Dr. Maclure's then-Assistant Deputy Minister said:

> *Malcolm's research areas are largely directed toward evidence-based care and focus strongly on developing evidence that would be of use to decision-makers in health care. Consequently, his activities at UVic will continue to be of great interest to the Ministry and to the health authorities.*

19 Dr. Maclure had won the award as a senior investigator. The MSFHR no longer provides senior investigator awards as they now have a different structure for grants to senior investigators.

Although he will be on a leave from the Ministry, his work will be of continuing interest to us … when Malcolm returns to the Ministry after five years, he will have developed a background of highly useable research and this will be of great benefit to us.

Instead of granting Dr. Maclure the five-year leave of absence at the outset, the then-Deputy Minister approved the leave on an annual basis, which meant that Dr. Maclure had to re-apply each of the five years he continued the leave. As part of Dr. Maclure's annual renewal request, he provided the ministry's senior leadership with detailed updates of the work he was doing coupled with descriptions of how his work benefited the ministry. As a result, his personnel file includes significant detail about the ministry's rationale for approving his leave each year and the contributions made by Dr. Maclure that were directly relevant to the Ministry of Health. For example, a memorandum to the Deputy Minister's approval for the 2003–2004 extension of Dr. Maclure's leave demonstrates that the ministry relied on and benefited from Dr. Maclure's skills while he was on leave:

In 2003, Malcolm Maclure will be devoting about half of his effort to drug policy evaluation and a proposed BC response to the Romanow Commission's recommendation to create a Centre for Innovation on Pharmaceutical Policy.

1. How Difficult would it be to replace the employee?

Malcolm Maclure's skills are rare and his work has focused on enabling evaluations of Ministry programs by external researchers. He will continue to take on this role while at the University because an aim of this research program is to increase linkages between the University and the Ministry. Therefore, during the tenure of this award, his skills will continue to be available to the Ministry.

Dr. Maclure's personnel file includes records that detail the benefits to the ministry of allowing him to pursue research relevant to ministry programs across various divisions.

It is significant that while on the five-year leave, both Dr. Maclure and the Ministry of Health expected that his academic work would remain intricately aligned with that of the ministry. During the five years that he was on leave, the ministry directly engaged Dr. Maclure in projects because they wanted him to promote the evaluation of ministry programs by researchers. Moreover, they wanted the benefits of linkages between academia and government, which included leveraging ministry funding for specific projects to stimulate financial support from funding agencies. The Education for Quality Improvement in Patient Care (EQIP) initiative described in Chapter 4 and below is a good example of this intentional synergy between Dr. Maclure's work and the ministry's goals.

In his ongoing communications with the ministry, Dr. Maclure envisioned the ways his employment with government could evolve when he returned at the end of his leave of absence. For example, Dr. Maclure suggested that the ministry could support building permanent relationships between it and researchers:

Long term goal: by 2006 I am to establish myself as being 50% with the Ministry and 50% with the university on a permanent basis. I think that will be the best way for me to serve as a bridge between PharmaCare and the research community in the long run. This goal is much like clinicians at teaching hospitals who have joint appointments with the university. In the coming year, I will develop a proposal that 50% of my funding come from CIHR and 50% from the Ministry on an experimental basis. Such a grant from CIHR will help reduce the institutional barriers to such a novel joint appointment.

During his leave extension request the next year, Dr. Maclure again expressed his view about the potential his relationships with the research community provided:

In my annual report last year, I said I aimed by 2006 to establish myself as 50% with the Ministry and 50% with the university on a permanent basis … For the record, I still hope something like this is possible.

At the same time, Dr. Maclure also gave the ministry a draft proposal outlining the potential for a B.C.-led national network for innovation on pharmaceutical policy. Dr. Maclure's idea centred on the opportunities created

by a "unique structure" in which half of the researchers would be located within provincial ministries of health to facilitate the opportunities for "linkage and exchange" between these two groups.

The ministry was very interested in Dr. Maclure's concept of linking decision-makers with researchers. One way the ministry implemented this approach arose when it engaged with Dr. Maclure during the development of the EQIP initiative. While on leave, Dr. Maclure secured external grants that were used to further support EQIP. In 2006, the ministry finalized its three-year EQIP contribution agreement with UBC.[20] Notwithstanding the fact that Dr. Maclure was likely to return to his position at the ministry soon after, the ministry expected that Dr. Maclure would continue to play a significant role in the project's implementation and evaluation design. When he did return full time to the ministry in 2007, the ministry preserved Dr. Maclure's role as the Implementation Director on the EQIP initiative, having determined it was consistent with its interests.

The Pharmaceutical Services Division underwent a significant reorganization in 2006. Bob Nakagawa, the Assistant Deputy Minister of PSD, saw Dr. Maclure's role as key to developing the pharmaceutical and policy evaluation work that PSD would be undertaking.[21] On December 8, 2008, Dr. Maclure became the Director of Research and Evidence Development reporting to the Executive Director of Policy, Outcomes Evaluation and Research in the Pharmaceutical Services Division. Dr. Maclure had no data access, no budget and no staff in this position. Dr. Maclure's role was unique and, in his view, meant to be like a "university researcher in residence."

At the time, the decision-makers in PSD continued to believe that there was a significant benefit to Dr. Maclure holding a dual position (in both academia and government) than if he were solely in one "world" or the other. The ministry could have required Dr. Maclure to sever his academic ties but did not. Evidence from executives who worked at the ministry at the time explained how his academic affiliations furthered ministry objectives. For example, Dr. Maclure's expertise in study design (obtained through his academic role) meant that, when reviewing or developing proposed research or evaluation (as a government employee), he could help the ministry maximize value for its money by ensuring the study was designed in such a way as to provide useful results.

In 2009, a panel selected and appointed Dr. Maclure as the first B.C. Academic Chair in Patient Safety, a position located at the University of British Columbia.[22] Because of his appointment as Patient Safety Chair, UBC granted Dr. Maclure a tenured position with the Department of Anaesthesiology, Pharmacology and Therapeutics.

UBC established the Patient Safety Chair position in 2005 after the Ministry of Health granted it $3 million to support the development of leadership capacity in the field of patient safety. The chair's role is meant to enhance safe and appropriate patient care through research and education. In a 2005 letter to UBC, the then-Deputy Minister of Health explained the ministry's commitment to supporting a broad range of research and educational activities to ensure British Columbia's health care system was supported by current knowledge of health, evidence-based treatment of illness and disease, and excellence in patient care. Thus, through both its funding and its public health and safety focus, the Patient Safety Chair position remained strongly connected to the interests and the objectives of the Ministry of Health in administering the provincial health system. When Dr. Maclure was selected for the chair position, UBC and the Ministry of Health agreed to a joint appointment in which Dr. Maclure would continue his work part-time at the ministry until his retirement, so long as both parties continued to agree to the arrangement. This was seen to be in the interests of both institutions who would continue to benefit from Dr. Maclure's skills and expertise.

There was no formal salary sharing agreement between UBC and the ministry to facilitate this arrangement. Rather, the ministry simply reduced Dr. Maclure to half-time status and paid him half of his salary. Dr. Maclure made special arrangements with UBC with regard to his salary as the

20 The contribution agreement for EQIP is between the ministry and UBC. The agreement is not between the ministry and Dr. Maclure. Dr. Maclure is not a party to the agreement himself; nor is he a subcontractor to the agreement.

21 See Chapter 4 for a detailed description of the history of PSD.

22 BC Patient Safety & Quality Council, "Malcolm Maclure" <https://bcpsqc.ca/about-the-council/council-members/malcolm-maclure/>.

Patient Safety Chair that were misunderstood by the 2012 investigation team. We investigated and determined Dr. Maclure was obligated to work half-time at the ministry, and that he was paid half the position's full time salary.

Because Dr. Maclure was only working part-time for the ministry, by 2009 the Policy Outcomes, Evaluation and Research (POER) Branch required a co-director to share Dr. Maclure's position. At that time, the Executive Director of POER created a position description, with the assistance of Dr. Maclure, who had helped develop the role over the previous two years. The following excerpts from the position description articulate the Dr. Maclure's and the other co-director's unique role in the ministry:

> *The Dir[ector] of research and evidence development provides leadership, expertise, strategic advice and management skills on the integration of research processes and evidence production with policy development. The position is responsible for bridging the cultures of academe and government by understanding the different pressures and barriers affecting academics and government decision-makers, as well as their needs for different types of communication tools. The position provides expertise in study design methodology and statistical analysis, and scans the environment for research and reviews of evidence related to PSD strategic needs, and evaluates the quality and applicability of findings to support senior decision-making.*
>
> . . .
>
> *Position links:*
>
> *Multi – University interdisciplinary research teams … Collaborates on the development of scientifically valid assessment tools and research protocols. Identifies other research agendas and analyses, and interprets, evaluates and disseminates research findings. Negotiates with researchers on scope and deliverables of research grants and contracts.*
>
> *Authors papers for publication and delivers lectures on findings. Represents PSD at public meetings and sessions and to other provincial drug benefit plans on matters concerning research priorities and findings.*

Dr. Maclure's responsibilities included authoring papers for publication and lecturing on findings. The ministry had a strong interest in supporting academic publications in which its employees were involved. This was particularly the case for someone in Dr. Maclure's role. Relying on the published results of academic research in peer-reviewed journals and other forums meant the ministry could better support and defend its evidence-based decision-making framework. In fact, the ministry had longstanding experience supporting research and scientific publishing dating back to the initial evaluations of the Reference Drug Program. Given this overall interest in publishing, and the close links Dr. Maclure maintained with the academic world, it is not surprising that his name appeared on numerous publications relating to British Columbia's pharmaceutical policy. This was expected of Dr. Maclure while he was on academic leave and was also part of Dr. Maclure's role at PSD when he returned. One former PSD employee told us she remembered receiving ministry-wide email notifications acknowledging Dr. Maclure's contributions when his articles were published.

7.7.1.1 THE REFERENCE DRUG PROGRAM ASSESSMENT

One example of the contribution of Dr. Maclure can be found in the Reference Drug Program assessment. As described in Chapter 4, in the late 1990s the provincial government faced significant opposition to its Reference Drug Program (RDP) from various sources, including the British Columbia Medical Association,[23] patient groups and the pharmaceutical industry. As the first Canadian jurisdiction to introduce this type of practice, "its experience [was] being watched across the country and around the world."[24]

Those in opposition to the RDP argued not only that it created administrative hurdles, but that switching people's drugs could harm their health. Despite the significant

23 Now known as Doctors of BC.

24 Anne Mullens, "Reference-based pricing: Will other provinces follow the BC lead?" *Canadian Medical Association Journal* 158 (1998):239-41.

opposition to the RDP, it is an approach that continues to be used today. Part of the success of this approach can be attributed directly to Dr. Maclure's role at the ministry.

Opponents of the RDP put pressure on the ministry to respond to justify its approach. When asked to assist the ministry in addressing the criticism that switching drugs could increase deaths, Dr. Maclure designed, within 48 hours, a quick study to compare people on a certain medication who were switched and others who were not switched. The ministry was able to use its administrative health data to conduct this study in-house. It was not sufficiently rigorous to be conclusive, but the results of this preliminary study supported the ministry's belief that, contrary to the concerns expressed, people were not dying when their medication was switched in accordance with the policy. A former executive in the ministry described Dr. Maclure as "ingenious" in being able to design effective studies in a short amount of time.

Dr. Maclure's small study laid the groundwork for the ministry to fund external researchers to study and analyze the RDP. Dr. Maclure's study propelled the ministry to obtain $90,000 in seed money to fund three external studies.[25] These studies also showed that the RDP had no detrimental effects on patient health. The ministry wanted the research to be published in a peer-reviewed journal rather than just in a government report. The view was that such publication would allow the evaluation – whatever its results – to carry more weight with both supporters and opponents of the RDP.

In 2012, the investigators discovered publications related to the evaluation of the RDP in which Dr. Maclure was involved. Without appreciating the way in which these publications were connected to the ministry's own goals, the investigators formed the conclusion that Dr. Maclure was improperly involved with external researchers.

7.7.1.2 DR. MACLURE'S ROLE IN 2012

By 2012, Dr. Maclure was working part-time as a co-director in the Policy Outcomes, Evaluation and Research (POER) Branch of PSD and part-time as B.C. Academic Chair in Patient Safety at UBC. The POER branch's functions related to research, including support of the Drug Intelligence Branch (DI) and the Drug Use Optimization Branch (DUO). The responsibility for budgeting and operation of the research contracts fell primarily to the Executive Directors in the DI and DUO branches. Dr. Maclure provided his expertise in research methodology to the projects in those branches and as such his roles on all these government projects were expressly contemplated and indeed fostered by the ministry.

7.7.2 ANALYSIS OF SUSPENSION DECISION

7.7.2.1 UNREASONABLE AND UNFAIR INVESTIGATIVE PROCESS

The lead investigator and the investigation team's contracts specialist interviewed Dr. Maclure on June 12, 2012. The lead investigator told us that Dr. Maclure was not at that time under suspicion and as such he was not cautioned that his conduct was at issue. However, the substance of the complaint to the Auditor General, the terms of reference for the investigation and the suspension of his data access demonstrate that he was one of the focal points of the ministry's investigation and that his conduct was, in fact, under review at that time.

The investigators also interviewed Dr. Maclure's Executive Director on June 12, 2012. She was not told details of the allegations against her employees, including Dr. Maclure. However, the investigators implied generally that her employees were manipulating contracts and pushing to get contracts for their friends.

This Executive Director told them that her employees were trusted public servants who took their responsibilities seriously and whose commitment was exemplary. This Executive Director explained that Dr. Maclure did not have access to data and did not need it for his role. She pointed the investigators to the POER Branch Plan as a resource to help them understand the programs. She described the Pharmaceutical Services Division as big, complex and detailed, and told the investigators she was available if they needed help understanding certain information. The investigators did not follow up on her offer and did not

25 It was seed money because each university obtained large amounts of additional funding to conduct the research. Information about these studies is summarized in Malcolm Maclure, Bob Nakagawa, and Bruce Carleton, "Applying Research to the Policy Cycle: Implementing and Evaluating Evidence-Based Drug Policies in British Columbia," in *Informing Judgment: Case Studies of Health Policy and Research in Six Countries,* (New York, NY: Milbank Memorial Fund, September 2001), 35-70.

approach her again until September 2012 when they conducted a more formal interview with her.

Ms. Walman made the decision to suspend Dr. Maclure based on a recommendation from the PSA investigator. At this point in the investigation the team had focused only on the complainant's allegations. They had conducted little, if any, analysis and had not considered any exculpatory evidence such as that provided by Dr. Maclure in his interview, or had they pursued the Executive Director's offer to provide more information about PSD.

The PSA investigator had only been on the team for four days when she recommended the suspension on June 25, and had not reviewed Dr. Maclure's personnel file or the evidence assembled by the team. She did not detail the reason for the suspension recommendation in a report.

After his suspension without pay, Dr. Maclure communicated a willingness to participate in the investigation and attend further interviews. As a condition of his participation, however, he requested that the government provide him with particulars explaining the reason for his suspension. Despite receiving legal advice, the ministry was unwilling or unable to provide any particulars to Dr. Maclure at this stage.

On August 15, 2012, the PSA Director told the employment lawyer that an interview with Dr. Maclure needed to occur as soon as possible and that, if it did not occur, the province might act on the information that it had. The employment lawyer replied that it could "get very ugly" if the government were to proceed without first speaking with Dr. Maclure.

Dr. Maclure treated his suspension without pay as a constructive dismissal. In September 2012, Dr. Maclure, through counsel, commenced a lawsuit for wrongful dismissal and defamation. In its response to Dr. Maclure's lawsuit, the government expressly pleaded that he had been suspended pursuant to the *Public Service Act* – in other words, that it had "just cause" for his suspension.[26] The specific allegations of what the government considered "just cause" were not, however, articulated in writing when it pleaded its legal defence. Moreover, the government's position in its legal pleading that it had "just cause" was inconsistent with the ministry's statement in the suspension letter that the investigation into Dr. Maclure's conduct was ongoing. Particulars of the pleading were later provided and we discuss those in the next section.

7.7.2.2 NO FACTUAL BASIS FOR SUSPENSION

As we discussed in section 7.7.1, Dr. Maclure, together with the co-director Dr. R. Warburton, held a unique role in the ministry that was unusual and involved complex linkages with the academic community. This was a conscious decision by the ministry in previous years. Properly understanding that role would have required in-depth and careful analysis by the investigative team. We determined that the investigation team had no evidence of any wrongdoing by Dr. Maclure justifying his suspension. Nonetheless, both the investigators and Ms. Walman continued to believe that Dr. Maclure was at the centre of the allegations of wrongdoing – more than one witness described him pejoratively as an "air traffic controller" of those wrongdoings. Throughout our investigation, we heard various working theories that the investigators held about Dr. Maclure.

Ms. Walman could not explain or recall the factual basis on which she had made Dr. Maclure's suspension decision. This is not unusual considering we interviewed her several years after she made her decision. She remembered general issues of conflict of interest and Dr. Maclure's involvement in hiring Dr. R. Warburton. She said she expected, for a suspension, that there was "enough evidence to … lead me to believe that wrongdoing was, could be, might be occurring … serious enough to take action, but not to terminate until the … final review would be finished." She relied on the recommendation from the PSA that conflicts of interest existed and that there was enough evidence to suspend Dr. Maclure while the investigation was ongoing.

The suspension letter stated only that Dr. Maclure had been suspended without pay because "as a result of our information gathering and interviews with yourself and others significant concerns became apparent to the employer. These concerns included the misuse of health data and methods by which contracts have been or are being awarded." The text of the letter was identical to that sent

26 Pursuant to the *Public Service Act,* R.S.B.C. 1996, c. 385, s. 22.

to other suspended employees and the concerns were not in any way particularized to Dr. Maclure.

The ministry had no evidence that Dr. Maclure misused health data. When they were interviewed on June 12, 2012, both Dr. Maclure and his supervisor explained that he had no data access. By June 20, 2012, the investigators had confirmed from a review of the data access records that this was accurate. The investigators' suspicions focused on the fact that Dr. Maclure was a co-author on publications that may have used British Columbia administrative health data. They did not consider whether the ministry had permitted the use of that data or whether Dr. Maclure's contribution to the publication involved him accessing any data.

The ministry had no evidence that Dr. Maclure had engaged in wrongdoing with respect to how contracts were awarded. The investigators did not understand or analyze Dr. Maclure's roles, the structure at PSD, the contract approval process, the nature of the programs at PSD, or the context in which contracts were awarded. Moreover, the investigators had information confirming that Dr. Maclure had no expense authority and had not signed any of the contracts that they were reviewing on behalf of the ministry. The investigators' information showed that Dr. Maclure was not a party to any of the contracts himself and that he did not own a company that was a party to the contracts. In fact, contrary to one of the allegations, a company search showed he did not own any companies in the relevant time period. Moreover, one of the investigators had, by the end of June 2012, confirmed that the contracts being reviewed were consistent with government's Core Policy and Procedures Manual.

One of the allegations was that Dr. Maclure played a role awarding ministry contracts to a small number of researchers associated with him. During our investigation we were told that the community of academic methodologists and pharmecoepidemiologists is relatively small in British Columbia and, as a result, many of them have collaborated on research work from time to time. Given his background, Dr. Maclure had connections with many people in this research community. A central part of his role was liaison with the academic research community.

Dr. Maclure had not awarded any of the contracts that the investigation team had reviewed. He was not the decision-maker and he was not the signatory on the contracts. There was suggestion by the complainant that even if Dr. Maclure was not awarding contracts he might have improperly been influencing the direction of contract awards by virtue of his relationships in the research community, and in particular his long-standing relationship with Dr. Dormuth. We examined the contracts about which the investigators had concerns, in particular as they applied to Dr. Dormuth's involvement in TI and ADTI. In the case of the ministry's relationship with TI it was clear that UBC had a long-standing series of funding agreements with the ministry that both pre-date Dr. Dormuth's employment at UBC and continued thereafter. Our examination of the ADTI agreements clearly showed that the ministry had spent several years engaging with the research community before the ADTI commenced in 2007. The research community was relatively small and most of the researchers either previously held, or then held, research agreements with the ministry. The ministry made its ADTI contracting decisions based on its pre-existing knowledge of the research community and it had the authority to approve direct award contracts for the ADTI, in accordance with government policy in place at the time. While Dr. Maclure's role for the ministry was to work with the research community, which as we note was rather small, we saw no evidence that Dr. Maclure improperly influenced the ministry's procurement decisions. This is discussed further in Chapter 14 in the context of the IU report.

When Ms. Walman made the decision to suspend Dr. Maclure, the investigation had produced no evidence of any wrongdoing. Further, the investigators also had no clear understanding of Dr. Maclure's role or the programs they were reviewing. The investigators had only a vague, incomplete and poorly formed idea of wrongdoing based on little more than the allegations contained in the initial complaint to the Auditor General (subsequently advanced by the complainant during the initial review). We reviewed the case against Dr. Maclure put forward by government in its defence of the litigation he commenced. The only written articulation of the Ministry of Health's case provided to Dr. Maclure was in the context of the litigation: a letter to Dr. Maclure's lawyer in March 2013, which included a list of particulars detailing the reasons for his suspension.

The list of particulars was created by legal counsel based on information received from the investigators. We examined the list of particulars and found, after reviewing the investigation files, that they showed no wrongdoing by Dr. Maclure. For example, the ministry used emails that Dr. Maclure had legitimately exchanged with contractors and researchers as evidence that he had disclosed confidential information to third parties. Not only did we find no evidence of wrongdoing, but the examples of misconduct the ministry forwarded to its external legal counsel were based solely on investigators' speculation, without proper consideration of the merits of the allegations and in the face of evidence that Dr. Maclure's conduct was proper. As discussed in Chapter 13, outside legal counsel for the province in Dr. Maclure's lawsuit later concluded that the evidence against Dr. Maclure was "weak or non-existent" and "that given the lack of evidence in support of the allegations" against Dr. Maclure, there was considerable risk that a court would award aggravated damages

Based on the above, we concluded that there was not a justifiable reason for the Ministry of Health's decision to suspend Dr. Maclure. Moreover, withholding his pay during his suspension was, as we have described above, contrary to law.

FINDINGS

F 7 The Ministry of Health's June 2012 decisions to suspend data access for various individuals:

- **a.** Were wrong because those decisions lacked adequate justification or sufficient documentation explaining the rationale.
- **b.** Were unrelated to the three suspected privacy breaches later discovered and reported to the Information and Privacy Commissioner.
- **c.** Went on too long because the ministry unduly delayed investigating its concerns about the contractors' data access and use.

F 8 The Ministry of Health's investigation was procedurally flawed, and therefore improper, as the investigation:

- **a.** Lacked organization and appropriate division of roles.
- **b.** Had no investigative plan that the team followed.
- **c.** Failed to adequately and appropriately assess the information it obtained.
- **d.** Failed to adequately document its activities.

F 9 The draft investigation reports produced by the investigation team in July and August 2012:

- **a.** Made findings unsupported by the evidence.
- **b.** Significantly influenced the direction and timing of the employment decisions which followed.

F 10 The suspensions of the four excluded employees suspended in July and August 2012 were contrary to law because they were without pay, and were wrong because:

- **a.** They lacked sufficient evidentiary basis.
- **b.** They were made without due regard for whether lesser measures were sufficient to address the perceived risk to the ministry.

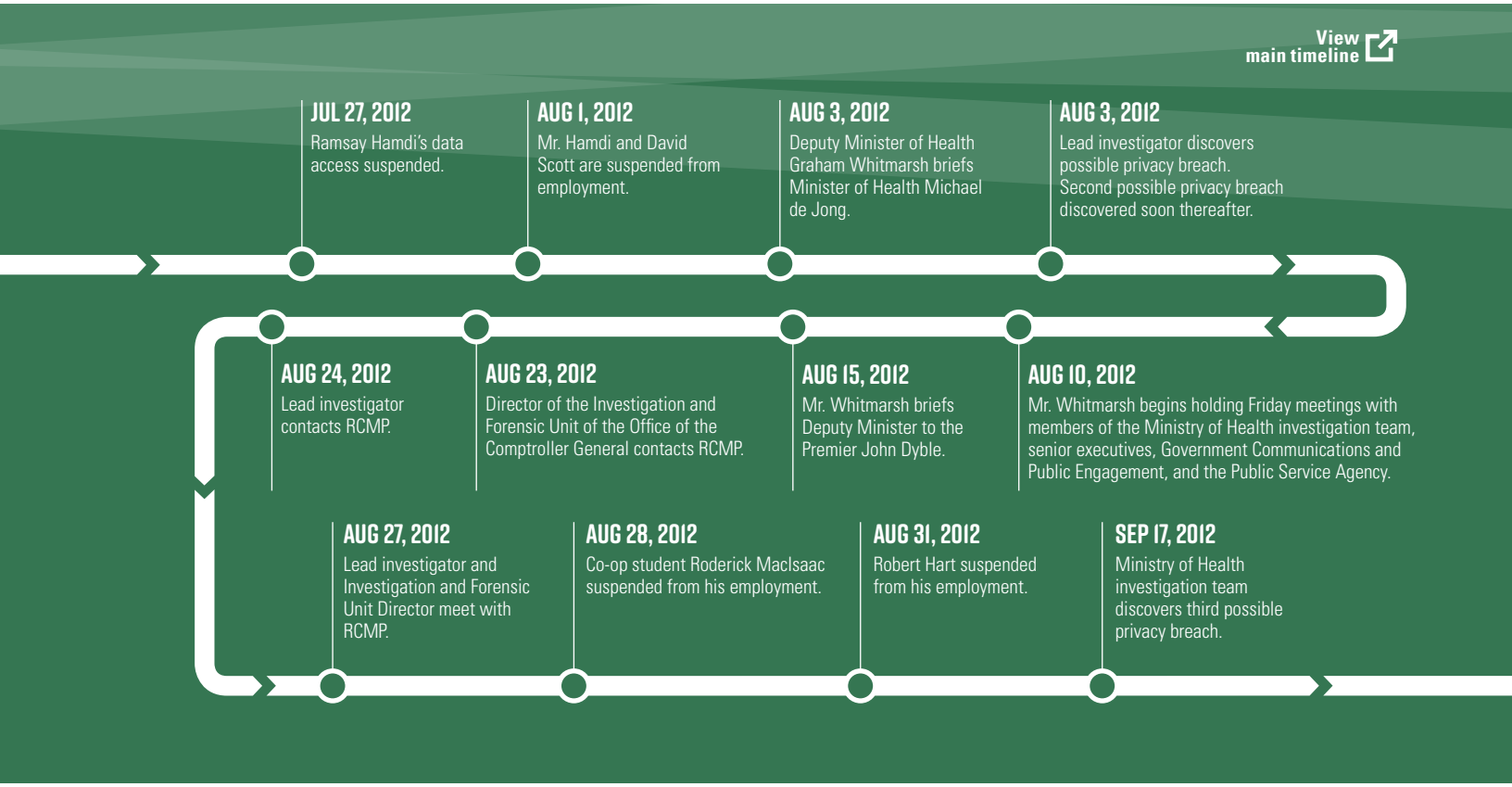
F 11 The Ministry of Health had no lawful basis to constructively dismiss Dr. Maclure.

8.0 / MINISTRY OF HEALTH INVESTIGATION CONTINUES THROUGH THE EMPLOYMENT TERMINATIONS: LATE JULY TO OCTOBER 2012

8.1 INTRODUCTION

In this chapter of the report, we focus on the ministry investigation between July 27 and October 19, 2012. This part of the investigation occurred after the initial employee suspensions and following the completion of the first two drafts of the Internal Review report (July 6 draft and July 18 draft). The core investigation team during this time consisted of the lead investigator, the PSA investigator, the contracts specialist and the Strategic Human Resources manager. This chapter is organized around five key developments in the investigation that occurred during this time frame. First, the Ministry of Health suspended four additional employees. Second, the Deputy Minister of Health Graham Whitmarsh began to oversee the investigation. Third, the investigators continued to conduct interviews, this time in a more formal way. Fourth, the investigators began to focus on three suspected privacy breaches. Fifth, on behalf of the ministry, the lead investigator and the Office of the Comptroller General (OCG) made a report to the RCMP about the investigation.

Within this time frame, the ministry also dismissed six employees for what it claimed was just cause, and made a public announcement about the investigation and dismissals. We discuss the decisions to dismiss those employees and the public announcement about them in Chapter 9 of this report.



8.2 POSSIBLE PRIVACY BREACHES DISCOVERED

The lead investigator contacted the Office of the Information and Privacy Commissioner (OIPC) on July 13, 2012, to notify it that the Ministry of Health was conducting an investigation into contracting practices and that, as part of this investigation, they had possibly uncovered data breaches. It is unclear what privacy breaches the lead investigator had in mind at that time since the breaches that were ultimately reported to the OIPC had not yet been discovered. At the request of Lindsay Kislock, Assistant Deputy Minister of Health Sector Information Management and Information Technology, the lead investigator met with two staff members from the OIPC on July 19, 2012, and continued to update the office about the ministry investigation throughout that summer.

On August 1, 2012, the same day that Ramsay Hamdi and David Scott were suspended, Ms. Kislock sent an email to all ministry employees stating that ministry data is provided to business areas of the ministry for operational purposes only, and as such, data is not to be used for any other purpose without appropriate approvals in place. The email warned that employees who contravene these rules may lose their data access rights, and the ministry may take "further disciplinary action up to and including termination."

On August 3, 2012 the lead investigator discovered an email describing a possible privacy breach involving Mr. Hamdi copying personally identifiable data to a flash drive for co-op student Roderick MacIsaac's use. The lead investigator believed that Mr. MacIsaac, a co-op student, intended to use this data for his PhD. At some point in the following two weeks, the investigation team discovered another email from 2010 containing a reference to a possible second breach. This email was between Mr. Hamdi and Dr. William Warburton, who was a ministry contractor at the time.

The discovery of these emails, along with other emails about data that the investigators viewed as suspicious, shifted the investigation's focus from a general concern about administrative health data use by external

researchers to specific possible privacy breaches involving personally identifiable data.

These two possible privacy breaches were a factor in three of the employment termination decisions, as we will discuss in Chapter 9. They were also a factor in the timing of the dismissals, the broad-based data access suspensions that occurred in the summer and fall of 2012, and decisions the ministry made about contract suspensions and terminations. A number of people we interviewed cited three possible privacy breaches as the basis for the data access suspensions, when in fact a number of people had their data access suspended prior to the discovery of the possible breaches. A number of the people that we interviewed thought that the privacy breaches involved many more individuals than was actually the case. The discovery of the possible privacy breaches also contributed to the investigation team's larger concern that ministry data was being sold.

The belief that the investigation had uncovered serious privacy breaches was a significant motivating factor in the decision to make a public statement. Then-Deputy Minister of GCPE, Athana Mentzelopoulos, gave evidence that she thought this was the main issue in September 2012, and explained why government needed to be proactive, complete and transparent in its communications. She said:

> *The [issue] that I was preoccupied with was the notion that there had been a serious data breach, and that the health information of potentially millions of British Columbians had been compromised … I personally expected that people were going to be furious and they were going to need to be reassured.*

Around September 17, 2012, the ministry investigation team discovered a third possible privacy breach. It involved Mr. Hamdi providing personally identifiable data on a flash drive to Mark Isaacs, a ministry contractor.

We discuss the three privacy breaches in Chapter 10.

8.2.1 PROPOSED "DATA AMNESTY"

Despite the significant concern in the Ministry of Health and elsewhere in government about the possible privacy breaches, there was, at the same time, some recognition in executive levels of the ministry that perhaps such problems were the result of existing practices and processes rather than intentional individual wrongdoing.

This was illustrated by a proposed "data amnesty" email sent by Ms. Kislock to Mr. Whitmarsh and Associate Deputy Minister Sandra Carroll on September 4, 2012. The email discussed the lack of a formal process in terms of using and releasing Ministry of Health data. Ms. Kislock described how in her first six months on the job, she was inundated with complaints from external researchers about wait times for data. She described plans to improve procedures around the use of data, particularly in light of some recent legislative changes. She concluded the email:

> *I think it would be advisable to understand what data other divisions have been releasing and to who. Post terminations this week, I recommend that we announce an amnesty period and task Branches/Divisions to come clean on previous data release practices. We can then use this information to determine if we have the appropriate data related activities in the right Division. I think the major data concerns from this investigation centre from staff inappropriately using their data access, and lack of clarity on the governance of data stewardship in the Ministry. The easiest way to provide clarity is to task one division with all data release responsibilities. I believe this should be HSIMIT.*[1]

Ms. Kislock described her thinking behind the email in her interview with us. She told us she understood that:

> *… the activities over the summer would have made people nervous … People didn't know, like, they didn't know what the rules were anymore and they were afraid that maybe they broke the rules. So, you know, if you just said, "It's okay," "Tell us what you've done" or "what you're doing," and then we could address it. That was my idea.*

This quite sensible advice was not followed and no amnesty was put in place. Moreover, no one considered at the time whether the idea of a "data amnesty" should apply to the employees who were about to be fired for,

1 HSIMIT stands for the Health Sector Information Management and Information Technology Division of the Ministry of Health.

allegedly, not following proper processes with respect to data.

On September 19, 2012, Ms. Kislock sent an email to all ministry staff about dealing with "sensitive and personally identifiable data," defined as any data with the high potential for re-identification, including de-identified, anonymized and aggregate data. The email included a list of data security principles that staff were required to follow and stated that her division would be organizing staff information sessions in the following weeks. It made no reference to a data amnesty.

8.3 FURTHER DATA AND EMPLOYMENT SUSPENSIONS

As we described in Chapter 7, soon after starting their work, the investigators had come to believe that employees in the Pharmaceutical Services Division (PSD) were working in an organized way to use administrative health data for their own benefit.[2] The investigators identified additional potential individuals to be investigated near the end of June, primarily because of their connections with employees in the PSD.

The lead investigator had been granted access to these additional employees' emails on the basis that it was necessary for her review. Investigators searched employees' emails looking for evidence of wrongdoing. In some cases, this included reviewing emails from up to 10 years earlier. As described above, in the course of their email review, the investigators discovered what they suspected were privacy breaches, unauthorized use and sharing of data and other misconduct by employees who were not identified in the complaint to the Office of the Auditor General. These findings reinforced their concerns that data was leaving the ministry in an uncontrolled manner.

On July 27, 2012, Heather Davidson, Assistant Deputy Minister of Planning and Innovation, on the advice of the investigators, suspended the data access of Ramsay Hamdi, a senior economist in the Planning and Innovation Division. The decision had first been discussed three days earlier, on July 24. The stated reason for the suspension, as described in the letter to Mr. Hamdi, was:

> *A concern has been raised with the Ministry of Health with respect to how research and contracts are managed in the Pharmaceuticals Division. In response to this complaint, an investigation has been undertaken… your role in research and data access will be included in this process. Effectively [*sic*] immediately, and for the duration of this investigation, the Ministry of Health is revoking your access to ministry data.*

Dr. Davidson told us that she met with two investigators, and wanted to know what evidence they had to support the data suspension. She told us the investigators showed her some emails and suggested that Mr. Hamdi "had been offered money" in relation to data but that "they made it clear that they didn't know that that was the case. That there was going to be a further investigation". She told us that she "felt like at that time they had enough to go on, at least to have suspicion":

> *I had them come and tell me what was the issue, because I couldn't support doing that unless I was told why … there was questions about what he was doing with data and they needed to investigate further, and in the meantime they were cutting off his access … They had a bunch of emails. They said they needed to do further work, and I was fine with – I trusted the process at that point, that it would be done. And I reassured Ramsay when I talked to him that the due process would be followed and he would be, you know, protected by the process.*

On August 1, 2012, three working days later, the ministry suspended Mr. Hamdi and his colleague David Scott from their employment without pay. Their suspensions brought the total number of employees suspended to five. Like Mr. Hamdi, Mr. Scott worked in the Planning and Innovation Division of the ministry. He was a senior research advisor. Both employees worked extensively with administrative health data. Neither of these individuals had been named in the complaint to the Office of the Auditor General that prompted the investigation. As noted above, their conduct came under review because of their ties to employees in PSD. This led to investigators reviewing Mr. Hamdi and Mr. Scott's email records. On July 31, following a review

2 *Internal Review Report: Ministry of Health, Pharmaceutical Services Division, Research and Evidence Development*, draft v.1, 6 July 2012, 5.

of their emails relating to data access which the investigators viewed as incriminating, the recommendation was made that the ministry suspend their employment pending investigation, resulting in their suspensions the following day.

The ministry suspended these individuals before conducting any interviews with them. They were interviewed more than two weeks after their employment suspensions. Their direct supervisors were not interviewed until the end of August.

As with the three employees suspended in mid-July, Mr. Scott's and Mr. Hamdi's suspension letters gave no details about the subject matter of the investigation or the specific allegations against them. Unlike with the excluded employees, the letters did not promise Mr. Hamdi or Mr. Scott an opportunity to respond to any investigative findings or recommendations about their employment. The identical form letters to both employees stated:

> *This letter is to advise you that you are hereby suspended without pay pending an investigation into allegations of workplace misconduct.*
>
> *It is our intention to complete this process as expeditiously as possible and we shall advise you accordingly. It will be necessary to interview you on this matter and we will contact you in the near future in this regard.*
>
> *You are directed not to communicate on this matter with anyone other than your BCGEU staff representative, which includes external stakeholders. You are further directed not to attend the workplace until otherwise requested by your Assistant Deputy Minister.*

The letters were signed by Nick Grant, who was Acting Assistant Deputy Minister on behalf of Dr. Davidson who was, at that time, away from the office. Mr. Hamdi filed a grievance disputing his suspension without pay on August 2, 2012.

On Tuesday, August 28, 2012, four investigators interviewed Roderick MacIsaac for more than two hours. Mr. MacIsaac was a co-op student in PSD who was due to complete his term at the end of that week. He reported to Dr. Rebecca Warburton, who by this time had been suspended for over a month. Through its review of email, and on learning that Mr. Hamdi had provided Mr. MacIsaac with administrative health data linked to federal Canadian Community Health Survey data on a flash drive, the investigation team had become suspicious of Mr. MacIsaac's data access and use, particularly as he was concurrently a PhD student at the University of Victoria.

During the interview, the lead investigator asked Mr. MacIsaac to sign a declaration stating that he had no "government information" either at home, in electronic format, or online. The PSA investigator cautioned him that if he signed it, and it turned out to be incorrect, he could face "potential criminal charges". Mr. MacIsaac told the investigators that he would sign the declaration, and provide it to the lead investigator the following day, but first he wanted to review the information in his possession and make a list of the material he had. He told the investigators that he was "entirely shaken".

At the end of the interview, the investigators handed Mr. MacIsaac a letter that suspended his employment pending investigation. The text of the letter was the same as those given to Mr. Hamdi and Mr. Scott. When Mr. MacIsaac asked in the interview why he was being suspended, an investigator said:

> *We are very concerned about the use and disclosure and sharing of this data. Based on our investigation thus far, we have a very real concern about where this data is being stored, how it is being used and so we will confirm that through further investigation. The only thing that I would add in terms of running commentary, Roderick, is that many of your answers today have been very evasive, your unwillingness to sign the data disclosure statement, the declaration that was put in front of you, all of these things add further to our concerns, so at this time we are moving to suspension … we would ask that you leave the building as soon as possible.*

Mr. MacIsaac's suspension letter was signed by the Strategic Human Resources Manager on the investigation team. Ms. Walman was on vacation at the time.

On Friday August 31, 2012 the investigation team interviewed Bob Hart, Director of Data Access and Stewardship. Mr. Hart was the direct supervisor of the employee

who had made the original complaint about data handling in the ministry. Throughout the interview, the investigators challenged Mr. Hart on whether he should have done more to respond to the complainant's concerns. As with Mr. MacIsaac, the investigators provided Mr. Hart a letter of suspension without pay at the end of the interview. The letter stated in part:

> *As a result of our information gathering and interviews with yourself and others significant concerns became apparent to the employer. These concerns included the inappropriate provision of health data access and methods by which contracts are being awarded.*

Mr. Hart's letter was prepared and signed by a member of the investigation team. Ms. Kislock, who was Mr. Hart's Assistant Deputy Minister, was on vacation at the time and learned of Mr. Hart's suspension after the fact.

8.3.1 ANALYSIS: DATA SUSPENSIONS AND EMPLOYMENT SUSPENSION DECISIONS

Dr. Davidson made the decision to suspend Mr. Hamdi's data access based on the information the investigators relayed to her about their concerns about Mr. Hamdi's data use. The investigators showed her an email that they viewed as suspicious; the ministry's concerns about the email eventually formed one of the grounds for Mr. Hamdi's dismissal. Dr. Davidson acted reasonably in requiring the investigators to explain to her the evidentiary basis for their concern about Mr. Hamdi's data access. Given the low threshold for assessing whether there is a suspected privacy breach, the information that Dr. Davidson reviewed was sufficient to ground a reasonable belief that Mr. Hamdi may have used data improperly. We note that, as discussed in Chapter 9, the investigators' concerns in relation to the email were not borne out. Nonetheless, given what was known at the time, Dr. Davidson's decision to suspend Mr. Hamdi's access pending further investigation was reasonable.

In relation to the decision to suspend Mr. Hart's employment, we determined that because Mr. Hart was an excluded employee, withholding his pay during his suspension was unreasonable on the same basis as the suspensions of the other excluded employees – namely, that it was not authorized by legislation or the terms of his employee contract and was therefore contrary to law (see Chapter 7).

The other three employees (Mr. Hamdi, Mr. Scott and Mr. MacIsaac) suspended during this time frame were members of the BC Government and Service Employees' Union (BCGEU) and the terms of their employment were governed by the collective agreement in place at the time. In the unionized context, the general rule is that an employer must act reasonably in suspending an employee pending investigation. In one case which addressed the issue, an arbitrator stated in part, "if an employee is suspended based on information that is objectively unreliable, it cannot be said that the Employer acted reasonably."[3] The arbitrator confirmed that the employer "must establish reasonable grounds for the suspension by showing the employee's continued presence in the workplace constituted a reasonably serious and immediate risk."[4] This decision was later upheld by the Labour Relations Board on review.[5]

8.3.1.1 UNFAIR PROCESS

The fact that Mr. MacIsaac and Mr. Hart were suspended immediately at the conclusion of what should have been strictly fact-finding interviews raises two serious questions about the fairness of the process leading to the suspensions.

The first question is whether the investigators conducting the interview were acting outside the scope of their authority as fact-finders. In Mr. Hart's and Mr. MacIsaac's case, the suspension letters were signed by the investigator responsible for strategic human resources management in the ministry, even though they were purportedly from their respective Assistant Deputy Ministers, Ms. Kislock and Barbara Walman, Assistant Deputy Minister of the Pharmaceutical Services Division. With respect to at least one of these letters, neither the employee's supervisor nor his Assistant Deputy Minister was consulted prior to his suspension. Both Ms. Kislock and Ms. Walman were

3 *British Columbia v. British Columbia Government and Service Employees' Union,* [2002] B.C.C.A.A.A. No. 395 at para 42.

4 *British Columbia v. British Columbia Government and Service Employees' Union*, [2002] B.C.C.A.A.A. No. 395 at para 45.

5 *Re British Columbia v. British Columbia Government and Service Employees' Union*, [2003] B.C.L.R.B.D. No. 13.

on vacation at the time of these suspensions, and were told only after the fact. In the case of Mr. MacIsaac, the suspension was particularly punitive given that his co-op term was ending in a few days.

The second question is whether the investigators who were conducting the interviews were predisposed to find misconduct by Mr. MacIsaac and Mr. Hart before the interviews began and as a result disregarded exculpatory evidence obtained during the interviews. The investigative team should have considered, with open minds, the evidence that Mr. Hart and Mr. MacIsaac provided, and considered whether the employees' evidence would explain or contextualize the email evidence that the investigators had previously obtained.

Both Mr. Hamdi and Mr. Scott were suspended before having an opportunity to respond to any allegations. They were suspended for more than two weeks before they were interviewed about the team's concerns. Even in those interviews, the investigators were not explicit in their description of the allegations. As a result, Mr. Hamdi and Mr. Scott were still uncertain as to the reason for their suspension after their initial interviews.

8.3.1.2 FAILURE TO ESTABLISH REASONABLE BASIS FOR SUSPENSIONS

In addition to questions about the fairness of the process, the suspensions were unreasonable because they were based on insufficient evidence. None of the evidence we reviewed, for any of the employees, met the ministry's burden to "establish reasonable grounds for the suspension by showing the employee's continued presence in the workplace constituted a reasonably serious and immediate risk."[6] The suspension letters did not indicate that the ministry was of the view that the employees posed a serious, immediate risk to government, let alone articulate what the risk might be.

Further, there was no consideration given to any measures less intrusive than suspensions which could have mitigated any perceived risk to the ministry. The ministry ought to have considered whether, for example, suspending the employees' data access sufficiently mitigated any risk. No consideration was given to whether the employees could fulfill different roles within the ministry while the investigation was ongoing. In addition, while suspending employees without pay was consistent with Public Service Agency (PSA) practice, it was unreasonable in the circumstances and in the case of Mr. Hart, an excluded employee, contrary to law.

8.4 DEPUTY MINISTER'S INVOLVEMENT

As we described in Chapter 7, the ministry's decision to notify the first three employees of their suspensions (Dr. Maclure, Dr. R. Warburton and Mr. Mattson) occurred while Mr. Whitmarsh was away. Ms. McKnight, who was acting for Mr. Whitmarsh during his vacation, directed the team to assemble the evidence within two weeks so that a final decision could be made quickly. Ms. McKnight also told the team to focus on putting together information on these three employees and to cease conducting further interviews on new matters.

This direction from Ms. McKnight caused concern among the investigation team. The investigation team began to suspect that Ms. McKnight might be involved in the matters they were investigating. One member of the team contacted Lynda Tarras, then-Deputy Minister of the PSA, with concerns that Ms. McKnight was attempting to shut down the investigation. Ms. Tarras, in turn, contacted Mr. Whitmarsh to discuss the concerns of the investigative team. Mr. Whitmarsh told her that he would look into it.

When Mr. Whitmarsh returned from vacation on July 30, 2012, he began to learn about the investigation. He would remove Ms. McKnight from the investigation when she returned from her vacation. He knew that Ms. McKnight had previous responsibility for the data area of the ministry and questioned whether she was in charge when "the train veered off the tracks in terms of custody of data." For this reason, he was cautious about her ongoing involvement. Similarly, he minimized any further involvement of Manjit Sidhu, Assistant Deputy Minister of Finance and Corporate Services and the Ministry of Health's Executive Financial Officer, given his responsibility for contracting. At the time, Mr. Whitmarsh did not know whether either of these two senior executives were responsible for any wrongdoing. This marked the end of the period that the executive sponsorship in the May 31, 2012 terms of reference effectively applied to the investigation. Ms. Walman and Ms. Kislock were on vacation and the team was no

6 *British Columbia v. British Columbia Government and Service Employees' Union,* [2002] B.C.C.A.A.A. No. 395 at para 45.

longer reporting to them. Ms. Kislock remembers being formally removed from the investigation, because the complainant made a complaint about her. Mr. Whitmarsh told us that he was not directing the investigation, but only overseeing it at a weekly meeting. No one we spoke with assumed responsibility for the investigation at this stage, but the evidence of the investigators we spoke with was that they understood that Mr. Whitmarsh was in charge.

Members of the investigation team saw Mr. Whitmarsh as a strong, decisive leader. "At the beginning I was very impressed with his leadership style," said the PSA investigator. "It was quite refreshing to have him come in and be … I think very legitimately upset that this might be going on in his ministry, and that he … we weren't going to stop until we had figured out what, you know, what was going on," she said. Another investigation team member described him as "a very quick study":

> *You could give him a huge binder of stuff and he was able to drill through it and get to the salient points right away. Didn't need a lot of support in terms of decision making. You know, didn't require a lot of time with information.*
>
> *…*
>
> *He was a strong leader.*

Many executives at the ministry had a similar view of their former deputy. Mr. Sidhu, the ministry's Executive Financial Officer told us:

> *He had a very directive – call it a very directive leadership style … He was very good at managing issues. You know, he would deal with things quickly, and he wasn't so good at kind of, what I would call, long-term strategy. But, yeah, he was good at managing issues. I could take issues to him and get decisions very quickly.*

Another Assistant Deputy Minister described him as "an amazing leader… he's energetic, he's decisive, he's great with people. He's hardworking." Other executives saw the same attributes, but in a more neutral light. "He was one of those individuals that was – because he was intelligent, he was quick to do things. He'd like make a decision and move on."

Consistent with his leadership style, Mr. Whitmarsh began to assume a greater role in the investigation. Beginning on August 10, 2012, he arranged Friday weekly meetings to discuss the investigation and the team's findings.

The investigation team attended these meetings. Also present, when available, were senior executives from the ministry, including Sandra Carroll (Associate Deputy Minister and Chief Operating Officer), Lindsay Kislock (Assistant Deputy Minister, Health Sector Information Management and Information Technology), and Barbara Walman (Assistant Deputy Minister, Pharmaceutical Services Division) . As noted above, both Mr. Sidhu and Ms. McKnight were excluded because they had senior roles at the ministry during the time of the alleged wrongdoing. The ministry's GCPE staff also attended the meetings, as did Ms. Tarras. After Ms. Tarras left for vacation on August 22, 2012, the Assistant Deputy Minister for the PSA took her place. No detailed minutes or lists of attendees were kept.

Mr. Whitmarsh told us that when he returned from vacation at the end of July he observed that:

> *… there was no organization to what [the investigators] were doing… there seemed to be this little, you know, band of people wandering around interviewing people and I was just concerned, partly about scope, and partly about focus, plus we had these timelines burning on the suspensions without pay.*

In his view, matters needed to be brought under control quickly and decisively. He said:

> *I want to be clear, I never told them to interview anybody, I never suggested what they should look into, I never told them a single thing they should ask, I suggested they get on with it and get it done, and complete their interview process, and get PSA to a point of recommendation but absolutely not in terms of … whether another interview was, whether it was necessary to talk to someone else, or gather a piece of information, absolutely no specifics that I would define as running an investigation.*

Mr. Whitmarsh acknowledged, however, that by virtue of his position others, likely perceived him as directing

the investigation, even if that was not his intention. This direction is illustrated by his decision to organize the weekly meetings to discuss the investigation. It is clear that others involved in the investigation believed that Mr. Whitmarsh was "calling the shots" from this point on. For example, the GCPE Communications Manager described him as, "hands-on … the day-to-day kind of guy on this one." He told us, "it was his investigation to kind of move forward and to kind of make decisions on." The lead investigator told us that she recalled that Mr. Whitmarsh directed that the interviews of the employees take place before any interviews of contractors and that he wanted the interviews of the suspended employees concluded before any public announcement. Likewise, the ministry's Communications Director described Mr. Whitmarsh as "very hands-on" regarding this issue, which was different from Mr. Whitmarsh's usual approach to communications.

A senior PSA executive recalled that when he first attended the meetings, the issue was being characterized as the "biggest and most sensitive data breach ever … what could be worse from a political standpoint?" He recalled that Mr. Whitmarsh was "very definitely running the meetings … and making it clear that he was in charge."

Most of the Assistant Deputy Ministers who had been involved in this matter were away through much of August, while Mr. Whitmarsh had just returned from vacation in July.[7] From this perspective, it is understandable why he became more involved in the investigation, as many of the other senior executives were not available to manage the investigation to the same extent he was. Mr. Whitmarsh was also sensitive to the potential impact from public disclosure of a privacy breach. Accordingly, he began exercising greater oversight of the investigation.

Once he became involved, Mr. Whitmarsh directed the lead investigator to focus on the seriousness of the alleged wrongdoing and directed the PSA investigator to provide advice on the appropriate employee discipline. Mr. Whitmarsh told us he was reliant on the investigators for the information on which he based his decisions, and on the PSA for guidance and support in the human resources investigation and decision-making process.

8.4.1 MINISTER OF HEALTH IS BRIEFED

On August 3, 2012, Mr. Whitmarsh briefed then-Minister of Health Michael de Jong about the investigation. In a draft letter summarizing the meeting, Mr. Whitmarsh wrote:

> *This is further to our discussion on August 3, 2012 when I briefed you on an investigation that was actively under way under my direction. This investigation into inappropriate data access arrangements and intellectual property infringements; irregular procurement, contracting and research grant practices; and standards of conduct policy conflicts and preferential treatment in employee-contractor relations within the Ministry of Health (primarily its Pharmaceutical Services Division – PSD) commenced after our being contacted by the Office of the Auditor General.*

The letter further noted that Minister de Jong had directed Mr. Whitmarsh to "take all necessary actions to identify and address the risk, ensure compliance with government policies and pursue employee disciplinary actions if warranted." Minister de Jong remembered being told that a serious data breach had taken place, which was something taken seriously by the government. Mr. Whitmarsh told us he warned the minister that this "had the potential to be a really significant issue" both in terms of privacy and contracting.

8.4.2 THE DEPUTY MINISTER TO THE PREMIER IS BRIEFED

John Dyble, the then-Deputy Minister to the Premier and Head of the Public Service, recalled that he first learned of the investigation from Mr. Whitmarsh, who described the issue as a "data breach." He said Mr. Whitmarsh told him that the team was still trying to determine what happened and the scale of the breach. He thought this initial discussion took place in May 2012. Mr. Whitmarsh was aware of the complaint by at least the third week of May 2012 and so it is likely this discussion occurred in the latter half of May 2012.

On August 15, 2012, Mr. Whitmarsh met with Mr. Dyble to brief him on the investigation. Ms. Tarras, head of the

7 See Appendix G for a listing of the Ministry of Health executive vacations in August and early September 2012.

Public Service Agency, attended the briefing. According to Ms. Tarras, her attendance was at the invitation of both Mr. Dyble and Mr. Whitmarsh. Mr. Whitmarsh explained that he thought it was important to have her human resources expertise in terms of assessing "the appropriate HR impacts" of what the investigation had found.

All three attendees confirmed that the only document Mr. Whitmarsh brought to the meeting was the Relationship Web, which he used to illustrate the complexity of the relationships and the problems arising from the ministry's contracting processes. In explaining his rationale for bringing this document to the meeting, Mr. Whitmarsh said, "it wasn't really to brief him so much as that we'd had several kind of hallway discussions … at the end of [Deputy Ministers' Council] about this," and "he'd been curious about the involvement of the Comptroller General and I said part of that's because … the web of relationships in this is complicated." Mr. Whitmarsh told us that he "didn't make any representations at those meetings with respect to rights and wrongs and what was going on, I just said look, here's the complexity of it, this is why we've handed it off to the Comptroller General."

Because he was Mr. Whitmarsh's immediate predecessor as Deputy Minister of Health, Mr. Dyble was familiar with the work at the ministry.[8] In the meeting, he questioned the veracity of the information presented. Ms. Tarras told us that Mr. Dyble appeared "not necessarily convinced" that the Relationship Web was accurate. Ms. Tarras said Mr. Whitmarsh defended his approach and even suggested that Mr. Dyble might be implicated in the problems uncovered, given his past role. According to Ms. Tarras, Mr. Whitmarsh was concerned that Mr. Dyble might be "conflicted because… a lot of these practices were created" when Mr. Dyble was Deputy Minister of Health. This was similar to the position Mr. Whitmarsh had already taken with respect to Mr. Sidhu and Ms. McKnight.

Mr. Dyble's principal recollection of the meeting was hearing about a privacy breach. He did not recall talking about the human resources consequences, only noting that "down the road that would become an issue." However, it was clear to him that such consequences were likely looming, "because the Public Service Agency would be there for an HR related matter. So I would have expected Lynda to be there if there was an HR investigation going on and I was being briefed on it."

Mr. Dyble said he "expressed…frustration" with the Relationship Web because "I couldn't figure out what it was trying to do… it made no sense to me." He said he made it quite clear at the meeting that he did not like the diagram. He could not see how it demonstrated conflicts of interest or how individuals may have personally benefited. He said Mr. Whitmarsh told him the investigation team had obtained evidence through a review of emails. Mr. Dyble also recalled that he asked Mr. Whitmarsh about the motives behind the alleged privacy breach; he said that in the absence of clear information about nefarious motives he was "worried" and told Mr. Whitmarsh to consider the motivation for any privacy breaches. Mr. Dyble told us he understood that the purpose of the briefing was to provide interim information and that nothing had yet been finalized. In his view, the matter was clearly for Mr. Whitmarsh to deal with.

Ms. Tarras recalled that Mr. Whitmarsh "said very clearly, 'John, you need to let me manage this. This is my job.'" Ms. Tarras told us that, by the end of the meeting, "It's clear to me that John agrees that he's going to trust Graham to work this through. He's not happy because this is clearly causing him grief in his world and he's concerned about it, but he understands that this is Graham's role and Graham is going to manage it."

Mr. Dyble remembered Mr. Whitmarsh telling him that "I might be in a conflict so I should stay away." He told us that he did not want to get "too close" to the investigation because "I really was trying to create a wall on HR issues between the public service and the Premier."

Following the meeting, Mr. Dyble told others in his office that he could not make sense of the Relationship Web used to brief him on the investigation.

At some point after his meeting with Mr. Whitmarsh and before the employee terminations on September 6, 2012 Mr. Dyble briefed Premier Christy Clark on the issue. He recalled mentioning it to her as an issue which might possibly come up. However, he told us that he kept the briefing

8 John Dyble was appointed Deputy Minister, Ministry of Health Services (as it was then called) on June 1, 2009, and continued in that role until March 14, 2011. See Order in Council 277/2009, 1 June 2009, and Order in Council 69/2011, 14 March 2011.

high level and focused on the alleged privacy breach, on the basis that any related human resources issues were a public service matter in which politicians should not get involved. He recalled the discussion as follows:

> *I mentioned that we had a data breach to the Premier and that there was an investigation going on – and that is the level I would have dealt with the Premier on it. Because there was a potential human resource role in here – I would have kept her away from it … whether or not you believe that's the right thing to do but I believe that the public service should – the politicians shouldn't get involved in human resources. Most of what I would have told her about was the data breach 'cause that's where the politics went in.*

Premier Clark did not have a specific recollection of being briefed on the matter prior to the terminations.

8.4.3 THE ACTING MINISTER OF HEALTH IS BRIEFED

Minister of Health Michael de Jong was on vacation from August 15 to September 2, 2012. On August 16, 2012, Mr. Whitmarsh briefed Minister George Abbott, who was the designated Acting Minister of Health while Minister de Jong was away.

Mr. Whitmarsh was concerned about the possibility that the suspensions and the investigation would be leaked publicly, and this was the apparent reason for the briefing. The telephone briefing lasted for approximately 15 minutes, sufficient for Mr. Whitmarsh to provide Minister Abbott with only the broad outlines of the investigation: serious allegations had been made by a reliable source about inappropriate disclosure of personal information for research purposes. According to Mr. Abbott, Mr. Whitmarsh sought no direction from him as to the next steps in the investigation, and Mr. Abbott had no further involvement.

Following this round of briefings, there was no further involvement from the Minister of Health until just prior to the public announcement on September 6, 2012. That involvement is discussed in Chapter 9.

8.5 SECOND ROUND OF EMPLOYEE INTERVIEWS

At the beginning of August, the investigation team decided it needed to conduct more interviews and review more emails. Between August 1 and October 19, 2012, the team interviewed over 25 different individuals. Three individuals were each interviewed three times during this period, and one individual was interviewed four times. In total, the investigation team completed 38 interviews in this time frame. Because the majority of the team's formal interviews were conducted in this period, our observations and analysis in relation to the formal interviews is set out in the following sections. We note, however, that the investigation team continued to interview ministry employees until the end of February 2013. Our analysis of the approach taken during the interviews as set out below is equally applicable to those later interviews.

Most of the second round interviews were audio recorded and in some cases, the audio was transcribed.[9] The PSA maintained the recordings and transcriptions of the interviews because the interviews were considered part of their role in relation to the ministry's investigation and the PSA investigator was to lead them. For reasons that the PSA could not explain to us, some key interviews – particularly with supervisors of the individuals who were later fired – were not audio recorded and in some cases no notes were kept; in some cases where notes existed, they were minimal or difficult to decipher.

8.5.1 INTERVIEWERS' ROLES AND PROCESS

The lead investigator, the PSA investigator and sometimes other members of the investigation team conducted these second round interviews. Based on our review of the records, it is clear that the PSA investigator and the lead investigator were in charge of the interview process and asked the majority of the questions. They did not maintain clear roles in terms of subject matter when asking questions. It was just as likely for the PSA investigator to ask questions around data, which she told us was not her area of expertise, as it was for the lead investigator

9 Based on our review of the audio recordings and the transcribed versions prepared for the Ministry of Health, some of the transcripts were not fully accurate.

to ask questions around standards of conduct, which she told us was the role of the PSA investigator.

With respect to the employees who were eventually terminated or disciplined, the PSA and the investigators generally offered the employees the opportunity to have representation at the interviews. Most of the BCGEU member employees were represented by union shop stewards, and most of the excluded staff were represented by counsel or representatives of the BC Excluded Employees' Association.

8.5.2 ANALYSIS: CONDUCT OF INTERVIEWS

We reviewed each of the interview transcripts and the investigators' handwritten notes. We listened to the audio recordings. Overall, we agree with Ms. Marcia McNeil's findings about the interview process that she described in her December 19, 2014, report. We recognize that it can be difficult to conduct interviews, particularly in an investigation of this nature, where the subject matter is complicated. We did not find every part of every interview problematic; some interviews were productive and appropriate. Through our investigation, we identified three main challenges with how the investigation team conducted the second round of interviews:

1. The investigation team provided insufficient notice of allegations and disclosure of particulars and documents prior to the interviews.
2. The investigators who conducted the interviews demonstrated a lack of objectivity. They often started from the premise that wrongdoing had occurred, and as a result they had closed minds.
3. The interview style and tone lacked neutrality and was sometimes aggressive and argumentative.

Taken together, these issues negatively affected the effectiveness of the interviews and therefore the investigation as a whole. We discuss each of these challenges in the following sections.

8.5.2.1 INSUFFICIENT NOTICE AND DISCLOSURE

One issue that arose in relation to the second round of interviews was whether the investigation team should provide employees it sought to interview with information about the allegations against them and the documents the investigators relied on to support those allegations.

The employees who were suspended on July 17, 2012 (Dr. Maclure, Dr. R. Warburton and Mr. Mattson) sought legal advice and asked the ministry to disclose information about the factual basis for their suspensions and the nature of the allegations against them. They asked for this information so that they could understand the ministry's concerns and properly participate in interviews with the investigation team.

8.5.2.1.1 LEGAL ADVICE ABOUT DISCLOSURE TO SUSPENDED EMPLOYEES

In the period between late July and October 2012, the PSA and the Ministry of Health obtained legal advice about the risks of not providing the employees with information about the allegations against them. The chronology of legal advice on this issue is described below.

On July 26, 2012, lawyers from the Legal Services Branch (LSB) recommended that the PSA provide all of the employees under investigation with particulars of the allegations against them, as well as any critical documents, in advance of their interviews. The PSA disagreed with this advice. The PSA investigator told the employment lawyer that she had discussed the matter with the PSA Director, and that the PSA's firm practice was not to provide any disclosure of specific information in advance of employee interviews. We note that providing little in the way of disclosure to employees under investigation was consistent with the PSA practice at the time.

The same day, the employment lawyer and the PSA Director had a call to discuss the investigation and the advice relating to particulars. On that call, the PSA Director informed counsel that in addition to the employee relations investigation, the Office of the Comptroller General and the Office of the Chief Information Officer were also investigating, and that those bodies were considering how soon to bring in the police. The PSA Director told the employment lawyer that those bodies did not want to provide particulars of the allegations to the employees. The PSA Director told the employment lawyer that this case required a "customized" approach.

On July 31, 2012, the employment lawyer obtained instructions to respond to her request for particulars, and to advise Dr. R. Warburton's counsel that the province was concerned that she "may have engaged in activities

which are in conflict of interest and a breach of fiduciary duty to her employer."

On August 2, 2012, counsel for Dr. R. Warburton wrote to the employment lawyer and raised concerns regarding the manner in which the investigation was being carried out, principally the ministry's continued refusal to provide particulars about the allegations against Dr. R. Warburton. The letter indicated that the province's statements about possible conflicts of interest and breaches of fiduciary duty were vague and did not allow Dr. R. Warburton to respond in a meaningful way to the concerns. The letter sought further information about the nature of the concerns as well as copies of the documents the PSA investigator was relying on. The letter raised concerns about the neutrality of the PSA investigator and concerns about whether the investigators had sufficient expertise in contracting and data access.

On August 3, 2012, the employment lawyer again advised the PSA Director to provide Dr. R. Warburton with particulars and documents relating to the allegations in advance of her next interview. The employment lawyer noted that "without access to particulars or documents in this case it is difficult to advise as to how [to] minimize legal risk and we want to ensure that we can do everything we can to assist you here."

Dr. Maclure conveyed to the ministry his willingness to participate in the investigative process but also requested further information about the allegations against him. On August 2, 8 and 9, 2012, counsel for Dr. Maclure wrote letters to the ministry noting the "complete lack" of particulars in the suspension letter and seeking full particulars and related documents with respect to the alleged misconduct in advance of Dr. Maclure's interview.

On August 16, 2012, the employment lawyer advised the PSA Director that without providing particulars to Dr. R. Warburton and Dr. Maclure, it was doubtful that either employee would attend an interview. The lawyer advised that the failure to provide particulars could form a basis for the individuals to claim that the investigation was flawed. The lawyer recommended that the PSA provide the following particulars to counsel for Dr. Maclure:

- particulars on the scope of the investigation, including the period of time under review, the health data that was allegedly misused and how it was misused
- the contracts that were the subject of the investigation and what improprieties were alleged in relation to the contracts
- policies and procedures that applied in the circumstances
- any documents that the investigators intended to put to Dr. Maclure in the interview

The lawyer also advised, however, that there was no requirement to comply with Dr. Maclure's lawyer's request for copies of the investigator's notes. The lawyer recommended that the PSA provide particulars to Dr. R. Warburton's lawyer as well, including any documents that would be put to her in an interview and copies of any relevant policies.

The PSA Director proposed a meeting with the investigation team and legal counsel to develop a strategy for responding to the employees' counsel and providing particulars. The meeting took place on August 23, 2012. Four lawyers from LSB attended the meeting, which comprised two lawyers for the PSA, a lawyer for the Ministry of Health, and a civil litigation lawyer who had been assigned to the matter a few days before. At that meeting, the investigators gave the lawyers an overview of the allegations relating to conflict of interest and misuse of data.

On August 28 and 29, 2012, the employment lawyer obtained instructions from the PSA Director and the lead investigator to provide some more information to Dr. R. Warburton and Dr. Maclure, including references to specific contracts and general enclosures related to the province's contracting and procurement processes. We note that although this disclosure provided the employees with some information about the nature of the ministry's concerns, it remained very general.

On August 30, 2012, counsel for Dr. Maclure wrote to advise that the province had still not provided all of the particulars requested in previous correspondence. On September 4, 2012, the LSB employment lawyer obtained instructions from both the PSA Director and the lead investigator to reply that the province was not legally required to provide some of the information sought, and that

the province's refusal to provide certain information did not mean that the investigation would not proceed fairly. On September 5, 2012 the employment lawyer wrote to counsel for Dr. Maclure declining to provide copies of the balance of the materials requested.

On September 6, 2012, counsel for Dr. R. Warburton wrote to the employment lawyer indicating that given the statements in the newspaper discussed in Chapter 9, the ministry should provide more information about the allegations against Dr. R. Warburton, and the interview which was scheduled for that day should be postponed. The ministry agreed to postpone the interview to accommodate the request.

On September 9, 2012, the employment lawyer told the PSA Director that if further particulars were not provided to Dr. R. Warburton in advance of her interview, it was likely that she would take the position that she had been constructively dismissed.

As part of putting together a response to Dr. R. Warburton's lawyer's request for further information, the employment lawyer contacted a representative at the Office of the Comptroller General to try to determine the basis for the referral to the RCMP. On September 10, 2012, the Office of the Comptroller General sent an email indicating that the ministry had asked the Office to refer the matter to the RCMP on its behalf, and that this was done pursuant to the Core Policies and Procedures Manual. The employment lawyer replied that same day, seeking information about why the ministry had reason to believe the conduct was criminal in nature. No reply was received from the Office of the Comptroller General.

Also on September 10, 2012, counsel for Dr. Maclure wrote to advise that Dr. Maclure was taking the position that, as a result of his suspension without pay, he had been constructively dismissed. Counsel wrote that the province had failed to provide proper disclosure of relevant documents and particulars and as a result it was no longer viable for Dr. Maclure to participate in the interview process.

On September 11, 2012, counsel for Dr. R. Warburton wrote to raise concerns about the public statements made in the September news release and to follow up again on their request for details of the ministry's allegations against Dr. R. Warburton. Counsel indicated that they considered the ministry's response to date insufficient. This letter provided information to explain Dr. R. Warburton's actions in an attempt to pre-emptively respond to the vague case against her. The employment lawyer forwarded the email to the PSA Director and the lead investigator and asked to discuss a response by phone. The employment lawyer emphasized that "a timely and comprehensive response is important, from a defensive standpoint, given the likelihood of future litigation," and sought further instructions from her clients to respond:

> *[The lead investigator], in our last telephone call (wherein we discussed my conversation with [Dr. R. Warburton's counsel] and her request that we provide an explanation for the referral to the police and also further particulars) you had expressed reluctance in terms of providing anything further. However, in light of this letter, please reconsider this and whether we can answer some of the questions posed. It would be helpful to respond to how Dr. Warburton's conduct is at issue given her explanation here that she had no spending authority or data access, acted under the authority of others … and had no undisclosed external roles such that there was a conflict of interest.*
>
> *If the Employer does not respond now, [Dr. R. Warburton's counsel] has put us on notice that the Employer will be obliged to respond in litigation – essentially this is the last chance to provide further particulars. Moreover, should the Employer fail to take any steps to respond, there is a significant chance that this will be relied upon in the litigation as a further basis for their claim that the Employer was unfair in its investigation and may result in additional significant damages.*
>
> *I am continuing to try to obtain information from the OCG to better understand the referral to the police.*

On September 12, 2012, the employment lawyer circulated a draft letter to Dr. R. Warburton's counsel for review by representatives at the ministry and the PSA. She also copied representatives of the Office of the Comptroller General to seek their feedback as to the accuracy of her description of the basis for the referral to the RCMP.

The lead investigator and the Office of the Comptroller General were not happy with the level of the detail the draft letter provided with respect to the nature of the concerns about Dr. R. Warburton. In briefing the Health and Social Services group (HSS) Supervising Solicitor about the issue, however, the employment lawyer wrote:

> *… the level of particulars provided is not unusual given the nature of the complaints, the position held by the employee and the possible consequences for her. Moreover, as we have repeatedly advised the client – the failure to provide particulars may result in a finding by the Court that the investigation was unfair and potential damages.*

On September 13, 2012, the employment lawyers had a conference call with the Deputy Attorney General Richard Fyfe, and the HSS lawyers. Mr. Fyfe indicated that he had spoken with Mr. Whitmarsh that day and that Mr. Whitmarsh was concerned about the amount of information that was going to be provided to Dr. R. Warburton. Mr. Fyfe suggested that the employment lawyers consult with a lawyer who had a criminal justice background to get his perspective on how the provision of particulars in the employment investigation could impact a potential RCMP investigation.

The employment lawyer followed up later that day with an email to Mr. Fyfe that set out the legal basis for providing particulars to counsel for Dr. R. Warburton. The employment lawyer noted that although public law duties of procedural fairness do not apply in the context of a private law employment relationship, significant damages can result from the manner of dismissal if the employer acts in bad faith or unfairly, and that aggravated and punitive damages have been awarded in cases where there has been an unfair investigation, including where the employer has failed to provide particulars to an employee who has been called to an interview. Mr. Fyfe forwarded the email setting out the employment lawyer's advice to Mr. Whitmarsh.

One of the HSS lawyers on the call followed up with another Legal Services Branch lawyer who had a background in criminal justice work. His advice was that failure to respond to Dr. R. Warburton's request for particulars might assist the investigation but could lead to a perception of high-handed conduct by government and to aggravated damages. He indicated that if government responded to the request, the effect on the position of the Crown was unknown but the response may assist with the perception of basic fairness.

Later that day, the employment lawyer obtained instructions from the lead investigator and the PSA investigator to provide Dr. R. Warburton's counsel with a letter containing further information regarding the concerns about Dr. R. Warburton's conduct as well as a description of the basis for the referral to the RCMP. The employment lawyer also advised the lead investigator and the PSA Director that there was no legal obligation to provide Dr. R. Warburton with preliminary findings or to provide her with the opportunity to respond before the ministry made a decision about her employment.

The interview with Dr. R. Warburton took place on September 14, 2012, with her counsel present, but it was not completed, and a further interview was scheduled for September 19. Following the September 14, 2012 interview, counsel for Dr. R. Warburton requested copies of the documents that had been put to her client during the interview. The employment lawyer told the lead Investigator and the PSA Director "that it is not uncommon to provide such documents in advance of an interview so as to provide an individual with a full understanding of the particulars of the complaint against them" and obtained instructions to provide the documents to Dr. R. Warburton's counsel on certain conditions.

On September 18, 2012, the employment lawyer sent a letter to counsel for Dr. R. Warburton enclosing 54 pages of documents that the investigation team had put to her in the September 14, 2012 interview. The documents mainly comprised emails with some attachments. Following receipt of the documents, counsel for Dr. R. Warburton and the employment lawyer exchanged correspondence regarding the manner in which the investigation was proceeding, with Dr. R. Warburton's counsel seeking additional disclosure. The September 19 interview was postponed as a result.

On October 2, 2012, counsel for Dr. R. Warburton wrote to advise that unless the ministry provided access to, among other things, all relevant documents, Dr. R. Warburton would not meet again with the investigators.

On October 3, 2012, the employment lawyer sought instructions regarding a reply to the letter. The employment lawyer wrote to the PSA investigator and the lead investigator, noting that their instructions had consistently been to limit the information provided to Dr. R. Warburton. The employment lawyer reiterated that this approach exposed the province to additional damages if Dr. R. Warburton pursued a claim for wrongful dismissal, and indicated she was concerned that Dr. R. Warburton's lawyer was, through correspondence, setting up to make an argument that the investigation was not carried out fairly or in good faith. The employment lawyer said that it was important to provide a response that addressed the requests for information, including when information would be provided, or why it would not be provided. The employment lawyer suggested that, where there was a concern that advance disclosure might jeopardize the investigation, allowing Dr. R. Warburton access to her files during the interview was an approach that could work. She said that, where the provision of certain information would not jeopardize the investigation, it should be provided in advance. The employment lawyer also sought clarification about what the PSA intended when it included language in Dr. R. Warburton's suspension letter that she would have the opportunity to respond to any findings made about her.

The PSA investigator replied to the employment lawyer that one of the major concerns about providing information in advance is that they wanted an "in-the-moment" response rather than something that might be rehearsed. With respect to offering Dr. R. Warburton a chance to respond to any findings about her, the PSA investigator indicated that this language was in the form letter from past legal advice they had received, but that if it was not something they were required to do, the language could be removed from future suspension letters.

On October 5, 2012, the employment lawyer obtained instructions to send a letter to counsel for Dr. R. Warburton proposing that, although Dr. R. Warburton would not be provided with documents before being asked about them, the investigators would provide her with access to a computer and her electronic mailbox during the interview. With respect to providing Dr. R. Warburton an opportunity to respond to findings, the employment lawyer indicated that at the end of the interview, the investigators would summarize their concerns and provide Dr. R. Warburton with a chance to respond.

On October 9, 2012, Dr. R. Warburton's lawyer wrote to the employment lawyer and indicated that although they disagreed with the government's approach to providing particulars, they would proceed on that basis. With respect to providing a response to any findings, Dr. R. Warburton's lawyer said that a meaningful opportunity to respond could not occur in the same meeting as the interview, and that Dr. R. Warburton should be allowed to review the materials and be given a week to prepare her response following a clear articulation by the PSA regarding any grounds for discipline.

The PSA did not agree to this approach, and no further interview was scheduled with Dr. R. Warburton. Dr. R. Warburton was dismissed on October 22, 2012.

8.5.2.1.2 THE APPROACH TO DISCLOSURE

As described above, the PSA's practice in relation to disclosure of information to employees prior to interviews ran counter to the approach recommended by the lawyers. The lawyers had explained to them that it is important to provide information in advance of interviews so that employees have a full opportunity to respond to the allegations against them. The lawyers told them that providing particulars in advance of interviews also limits government's exposure to damages from claims by dismissed employees that the investigation was not carried out in good faith. This advice was largely not followed.

None of the interviewed employees was provided with adequate information as to the nature of the concerns about them. The following excerpt from an employee's interview demonstrates how difficult it was to respond to an investigator's questions because the investigator did not provide advance information about why they were to be interviewed:

> *Investigator: … I am just going to be very frank and say that to you. Here is an opportunity today that we are meeting with you because we have to make sure that, 1) the government's information is safe and secure. We have to have a better understanding of what has happened here. We have concerns in terms of some of the emails we have posed to you, and I find it a bit confusing based*

on what I have reviewed in your mailbox that you are so unsure about the questions we are asking you about [others] … You know, I have actually found it very interesting that you have not been able to give us a clear answer. From what I have read, I find that very questionable.

Employee: … I'm not really sure, I guess up until now, what it is that you are looking for and what it is that you thought I did.

It was the PSA practice to limit disclosure of particulars. The lead investigator also preferred to limit disclosure. We asked the investigators why they preferred not to provide interviewees with documents or information about the allegations or issues prior to interviews. They told us they feared the interviewees would, by reviewing documents, have a chance to concoct alternative explanations for their conduct or rehearse their answers. The investigators believed that by surprising witnesses with documents or questions they would obtain the best evidence. One investigator described, in an email he wrote in 2012, the basis for his concern about providing information to employees in advance:

I was thinking about this a lot and it really bothers me. The lawyer for [the suspended employee] is sharp and obviously coached [the suspended employee] on how to answer some of the questions that were provided before (scripted almost). If we provide the e-mails it is not so [the suspended employee] can read them ahead it is so they can rehearse the right things to say. If they get the e-mails I don't even know if it would be that worthwhile to continue questioning. Part of the idea of these meetings is to capture that initial response, potentially catch them in a lie and not give them time to prepare an elaborate work around answer.

The lead investigator replied to this email, indicating that she agreed with the investigator and that she was "totally opposed" to providing information in advance.

When we asked the investigator about writing this email, the investigator reflected that this may not have been the best approach. He described:

… when [the lead investigator] started dropping those emails in front of people … the reactions, quite often, explained quite a bit. You could tell if they looked at it and they were boggled and were trying to figure out, well, what is that from, which is why it would have been nice to give them ahead of time.

However, the investigator then told us,

… but I found that sometimes when you put one of those notes down in front, by the reaction you would get in their expression that you get, you would know if you were on the right track to something.

8.5.2.I.3 ACCURACY OF INFORMATION PROVIDED TO INTERVIEWEES

Contrary to the views expressed by the investigators, adequate disclosure can help to ensure that the evidence obtained through the interviews is reliable. The ministry investigation relied heavily on emails, in some cases related to events that occurred years before, as evidence of wrongdoing. Providing employees with those documents in advance or, at the very least, providing them during the interview with adequate time for the employee to fully review the documents would have helped the interviewees to:

- refresh their memories
- accurately explain and answer questions related to the content, purpose and context of the documents
- provide necessary contextual evidence
- identify additional documentation or information needed to explain the documents, circumstance or facts at issue

During the course of the interviews, the investigators sometimes provided the employees copies of the documents that they had questions about. This approach is appropriate. However, in some cases, the interviewers did not show the actual documents to the witness but instead paraphrased them, telling the interviewee what a document said (sometimes incorrectly), and expecting them to explain without having the opportunity to review the relevant portions of the document. Sometimes, the emails that were provided did not include the entire string.

As a result, the ability of the employees to provide clear answers was impeded.

The following is one example of an employee providing unreliable evidence because the investigation team withheld a full email chain that was, at the time of the interview, four years old.

This employee was interviewed three times. The investigators first asked the employee a series of questions about an email before showing it to him and without bringing the full email chain to his attention. The events at issue had happened four years before the interview. Without seeing the full email chain, the employee did not have a full recollection of the actions he took following receipt of the email he was being questioned about. Throughout the next two interviews, the investigators repeatedly questioned the employee about the same email, implying that he had not acted on it. During those interviews the employee admitted that he did not remember but speculated that he might not have acted on the email. In the final interview, the employee was finally provided with the full email chain. He noted that in the full chain there was an additional email showing he did in fact act on the email in question. Despite the employee's evidence, supported by documentation, a failure to take any "discernable steps" in response to this particular email was listed as one of the grounds to support his termination.

We found multiple additional examples where the investigators incorrectly quoted evidence obtained through their investigation when questioning witnesses. At times, it was clear that the investigators were quoting evidence from another witness in order to test its reliability. While this can be accepted investigative practice, the investigators sometimes did not quote the evidence verbatim but misstated or exaggerated it. To the extent that the investigators used this practice to test the reliability of evidence, it was incumbent on them to correctly characterize the statement or make it clear that they were paraphrasing. Investigators did not always do so.

8.5.2.1.4 NOTIFYING INTERVIEWEES OF POTENTIAL FOR DISCIPLINE

As part of carrying out a fair investigation, employers should inform employees, prior to their interviews, that their conduct is under review and that disciplinary consequences could result. In many cases, the investigative team advised the employees prior to their interviews that their conduct was under investigation and they were permitted to have representation at the interview. At the outset of some of these interviews, the PSA investigator stated that the interview was part of an investigation into allegations that the employee had engaged in misconduct. This is a reasonable and fair approach.

In some other cases, the investigation team did not tell employees that their conduct was under review. By mid-August 2012, the actions of several of the suspended employees' supervisors in the Pharmaceutical Services Division had come under scrutiny. They received electronic calendar invitations from an investigator that said simply: "… this meeting is part of an ongoing investigation into the Ministry's data practices which you are required to attend. *If you have questions or concerns please call me*" [emphasis in original]. In the interviews, they were not told that their conduct was at issue.

One of these supervisors told us that, during an interview in October 2012, she asked one of the investigators whether the team was investigating her and was told no. However, the evidence indicates that the supervisor's conduct was under scrutiny as early as August 2012 and that Mr. Whitmarsh had already discussed with PSA representatives the prospect of terminating her employment.

One supervisor's evidence illustrated her experience of participating in the interview, having been given no context and no notice that her conduct was in question. She knew only that the interview related to an investigation into data practices and that she was required to attend:

> *I go into the [interview] and I was totally unnerved. I felt like I was being interrogated and in some situations I actually felt bullied by that meeting. The questions came out of context from scraps of e-mails. And if you read an e-mail out of context that maybe the person wrote in a hurry, you often could read almost anything into that e-mail. And … I was actually confused by the process. I take pride in being a relatively bright person and paying attention to what's going on. And no matter how hard I tried to figure this out, I couldn't figure it out … it didn't make sense to me.*

When an employee is under investigation, government should always inform the employee – prior to any interview – that the employee is the subject of the investigation and that disciplinary action is a possibility. In this case, the employees who were not provided notice were deprived of an opportunity to know and respond to the case against them and to seek representation.

8.5.2.2 THE INVESTIGATORS LACKED OBJECTIVITY

Objectivity is fundamental to a fair and effective investigation. Investigators should approach fact-finding interviews with open minds, and consider all relevant evidence presented to them. In the ministry investigation, the investigators did not approach the interviews with an open mind and started from the proposition that wrongdoing had occurred. The manner in which the investigative team conducted the interviews demonstrated that they were not willing to consider, in an open-minded way, evidence which contradicted their pre-conceived views. As a result, they consistently disbelieved the employees and took the view that the employees were being unresponsive and uncooperative. The investigation suffered as a result.

In our interviews with the investigation team members, we asked them whether they had considered alternative explanations for individuals' behaviour in interviews or for the emails they had read. In most cases, they were unwilling to accept that there could have been an innocent explanation for the conduct being examined. This is consistent with what we observed elsewhere in the investigative process. Members of the team consistently reinforced each other's belief in wrongdoing to the extent that no other explanation was possible.

The investigators' lack of objectivity resulted from four main factors.

First, the interviews built on the shaky evidentiary foundation established by the draft Internal Review report of July 6 and July 18, 2012, which had already identified that certain employees had engaged in wrongdoing.[10] As a result, the interviews were focused primarily on finding evidence to support pre-existing conclusions.

For example, when we asked the PSA investigator whether anyone on the team had done work to determine whether there was in fact a conflict of interest in a specific instance dealt with during an interview, her response was:

> *No, I don't think there was any ambiguity about whether that was happening, I just personally hadn't looked at it. So that work had been done, so I think it was confirmed, the contracts that, that [this employee] was signing on both ends. That that had been … confirmed. I don't remember [particular investigators], or somebody else in the ministry, but my understanding absolutely was that that that was happening. I just didn't review the contracts themselves to look at, you know, is he signing it here? Is he signing it there? So my understanding is that work was done.*

As we described in Chapter 7, the investigators had not done this analytical work despite having drawn conclusions about conflicts of interest.

Second, the investigation team did not demonstrate a good understanding of the applicable context, policy and practices. The lead investigator told us that the investigation team relied on ministry executives who had experience and skill in health research issues in order to confirm their own understanding and fill in any gaps in their knowledge. However, when they interviewed employees as part of the investigation, they appeared to discount the subject matter expertise of those employees. The investigators needed to have broad knowledge of the context in which the employees were operating in order to ensure that they gathered sufficient and appropriate evidence in the interviews, and then evaluated that evidence against the relevant standards.[11]

In a complex investigation, interviews can assist investigators, particularly those with no prior subject matter knowledge, to learn about and understand the relevant issues and make appropriate, accurate findings about employee conduct. The investigators did not gain the necessary knowledge prior to, or through, the interview process to execute their task proficiently.

When draft termination letters were prepared regarding two of the employees, the letters initially stated that they had acted contrary to the *E-Health (Personal Health*

10 See Chapter 7.

11 See Chapter 3.

Information Access and Protection of Privacy) Act. On reviewing the drafts, the lawyers pointed out that those laws did not apply to the conduct of the employees. Understanding the context in which employees are operating is critical to assessing whether their actions constitute misconduct.

Third, a number of significant steps took place early on, including the early suspensions of employees without pay, and the early notification of the Office of the Comptroller General and the OIPC, and the referral to the RCMP in late August. All of these steps were taken while the investigation was still ongoing and no formal conclusions had been reached. This created a risk that the investigators would become wedded to their theories in order to justify actions that the ministry had taken based on the information the investigation team had relayed.

The risk of any investigation losing its objectivity is always present; investigators will not always realize during an interview that they are operating with a closed mind. Everyone has a tendency to seek out information that supports their pre-conceived beliefs in a phenomenon known as confirmation bias. Typically, confirmation bias "connotes the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand."[12] In this case, the investigators determined early on that the ministry was facing a serious problem, and as a result, they tended to more readily accept evidence that supported their view and discount or disbelieve evidence which contradicted it.

Fourth, the investigation team was operating under significant time pressures, in part because they understood that Mr. Whitmarsh wanted those employees who were engaged in misconduct terminated by the date of the public announcement. Investigators were not always well prepared for interviews, which meant they had to rely on their own theories and assumptions to inform their questions. Such a practice may be an appropriate interview technique, but only if the interviewers are open to having their theory questioned or refuted by the witness and then take time to properly inform themselves where they need to. For example, it may have been appropriate if the investigators needed to test their theories or conclusions with witnesses who were subject matter experts, or if they wanted to put a preliminary conclusion about conduct to an employee to give that employee an opportunity to respond. However, in such circumstances, the investigators should not have an "end result" or "anticipated outcome" in mind.[13]

The PSA investigator gave evidence that she recognized they were sometimes unprepared: "I do have a lot of respect for [the lead investigator], but I did talk to her about things, like being prepared for the interviews, that we couldn't go in and have incomplete documentation." For her part, the lead investigator told us that the PSA set the interview schedule, and on at least one occasion, the team delayed an interview, recognizing that they were not ready.

A good safeguard against losing objectivity is to establish, and update as necessary, an investigative plan. The terms of reference did not cover the myriad issues that the team was investigating by the time it began the second round of interviews. The lack of investigative planning and the expansion of the investigation to increasing numbers of ministry staff meant that the investigative team would have required significant amounts of background information in order to properly consider the employees' evidence. Because they did not always have sufficient background information, they sometimes misunderstood the employees' evidence and reached incorrect conclusions.

8.5.2.2.1 AN EXAMPLE OF LOSS OF OBJECTIVITY

The primary way the investigators' lack of objectivity manifested in the interview process was in their failure to properly consider the witnesses' evidence.

Rather than asking additional questions or paraphrasing the witnesses' responses back to the witness to ensure they understood, the investigators sometimes argued with the witness, or moved on without acknowledging the witness' evidence or exploring the issues further. Even where the investigators believed they already had facts to support a conclusion, when presented with new facts or an alternative interpretation of facts, they should have been prepared to examine that matter further in the interview.

12 Raymond S. Nickerson, "Confirmation Bias: A Ubiquitous Phenomenon in Many Guises," *Review of General Psychology*, 2, 2 (1998): 175-220 <http://psy2.ucsd.edu/~mckenzie/nickersonConfirmationBias.pdf>.

13 Marli Rusen, "RV-3: Fundamental Requirements of a Fair and Defensible Investigation," 4.

The investigation team's closed-minded approach was also illustrated by how it interpreted a witness' nervousness or anxiety during the interview as a sign of culpability, or an employee not answering a question as a sign of evasion rather than a genuine inability to answer the question. Often, interviewees were put in an impossible position. If they denied engaging in the conduct alleged, they were disbelieved. If they admitted engaging in the alleged conduct, it convinced the investigators they were really on to something. As described in the sections above, witnesses were often given insufficient or inaccurate information, which impaired their ability to adequately and accurately respond to the interview questions.

We expected the interviewers to have taken evidence that contradicted their theories into account in their subsequent questioning, particularly when that evidence was provided by those with subject matter knowledge. In most cases, they did not do this. For example, when interviewing Roderick MacIsaac, the investigators repeatedly asserted that he was using data for his PhD and that he had a flash drive containing ministry data in his possession. Mr. MacIsaac told the investigators nine times in the space of a two-hour interview that he did not use any data for his PhD, and five times that he did not have a flash drive containing ministry data in his possession. To illustrate the extent to which the investigators received, but did not hear this evidence, we have reproduced the nine occasions on which Mr. MacIsaac gave evidence that he did not use any data for his PhD (emphasis added):

> *Investigator 1: I'm asking* did you have a signed off document or agreement in place for you to externally use the data for your PhD project?
>
> *Employee:* No, but I haven't actually started on that yet.
>
> *Investigator 2: But you did submit a formal submission to the ethics review board?*
>
> *Employee: Right. That has to be done to explain to them that I am using anonymized personal data to get an ethic waiver so I don't have to do an ethical review.*
>
> *Investigator 1: You identified [it] as an anonymized.*
>
> *Employee: Yes.*
>
> *Investigator 1: And who was going to make it anonymized for you?*
>
> *Employee:* I don't know. We are not at that stage yet.
>
> . . .
>
> *Investigator 1: And what does the proposal say in terms of how the data will be anonymized?*
>
> *Employee: It just says it will be anonymized.*
>
> *Investigator 3: Did you have a plan for that?*
>
> *Employee: No*
>
> *Investigator 3: Was that through [two employees]?*
>
> *Employee: No.*
>
> *Investigator 3: … You had no discussion … about anonymizing the data at any time?*
>
> *Employee: No. Because* I wasn't working on my PhD. I was working on the smoking cessation program.
>
> . . .
>
> *Investigator 3: And we can give you some high level things. Basically what the allegation is, or the concern is at this point, is that [you have] been using Ministry of Health data inappropriately for [your] PhD thesis without approvals.*
>
> *Employee: Okay.*
>
> *Investigator 3: Along with that, goes the release of data.*
>
> *Investigator 1: Possession.*
>
> *Investigator 3: Exactly. There are very strict rules around what data can be used for and the release and sharing of that data. Sharing disclosure … Before we get into any more questions did you want to respond to anything that I have just said?*
>
> *Employee: Well,* so far I have only worked on the, when it comes to data, working with it, with regards to the internal evaluation on the smoking cessation program. I have

not gone to the stage where I am using any data for my PhD project. That has not started yet.

. . .

Investigator 1: And you have also confirmed earlier that you said that [an employee] had access to the secure portal for the data from Health Community Survey and you have just talked about [an employee's] access to that, and that it was from the secure aspect, not the open data, correct, that was tied to your project.

Employee: To the smoking cessation, *yes.*

Investigator 1: Are you in the possession of any, any information from [certain employees . . .] that includes data for your PhD?

Employee: Well, I am in possession of data for the smoking cessation program.

Investigator 1: I will repeat my question.

Employee: I haven't started. I have not produced any data sets for my PhD.

. . .

Employee: Right. The data would be collected internally for the 2011 smoking cessation program and it would just simply refer to that being mean collected. Thank you. I have read it several times. The issue here is that I'm using PSD secure for the internal evaluation. I am not supposed to do any evaluation for smoking cessation until those data sets are anonymized. So I haven't started anything in terms of data analysis for my PhD.

. . .

Investigator 1: No we are discussing it today with you . . . because it is your PhD. And we have emails here that say, "need data appendix for PhD proposal." "Need data for . . . PhD." So we are asking you, can you confirm that [other employees] provided you data for your PhD?

Employee: No, they were providing me information for my smoking cessation program.

Investigator 3: But . . . it says right on there.

Employee: I know that . . . They are aware that I was eventually going to do a PhD, but this was actually for the smoking cessation program.

. . .

Employee: Yes, and people started getting confused about what I was working on for the Ministry and what I was working on for my PhD.

. . . But everything I have been working on so far, except for the PhD proposal has been for smoking cessation program.

PSA Investigator: That is not at all what the evidence suggests here.

. . .

Investigator 3: I'm asking the question, what we are talking about is data related to your PhD. You are saying that you were just a co-op student. We are saying that the data that we are talking about relates to your PhD proposal and you are saying you were just a co-op. And my comment or question to you, is as a PhD student are you not accountable and responsible for data usage, data access and data for your project?

Employee: But that we would be working on it later on.

Investigator 3: But you are not working on it later on. You are working on it.

Employee: I'm working the proposal so it can be submitted before a committee *and stuff like that.*

. . .

Investigator 3: So you are aware that there are sharing data, and requests for data, there are,

Employee: Yes, I know that. And I said that. And if you had looked at my previous emails you will have noted that I mentioned to [an employee], you can't just give me the data. There are arrangements that have to be put out.

Investigator 3: Yet you didn't have anything in place for your PhD?

Employee: This was for the smoking cessation program again.

Investigator 3: I know, I am just talking in general terms. You are aware of what needs to happen for the release of data, but there was no such documentation for the release of data to do with your PhD.

Employee: Well there was no data released.

Investigator 3: Well I disagree with that.

Mr. MacIsaac's termination letter asserted that he had "inappropriately accessed data for the purposes of [his] PhD" and that he had, in the interview, "provided misleading and incomplete information."[14]

The investigation team's reluctance to believe the evidence that employees provided in their interviews was reflected in the termination letters, which in some cases included the following statement:

> *You were given opportunities to respond to the allegations … your responses were often vague, evasive and generally untruthful; you routinely attempted to mislead the investigators by providing false information.*

Having read the transcript and listened to the audio of the interviews with these employees, we found that this was an inaccurate and, unfair characterization of the employees' responses in the interviews. Rather, it is evident that the interviewers did not adequately consider, with an open mind, what the employees were telling them.

8.5.2.2.2 LACK OF OBJECTIVITY MADE THE INVESTIGATION INEFFECTIVE

The purpose of the interviews should have been to gather evidence and contextual information that could later be assessed and weighed with other evidence to establish whether or not there was any employee misconduct. This did not happen. The investigators were often trying to find wrongdoing rather than determine facts.

This approach meant the investigators did not gather the necessary information to draw accurate conclusions about employee conduct. It meant the investigators dismissed or overlooked evidence directly relevant to the issues they were meant to be examining. As a result, the interviews were not only unfair but ineffective.

The investigators discounted relevant documentary and oral evidence that tended to show there was no misconduct, mischaracterized evidence and failed to provide employees with genuine opportunities to respond to the allegations against them. The ineffective fact-gathering process meant government made termination decisions with insufficient evidentiary bases and, in many cases, in the face of evidence that there was no misconduct at all, creating a risk that it would not be able to defend its decisions later. The investigative process exposed the government to risk of increased damages in the event of legal action or arbitration due to the manner in which employees were dismissed.

8.5.2.3 INTERVIEW STYLE WAS TOO OFTEN ARGUMENTATIVE

In any public service investigation, witness interviews should be conducted respectfully and in a manner that reflects the function of the interviews as fact-gathering exercises. There is room for a range of appropriate behaviour in an interview setting. Interviews can be difficult to conduct, particularly when the interviewer believes that they are dealing with a serious matter. However, fact-gathering interviews should never be conducted in such a way that the ability of the witness to provide full and frank evidence is impeded because they are put on the defensive by the interviewers' conduct.

Many witnesses who had been part of this interview process reported that they were shaken up or upset by the conduct of the interviews. When we spoke with individuals who had been interviewed, they most often described their experience as an "interrogation." Many people were emotional when telling us how they had been treated during these interviews, which had taken place years earlier. This reaction was not limited to those individuals who were fired.

Based on our review of the audio recordings of the interviews, we found that the investigators often did not ask open-ended questions. The lead investigator in particular tended to ask questions in the style of cross-examination.

14 We assess the reasonableness of the decision to terminate Mr. MacIsaac's employment in Chapter 9.

That is, her questions too often contained the answer she was expecting, and accordingly did not allow employees to provide full evidence on specific points. Interviewers sometimes interrupted the employees' answers, and did not return to the question to allow the employees to continue their response. These issues impaired the evidence-gathering process. The interviews were not in keeping with our expectations for a fair and reasonable interview process.

The tone of some of the interviews was problematic. Sometimes the investigators argued with the employees, rather than asking them questions. Sometimes they told the employees that they disbelieved the employees' explanations about their conduct. On a few occasions, the investigators lectured the employees on their conduct or told them that their conduct was unacceptable. The investigators were not in a supervisory or reporting relationship with the employees and such conduct was outside of their role as fact-finders.

When we spoke with her, the PSA investigator explained her perspective on the conduct of the interviews:

> *I did talk to [the lead investigator], sometime let's say half way through the process, I did talk to her about that we needed to be careful of our tone in the interviews and maybe dial it back a little bit, and there were you know she does have a very sort of police-investigator style at times with people so you know there were definitely issues with some of the ways that some of the questioning was done, I mean I know there were a couple of times where I started to lose my cool a little bit when you feel like you're just constantly getting lied to. . . .*

In one case in particular, the investigators questioned an external contractor who they believed had possession of a flash drive containing personally identifiable data. The contractor was brought in on the pretence of discussing his contract and then questioned about the flash drive. The contractor was taken aback by the aggressive nature of the questioning. At the conclusion of the interview, the investigators began to search for and question – with no notice – the contractor's wife, who was a ministry employee. This employee described to us how the investigators appeared at her desk and said, without introducing themselves, "you have to come with us." When the employee asked what this was about, the investigators refused to answer. They could not find space for the interview, so after walking around the entire floor of the Ministry of Health building, ended up questioning her on a patio of the building. The employee said of her interactions with the investigators, "they had nothing planned, they just swooped in and scooped me up." It wasn't until they were finally on the patio that the investigators even introduced themselves.

These approaches were not only inappropriate but were also not conducive to obtaining the best evidence. They had the effect of putting the witnesses on the defensive, which made it hard for them to give full answers to the questions posed. One witness explicitly told the investigators that he was feeling defensive because he felt he was being accused of things that he did not do.

Overall, the approach to the interviews fell below the public service standard of ensuring that members of the public service are treated with respect.[15]

8.5.3 EXECUTIVE OVERSIGHT OF INTERVIEW APPROACH

We have explained how the practice of not providing disclosure hampered the effectiveness and fairness of the interviews. It is essential for executives to ensure that individuals conducting investigative interviews do so with appropriate training and policies in place to guide their conduct. We heard from the PSA investigator that such controls were not in place at the time she was conducting this investigation. She told us that the best practices and training materials discussed in Ms. McNeil's 2014 review report (see Chapter 16) "weren't in place at the time … we started the investigations unit, and no one really knew what they were doing." It was up to the PSA executives of the day to ensure that PSA investigators had the training and policies necessary to carry out their work effectively. One PSA executive did tell us that, with the benefit of

15 "We want to make sure that members of the public service are treated with respect, are treated appropriately when there are human resource implications involved with their work." Hon. Terry Lake, British Columbia Legislative Assembly, Hansard, 7 October 2014, 4542 <https://www.leg.bc.ca/documents-data/debate-transcripts/40th-parliament/3rd-session/20141007pm-Hansard-v15n3#4542>.

hindsight, he would have taken more steps to help the PSA investigator better carry out her role.

We also heard evidence that concerns were brought to the attention of executives in the ministry about the conduct of the interviews. Mr. Whitmarsh denied hearing any such concerns. He said, "I had nothing to indicate to me that the conduct of the interviews was in any way inappropriate when I was there, not a single thing." He also told us that he had:

> *… heard that the individuals weren't cooperating as I understood it with explanations as to what these events were … A frequent theme was incredible frustration that no one would cooperate in the interviews and help them explain not just what happened.*

The idea that individuals were not cooperating was persistent; it showed up in three of the termination letters as one of the grounds on which individuals were fired. However, what investigators perceived as lack of cooperation was, as described above, often a refusal by interviewees to agree with the investigators' theory of events, because the interviewee believed that theory was incorrect.

In November 2012, an employee who was interviewed grew increasingly concerned that the investigators' lack of knowledge of basic facts and the serious accusations they levelled against him threatened his employment and indicated major flaws in the investigation. He sent an email to both the Minister and the Deputy Minister of Health outlining his view of the investigators' misunderstandings and the serious allegations of wrongdoing that were built upon those misunderstandings. He questioned whether "information-gathering" interviews were appropriate venues to level serious accusations. If so, he believed it was only fair that the investigators advise staff of their right to be accompanied by legal counsel.

Mr. Whitmarsh responded to the email the same day by expressing the confidence he had "in the investigative team and the work they are doing," and asking the employee to continue to work "within the parameters of the ongoing investigation." He explained:

> *Neither the Minister or I will be engaging in, or commenting on the points you raise. I will review the outcome of the investigative teams [*sic*] inquiries when they are complete and in the meantime would encourage you to participate fully.*

Minister MacDiarmid did not recall receiving the email, and she did not respond directly.

On September 5, 2012, a PSD Executive Director who had been interviewed wrote an email to Ms. Walman raising concerns that the investigators misunderstood the context of the ministry programs and questioning whether they might be inappropriately targeting individuals:

> *… [following my interview] I left wondering whether the review has made its conclusion of scandal, but was fishing to find things to fit the conclusion.*
>
> *I also left wondering whether there was a full understanding of the ADTI, how PSD viewed research and relationships with researchers.*
>
> *Without the full understanding, it seems awkward and a bit unfair to apply a more conservative black-white approach towards staff, research or associated, and penalize them when a more liberal grey approach was generally accepted before. That is not to say a different approach cannot be used or that we cannot improve going forward.*
>
> *I support a review that strives to find the truth around alleged inappropriate action. And if there is inappropriate actions, that whatever penalty is determined will consider the degree of severity of inappropriateness and considers the individuals' other contributions to public service.*
>
> *Aside from the potential impact to the individuals, I am concerned about the overall impact of this on PSD staff and ADTI project itself.*
>
> *I write this to you so you can hopefully get a better understanding of the "other side" of the story, both of the investigation and the context within PSD that the situation has emerged …*

The evidence demonstrates that key executives had some awareness about concerns that employees were raising about how the interviews were being conducted. The oversight provided by senior executives is a key control in an investigative process. It is difficult for a public service investigation to be conducted fairly if executives do

not take responsibility for ensuring that those conducting the investigation understand and apply basic principles of fairness of the kind that we articulated in Chapter 3. In this case, executives did not take responsibility for the way that the investigation was unfolding.

8.5.4 FAILURE TO INTERVIEW KEY INDIVIDUALS

8.5.4.1 FORMER ASSISTANT DEPUTY MINISTER

No one interviewed Mr. Nakagawa, who had created the organizational structure within which many of the matters under investigation allegedly occurred. The reason for this omission is unclear.

The PSA investigator's evidence was that Mr. Whitmarsh told the investigators not to interview the former Assistant Deputy Minister. The lead investigator also recalled that a member of the executive at the ministry gave that direction. The PSA investigator described this as "crushing" because Mr. Nagakawa had a lot of information that would have related to the issue of whether the employee conduct at issue had been condoned.

When we interviewed Mr. Nakagawa, he said that Mr. Whitmarsh had called him to let him know that he might be contacted by an investigator and asked if he would cooperate. He did not remember the exact timing of the telephone call, but speculated that it was around the public announcement of the firings. The former Assistant Deputy Minister's evidence was that he responded, "Of course I'll cooperate." He said that he was not given any specifics about the investigation and did not volunteer any information.

Mr. Whitmarsh's evidence was that the investigation would likely expand to the executive at some point, but he did not want it to involve them while employees were still suspended without pay. He was concerned that some ministry executives might have been implicated in the wrongdoing.

The investigator's inability to interview Mr. Nakagawa, whatever the cause, was a significant omission in the investigative process. It left investigators with a gap in information in terms of understanding the history, purpose and structure of PSD. When we spoke to Mr. Nakagawa he told us it was the first time he had been asked about this matter.

8.5.4.2 SUPERVISORS AND OTHERS IN THE REPORTING STRUCTURE

As we reviewed transcripts and audio of the interviews, it became clear that the investigators were struggling to figure out whether the alleged conduct of many individuals was appropriate. It is understandable that they struggled in this respect; as described above, they did not have the program knowledge to fully understand what were, in some cases, very complicated questions.

However, the investigators failed to involve other employees who could provide explanations, context or background information. For example, they did not always seek information from individuals' supervisors or from others who were in a position to understand the kind of work that the employee did and was supposed to do. Instead, supervisors were, in many cases, cut out of the investigation and any resulting disciplinary decision making. One employee raised this issue in her interview, stating:

> *Before we get underway, I would like to ask a question of the panel? My ADM and my Executive Director both wanted to be here in the room during this informational interview. That request was declined. I would like to know the rationale for that? If this is informational, they have an interest in what is happening to their employees.*

The investigator responded:

> *Our interest is really hearing directly from you … this is a very large and complex investigation and … It is incumbent upon us to keep things as tightly controlled as possible so the fewer people that are accessing the information, or are privy to the things that we are discussing, the better.*

In other cases, the investigators did speak with supervisors but only in a limited way. One Executive Director whom we spoke with was interviewed for 30 minutes and left wondering whether an employee in her branch had sold health data (the investigation team had no evidence that this was the case, and we found no evidence to support that allegation). That supervisor told us:

> *… they implied that [the employee] had received money. For some kind of personal or financial gain, [the employee] had provided data to an outside source, and they wanted to know if I thought*

that – that that would have been okay, that providing some kind of data for personal gain or financial gain. … And the reason why I remember is because I thought that was bizarre. … I had no idea what they were talking about.

The Executive Director said that the investigators did not relate the allegations to specific individuals or data; rather, it implied something was going on "behind the scenes." No one asked the Executive Director about the allegations that actually appeared in the employee's termination letter.

The investigative approach in relation to the supervisors of the employees under review, created a gap in the investigation team members' knowledge that made it more likely they would base their conclusions and recommendations on an incomplete or inaccurate understanding of the facts.

8.6 REPORT TO THE RCMP

The first discussions about reporting the matters under investigation to the RCMP likely occurred in a meeting between members of the investigation team and the Office of the Comptroller General held on June 22, 2012, three weeks into the investigation.

When we asked the lead investigator about the rationale for reporting to the RCMP, she told us that where there are "concerns about any potential criminal wrongdoing on any investigation I've done in the past … whether it's conflict of interest or, you know, fraud or any type of event that you, that could be any possibility, our role is just to notify the OCG." While the lead investigator said she was following the lead of the Office of the Comptroller General, the Director of the Comptroller General's Investigation and Forensic Unit (IU), in contrast, said he was just involved to "monitor" the situation. He said ministries "are obliged to contact the RCMP. We're not their servants … in the early stages my instructions were to monitor so if I'm invited by [the lead investigator] to attend a meeting with the RCMP I think it's fitting that I attend the meeting to monitor." He told us that it was common for him to recommend referrals to the RCMP as it was standard operating procedure and consistent with the Core Policy and Procedure Manual. When we interviewed each of them separately, the lead investigator and the IU Director each indicated that the other made the decision to report the matter to the RCMP.

Regardless of who decided to contact the RCMP, the evidence is clear that they jointly supported the referral. On August 20, 2012 the lead investigator emailed the IU Director and another IU staff member to say, in part:

… we had a MOH briefing on Friday re this file and wondered if we could chat for a few minutes tom re advising police.

On August 23, 2012, the IU Director telephoned an officer in the RCMP's Commercial Crimes Unit. He told the RCMP member to expect a call from the lead investigator about "possible breach of trust/data breach." The following day, the lead investigator spoke with the RCMP member to discuss the matter. They set up a meeting for the following Monday, August 27, 2012. Over the weekend, the lead investigator sent the RCMP member a copy of the draft Internal Review report dated August 16, 2012. The RCMP member's evidence was that he reviewed this document quickly.

On August 27, 2012, the RCMP member met with the lead investigator, the IU Director and another IU employee. According to the RCMP member's notes of the meeting, as well as notes taken by the provincial government employees who attended, they discussed the August 16, 2012 draft of the Internal Review report and allegations of possible "fraud/breach of trust." The lead investigator "laid out relationships between the parties."

Mr. Whitmarsh told us that he understood that the lead investigator had referred the matters arising from the investigation to the RCMP. Mr. Whitmarsh said that he understood the referral was routine and required by government's core policy.

According to the RCMP member's recollection of the meeting, the lead investigator explained that an individual had come forward with information about employees in the Pharmaceutical Services Division of the Ministry. The allegations related to access to and use of data for academic research and publications, thereby creating a personal benefit, and possibly resulting in missing data.

For the RCMP member, this raised various questions about whether the use of data as described was a benefit and whether such use was authorized through contract or other means. The lead investigator put considerable emphasis on the relationships between the parties, which for

the RCMP member raised questions about whether those relationships or any transfer of money between individuals was properly authorized.

At the meeting the RCMP member described the elements and evidence that would be required in order to prove a possible offence under the *Criminal Code*, based on the facts provided to him. He made no commitment that the RCMP would investigate, nor did he require those at the meeting to take any steps to further the RCMP's potential investigation. He told them that a decision on whether to investigate would depend on the RCMP receiving a final report and on the RCMP's capacity at the time to take on the matter.

The lead investigator told the RCMP member that a final investigation report would be ready around September 18, 2012.

Following this meeting, the RCMP had internal discussions about how they would manage the file if it became an active investigation. Despite these discussions, the RCMP remained of the view that they had not been provided with any evidence of a criminal offence. In the absence of this evidence, they would not conduct an investigation.

The RCMP member did not recall any discussion at this initial meeting of employee suspensions or firings. His understanding was that the ministry's team was close to completing its investigation.

On September 12, 2012, the RCMP opened a file on this matter, pending receipt of a report that contained evidence of criminal activity. The RCMP confirmed that opening a file is an administrative step only. The date on which a file is opened does not necessarily correspond with the date on which the RCMP was contacted with a complaint. We were told by the RCMP that it was not unusual for a file number to be generated some time after a referral was made.

In this case, the records were unequivocal that the IU Director first contacted the RCMP on August 23, 2012, followed the next day by the lead investigator. The Labour Day weekend, police training days and regular time off between that date and September 12 accounted for the time lapse between the initial contact with the RCMP and the RCMP file being created. We also learned that as part of the RCMP's record-keeping process, the initial synopsis of a file must be updated when the file is concluded. The concluding synopsis for this file inadvertently made reference to the initial meeting with the investigation team having occurred on September 12, 2012. In fact, it had occurred on August 27, 2012, as was confirmed by the verbal and documentary evidence we received.

8.6.1 ANALYSIS: DECISION TO REPORT TO THE RCMP

As it read in 2012, the Core Policy and Procedures Manual set out the following procedure for making reports to the police:

> *In all cases where a ministry has reason to believe that the conduct of an employee or contractor in the workplace is criminal in nature, the ministry should promptly notify the appropriate police authority and cooperate in any resulting investigation or prosecution. It is recommended that ministries contact the Comptroller General and the human resources consultant assigned to their ministry for advice and guidance.*

For loss incidents arising from illegal activity, the policy in effect in 2012 provided that the Executive Financial Officer will contact police:

> *Where it is suspected that an employee is involved in a loss incident resulting from an illegal activity, the executive financial officer or delegate must immediately advise and seek guidance from the Comptroller General and the human resources consultant assigned to the ministry. The executive financial officer will contact police, if warranted.*
>
> *The Comptroller General may direct Internal Audit and Advisory Services to conduct or otherwise assist in an investigation of the incident.*

Since 2012 the policy has been amended and now provides:

> *In all cases where a ministry has reason to believe that the conduct of an employee or contractor in the workplace is criminal in nature, the ministry should promptly notify the appropriate police authority and cooperate in any resulting investigation or prosecution. It is recommended that ministries contact the Comptroller General;*

Legal Services Branch; and the BC Public Service Agency for advice and guidance.

And

Where it is suspected that an employee is involved in a loss incident resulting from an illegal activity, the executive financial officer or delegate must immediately advise and seek guidance from the Comptroller General; Legal Services Branch; and the BC Public Services Agency. The Executive Financial Officer will contact police, if warranted.

The Comptroller General may direct or assist in an investigation of the incident.

In this case, Mr. Sidhu, Executive Financial Officer for the ministry, contacted the OCG about the matters under investigation. With the assistance of the OCG, the lead investigator reported the matters to the RCMP on behalf of the ministry. If the ministry was concerned about a "loss incident" then under the policy Mr. Sidhu should have been the individual to have made such a report. However, the ministry investigation team did not find that the ministry had suffered any losses.

In an email to the lead investigator on August 1, 2012 Ms. Kislock suggested that one of the employees was "breaking the law" by sharing data. In her interview, Ms. Kislock indicated that she thought that the conduct of the individuals under review could have potentially engaged the offence provisions in the *Pharmaceutical Services Act*. However, we did not obtain any evidence that suggested that breach of that provincial statute was what formed the basis for the report to the RCMP in 2012.

The Ministry of Health publicly announced that the matter had been referred to the RCMP in its September 6, 2012, news release. This issue will be discussed in the following chapter.

FINDINGS

F 12 The Ministry of Health acted reasonably in suspending Ramsay Hamdi's access to data pending an investigation.

F 13 The August 2012 employment suspensions of the three included employees were improper because:

- **a.** They lacked sufficient evidentiary basis.
- **b.** They were made without reasonable grounds that their continued presence constituted a reasonably serious and immediate risk.
- **c.** They were made without due regard for whether lesser measures were sufficient to address the perceived risk to the ministry.

F 14 The interviews conducted by the investigation team were improper as they had all the procedural flaws identified in the findings of the McNeil Report:

- **a.** The interviews were not conducted objectively and failed to adequately obtain or record exculpatory as well as inculpatory evidence.
- **b.** The employees were not consistently provided notice of the allegations against them.
- **c.** Employees were not always provided an adequate opportunity to provide a full response.
- **d.** Employees were not provided an adequate opportunity to review relevant documents in advance of the interviews.

F 15 In addition, there were other procedural flaws, as some of the interviews were:

a. Not conducted appropriately in that investigators were unnecessarily argumentative and aggressive when it served no investigative purpose.

b. Conducted in disrespectful manner or inappropriate location.

c. Purportedly conducted as informational interviews when in fact the interviewee was suspected as having committed wrongdoing even before the interview took place.

d. Conducted without having afforded individuals the opportunity to have representation present.

F 16 In 2012 ministry executives had some awareness of the concerns being expressed by ministry staff about the conduct of the interviews and the direction of the investigation but took no substantive action to determine whether the concerns were valid.

F 17 The lead investigator and the Director of the IU met with the RCMP on August 27, 2012. The RCMP indicated no decision would be made whether to commence a police investigation until government's investigation was complete and a final report was provided to the RCMP. No final report from the Ministry of Health investigation team was ever provided to the RCMP.

9.0 / EMPLOYEE DISMISSAL DECISIONS AND PUBLIC ANNOUNCEMENT

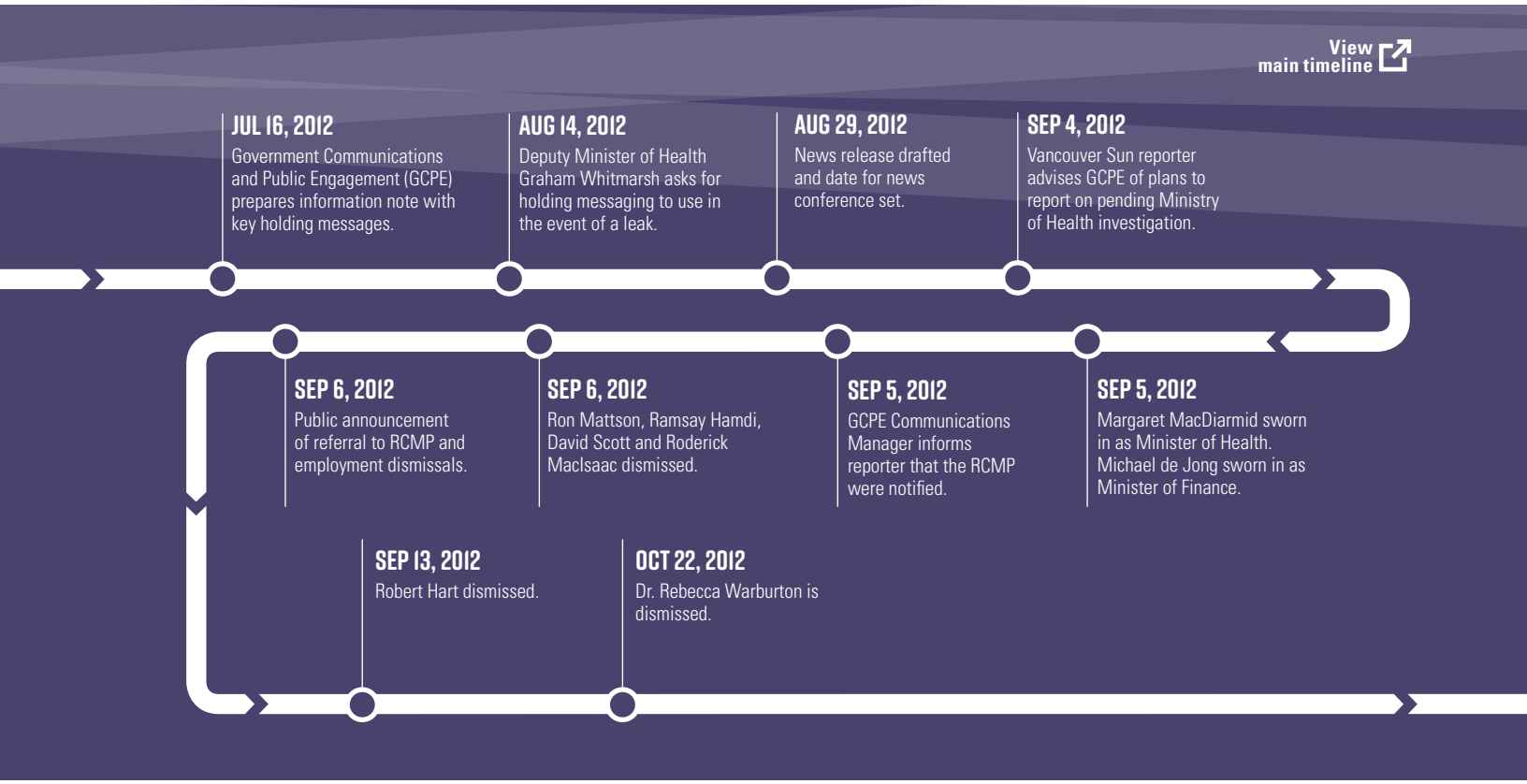
9.1 INTRODUCTION

On September 6, 2012, the Minister of Health announced publicly that ministry employees had been suspended or terminated with cause and that the RCMP had been contacted. The accompanying press release stated that the Ministry of Health had provided the interim results of its investigation to the RCMP and had asked the RCMP to investigate.

That same day, the ministry dismissed David Scott, Roderick MacIsaac, Ramsay Hamdi and Ron Mattson for what it alleged was just cause. On September 13, the ministry dismissed Robert Hart, also alleging just cause. On October 22, 2012, the ministry dismissed Dr. Rebecca Warburton, also alleging just cause.[1]

This chapter of the report outlines who was responsible for those dismissal decisions; describes and analyzes the process leading to the decisions, including the involvement of legal counsel; and assesses the propriety of the decisions as they related to each of the employees who were fired. It then describe the series of events leading to the September 6, 2012, public announcement.

1 The Ministry of Health did not terminate Dr. Maclure's employment because he had already taken the position that his suspension without pay amounted to a constructive dismissal. Mr. Whitmarsh was not directly involved in the decision to suspend Dr. Maclure.



9.2 DISMISSAL DECISIONS

9.2.1 DECISIONS MADE BY DEPUTY MINISTER

Ministry of Health Deputy Minister Graham Whitmarsh made the decisions to terminate the employment of these six individuals. As Deputy Minister, Mr. Whitmarsh was the only person who had the statutory authority to dismiss an employee for just cause, pursuant to section 22 of the *Public Service Act*.[2] When we interviewed him, Mr. Whitmarsh accepted that he was the only person in the Ministry of Health with the power to dismiss individuals and that he had made the decisions. Our conclusion that Mr. Whitmarsh made the dismissal decisions is also consistent with evidence we received from other witnesses. It is also consistent with the evidence we received about his decisive leadership style, as discussed in Chapter 8.

Neither Mr. Whitmarsh nor anyone on the investigation team pointed to Deputy Minister to the Premier John Dyble, Premier Christy Clark, Minister Michael de Jong (Minister of Health from March 2011 to September 5, 2012), Minister Margaret MacDiarmid (Minister of Health from September 5, 2012, to June 2013); or anyone else in a similar role as having directed the dismissal decisions. Based on the evidence we have received and reviewed, we are confident in concluding that, although Premier Clark, Minister de Jong and Mr. Dyble were all aware of the investigation, none of them, and no one in the Premier's office or the Minister of Health's office directed Mr. Whitmarsh to make the dismissal decisions.

When we interviewed him, Minister de Jong confirmed that, as set out in a draft letter Mr. Whitmarsh prepared, he directed Mr. Whitmarsh on August 3, 2012 to "take all necessary actions to identify and address risk exposure, ensure compliance with government policies and pursue employee disciplinary actions if warranted." The Minister told us that when he was briefed on August 3, 2012, it was uncertain whether there had been any wrongdoing,

2 *Public Service Act*, R.S.B.C. 1996, c. 385. Section 22(2) states: "The agency head, a deputy minister or an individual delegated authority under section 6(c) may dismiss an employee for just cause." In September 2012, the authority to dismiss employees for just cause had not been delegated to any other individual in the Ministry of Health.

only that there had been a data breach. He recalled asking Mr. Whitmarsh "whether, based on what he knew thus far, was this a case of people in the pursuit of their duties and in pursuit of the public good maybe being a little overzealous?" Minister de Jong told us, "I indicated that [Mr. Whitmarsh] should proceed as he is required to do and do so in accordance with the rules and policies that are in place." Minister de Jong told us that he does not provide specific instructions to his Deputy Ministers on human resources issues, and did not do so in this case.

Premier Clark did not recall ever being briefed about the decision to terminate the employees. Mr. Dyble denied he put any pressure on Mr. Whitmarsh to make the dismissal decisions, and this is consistent with the evidence of Deputy Minister Lynda Tarras, then-head of the Public Service Agency (PSA), and Mr. Whitmarsh.

Minister MacDiarmid first learned about the dismissals planned for September 6, 2012, at her first briefing on September 5 (discussed in section 9.4.6 below). She recalled:

> *. . . the firing decisions, I think had already been made. Nobody ever talked to me about, you know, should we fire these people or shouldn't we. I didn't think anything of that because in my view, the minister does not do that.*
>
> . . .
>
> *I just remember it being presented to me as a* fait accompli.
>
> . . .
>
> *I did not question that and I don't remember Graham, other than just saying, "we're doing this."*

Ms. Tarras was involved in the process leading to the decisions as outlined earlier in this report but did not make the decisions. She was out of the country on vacation from August 22, 2012 until the day before the terminations. As Deputy Minister of the PSA she had overall responsibility for the human resources advice provided to Mr. Whitmarsh and we comment in section 9.2.3.2 below regarding the problems PSA had carrying out its advisory function.

We also describe the role of the Legal Services Branch (LSB) of the Ministry of Justice in detail later in this chapter, including our finding that no legal advice was sought or provided regarding whether there was just cause for the dismissals. Mr. Whitmarsh testified that he believed that LSB had provided legal advice in relation to the merits of the terminations.[3] He said that he believed lawyers had reviewed the termination letters and that legal advice about the merits of the terminations was implicit in that review. We have concluded that he held an understandable though mistaken belief that legal advice on the merits of the dismissals had been provided. In one case, however, involving Mr. Mattson's dismissal, we find that, despite that belief, Mr. Whitmarsh should have taken proactive steps to follow up to resolve the conflict between his belief that legal advice had been provided and the advice he was receiving from the PSA that just cause probably did not exist to dismiss Mr. Mattson.

9.2.2 PROCESS FOR REACHING DISMISSAL DECISIONS

Serious discussions about whether to fire the employees for cause occurred at the regular Friday meetings that Mr. Whitmarsh scheduled in August 2012 with the investigation team, senior executives from the Ministry of Health, staff from Government Communications and Public Engagement (GCPE) and the PSA throughout August. During this time period the core investigation team still consisted of the lead investigator, the PSA investigator, the strategic human resources specialist and the contracts specialist.

The PSA investigator described the process of gathering evidence to support a dismissal decision as getting over a "hurdle." Mr. Whitmarsh used similar language to describe the process of determining who would be dismissed. Mr. Whitmarsh described it as getting "over the bar." He described the process:

> *. . . [the lead investigator] looks at the severity of what's happened with respect to data handling, [the PSA investigator's] job is to decide what the consequences are, now we have to be sure that*

3 As will be pointed out below, one of the jurisdictional limitations that applies to this investigation is that the Ombudsperson may not investigate a person acting as a solicitor to an authority or a person acting as counsel to an authority: *Ombudsperson Act*, s. 11(1)(b). Since the Ombudsperson's role is to examine the conduct of authorities, this limitation does not prevent the Ombudsperson from examining whether an authority sought or received legal advice, which is why we received evidence directly from LSB. However, we have done that solely for the purpose of assessing the actions of the authorities, not to assess the actions of legal counsel.

> *these individuals were over the bar you know with or without management … I mean there's a set of scenarios, right, and I did not know which was true … one scenario is that management had no idea about this, in which case there's clear culp[ability], there's another where management had some idea, which seemed to be kind of what I gathered – that this was as much as anything inaction when these things were raised to them …*

The PSA investigator gave evidence that Mr. Whitmarsh presented terminating individuals as the only option where misconduct was found, and directed the investigators to amass instances of wrongdoing for those individuals. Mr. Whitmarsh did not accept this explanation when we put it to him.

The language used by both Mr. Whitmarsh and the PSA investigator to describe the dismissal discussions, the evidence we heard from other witnesses, and the content of and approach to the interviews strongly suggest that, from the outset of the investigation, investigators believed dismissals were likely. To a large extent, the investigation team spent the time between the initial suspensions and the dismissal decisions focused on trying to gather sufficient evidence to support dismissals.

When we spoke with him, Mr. Whitmarsh explained that he made the dismissal decisions on the basis of recommendations from the PSA. The PSA investigator confirmed that Mr. Whitmarsh made the decision to dismiss the employees, but asserted that "there weren't recommendations" from the PSA. She elaborated:

> *Graham said it was from the very beginning that anybody that was touched with this was getting fired. So, it's not like there were an assessment of each person like … what you would normally do. That didn't happen in this case because it was – well, have you found misconduct? Yes? Then it's terminate. … so if you want to say I made recommendations, it would be I guess so, because I said, oh absolutely, [an employee] misconducted himself for example, based on our findings to date … There were certainly conversations with Graham about the weakness of not finishing the investigation, and he wasn't interested in that so there weren't specific recommendations.*

Mr. Whitmarsh strongly denied that he ever told the PSA representatives that terminations were the only option. He believed that the PSA was backing away from its responsibility. His position was that, "it is inconceivable to me that four people could have letters drafted by PSA and I would get to sign them if PSA was uncomfortable in any way."

The PSA drafted the dismissal letters and decided what grounds for dismissal would be included in them. For some of the letters, other members of the team provided input, fact-checking, and revisions. Mr. Whitmarsh indicated that he viewed these letters as the PSA's effective recommendations for dismissal.

While Mr. Whitmarsh made the dismissal decisions, he did so based on the information the investigation team provided to him. The PSA supported the process by preparing the content of the dismissal letters and facilitated and attended the termination meetings.

Since the dismissals, many of the parties involved have minimized their involvement in the actual dismissal decisions. The lead investigator told us that she was not involved in human resources decisions. However, the evidence shows that the lead investigator reviewed and contributed some of the alleged grounds for the dismissals in the termination letters. Further, there is no doubt that the human resources decisions were based on the investigative findings. Mr. Whitmarsh told us that he tasked the lead investigator with uncovering the wrongdoing and relaying it to him and the PSA investigator to make a recommendation about the appropriate discipline.

9.2.2.1 ASSISTANT DEPUTY MINISTER INVOLVEMENT IN DISMISSALS

The dismissal letters for Mr. Hamdi and Mr. Scott were accompanied by "suspension pending recommendation for dismissal" letters purportedly from Heather Davidson, Assistant Deputy Minister of the Ministry of Health Planning and Innovation Division. This dual letter approach was common practice when dismissing bargaining unit employees. Their suspension pending recommendation for dismissal letters and their dismissal letters (the latter signed by Mr. Whitmarsh) were issued on the same date. The suspension pending recommendation for dismissal letters provided greater detail with respect to the alleged misconduct than the dismissal letters did. The dismissal

letters to Mr. Hamdi and Mr. Scott referenced the suspension pending recommendation for dismissal letters in the following way:

> *Having considered the information on which this recommendation is based, I concur fully with the conclusions reached by Heather Davidson and communicated to you by letter dated September 6, 2012.*
>
> *It is my opinion that the misconduct identified in Ms. Davidson's attached letter is completely incompatible with the standards of conduct required of Public Service employees.*

However, Dr. Davidson made no such recommendation to Mr. Whitmarsh either orally or in writing. Dr. Davidson did not sign the suspension pending recommendation for dismissal letters. In fact, Dr. Davidson did not know of their existence until she reviewed them as part of our investigation. Dr. Davidson was not involved in assessing the allegations against her employees, deciding whether their actions amounted to misconduct or whether dismissal was appropriate discipline. She was aware only that the ministry intended to terminate Mr. Hamdi's and Mr. Scott's employment. She attempted to gain information about the pending dismissal decisions, but she was not able to get a briefing before the dismissal decisions were made.

On September 4, 2012, a member of the investigation team contacted Dr. Davidson to inform her of the impending dismissals of two of her employees:

> *Hi Heather – looks like we will be ready to proceed with 2 terminations in your area (Ramsey [sic] Hamdi and David Scott) this week.*
>
> *You will need to invite Mr. Hamdi and Mr. Scott to attend separate meetings this week (preferably Thursday), along with their union representation.*
>
> *I suspect this will need to be couriered to them and have asked the PSA for some wording re: the meeting notice. I should be getting this shortly and will forward to you.*
>
> *Graham will sign the termination letters (today or tomorrow).*

Dr. Davidson responded by asking for information on the process and justification for the dismissals, as she had not been privy to the investigation process or findings. She explained her request for more information to us:

> *Because by then I had got suspicious about what the process was, because I was seeing how – well, I was just hearing from my staff about, about it and their concerns. And so that's why I – and just as a matter of process, that I would want to see what the evidence was. And like I said, I never saw that letter until I read it here. I was really actually quite shocked that they'd use my name.*
>
> *. . .*
>
> *And also as I said, I was beginning to get concerned about what the process had been, because of what I knew, or what I was hearing from my staff. So that was why I wanted to know, "Is there justification, and has there been a legitimate process?"*

The Employee Relations Specialist, who was copied on the email exchange, responded by requesting that Dr. Davidson reply immediately with her availability for the termination meetings set up for the following day. Dr. Davidson was not given information on the process and justification for their terminations.

Dr. Davidson informed the Employee Relations Specialist that she would be in Vancouver on September 6, 2012, when the termination meetings were scheduled and reiterated that she had asked for a briefing on the process and rationale for termination before the meetings. The Employee Relations Specialist responded on September 5, 2012, stating, "These meetings need to occur tomorrow per Graham's request therefore I have made alternate arrangements." Dr. Davidson was never briefed on the reasons for termination, nor was she told that suspension pending recommendation for dismissal letters had been drafted under her name.

Manjit Sidhu, Assistant Deputy Minister of Finance and Corporate Services, signed those letters on Dr. Davidson's behalf and he attended the meetings with Mr. Hamdi and Mr. Scott to deliver them. Mr. Sidhu told us that because Dr. Davidson was unavailable, "Graham asked me to go and basically convey the message to them, so that's what I did. I went and read from a prepared script and gave them the message. That was my only involvement." Mr.

Sidhu was unaware of any concerns that Dr. Davidson had. It was also Mr. Sidhu who met with Mr. MacIsaac on September 6, 2012, to deliver his dismissal letter.

Barbara Walman (Assistant Deputy Minister, Pharmaceutical Services Division) had been away from the office from August 7 to 31, 2012. On September 4, 2012, the same member of the investigation team who had written to Dr. Davidson sent a similar email to Ms. Walman, as follows:

> *Hi Barb – looks like we will be ready to go with 2 terminations (Ron Mattson and Roderick MacIsaac) this week.*
>
> *Don't believe we need to do Roderick's in person; however, we need to invite Ron and his representation to a meeting to deliver the message.*
>
> *I have asked the PSA for some wording re: the meeting notice. Should be getting this shortly.*
>
> *Graham will sign the termination letter (today or tomorrow).*
>
> *Can you set some time aside to conduct the termination on Thursday?*
>
> *I have copied [the Employee Relations Specialist] on this email – as she has agreed to sit in on the terminations.*

Ms. Walman responded the following morning to say, "I would like a briefing on exactly what we are terminating him for." When we showed this email to Ms. Walman she told us, "there's obviously been a decision by the Deputy [Minister] … so he's obviously been briefed on Ron Mattson … and then I get a letter … he's in my division. So I – I am the one that delivers the – the termination letter." She did not recall the specific details of the briefing she received about Mr. Mattson, only that she thought "it was the restatement of – of the case."

The decision to dismiss Mr. MacIsaac was made not long after his interview. Mr. MacIsaac was interviewed on August 28, 2012. His Assistant Deputy Minister Ms. Walman was informed of the decision to terminate Mr. MacIsaac on September 4, 2012. Mr. Sidhu met with Mr. MacIsaac and delivered the dismissal letter in person on September 6, 2012. Because Mr. Sidhu was delivering the termination letters to the other two included staff, arrangements were made for him to deliver Mr. MacIsaac's letter as well. As described by the Employee Relations Specialist:

> *And then Roderick was added at kind of the last minute on the 5th.*
>
> *…*
>
> *It's interesting because when I was looking – yeah, because I had been setting up meetings for Dave Scott, and Ramsay Hamdi, and it wasn't until the afternoon that Roderick was added …*

Lindsay Kislock (Assistant Deputy Minister, Health Sector Information Management and Information Technology) was away from the office from August 20 to September 7, 2012 so she was not present during the period leading up to the termination and was not present or consulted when Mr. Whitmarsh made the decision to terminate Mr. Hart, who worked in her division. She gave evidence regarding the arrangements for Mr. Hart's termination on September 13:

> *… a date and time has been fixed where Bob Hart will appear at the Public Service Agency office … and I'm advised where to go and meet [the Employee Relations Specialist] who gives me a letter that's been signed by Graham that outlines the reasons that Bob is being terminated.*

Ms. Kislock met with Mr. Hart and delivered his termination letter.

9.2.2.2 INVOLVEMENT OF SUPERVISORS

In Chapter 8, we described how the investigators, in general, either failed to interview employees' supervisors or did not interview them in a comprehensive way so as to understand the work these employees did or obtain context about the allegations. Similarly, these supervisors – mainly at the Director or Executive Director level – were not involved in the decision-making process with respect to the dismissal decisions. Instead, the investigation team provided information directly to the Deputy Minister.

For example, one Executive Director we spoke with had not seen the dismissal letter for an employee in her division until we interviewed her in the fall of 2016. She told us:

> *… I was never consulted, advised, discussed prior to this happening … I was quite upset and*

disappointed in that because [the fired employee] was a staff person in my branch. So I do feel that it would have been beneficial to talk to me. So I do disagree with that approach of not speaking with me prior to any action being taken.

Similarly, another Executive Director told us that he was "just informed" about the interview with, and the subsequent dismissal of, one of his employees. When we asked this Executive Director if he would normally be given notice of the interview, he said, "I would hope so."

Mr. Mattson's former Executive Director gave the same evidence that he was not consulted on the decision to dismiss Mr. Mattson or the rationale. He said:

So … all I knew, there was some investigation. I would be needing to cooperate. I would be interviewed at some point, and … we just went along with it. But … the entire culture of … everything sort of changed. I was asked to … collect Ron, he was [in Vancouver] for a conference. I was told to get him, so I picked him up, drove him to his hotel to get his stuff and then drove him to the Harbour Air [terminal] to catch a flight to … meet Barb to be terminated.

I have to this day not seen his letter of termination. As his direct report, I was never – I was not consulted directly with, "Okay … this is the evidence we found for Ron. What do you think? … What's your take on this?"… To this day I've never seen any of that stuff.

9.2.2.3 INVOLVEMENT OF LEGAL SERVICES BRANCH

As described in a Chapter 8, Legal Services Branch (LSB) lawyers met with investigators and the PSA Director on August 23, 2012. At that meeting, investigators gave the four lawyers in attendance (two employment lawyers, a Health and Social Services (HSS) lawyer and a civil litigation lawyer who had been assigned to the matter a few days earlier) an overview of the allegations relating to conflict of interest and misuse of data. At least two of the lawyers raised a concern that some of the conduct of the employees under investigation had been condoned. This advice was unsolicited and was given verbally.

On September 12, 2012, the employment lawyer briefed her Supervising Solicitor on the file, noting that

… there appears to be a division of opinion amongst the investigators as to whether just cause exists in the case of Dr. Maclure: although [the lead investigator] believed there is just cause, [the PSA investigator] has indicated that Dr. Maclure was operating outside the rules with the knowledge of his ADM, Robert Nakagawa and therefore there is the potential for a defence of condonation.

The employment lawyer went on to note that although she had not been asked to provide legal advice on the issue, "the defence of condonation is something that we have repeatedly raised as a possible defence including at the group meeting which was held on August 23rd with the investigative team and legal counsel …"

The unsolicited advice relating to condonation referenced above was the only advice that LSB gave regarding the merits of the dismissals before they took place. Prior to the dismissals, no one at the ministry or the PSA sought a legal opinion as to how the legal principles relating to condonation could impact the government's position that it had just cause to terminate the employees. There was no evidence that the lawyers' advice in relation to condonation was communicated to Mr. Whitmarsh prior to the terminations. Mr. Whitmarsh's evidence was that he considered whether executives ultimately needed to be accountable for what he understood to be poor oversight of practices within the ministry. On the issue of condonation specifically he said, "it's a complicated scenario and I … had no option but to rely on PSA."

On August 29, 2012, the employment lawyer gave the PSA Director case law relating to conflict of interest, breach of fiduciary duties, and just cause.

Also on August 29, 2012, after learning about the suspension of Mr. MacIsaac, the LSB employment lawyer sent an email to the PSA Director as follows:

In relation to our last discussion about the co-op student – here is the case I mentioned about the loss of an apprenticeship.

What is interesting is that in this case the Court of Appeal confirmed the award of $25,000 for "consequential damages" (see paras. 64 to 65) for the loss of the apprenticeship on the basis that it

> *was in the reasonable contemplation of the parties that a wrongful ending of his apprenticeship and ability to train as a journeyman would cause a setback in his career. This amount was is in addition to the damages for wrongful termination*

The email included a link to the court decision. The employment lawyer gave evidence that she provided this case law because she was concerned about the Ministry of Health terminating Mr. MacIsaac's contract without being certain they had just cause to do so.

On September 4, the PSA investigator provided the employment lawyers with draft dismissal letters for Mr. Mattson and Mr. Hart and asked them to have a "look" at the letters. The employment lawyer who took on this task wrote to the other employment lawyer advising that she would like to have a call with the PSA investigator, and perhaps the PSA Director, to find out, among other things, if the PSA was seeking their opinion on whether the Ministry had just cause to dismiss Mr. Hart and Mr. Mattson. The lawyer went on to say that if the PSA was seeking their opinion on cause, it would be helpful to have additional information.

Later that day, the employment lawyers had a conference call with the PSA investigator and the PSA Employee Relations Specialist. The PSA representatives told their lawyers that they did not want legal advice about whether there was just cause to terminate Mr. Hart and Mr. Mattson, but instead were seeking the lawyers' comments on the draft letters. On that call, the lawyers noted that both draft dismissal letters stated that Mr. Mattson and Mr. Hart had acted in contravention of the *E-Health (Personal Health Information Access and Protection of Privacy) Act* and sought clarification as to which provisions of that Act were engaged. The PSA representatives did not know which provisions of that Act applied. The employment lawyers consulted an HSS lawyer for advice on the issue and were informed by the HSS lawyers that the Act likely did not apply in the circumstances. The employment lawyers told the PSA investigator and the specialist that the legislation was likely not applicable and removed the reference from the dismissal letters. The employment lawyer made some other revisions to the letters.

On September 5, 2012, the employment lawyer wrote an email to the PSA investigator and the Employee Relations Specialist, copied to the PSA Director and other legal counsel, attaching the revised dismissal letters. The covering email confirmed the scope of the PSA's instructions to their counsel, as follows:

> *As discussed, I confirm that you have not, at this time, sought our opinion as to whether the Ministry has just cause for the termination of these individuals, but rather our comments on the letter.*

Mr. Whitmarsh was not copied on this email. There is no evidence that he saw it or was made aware prior to the terminations that the lawyers had not provided legal advice on the merits of the terminations of Mr. Hart and Mr. Mattson.

The LSB lawyers were not asked and did not review the dismissal letters for the included employees (Mr. Scott, Mr. Hamdi and Mr. MacIsaac) who were dismissed on September 6, 2012. We were told it was not the general practice at the time for LSB to be asked to review dismissal letters for included employees.

More than a month later, on October 10, 2012, the employment lawyer was asked to review Dr. R. Warburton's termination letter. The PSA investigator sent an email to members of the investigation team, the PSA Employee Relations Specialist, and the employment lawyer, attaching a draft dismissal letter for Dr. R. Warburton. The PSA investigator instructed the employment lawyer to "edit/amend [the letter] as necessary."

On October 16, 2012, the PSA investigator asked the employment lawyer when the revisions to the letter would be complete so that she could keep Mr. Whitmarsh "in the loop". The employment lawyer indicated that she had been working on the letter and that she thought they could finalize the letter for Mr. Whitmarsh by October 19. The employment lawyer noted that the letter contained a lot of detail and that it was "critical that the conclusions that we draw from the emails and from other information we have gathered is supportable and reasonable." She went on to note in her email to the PSA investigator that she would like to:

> *… go through the revised letter with you (and [the lead investigator] if available) paragraph by paragraph, together with the binder of emails that you sent me to make sure we are 100% confident in*

the point we are making; if not we should delete it (and I need your help with this as I have had trouble finding the emails that are reflected in the letter).

Late in the morning of October 17, 2012, the PSA investigator sent the employment lawyer copies of the majority of the emails referenced in the dismissal letter. Around that same time, the employment lawyer had a call with the PSA investigator and the lead investigator to discuss the letter, and followed up the call with an email attaching a revised draft which included the revisions discussed on the call.

On October 18, 2012, a draft of the letter was sent to an outside law firm who had been retained by the ministry to defend Dr. Malcolm Maclure's constructive dismissal claim and the grievances filed by the included employees. Outside counsel added a comment which was then included in the letter, and the dismissal letter was sent to Dr. R. Warburton on October 22, 2012.

When revising the dismissal letter for Dr. R. Warburton, the employment lawyer had more time and more access to information than when she revised the dismissal letters for Mr. Mattson and Mr. Hart. However, she did not provide an opinion as to whether there was just cause to terminate Dr. R. Warburton's employment. The employment lawyer said that when she received the draft dismissal letter for Dr. R. Warburton, the ministry had already decided to terminate her employment, nor was she asked. She said that, as with the dismissal letters for Mr. Mattson and Mr. Hart, she understood that the PSA was only seeking her comments on the letter and that is why the PSA investigator instructed her to "edit/amend" the letter as necessary.

The PSA investigator confirmed that she did not seek the employment lawyer's opinion on whether there was cause to terminate Dr. R. Warburton. However, that was not Mr. Whitmarsh's understanding. Mr. Whitmarsh recalled a conversation with a lawyer (he was unable to recall the name) in which the number of grounds to include in the dismissal letter were discussed. Although no legal advice was provided on the issue of just cause, in the case of Dr. R. Warburton's dismissal, Mr. Whitmarsh had the most justification for his belief that such advice had been provided.

9.2.3 ANALYSIS OF DISMISSAL PROCESS

The process that led to the dismissal decisions was flawed in a number of ways. First, we consider problems with the investigation team's fact-finding. Second, we discuss problems with PSA fulfilling its advisory function. Third, we outline the legal advice that was provided and confusion regarding that advice. Fourth, we outline problems with the decision-making process itself.

9.2.3.I PROBLEMS WITH THE INVESTIGATION TEAM'S FACT-FINDING

There were several problems with the investigative team's fact-finding. For example, during employee interviews, on a number of occasions, employees offered explanations for their conduct or provided information to contextualize emails that were of concern. Investigators rejected the explanations of the employees without conducting a considered analysis of the evidence because of their view that the credibility of the employees was in doubt from the outset.[4]

The investigation team should have spoken with all of the key witnesses who may have had relevant information about the employees and the allegations against them, including the employees' supervisors. As described in Chapter 8, investigators sometimes failed to speak with supervisors within the Ministry of Health who could have provided explanations for the employees' actions.

Where they did speak with the employees' supervisors, investigators sometimes failed to ask critical questions.[5] Sometimes the evidence of the employee was not accurately characterized to the supervisor. This meant that the evidence elicited from the supervisors was based on

4 See Chapter 8 for a more complete description and analysis of the interview process.

5 For example, when the investigators spoke to the Executive Director of the Drug Intelligence Branch in charge of the ADTI initiative on August 29, 2012, the transcript of the interview indicates that they did not ask him questions about the work of the contract manager (Ron Mattson) of the project, or about the project itself.

a faulty premise.[6] They also failed to talk to the former Assistant Deputy Minister of the Pharmaceutical Services Division (PSD), Mr. Nakagawa, who would have provided valuable information regarding the impugned actions of some of the terminated employees.

An objective investigative report pertaining to a dismissal should identify and describe the key documentary and oral evidence that was uncovered regarding the alleged employee misconduct whether inculpatory or exculpatory, and then describe how that information was assessed, against the relevant public service standard, to inform its conclusions. The Internal Review report drafts that the team compiled in July and August 2012 did not meet this standard, and no other report was completed. Developing a written report is considered a best practice in human resources because it imposes discipline on an investigation. In this case, a written report would have imposed a framework on the PSA investigator to systematically summarize and assess the evidence rather than relying on memory and off-the-cuff analysis through verbal communication with decision-makers.

9.2.3.2 PROBLEMS WITH THE PSA FULFILLING ITS ADVISORY FUNCTION

There is supposed to be a separation of functions when a human resources investigation is conducted. Typically, the PSA investigator provides a copy of the written investigative report to the Employee Relations Specialist at the PSA. The specialist reviews the facts in the report, conducts an analysis as to whether the employee's actions constitute employee misconduct, and provides recommendations as to what discipline, if any, is appropriate in the circumstances. In making recommendations, the specialist may consider the severity of the wrongdoing; the import of any organizational condonation of the employee's conduct; the employee's years of service and employment history; and any mitigating factors.

The decision of the B.C. Labour Relations Board in the oft-cited case Wm. Scott & Co. (Re) sets out a list of factors that arbitrators, and by extension, employers, must take into account when considering whether to terminate an employee for cause. These factors apply equally in the case of excluded employees, and include:

1. The employee's record
2. The employee's length of service;
3. Whether or not the misconduct was an isolated incident in the employment history of the employee
4. Whether the employee's conduct was provoked in any way;
5. Whether the misconduct was spur of the moment or premeditated;
6. Evidence that the employer's rules of conduct, have not been uniformly enforced, thus constituting a form of discrimination;
7. Circumstances negating intent;
8. The seriousness of the offence in terms of employer policy and employer obligations; and
9. Any other circumstances which the employer should properly take into consideration.[7]

When the PSA specialist is considering recommending termination of an excluded employee for cause, usually the PSA specialist, or sometimes the PSA Director, obtains legal advice as to the strength of a finding of just cause. For unionized employees, the specialist usually obtains labour relations advice from a senior labour relations advisor at the PSA regarding the strength of a termination for cause.

In 2012, the specialist in this case usually provided her analysis and recommendations to client ministries in writing except in cases where there were no findings of misconduct or the misconduct was relatively minor. Usually, the specialist would provide her analysis and recommendations, any legal advice, and the investigator's fact-finding report to the decision-maker in a package that is commonly referred to as "the binder." The binder may serve as the evidentiary record for any disciplinary action. If the specialist recommends dismissal and a Deputy Minister decides to terminate, the specialist would then draft the dismissal letters with reference to the information in the

6 For example, Dr. R. Warburton's supervisor was asked about Dr. Warburton's hiring of Mr. MacIsaac, when Dr. Warburton was not on the hiring panel.

7 WM Scott 1976 BCLRBD No 98 1977

binder. In this case, the PSA specialist assigned to the investigation did not discharge the advisory function she was supposed to fulfill. She did not review the factual findings of the PSA investigator, which were, at this stage, incomplete and not in the form of a written investigative report. The specialist did not consider what disciplinary action was warranted in the individual circumstances of each employee or obtain legal advice or labour relations advice with respect to any recommendations. No binder was prepared for any of the terminated employees.

A number of factors interfered with the ability of the PSA specialist to fulfill her advisory function. She told us that the PSA investigator was fulfilling some of her job functions. The specialist also said that sometimes the PSA Director would step in and have discussions with the lead investigator and the employment lawyer about issues that the specialist would ordinarily deal with. She said she raised her concerns with the PSA Director but the PSA Director did not take any action that she was aware of. The specialist was concerned that "we were all kind of being asked to do things that didn't really make a lot of sense," and as a result, she was "concerned about being able to do my job effectively because I didn't have all the information, the investigation wasn't done. I couldn't advise on what to do when I hadn't known what the findings were." The specialist told us that she wasn't always clear on what the PSA Director had said to other people involved in the investigation, and she was concerned about "not being in the loop."

In this case, the PSA investigator did not prepare any investigation reports about any of the terminated employees. These reports were not prepared, in part, because of time pressure to terminate the employees quickly, and because the team briefed Mr. Whitmarsh directly at the Friday meetings about the facts the team was finding. Further, at the time the dismissal decisions were made, the investigation was incomplete and ongoing.

On July 23, 2012 the PSA Director returned from vacation. Following her return the PSA Director was involved in issues arising out of the investigation regarding the disclosure of particulars and providing instruction to legal counsel. She discussed the investigation with the PSA specialist and the PSA investigator, and on July 26, 2012 she had a call with the employment lawyer regarding the need for a "customized" approach to this case. The PSA Director arranged the July 30, 2012 conference call with the lawyers, investigators, and the Office of the Comptroller General. Throughout August 2012, she was in regular, if not daily, contact with the PSA investigator and the specialist regarding the investigation. The PSA investigator told us that she did not do anything in the investigation without discussing it with the PSA Director and that the PSA Director was "extremely involved."

The PSA Director was in regular contact with the employment lawyers who were taking their instructions from her and the lead investigator in relation to issues arising from the investigation. The PSA Director, as well as the lead investigator, were setting the direction on the disclosure of particulars to the suspended employees, approving letters to the employees' lawyers, and receiving legal advice on process and damages issues.

The PSA Director attended a number of key meetings throughout August. She attended an August 15, 2012 "whiteboard meeting", arranged and attended the August 23, 2012 meeting between investigators and various lawyers, and attended a meeting on August 28, 2012, where the team discussed the issues around the termination of Mr. Mattson.

Both the PSA specialist and the PSA investigator recalled that the PSA Director gave them direction that if Mr. Whitmarsh had already decided to terminate the employees, and did not want their advice, then their role was to "support" him as the decision maker to carry out the dismissals. The evidence that we obtained indicates that the PSA Director's instruction was consistent with the PSA's practice at the time. The PSA has since changed this approach. In this case, the PSA's approach contributed substantially to the problems with the process followed in reaching the dismissal decisions because the PSA did not insist on following its own procedure and provide Mr. Whitmarsh with appropriate written advice in relation to the terminated employees.

The PSA Director told us that her involvement in the investigation and the amount of control she exercised over it was limited because of the involvement of the executive. She said as the PSA Assistant Deputy Minister Bert Phipps and Ms. Tarras became increasingly involved, her role diminished.

As previously described, Ms. Tarras had several discussions with Mr. Whitmarsh about the investigation. In mid-August, Ms. Tarras indicated that either she or her ADM would attend the Friday update meetings with the Deputy Minister of Health. Ms. Tarras attended the Friday meeting on August 17 and Mr. Phipps attended at least one Friday meeting on August 24 or August 31, but likely both. The PSA Director gave evidence that the involvement of the PSA executive in the investigation interfered with the ordinary PSA processes:

> *Because I think there's too many executive[s] involved calling the shots, sorry. Because [the employee and labour relations advisors are] not there, I'm not there, [the PSA investigator]'s only there as an investigator, really, not in that role to give advice. And it's all coming down to a lot of people in the executive talking to one another.*

The Employee Relations Specialist said that her advice was not sought and that she did not feel it was her place to provide it. Like the PSA Director, the PSA specialist gave evidence that the involvement of the PSA executive interfered with the ordinary human resources processes:

> *… and people above me, at every level knew, and if nobody's putting a stop to it then …who am I do anything else? … I felt … like I was uncomfortable, I felt like I didn't have a handle at all on what was going on, that I was trying to kind of cobble things together based on –… write a letter, do this, or we're firing people, and … there was no plan… it was just so chaotic.*
>
> …
>
> *Like for me I know why I didn't … call Graham Whitmarsh directly, because my boss was aware of what was going on, her boss was, so was Lynda … and again I don't know at what point Lynda [Tarras] was, but Bert [Phipps] was earlier. So if, you know, an ADM who's been around for over 20 years isn't calling to say, hey, there's a problem here, … I don't know what place it is for me to do that, when … I'm new in the job, and this is basically what we're being told, so … but what do you do?*

The PSA specialist told us that she ended up performing administrative tasks rather than providing advice. She said that she was not part of the discussions when the dismissal decisions were made. She said her role was reduced to assisting with the implementation of the dismissal decisions, including assisting the PSA investigator with drafting the dismissal letters and arranging the meetings for the dismissals to take place. She said she had to rely on the PSA investigator to assist with the drafting of the dismissal letters because she was unfamiliar with the facts underlying the alleged misconduct.

The PSA specialist explained her view to us of the flaws in the process:

> *Like our investigations aren't done. We don't have findings. I can't write a letter because I don't know what's happened. But I'm supposed to write a letter and have meetings with people terminating them from their employment when I don't really know what they did. Like it was a complete train wreck.*
>
> *But – but – and there was so much pressure to do it quickly, and have everything happen, and like nobody said stop. To my knowledge.*

Another reason that the PSA did not provide advice in the ordinary course was the general consensus among investigators and the Deputy Minister of Health that the employee misconduct at issue was not only sufficient to justify dismissals for cause, but was serious enough to warrant the involvement of the Office of the Comptroller General, the Information and Privacy Commissioner, the RCMP, and the public announcement. Mr. Phipps described his perception of the seriousness with which the issues under investigation were viewed by the Deputy Minister, the executive at the ministry, and investigators as follows:

> *… my perception at the time was that Graham felt that he was managing the crisis… I doubt that he knew any of these players. It wasn't that it was something personal with him. …I believe he was under the genuine belief that this was a major crisis for Health and as the Deputy it was his job to put things right.*
>
> …

> *… there were a lot of people involved in this. So you have got Graham Whitmarsh; you have got John Dyble; you have got the whole executive of Health. At no meeting did somebody stick their hand up and say, I think we are getting this wrong. You know, actually, I think we are overblowing this. There was nothing like that.*

The general consensus among the people involved in this investigation was that they were dealing with a serious crisis at the ministry, and that most of the employees who were terminated had committed acts that justified severing the employment relationship for cause. This widely held view did not abrogate the PSA's responsibility to conduct a fair investigation and provide reasoned advice.

Ms. Tarras pointed to a historical culture of "accountability of Deputy Ministers" within the public service. She said that it was up to Mr. Whitmarsh as Deputy Minister to seek and obtain the advice he needed to fulfill his duties, and obtain adequate information to make a decision. Ms. Tarras described for us the origins of the PSA, the conscious shift of accountability for employee discipline, including terminations, to line ministries and the supporting role PSA was to play. The organizational theory underlying this shift was described to us as "management for grownups". However, once the ministry sought the assistance of the PSA, the PSA was obliged to follow its own investigative and advisory processes. It did not do that in this case. The PSA did not separate its investigatory and advice functions. It did not insist on providing Mr. Whitmarsh with advice in the manner set out by its own policies and procedures. The breakdown in PSA procedures contributed to the outcome.

9.2.3.3 LEGAL REVIEW OF DISMISSAL DECISIONS

While the PSA sought legal counsel's input on the draft dismissal letters for Mr. Mattson, Mr. Hart, and Dr. R. Warburton, it did not seek – and the lawyers did not provide – legal advice on whether the ministry had just cause to dismiss those employees. The PSA did not provide the dismissal letters for the unionized employees to Ministry of Justice lawyers for review.

In 2012, there was no obligation on the PSA to seek legal advice when it was considering recommending that an excluded employee be terminated for cause. Nor was there a standing requirement on a Deputy Minister who was terminating an employee for cause to verify that a legal opinion had been provided. However, it was the usual practice of the PSA to seek written legal advice regarding dismissals of excluded employees for cause, and to provide that advice to the Deputy Minister. Sometimes, Deputy Ministers would, quite appropriately, follow up directly with the LSB lawyer to discuss the advice provided.

In this case, the PSA did not seek, and the LSB lawyers did not provide, advice on whether the ministry had just cause to terminate the employees. LSB did not provide any legal advice on the merits of the dismissals of any of the employees who were fired, except that LSB counsel did verbally raise the issue of condonation at the August 23, 2012, meeting with investigators prior to the dismissals, provided case law related to loss of an apprenticeship and appear to have spoken with Mr. Whitmarsh about the number of grounds of dismissal to be included in one of the letters. There is no evidence that Mr. Whitmarsh was aware the lawyers had concerns that the terminated employees might rely on the defence of condonation. The PSA did not seek further legal advice as to how the defence of condonation could impact the strength of the case that there was just cause to terminate the employees.

Mr. Whitmarsh was clear in his testimony to us that he understood that legal advice on whether the ministry had just cause to terminate the employees was implicit in the lawyers' review of the dismissal letters. However, the evidence shows that the lawyers reviewed only three of the six dismissal letters. The employment lawyer reviewed and revised the dismissal letters for Mr. Mattson, Mr. Hart, and Dr. R. Warburton. Legal counsel did not review the dismissal letters for Mr. Hamdi, Mr. MacIsaac, and Mr. Scott, as they were included employees, and the Legal Services Branch was not usually involved in such cases. No legal opinions were sought or provided on whether just cause existed in any of the six cases.

With respect to the excluded employees, it is not surprising that Mr. Whitmarsh formed the mistaken view that LSB had provided legal advice about whether there was just cause for termination. The PSA was the client that the employment lawyer was billing during this phase of the investigation and she was providing advice on employment matters directly to the PSA. As described above, it

was the role of the PSA specialist, and sometimes the PSA Director, to obtain legal advice about terminations, and to provide that advice to the ministry. As a result, the email that the employment lawyer sent confirming that the PSA had not sought her opinion on whether the ministry had just cause to dismiss Mr. Mattson or Mr. Hart was sent to representatives of the PSA, and not to Mr. Whitmarsh.

With respect to Dr. R. Warburton, the evidence indicates that Mr. Whitmarsh knew that the PSA investigator had given Dr. R. Warburton's letter to the employment lawyer, and he recalled participating in a discussion with the PSA investigator and a lawyer about what grounds for dismissal to include in the letter. Although the lawyers did not provide advice on whether there was cause to terminate Dr. R. Warburton, in those circumstances, it is understandable that Mr. Whitmarsh formed the mistaken view that the PSA was seeking a legal opinion on the merits of the terminations, rather than asking the lawyer to edit the letter.

The thrust of the evidence from the PSA representatives that we spoke with was that they did not seek legal advice on whether there was just cause to terminate the employees because they understood that Mr. Whitmarsh had already made the dismissal decisions, rendering advice unnecessary.

It is clear that Mr. Whitmarsh had been advised that at least some of the letters were reviewed by counsel. It is reasonable for a Deputy Minister to assume that substantive legal advice was implicit in such review. However, at least in the case of Mr. Mattson, the PSA investigator told him that there were not sufficient grounds to terminate Mr. Mattson for cause. As noted below, this should have at least caused Mr. Whitmarsh to pause and seek an explanation for the conflict between what he believed was implicit in the legal review of the Mattson letter and the express advice PSA was providing,

It is unclear whether Mr. Whitmarsh knew that only the PSA reviewed included employees termination letters, and not LSB lawyers. Mr. Whitmarsh had an honest but mistaken belief that legal advice had been sought.

As for the PSA, which now requires that legal advice be sought in instances of termination for cause, it should not only have sought legal advice, but it should have told the Deputy Minister – particularly given the scope and profile of these dismissals – the legal review of the excluded staff termination letters did not include legal advice on whether there was just cause to dismiss any of the employees.

9.2.3.4 PROBLEMS WITH THE DECISION-MAKING PROCESS

Mr. Whitmarsh did not seek written reports from the PSA with respect to the dismissals. A number of people we spoke with noted Mr. Whitmarsh's preference to not receive information in writing in this matter. The lead investigator told us that Mr. Whitmarsh "didn't want any reports, any summaries prepared or presented to him at all." She said, "we were to provide verbal updates." These statements are generally consistent with the lack of documents related to both the dismissals and the Friday meetings. Mr. Whitmarsh told us that he did not instruct the investigators to not prepare reports. He indicated that the only instruction he provided regarding documents related to their retention; he told us that he directed that no reports or documents should be retained by him or his office, the ADMs or other Ministry of Health executive offices. He indicated that he told the investigators to retain any paperwork.

Further, whether or not they agreed with the decisions, the Assistant Deputy Ministers were not included in the dismissal process, which removed one additional potential safeguard on the decision making. Dr. Davidson raised concerns and attempted to obtain a briefing with respect to the employees in her division, but this request was rejected so that the dismissal could proceed prior to the September 6, 2012 press conference. Vacations at the end of August and early September 2012 diminished the involvement of other ADMs at a pivotal time.

A further flaw in the decision-making process was the failure of the PSA and the Ministry of Health to consider the individual circumstances of each of the employees whose employment was terminated. Part of this was due to their failure to involve or consult with employees' supervisors in their decision making. No proper consideration or weight was given to whether senior officials in the ministry had condoned the individuals' conduct. No weight or meaningful consideration was given to their employment histories with the public service. No consideration was given to the possibility of without cause dismissals

or whether lesser disciplinary measures were appropriate in the circumstances (leaving aside Mr. Mattson and Mr. MacIsaac). The fact that the terminated employees were painted with the same brush without analysis of their individual circumstances contributed to a flawed decision-making process.

The evidence indicates that Mr. Whitmarsh viewed the actions of the dismissed employees as part of a larger, organized whole. On September 5, 2012, before the press conference, the HSS Supervising Solicitor provided her comments on the press release, and raised a caution about certain language in Mr. Whitmarsh's speaking notes. Mr. Whitmarsh sent an email to counsel that stated in part:

> *Most of the comments make sense to me. One [of] the major one[s] in my speaking notes around individuals working together; it's really really clear from the emails that they are working together. Indeed there isn't any separation between the core group.*

The pending press conference also impacted the dismissal process. Some witnesses told us that once the date of the press conference was set, investigators were under pressure to complete the investigation so that they could be included in the announcement to show that government had taken the matter seriously. Mr. Whitmarsh told us that he wanted to "deal with" as many of the employees as possible by that date where there was sufficient evidence to support the decision. The PSA investigator told us that she raised her concerns about the deadline with Mr. Whitmarsh several times but that no change was made. Four employees had their employment terminated the morning of the press conference.[8] The Deputy Minister acknowledged that "there's no doubt the date created pressure and I think, you know, there were some of the cases where it put pressure on them to sort of get to a decision." However, the September 6, 2012 deadline was self-imposed. To the extent that the Deputy Minister required more time to make considered decisions, he could have taken it.

As Deputy Minister, Mr. Whitmarsh obviously had to rely on the work done by others in reaching his decisions. He explained that "the Deputy Minister of Health is one of the busiest jobs in this province, it's overwhelming, it's 100 hours a week, it goes on from dawn till dusk, on hundreds of issues every day … it's like you know 5,000 miles wide and an inch deep."

Despite these pressures arising from the breadth of his responsibilities, when acting as the statutory decision-maker with respect to terminations of employees for just cause, Mr. Whitmarsh should have put himself in the position to consider the investigative process and allowed sufficient time and distance to do so with an appropriately critical eye. Instead his active involvement and the manner in which he obtained his information from the lead investigator and the PSA investigator, and the setting of the September 6, 2012 deadline, contributed to the breakdown of the provision of employee and labour relations advice and production of the "binders" containing considered written advice for each individual. This, contributed to his misunderstanding regarding the extent to which labour relations and legal advice had been obtained on the merits of the dismissals.

9.3 EVALUATION OF DISMISSAL DECISIONS

We have described the investigative, advisory, and decision-making processes which resulted in the termination decisions. In carrying out our investigation, we were bound by the motion of the Select Standing Committee on Finance and Government Services, which require us to investigate and report on "the decision to terminate itself." In order to fulfill that obligation, we considered it necessary to investigate and assess whether the employees who were terminated had engaged in misconduct, and if so, whether that misconduct was sufficiently serious such that terminations for cause fell within a range of reasonable outcomes. In making an assessment as to the merits of the terminations, we recognize that only a court or an

8 Ms. Kislock told us that Mr. Hart was not terminated until September 13, 2012, because she was away on September 6 and it was her responsibility to deliver the termination letter. It appears that Dr. R. Warburton was not dismissed until October 22, 2012, because on September 6 she and her legal counsel were still engaged with Legal Services Branch on the question of disclosure of particulars of the allegations against her and any relevant documents (see Chapter 8).

arbitrator could conclusively find whether the employees were wrongfully dismissed or whether the terminations were warranted. We also recognize that we are not bound by the same evidentiary rules which apply in the context of litigation and grievance proceedings, and that as a result we have reviewed and considered evidence that a judge or an arbitrator may not have had access to, including hearsay and privileged evidence.

In the following sections, and in accordance with the referral motion of the Committee, we assess the dismissal decisions with respect to each employee who was fired. While, by necessity, what follows includes personal information about the affected employees, the discussion in this section that follows (and, in respect of Dr. Maclure, that which is set out in Chapter 7) strives to disclose only such personal information as is necessary to explain the findings.

Based on the totality of the evidence that we reviewed, we have come to the opinion that, in relation to all of the terminated employees, there was insufficient evidence of misconduct to conclude that terminations for cause were correct or proper outcomes. Our assessment is consistent with the opinions of the lawyer who represented the province in the wrongful dismissal lawsuits that the excluded employees filed. That lawyer concluded that in all of those cases the province would not be able to prove it had just cause for the firings. Those opinions are described in Chapter 13. This section provides a description of the employees who were terminated, a review of the grounds for their terminations and our conclusions about whether those grounds had a sufficient evidentiary basis to warrant terminations for cause.

9.3.1 DR. REBECCA WARBURTON

9.3.1.1 HISTORY OF EMPLOYMENT WITH THE MINISTRY OF HEALTH

By 2012, Dr. R. Warburton had a long history with the British Columbia public service, including 13 years in the Ministry of Health. She began her career with the public service in 1982 in the Ministry of Finance. In 1985, she was in the Health Economics and Planning Branch and then in the Research and Evaluation Branch, where she remained for 10 years. In 1997, Dr. R. Warburton left the ministry voluntarily to begin teaching at the University of Victoria (UVic) as a visiting assistant professor. She joined the School of Public Administration in 1999, and she is currently an associate professor in that faculty.

During her decade in the Research and Evaluation Branch of the Ministry of Health, Dr. R. Warburton's role as a health economist included advising other areas of the ministry on evaluation; liaising with university researchers; designing, conducting and reporting on economic evaluation studies of health care programs, procedures and equipment; publishing results in peer-reviewed journals; and making presentations at major conferences. During this time, she co-authored government policy on research uses of linked health data and co-developed the Ministry of Health Program Evaluation Framework.

On July 31, 2009, the Executive Director of the Policy Outcomes, Evaluation and Research Branch (POER) of the Pharmaceutical Services Division hired Dr. R. Warburton as Co-Director of Research and Evidence Development. It was a part-time position allowing her to keep her position as a faculty member at the University of Victoria. The other half of the position was filled by Dr. Maclure, who had previously occupied the position full-time.

Dr. R. Warburton was well qualified to carry out the responsibilities and duties of the role. In addition to her 10 years' experience in the Ministry of Health, Dr. R. Warburton contributed as co-investigator or principal investigator on numerous health care-related projects. Immediately before she was rehired, Dr. R. Warburton was principal investigator on a grant from the BC College of Pharmacists, for a Coverage with Evidence Project (2008–2012) and was a Michael Smith Foundation for Health Research Scholar (2002–2008) where she worked in collaboration with the Vancouver Island Health Authority on a project entitled "Improving Patient Safety in Health Care: Costs and Benefits Count."

In 2012, Dr. R. Warburton's main responsibilities in the POER branch were acting as chair of the Pharmaceutical Services Research Team (PSRT) and assisting with drafting and finalizing information sharing agreements (ISAs) for PSD-related projects. While the POER branch's economists conducted its own research, the Drug Use Optimization (DUO) and Drug Intelligence (DI) branches also conducted research. As chair of the PSRT, Dr. R. Warburton assisted in coordinating the research priorities between

branches of the Pharmaceutical Services Division, and thus the team was focused internally within that division. The PSRT had no influence on the research priorities of the Ministry of Health generally or the work being done in other divisions, only on research in relation to PSD.

Early on in her role on the PSRT, Dr. R. Warburton noticed that research priorities were not well organized. The PSD had up to three branches actively trying to do research, many projects were happening simultaneously, and there were limited resources. With a view to creating more structure, Dr. R. Warburton devised a prioritization tool to objectively categorize the various projects in a way that would best serve the division and balance questions of pharmaceutical effectiveness, safety and use. The tool allowed PSD to evaluate questions such as:

- whether the research supports a PSD policy
- whether the research aligns with therapeutic priority areas
- whether there is external pressure that makes the research a priority
- what the potential benefits and risks are
- what the potential PSD expenditure would be

The prioritization tool had several functions. For example, it provided those individuals working in the various PSD divisions with direction on where to allocate their time when juggling the various projects. It also provided an objective basis on which the decision-makers could make informed decisions in relation to the projects. Although she had developed the prioritization tool, Dr. R. Warburton was not herself the effective decision-maker with respect to which projects went forward, nor did she have spending authority or a budget. The effective decision-makers were at the Executive Director and Assistant Deputy Minister levels. The PSRT and, ultimately, decisions related to research prioritization and spending, etc., were overseen by the Pharmaceutical Services Leadership Team (PSLT), a team made up of PSD Executive Directors and including a member from the Finance division.

Dr. R. Warburton was committed to the work of PSD and to advancing evidence-based decision making within the Ministry of Health. For example, at the time she was suspended she was working on an evaluation plan for the ministry's Smoking Cessation Program. The draft evaluation plan proposed a comprehensive evaluation of the program to evaluate to what extent it had successfully met its goals of reducing smoking, smoking-related health harms, and smoking-related use of health services.

As a result of her employment suspension, Dr. R. Warburton was unable to continue her work on this evaluation plan. In the spring of 2012, Dr. R. Warburton had been working with the complainant on ISAs for several ministry projects. Dr. R. Warburton took on this task because the projects were stalled due to the amount of time it was taking the Data Access, Research and Stewardship group to complete ISAs.[9] This in turn affected whether research could be completed. Dr. R. Warburton and the complainant had conflicting views on what information should go into the ISAs. On one particular project, the complainant had refused to work on the ISA, and Dr. R. Warburton had to take over the task. Dr. R. Warburton felt pressure to move the projects along and was frustrated with the delays in making data available for research.

This is the context in which Dr. R. Warburton was working when the complainant made the allegations against her in March 2012.

9.3.1.2 ANALYSIS OF SUSPENSION AND DISMISSAL DECISIONS

When Ms. Walman, Assistant Deputy Minister of the Pharmaceutical Services Division, suspended Dr. R. Warburton without pay on July 17, 2012 pending an investigation into allegations of workplace misconduct, the suspension letter stated that the ministry had "significant concerns" about "the misuse of health data and methods that contracts were and are being awarded." The letter did not set out any specific concerns about Dr. R. Warburton's conduct, and its wording was identical to that in letters sent to other employees.

Like Dr. Maclure, Dr. R. Warburton was an excluded employee with no provision in her contract to allow the government to suspend her without pay. The decision-maker did not have evidence to support a decision to suspend Dr. R. Warburton's employment, and did not consider whether lesser disciplinary measures were appropriate. Although this likely amounted to a constructive dismissal of Dr. R.

9 As described in general terms in Chapter 4.

Warburton from her employment had she taken that position, the Ministry of Health terminated her employment in a letter dated October 22, 2012.

The PSA investigator drafted the dismissal letter on the basis of information obtained by the investigators, and it was signed by Mr. Whitmarsh. In that letter, the ministry alleged that it had just cause to terminate Dr. R. Warburton's employment. The dismissal letter contained mistakes of fact, omitted or misconstrued information collected by the investigation team, and incorrectly applied relevant standards.

9.3.1.2.1 INVESTIGATIVE PROCESS

Investigators interviewed Dr. R. Warburton informally on June 12 and formally on August 1 and September 13, 2012. The issues explored in the interviews included concerns about conflicts of interest between her obligations as an employee, her professional interests as a researcher and her private financial interests. Investigators also questioned Dr. R. Warburton about issues around data access, contracting and hiring practices as well as sharing of personal or confidential information. Finally, the investigators questioned Dr. R. Warburton about the work Mr. MacIsaac performed in relation to the smoking cessation program.

As described in Chapter 8, Dr. R. Warburton, through her counsel, requested that the ministry provide disclosure of documents in advance of the formal interviews. Contrary to the legal advice they received, the investigators provided limited disclosure. Because of the unwillingness of the PSA and the investigators to provide sufficient materials in advance, Dr. R. Warburton declined to attend any further interviews. Consequently, the ministry terminated Dr. R. Warburton's employment without having put each allegation to her for a response. This was a significant flaw in the fairness of the process, particularly since the July 17 suspension letter stated that the employer would provide her "an opportunity to respond to the findings of the investigation and any recommendation regarding your employment." The Ministry of Health created expectations of fair treatment that it then did not fulfil.

9.3.1.2.2 DISMISSAL DECISION

In identifying matters for PSA to include in the dismissal letters, the PSA representatives and the investigators made a number of factual errors. This can be attributed, first, to the fact that investigators did not put many of those allegations to Dr. R. Warburton for a response, and second, that the investigators did not impartially assess the evidence they had uncovered.

For example, in the dismissal letter, the ministry characterized Dr. R. Warburton's role on the PSRT, which we have described above, to make it seem that she was influencing the entire ministry's research priorities. This was false and misleading. Moreover, the ministry failed to take into account the fact that Dr. R. Warburton was a part-time employee who continued to carry out her duties as a professor at the University of Victoria.

In the dismissal letter, the ministry pointed to an email Dr. R. Warburton sent in June 2010 where she directed another employee to provide data to an external individual without authorization. The factual basis on which the investigators analyzed this incident and attributed blame to Dr. R. Warburton was incorrect because the external individual was authorized to receive the data in question. Moreover, this person worked as a physician who was part of a longstanding initiative with the Primary Care Branch of the Ministry of Health's Medical Services Division related to a core program within that branch. The "data" in question was only a list of this physician's participants in the program who had signed consent forms to allow the ministry to release their health records for the purposes of the study. For some reason the investigators, who were unable to locate the signed consent forms that were referenced in this email, also determined the consents would have expired, even though they had other evidence that contradicted this conclusion. We found the signed consent forms inside several boxes of material collected by the investigation team. Not only did the investigators have the consent forms in their possession, the consent forms had not expired.

Dr. R. Warburton's role at the Ministry of Health involved liaising with external researchers with respect to PSD's research priorities and interests. Notwithstanding that this role was clearly articulated in Dr. R. Warburton's position description and supported by her Executive Director, the dismissal letter also listed four incidents in which investigators believed that Dr. R. Warburton had provided confidential ministry information to external individuals

without authorization. They appear to have discounted evidence they obtained in the course of the investigation that the information she shared was not considered confidential and that she was likely permitted to share it.

In one case the investigators pointed to a "dream circle" document that Dr. R. Warburton had shared with external stakeholders; in the same email, Dr. R. Warburton advised that the diagram was not public. Investigators interpreted this as an acknowledgement that Dr. R. Warburton should not have shared the diagram at all. Although the investigators never asked Dr. R. Warburton about this disclosure in her interviews, they did ask two Executive Directors in her division about it. Both agreed that disclosure of the diagram was acceptable and that it had in fact already been disclosed. One of these Executive Directors was the author of the diagram and explained in writing to the PSA investigator that it had been approved by Government Communications and Public Engagement for use in external presentations. Investigators appeared to discount the evidence provided by the Executive Directors and continued to assert that Dr. R. Warburton had inappropriately shared confidential ministry information.[10]

The ministry also asserted that Dr. R. Warburton had given Mr. MacIsaac access to her ministry IDIR account and laptop, giving Mr. MacIsaac full access to her email and files. In fact, as Dr. R. Warburton explained to us, she gave Mr. MacIsaac the laptop to log on with his own IDIR.[11] In any event, he would not have been able to access any data had he logged on with her IDIR as she did not have data access. Given that Dr. R. Warburton did not have data access, her explanation appeared reasonable. Had she been given the opportunity to respond to this allegation the investigation team could have received this same information.

Other grounds set out in Dr. R. Warburton's dismissal letter reflect a failure to appropriately understand and apply the Standards of Conduct.

For example, the dismissal letter pointed to Dr. R. Warburton's failure to disclose to the panel that hired her that she was Dr. Maclure's second cousin by marriage, when there is no such requirement to disclose such a distant familial relationship anywhere in public service standards or policy. There can be no justification for dismissing her based on this "failure" when it would not be apparent to a reasonable person that this connection would trigger a conflict or apparent conflict of interest to begin with.

The letter also described Dr. R. Warburton asking, when she was applying to the Co-Director position, that the ministry not have a certain person on the panel because that individual might hold a negative view of her. The letter suggested that in making this request, before she was even a ministry employee, Dr. R. Warburton had somehow contravened merit-based principles of hiring. To the contrary, however, an impartial panel is directly relevant to the question of whether Dr. R. Warburton could expect to be assessed fairly in the competition. The investigators also failed to consider the evidence they gathered with respect to Dr. R. Warburton's hiring, including that the individual Dr. R. Warbuton had expressed concerns about was never considered for the panel and that she was hired through a merit-based competitive process that later passed an audit conducted by the Merit Commissioner.

The dismissal letter also described Dr. R. Warburton's supposed "considerable influence" over the hiring of Mr. MacIsaac as a "conflict of interest" while also acknowledging that she was not involved in the hiring process. Mr. MacIsaac was Dr. R. Warburton's student at UVic. While it was clear that the work Mr. MacIsaac was doing at the ministry was intended to benefit PSD while also providing impetus for his PhD research, this does not in itself amount to a conflict. In fact, we heard that it is common and accepted practice in government for employees to provide assistance and encouragement to co-op students who are also working on their PhDs. The lack of any analysis as to what precisely the conflict was reflected a failure to apply a proper standard to the dismissal decision.

The ministry also suggested that Mr. MacIsaac was not hired based on merit when this was demonstrably untrue

10 The "dream circle" was a diagram authored by one of the Executive Directors in PSD based on Health Canada's "Life-cycle Management" diagram to represent pictorially this Executive Director's personal vision of the regulatory life cycle for listing a drug in British Columbia. The Health Canada diagram on which it is based is found here: <http://www.hc-sc.gc.ca/dhp-mps/homologation-licensing/model/life-cycle-vie-eng.php>

11 An IDIR is the unique identifier government employees use to log on to their workstations and access many government applications.

– he was hired through a competitive process in which the hiring panel, which did not include Dr. R. Warburton, had concluded that he was the best candidate.

Finally, the dismissal letter alleged that Dr. R. Warburton had "routinely engaged in work with" her husband, Dr. William Warburton. The evidence the ministry had to support this ground was that Dr. R. Warburton assisted her husband in drafting a Privacy Impact Assessment (PIA) for research work he was conducting for the proposed "trajectories project" funded by the Public Health Agency of Canada (PHAC). Dr. R. Warburton was paid for this work, which she performed on her own time. The proposed project was supported by the Population and Public Health Branch who contributed no funding to it. Dr. R. Warburton's supervisor knew she had conducted this work for her husband. Her supervisor did not consider her work in this regard to have placed her in a conflict of interest where the work was on a PIA for the health authority and where the work was conducted on her own time. Because of the nature of a PIA he also could not see how her working on it would create a conflict.

The purpose of a PIA is to evaluate and manage privacy impacts and to ensure compliance with privacy protection rules and responsibilities. There are no rights granted or taken away in the PIA. It is an informational statement that will be presented to the privacy assessor about the steps that the researchers are proposing that could impact privacy interests.

Dr. R. Warburton's supervisor confirmed to us that while he does not remember exactly what he told the investigators during his interview, his evidence to investigators would have been that he did not consider her work to be a conflict.[12] As with the other allegations of conflict of interest, investigators did not engage in a full analysis of this issue in light of the provisions of the Standards of Conduct including whether this work was condoned by the ministry.

In the end, there were only two grounds for dismissal in Dr. R. Warburton's dismissal letter that had any possible factual basis. As we describe below, those grounds were insufficient to support the dismissal decision.

One allegation was based on an email from 2010 on which Dr. R. Warburton was copied. In the email, an employee wrote that he had provided her husband, Dr. W. Warburton, with ministry data on a flash drive. The way in which the email was written suggested that this was done without approval from the Director of Data Access, Research and Stewardship. Dr. R. Warburton then advised the employee to delete his email. The investigators viewed Dr. R. Warburton's instruction to delete the email as evidence of misconduct. While such conduct was not itself a data breach, it would have warranted management attention if not adequately explained by Dr. R. Warburton. The problem was that the investigators never put the allegation to Dr. R. Warburton or the Director of Data Access, Research and Stewardship. Without doing that, government's ability to rely on the email as evidence of misconduct was limited at best. When she spoke to us, Dr. R. Warbuton indicated that she could not recall the specifics, and did not know why she would have asked for the email to be deleted, as she knew they were recoverable.

The other ground for dismissal related to the investigators' discovery that Dr. R. Warburton had shared a provision from an external contractor's contract with her husband, suggesting that he seek a similar provision in his own contract. The language that Dr. R. Warburton provided her husband was standard form language in respect of intellectual property rights and ownership of materials. The language she provided was publicly available and substantively the same as the language contained in the Research Relationships Tool Kit. The language also was consistent with the intent of the ministry that researchers have the ability to publish their research in peer-reviewed academic research. Further, when she provided this clause to her husband she copied ministry officials on the email. It was wrong for Dr. R. Warburton to have provided this contract language to her husband in this way, even though the language was ministry-approved and it was provided with the knowledge of ministry officials. Where a ministry employee holds a senior position and their spouse holds a contract with the same ministry, prudence demands that the employee have nothing to do with the spouse's contractual dealings with the ministry. Dr. R. Warburton

12 The PSA did not have or, if it was recorded, retain, a copy of the supervisor's interview audio recording, and provided us with only sparse, illegible notes.

should have exercised such prudence. However, given that the contractual language was publicly available and the other factors, this was not an act that could reasonably support a dismissal for cause.

Having carefully assessed each of the grounds that the Ministry of Health relied on as the basis to terminate Dr. R. Warburton's employment, we have concluded that most of the grounds were not supported by the evidence and were not true. With respect to the two grounds that did have an evidentiary basis, while they may have merited some direction from her manager and possibly even some discipline, it was wrong to conclude that those actions were sufficiently serious to undermine the employment relationship. The public statement that accompanied the December 2015 settlement of Dr. R. Warburton's litigation with government included an acknowledgment by her and her husband that "they did breach some rules and procedures." It is our conclusion that these two instances are examples of such breaches. In light of all of the evidence we have considered, we have determined that terminating Dr. R. Warburton for cause was improper.

9.3.2 RON MATTSON

9.3.2.1 HISTORY OF EMPLOYMENT WITH THE MINISTRY OF HEALTH

When Ms. Walman suspended Mr. Mattson without pay on July 17, 2012, he had worked in the Ministry of Health for nearly 28 years. Throughout his long tenure with the ministry, Mr. Mattson was well regarded by his managers, co-workers and ministry stakeholders for his contributions to the ministry. For example, in an annual review, Mr. Mattson was described as an "energetic and conscientious employee [who] tackles his assignments with energy and enthusiasm." Mr. Mattson was also noted for his ability to "[recognize] the importance of a consultative approach to policy development and is always ready to consider and incorporate input from others."

In 2012, Mr. Mattson was a Special Projects Manager in PSD. His position included supporting the Alzheimer's Drug Therapy Initiative (ADTI) as part of the Project Advisory Committee (secretariat).[13] In this role, Mr. Mattson was required to perform project and contract management for the project and facilitate the transmission of Ministry of Health data to the researchers and contractors who were approved to receive it.

9.3.2.2 ANALYSIS OF SUSPENSION AND DISMISSAL DECISIONS

The July 17, 2012, suspension letter stated only that the ministry had "significant concerns" about "the misuse of health data and methods that contracts were and are being awarded." The letter did not set out any specific concerns about Mr. Mattson's conduct, and its wording was identical to that sent to other employees.

Like Dr. Maclure and Dr. R. Warburton, Mr. Mattson was an excluded employee with no provision in his contract to allow the government to suspend him without pay. The decision-makers did not have specific evidence to support a decision to suspend Mr. Mattson's employment.

At the time Mr. Mattson was suspended, investigators were focused on the ADTI contract, which had begun as a $25,000 direct award, and grew to approximately $2.3 million. This concern came directly from the complainant. Because Mr. Mattson's work supported the ADTI project, the ministry suspended him on the basis of concerns about the ADTI contract, even though he had nothing to do with how that contract was negotiated. Moreover, as we have described in earlier sections of this report, the increase in the amount of the ADTI contract was both planned and approved. To the extent that this formed a basis for Mr. Mattson's suspension, it was factually incorrect.

In the suspension letter, the ministry also told Mr. Mattson it intended to take the necessary steps to review these concerns and that he would have the opportunity to respond to the findings of the investigation and any recommendation concerning his employment. The ministry directed Mr. Mattson not to speak with any external stakeholders or other ministry employees about the matter.

9.3.2.2.1 INVESTIGATIVE PROCESS

The investigators interviewed Mr. Mattson four times in the summer of 2012: once on June 14 and three times in August. During the August interviews, it is clear that Mr. Mattson was under investigation yet no investigator adequately explained the allegations he faced. At the end of the first August interview, Mr. Mattson asked, "based on

13 See Chapter 4 for further details of ADTI.

our discussion, I'm still not sure what I did wrong today?" An investigator responded:

> *Yes, I mean the things, and again, as I said at the beginning, today isn't about conclusions, it is about gathering information so. The issues that we raised with you are the issues that we have concern around. That is why we are looking for your input into that. And we will get back to you if we think there is something that needs to be addressed further.*

By the end of the third formal interview, investigators were not any clearer with Mr. Mattson about the process or the allegations against him. Mr. Mattson asked "I just wonder where we are at with all of this?" An investigator responded:

> *As you can imagine, each time we meet, we have more information to go back and check. We did have a number of things that we did want to put back to you after we discussed the contract last time. We have some more things to check and we will be in touch as soon as we can.*

Throughout the interviews, the investigators asked Mr. Mattson about the development of the ADTI contract five years earlier, without always giving him an opportunity to review the relevant documents. In at least one instance, an investigator pressed him to provide specific answers off the top of his head when it was clear he could not recall a matter.

9.3.2.2.2 DISMISSAL DECISION

The investigators had two primary concerns about Mr. Mattson. First, they believed that he had lied to them when he denied having access to ministry data. Second, they were concerned Mr. Mattson had taken steps to evade the ministry's data access controls by attempting to secure data access for Dr. W. Warburton in 2012 in connection with the ADTI contract.

The ministry investigators found evidence that appeared to show that Mr. Mattson was granted access to ministry data in 2009 and 2010. Although Mr. Mattson may have had some sort of data access after this point, the ministry investigators also learned there was no evidence that clearly showed that he had ever actually used the access he was granted. There was some evidence that he may have never used the access he had been given. During their interviews, the ministry investigators asked Mr. Mattson about his data access and he indicated he did not have any. When challenged on his answer, Mr. Mattson explained that he understood the definition of data in this context referred to personally identifiable health data, to which he understood he did not have access. He also said that if he had access to personally identifiable health data, that fact had not been made clear to him by his Executive Director. Despite the answers he provided, investigators concluded that Mr. Mattson's answers were evidence of his dishonesty.

The ministry's second concern ultimately formed the main reason Mr. Mattson was terminated. Investigators believed that between June and July 2012, Mr. Mattson improperly tried to secure data access for Dr. W. Warburton under the ADTI contract at a time when Mr. Mattson knew or ought to have known that Dr. W. Warburton's data access was suspended. At the time, Dr. W. Warburton had recently contracted with the University of Victoria to conduct some data analysis for ADTI. Mr. Mattson did not have the authority to grant direct access to confidential health data and he did not have the authority to approve data access for researchers or contractors.

Mr. Mattson was asked about this matter in his first formal interview. He clearly stated that he had not provided any data to Dr. W. Warburton and was not aware that Dr. W. Warburton's ("Bill's") data access was suspended:

> *Investigator: So [a UVic employee] asked that the data be provided to Bill.*
>
> *Employee: Right. But I couldn't do that unless Bill was an approved subcontractor and that is when they sent me, whatever that conflict of interest guideline thing that he signed. When I received that, I then asked, and they told me was then on contract, so then I asked our finance people to make him an approved subcontractor. And I think I also asked Bob how would we then ensure that Bill was on the list, that we had to approve that ISA, but I'm not 100% sure.*
>
> *Investigator: Did you know that Bill had had his access cut off?*
>
> *Employee: No, I didn't.*

Investigator: You weren't aware of that?

Employee: I didn't know until somebody came and told me that. The only one I knew, up until the day I was suspended, the only one who I knew who had any, was me.

. . .

Investigator: Did you actually send the information to Bill?

Employee: No, we don't have it yet.

Investigator: You don't have it?

Employee: The data, no.

Despite this evidence, investigators continued to believe that Mr. Mattson had inappropriately facilitated access to data for Dr. W. Warburton. Investigators assessed a series of emails to come to their conclusion. We reviewed the emails in question, and the investigators' internal memoranda describing their understanding of these events, and we asked both Mr. Mattson and Dr. W. Warburton, as well as those investigating their conduct, about the matter under oath. Based on the evidence, we have determined that the investigation team's conclusion was founded on an incorrect understanding of the facts.

As we described in Chapter 7, the Ministry of Health suspended Dr. W. Warburton's data access on June 11, 2012. The ministry notified Dr. W. Warburton of this suspension in a letter and simultaneously instructed him in writing to keep the suspension confidential:

*That cooperation includes maintaining the confidentiality on [*sic*] any information provided and refraining from discussing the complaint or the review with Ministry employees or persons inside or outside of your organization. Any attempt to influence the outcome of the review by discussing it with others may impact the result of the review and may be the basis of further action.*

The letter did not specify which data Dr. W. Warburton was no longer able to access, only that "his access to ministry data" was suspended with immediate effect. After he received this letter, Dr. W. Warburton was still able to log on to his ministry computer and access project files containing data, so it is understandable that he did not appreciate the full scope of the data suspension. He believed it related only to his work on the atypical antipsychotic drugs research. Moreover, it was entirely consistent with the direction in that letter that Dr. W. Warburton did not share its contents with Mr. Mattson.

When the ministry investigators asked Mr. Mattson whether he knew Dr. W. Warburton's data access had been suspended, he said that he did not learn about it until sometime after his own employment was suspended in July 2012. The ministry investigators had no information that contradicted Mr. Mattson's evidence on this point. Despite this, and despite their instruction to Dr. W. Warburton to maintain the confidentiality of his data access suspension, the ministry investigators believed that Mr. Mattson should have been aware of both the suspension of Dr. W. Warburton's data access and the details of this suspension.

The evidence we reviewed showed that starting in June 2012, Mr. Mattson, Dr. W. Warburton and representatives from UVic began discussing the possibility of Dr. W. Warburton doing some analytical work on the ADTI project. The ministry anticipated that it would have finished compiling an ADTI dataset for UVic by the end of June 2012. By this time, UVic had contracted with Dr. W. Warburton to assist with some data analysis work on this project, which would require access to the dataset prepared by the ministry.

UVic had the authority to hire Dr. W. Warburton to work on the ADTI project, but it also understood that it needed to add him to its official list of people entitled to receive the ministry's dataset before he could do any work. It asked Dr. W. Warburton to complete the necessary confidentiality forms and submit them to the ministry for approval before the dataset was released. UVic, Mr. Mattson and Dr. W. Warburton all understood that the ministry had to add Dr. W. Warburton to the approved list before he could get access to the data. They also understood that Mr. Mattson did not have the authority to unilaterally add Dr. W. Warburton to the list of approved data receivers. Thus, once Mr. Mattson received UVic's request to add Dr. W. Warburton to the list, he forwarded it to the ministry employee responsible for approving UVic's request. Moreover, when he forwarded the request, Mr. Mattson specifically highlighted the fact that the request was to enable Dr. W. Warburton's access.

From the evidence we reviewed, it is clear that Mr. Mattson initially suggested that Dr. W. Warburton could receive the dataset in the event UVic's primary contact was not available; however, Mr. Mattson very quickly realized (at the time he was writing the emails) that the ministry had not yet approved Dr. W. Warburton to receive the ministry's dataset. As a result, he arranged with UVic for another approved person to be available to receive the dataset. Thus, the evidence clearly showed that Mr. Mattson expressly turned his mind to which individuals had the authority to receive the data, and he did not provide or attempt to provide the Ministry of Health dataset to Dr. W. Warburton before his authorization form had been processed.

Based on a review of all of the evidence, we have determined that there is no evidence that Mr. Mattson engaged in any misconduct. We have also determined that the Ministry of Health had no evidence of any wrongdoing by Mr. Mattson at the time of his termination.

Moreover, the decision to dismiss Mr. Mattson with just cause was arrived at through an unfair process. Mr. Mattson should not have been dismissed from his employment.

We received evidence that at the time he decided to terminate Mr. Mattson's employment Mr. Whitmarsh was advised that the ministry did not have sufficient evidence to constitute just cause.

As described above, Mr. Whitmarsh asserted that the review of the dismissal letters by the Legal Services Branch – including the review of Mr. Mattson's dismissal letter – constituted a legal opinion on the merits of the dismissals.

However, as already noted, the PSA investigator did not think there was just cause to terminate Mr. Mattson and that she conveyed her view to Mr. Whitmarsh. She told us, "the one time I offered an opinion on Mr. Mattson, it was shut down really really quickly and frankly embarrassingly." The PSA investigator told us:

> *It would have been sometime towards the end of August … because Graham's whole thing was that everybody was getting terminated, and I said if you're going to terminate Ron I think it should be without cause … because like then you pay him because I don't think that we have anything on this guy, and Graham said made some snarky comment about how conservative the PSA was and then said that nobody was getting a dollar from him and basically made some comment to the effect that let them sue … we've got unlimited funds, we'll bury them in paperwork and they won't be able to afford to take us on.*

On the question of whether just cause existed for Mr. Mattson, Mr. Whitmarsh said that the PSA investigator:

> *… did not say to me that that he … should not be dismissed with cause. The discussion with him was that, I'm trying to use the right words here that, how to characterize it, that his was sort of less clear if you know what I mean, like there's a there was cause but it was sort of like in that middle zone.*

Mr. Whitmarsh told us that Ms. Tarras suggested Mr. Mattson should be dismissed with cause, even if just cause did not exist, and the government could settle with him later. Ms. Tarras denied that she ever discussed the dismissal of Mr. Mattson specifically with Mr. Whitmarsh. She said she may have had conversations with Mr. Whitmarsh in the past about

> *… the fact that … it's your decision whether it's for cause or not cause. And this is what would happen if you fire for cause – … you'd likely never [make] it to the courthouse anyway – … there would be a process of settlement that would happen before that.*

The PSA Director told us that she attended the meeting during which the PSA investigator told Mr. Whitmarsh that the investigators did not have sufficient evidence to support terminating Mr. Mattson for cause. She recalled that Mr. Whitmarsh indicated at that meeting that the ministry had unlimited resources and Mr. Mattson could sue.

The PSA specialist told us she recalled a meeting with investigators and the PSA Director regarding "how to make cause for Ron Mattson:"

> *… we had a whole meeting about Mattson where we – like myself and [the PSA Director] and the investigation team, where like the purpose of the meeting was Graham Whitmarsh has decided we're firing Ron Mattson for cause, let's figure out what we're going to put in the letter. Like it*

was – it was just absurd. You know, so like do I – like we all knew that there wasn't cause, but – but Graham made the decision that that was what was happening, so…

The PSA specialist's recollection about this meeting is consistent with the handwritten notes she took at the time.

As I have noted in Chapter 2 and earlier in this chapter the *Ombudsperson Act* prevents me from investigating an act or omission of legal counsel for an authority. This limitation has raised a complication in this case because Mr. Whitmarsh has taken the strong position that if Ministry of Justice lawyers thought there was a problem with any of the proposed dismissals, including Mr. Mattson's dismissal, they should have told him directly, rather than providing advice to PSA, particularly if the lawyers were only giving limited advice. Whether or not that criticism is valid - an issue on which I make no comment and which I am prohibited by law from investigating - it does not in my view absolve the deputy minister from being responsible to have sought to resolve the conflict between his belief in what was implied in counsel's review of the letter, and the express opinion he received from the PSA representative that there was probably not cause to dismiss Mr. Mattson. On this issue, I am satisfied that Mr. Whitmarsh did not take this step because he decided to terminate Mr. Mattson for cause anyway, with a view to a possible settlement later. Mr. Whitmarsh gave evidence that this can be an effective strategy, because "the reason people settle is because they don't want to take on government," and because the government has "bottomless pockets and an unlimited number of lawyers."

9.3.3 RAMSAY HAMDI

9.3.3.1 HISTORY OF EMPLOYMENT WITH THE MINISTRY OF HEALTH

Mr. Hamdi was a valued, longstanding public servant. When the Ministry of Health suspended and then terminated Mr. Hamdi's employment in 2012, he had been employed with the ministry for 28 years.

Mr. Hamdi was a senior economist in the Modelling and Analysis Branch of the Planning and Innovation Division. He was responsible for conducting a wide variety of economic analysis and research to support internal decision making. His tasks included designing and implementing complex statistical analysis and economic modelling projects and advising senior executives on the results of his work.

Mr. Hamdi was one of the most experienced employees in terms of using the ministry's administrative health data. Unlike many other analysts who only had experience with one or perhaps two databases, Mr. Hamdi had experience in many. His cross-database knowledge allowed him to conduct more complex analyses and to provide results quickly. As Mr. Hamdi's Assistant Deputy Minister, Dr. Davidson, told us:

… he was helpful and knowledgeable about the databases. And many of the other people that worked there only knew a single database, whereas Ramsay seemed to have a broader knowledge than other of the analysts, and he was viewed as helpful … he knew all of the databases in a way that was … unique in the ministry.

It was evident from the records we reviewed, and the individuals we spoke with during our investigation, that Mr. Hamdi did work with data – putting together datasets and conducting analyses – that no one else knew how to do. In this respect, he provided a valuable service to both ministry employees and the contractors who required ministry data and were entitled to receive it.

9.3.3.2 ANALYSIS OF SUSPENSION AND DISMISSAL DECISIONS

The investigation team first turned their attention to Mr. Hamdi in late June 2012 as a result of the emails that they were reviewing. The investigators' early suspicions about Mr. Hamdi were based on the perception that Mr. Hamdi had a personal relationship with Dr. Maclure, Dr. R. Warburton and Dr. W. Warburton outside of work and they received confidential information from Mr. Hamdi. An early version of the July 6 draft of the Internal Review report included references to this allegation. The investigation team requested Mr. Hamdi's emails for review on July 11, 2012.

As we have described in Chapter 8, the ministry notified Mr. Hamdi that his data access was suspended on July 27, 2012. The suspension letter informed Mr. Hamdi that his role in research and data access was being included in the ministry's ongoing investigation and that he might

ultimately be subject to disciplinary action. Five days later, on August 1, 2012, the Ministry of Health suspended Mr. Hamdi from his employment without pay.

It appears that Ms. Kislock formed the view early on that Mr. Hamdi was engaged in serious misconduct. There were reasons to be concerned about Mr. Hamdi which justified a detailed review. On August 1, 2012, Ms. Kislock wrote to the lead investigator:

> *The data Ramsay is sharing is pharmaceutical information – that is subject of approval of the Data Stewardship Committee. Not only is he violating ministry data stewardship rules – he is breaking the law.*

Ms. Kislock's view of Mr. Hamdi was consistent with that of the lead investigator. For example, the RCMP notes of a conversation with the lead investigator in July 2013 indicate that she described Mr. Hamdi as a "data access dealer."

9.3.3.2.1 INVESTIGATIVE PROCESS

The ministry did not interview Mr. Hamdi until August 16, 2012. During the more than two weeks between his suspension and his first interview, he was not informed about the allegations against him or provided with any information that would assist him to respond in the interviews. Investigators then interviewed Mr. Hamdi three times prior to his dismissal on September 6, 2012: August 16, 24 and 30, 2012. Investigators interviewed him about various projects that he worked on and asked how he shared and stored data for those projects.

The way in which the interviews were conducted did not provide Mr. Hamdi with a full and fair opportunity to respond to the allegations against him.

Some of the investigators' questions were focused on specific allegations, which we describe below. Other questions were broad in scope. A large focus was Mr. Hamdi's personal relationships with various individuals already under investigation. Based on the questions that the interviewers asked and the conclusions that they reached to substantiate their allegations, it is apparent that the interviewers had a fundamental misunderstanding of Mr. Hamdi's role at the ministry with respect to his access to and use of data, both in what he was explicitly authorized to do and what was expected of him in that role.

The interview transcripts and recordings demonstrate that the interviewers were suspicious of and did not believe Mr. Hamdi. The interviewers' approach was sometimes disrespectful and patronizing. They asked questions out of context or without providing the relevant documentation to Mr. Hamdi, despite his requests. In one instance – in response to his request to review a document – the interviewer told him, "You can't say 'show me this and then I will tell you.' We are asking you a question."

The investigators questioned Mr. Hamdi about a particular email (discussed in greater detail below) but only sometimes had that email in front of them. This carelessness in presenting Mr. Hamdi with the actual document suggested that the investigators thought the specific wording of the email was irrelevant. However, the wording of the email was important to understanding its meaning.

9.3.3.2.2 DISMISSAL DECISION

On September 6, 2012, the ministry provided Mr. Hamdi with a suspension pending recommendation for dismissal letter, signed by Mr. Sidhu on behalf of Mr. Hamdi's Assistant Deputy Minister, Dr. Davidson, and a dismissal letter signed by Deputy Minister Whitmarsh. The suspension pending recommendation for dismissal letter provided more details about the alleged misconduct, while the dismissal letter itself included nine grounds for dismissal. As discussed earlier in this chapter, Dr. Davidson was not aware, until we interviewed her in the fall of 2016, of the letter drafted and signed in her name.

All of the allegations set out as grounds for dismissal related to Mr. Hamdi's use of data. The dismissal decision did not factor in the generally deficient data practices at the ministry, which were later highlighted by the Information and Privacy Commissioner in her report that we discuss in Chapter 10 and by an independent analysis conducted by Deloitte. The dismissal letter was critical of Mr. Hamdi in a manner which was unfair, given the lack of appropriate policy and practice at the ministry at the time. As such, the alleged grounds did not constitute a reasonable basis on which to terminate his employment.

The first allegation was that on June 19, 2008, an external researcher, Dr. W. Warburton, offered Mr. Hamdi up to $2,000 in relation to data access. The exact language of the email was:

> *I have approval to spend up to $2000 on you to help us with access to data. We don't need a contract. You can just invoice us. Set up a meeting with you, me and [another employee] as soon as possible after he gets back.*

The suspension pending dismissal letter stated that although Mr. Hamdi denied receiving any such monies, he did not inform his supervisor of the offer nor was there evidence that he did not take the external researcher's offer. Many of the investigators and Ministry of Health executives whom we spoke with cited this as one of the more serious events of alleged misconduct discovered in the investigation.

Investigators did not take the steps necessary to understand and assess this email. The email is short and sufficiently vague that several interpretations are possible. Faced with many potential explanations, investigators should have investigated further. Instead, they jumped to conclusions, reaching the most pejorative interpretation.

Investigators did not appropriately consider evidence which was relevant to assessing whether the email demonstrated potential misconduct. For example, the investigators did not interview the external researcher and therefore did not obtain information about his intention in sending the email and whether the offer was to compensate the ministry for time spent to prepare the data for release, pay Mr. Hamdi to work privately for the researcher collecting non-ministry, publicly available data, or offering Mr. Hamdi money to improperly release confidential ministry information. The first of these two scenarios would not be improper. The third would be highly improper.

When investigators interviewed Mr. Hamdi about the email, he was clearly unsure about its meaning, in part because he did not write the email and because it was four years old at the time. Ultimately, the investigators determined that Mr. Hamdi engaged in misconduct merely by virtue of being a recipient of the email.

It would have been reasonable, indeed advisable, for the investigation team to investigate the matter further because of the range of possible interpretations of the email. Investigators needed to properly obtain and evaluate information in order to fairly assess the email and Mr. Hamdi's conduct. No one gathered any additional information.

There was no indication that any other steps were taken beyond the proposal. The evidence indicates that Mr. Hamdi's services were never used, no work was done and no money was given or received. The email represented a preliminary inquiry only and there was no attempt to conceal it. Mr. Hamdi included a Director, Mr. Hart, in the email conversation about the offer because he was ultimately responsible for responding to data requests. This was completely appropriate and indicated that he believed the offer to be legitimate. Mr. Hart's response to the request that he didn't "want to get in the middle of anything until a formal request is initiated" also indicates that he viewed this as a legitimate data request which would have to follow appropriate data request procedures.

In his interviews with the investigators regarding this allegation, Mr. Hamdi's union representative challenged the investigators on their failure to put forward evidence to support their assertion that the interviewee was guilty of the alleged misconduct. One of the investigators responded, "we have no evidence that he took money, but we have no evidence that he didn't." However, Mr. Hamdi had just provided evidence during the interview to support a conclusion that he not engaged in the alleged misconduct. The investigators had no other contradictory evidence.

It was apparent that the investigators had made up their minds early in the investigation that this email was evidence of the contractor trying to buy data from Mr. Hamdi. This theory was based entirely on conjecture but it was consistent with the investigators' more general belief that Ministry of Health employees were selling ministry data (as discussed in earlier sections of the report).

Had the parties to the email wished to pursue the proposal and had there been something inappropriate about it, the ministry would have had the opportunity to stop it or to amend the proposal to make it acceptable to the ministry, given that it had already been raised to a Director. Likewise, had Mr. Hamdi seriously considered doing such contract work, he could have sought permission through his supervisor and executives.

Mr. Hamdi's employment was terminated in part because the investigation "conclusively established" that: "You were offered money for access to data and took no discernable steps to appropriate [*sic*] address the same." This

conclusion was made despite the fact that the team had undisputed evidence from Mr. Hamdi that their interpretation of the email was wrong, and undisputed evidence – from the email chain itself – that he notified a supervisor of the offer. As such, it was wrong for the investigation team to make this finding of fact and for the ministry to assert that this constituted a ground for dismissal.

The Ministry of Health also alleged that in 2010, Mr. Hamdi inappropriately released a flash drive containing personally identifiable data to Dr. W. Warburton without having the proper approvals in place. The incident is described in detail in Chapter 10 of this report and is the second incident described in the June 26, 2013, report of the Information and Privacy Commissioner. Mr. Hamdi's suspension pending recommendation for dismissal letter stated that:

> *Not only did you release this information to Mr. [sic] Warburton, you warned him to "tread carefully" as the Employer was not aware that he yet had access. I note in particular that Mr. Warburton is an admittedly close friend of yours.*

As described in Chapter 7, Dr. W. Warburton had a contract with the Primary Care Branch of the Medical Services Division of the ministry to conduct research related to atypical antipsychotic drugs. Mr. Hamdi's supervisor had instructed him to work with Dr. W. Warburton on the project as Mr. Hamdi had already been doing related work for the Primary Care Branch on atypical antipsychotic drugs. At the time of the incident, Dr. W. Warburton was two months into his contract with the ministry; however, his data access had not yet been approved.

Related to but separate from his own contract deliverables, Dr. W. Warburton had been assisting Mr. Hamdi on the development of a statistical analysis tool. The pair was using atypical antipsychotic drugs data to test the code that Mr. Hamdi had written for the tool. Mr. Hamdi gave the drug data containing personally identifiable information to Dr. W. Warburton so that he could test the reliability of the code with a different statistical program that Mr. Hamdi did not use. This data transfer was for the sole purpose of testing the code and not for Dr. W. Warburton to use in carrying out his own work under his contract. The data set was a relatively small sample and related only to one atypical antipsychotic drug. It contained a fraction of the information that Dr. W. Warburton needed to conduct his own research and to which he eventually received full access.

No one asked Dr. W. Warburton about this exchange with Mr. Hamdi. In fact, neither Mr. Hamdi nor Dr. W. Warburton was aware of what the ministry was alleging or that this incident was one of the "breaches" that was reported to the OIPC and contained in its report. Consequently, the investigators and the ministry were not able to identify the context within which this exchange occurred in order to accurately evaluate the appropriateness of the exchange, including whether the exchange did in fact constitute a privacy breach.

Our conclusion is that sharing this data with Dr. W. Warburton was a privacy breach because Dr. W. Warburton did not have explicit authorization from the ministry to possess this data. However, there are several mitigating factors that the ministry should have considered, all of which would indicate that the incident did not amount to just cause for ending Mr. Hamdi's employment. Specifically, he was using the data to refine a statistical analysis tool he was developing as part of his employment. It appears that providing data to Dr. W. Warburton was in furtherance of his own duties as a public servant. It does not appear that Mr. Hamdi was attempting to give Dr. W. Warburton data access for Dr. W. Warburton's own use.

Further, we heard from several witnesses that ministry practice was to view and treat contractors the same as employees. This is consistent with the 1999 Data Access Policy, which was in place at the time. Because Dr. W. Warburton was under contract with the ministry at the time of the incident, it was consistent with policy and practice for Mr. Hamdi to approach Dr. W. Warburton for assistance with his work. Dr. W. Warburton was under the same duty of confidentiality as Mr. Hamdi. Moreover, at the time, data handling policies throughout the ministry were lacking, so it was unfair to single out Mr. Hamdi for significant discipline based on this particular incident.

The ministry also alleged that Mr. Hamdi had inappropriately released personally identifiable data on a flash drive to Mr. MacIsaac at the request of his PhD supervisor. Mr. MacIsaac was a co-op student evaluating the ministry's smoking cessation program. Dr. R. Warburton was his supervisor at the ministry and was planning to be

his PhD supervisor once Mr. MacIsaac's thesis proposal was approved.

Mr. Hamdi provided a flash drive containing Ministry of Health administrative health data linked to federal Canadian Community Health Survey (CCHS) data to Mr. MacIsaac.[14] Mr. MacIsaac had been authorized to access both the ministry's administrative health data and the CCHS data for his ministry work. Investigators, however, believed that he was also using the data for his PhD without authorization. As we have discussed elsewhere in the report, it is our view that the determination of Mr. MacIsaac's intended use was not supported by the weight of the evidence. Further details of this incident, which is the third incident described in the Information and Privacy Commissioner's June 2013 report, are described in Chapter 10 of this report.

Mr. Hamdi's suspension pending recommendation for dismissal letter stated:

> *Not only did you fail to ensure there was a data sharing agreement for Mr. MacIsaac to have this information, your involvement in providing assistance to Mr. MacIsaac (which occurred over several months) was outside the bounds of your job duties and expectation; you had no authority to assist Mr. MacIsaac in any manner.*

It was wrong for the ministry to rely on this incident as a ground for dismissal for two reasons.

First, the investigation team erred in its assessment of the incident. Mr. Hamdi ultimately provided the flash drive with the linked information to Mr. MacIsaac, however Mr. MacIsaac did not intend to use it for any external research purposes. Mr. MacIsaac was allowed to receive the data, as a co-op student. Mr. Hamdi provided the data to Mr. MacIsaac for his ministry work. Mr. MacIsaac's PhD was still in the proposal phase, and moreover, he intended to use anonymized data for his thesis.

Second, given that the data was only intended for internal use, for which it was authorized, it was not unusual given the internal information management practices at the time for Mr. Hamdi to assist a co-op student when he was requested to do so by a Director such as Dr. R. Warburton.

We heard from Executive Directors that they would generally encourage their staff to assist a co-op student, even in a different division, if a need were identified and it would not take up too much of their time. In this case, Mr. Hamdi provided evidence in his interviews with the investigation team that it did not require a lot of his time.

Though accessing data through Mr. Hamdi was not the formal process within the ministry, it was not uncommon for staff such as Mr. Hamdi, who regularly worked with data, to link data and hand it over to another staff member. This practice was consistent with common ministry practice at the time and was later flagged for improvement in the Deloitte report. As Mr. Hamdi's Assistant Deputy Minister, Dr. Davidson, described to us, in 2012 there were no clear rules for having analysts pull data for internal use and analysis. Even as the Assistant Deputy Minister, she often was not able to get access to what she wanted or needed, calling data access a "black box" and that the process for obtaining access was relationship driven. In her words:

> *… people had relationships with different analysts who were helpful or not helpful.*
>
> *…*
>
> *And many of the other people that worked there only knew a single database, whereas Ramsay seemed to have a broader knowledge than other of the analysts, and he was viewed as helpful. And so I know that [my analyst] worked with him. Because even though I had my own analysts, they couldn't pull data, they had, still had to go and get the data from that division – but then they could – when they had the data, they could manipulate it. They knew how to manipulate it and do their own – do analyses for us. But they didn't have direct access to it.*
>
> *…*

14 According to the Government of Canada, "the CCHS is a cross-sectional survey that collects information related to health status, health care utilization and health determinants for the Canadian population. The survey is offered in both official languages. It relies upon a large sample of respondents and is designed to provide reliable estimates at the health region level every 2 years…. The primary use of the CCHS data is for health surveillance and population health research." Statistics Canada, "Canadian Community Health Survey - Annual Component (CCHS)" <http://www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&SDDS=3226>.

> *– in, in those days that was the process; you had to find an analyst that would pull the data for you.*

Dr. Davidson confirmed that this was "common practice" in the ministry at the time. As we have described in earlier chapters of the report, both the lead investigator and Ms. Kislock, the Assistant Deputy Minister responsible for data stewardship matters, understood that in 2012 the ministry's general practices with respect to data handling needed improvement.

Mr. MacIsaac shared his perspective on Mr. Hamdi's assistance in an email to his union representative:

> *With Rebecca's approval, I asked several data experts with the Ministry to help me out. Ramsay Hamdi is the most experienced data expert in the Ministry, and eventually I sought him out to help me. It was Ramsay's kind heart that he decided to help me out. He created several data tables for me, and which are stored on my computer.*

The Ministry of Health also alleged that Mr. Hamdi uploaded a flash drive containing administrative health data onto Dr. W. Warburton's work computer despite being aware that the ministry had suspended Dr. W. Warburton's data access. This event, which was to assist Mr. MacIsaac, took place after Dr. W. Warburton's data suspension but before his contract dismissal. Dr. W. Warburton's evidence was that he did not understand that the ministry had completely banned his access to ministry data. He believed the data access suspension was project specific, and related only to his work on the atypical antipsychotic drugs contract. He explained that his logins for ministry databases were suspended; however he still had access to the LAN drives, some of which he shared with Mr. Hamdi and which contained personally identifiable data. Moreover, he had been instructed not to discuss the details of his data suspension with anyone. It was unreasonable to expect Mr. Hamdi to be aware of or understand the details of Dr. W. Warburton's data restrictions given Dr. W. Warburton's own understanding of the restriction and the fact that he was told not to discuss it.

Further, the investigators failed to consider the reason for the upload, which was to convert the files from one format (SAS) to another (STATA) for Mr. MacIsaac, not for Dr. W. Warburton to use the data for his own work. The evidence the investigation team had gathered at the time was that once the file conversion was complete, the data was deleted from Dr. W. Warburton's computer.

Again, Mr. MacIsaac's perspective on the incident that he provided to his union representative at the time is illuminating:

> *Ramsay installed the data tables onto my work station's computer at the Ministry of Health. Several of the tables were converted to STATA (a statistical software format to which I am most familiar with in data analysis). To do that conversion, though, Bill Warburton (a contractor in Primary Care, I believe), was asked to convert the tables from SAS to STATA. Bill had a StatTransfer program on his computer that could make the table conversions for me. Ramsay and I were present when Bill did these conversions, and all traces of the data files were removed from Bill's computer after the conversion — as far as I am aware.*

The suspension and dismissal letters also asserted that Mr. Hamdi had inappropriately provided data to an external researcher who had been working with Dr. W. Warburton on his atypical antipsychotic drugs research. This researcher requested Mr. Hamdi's and Mr. Scott's assistance after Dr. W. Warburton's data access was suspended. As described later in this chapter, Mr. Hamdi and Mr. Scott had both been working with Dr. W. Warburton and the external researcher on this project for over a year; such assistance was approved and directed by ministry staff at the Executive Director and Assistant Deputy Minister level. The extent to which the ministry had authorized Mr. Hamdi to assist the external researcher was reflected in a paper that Mr. Hamdi and Mr. Scott co-authored with the external researcher.[15]

The researcher requested the data because she had been selected to deliver an oral presentation to a medical association based on an abstract that she had developed with Dr. W. Warburton and with the assistance of Mr. Hamdi and Mr. Scott. The abstract was also to be published in a medical journal; however, it was never published

15 Rebecca Ronsley et al., "A population-based study of antipsychotic prescription trends in children and adolescents in British Columbia, from 1996 to 2011," *The Canadian Journal of Psychiatry* 57, 1 (2012).

because of the data suspensions and investigation. Before the presentation and the publication of the abstract, she needed to ensure that the data was available to one of the co-authors if the reviewers came back with questions. She noted in an email that "ethics requires that someone on the team can verify the data for 5 years if questions arise." The requested data was aggregate data on diabetes outcomes in relation to atypical antipsychotic drugs, and had also been previously provided to the external researcher. In his interviews, Mr. Scott explained that the data requested by the researcher were summary tables and charts. Moreover, the investigation team did not have evidence of either Mr. Hamdi or Mr. Scott providing any data, even in summary form, to this external researcher.

Twice the suspension pending recommendation for dismissal letter noted that Mr. Hamdi had a close friendship with someone that he worked with and who was also party to one or more of the allegations. The comment is irrelevant. As Mr. Hamdi's union representative correctly pointed out more than once during the interviews, there is nothing in the Standards of Conduct that says colleagues cannot also be friends outside of work. A personal relationship is not, in itself, grounds for suspicion, let alone dismissal.

Another important consideration in assessing Mr. Hamdi's conduct generally was the fact that he was known throughout the ministry as an employee with a lot of data access and expertise who was willing to help colleagues at various levels. He and a few others in similar positions provided answers to questions and solutions to problems requiring data access. While his direct supervisor at the time of his dismissal explained that she had attempted to gain control over Mr. Hamdi's work and data practices, the reality was that Mr. Hamdi's actions had been not only condoned but expected of him for many years. As stated by one of Mr. Hamdi's previous Executive Directors,

> *He didn't get any of his access fraudulently … he was given access at some point … I'm sure if some of that access had been taken away, there would have been parts of the Ministry that would probably have screamed and complained.*

We reviewed Mr. Hamdi's suspension pending recommendation for dismissal letter with Dr. Davidson, to discuss her view of each ground for dismissal given this was the first time that she had reviewed the letter or was aware of what the allegations were.

Dr. Davidson consistently commented that the evidence relied on in the letter was insufficient to support the allegations. Moreover, she said that email evidence that the investigators showed her before Mr. Hamdi's data suspension was vague and that she would have required more information before reaching such a conclusion. She did not know whether the investigators had gathered more information in support of their conclusions. Dr. Davidson's comments that she would have sought more information before signing the suspension pending recommendation for dismissal letter is significant.

She also confirmed that she would not put any weight on the fact that Mr. Hamdi was friends with his colleagues. She specifically noted that Mr. Hamdi's practices with respect to data and his participation in ministry work appeared to have been consistent with ministry practice and, specifically, the practice of other economists. Finally, she stated that even if the grounds listed were true, in her view, they would not amount to the level of misconduct required for dismissal.

We believe that Mr. Hamdi acted inappropriately in 2010 when he provided Dr. W. Warburton the personally identifiable data so Dr. Warburton could assist Mr. Hamdi in refining the ministry's statistical tool. This was wrong but viewed in its entirety was a minor incident and could have been resolved with little or no employment discipline.

Our assessment of Mr. Hamdi's conduct was made more difficult by his refusal to participate in our investigation as outlined in Chapter 2. We did not have his evidence under oath to consider. However, based on the information available and having carefully assessed each of the grounds the ministry relied on in terminating Mr. Hamdi, we have confidence concluding that some of the grounds relied on were unsupported by the evidence and the investigators did not consider or obtain evidence which was available to explain Mr. Hamdi's conduct. Further, with respect to the grounds that did have an evidentiary basis, the ministry did not consider that much of Mr. Hamdi's conduct in providing information within the ministry had been condoned by his employer for many years.

It is therefore our conclusion that Mr. Hamdi's employment dismissal was wrong. We base this conclusion on the following:

- Mr. Hamdi was suspended without pay for more than two weeks before having the opportunity to respond to the allegations against him
- The investigation and the interviews were conducted unfairly
- Mr. Hamdi's data handling practices were consistent with the ministry's practices at the time, and it was unfair to single him out based on his relationships with other employees in the Pharmaceutical Services Division
- The investigation team misunderstood or did not obtain key evidence in relation to the allegations, and the ministry relied on irrelevant grounds such as Mr. Hamdi's friendships with other employees in terminating his employment
- Even if some discipline were warranted for Mr. Hamdi's data handling practices, it would not be reasonable to sever the employment relationship on the basis of this conduct alone

Mr. Hamdi should not have been dismissed from his employment.

9.3.4 DAVID SCOTT

9.3.4.1 HISTORY OF EMPLOYMENT WITH THE MINISTRY OF HEALTH

In 2012, Mr. Scott was a senior researcher/advisor in the Management Information Branch of the Planning and Innovation Division. His general duties included producing a variety of summaries and analyses as requested on selected topics relating to division and ministry planning and decision making, and producing data and analyses as requested on community, regional, provincial, national and international trends in population health, health services and health expenditures. Mr. Scott's work products included data analyses, reports, literature reviews and other analytical documents.

Mr. Scott had been a valued Ministry of Health employee for 12 years at the time of his dismissal in 2012.

9.3.4.2 ANALYSIS OF SUSPENSION AND DISMISSAL DECISIONS

Mr. Scott first came to the attention of investigators because of his work with Mr. Hamdi, Dr. W. Warburton and an external researcher on an atypical antipsychotic drugs project. He was suspended without pay August 1, 2012, the same day as Mr. Hamdi, by way of letter signed by Acting Assistant Deputy Minister, Nick Grant.

9.3.4.2.1 INVESTIGATIVE PROCESS

As they had done with Mr. Hamdi, investigators did not interview Mr. Scott until August 16, 2012. During the more than two weeks between his suspension and his first interview, he was not informed about the allegations against him or provided any information that would assist him to respond in the interviews. Investigators interviewed Mr. Scott three times prior to his dismissal on September 6, 2012: August 16, 24 and 30, 2012.

The way in which the interviews were conducted did not provide Mr. Scott with a full and fair opportunity to respond to the allegations against him. Starting with the first interview, the interviewers set an accusatory and aggressive tone, which was apparent in our review of the transcripts and the audio recordings. Like the other interviewees, Mr. Scott was not provided with advance disclosure of documents or particulars of the case against him.

Most of the first interview related to Mr. Scott's work on the atypical antipsychotics project with an external researcher. During this interview, investigators spent 10 minutes asking Mr. Scott about an email that he neither sent nor received, and thus, had never seen before. The email was from Mr. Hamdi to the external researcher. The interviewers repeatedly asked Mr. Scott about Mr. Hamdi's intent in sending the email, which he explained that he did not know. The interviewers openly disbelieved Mr. Scott's responses when he was required to speculate.

The interviewers spent the final 11 minutes of the first interview pressing Mr. Scott about one more email, which he did not write. In the email, the external researcher requested data in relation to the atypical antipsychotic drugs research. When questioned, Mr. Scott attempted in vain to explain that he did not give the external researcher any data. He told the investigators that the researcher

was seeking summary data that she had been previously provided.

Mr. Scott informed the investigators several times in his interviews that he was directed and expected to work on the atypical antipsychotic drugs project with Dr. W. Warburton and the external researcher. He also informed the interviewers that the atypical antipsychotic drugs project was included in his Employee Performance and Development Plan (EPDP), which was the case in 2009 and 2010.

The lead investigator told us that she did follow up at the time and could not find reference to the atypical antipsychotic drugs project on Mr. Scott's EPDP. When we reviewed it, we saw that the EPDP specifically referenced Mr. Scott's work on the project.

It appears that the investigators did not accept the evidence Mr. Scott provided in his first interview, as in his second and third interviews, they repeated some of the same lines of inquiry. They asked Mr. Scott repeatedly about his working with an "external researcher." He explained that he viewed the atypical antipsychotic drugs project as an internal project, given Dr. W. Warburton's contract with the ministry and the direction he had received to work on the project. Mr. Scott explained that his direct supervisor had received a participants list in the project, which included Dr. W. Warburton and the external researcher. When Mr. Scott provided new evidence that did not fit with their theory that he was providing data to an external researcher without authorization, no one followed up with additional questions, or even acknowledged that they had heard it.

In the final interview, the investigators returned to this issue, telling Mr. Scott that they had spoken with his supervisors who said that he was not to be doing any "external" work. This would appear to be correct and consistent with Mr. Scott's evidence that he was not to be doing "external" work. The problem, however, is that the atypical antipsychotic drugs research that Mr. Scott participated in was not considered external by him or by the Primary Care Branch which directed the work. We describe in Chapter 12, that the project was a collaboration between the Primary Health Care Branch and the Provincial Health Services Authority, where the "external researcher" worked. The project was funded by the PHSA. Mr. Scott explained to the investigators that he understood the project was internal and that he was permitted to communicate with the "external" researcher. When we spoke to one of his supervisors, she remembered only being asked general questions by the investigators and not specifics with respect to the communications with the external researcher in question. The investigators interviewed the two supervisors, but did not take notes, or record a transcript so we were unable to confirm what they told the investigators at the time.

9.3.4.2.2 DISMISSAL DECISION

On September 6, 2012, the Ministry of Health provided Mr. Scott with a suspension pending recommendation for dismissal letter, signed by Mr. Sidhu on behalf of Mr. Hamdi's Assistant Deputy Minister, Dr. Davidson, and a dismissal letter signed by Deputy Minister Whitmarsh. The suspension pending recommendation for dismissal letter provided more details about the alleged misconduct, while the dismissal letter itself was brief but included nine grounds for dismissal. As discussed earlier in this chapter, Dr. Davidson was not aware, until we interviewed her in the fall of 2016, of the letter drafted and signed in her name.

One of the grounds listed in Mr. Scott's September 6, 2012, dismissal letter was facilitating provision of data to the external researcher engaged in the atypical antipsychotic drugs research. For the reasons discussed with reference to Mr. Hamdi's dismissal and Mr. Scott's interview evidence described above, the inclusion of this as a ground for dismissal was wrong.

The ministry also asserted that Mr. Scott facilitated the provision of personally identifiable data via a flash drive to Roderick MacIsaac for his PhD. Our analysis with respect to these events as they relate to Mr. Scott is the same as our analysis for Mr. Hamdi. In our assessment, Mr. Scott conducted himself appropriately, and therefore, these events did not constitute misconduct, let alone grounds for dismissal.

The ministry further asserted that Mr. Scott solicited a university professor with a general proposal for a research project without discussing it or requesting approval from his supervisor. Mr. Scott had been intending to enrol in a university program outside of work hours, as he had

done in the past. He explained in his 2012 interviews that if he wanted to have the course paid for by his employer, he would have to submit a request, which he had not yet done. There is nothing in the standards of conduct prohibiting an employee from taking educational courses outside of work hours, paid for by the employee. If he had wanted to take courses during his work hours, he would have required permission. The course had not yet begun. This did not constitute misconduct, let alone grounds for dismissal.

Moreover, in their interviews with Mr. Scott, investigators tried to establish that he had been intending to use personally identifiable data for the upcoming course based on his email communications with the same professor. Mr. Scott made several attempts to disabuse them of this concern. He explained that the work product of the course would be a research proposal, a theoretical and methodological portion of a potential project, not actual research involving data analysis. Mr. Scott's explanation in his interviews was consistent with his emails on the topic. Further, when the professor asked him about the potential to access ministry data for the purposes of a research project, Mr. Scott appropriately referred him to the PopData BC data access process.

The dismissal letter also stated that Mr. Scott stored and accessed approximately 50 CDs of personally identifiable data at his desk. The letter alleged that Mr. Scott was not authorized to have most of that information and that he was not forthright about its contents. Mr. Scott told investigators that the material comprised copies of old CCHS data that he was entitled to have, as well as some projects that he had worked on. Investigators conducted an analysis of the CDs. They had not, at that time, determined whether Mr. Scott was entitled to have the CDs. They did determine that some of the CDs contained CCHS data only and others contained CCHS data linked to Ministry of Health data in fully identifiable form. The letter stated that Mr. Scott's possession of this data represented an "egregious potential privacy breach."

Based on our assessment of the transcripts of Mr. Scott's 2012 interviews, the documentary evidence and our interviews with his former supervisors and executives in his division, Mr. Scott was permitted to have most if not all of this information to carry out his job duties. It was known that Mr. Scott was one of the few people at the ministry who had extensive experience with CCHS data and that he had previously been the informal data custodian who received the CCHS disks from Statistics Canada.

The ministry was rightfully concerned about Mr. Scott's data security practices. The CDs contained highly personal and sensitive data on portable media with the passwords taped to or included in the disk case. This was far from best practice and was not consistent with government policies with respect to information security. The CDs, however, were held in a locked drawer of his desk. The investigation team criticized Mr. Scott in his interview, because they got the drawer key from maintenance staff easily. Mr. Scott said that he did not realize that the staff also had keys to the drawer. Further, almost everyone we asked about information security said that Mr. Scott's practices were not uncommon within the ministry. They explained that in 2012, best practices for data security were not sufficiently disseminated to staff or enforced, and many were addressed by the Deloitte report in the year after Mr. Scott's dismissal.

Of all of the grounds for dismissal listed in Mr. Scott's letter, only the matter with respect to the CDs might have been considered inappropriate conduct at the time. However, this does not mean that his dismissal was justified. Given the culture and practices regarding data at the ministry at the time, Mr. Scott's actions were implicitly condoned.[16] His supervisors expressed in their interviews with us that they would not have considered dismissal as an appropriate response and might not have considered any disciplinary action had they been directly consulted or involved in the decision to terminate his employment. They indicated that it would have been an opportunity to educate Mr. Scott on best practices in information security.

Having carefully assessed each of the grounds the ministry relied on in terminating Mr. Scott, we have concluded that most of the grounds relied on were unsupported by the evidence and not true. Further, with respect to the ground that did have an evidentiary basis, it would have been unreasonable to conclude that Mr. Scott's conduct

16 These systemic information practices within the Ministry of Health were the subject of criticism by the Information and Privacy Commissioner in that office's review of these matters discussed in Chapter 10.

was sufficiently serious to undermine the employment relationship.

It is our conclusion that Mr. Scott's employment dismissal was wrong. We base this conclusion on the following:

- Mr. Scott was suspended without pay for more than two weeks before having the opportunity to respond to the allegations against him
- The investigation and interviews were conducted unfairly
- Mr. Scott's data handling practices, while not consistent with best practice, were consistent with the ministry's practices at the time and it was unfair to single him out
- Even if discipline were warranted for Mr. Scott's data handling practices, it would not be reasonable to sever the employment relationship on the basis of this conduct alone

Mr. Scott should not have been dismissed from his employment.

9.3.5 RODERICK MACISAAC

9.3.5.1 HISTORY OF EMPLOYMENT WITH THE MINISTRY OF HEALTH

Mr. MacIsaac was first hired as a co-op student by the Ministry of Health in October 2011. His appointment was renewed for two subsequent terms. Dr. R. Warburton, Co-Director of Research and Evidence Development, became his supervisor in November 2011. After he transferred to her supervision, he began working on projects related to the methodology the Ministry of Health could use to evaluate its 2011 smoking cessation program.

One project was to develop the statistical method or "code" to evaluate the 2011 program. Creating this statistical method required data to test the code. Mr. MacIsaac intended to use the data from a project on an earlier smoking cessation program operated by the Ministry of Employment and Income Assistance (MEIA) to assist in developing the code.

9.3.5.2 DOCTORAL STUDIES

Mr. MacIsaac was also a PhD candidate in the public administration program at the University of Victoria, and Dr. R. Warburton was his potential dissertation supervisor.

By summer 2012, Mr. MacIsaac was beginning to develop his thesis proposal but had not yet finalized it. He had not begun doing any formal research as part of his thesis.

Mr. MacIsaac planned to conduct his thesis on the health outcomes from the MEIA 2007 program. Mr. MacIsaac's proposal stated that he would assess the impacts of MEIA's 2007 program on income assistance participants. The intention was to use complex statistical analysis methods to compare the program participants with non-participating income assistance recipients who also smoked.

The study would require two types of anonymized data: BC Ministry of Health data and CCHS data. Participation in the 2007 program was recorded in the PharmaNet system, a ministry database that contains prescription drug records. This database was linkable to other ministry databases to track hospital admissions, physicians' visits and deaths. These records could also be linked to CCHS data, which would have provided information about who smoked, who successfully quit smoking and who continued to smoke after participating in the income assistance smoking cessation program.

It was the evaluation of the health outcomes of the 2007 MEIA program that Mr. MacIsaac had hoped would become the topic for his planned thesis.

When Dr. R. Warburton was suspended from her job on July 17, 2012, Mr. MacIsaac was worried about the impact on both his work product and his academic research. He had just received access to linked ministry datasets in late June so that he could write the code that could be used for evaluating both smoking cessation programs. At that time, he did not yet have the anonymized data for his PhD and he had not yet analyzed the data for the ministry.

After Dr. R. Warburton's suspension, Mr. MacIsaac requested a meeting with his Executive Director. According to his Executive Director:

> *Roderick came to me and was wondering what his – what his future was, and he was concerned because he hadn't completed the work that he was doing and that, you know, he didn't have the direction from Rebecca anymore and would he be able to do this. And he was asking, you know, if there's a possibility for further extension on his contract and all that.*

> . . .
>
> . . . but then he said to me, "Well, not only that, though, I've got a lot riding on this because I've got – my whole academic future is tied up in this," and – I was – you know, kind of troubled just by the whole situation, I guess.

Mr. MacIsaac was not able to finish his work for the ministry or complete any data access arrangements required for his academic work before his employment was suspended.

9.3.5.3 ANALYSIS OF SUSPENSION AND DISMISSAL DECISIONS

Mr. MacIsaac was interviewed once on August 28, 2012. He was suspended without pay pending investigation at the conclusion of his interview. The suspension letter was from his Assistant Deputy Minister, Ms. Walman, but it was signed by one of the interviewers, the Strategic HR Manager. As we have described above, Ms. Walman was not consulted prior to Mr. MacIsaac's suspension as she was on vacation at that time.

The PSA investigator told us that she told Mr. Whitmarsh that there was no point in firing Mr. MacIsaac because his co-op term with the ministry finished on August 31, 2012 but that she did not press this point once Mr. Whitmarsh had made the decision to dismiss him. Mr. Whitmarsh told us the PSA investigator recommended Mr. MacIsaac's dismissal, and that the dismissal letter the PSA representatives drafted constituted the PSA's recommendation.

On September 6, 2012, Mr. Whitmarsh dismissed Mr. MacIsaac for having "irreparably breached the trust of [his] employer, [his] colleagues and the general public," thereby rendering him "unfit for employment in the Public Service." The dismissal served no immediate purpose as the term of Mr. MacIsaac's contract had ended on August 31, 2012, three days after his suspension and six days before his firing.

9.3.5.3.1 INVESTIGATIVE PROCESS

Mr. MacIsaac's interview shared a number of deficiencies that occurred in the interviews the other employees underwent. Mr. MacIsaac was interviewed by four members of the investigation team. The interviewers' tones were sometimes condescending. They asked Mr. MacIsaac the same questions multiple times, and despite his consistent answers, they disbelieved him. Mr. MacIsaac responded at least nine times that he did not use any data for his PhD and at least five times that he did not have a particular flash drive in his possession. Mr. MacIsaac was ultimately dismissed for these reasons.

We discuss Mr. MacIsaac's interviews below in greater detail as they relate to the specific grounds for his dismissal.

9.3.5.3.2 DISMISSAL DECISION

The ministry ended Mr. MacIsaac's employment on the basis that he had inappropriately accessed data for the purposes of his PhD while knowing that no such authorization had been provided. This is the same incident identified above with reference to Mr. Hamdi's dismissal. It is also the third incident described in the Information and Privacy Commissioner's June 2013 report and is described in Chapter 10.

As previously described, Mr. Hamdi provided a flash drive to Mr. MacIsaac containing linked health datasets with federal CCHS data. The investigators believed that Mr. MacIsaac had used that same data for his PhD research. However, the investigators failed to consider the oral and documentary evidence before them. Mr. MacIsaac was authorized to have and use the data for his ministry work and he did not use, nor did he appear to have the intention to use, the data for any external purposes. Although investigators received some contradictory evidence from other people about what they thought the data was for, Mr. MacIsaac was consistent in his evidence that he had not begun doing any formal research as part of his thesis.

In his interview, Mr. MacIsaac stated at least nine times in no uncertain terms that he had not used any data for his PhD. He explained that his PhD was still in the proposal stage and that any data he had received was for the smoking cessation evaluation work he was contributing to as part of his co-op position with the Ministry of Health. Significantly, he explained that, for his thesis, he intended to use an anonymized data set that had not yet been requested or created. This is outlined in his draft proposal, which stated under the subject heading "Data Sources":

> *All data will be anonymized at the source, as authorized by the BC Ministry of Health's Data*

> *Access, Research and Stewardship Branch. All personal identifiers including Personal Health Numbers (PHNs) will be removed or scrambled prior to accessing the data for purposes of this research. No raw data will be collected from BC Ministry of Employment and Income Assistance; only BC Ministry of Health and CCHS data will be used.*

Mr. MacIsaac's assertion that he intended to use an anonymized data set for his academic work was also supported by the analysis an investigator conducted after Mr. MacIsaac's firing. That investigator concluded:

> *The information that was prepared for – that we reconstructed included a study – what's called a study ID crosswalk key in the data set. So they were actually – so it appeared from the data being prepared that they were intending to have the final product keyed with a study ID not with the personal health number. So that is actually consistent with his statement that it was – that they were going to be using anonymized data.*

As Mr. MacIsaac wrote to his union representative after his suspension but before his dismissal:

> *My data analysis has not been completed because of the recent series of suspensions. As Rebecca was removed from the Ministry, her key role in developing the Ministry's evaluation plan was halted. After Ramsay Hamdi's suspension, I was unable to complete the construction of the datasets for analysis.*

Mr. MacIsaac further wrote after his dismissal:

> *Rebecca Warburton thought it best to get the Waiver done first, even before I started working on the Smoking Cessation Evaluation. Had I been able to complete my work for the Smoking Cessation Evaluation, I would then have generated an anonymized dataset for the purposes of the PhD dissertation. This anonymized dataset had not been created by August 2012.*

Other evidence suggests that Mr. MacIsaac was quite conscientious with respect to protecting the personal information contained in administrative health data. In an email to Dr. R. Warburton in November 2011 with respect to his PhD proposal and ethics waiver, he said:

> *The Waiver is on your desk with the data sources appended, and so will the proposal as soon as I finish fixing the references. I've encountered a problem with the Waiver. The final line in the fourth paragraph on the second page states: "Attach a sample of the data". They want to see something that shows how I am linking different datasets. All databases already linked require a sample for the waiver to be approved. I don't know what to do. Anonymized or not, any health data taken outside the Ministry would be a information breach would it not?*

There is some dispute in the evidence about whether Mr. MacIsaac and Dr. R. Warburton believed that he also had authorization to use ministry data for his PhD. Mr. MacIsaac was not personally aware of any specific authorizations, but he believed Dr. R. Warburton to be in possession of them if they existed. In any event, because Mr. MacIsaac was authorized to possess that data for his ministry work and had not yet used any data for his academic work, the ministry had an opportunity and an obligation to inform Mr. MacIsaac that he would require a separate authorization process before using any data for his PhD. This was a lost opportunity to engage with and educate a co-op student on ministry processes. Instead, the ministry found misconduct.

The second ground for Mr. MacIsaac's dismissal related to the data set being converted from SAS to STATA format on Dr. W. Warburton's computer by Mr. Hamdi before Mr. Hamdi provided it to Mr. MacIsaac (discussed in section 9.3.3.2.2, above). Our analysis is the same here as it was with respect to Mr. Hamdi. The ministry and the investigators could not have expected Mr. MacIsaac to know the details of Dr. W. Warburton's data suspension, given that Dr. W. Warburton himself did not understand the limits of his suspension.

The ministry's third reason for terminating Mr. MacIsaac was his refusal to sign a declaration stating that he had "no knowledge of any data stored outside of the Ministry." This allegation arose from his interview. During the interview, the lead investigator asked Mr. MacIsaac six times to sign a declaration that stated that he did not have any

ministry data in his possession. The interviewers emphasized that Mr. MacIsaac could face civil or criminal action if he signed the declaration. The investigators described the range of data covered by this declaration broadly; it was not just limited to personal information. The investigators said, "if you have … any documents outside of the work place that has any government information on it, any data … anything needs to be returned to the ministry." Mr. MacIsaac was – understandably – reluctant to sign the declaration without the opportunity to ensure that he did not have anything in his possession that would fall within this broad definition. He told the interviewers he needed some time to "make sure that everything that I have is not related."

Mr. MacIsaac also expressed concern about the form and legitimacy of the declaration that he was asked to sign. The form was not on official Ministry of Health or Office of the Chief Information Officer letterhead. As described by Mr. MacIsaac to his union representative:

> *I was immediately suspicious of the page, for it [is] unclear that it is a government document. The usual ministry letterhead (either from Citizen Services or Health) is conspicuously absent. Further, declarations are preceded by legal text. This is a blank declaration page requiring me to sign a legal document that I had not been allowed to view. I want a lawyer to look at this document and verify whether [the lead investigator] obtained this declaration page from an official Citizen Services document, and verify whether she was overstepping her authority in this case.*

Mr. MacIsaac offered to return the signed form to the investigators the following day, but they continued to pressure him to sign it at the meeting, saying that he could just "list… anything that you have" and sign the declaration. The investigation team interpreted his reluctance to sign the form at the meeting as further evidence that Mr. MacIsaac was complicit in wrongdoing rather than an effort to be truthful and conscientious. It was completely appropriate for Mr. MacIsaac to request time to ensure that his declaration was accurate before signing, particularly as he had not had any opportunity to review it before the interview. It was unfair and inappropriate to include this as a ground for dismissal.

Mr. MacIsaac's dismissal letter also asserted that he routinely attempted to manipulate the investigation process by providing misleading and incomplete information. Mr. MacIsaac's response to that allegation, which he provided to his union representative, was as follows:

> *The above sentence is not an objective statement with any substantive allegations. I provided information to the best of my knowledge.*[17]

We reviewed Mr. MacIsaac's transcripts and audio recording of his interview and there was no indication that he provided misleading information. All of Mr. MacIsaac's evidence was consistent with the documentary evidence that we gathered and that the investigation team had available to them at the time, including his draft PhD proposal and email communications.

One investigator who was at the interview with Mr. MacIsaac told us that Mr. MacIsaac appeared agitated during the interview. At the time, the interviewers interpreted this as a sign of deceit but it could also just as reasonably be conceived as a sign of anxiety and concern. It was not fair for the investigators to draw that inference. It was inappropriate to include as a ground for dismissal the allegation that he "routinely attempted to manipulate the investigative process."

Lastly, the ministry dismissed Mr. MacIsaac for jeopardizing the privacy of British Columbians and the reputation of the ministry. Given that Mr. MacIsaac was authorized to receive and use the datasets that he received for his ministry work, and that there was no evidence that he used it for any other purpose, it cannot be said that Mr. MacIsaac's actions jeopardized "the privacy of British Columbians." This statement was unsupported by the evidence.

Having carefully assessed each of the grounds the ministry relied on in terminating Mr. MacIsaac, we have concluded that most of the grounds relied on were unsupported by the evidence and not true, and that the ground relating to declining to sign the declaration did not constitute misconduct.

17 Letter from Roderick MacIsaac to Cheryl Jones, staff representative BCGEU, 13 September 2012.

It is our conclusion that Mr. MacIsaac's employment dismissal was wrong. We base this conclusion on the following:

- The interviews were conducted unfairly
- The dismissals were based on incorrect or incomplete evidence about Mr. MacIsaac's PhD research and his access to and use of ministry administrative health data
- It was inappropriate and unfair to infer from Mr. MacIsaac's conduct in the interview or his refusal to sign the data declaration that he was attempting to mislead the investigation team

Mr. MacIsaac should not have been dismissed from his employment.

After his dismissal, an investigator reviewed Mr. MacIsaac's communications with respect to data access. On November 27, 2012, he determined that it was highly unlikely that Mr. MacIsaac had taken any data away from the ministry:

> *Roderick worked a fair bit at home, but it appears that there was an understanding that he had to work at the office when working with sensitive data. Nevertheless, he wouldn't be working in a vacuum, and there would have been government documents that he either developed at home or that he took home to work with.*
>
> *While he was provided copies of CCH survey and administrative data on his PC at the office which provided an opportunity to copy the data and bring it home, I have never found anything that suggests that he ever brought home any sensitive data, either PI or anonymized, or sent any of this data to UVIC accounts. Rather I found that he was adverse to the idea of handling this information at home and also that Rebecca instructed him to only work with "CCHS" and "admin data" at the office.*

As far as we can determine, the ministry did not contact Mr. MacIsaac to inform him of this reappraisal of his conduct.

9.3.6 ROBERT HART

9.3.6.1 HISTORY OF EMPLOYMENT WITH THE MINISTRY

At the time of his firing, Robert Hart was the Director of Data Access, Research and Stewardship in the Information Management and Knowledge Services Branch (IMKS) of the Health Services IM/IT Division of Ministry of Health. He had been in that role since 2008 and had been with the public service since 1985. Mr. Hart had a lot of background knowledge about the ministry and its programs, which informed his work. Mr. Hart was a loyal and hard-working employee.

Mr. Hart reported directly to the Executive Director of IMKS and the Chief Data Steward. As the Director of Data Access, Research and Stewardship, Mr. Hart had a large portfolio. He was the senior manager responsible for a number of data-related work groups including those responsible for drafting the ministry's information sharing agreements, reviewing and approving data access for ministry contractors and employees and, for a time, reviewing and approving data access applications from researchers through PopData BC.

Mr. Hart's employees included the employees who were "data stewards" and who held conservative and risk-averse views of privacy and data access, as described in Chapter 4. The complainant worked in his branch and thus he had to deal with the challenges that the complainant and some of her colleagues brought to the work place, including their various theories, their distrust and, at times, their refusal to work on certain projects. As described by a previous Chief Data Steward, it was a highly stressful place to work due to both internal and external pressures. Mr. Hart's area was understaffed for a long time and he was faced with managing a massive backlog of data access applications and information sharing agreements, adding to the stressful work environment.

9.3.6.2 ANALYSIS OF SUSPENSION AND DISMISSAL DECISIONS

Investigators interviewed Mr. Hart once on August 31, 2012, and suspended him without pay at the conclusion of that interview. Mr. Hart was an excluded employee with no provision in his contract to allow the government to suspend him without pay. Although this likely amounted to a constructive dismissal of Mr. Hart from his employment,

had he taken that position, the Ministry of Health terminated his employment in a letter dated September 13, 2012.

The suspension letter Mr. Hart received was from his Assistant Deputy Minister, Lindsay Kislock, but it was signed by one of the interviewers, the Strategic HR Manager. The Strategic HR Manager told Mr. Hart that the reason for the suspension was "the fact that as the Director for Data Access in the Ministry that your response to the email regarding the selling of data was inaction and less than appropriate."

Ms. Kislock did not make the decision to suspend Mr. Hart. She was on vacation out of the country at the time of his suspension, and only learned about it after it happened.

The documentary evidence indicates that, while she was not involved in the decision, she did discuss the matter with the lead investigator via email. Following Mr. Hart's interview, the lead investigator sent an email to Ms. Kislock notifying her that Mr. Hart was suspended that day without pay. Ms. Kislock replied: "Be careful not to mix our desires with the facts." The lead investigator responded, "Believe me we have facts." From our review of other emails and our interview with Ms. Kislock, it was evident that she did not think highly of Mr. Hart. She viewed him as partially responsible for the data backlog and other challenges of the data area. Ms. Kislock gave evidence that the lead investigator knew that Ms. Kislock "wasn't glowing" in her praise of Mr. Hart and she was cautioning the lead investigator that she should not allow bias to cloud her judgment.

9.3.6.2.1 INVESTIGATIVE PROCESS

Investigators brought Mr. Hart in for an interview on the basis that he would be asked questions to "learn a little bit more about what information you might have as part of this review that is going on." He was not informed that disciplinary action might result from the interview. He was not informed of any specific concerns about his conduct before or during the interview.

Three-quarters of the way through the interview Mr. Hart was taken aback with a line of questioning about providing ministry data for money. As in other interviews, the investigators seemed uninterested in what the interviewee had to say, creating the impression that they had already reached a conclusion before the interview. For example, Mr. Hart explained to the team that he wanted to conduct a review of the data access that individuals in the ministry had, starting with Mr. Hamdi, but advised that he had insufficient resources to carry out that review. The ministry cited Mr. Hamdi's "blanket access" to data as a reason to terminate Mr. Hart; it appears not to have considered Mr. Hart's evidence on this point.

The interviewers failed to be objective. Investigators planned to ask Mr. Hart during the interview about a specific email exchange, which directly led to his suspension, yet it was apparent to us there was nothing that Mr. Hart could have said that would have changed that decision. Further, given that the investigators had already made up their minds about the nature of the email exchange and Mr. Hart's culpability, they should have notified him at the outset that he was under investigation and that a disciplinary decision might be taken.

9.3.6.2.2 DISMISSAL DECISION

Mr. Hart's employment dismissal was based on three allegations. These allegations were either factually inaccurate or an unreasonable interpretation of Mr. Hart's role.

The first allegation was that, having been copied on the June 2008 email chain in which a contractor sent an email to Mr. Hamdi indicating that the contractor had approval to spend $2,000 for assistance with data access, Mr. Hart "wilfully turned a blind eye" and "did not take any action." The PSA investigator in the interview mischaracterized the email without any evidence to support her characterization. She said: "This is talking about selling Ramsay's access directly to [the contractor] and involving [another employee]." As we discuss earlier in relation to Mr. Hamdi's dismissal, the investigation team failed to properly investigate this e-mail and its various possible interpretations.

Before presenting the email to Mr. Hart, the interviewers asked him if he was aware of whether he could recall anyone being offered money to provide ministry data. Mr. Hart responded that he recalled that the contractor had offered Mr. Hamdi a contract to work with him at some point. He then went on to explain that it would not be a problem if Mr. Hamdi "followed the process and went and talked to his boss and says, 'I have been offered this contract.'" He explained that he did not tell anyone about it because,

I told Ramsay "if you are going to do it, you have got to go through the process." Or I probably told him that. I didn't report him to anybody.

. . .

I don't think he took Bill up on it; to be honest, but I don't know.

Even if the investigation team did not accept Mr. Hart's evidence, the records made it clear that Mr. Hart did not ignore this series of emails. To the contrary, it is clear from the email that he believed that a "formal request" would be "initiated." He believed everyone would be following the appropriate rules, and nothing had yet occurred. To the extent that this allegation formed the basis for his dismissal, the dismissal was wrong. In fact, there was a series of follow-up emails and meetings later in June and July 2008 in which Mr. Hart confirmed that some kind of agreement would need to be in place in order to provide data to the contractor. Because the request was not imminent, the form of that agreement was not worked out at the time.

The second ground for dismissal related to Mr. Hart's alleged failure to limit the data to which Mr. Hamdi had access.

We interviewed a number of individuals about Mr. Hamdi's access to data. These interviews confirmed that the extent of Mr. Hamdi's access to data was common knowledge and widely accepted in the ministry in 2012. As we have described above, many people at the ministry relied on Mr. Hamdi's data access and his cross-database skills to do their work. We also heard evidence that, generally, employees did not lose data access over time. There was no audit process by which employee data access was reviewed. We learned that additional data access would usually be added over time, but not removed, unless the employee was starting a new position, at which point it may be reviewed and adjusted. While it may not have been a best practice, it was widespread in the ministry, and thus it was wrong and unfair to single out Mr. Hart for what could at best be characterized as a systemic issue. We describe in Chapter 10 the Information and Privacy Commissioner's criticisms of the poor systemic information management practices that existed within the ministry at the time.

The third ground for terminating Mr. Hart was that he failed to raise concerns from other staff members (primarily the complainant) about "improper contracting and data practices" in the ministry. This is not correct. In fact, Mr. Hart raised this issue with his direct supervisor, and together, they raised these concerns with Mr. Sidhu. As we have heard from others in the ministry, the data stewards with whom Mr. Hart worked were challenging to manage given their strongly held views with respect to access and use of health data, and the impact this had on their productivity.[18]

Further, some of the concerns raised by the complainant and other employees in Mr. Hart's branch were raised directly with the previous Assistant Deputy Minister Elaine McKnight. As a result of a lot of complaining and concerns raised by the data stewards, Ms. McKnight was directly involved in discussions about the direction of data access for the Drug Safety and Effectiveness Network (DSEN) with Mr. Nakagawa and another former Associate Deputy Minister. When investigators asked Mr. Hart about this, he explained that he did not see a need to raise the concerns to the Deputy Minister given that three ministry executive members were already involved. Given that Mr. Hart did actually raise concerns from his staff to his superiors, it was wrong for the ministry to assert this as a ground for dismissal.

Having carefully assessed each of the grounds the ministry relied on in terminating Mr. Hart, we have concluded that the grounds relied on were unsupported by the evidence. It was wrong to conclude that his actions constituted misconduct, let alone misconduct sufficiently serious to undermine the employment relationship. In light of all of the evidence, we have determined that terminating Mr. Hart for cause was improper.

Mr. Hart was a longstanding, valued public servant. As they did with all of the individuals dismissed as a result of the ministry's 2012 investigation, neither the PSA nor the ministry considered Mr. Hart's positive personnel record.

Mr. Hart should not have been dismissed from his employment.

18 As described in Chapter 4.

9.4 THE PUBLIC ANNOUNCEMENT

9.4.1 INVOLVEMENT OF GOVERNMENT COMMUNICATIONS AND PUBLIC ENGAGEMENT BEFORE THE FIRST SUSPENSIONS

The Ministry of Health investigation first came to the attention of Government Communications and Public Engagement (GCPE) in mid-July 2012. Responsibility for communications was assigned to the manager responsible for issues management in the Ministry of Health and his staff. Related communications materials were drafted by the manager or his staff, and then reviewed by the Director of communications for the Ministry of Health. The GCPE staff received information for the communications materials from Mr. Whitmarsh, Ms. Kislock and Ms. Walman, as well as the investigation team.

GCPE staff drafted an internal information note on July 16, 2012 that contained some key "holding messages" for use if the investigation became public knowledge. At the request of Ministry of Health executives, GCPE drafted this note to coincide with the employee suspension decisions and Dr. W. Warburton's contract dismissal. On July 16, 2012, Ms. Walman directed the Communications Director to "pls ensure we are ready."

After noting the complaint made to the office of the Auditor General, the July 16, 2012 information note set out the background of the issue:

> *… the allegations … included inappropriate data access, intellectual property infringement and possible violations of the public service code of conduct. The ministry's financial and corporate service division interviewed staff and looked at the contracts involved in the complaint. Following this, a formal internal review was launched in May by the Ministry of Labour, Citizens' Services and Open Government as lead, supported by the ministry.*
>
> *…*
>
> *The internal review draft report is complete; the reviewers are now completing final recommendations. The Public Service Agency has the initial findings and is doing a formal investigation. On Monday, July 16, three staff members will be suspended without pay, pending further investigation by the PSA. One contractor will be advised that his contract is being cancelled.*
>
> *…*
>
> *… the ministry has or may suspend data access for all people involved in the PSD contracts under review, in government and at UVic and UBC.*

The "advice and recommended response" in the information note included the following bullet points:

- *We cannot comment on personnel matters.*
- *The Public Service Agency has established processes and procedures in place to handle all human resources complaints and concerns.*
- *Employees who fail to comply with the Public Service standards of conduct may be subject to disciplinary action, including dismissal.*
- *The Ministry of Health fully cooperates with the Public Service Agency on all human resource and disciplinary matters.*

9.4.2 PREPARATIONS FOR A PUBLIC ANNOUNCEMENT

By mid-August 2012, government began preparing for a public announcement on the investigation at some point in early September. Based on what they heard from investigators, GCPE staff understood that this was a serious matter and necessitated a strong communications response. As described above, by mid-August, Mr. Whitmarsh had become increasingly concerned about the potential for news of the investigation being leaked publicly. In an August 14, 2012 email to communications staff, Mr. Whitmarsh said:

> *Can we work up the holding messaging in the event of a leak? … No matter when a leak happens, if it does, the messaging is the same.*
>
> *A few facts, people suspended, when etc*
>
> *Investigation ongoing, cannot comment further*
>
> *We take these issue [sic] very seriously, have acting [sic] quickly and will peruse [sic] to resolution.*

We do not know the outcome at this point and may not for some considerable time

The Communications Director responded to Mr. Whitmarsh that GCPE had asked Ms. Kislock, Mr. Sidhu and the lead investigator to review the July 16 information note and would update it to better reflect Mr. Whitmarsh's suggestions.

Between August 15 and September 6, 2012, GCPE staff in the Ministry of Health updated the information note as necessary and worked with Mr. Whitmarsh, the investigation team, and legal counsel in Legal Services Branch to develop the communications material for a public announcement.

9.4.3 DECISION TO MAKE A PUBLIC ANNOUNCEMENT

None of the individuals we interviewed and none of the documents we reviewed clearly answered the question of who initially suggested that government should make a public announcement about the investigation. Mr. Whitmarsh told us:

I thought once you start, if we do terminate a group of people then – and I was alert to sort of the … vocal voice that groups like the T[herapeutics] I[nitiative] had.… you know I don't have to be a rocket scientist to realize this is all going to the public at some point …

He stated that, typically, Deputy Ministers do not appear before the media. He said, "part of our role is to highlight these issues for the political side of government so that they're aware that they're coming and … they have input at the various levels on how they want to handle it." GCPE staff in the Ministry of Health told us the decision to hold a press conference was made on the basis of direction from senior executives in the Ministry of Health and GCPE. GCPE staff were consulting with Mr. Whitmarsh on the key messages and communications approach and then-Deputy Minister of GCPE Ms. Mentzelopoulos on strategy.

On August 27, 2012, GCPE staff updated the information note and circulated it to Ministry of Health Assistant Deputy Ministers and the lead investigator for review and comment, as they hoped to provide a final version to Mr. Whitmarsh that day.

This was the first update that mentioned that the RCMP had been contacted. Ms. Kislock questioned whether this had indeed happened, to which the lead investigator responded: "the RCMP were contacted by phone by myself and OCG last week and today [the Director and an employee] from OCG and myself met with the RCMP for several hours to review the file."

In an email Ms. Walman suggested a cautionary note be included: "Can we stress all are allegations until proven differently?"

On August 29, 2012, then-Minister of Finance and Deputy Premier Kevin Falcon announced that he would be stepping down from his Cabinet post effective immediately.[19] This meant that Premier Clark would have to shuffle her cabinet to fill the key roles held by then-Minister Falcon.

By August 29, 2012, the Ministry of Health Communications Manager had developed a draft news release. It opened with the following statement:

VICTORIA – The Ministry of Health has contacted the RCMP in connection with allegations of inappropriate conduct and practices within the research and evidence development section of its pharmaceutical services division.

On August 29, 2012, Mr. Whitmarsh called Ms. Mentzelopoulos. He remembered that he thought he was supposed to keep her "in the loop from the communications side." Mr. Whitmarsh remembered giving Ms. Mentzelopoulos a general update about the situation and "that she felt that the government should get on top of this by putting out some kind of announcement."

Ms. Mentzelopoulos had a different recollection of the conversation. She understood that people were going to be dismissed, and recalled telling Mr. Whitmarsh that he needed to be able to explain why people were going to be losing their jobs. She said that Mr. Whitmarsh was emphatic that she stay out of it.

19 "B.C. finance minister steps down from cabinet," *CBC News,* 29 August 2012 <http://www.cbc.ca/news/canada/british-columbia/b-c-finance-minister-steps-down-from-cabinet-1.1164441>.

9.4.4 PLAN TO BRIEF MINISTER DE JONG

By August 29, 2012 a press conference had been set for September 5, 2012, with the above news release to be issued the same day. GCPE planned that Minister de Jong would conduct the press conference.

The impending Cabinet shuffle resulted in a change to the planning for the press conference and the date of the announcement. According to a draft letter dated September 4, 2012 from Mr. Whitmarsh to Minister de Jong, and an accompanying meeting request titled "Minister de Jong Briefing – Announcement," Mr. Whitmarsh intended to brief Minister de Jong that day about the progress of the investigation and about the planned press conference. However, Minister de Jong had no recollection of being updated on the issue after returning from his vacation that day. While the draft letter dated September 4 stated, "as discussed with you earlier today," it is apparent that the letter was drafted in anticipation of a discussion that never happened given the upcoming Cabinet shuffle.

This draft letter, which was not finalized due to the Cabinet shuffle, was intended to update the minister on the status of the investigation and describe findings of the investigation to date, including:

- Inappropriate data access, use and disclosure
- MoH employees having been offered money by an external contractor in exchange for data
- Unauthorized work by employees with external stakeholders
- Breaches of the Standards of Conduct
- Inappropriate hiring practices
- "A $1 service contract established for the spouse of a PSD employee by another MoH division to facilitate direct contractor data access for a project funded by a health authority."

The letter went on to describe the resulting suspension of data access; suspension of signing authority for everybody in PSD, except the Assistant Deputy Minister; and the meeting with the RCMP. It said, "to date, seven staff members have been suspended without pay and, by the end of the week of September 3, I expect that five of those individuals will be terminated for cause." The letter also stated that the first phase of the investigation would be complete by September 15, 2012, "to ensure all evidence is prepared for transfer to the RCMP by September 19, 2012." The letter concluded, "I want to assure you that this is receiving my full and direct attention."

9.4.5 SEPTEMBER 4, 2012

On September 4, 2012 the Communications Manager received a call from Jonathan Fowlie, then a legislative reporter for the *Vancouver Sun*. Mr. Fowlie told the manager that he was going to write about the Ministry of Health investigation, and that he had detailed information about it – someone had decided to leak news of the investigation to him. The Communications Manager told him he would call him back, and immediately walked over to Mr. Whitmarsh's office to tell him about the call. They agreed to tell Mr. Fowlie that government was planning to announce details in "the next little while." The Communications Manager would "confirm details" on the basis that Mr. Fowlie not file his story until the morning of the announcement. By this time, because of the impending Cabinet shuffle, the press conference had changed from September 5 to September 6.

When we spoke with him, Mr. Whitmarsh confirmed that he knew Mr. Fowlie through their common interest in cycling. Mr. Whitmarsh told us that he did not discuss the details of his job in a social context. This call from Mr. Fowlie on September 4 did not hasten the government's plans for a public announcement in any significant way; moreover, it did not result in any significant change to the content of the news release.

The ministry planned to coordinate some of the employee dismissals to occur on the day of the press conference. GCPE prepared a news release and communications materials for both the Minister and Deputy Minister. Mr. Whitmarsh planned to provide a technical briefing to media in advance of the Minister's statement. As the materials were being vetted, Mr. Whitmarsh wrote at 4:12 p.m. on September 4, 2012:

> *On quick read, we need to get the employee facts right. Its [*sic*] 7 suspensions and by Friday a number of dismissals (5?)*
>
> *Another action is to get independence [*sic*] advi[c]e on information sharing privacy and data management/governance.*

Within five minutes, an investigator confirmed the plan to fire five people on the day of the press conference. The Communications Manager confirmed the need to update the communications materials "with the dismissals just before we go out to make sure we have the most up to date information." He also confirmed that the reporter "has info that six employees have been suspended."

9.4.6 SEPTEMBER 5, 2012

On September 5, 2012, Dr. Margaret MacDiarmid became Minister of Health, replacing outgoing Minister Mike de Jong, who became Minister of Finance. By this time, both the news release and the accompanying communications materials were in the final drafting stages.

According to Minister MacDiarmid, Minister de Jong told her that he had left her with a "pretty big problem" and apologized in advance. Immediately after she was sworn in, Mr. Whitmarsh told Minister MacDiarmid that he had to brief her. Minister MacDiarmid was "horrified" by the situation Mr. Whitmarsh described. He explained how a "whistleblower" had come forward, was ignored within the ministry, and then took her complaint to the Auditor General. The resulting "complex investigation" by the Ministry of Health had uncovered many problems. Minister MacDiarmid recalled that the problems were described in two ways. First, researchers were allegedly finding ways to work around the policies and regulations that governed access to health data. This included transferring personal health data onto unencrypted devices and possibly selling data. Second, contracts were allegedly being direct-awarded at a low rate, but the contracts' costs then increased significantly, as a way to circumvent direct-award rules.

Minister MacDiarmid's executive assistant, who had also started in the ministry that day, recalled being taken aback at the substance of the briefing and surprised by the way Mr. Whitmarsh briefed the Minister – he provided her with no options about the best way to proceed, which was inconsistent with her previous experience. This individual observed that Mr. Whitmarsh was very much directing the Minister on the next steps to take.

Minister MacDiarmid's shock at the contents of this briefing arose in part from her time at the Ministry of Labour, Citizens' Services and Open Government, where she had seen the conscientiousness with which public servants performed their duties. Given this experience, she was surprised that a group of public servants would – as was described to her – be "bending the rules and going around the rules." She believed that the matter was reported to the RCMP because two unencrypted flash drives that were believed to have data on them could not be found – and thus were presumed stolen.

Minister MacDiarmid recalled that, from her perspective, "one of the things that I was really gobsmacked by was that people were being fired. I didn't remember anyone being fired. People got severed and they got huge piles of money."

At the briefing on September 5, 2016, Mr. Whitmarsh provided Minister MacDiarmid with a verbal overview of the investigation. She did not see any of the underlying evidence supporting the allegations, nor did she receive a copy of the Relationship Web that Mr. Whitmarsh had used to brief the Deputy Minister to the Premier Mr. Dyble. Instead, Mr. Whitmarsh provided most of the information about the investigation verbally. In our interview with her, Minister MacDiarmid reflected on the lack of documentation that was presented to her once she became minister:

> *… I never saw, like, any of the interviews or anything like that at all. And … those pieces of information, I feel like those were verbal… It was, you know, people walking me through and of course that's why I then have to count on my memory because you can't provide me with a briefing note that says this is what happened.*
>
> *And now that I reflect on that, it's unusual. You know, it started out with no paper because I'd just started today. There's no time for people to give me, you know, 48 hours. This is a big explosive issue, we've got to deal with it now. So I – I didn't even question.*
>
> *But as time went on, this stands out for me. Other things that I would have met with Graham and other ADMs and so on with, I would have always had paper on them. It would be very unusual. Whereas this one continued to be verbal, and Graham and I talked about it frequently.*
>
> *…*
>
> *And I don't remember getting a lot of paper on this.*

When we interviewed her, Minister MacDiarmid took responsibility for her decision to appear at the press conference on September 6. She believed that she had to be accountable for what had gone wrong. However, it is clear that at the press conference, and in subsequent media appearances, she was operating on very little information.

Also on September 5, 2012, the Communications Manager had a telephone conversation with the *Vancouver Sun* reporter, Mr. Fowlie, in which the Manager confirmed facts related to the investigation. This conversation was in response to the call the Communications Manager had received from Mr. Fowlie the previous day. During that conversation, Mr. Fowlie asked if the RCMP were involved and the Communications Manager confirmed they were. The Communications Manager immediately followed up with an email to Whitmarsh:

> *He just called and asked me straight up if the police were involved. I said they are serious allegations and we've notified the RCMP.*

We asked the Communications Manager if he knew why Mr. Fowlie asked about the RCMP's involvement, given that no news release had yet been issued and no other public statement made about the RCMP referral. He said he had asked Mr. Fowlie, who told him that it was just a guess. By confirming the information, the ministry had gone down a path from which it never retreated and, as discussed below, despite considerable legal advice to the effect that announcing the RCMP's involvement was not advisable. In Mr. Fowlie's news article the following day, which ran before the public announcement later that day, he reported, "Both the RCMP and B.C.'s office of the Information and Privacy Commissioner have been notified about the allegations."[20]

9.4.6.1 LEGAL REVIEW OF COMMUNICATIONS MATERIALS

In the evening of September 5, 2012, the communications materials were provided to the Legal Services Branch (LSB), with a request that LSB lawyers review them. The advice from LSB lawyers focused primarily on whether the news release should include mention of the RCMP. The Ministry of Health heard from the HSS lawyer as well as the lawyer who was advising the PSA, a specialist in privacy legislation and eventually, from the Deputy Attorney General.

At 5:10 p.m. on September 5, 2012, an LSB lawyer who is an expert in privacy warned Mr. Whitmarsh and the Communications Manager that by identifying the number of people suspended and terminated, and their length of service, the ministry would need to consider "if the release of any of that information could potentially lead to the identification of the employees involved." If this was the case, "the Ministry will need to treat the release of such information as disclosure of 'personal information' for the purposes of the *Freedom of information and Protection of Privacy Act*."

At 8:44 p.m. on September 5, 2012, the Communications Manager wrote that the lead investigator "spoke to the RCMP this evening who said they would be willing to confirm that the ministry has contacted them and is involved in an investigation. They will also likely say that they are waiting for the ministry to complete the final piece of its investigation before beginning their own." Mr. Whitmarsh replied one minute later, "This is perfect for where we are." The Communications Manager told us that he contacted the lead investigator to find out the status of the RCMP file and whether they were prepared to answer questions. The lead investigator had no recollection of the email or of speaking with the RCMP on that particular day, but said she did call the RCMP member around this time to "make sure we were on the same page." This RCMP member had no record or recollection of such a conversation, and remembered being surprised by the press conference.

The employment lawyer sent an email, at 10:05 p.m. This lawyer noted that at no time in the interviews conducted by the investigation team did any of the investigators tell the employees that they would be providing information to the RCMP. This lawyer wrote:

> *. . . although there is no strict legal obligation to do so, from a moral or ethical perspective it would be preferable to let these employees know in advance of any further interviews given the potential implications for the employees. Although this matter is certainly not clear from a legal perspective, a Court may take a dim view of this failure*

20 Jonathan Fowlie, "B.C. Health ministry suspends workers over privacy breach," *Vancouver Sun*, 6 September 2012.

to disclose and consequently there is also a risk that, should these matter proceed to trial, punitive damages may be ordered against the government.

The employment lawyer said it would be "preferable" to communicate information about the RCMP's involvement to counsel for Dr. Maclure and Dr. R. Warburton before an interview and sought instructions to this effect. She noted her understanding that "this may be problematic given the coincidental timing of any media announcement and that we should not be seen as pre-empting any communication from the Ministry on this topic." The employment lawyer noted she had communicated with the lead investigator and hoped to have further clarification in the morning. The employment lawyer also stated that, "until I spoke to you tonight, I was not aware that the Employer was planning to hand over all of its investigation materials to the RCMP."

By 10:24 p.m. on September 5, the employment lawyer questioned both the accuracy of the materials, and whether there should be mention of the RCMP at all. The lawyer wrote to the PSA Director, the lead investigator and other LSB legal counsel:

I have some concerns with the accuracy of some of the comments (for example, it suggests that the RCMP have already received the investigation materials which is not wholly accurate – rather they have received some interim reports). Moreover, it would be preferable, I believe to indicate that the referral to the RCMP was done by the OCG in accordance with their legislation.

. . .

In speaking with [the PSA investigator] and [the lead investigator] tonight on this and other matters, I have questioned whether the Ministry should do any media announcement, however, it appears that the Ministry is intent on proceeding to do so despite [the lead investigator's and the PSA investigator's] cautionary warnings to the contrary. Perhaps tomorrow's edition of the Vancouver Sun will confirm or assuage the concerns!

The employment lawyer had serious concerns about the potential harm to individuals' reputations and the subsequent risk to the ministry from mentioning the RCMP referral in the news release. When speaking with us, she told us that she thought mentioning the RCMP was a bad idea in general, as did the PSA investigator, and the lead investigator. However, if the report to the RCMP were to be mentioned, it should be described as a routine practice mandated by government's core policy. The Health and Social Services (HSS) lawyer had a similar view. She told us that her advice was, first, to not say anything about the RCMP, but if the ministry insisted on mentioning their involvement, then "refer to it in terms of the OCG following through with their own legislation to make a report … don't say that there's a criminal investigation underway."

9.4.7 SEPTEMBER 6, 2012

On September 6, 2012, Mr. Fowlie's story about the investigation, employment suspensions and dismissals, alleged privacy breaches and the RCMP referral was front-page news in the *Vancouver Sun*. However, the government's news release had not yet been issued, and the content of the news release continued to be the subject of considerable debate throughout the morning.

Referring to the *Vancouver Sun* story the employment lawyer wrote at 7:28 a.m.: "I don't think this story is that bad in the circumstances." The PSA investigator replied, "No it could be worse and certainly gets us off the hook in terms of releasing the information." The lawyer replied that she was still waiting for instructions from the lead investigator, the PSA Director and ultimately Mr. Whitmarsh on whether to communicate with the employees' counsel directly.

Throughout the morning of September 6, 2012, LSB lawyers continued to provide advice about the news release as it related to privacy and litigation concerns. At 8:42 a.m. the employment lawyer emailed the HSS lawyer, investigators and the PSA Director with a detailed list of concerns about the public announcement:

- *There is always a risk of significant punitive damages when employment disputes are played out in the media especially in circumstances where the employer provides inaccurate information which is then repeated in the media;*
- *I would also strongly recommend that there is no message that we have turned over our entire investigation to the RCMP since a) this is*

not true – only interim information has been provided; and b) this may be very harmful to the reputation of individuals involved. Similarly, I'd recommend that we not comment on the monies involved – could we simply say that we are presently reviewing the contracts that are involved, but all of this is under review?

- *Another key message is that we need better procedures; it would be preferable to suggest that procedures [are] in place that were not followed;*
- *Because this is an ongoing internal investigation – no personal information about staff should be released;*
- *The message should not be that there are findings – rather that this is an ongoing investigation;*
- *We [Ministry of Justice lawyers] have not been involved in investigation except on periphery. In one of the edits I believe that there was a comment that the Ministry of Justice was involved in this investigation, but rather on the periphery to respond to counsel. Consequently, we have not been asked to advise on the legality of the suspensions without pay, the process of the investigation or as to whether the Ministry of Health has just cause for termination. I would therefore recommend that any references to the MoJ be removed.*

The same lawyer then spoke to the Communications Manager directly. She was hopeful that some of the advice was being accepted. In a further email to the PSA Director, lead investigator and others in LSB at 9:09 a.m., the lawyer wrote:

… just wanted to let you know that I talked with [the Communications Manager] on the phone; he was very receptive to my communication about the media release and understands the concerns about stating this is an ongoing RCMP investigation when this is not true and will scale this back (e.g. 'potential criminal investigation').

The press conference was scheduled for 2:30 p.m. on September 6. A Ministry of Justice GCPE employee wrote a Ministry of Health GCPE employee at 12:41 p.m.:

I just had a quick chat with the DAG who notes that no mention of rcmp should be in your comm materials today. Legal reasons. Pls confirm that is the case.

With the press conference less than two hours away, the Ministry of Health GCPE employee quickly forwarded the message to the Communications Manager noting "It is in the first line!"

The Ministry of Justice GCPE employee added eight minutes later, in an email to other GCPE employees and the Deputy Attorney General at 12:49 p.m.: "Please remove. Legal advice … should health have one of the lawyers review the comm[unications] materials?"

Mr. Whitmarsh told us that he issued a directive to remove the reference to the RCMP at some point earlier in the day.

At 12:53 the HSS lawyer sent an email to others in the Ministry of Justice, and then attempted to recall it two minutes later. The email read, "[the employment lawyer], this concern will now be addressed by DM Whitmarsh's directive that all reference to the RCMP be removed from the news release." When we asked her about why she sent and tried to recall the email, she said she did not remember: "…It does look as though maybe I thought – maybe I found out that, in fact, the opposite was true because – or that it was an earlier directive and that it since been countermanded…"

At 12:58 p.m., the GCPE Communications Director for the Ministry of Health wrote to the ministry's lawyer to ask for assistance: "we need consistent direction. We are issuing our media release in an hour and a half. We are briefing the minister now and this previously went through legal channels." The Communications Director also copied this email to Ms. Mentzelopoulos, who wrote, at 1:00 p.m., "I am at my desk and can assist if necessary. Please let me know what you need me to do."

The HSS lawyer contacted Deputy Attorney General Richard Fyfe to seek his advice, and then sent an email to GCPE staff, Mr. Whitmarsh and Ms. Mentzelopoulos at 1:41 p.m. recounting the conversation:

Richard Fyfe's concerns were not communicated accurately. He didn't say that the RCMP references were not communicated accurately. He didn't say that the RCMP references should be removed completely. He was concerned:

1. *that the references be accurate factually, and*
2. *that the ministry be aware of the potential reputational damage that might be caused by making the criminal aspect seem more central than it is.*

If, at the end of the day, there turns out to have been no criminal aspect to this, then there could be concerns about defamation. Last night we agreed that these concerns would be lessened by only referring to the Pharmaceutical Services Division and not the specific work area involved. The problem that has emerged since then is that the Vancouver Sun *has revealed the specific work area, so it would be much simpler for many people to identify the individuals involved.*

The HSS lawyer then suggested rewriting the opening lines of the news release in a 1:48 p.m. email to all the involved communications staff as well as to Ms. Mentzelopoulos, Mr. Whitmarsh, the Deputy Attorney General and LSB lawyers which stated:

Here are our suggested changes to the first two paragraphs of the news release:

Ministry of Health taking immediate steps to respond to investigation

VICTORIA-The Ministry of Health in conjunction with the Office of the Comptroller General and in accordance with the OCG's mandate, has notified the RCMP of allegations of inappropriate conduct, contracting and data-management practices involving ministry employees and drug researchers.

Health Minister Margaret MacDiarmid said today that the ministry has been investigating this matter. The investigation was supported by a lead investigator from the Office of the Chief Information Officer, Ministry of Citizens' Services and Open Government. It is examining contracting and research grant practices between ministry employees and researchers at the University of British Columbia and the University of Victoria.

At the same time, the lawyer suggested changes to the Minister's and Deputy Minister's speaking notes. The employment lawyer told us these proposed changes did not capture her preferred view. She thought the best approach would be to not have a news release, or at the very least, not mention the RCMP. If the RCMP were mentioned, it should not be front and centre in the news release.

Based on what he had heard from the investigation team, the Ministry of Health Communications Manager thought that the RCMP were "absolutely going to be investigating." He was concerned about these last minute changes. Given the timing – at this point, the news conference was less than an hour away – he turned the proposed news release over to Mr. Whitmarsh.

The Communications Director recalled that she called Ms. Mentzelopoulos, who told her that Mr. Whitmarsh had to sort it out with Mr. Fyfe.

As the debate continued, Mr. Whitmarsh was sufficiently concerned that he did contact Mr. Fyfe directly for advice at some time shortly before 2:08 p.m, when the Communications Director wrote "Graham and Richard have spoken we are good – and release and products will stay as original." In recalling their conversation, Mr. Whitmarsh said that Mr. Fyfe "was concerned about the reputational damage and my impression of his conversation was that he really was recommending it should not be in there."

Mr. Fyfe recounted the phone call in his interview with us. He said:

… it was a call to discourage him [Whitmarsh] from including information about the RCMP … based on the advice he'd been getting. The call began, he said, "The lawyers are telling me not to include reference to the RCMP or the language that – they want to limit the language to the RCMP," and I don't remember exactly how he said it but it was something to that effect.

He then said that the minister was about to go to the media and that this was in her speaking notes and she wanted to.

> *I explained the concerns with making that reference and I have to say … that I also talked to him about the ability to link the media announcement to specific individuals, which heightened the concern about the defamatory effect or the reputational effect of making that reference to the RCMP.*
>
> *Now, I – I surmise, because it's my usual approach, and I don't remember specifically saying this, but my usual approach is to distinguish between specific … acts, where government is prohibited from doing something and risk acts, where government is doing something that takes a risk. And I believe that what I would have done in this case is said to Graham, "I can't tell you you can't do it. But I can tell you what the risks of doing it are and they are significant."*

We asked Mr. Fyfe if he could remember why Mr. Whitmarsh felt it was important to include mention of the RCMP:

> *Very vaguely. I recall he wanted to include it because it was factual. I think he wanted to include – he gave me wording and told me that this was wording that was acceptable to the lawyers. And he also wanted to include it because it was with the Minister who was about to go out, go live.*

When we asked Mr. Fyfe whether Mr. Whitmarsh told him what decision he had made on the matter, Mr. Fyfe told us:

> *He was – yeah, I think he – he did. He, at the end of the call, he was satisfied that the language that he had in the press release was suitably vague, and that the reference to the divisional level. The language was suitably vague that it would not be – that the defamation risk would not be a significant risk.*

Consistent with Mr. Fyfe's advice about potential reputational damage, the HSS lawyer wrote to Mr. Whitmarsh, Ms. Mentzelopoulos, Mr. Fyfe and GCPE staff at 2:01 p.m. suggesting that the news release not mention the number of employees under investigation or terminated. The same email also enclosed LSB's suggested RCMP-related edits.

What happened next is the subject of conflicting evidence. Mr. Whitmarsh told us he had decided to remove the reference to the RCMP in the news release. According to Mr. Whitmarsh, it was GCPE who had the final call. He said:

> *I did speak to the comms folk and they were really insistent that it should be in, and I was sort of at the other side saying to Richard, you know, we can continue to sort of recommend this but at the end of the day you know, as Richard knows and I know, we don't get to decide what goes into the releases … in this government, the Premier's office gets to decide what goes in and then you know, I was concerned about the reputational damage so there was one point in this where I definitely said, like okay I'll deal with so I said let's just take it out, we can't do and then I got push back from the comms people saying no we want it in, and eventually I got to the point where I was – okay this – you know, we give them advice but they ultimately get to decide what goes into media releases.*

Mr. Whitmarsh could not, however, definitively say who made the decision. He acknowledged that the staff who were with him that day – the Communications Manager and the Communications Director – were both junior.

The Communications Director specifically remembered Mr. Whitmarsh telling her that the press release would not be changed. She said when Mr. Whitmarsh finished his call with Mr. Fyfe, he told them that it was all a misunderstanding. The Communications Manager also remembered Mr. Whitmarsh stepping out of the room to speak with the Deputy Attorney General. We asked him if it was the Communications Director or the Deputy Minister who made the decision to stick with the original wording in the news release, and he told us that it was the Deputy Minister.

Ms. Mentzelopoulos told us she would have supported the mention of the RCMP referral as long as it was true. In her view, government needed to demonstrate that it was serious about dealing with the privacy breaches, and describing the referral to the RCMP would show such leadership. However, in the interview with us, she said she had misjudged how news of the privacy breach would quickly be overrun by the news of the dismissals and the RCMP referral.

In the end, the final news release stated in the first line, "The Ministry of Health has asked the RCMP to investigate allegations of inappropriate conduct, contracting and data-management practices involving ministry employees and drug researchers."

Despite the intensive discussions about the content of the news release, Minister MacDiarmid was unaware until years later that there had been internal debate or legal advice about including mention of the RCMP in the news release. No one shared the concerns we have described above with the minister. She told us:

> *I just did not understand the consequences of even breathing the letters RCMP. I had no idea and no one told me.*

9.4.8 ANALYSIS: PUBLIC ANNOUNCEMENT

The plan for a press conference was detailed in a draft communications plan, which listed three strategic options for the Ministry of Health to consider, ranging from "reactive" to "proactive and aggressive."

When we spoke with the GCPE Communications Manager, he did not remember the planning documents. However, he agreed that the plan was for the Ministry of Health to be both "proactive and passive," a combination of the options listed in the draft plan. The draft communications plan is interesting, however, because it highlighted the potential risks to the Ministry of Health of providing details of the investigation publicly if a proactive approach was taken. The ministry wanted to "show leadership" and "emphasize the seriousness of the issue with the RCMP involvement." At the same time, however, there was concern that providing insufficient information "could lead to a number of misleading or factually incorrect stories that the ministry will not be able to respond to or correct because of the ongoing investigation." The ministry considered disclosing more details of its investigation on the basis that it would allow the ministry to "emphasize that the public and the ministry is the victim because of unscrupulous actions by a number of individuals colluding together," therefore showing leadership. The draft plan clearly articulated the problems with such an approach, however:

> *This approach will make it difficult for the ministry and the RCMP to complete its investigation without prejudice. It would not allow the individuals facing these allegations due process. It also opens the Ministry and minister up to vulnerabilities and potential credibility issues as the investigation is still not complete and may be missing some of the facts.*

The above paragraph was prescient in describing, before the announcement, the risks that could flow from such an approach.

It is clear that there was considerable confusion on September 6, 2012 over the content of the press release and, looking back, who had the final say as to the contents. Whatever the general practice was, the rushed events of that day meant that the issue was being actively considered until only a few minutes before the public release. It is important to note that GCPE supported the communications approach up to and including the Deputy Minister level. Ms. Mentzelopoulos conceded that she thought that it was important to have the RCMP in the press release, "because I assumed that it was true." The GCPE Communications Manager had already confirmed the RCMP involvement to the *Vancouver Sun*, which had reported the fact that morning.

The decision to make a public announcement about this investigation was driven by senior public servants wanting to demonstrate that the government was fulfilling its duty to inform people whose information may have been compromised, and to reassure the public that it was in control of the issue. However, this was a problem that government created for itself. The fact that employees were suspended without pay so early in the investigation led Mr. Whitmarsh to be concerned that there would be a leak about the investigation. This prompted him to ask GCPE to become more involved in the matter, going so far as to have GCPE representatives join the weekly meetings in August 2012, where he and investigators discussed the impending dismissal decisions. Ms. Mentzelopoulos explained how a leak could affect government:

> *… if people hear there's a data breach and it hasn't been – come officially from government, us saying, we've screwed up, we've had a data breach. If it's instead somebody from the ministry saying to the press, as an unnamed source, there's been a data breach, then you have actually a doubly worse story. Like, you have to, when you*

make a mistake of this magnitude in government, the best thing you can do is own it quickly.

Because Mr. Whitmarsh and others, including Ms. Mentzelopoulos, saw the primary issue as being a data breach, talking about the human resources decisions was one more way of government demonstrating it was serious about protecting privacy. As Ms. Mentzelopoulos told us, "I said we can't have people thinking that we're trying to hide something," so if there was a data breach, "we have to … let everybody know." This concern was given higher priority than those expressed by the lawyers about the personal privacy of employees, the impacts on the individuals or the risks to government of making the announcement in the way it did.

The reference to the RCMP referral was based on nothing more than a single meeting with the RCMP. At that meeting, described in Chapter 8, the RCMP had made it clear that they would make no decision about whether to investigate until they received the investigation team's final report. This was not a case where a criminal charge was imminent. By adopting an aggressive communications plan and mentioning the RCMP in the first line of the news release, government reinforced the impression that the RCMP referral was serious. This was not only factually misleading but showed little understanding of the significant impact the spectre of an impending criminal investigation would have, not just on the fired employees, but on others caught up in the investigation and public servants in general, who did not know or understand what anyone had done wrong.

We were told of the dynamic, and often time-pressured nature of public communications. That time-pressured environment was certainly a factor in the hurried and confused events of that day. It is worth noting that the time pressure in this case was of the government's own making. The story in the *Vancouver Sun* had already appeared so there was no compelling need to rush the announcement before the story broke. Postponing the announcement for a day, or even a few hours, would have allowed a more deliberate, considered decision to be made.

One witness told us clearly about how the public announcement had affected him:

… knowing that the RCMP has been contacted – that somebody has called the RCMP about you is actually terrifying. … I would wake up in the middle of the night. I would think about, oh, my god. … what was this horrible thing that I had done? Is the RCMP going to break into our house?

…

And so – so I think … as a member of the public when I've heard about the RCMP being involved in this, that or the other thing … I had never thought of it as being a big deal in the past. I think … being innocent is … sufficient protection from anything like that. But, in fact, it was extremely scary.

We received similar evidence throughout our investigation from other witnesses, even those who were not fired or otherwise directly implicated in the investigation.

FINDINGS

F 18 Deputy Minister Whitmarsh made the decision to terminate the employment of David Scott, Roderick MacIsaac, Ramsay Hamdi, Ron Mattson, Robert Hart and Dr. Rebecca Warburton. There was no political interference in the dismissal decisions.

F 19 The ministry did not have just cause to terminate any of the dismissed employees, though Deputy Minister Whitmarsh believed that the issue of just cause had been considered by government legal counsel. However, in the case of Mr. Mattson, Deputy Minister Whitmarsh should have followed up to address the conflict between his belief that legal advice had been provided and his advice from the Public Service Agency that valid grounds likely did not exist to dismiss Mr. Mattson.

F 20 The human resources process leading up to the dismissals was improper as reflecting numerous procedural flaws:

- **a.** There was a breakdown between the PSA's usual investigative and advisory processes.
- **b.** The PSA did not prepare an investigative report setting out its findings of fact in relation to each employee.
- **c.** The PSA did not provide organized and appropriate employee and labour relations advice to the Ministry of Health.
- **d.** The weekly meetings held in August 2012 and attended by numerous ministry and PSA executives supplanted the regular process for developing advice on human resources matters and adversely impacted the quality of advice given to the Deputy Minister as well as the Deputy Minister's opportunity to appropriately consider that advice.
- **e.** The decision-making process regarding the dismissals was rushed.

F 21 Regarding legal advice related to the dismissals:

- **a.** The PSA did not request legal opinions on whether there was just cause to dismiss each of the six employees and the Ministry of Justice did not provide such advice.
- **b.** The Ministry of Justice was asked to review some of the dismissal letters and did so.
- **c.** Mr. Whitmarsh did not request such advice but had an honest but mistaken belief as to the scope of the legal advice provided to the PSA.

F 22 In August 2012 many ministry executives were on vacation which resulted in gaps in knowledge, inconsistent advice and poor executive continuity in the time immediately preceding the dismissals.

F 23 The dismissal decisions gave no meaningful consideration to the question of condonation when considering the issues of data handling that formed the basis for some of the dismissals. The systemic problems internal to the ministry regarding governance and management of personal health information about which the ministry was well aware at the time (and which were found to exist in the later report of the Information and Privacy Commissioner) were not considered in the context of condonation.

F 24 The reasonable suggestion by a ministry executive member of a data amnesty for ministry employees was not pursued.

F 25 Concerns over possible public disclosure of the allegations and the ministry's investigation, including that a number of employees had been suspended, created pressure to make a public announcement. This, in turn, accelerated the decision making on the dismissals even though the employees had all already been suspended.

F 26 The decision-making process leading to finalizing the content of the September 6, 2012 news release was improper as it was unstructured, marked by confusion and, for no valid reason, rushed to meet a self-imposed deadline.

F 27 The inclusion of the reference to the RCMP in the press release was wrong in that:

- **a.** It was misleading to suggest that the matter was with the RCMP when the RCMP advised no decision would be made about whether to even commence an investigation until the ministry provided a final investigation report.
- **b.** It failed to consider the impact on individuals.
- **c.** It effectively committed government to a public position on the conduct of the individuals, thus making reappraisal of such conduct more difficult.
- **d.** It increased government's legal risk related to the dismissals by adding damage to the reputation of the dismissed employees to the claims it had to defend.

10.0 / THE MINISTRY OF HEALTH'S RESPONSE TO THREE SUSPECTED PRIVACY BREACHES

10.1 INTRODUCTION

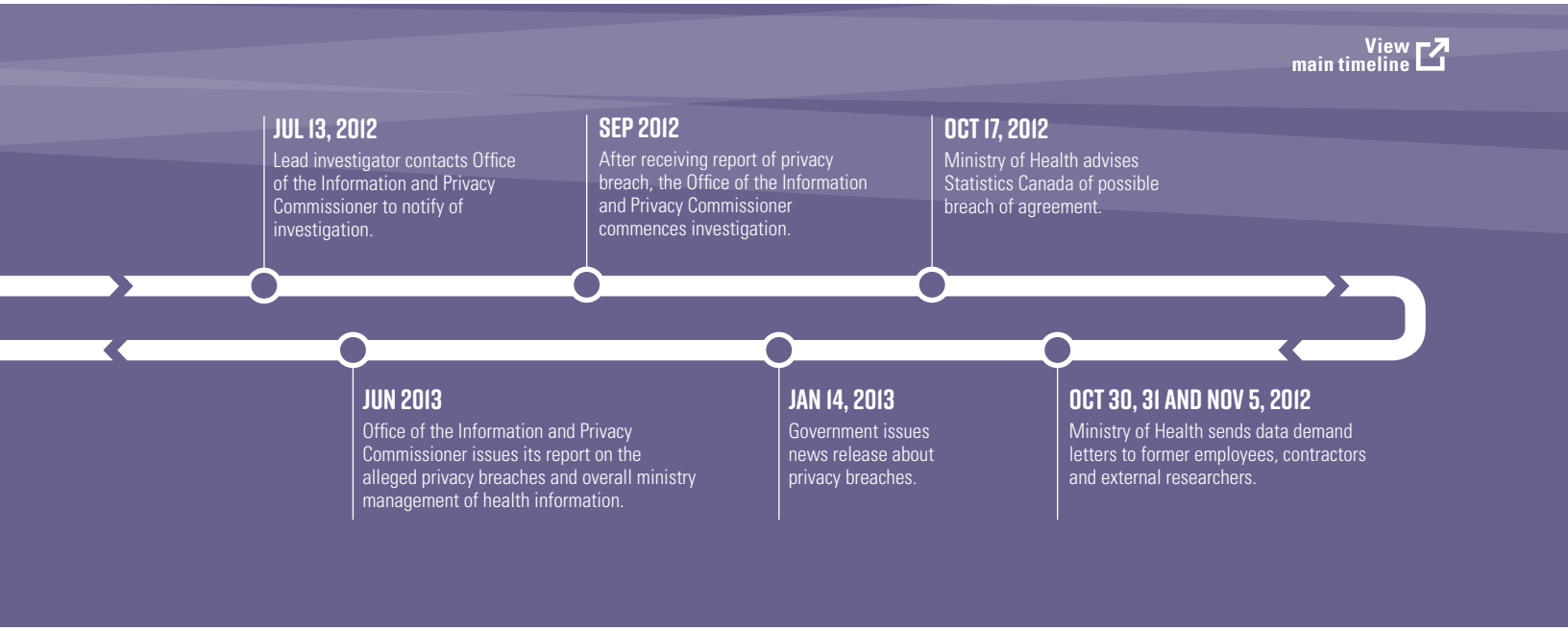
In the more than four years since the terminations, the issue of health information privacy and its unauthorized disclosure has been a key part of government's public position on this matter.

Government has indicated that in 2012 the Ministry of Health was dealing with serious privacy concerns.[1] Thus, in the government's view, while the investigation may have been "heavy-handed" in some respects, it was still necessary to protect the personal information of British Columbians.

1 For example, in the October 3, 2014, news release where the Minister of Health confirmed that government had apologized to Mr. Maclsaac's family, the government stated: "there was a series of breaches of data and inappropriate use of private information." Ministry of Health, "Government apologises to family; reviews HR policy," news release, 3 October 2014. In July, 2015, Minister Lake stated in the legislature: "the Privacy Commissioner confirmed that there were three incidents where data was used inappropriately. In fact, the report did go on to say that there were no mechanisms to ensure that researchers were complying with the privacy requirements as stipulated in contracts and written agreements and to ensure that ministry employees were taking appropriate privacy training and following privacy policies. As a result, ministry employees were able to download large amounts of personal health data onto unencrypted flash drives and share it with unauthorized persons." Hon. Terry Lake, Legislative Assembly of British Columbia, Hansard, 14 July 2015, 8934 <https://www.leg.bc.ca/documents-data/debate-transcripts/40th-parliament/4th-session/20150714am-Hansard-v27n10#8934>.

On a number of occasions and in order to support its position, the government repeatedly cited a June 26, 2013 report released by the Information and Privacy Commissioner.[2] Indeed, as described in Chapter 9 of this report, the three incidents reported to the Office of the Information and Privacy Commissioner were also a significant factor in three of the employee dismissal decisions.

As such, it was essential for us to understand the nature of the suspected privacy breaches reported to the Office of the Information and Privacy Commissioner and the relation between those breaches and the Commissioner's broader findings about the state of personal health information management in the Ministry of Health at that time.



10.2 PRIVACY BREACHES AND CONDONED WORKPLACE CONDUCT

In this chapter we focus on the three data incidents, the determinations they were privacy breaches and the circumstances involved. Our determinations on these issues are related to our analysis of three of the employment dismissals that we discuss in Chapter 9. However, it is important to note, as we do in Chapter 9, that the question of whether an incident that is determined to be a privacy breach constitutes grounds for employment discipline, including dismissal, raises other issues such as whether the employee's behaviour has been implicitly or expressly condoned by the employer. Thus, depending on the seriousness, the same event can be a privacy breach but can also be conduct that does not warrant dismissal because it may be workplace conduct that is explicitly or implicitly condoned. That question is addressed in Chapter 9.

10.3 REPORTING TO THE OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

During the course of its investigation in 2012, the ministry's investigation team discovered what it suspected

2 Office of the Information and Privacy Commissioner, *Investigation Report F13-02: Ministry of Health*, 2013 BCIPC No. 14, 26 June 2013. <https://www.oipc.bc.ca/investigation-reports/1546>.

were three discrete privacy breaches.[3] In the words of the Information and Privacy Commissioner:

> *A privacy breach occurs when there is unauthorized access to or collection, use, disclosure or disposal of personal information. Such activity is "unauthorized" if it occurs in contravention of the* Personal Information Protection Act *or Part 3 of the* Freedom of Information and Protection of Privacy Act.[4]

The Information and Privacy Commissioner's report notes that the ministry reported the first of three suspected breaches to the Office of the Information and Privacy Commissioner on September 10, 2012. The other two suspected breaches were added subsequently.

Under government policy as it stated in 2012, not all suspected privacy breaches were required to be reported to the Information and Privacy Commissioner. The privacy lawyer who assisted the lead investigator and Mr. Whitmarsh told us that the ministry initially characterized the three suspected breaches as serious incidents warranting a high level of concern. In the months after initially reporting the incidents however, the Ministry of Health came to characterize the risks associated with the breaches as low. We discuss this evaluation later in this chapter.

On January 7, 2013, in the context of providing comments on a proposed press release, the Health and Social Services (HSS) Supervising Solicitor wrote to Mr. Whitmarsh and the Communications Director confirming that the LSB had not provided an opinion as to whether or not there had been breaches of *FOIPPA*:

> *One thing we want to point out is that we have never been approached for an opinion as to whether* FOIPPA *was breached in any of these circumstances – that's the main reason we are more comfortable with you referring to rules and protocols rather than to laws as such. It occurs to us that some reporter might ask the minister this question directly. We won't have time to prepare an actual opinion on that before the press conference, but we can say that, at this point, it looks to us as though there likely was a breach of section 35 of* FOIPPA *in each of these instances.*

One of the proposed statements in the "Question and Answer" document that accompanied the proposed release referred to people circumventing British Columbia's privacy laws. The privacy lawyer made the following comment in the text of the release:

> *I have suggested previously that we focus on contraventions of policies, not laws. There may have been breaches of the law, but I have not been asked for an opinion on that issue. I take it that the OIPC assumes that there has been a breach of* FOIPPA*, but I have not provided advice on that issue.*

Evidently, the ministry had self-reported three disclosures as breaches of *FOIPPA* based primarily on the lead investigator's analysis.

Once the disclosures had been reported, the ministry continued to correspond with the Office of the Information and Privacy Commissioner throughout August and into September 2012. In a letter dated September 11, 2012, the Information and Privacy Commissioner notified Mr. Whitmarsh that the office had decided to conduct an investigation into the apparently unauthorized disclosures by the "Ministry of Health, Pharmaceuticals Division."[5]

Between September and December 2012, with the assistance of ministry employees with the technical expertise to understand and explain the data, the ministry continued to respond to requests from the Office of the Information and Privacy Commissioner.

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3 Dates of the three reported breaches according to order of appearance in the Office of the Information and Privacy Commissioner's *Investigation Report F13-02: Ministry of Health*: June 6, 2012 (Incident #1), October 4, 2010 (Incident #2), June 28, 2012 (Incident #3). The breaches were reported to the Office of the Information and Privacy Commissioner in September 2012.

4 Office of the Information and Privacy Commissioner, *Privacy Breaches: Tools and Resources*, 2 April 2012, 3 <https://www.oipc.bc.ca/guidance-documents/1428>.

5 In fact, the Pharmaceutical Services Division (PSD) was not involved in the suspected privacy breaches except that one of the recipients of data in one of the cases was a PSD employee. Our conclusion in that case is that the PSD employee who received the information was authorized to receive the information. The employee who provided the data was an employee of another division other than PSD and the two contractors that received the data in those two cases had contracts with other divisions.

10.4 THE INFORMATION AND PRIVACY COMMISSIONER'S REPORT F13-02

In June 2013, the Information and Privacy Commissioner issued her report into personal health information management at the Ministry of Health, including the three data incidents.[6]

A careful reading of the Information and Privacy Commissioner's report is important to properly understand the findings she made and the causal factors involved.

In her message at the outset of the report the Commissioner set out the importance of personal health information to the health system and health research:

> *This data is invaluable to health researchers seeking new solutions for patients and improved health outcomes for citizens. BC is fortunate to have a strong and vibrant community of researchers who are developing and testing new health treatments, and pioneering innovative drug therapies that are saving lives. These innovations have their roots in timely and secure access to health data.*
>
> *It is therefore in the public interest for there to be active and effective research within the Ministry, health authorities and post-secondary institutions. However, the public, whose data it is, expects this research to be conducted responsibly and that their personal health data is managed securely in the research process.*

The Commissioner then addressed the three breaches:

> *This investigation examined three breaches of personal health data for research purposes* that happened because the Ministry failed to translate privacy and security policies into meaningful business practices. The primary deficiency at the Ministry was a lack of effective governance, management and controls over access to personal health information *[emphasis added].*
>
> *At the time the breaches occurred, there was a lack of clear responsibility for privacy within the Ministry. This was due, in part I believe, to a lack of clarity of roles and responsibilities following the centralization of some information access and privacy functions. Ministry privacy governance was further weakened by a complete lack of audit and review of employee and contractor functions relating to privacy. There were no mechanisms to ensure that researchers were complying with the privacy requirements, as stipulated in contracts and written agreements, and to ensure that Ministry employees were taking appropriate privacy training and following privacy policies.*[7]

The Commissioner's message then pointed the way forward for health research and noted the ministry had begun to make systemic improvements:

> *Many of the issues relating to research would be resolved, if all researchers, whether based in the Ministry, health authorities or post-secondary institutions, obtained access to personal health data only through a secure research environment, such as PopData BC. It is important that the Ministry review and adjudicate requests in a timely manner and, should they be approved, provide access through the secure environment efficiently and without delay.*
>
> *I note in the report that during the course of this investigation, the Ministry has implemented a number of significant improvements with respect to governance, policy development and physical security measures. Most importantly, it is moving towards the establishment of a highly secure environment for health research that uses personal health information.*
>
> *The recommendations I have made in this report are essential to both facilitate access to information for health research in a more timely and secure manner and to address the privacy deficiencies identified by this investigation. Privacy*

6 Office of the Information and Privacy Commissioner, *Investigation Report F13-02: Ministry of Health*, 2013 BCIPC No. 14, 26 June, 2013.

7 Office of the Information and Privacy Commissioner, *Investigation Report F13-02: Ministry of Health*, 2013 BCIPC No. 14, 26 June, 2013, 3.

and research are allies, not adversaries, in the pursuit of better health outcomes.[8]

10.4.1 THE COMMISSIONER'S CRITICISMS OF THE MINISTRY'S MANAGEMENT OF PERSONAL HEALTH INFORMATION

In the "Issues" section of the report the Commissioner elaborated on the systemic problems with information access privileges that existed at the Ministry of Health at that time:

> *The investigation found that current access privilege systems at the Ministry of Health do not consistently comply with the principles or controls set out above. The Ministry does not consistently assign permissions to roles, which is the best practice. Access permissions are assigned to business groups within the Ministry and the level of permissions assigned to an individual is based on the type of group an individual belongs to. Individuals are then assigned to one of these groups. Permissions are not necessarily removed when an employee's roles change.*
>
> *The Health Information Privacy, Security and Legislation Branch in the Ministry has recognized this problem and supports the implementation of a role-based access model for all employees and a reliable process for adjusting access levels for employees when their job functions change.*
>
> *The Ministry has acknowledged that some employees have access to levels of information beyond what they require for their jobs. Even in cases of Ministry employees who had legitimate reasons for access to a broad range of Ministry information, their ability to access, use and disclose the information and to copy it to portable storage devices, unmonitored by an access log, was contrary to the least privilege principle.*
>
> *In simple terms, such employees had excessive access to personal information with inadequate tools in place to manage the risk such wide access poses.*[9]

The Commissioner was critical of the absence by the ministry of any monitoring of access, use and disclosure:

> *Further heightening the risks of unauthorized access, use and disclosure of personal information in the Ministry was a complete lack of monitoring, enforcement and evaluation. There was no audit at any level of employee or researcher compliance with privacy policies. Nor did the Ministry conduct any reviews of privacy provisions in agreements that provide for information sharing.*
>
> *Government policy gives the Office of the Chief Information Officer the authority to develop privacy policies and standards for ministries and evaluate their compliance. The Health Information Privacy, Security and Legislation branch and the Information Management and Knowledge Services branch in the Ministry have responsibility for monitoring compliance by the Ministry with those policies and standards. Representatives from all three told us that they lacked the resources to undertake effective evaluation or monitoring of compliance. This response, given the large volume of personal information in the Ministry is unacceptable; it indicates a lack of sufficient executive commitment, on the part of the Ministry and government corporately, to privacy and security compliance.*
>
> *The current information management infrastructure at the Ministry presents particular challenges to proper monitoring and compliance with privacy policies. Legacy databases lack easy methods to proactively detect and investigate unauthorized access and removal of information. It appears that most of the databases lack the ability to trace employee access to information.*[10]

The Information and Privacy Commissioner's report recommendations were aimed at improving information security

8 Office of the Information and Privacy Commissioner, *Investigation Report F13-02: Ministry of Health*, 2013 BCIPC No. 14, 26 June, 2013 4.

9 Office of the Information and Privacy Commissioner, *Investigation Report F13-02: Ministry of Health*, 2013 BCIPC No. 14, 26 June, 2013 14.

10 Office of the Information and Privacy Commissioner, *Investigation Report F13-02: Ministry of Health*, 2013 BCIPC No. 14, 26 June, 2013 15-16.

policies and practices in the ministry. It was clear from our own investigation that such issues have existed for many years in the ministry and note the Commissioner's recommendations for widespread change in how health related information is managed by the Ministry of Health.

10.4.2 THE THREE DISCLOSURES OF PERSONAL INFORMATION IN THE COMMISSIONER'S REPORT

As for the three specific incidents, the Information and Privacy Commissioner's report described each of the incidents as breaches on the basis that the person providing the information was not authorized to disclose it. The Ministry of Health reported to the Commissioner that in all three incidents, the employee was not authorized to provide personally identifiable data to other employees or contractors. The employee who provided this data in the three incidents was Ramsay Hamdi.

10.4.2.1 INCIDENT #1

The Information and Privacy Commissioner's report described the first incident as follows:

> *The first case involved the disclosure of personal health information by an employee to a contracted service provider in June 2012.*
>
> *On May 31, 2012, the contractor asked a Ministry employee for a table that had two years of health information for each of the approximately 4 million people in the province, which combined represented 8 million rows of information. The information was needed for testing purposes. Each row represented an individual, and was to have up to 19 fields of health information. The fields included PHNs [Personal Health Numbers]; number of mental health service encounters; whether the individual had diabetes; number and length of hospital stays; and all services billed for the person.*
>
> *The contractor requested that the PHNs be masked or removed, as the testing process did not need such sensitive personal information. On June 6, 2012, the employee provided the contractor with the requested information on a portable storage device. On June 8, 2012, the contractor noticed that the information file contained unencrypted PHNs. The contractor immediately deleted the PHNs from his work computer and returned the flash drive to the Ministry employee.*

Mark Isaacs, a long time and trusted ministry contractor, was the recipient of data in this incident. Mr. Isaacs' contract with the ministry was to develop and maintain an information tool called Quantum Analyzer that was used by ministry staff.[11] The contract authorized Mr. Isaacs to request person-level data[12] from the ministry. While the contract did not specifically prohibit Mr. Isaacs from receiving personally identifiable data, he did not need data in this form to do the work under his contract. Once he received ministry data, Mr. Isaacs would analyze it and input it into Quantum Analyzer. The ministry's contract manager and other executives responsible for his contract supported his access to person-level data as such access was the purpose of the contract. The ministry had also authorized Mr. Isaacs to seek new data sources to develop the content and functionality of Quantum Analyzer, which is what Mr. Isaacs was doing when this incident occurred. In this role, Mr. Isaacs would contact various individuals in the ministry who he believed would have data useful to improving either the content or function of Quantum Analyzer, and would receive data from them. Mr. Isaacs was bound by confidentiality provisions in his contract that required him to treat all information he received from the ministry as confidential and not disclose it without authorization.

On May 31, 2012, Mr. Isaacs contacted Mr. Hamdi to request a set of sample Medical Services Plan (MSP) data that he could use to test a new function in Quantum Analyzer. Mr. Isaacs did not intend to use the data in Quantum Analyzer itself. As noted in the Office of the Information and Privacy Commissioner's report, Mr. Isaacs specifically requested that the data set include encrypted Personal Health Numbers (PHNs) or another unique identifier, rather

11 A more detailed explanation of Mr. Isaacs' contract and the Quantum Analyzer tool is contained in Chapter 12.

12 "Person-level data" refers to data that pertains to an individual, rather than a population or group of individuals. It is represented as one row of data per person. However, it is not necessarily personally identifiable data, meaning the data has been de-identified to the point of anonymity and cannot be readily re-identified.

than actual PHNs.[13] In response, Mr. Hamdi prepared the set of MSP data. There was some back-and-forth over the following two days regarding the data, and Mr. Isaacs returned the flash drive to Mr. Hamdi to correct data quality issues identified by Mr. Isaacs. Mr. Hamdi returned the flash drive with the repaired data set.

At this point, Mr. Isaacs noticed that the data set included what appeared to be real PHNs. He immediately notified Mr. Hamdi by email and returned the flash drive and admonished Mr. Hamdi for including the PHNs[14]. It was as a result of this email exchange that the incident came to the attention of the ministry's investigation team when they were reviewing Mr. Hamdi's emails.

The investigators did not discover this incident until after their three interviews with Mr. Hamdi in August 2012. The investigators had previously asked whether he had any ministry data in his possession, to which he answered that he did not. As far as we are aware, the ministry's investigation team never returned to Mr. Hamdi to ask about the whereabouts of this specific flash drive, possibly because by the time this incident was discovered, Mr. Hamdi had already been fired.

Three years later, in September 2015, Mr. Isaacs contacted Mr. Hamdi about the flash drive. In his response, Mr. Hamdi explained to Mr. Isaacs that the investigators had never asked him who had possession of the flash drive. Mr. Hamdi said that he did recall Mr. Isaacs returning the flash drive to him and confirmed that he still had it in his possession. Mr. Isaacs told us that in a later discussion, Mr. Hamdi explained that he had deleted the data on the flash drive after Mr. Isaacs returned it to him in 2012. This is consistent with Mr. Hamdi's statement to the interviewers in August 2012 that he did not have any ministry data at home.

We heard from several witnesses that the ministry practice at the time was to treat contractors the same as employees with respect to data access. This is consistent with the Ministry of Health Data Access Policy that was then in place. In this particular case, given the terms of Mr. Isaacs' contract, the fact that the contract was for the development of an information tool for the ministry's use, past information management practices that existed in the ministry at the time, and the nature of the request, in our view it was not outside normal practice for an employee like Mr. Hamdi to provide a sample data set to Mr. Isaacs. However, it should not have included the actual PHNs rather than encrypted PHNs or another unique identifier.

Mr. Hamdi's inadvertent provision of a flash drive containing PHNs to Mr. Isaacs did amount to a privacy breach as Mr. Isaacs did not have explicit authorization to receive personally identifiable data, nor did he require personally identifiable data to fulfill the deliverables of his contract.

However, Mr. Isaacs did nothing wrong, and as the Information and Privacy Commissioner noted, the breach was quickly contained. Mr. Isaacs requested data that he was entitled to under his contract. Mr. Isaacs was under a contractual obligation of confidentiality. When he realized that he was provided with more than he had asked for, he alerted Mr. Hamdi, returned the flash drive, and deleted the personally identifiable information from his computer. It appears that Mr. Hamdi then deleted the data from the flash drive. There was no indication at any time that Mr. Isaacs or Mr. Hamdi intended to use the data for anything other than completing deliverables under Mr. Isaacs' contract with the ministry. Rather the incident appears to have been an inadvertent error by Mr. Hamdi.

10.4.2.2 INCIDENT #2

The Office of the Information and Privacy Commissioner's report described the second incident as follows:

> *The second case involved the disclosure of personal health information to a contracted researcher. On October 4, 2010, the researcher contracted with the Ministry to conduct data analysis. The contracted researcher subsequently submitted a request to the Ministry, under established Ministry procedures, for access to the information*

13 Every B.C. resident enrolled under the Medical Services Plan is given a unique lifetime identifier for health care called a Personal Health Number (PHN). This PHN remains the same, regardless of any changes to personal status. See "Medical Services Plan (MSP) – B.C. Residents – Personal Health Identification" <http://www2.gov.bc.ca/gov/content/health/health-drug-coverage/msp/bc-residents/personal-health-identification>.

14 There was some difference in the evidence we received as to whether Mr. Isaacs or his spouse, a ministry employee, returned the stick to Mr. Hamdi on Mr. Isaacs' behalf.

necessary to conduct the analysis. The employee gave the contracted researcher a portable storage device with health information of over 20,000 individuals including PHNs, ages and information gathered from chronic disease registries including diagnoses and pharmaceutical histories.

However, according to the Ministry, the employee, who had access to the data for his Ministry work, was not authorized to disclose data to other employees, contracted researchers or academic researchers. Ministry procedures for access to health data for research involve researchers receiving data though an approved and secure process. The device was also unencrypted, contrary to the repeated advice on this matter from this Office, provided in a series of recent Investigation Reports.

In this incident, Mr. Hamdi was the employee and Dr. William Warburton was the contractor described. It is the same incident discussed in Chapter 9 with reference to Mr. Hamdi's dismissal.

The investigation team discovered an email dated October 4, 2010 indicating that Mr. Hamdi was providing Dr. W. Warburton a flash drive containing 21,000 health records related to quetiapine, an atypical antipsychotic drug. The investigation team believed that Dr. W. Warburton did not have authorization to access those records and that Mr. Hamdi was not authorized to provide them.

The email appeared suspicious to the investigation team as in it, Mr. Hamdi said to Dr. W. Warburton, "Bob Hart is assuming that you are not getting it until the agreement is done, so tread carefully." Given the language of the email it quite correctly drew the attention of the investigation team.

As we described in Chapter 9, this data transfer appears to have been for the purpose of testing the statistical tool that Mr. Hamdi was expected to develop as part of his employment. We interviewed Dr. W. Warburton about this exchange. Based on all of the evidence that we reviewed, the most likely scenario is that Dr. W. Warburton ran the data through the statistical program on his personal laptop while at the ministry, for the purpose of assisting Mr. Hamdi to refine the statistical tool he was developing. There was evidence that Dr. W. Warburton met with Mr. Hamdi at the ministry in October 2010 to work on the statistical tool together. Dr. W. Warburton told us that he recalled running this data through his computer to test Mr. Hamdi's code.

The ministry was unable to locate the flash drive used in the second incident as it had occurred two years prior. The evidence suggests that it is highly likely that the flash drive had been written over and reused around that time. The investigation team was unable to determine whether the flash drive or the data ever left the ministry building. We found no evidence that it did.

This incident constituted a privacy breach given that Dr. W. Warburton was not authorized at that time to receive the information and it should not have been provided by Mr. Hamdi even for the purpose of refining a statistical tool that Mr. Hamdi was developing.

10.4.2.3 INCIDENT #3

The Office of the Information and Privacy Commissioner's report described the third breach as follows:

The third case involved the disclosure in June 2012 of Canadian Community Health Survey ("CCHS") information. In the autumn of 2011, another employee who was also an academic researcher, requested personal health information. The personal information included Medical Services Plan billing records, hospital discharge summaries, PharmaCare prescriptions and information gathered by Statistics Canada under the CCHS.

The CCHS survey collects a large volume of sensitive personal health information on the basis of consent and strict conditions for data use, collection and disclosure. There are approximately 50 categories of questions, including questions about alcohol use, drug use, mental health, self-esteem and sexual health. The survey results also include individuals' PHN, age, birth date, gender and full postal code.

Statistics Canada shares CCHS survey results with the Ministry under a signed agreement that the Ministry not disclose any of the information in personally identifiable form to parties outside of the Ministry. Statistics Canada had promised

individuals who completed the survey that the Ministry would not disclose any of their information in personally identifiable form.

On June 28, 2012, the employee gave the other employee a portable storage device with all of the requested personal information. According to the Ministry, as in the previous case, the employee was not authorized to disclose data to this individual.

Roderick MacIsaac was the employee and academic researcher described in this incident. It is the same incident described in Chapter 9 with reference to the employment dismissals of Mr. Hamdi, David Scott and Mr. MacIsaac.

The ministry had authorized Mr. MacIsaac's access to certain ministry databases in personally identifiable form for his ministry work. He was also authorized to link CCHS (Canadian Community Health Survey) data to the ministry's data for his work. This work was consistent with the ministry's agreement with Statistics Canada for use of CCHS data. Mr. MacIsaac had been given direct access to the ministry's databases for the health data; however, it appears that he had not yet been given direct access to the CCHS data. Because he did not have the skill to link the datasets himself, his supervisor asked Mr. Hamdi for assistance. Mr. Hamdi, with the assistance of Mr. Scott[15], created a dataset with linked ministry and CCHS data. Mr. Hamdi then put the dataset onto a flash drive and uploaded the linked dataset to Mr. MacIsaac's work computer. Though Mr. Hamdi, as an analyst, was not the formal pathway for providing data to a ministry employee, as discussed in Chapter 9, it was not an uncommon practice at the time for employees to receive data in this way. Further, as we detailed in Chapter 9, it was generally accepted that ministry employees provide assistance to co-op students during their work terms with the ministry.

Aside from his work for the ministry, Mr. MacIsaac had hoped to use a similarly linked data set for his PhD, but in an anonymized form. He had not applied for or been granted authorization to use either ministry or CCHS data for his PhD. The ministry's investigation team believed that Mr. MacIsaac had received a linked dataset for his PhD. This belief was initially understandable given that some emails that the team reviewed mistakenly referred to the data or other information as being for Mr. MacIsaac's project or PhD. In turn, this caused some confusion among staff about what the data was for and what Mr. MacIsaac was working on. These emails came up in Mr. MacIsaac's interview, and he attempted to clarify for the investigation team that the reference to data for his PhD was a mistake made by others.

Moreover, all of the evidence we received confirmed that Mr. MacIsaac had in fact not begun doing any research as part of his thesis and that, when he did begin his research, he intended to use an anonymized data set. In 2012, his thesis proposal was in draft form and had not yet been approved. The proposal document itself did not use or analyze any administrative health data.

An investigation team member whom we interviewed described his understanding of Mr. MacIsaac's use of CCHS data as follows:

So I'm not sure what the awareness of the rest of the team was or what their opinions on the matter were and at the time – so now, after having gone through the investigation and knowing what I know now, it's clear that to me that the information was not used for his thesis. It never had gone beyond the thesis proposal. There was work going on around the project that Rebecca [Warburton] and Roderick had hoped would support his thesis work.

I would say that the access that he had was access that he should have had for the work that he was doing [for the ministry].

It is noteworthy that in the Commissioner's summary of this information incident she identified Mr. MacIsaac as an "employee" when describing his receipt of the data, even though she had noted earlier in her summary that he was an employee who was also an academic researcher. Furthermore, while the Commissioner noted that the employee who provided the information (Mr. Hamdi) was not authorized to provide it, she made no findings that the person receiving it was not permitted to receive it. We spoke to the Office of the Information and Privacy Commissioner and confirmed that in the case of this data incident the

15 Dr. W. Warburton also assisted with converting the statistical format of the data. This is described in Chapter 9.

Commissioner's finding of a breach was limited to a determination that the person providing the information was not authorized to provide it. Such a result can occur where, as here, the employee providing the information does so not in compliance with the applicable privacy policies of the ministry but the person receiving the information is a ministry employee who meets the "need to know" requirement in s. 33(1)(e)(i) of *FOIPPA*. Thus this privacy breach differs from the other two in that, in the other two cases a breach occurred in circumstances where the recipient ought not to have received the information whereas in this case, the recipient was entitled to receive the information but was provided the information improperly, not in compliance with ministry procedures.

10.5 STEPS IN RESPONDING TO PRIVACY BREACHES

The Office of the Information and Privacy Commissioner describes four key steps in responding to a known or suspected privacy breach.[16] These include containing the breach, evaluating the risks associated with the breach, notifying those impacted by it and then taking steps to prevent similar incidents in the future. This section considers the ministry's actions in response to discovering the three breaches in the context of these four steps.

10.5.1 CONTAIN THE SUSPECTED BREACH – SUSPENDING DATA ACCESS

Prior to the discovery of the incidents in August and September of 2012, the ministry had already suspended data access for a number of individuals named in the complaint to the Auditor General or otherwise suspected of wrongdoing as a result of allegations made in the complaint. When the privacy breach involving Mr. Isaacs was discovered his data access was suspended.

The B.C. Information and Privacy Commissioner stated in her June 26, 2013 report that "Overall the Ministry's immediate breach containment efforts were reasonable…I conclude that the Ministry made reasonable efforts to contain the breaches in the circumstances." The Commissioner noted that "The Ministry, unsure of the scope of the breach, attempted to contain potential unauthorized disclosures by suspending access to Ministry information by Ministry staff and external researchers." Several senior executives from the Ministry of Health explained to us that their decision to suspend data access flowed from their obligations to contain suspected privacy breaches under the Protocol.

We spoke with the Office of the Information and Privacy Commissioner regarding the Commissioner's investigation and report. They confirmed that the Commissioner's finding on the reasonableness of the ministry's "immediate" containment efforts, including the data suspensions, only related to steps the ministry took following the identification of the three suspected privacy breaches, and only insofar as they related to those three breaches.

10.5.1.1 LOCATING THE FLASH DRIVES

One of the steps taken to contain the three identified breaches was to try to locate the flash drives that were used to transfer data.

With respect to the first incident, the investigators did not ask Mr. Hamdi whether the flash drive had been returned to him and what he had done with it. Presumably they did not take this step because by the time they discovered this incident he had already been fired. Based on Mr. Isaacs' evidence, had they done so they would have learned that it was Mr. Hamdi's personal flash drive, that he was in possession of it and that the data shared with Mr. Isaacs had been deleted from it.

As described above, the inability to locate the flash drive in the second incident was because the event had occurred two years earlier. As such, the flash drive was likely reused in the interim.

Respecting the third incident, the investigators had evidence from both individuals involved that Mr. Hamdi did not leave the flash drive with Mr. MacIsaac after uploading the data to Mr. MacIsaac's computer. Mr. MacIsaac told the investigators that the flash drive "was always in the possession of Ramsay Hamdi". Mr. Hamdi said he uploaded the data from the flash drive to Mr. MacIsaac's computer and then he believed he returned it to an administrative assistant in the building. Unfortunately,

16 Office of the Information and Privacy Commissioner, *Privacy Breaches: Tools and Resources*, 2 April 2012, 3-10 <https://www.oipc.bc.ca/guidance-documents/1428>.

the investigators were not able to find the flash drive. The investigators told us that they searched employees' offices and spoke with several administrative assistants in their efforts to locate it. Unfortunately, the investigators did not contemporaneously or otherwise document who they spoke with or the other steps they took to try to locate the flash drive. Also, the evidence we received was that at that time, there was no secure system in place for the flash drives in the branch where Mr. MacIsaac worked. For example, unencrypted flash drives were borrowed from administrative assistants without sign out sheets and usually wiped clean when returned. This would have made it difficult for the investigators to locate a specific flash drive once returned to the administrative assistants unless the administrative assistant remembered the specific flash drive exchange.

10.5.1.2 DATA DEMAND LETTERS

The ministry sent "data demand letters" in late October and early November 2012 to each of the dismissed employees and a number of contractors and researchers to demonstrate that they were taking the protection of personal information seriously. However, most of the employees and contractors who received data demand letters had no involvement in or relationship to the three reported breaches. Thus these broader efforts were not encompassed in the Commissioner's determination that the "immediate response" to the unauthorized disclosure was reasonable.

Work on these letters began in September 2012 when the lead investigator spoke with the LSB privacy lawyer about the ministry's concerns that individuals may have data in their possession that they were not authorized to have. The ministry decided to send letters to those individuals regarding unauthorized access or use of data. Initially, the ministry intended to ask individuals to swear statutory declarations that they did not have any ministry data. The privacy lawyer drafted the declarations and sent them to the lead investigator on September 13, 2012.

On September 26, 2012, there was a meeting between the lead investigator, another investigator, two HSS lawyers, and the privacy lawyer, to discuss the approach to demanding the return of ministry data. Around that time, it was determined that the ministry would demand the return of its data under section 73.1 of *FOIPPA*. Under section 73.1, where the ministry has reasonable grounds to believe that personal information in its custody or control is in the possession of someone not authorized to have it, the ministry has the discretion to issue a written notice demanding the return of the information or the destruction of electronic records.

On October 10, 2012 the privacy lawyer sent draft data demand letters to the lead investigator for her review, and suggested that the employment lawyer review the letters where they related to someone who was in litigation or had threatened litigation with the ministry. At this stage, there were draft section 73.1 demands prepared for four of the terminated employees and one contractor. There were also draft demands, not made pursuant to section 73.1, for four other contractors or external researchers. The privacy lawyer advised the lead investigator that the ministry should wait for responses to these letters before asking the recipients of the letters to swear a declaration that they did not have Ministry of Health data in their possession.

On October 10, 2012, the lead investigator sent the draft demand letter for one employee to the employment lawyer. The employment lawyer advised the lead investigator that the letter, and other similar letters to the other individuals, should not be sent without further discussion, noting that in the context of litigation, it was unusual to send a letter asking the opposing side to destroy information that may be evidence in the case. The employment lawyer proposed a conference call with the lead investigator and others to discuss strategies for the return of data.

On October 12, 2012, a conference call was held with Mr. Whitmarsh, the lead investigator, the lead investigator for the Office of the Comptroller General, the PSA investigator and five LSB lawyers (the privacy lawyer, the employment lawyer, the HSS lawyer, a civil litigation lawyer and the Supervising Solicitor for the Finance, Commercial and Transportation Group of LSB). The key points discussed on that call were the ministry's obligation to protect its property and contain any personal information that was released without authorization, and the competing objectives of ensuring no data was destroyed that could hamper the RCMP investigation, the Comptroller General's investigation and the ministry's ability to defend against any wrongful dismissal claims. The plan developed on that

call was to determine whether the RCMP would shortly seize the data from individuals who were believed to have unauthorized data. If not, the government would consider whether the Comptroller General could take steps to obtain the data under section 8.1 of the *Financial Administration Act*. If the RCMP and the Comptroller General were not going to assist in obtaining the data, then the ministry would send letters seeking a return of the information while putting the recipients on notice not to destroy evidence that may be evidence in any future litigation.

On October 15, 2012, the lead investigator met with the RCMP. Following that meeting, she told a LSB lawyer that the RCMP had indicated that their usual timeline to execute a search warrant was six to eight months. On October 17, 2012, legal counsel for the Comptroller General notified legal counsel for the PSA that his advice to the Comptroller General was not to try to seek the return of data under section 8.1 of the *Financial Administration Act* as there was a risk that such an order could be successfully challenged.

Accordingly, a determination was made that the ministry would send letters demanding the return of data or personal information. The privacy lawyer drafted the letters, and the employment lawyer provided her comments on the drafts. The lead investigator was tasked with particularizing the letters for each individual to request the specific information that the ministry believed was in their possession. The task of particularizing the data demand letters proved challenging.

The lead investigator was on vacation the week of October 22, 2012. Another member of the investigation team was tasked with finalizing the letters in her absence, and had access to the lead investigator's files. On October 24, 2012, Mr. Whitmarsh contacted the Supervising Solicitor of the HSS group inquiring about the status of the letters and indicating that he would like the letters to be sent in the next 24 hours. Mr. Whitmarsh indicated that he had received correspondence from the Information and Privacy Commissioner, and that the ministry needed to be in a position to say what steps it had taken to mitigate the privacy breaches. The Supervising Solicitor spoke with the employment lawyer about the status of the letters. The employment lawyer indicated that it was important that the letters specify which information the ministry was looking for, that the lead investigator was on vacation and that much of the file was "in [the lead investigator's] head."

The lead investigator's absence created a practical problem for the LSB lawyers and the ministry. In her absence, it was difficult to identify the specific information that the ministry believed the individual terminated employees and contractors had in their possession. There was no file that LSB could access to readily find the information necessary to complete the letters. The employment lawyer told us that it was important that the letters clearly set out the information that the ministry was demanding given the prospect that these letters may be produced in future litigation.

On October 25, 2012, the employment lawyer had a phone call with two members of the investigation team and was able to obtain some additional information about the particular data the ministry was seeking from one of the fired employees.

When the lead investigator returned to work on October 29, 2012, she requested copies of the latest drafts of the letters. She did not further particularize the letters, and told the employment lawyer that Mr. Whitmarsh had directed that the letters go out that day. Following a discussion between the employment lawyer and the lead investigator, the employment lawyer wrote an email to the lead investigator as follows:

> *As I mentioned in my first comments on the original draft, it would be preferable to be as specific as possible with respect to the demands for return of property being made in this letter as well as all other letters as this will make it more certain that specific property is returned and also lay a better foundation for potential litigation concerning the return of specific property. Given the ongoing nature of the investigation and time constraints in terms of getting this letter out asap, I understand that no further specifics can be provided at this time.*

On October 30 and 31, 2012, the data demand letters were sent to five of the fired employees and a former contractor.

On November 5, 2012, data demand letters were sent to four contractors and external researchers. A lawyer from the HSS group and the privacy lawyer assisted in drafting

the letters. There was some discussion between the lead investigator and legal counsel regarding what version of the demand letter the contractors should receive as the lead investigator had advised that "no one has spoken to those contractors during the course of the investigation." Ultimately, each contractor received the same form of letter, which did not include particulars of the specific data sought from each individual.

These letters, signed by Ms. Kislock, stated that the ministry believed the recipients to be in possession or control of "property of the ministry including, but not limited to, third party personal information" without authorization. The letters stated that the recipients were not authorized by the ministry to possess or retain any ministry information, which included documents and data stored on their personal computers or other storage devices and notes, records, documents or other written information. All of the data demand letters contained this language, irrespective of any contract, data access agreement or information sharing agreement authorizing the recipient's possession, access or use of data.

The letters demanded the return of any such ministry information. The letter's recipients were given 10 calendar days to demonstrate to the ministry's satisfaction that they were not in possession of any information, and were warned that if they did not do so, the ministry might initiate legal action. Some of the letters referred, incorrectly in all but one case, to ongoing litigation. The letters stated that individuals were not to have access to data ever again. Ms. Kislock's exact words in the letters were:

> *I wish to make it clear that you are not authorized to have access to any Ministry-owned data, whether directly or indirectly, now or in the future.*

The letters further indicated that the recipients were subjects of the ministry's continuing investigation into the unauthorized release of data and that the Office of the Comptroller General was investigating related matters.

It is not entirely clear from the evidence how the ministry determined which specific individuals should receive letters demanding the return of data. One of the objectives of the letters was to contain the breaches and fulfill the requirements under the Protocol, but the letters were sent to some individuals who had no role in the breaches. The lead investigator gave evidence that people were chosen to receive letters "just based on their review as individuals, mostly from the relationship chart," that "they were involved with some of the projects that we were reviewing for data access and use" and that she worked with the investigation team to determine "projects and backgrounds and who had data." She said that "there was no casting of wrong. It was just securing the data while we were doing the ongoing investigation."

The privacy lawyer gave evidence that sending data demand letters is standard practice where there is reason to believe that personal information has been disclosed contrary to *FOIPPA* and informal attempts to recover the information have been unsuccessful. He said that the demand letters related to the ministry's obligation under section 30 of *FOIPPA* to protect personal information, and to meet the expectations of the Office of the Information and Privacy Commissioner to contain the suspected breaches. He said that he did not give advice on whether there were "reasonable grounds" to believe that the recipients of the letters had personal information in their possession that they were not authorized to have, and that he relied on the lead investigator to have that information. He told us that he understood that the ministry had definitively determined that the recipients of the letters had access to personal information that they were not authorized to have. He said that he thought that all of the employees who were receiving the letters were involved in the three suspected privacy breaches that had been reported to the Office of the Information and Privacy Commissioner.

The HSS Supervising Solicitor also told us that she understood that the ministry was sending the data demand letters as part of its response to the Information and Privacy Commissioner's investigation, and as part of the ministry's efforts to mitigate the privacy breaches. She did not know why data demand letters were sent to individuals not involved in the privacy breaches that formed the subject matter of the Information and Privacy Commissioner's report.

The decision to send the demand letters as part of the ministry's ongoing response to the three suspected privacy breaches is odd, since most of the recipients had no connection to the three incidents reported to the Office

of the Information and Privacy Commissioner. When we spoke with the LSB privacy lawyer, he believed that the letters were in fact connected to the suspected breaches. The Commissioner's report states, "once the Ministry identified the three disclosures at issue, it attempted to retrieve the information held outside the Ministry. The Ministry wrote letters to key individuals demanding that they securely return any Ministry owned data or information in their possession, including personal information."[17] While correct, in fact the ministry also made the same demand of individuals not involved in the three incidents.

Moreover, the fact that the ministry was unable to particularize the concerns about the recipients' data access also suggests that, even by this point in its investigation, the ministry did not have a clear understanding of the nature and extent of these individuals' data access. The scope of the letters was so broad as to encompass just about any government information, even that which was not personally identifiable. Finally, the assertion in some of the letters that the individuals would not be permitted data access ever again – combined with the lack of particulars about the suspected wrongdoing – caused unnecessary alarm among the recipients and was inconsistent with the suggestion that this was a precautionary and temporary step while further investigation occurred.

Some of the responses the ministry received to these letters are described in Chapter 12.

10.5.2 EVALUATE THE RISK

According to the Information and Privacy Commissioner, an evaluation of the risks of a privacy breach includes considering what personal information is involved (including the level of sensitivity), the cause and extent of the breach (including whether there is a risk of ongoing or further exposure), the individuals affected by the breach and the foreseeable harm from the breach. The assessment of foreseeable harm includes examining who received the information (for example a stranger or a known contractor) and the potential harm to the public (for example whether the disclosure poses a risk to public health and safety).[18]

We were told that when the breaches were first reported, officials expressed considerable alarm to the OIPC. During the ensuing few months the ministry developed a more considered perspective on the breaches and the resulting risk they posed.

On November 29, 2012, Deputy Minister Whitmarsh stated in a letter to the OIPC:

> *Our investigation into this matter did not uncover any evidence or basis upon which we could conclude that foreseeable harm to third parties could result from the breaches in question. While the past employees and consultants in question demonstrated poor judgment in failing to comply with existing approval processes, there is no reason to believe at this time that they have used that information for non-research purposes or that they have made that information available to others.*
>
> *These individuals are researchers whose livelihoods depend on their being able to be trusted with sensitive data, including personal information. Based on the evidence, we see no reason to believe, at this time, that the individuals in question would use that information for the purposes of identity theft or fraud or in any other manner that could result in harm to third parties.*

An appendix to that letter contained a risk assessment that included the following:

> *The Ministry's position is that there is no evidence upon which to conclude that foreseeable harm could result from the breaches in question. The following factors support such a position:*
>
> - *While the past employees and consultants demonstrated poor judgment, there is no reason to believe at this time that they have used, or will in the future use, the personal information in question or would otherwise make that information available to others.*
> - *Many of these individuals have academic research credentials and/or affiliations with*

17 Office of the Information and Privacy Commissioner, *Investigation Report F13-02: Ministry of Health*, 2013 BCIPC No. 14, 26 June 2013, 21 <https://www.oipc.bc.ca/investigation-reports/1546>.

18 Office of the Information and Privacy Commissioner, *Privacy Breaches: Tools and Resources*, 2 April 2012, 5 <https://www.oipc.bc.ca/guidance-documents/1428>.

post secondary institutions. The Ministry cannot find any evidence that would demonstrate that the employees and consultants cannot be entrusted to ensure the ongoing security of any personal information that they may currently have.

- *There is no reason to believe that there is a risk of identity theft or fraud to third parties. Despite conducting a detailed investigation, which included interviews with the former staff, there is no evidence that those persons have used or disclosed, or would use or disclose, the personal information for the purpose of fraud or identity theft or in any other manner that could cause harm to third parties.*

The risk assessment also stated:

> *… the ex-staff or contractors in question all stood and still stand to significantly damage their academic standings at their respective universities, contract status with the ministry and/or professional career potential by misusing and/or enabling further unauthorized disclosure of the data. Based on reviews of email communications and interviews with the involved parties, the Ministry has no reason to conclude at this time that these parties including R. Hamdi, shared the personal information in question with other parties or that they have used or intend to use the data in a manner other than for its intended research, evaluation and/or development purposes or in a way that could potentially harm third parties.*

This view of the breaches and the motivation of the individuals to misuse the data accords with our view. There was no indication that any of these three individuals had, or were planning to further disclose, any data that they may have received in the three incidents. It is clear that such disclosure would have jeopardized their careers. Dr. W. Warburton could not have published with unauthorized data, and if he did, his career in data analysis would be irreparably damaged. Mr. Isaacs relied on his ministry contract for most of his income, and he was passionate about the Quantum Analyzer tool that he had created, so he would not have wanted to jeopardize the contract with the ministry. Mr. MacIsaac was a mature student working as a co-op employee for the ministry. There is no reason to believe he would jeopardize his completion of his studies by using unauthorized data. In any event, we have concluded that he received the information as part of his responsibilities as a ministry employee.

It is important to understand that even though the data that was provided in each incident was personally identifiable, it did not include any names, addresses or other unique identifiers other than a PHN. In order to link that information to a specific individual, the recipient of the data would have to know a specific person's PHN. As the ministry acknowledged in a January 14, 2013, news release, "it would be difficult to match personal health numbers to identifiable individuals."[19]

The Office of the Information and Privacy Commissioner's report pointed out that the ministry's assessment of risk "overlooked the indirect harm of loss of assurance and public trust arising from the unauthorized disclosures, especially given media coverage of these breaches, staff terminations and the Ministry's broader investigation."[20]

The risk to the public from the three incidents was very small; indeed, it was almost nonexistent. The January 14, 2013 news release from the ministry indicated "the ministry's investigation has concluded there is minimal, if any, risk of inappropriate use of personal information." Minister MacDiarmid stated in the news release "there continues to be no evidence that information was accessed or used for purposes other than health research."[21]

10.5.3 NOTIFICATION

After it reported the breaches to the Office of the Information and Privacy Commissioner, the ministry took the position that public notification was unnecessary because the risk associated with the breaches was low.

19 Ministry of Health, "Further details released in data access investigation," news release, 14 January 2013.

20 Office of the Information and Privacy Commissioner, *Investigation Report F13-02: Ministry of Health*, 2013 BCIPC No. 14, 26 June 2013, 22 <https://www.oipc.bc.ca/investigation-reports/1546>.

21 Ministry of Health, "Further details released in data access investigation," news release, 14 January 2013.

However, the Information and Privacy Commissioner determined that public notification was required. This advice was based on the volume of records, the sensitivity of the data (the CCHS data in particular) and people's expectations that their personal information would be secured. As indicated above, it was the ministry's own actions in publicizing these matters that caused the difficulties with public expectations about the protection of personal information.

The ministry issued a news release on January 14, 2013, notifying the public about all three breaches and set up a call centre to respond to the affected public's concerns.[22] The ministry's press release and related materials indicated that the ministry had no evidence that the data was used for anything other than health research. This is consistent with what we found.

The Information and Privacy Commissioner also recommended that the ministry provide direct notification to approximately 38,000 individuals whose personal information was disclosed in the third incident involving the CCHS data. The notification was provided through letters to the affected individuals and the ministry also set up a call centre to respond to any questions from these individuals.

10.5.4 PREVENTION

As the Information and Privacy Commissioner's investigation continued, it focused on the ministry's policies and practices with respect to data security and privacy. The Commissioner made a number of recommendations related to the systemic problems she identified with respect to "governance, management and controls in the ministry." The ministry accepted the Information and Privacy Commissioner's recommendations and committed to implementing them.

The ministry engaged in a number of initiatives responding to some of the data access issues identified throughout the investigation including contracting with Deloitte to conduct a review and making certain changes to data access processes through a Lean Initiative. As those issues are canvassed in detail in the Information and Privacy Commissioner's report, we have not commented on them further here.

10.6 NOTIFYING STATISTICS CANADA ABOUT BREACH OF CONTRACT AND RETURN OF CCHS DATA

On October 17, 2012, Ms. Kislock and the lead investigator contacted Statistics Canada to notify them of the suspected privacy breach involving CCHS data. At that time, the ministry was still in the process of determining the number of individuals they believed could be affected by the disclosure.

In an email briefing other executives about the call, Ms. Kislock stated that the CCHS disclosure "was in violation of the information sharing requirements of the agreement" with Statistics Canada. No details about the breach were provided. As noted above, we conclude that the ministry's conclusion about this incident was a result of an honestly held but mistaken belief of what had occurred.

Based on our review of the investigation team's interviews with some of the employees, it is clear that the ministry had not carefully read the Statistics Canada agreement or did not understand its provisions. We were unable to determine precisely what the ministry told Statistics Canada orally with respect to the disclosure, including which provision of the contract it believed was breached and how. No legal advice was sought from LSB with respect to whether the ministry had breached the agreement with Statistics Canada or with respect to notifying Statistics Canada about a suspected breach.

Following being advised of this information Statistics Canada decided to cancel its CCHS data sharing agreement with the ministry. Correspondence we reviewed stated that the Chief Statistician decided to cancel the agreement with the ministry based on the apparent seriousness of the breach as relayed to them by the ministry and the need to refresh the old agreement (which was 12 years old at that time).

On October 19, 2012, Statistics Canada emailed Ms. Kislock, letting her know to expect a letter acknowledging that the province had breached the conditions of the data sharing agreement. In that email, Statistics Canada requested the return of all confidential data shared under

22 Ministry of Health, "Further details released in data access investigation," news release, 14 January 2013.

the existing data sharing agreement. However, Statistics Canada decided to leave the agreement in force in order to protect the CCHS data that had been provided under the agreement. Statistics Canada requested that the ministry not provide the data to any third parties, including the police as indicated in section 6 of the existing agreement. They assured the ministry that following an onsite audit or review it, would enter into a new data sharing agreement.

On October 30, 2012, the Chief Audit Executive of Statistics Canada wrote to Ms. Kislock confirming that Statistics Canada's Internal Audit Services would be performing an audit of its data sharing agreements with the ministry that would include the agreement respecting the CCHS data. The audit was scheduled for the week of November 5, 2012. The audit was later postponed but took place shortly thereafter.

The ministry spent a significant amount of time gathering and returning the CCHS data to Statistics Canada. The agreement is still in force today but all of the CCHS data has been returned. The ministry only has access to the public CCHS files, which do not include personally identifiable information. Without this information, the records cannot be linked to the ministry's administrative health data, limiting the utility of the CCHS data to the ministry and to health research.

The ministry and Statistics Canada have been working on another agreement since 2013. We have been advised that it is not yet finalized.

FINDINGS

F 28 As confirmed in the Information and Privacy Commissioner's June 2013 report, the privacy breaches happened because the ministry failed to translate privacy and security policies into meaningful business practices.

F 29 In the privacy breach involving Mark Isaacs, Mr. Isaacs acted appropriately.

F 30 In the privacy breach involving Roderick MacIsaac, Mr. MacIsaac was improperly provided with the information but he was authorized to receive the information and did so as a ministry employee.

F 31 The actual risk arising from the privacy breaches was low, but the perceived risk due to the government's own September 6, 2012 announcement elevated the public concern.

11.0 / MINISTRY OF HEALTH INVESTIGATION INTO EMPLOYEES CONTINUES AFTER THE TERMINATIONS: SEPTEMBER 2012 TO OCTOBER 2013

11.1 INTRODUCTION

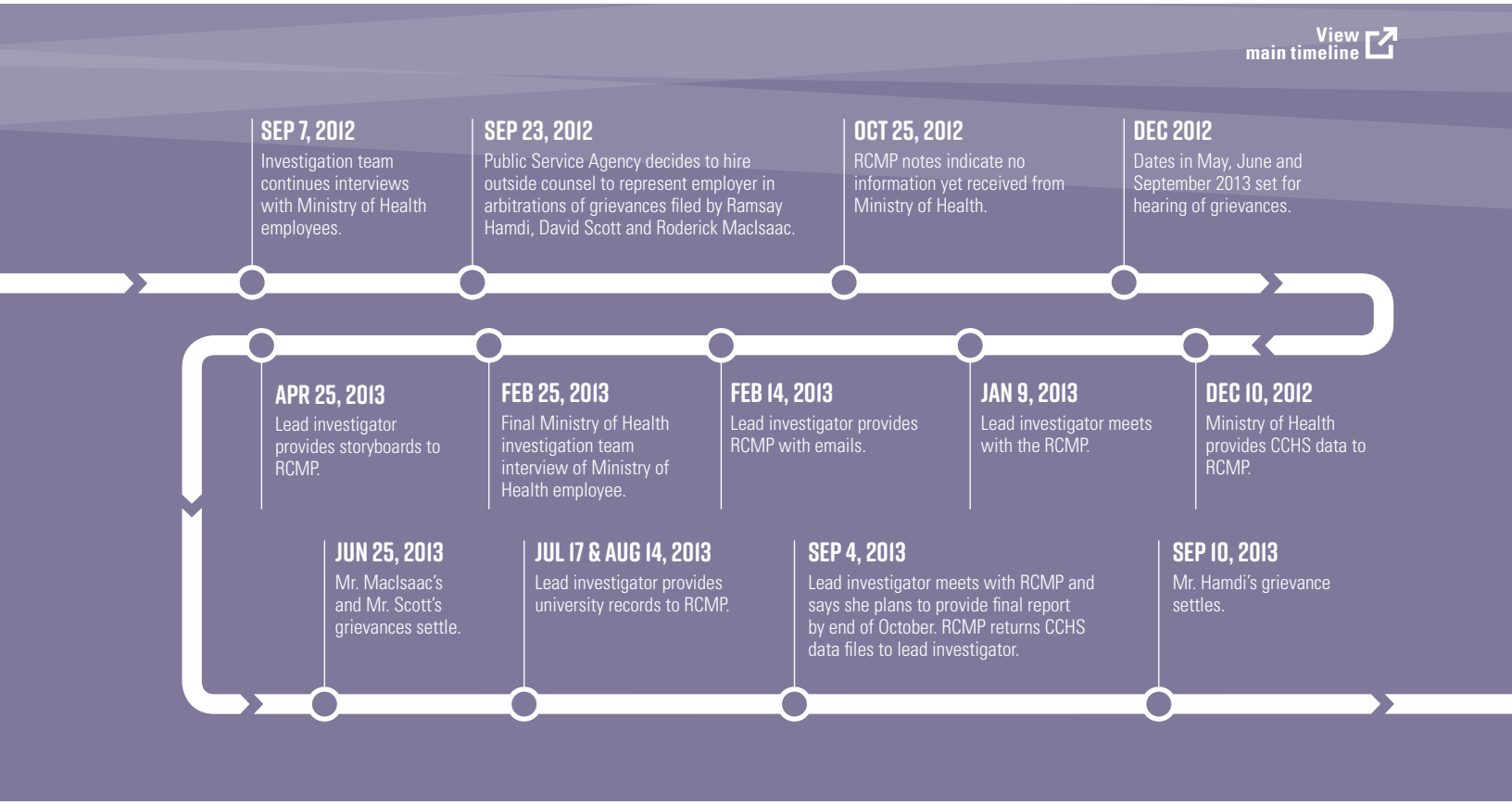
After the termination decisions in September and October 2012, the investigation into Ministry of Health employees continued. This section of the report describes four parts of the investigation that occurred between September 2012 and October 2013.

First, we describe how the investigation team continued to conduct interviews and broadened its scope to investigate additional employees who it suspected of wrongdoing. This resulted in disciplinary decisions against three more ministry employees.

Second, the investigation team continued to search for evidence to support the September and October dismissal decisions because the terminations were being contested by the fired employees. Little documentation about the rationale for the terminations had been assembled before those decisions were made, so the team needed to put together new material to assist with the litigation.

Third, the grievances filed by the three fired unionized employees – Ramsay Hamdi, David Scott and Roderick MacIsaac – proceeded toward arbitration but were ultimately settled before a hearing.

Fourth, the lead investigator continued to have significant contact with the RCMP and handed over material that the team had gathered in the investigation throughout the fall of 2012 and 2013, including disks containing Canadian Community Health Survey (CCHS) data collected by Statistics Canada.



11.2 ADDITIONAL INTERVIEWS

The investigation team continued to conduct interviews after the terminations. The team conducted in excess of 28 interviews with 19 public service employees between September 7, 2012, and February 25, 2013. The purpose of these interviews was two-fold: to further explore the allegations of wrongdoing that had already been raised and to address new suspicions that the team had developed. The lead investigator told us that the team was continuing to "follow the data."

Records do not exist for all of the interviews conducted in this time frame. However, based on the records we have reviewed, many of these interviews shared the characteristics we identified in Chapter 8; a failure to provide witnesses with appropriate disclosure or notice of allegations, a lack of objectivity and a disrespectful approach.

11.3 EXPANSION OF SCOPE

The investigation team widened its investigative net to include additional employees during this time. In the fall of 2012, it focused on individuals at the more senior level in the Pharmaceutical Services Division (PSD). It also began to investigate individuals who had no connection to either the initial complaint or to the fired employees. Although no additional public servants had their employment terminated, the ministry nonetheless imposed disciplinary measures on three employees as a result of the additional investigative work.

None of these three individuals has been identified publicly as being disciplined as a result of the ministry's investigation. We interviewed each of them and assessed the veracity of the allegations made against them based on their own evidence, that of other witnesses and documentary records. In each case, we concluded that the employees were treated unfairly and the disciplinary measures taken against them were unjustified. We have decided

not to identify these individuals or describe their work or experiences in a way that reveals their identities in this public report. Instead, we have written to the Deputy Minister of Health with our detailed findings concerning these individuals and will follow up with the ministry on the steps it is taking to implement the recommendations made in Chapter 18.

While we will not name these individuals in this report, we believe it is important to relate some of their experiences anonymously to illustrate both the extent to which unfairness occurred as well as to demonstrate the steps that a senior ministry executive took to intervene in support of her employee.

Two public servants came under scrutiny by the investigation team because they happened to work for Blue Thorn Research and Analytics Inc., which itself came under suspicion solely because of a connection with Dr. William Warburton.[1] When reviewing their roles in the firm, the investigators learned that both individuals were also full-time employees with the province.

The Standards of Conduct for public service employees permit employees to hold other employment outside government when certain conditions are met.[2] The evidence we reviewed is that the two employees' respective ministries permitted the employees' employment with Blue Thorn. In one case, the ministry provided express written consent. In the other case, the ministry hired the employee with the full knowledge that she worked for the firm and approved a contract with the firm (in which her name was listed) with the knowledge that she was a ministry employee. While the investigation team made numerous allegations of impropriety against the latter individual in support of their conclusion that she was in a conflict of interest, the only evidence of a possible issue with her conduct was that she had sent infrequent emails while at work to her Blue Thorn colleagues during times that she thought were her coffee breaks but that others viewed as work hours. Nevertheless, the employee was disciplined and the data access she needed to do her work was also suspended.

As the investigators' scope continued to widen they focused their attention on another ministry employee who they understood may have been connected to the data that they believed had been improperly disclosed. The investigators interviewed this individual five separate times. During his first interview, he realized that the investigation team fundamentally misunderstood his role in the ministry. Despite his increasingly adamant attempts to explain what his role actually was, the investigators persisted with their misunderstanding, levelling serious allegations against him and accusing him of not being truthful when he attempted to correct them.

The investigator suggested, to the same individual, that the individual had acted improperly when his conduct was not only approved of by senior ministry executives, but also required by a contract to which the ministry was a party. The investigator also suggested this individual had breached a term of an agreement when the term referred to did not exist.

The lead investigator recommended that this employee be terminated for cause. This view was not shared by all on the investigation team. The PSA investigator recalled:

> *You know, I think the [lead investigator] really wanted to see, like she really had a problem with [the employee's] behaviour, and I think at one point had wanted to see him terminated, and, you know, I certainly stepped back from this one and let [other PSA staff] deal with [the*

1 See Chapter 12 for a discussion of the investigation into Blue Thorn.

2 The Standards of Conduct state: "Employees may hold jobs outside government, carry on a business, receive remuneration from public funds for activities outside their position, or engage in volunteer activities provided it does not Interfere with the performance of their duties as a BC Public Service employee; bring the government into disrepute; represent a conflict of interest or create the reasonable perception of a conflict of interest; appear to be an official act or to represent government opinion or policy; involve the unauthorized use of work time or government premises, services, equipment, or supplies; or gain an advantage that is derived from their employment with the BC Public Service. Employees who are appointed as directors or officers of Crown corporations are not to receive any additional remuneration beyond the reimbursement of appropriate travel expenses except as approved by the Lieutenant Governor in Council." British Columbia, "Standards of Conduct for Public Service Employees - Outside Remunerative and Volunteer Work" <http://www2.gov.bc.ca/gov/content/careers-myhr/about-the-bc-public-service/standards-of-conduct>.

> *lead investigator] on the follow-through and because we had all just agreed behind the scenes that this guy hadn't done anything … worthy of termination…*

Another member of the investigation team acknowledged in retrospect that "to take a disciplinary action against [the employee] was not appropriate and unnecessary and didn't really meet the objectives of the ministry in securing anything."

The intervention of this individual's Assistant Deputy Minister also served to mitigate the impact on this employee. The Assistant Deputy Minister placed considerable pressure on the investigation team to produce evidence justifying discipline. On review of the information that was eventually provided, the Assistant Deputy Minister was unable to conclude that the employee had acted in the manner alleged. Despite this, the individual was still inappropriately disciplined, albeit to a much lesser degree. It is our conclusion, based on the evidence we have reviewed, that the discipline was unjustified because it was based on an assumption that the employee had provided administrative health data to someone who was not authorized to possess it. Based on our investigation we believe this was not the case.

Nonetheless, the fact that this Assistant Deputy Minister was willing and able to review the evidence against the employee and challenge the investigation team's findings shows the importance of having an independent assessment of potential employee discipline decisions at the executive level. The Assistant Deputy Minister was able to put the brakes on a process that may otherwise have resulted in termination. As we have described in Chapter 9, the failure to appropriately use such controls contributed to the poorly informed decisions to terminate other employees.

Another of the senior employees who was impacted during this phase of the investigation did not receive such support. While the ministry did not dismiss her, she was disciplined in a way that negatively impacted her employment status and pay. The ministry's actions would have constituted a constructive dismissal at law had she not accepted the result. This employee was interviewed three times by the investigators with no notice that her conduct was being questioned, no particulars of a case against her and no reasonable opportunity to respond.

During her interviews with the investigators, this employee repeatedly provided evidence that contradicted many of the investigators' assumptions about the issues they were examining. Rather than considering that they may be wrong, the investigators interpreted her evidence as indicative of lack of managerial oversight and an attempt to shift the blame for her alleged misconduct to others.

As with the other two employees who were disciplined after the terminations, the conclusion that this employee had engaged in misconduct lacked an adequate evidentiary basis. The investigators drew conclusions based on inferences drawn from emails, without contextual knowledge of the program areas or a full analysis of the Standards of Conduct. As a result, the reasons for the discipline against this employee were without merit. Ultimately, the ministry's decision to discipline this employee was wrong because it was the result of an unfair process and not supported by the evidence.

11.4 DEVELOPMENT OF STORYBOARDS

As we have described in Chapter 9, the investigation team did not create binders assembling all the necessary information. Reports to document the evidence and rationale for the employee termination decisions made in September and October 2012 were not assembled in one place for Deputy Minister Whitmarsh. The normal practice in dismissals is for all such information to be prepared in a single binder for consideration by the decision maker. When all of these employees commenced litigation or filed grievances, the lack of documentation created problems for legal counsel who were defending the litigation and handling the grievances.

Due to the lack of already-existing particulars, legal counsel requested that the investigation team develop what came to be known as "storyboards" or "incident summaries." These documents compiled for litigation support purposes outlined the allegations against the employees along with the evidence the team had collected to support those allegations. One member of the investigative team told us that "lawyers couldn't make sense of it so it was a matter of making it something consumable." The storyboards were intended to be used to "support any litigation."

These storyboards were completed between mid-March and early May 2013. The storyboards were intended to be brief narrative descriptions of the incidents of wrongdoing for which the employees were terminated.

Additional resources were added to the team to assist in compiling the storyboards. They were compiled primarily by the investigator who worked from an office in New Westminster and some short-term auxiliary employees – former criminology students – who were hired to support this work. These individuals drafted the narrative, then sent the storyboards out to the "subject matter experts" on the team who were expected to identify evidence to support the allegations. The person responsible for compiling the storyboards explained how the procedure would work:

> *We did incident summaries for all the key players with all of their major allegations … in terms of the steps taken around if there was policies or procedures that were not correctly followed … I can't speak to that because I'm not the HR executive or subject matter expert, but from [the PSA investigator's] opinion, there was because these are the things that she would bring to my attention as potential pieces of evidence to support allegations or concerns around conflict of interest or, you know, granting favour to certain individuals.*

We heard from more than one team member involved in reviewing emails after the terminations who said that the focus of their work at that time was to find evidence to support decisions that had already been made. In the words of one team member:

> *… so I would characterize the investigation that the team was undertaking as not looking for information necessarily that supported a different view, … but more to support the statements of wrongdoing that had already [been] made.*

It was, of course, appropriate for the ministry to provide their legal counsel with documents relating to facts at issue in the litigation, and also to assist their lawyers in putting together their defence.

However, because the ministry had to build the case after the fact, and because the investigation was not well documented prior to the termination decisions, the individuals compiling the storyboards attempted to draw in every possible issue to better support the ministry's case.

The investigation team looked for new allegations against the terminated employees and in doing so, the investigators sought out emails from as far back as 2003, nearly a decade prior to the termination decisions.

II.5 GRIEVANCES AND ARBITRATIONS

The three unionized employees who were fired in September 2012 – Ramsay Hamdi, David Scott and Roderick MacIsaac filed grievances with respect to their terminations. Mr. Hamdi and Mr. Scott both sought reinstatement, to be made whole, and damages for "wilful misconduct" in the manner of their dismissals. Mr. MacIsaac sought lost wages for three days remaining on his co-op term, confirmation that he had permission to access the data that he received, and to "clear" his name within the Public Service Agency (PSA) so that he could be considered for jobs with government. All of the unionized employees eventually also sought damages for defamation.

By September 23, 2012, the PSA decided to bring in outside counsel to represent the employer in conducting the arbitrations. The PSA designated a Senior Labour Relations Officer to be the instructing client.

By December 2012, dates had been set for the arbitration hearings. Mr. Scott's arbitration was scheduled to be heard on May 14, 2013, to be followed by Mr. MacIsaac on June 26, 2013, and then Mr. Hamdi on September 17, 2013. Mr. MacIsaac died before the date set for the hearing. The hearing process nevertheless proceeded following his death.

In the interim, it was intended that the investigation team would provide legal counsel with the evidence to support the government in the arbitrations. Early in the process the Senior Labour Relations Officer spoke directly to Mr. Whitmarsh. She told us that she explained to him that while she understood that the Deputy Minister was the only person who had the statutory authority to terminate an individual, often an Assistant Deputy Minister who did the bulk of the work would testify at an arbitration hearing, because they would have the greater knowledge of the facts. Mr. Whitmarsh explained to us that he told the PSA that the task of testifying should be up to the investigators

who assessed the severity of the wrongdoing and recommended appropriate action. He told us he made it clear to the PSA that he would not testify.

As the time for Mr. Scott's arbitration approached, outside counsel became frustrated with the lack of support they were receiving from the investigation team and encountered challenges in finding witnesses for the hearings. As hearing dates drew closer, the PSA attempted to convince Mr. Whitmarsh that, in accordance with the *Public Service Act*, he was the only person who had the authority to terminate and therefore should be the one to testify. Mr. Whitmarsh explained that he had merely followed the advice of the PSA investigator regarding the terminations and suggested that the PSA was conducting "revisionist history."

The PSA investigator wrote to outside counsel on April 25, 2013 indicating that if she testified, she would testify that Mr. Whitmarsh told her that anyone who had engaged in misconduct would be terminated:

> *We had a mtg to discuss this with all the ADMs and [the lead investigator]. It did not go well. Graham is insistent that I need to testify. He says he will get up there and say that he did what I recommended. I tried to explain that it is fine to say that you considered and accepted LR [labour relations] advice, but you need to say whether or not you agreed and why. I cannot go on the stand about this issue given that what actually happened was that Graham said anyone caught doing this would be fired and we worked under that umbrella. He is going to talk to the ADM who delivered the termination to see if he will go up. This is a nightmare. The ADMs, not surprisingly, are completely backing him.*

Outside counsel wrote back five minutes later:

> *We won't put you on the stand. We will see how our next meeting goes with Graham. When we met with him yesterday he seemed in the end to get to the point whereby he was content to say the relationship of trust had been broken by Scott's actions.*

In April and May 2013, the union provided particulars of Mr. Scott's claim to counsel for the PSA, including particulars in relation to allegations that the government had made comments about Mr. Scott that were defamatory. Prior to Mr. Scott's arbitration, government's counsel brought an application to sever the defamation claim from the grievance proceedings. The arbitrator concluded that he did not have jurisdiction to hear Mr. Scott's defamation claim. The arbitrator's decision ultimately made it easier for the government to reach a settlement of the grievances because it no longer had to address the defamation allegations in the context of subsequent settlement negotiations.

The arbitration process was temporarily derailed when one of government's lawyers who was planning to conduct the arbitrations became ill. The first hearing into Mr. Scott's grievance was adjourned and rescheduled for June 25, 2013. In the interim, Mr. Whitmarsh's appointment as the Deputy Minister of Health came to an end.

On June 25, 2013, the day the hearing was to proceed, Mr. Scott's grievance was settled. That same day, the union withdrew its grievance with respect to Mr. MacIsaac, and settled the matter on the basis that his estate would receive a sum equal to three days' wages, which was the amount of time which remained on his co-op term.

The union and government settled Mr. Hamdi's grievance on September 10, 2013.

The employment lawyer, in briefing the Deputy Attorney General on the settlements, noted that all of the included employees' claims "have been settled on terms favourable to the Employer." An Assistant Deputy Minister in the PSA confirmed to us that the settlements were viewed as a very good result for the province. He told us that the PSA has since heard from the union that it now views the settlements as unfair, particularly in light of the settlements obtained by the terminated excluded employees.

All of the grievances were settled before the ministry recognized that there were significant flaws in the manner in which the investigation was carried out. As bargaining unit employees, Mr. Scott, Mr. Hamdi and Mr. MacIsaac were not able to pursue their claims to an individual remedy; instead, their grievances were settled at the instance of the BCGEU. The union, in turn, was reliant on the government's assertions that it had indeed found evidence of misconduct and had done so through an appropriate and fair process. Accordingly, the questions of whether

the investigation team followed a fair process, and the extent to which government had evidence to support its termination decisions, were not known to the same extent as has now become evident.

The grievances were settled on substantially less favourable terms than the settlements the government reached with the excluded employees. We have already noted that the union withdrew Mr. MacIsaac's grievance in exchange for three days wages paid to Mr. MacIsaac's estate. Mr. Scott and Mr. Hamdi's grievances were resolved without reinstatement of the employees or any financial compensation for lost wages, lost opportunity or for damages for the manner of dismissal. The unionized employees did not pursue their defamation claims once those claims were severed from the grievance proceedings and accordingly the settlement negotiations did not address any reputational harm the employees may have incurred.

II.6 ONGOING COMMUNICATIONS WITH THE RCMP

When she first spoke with the RCMP in August 2012, the lead investigator had promised the RCMP member that he would soon receive a copy of the ministry's final investigation report for review. This never happened as the completion of the report was first delayed and then it was never finalized. However, between December 2012 and August 2013, the lead investigator proactively disclosed to the RCMP a significant amount of information her team had gathered. The purpose of the proactive disclosure to the RCMP was unclear since the police had said they would make a decision only following receipt of a final report from the ministry's investigation.

On October 25, 2012, a member of the investigation team contacted the RCMP to determine how the RCMP was responding to Freedom of Information (FOI) requests. The RCMP member he spoke with made a note of the conversation that said, "we have not rec'd any info from MOH yet & [therefore] have not started any investigation. Nothing to say."

On December 10, 2012, a member of the investigation team provided the RCMP with disks containing the CCHS data belonging to Statistics Canada. This is discussed in greater detail below.

On January 9, 2013, the lead investigator met with the RCMP (members of the Investigation and Forensic Unit [IU] from the Office of the Comptroller General were also in attendance). According to the RCMP member's notes, at this meeting the lead investigator stated that "their tech people have pulled all the emails. She will hand over all their materials electronically." In explaining the issues, she described that "data is very valuable to researchers and pharmaceutical companies" and gave the names of "potential criminal suspects," which included the fired employees, as well as other individuals the team had investigated or interviewed.

On February 14, 2013, the lead investigator met again with the RCMP. At this meeting, the lead investigator said she expected to hand over all the evidence "on each employee" by the end of the month. At this point, she gave July 31, 2013, as an anticipated end date for the investigation. During this meeting, the lead investigator provided the RCMP with a hard drive containing approximately 6,500 emails from one of the targeted employees. That same day, the lead investigator emailed Lindsay Kislock, Assistant Deputy Minister of Health Sector Information Management and Information Technology, to let her know "that the RCMP today received the complete evidence package for MM. Additional evidence discovered in the next phase will be sent to them by found date for MM [Malcolm Maclure]. I have confirmed with the RCMP that information on RW [Rebecca Warburton] and WW [William Warburton] will be provided by the end of next week. Will keep you updated on the evidence transfer process."

On February 27, 2013, one of the RCMP members assigned to the file made a note of an internal conversation with another member: "we have not rec'd the data needed to form an opinion if a criminal offence has occurred. It will be months before this happens."

On April 25, 2013, the lead investigator provided the RCMP with a binder containing a series of storyboards developed by the team. As described above, these storyboards were litigation support documents that summarized allegations made against the fired employees, including new allegations not part of the original termination decisions. The RCMP member reviewed the storyboards over the next

two months but concluded that the material in the storyboards did not warrant an investigation.

On July 17, 2013, the lead investigator forwarded to the RCMP by email a copy of a letter sent to the University of British Columbia on June 13, 2013, to request financial information about Ministry of Health contracts and agreements. In a separate email, the lead investigator forwarded to the RCMP "the results or shall I say what they sent" of a similar information request that the Ministry of Health had sent to the University of Victoria. These included requests for contracts and financial information.

Also on July 17, 2013, the lead investigator forwarded to the RCMP a "briefing table" summarizing the allegations against all of the fired employees and setting out the next steps for the investigation team. She also forwarded a similar "briefing table" summarizing allegations against external contractors and researchers.

On August 14, 2013, the RCMP received from the lead investigator two disks containing an Excel spreadsheet and other data, along with copies of contracts and financial information from the universities. The RCMP member who received the disks noted that most of the files could not be opened in their current format and that the spreadsheets required explanation. Two days later, the RCMP member noted she was able to open the files with some assistance and one file alone contained 6,707 emails. On August 27, 2013, the RCMP members involved in the file discussed the need to contact the lead investigator about the "data dump." The RCMP member reiterated that "I require the final report instead of bits and pieces."

On September 4, 2013, the RCMP met with the lead investigator who, at that time, said she would complete her final report before the end of October. She had been in contact with the IU Director about that investigation, and, according to the RCMP member's notes, "once she has their report and hers she will make one for the RCMP."

In each instance where the lead investigator provided the RCMP with material from her investigation, the RCMP declined to investigate, taking the position that it required a final report before it could do anything. One RCMP member we spoke with who was involved in the meetings with the investigation team in late 2012, and 2013, said he tried to explain to the lead investigator that simply providing emails without context was not helpful for the RCMP in terms of beginning an investigation. However, the lead investigator continued to provide such materials until the Ministry of Health's investigation ended in the fall of 2013.

11.6.1 PROVIDING CCHS DATA TO THE RCMP

As described in Chapter 10, the Ministry of Health advised Statistics Canada on October 17, 2012, that it believed it (the ministry) had breached the agreement in relation to the CCHS data. It was likely on that October 17, 2012 call to Statistics Canada that Ms. Kislock or the lead investigator told the federal government that they wished to provide CCHS data to the RCMP, in the form of the CCHS disks that had been discovered in the locked desk drawer of one of the fired employees.

The principles underlying the importance of official statistical information provide context for why Statistics Canada would object to the ministry providing the CCHS data to the RCMP. Statistics Canada states that "Objective statistical information is vital to an open and democratic society. It provides a solid foundation for informed decisions by elected representatives, businesses, unions and non-profit organizations, as well as individual Canadians."[3] Statistics Canada has committed to maintaining the confidentiality of the information that it collects from Canadians. That commitment "is enshrined in the *Statistics Act* and the Agency's various policies and practices that frame its data collection, analysis and dissemination activities."[4]

The agreement between the ministry and Statistics Canada prohibited the ministry from sharing the CCHS data with third parties, except in certain enumerated circumstances, and providing the data to the RCMP was not one of them. The evidence indicates that Statistics Canada made it clear to the ministry that it was opposed to the ministry providing the CCHS data to the RCMP.

In an October 19, 2012 email to the ministry, Statistics Canada asked that, in accordance with the existing agreement, the ministry refrain from providing confidential data to third parties, including the police. Ms. Kislock then sent an email to Mr. Whitmarsh indicating that Statistics

3 Statistics Canada, "About us – What we do" <http://www.statcan.gc.ca/eng/about/about>.

4 Statistics Canada, "About us – Privacy impact assessments" <http://www.statcan.gc.ca/eng/about/pia/pia>.

Canada had agreed not to cancel the agreement but "they still have an issue with us providing the data to the RCMP for evidence." Mr. Whitmarsh replied to Ms. Kislock the same day, indicating that "If RCMP need we will supply it. Talk to our lawyers." Ms. Kislock replied that "We are waiting on our lawyers prior to responding. We are going to give the RCMP what they need – just looking for a way to do it that can sell to stats can."

Mr. Whitmarsh's direction to obtain legal advice was followed. However, the Ministry of Health did not follow that legal advice, which was to not provide the data to the RCMP.

Also on October 19, 2012, the employment lawyer, the privacy lawyer, and a Health and Social Services (HSS) lawyer had a conference call with the lead investigator. On this call, the employment lawyer learned about the issues relating to the CCHS data. The lead investigator indicated that the CCHS data was key to the RCMP investigation, but that Statistics Canada had taken the position that the data should not be released to the RCMP. On the call, it was agreed that the employment lawyer would arrange for an articling student to draft a memo regarding Statistics Canada's authority to prevent the province from sharing the CCHS data with the RCMP.

On October 19, 2012, an articling student prepared a memo about the risks of providing the CCHS data to the RCMP against the wishes of Statistics Canada. The employment lawyer forwarded the memo to the privacy lawyer and the HSS lawyer, noting that the articling student concluded, among other things, that "there may be some liability for provincial employees who release data to the police."

On October 22, 2012, the HSS lawyer and the privacy lawyer discussed the memo. The privacy lawyer followed up their discussion with an email noting that, after reviewing the memo, he remained of the view that the police should seek an order to compel production of the Statistics Canada data.

Also on October 22, 2012 outside counsel, hired to represent government in the grievance arbitrations, wrote to the employment lawyer and the PSA investigator to provide them with an overview of a recent Supreme Court of Canada case (the *Cole* decision), which dealt with the rights of an employer to search employees' computers and the potential impacts of the employer providing information to the police.[5] The *Cole* decision stands for the proposition that, where an employer obtains evidence as part of an employment investigation and subsequently provides it to the police without judicial authorization, an employee's right against unreasonable search and seizure may be infringed. That day, the employment lawyer forwarded a link to the decision to the various lawyers involved in the Ministry of Health and the Office of the Comptroller General investigations, noting that the case sets out risks associated with sharing information with the police. The PSA investigator sent an email to the employment lawyer and outside counsel indicating that nothing had been handed over to the police, and that she would email "everyone involved" to ensure that "nothing gets handed over until a warrant is issued." The employment lawyer replied to the PSA investigator noting that the police might already have received extracts of emails from the interim investigation report and that it might be prudent to check in with the police to see what their next steps might be in light of the *Cole* decision.

On October 26, 2012, the HSS lawyer wrote to the lead investigator as follows: "looks like the RCMP will have to get an order for the info. Otherwise we cannot give it to them. We can discuss on your return."

On October 30, 2012, the HSS lawyer forwarded a copy of the memo to the lead investigator, noting that "there may be personal liability for MOH employees who divulge info that was collected by Stats Can." The lead investigator replied that she thought the issue of personal liability arose for Statistics Canada employees rather than Ministry of Health employees. The HSS lawyer replied noting that Statistics Canada deems provincial employees to be Statistics Canada employees for the purpose of dealing with Statistics Canada's information. He wrote that although there is a question as to whether that would "hold up in court," the Ministry of Health did agree to that arrangement with Statistics Canada.

On October 30, 2012, the lead investigator had a phone call with an RCMP member about the CCHS data. The RCMP member provided us with his summarized notes of that conversation, which indicate that the lead investigator

5 *R. v. Cole*, 2012 SCC 53 [2012] 3 S.C.R. 34 [*Cole*]

"identified that the data was evidence of the fact that the person had possession of, and was transferring data (evidence of the offence)." On that call, they discussed the prospect of the RCMP seizing the disks and then seeking judicial authorization to keep the disks in its possession.

On November 14, 2012, the HSS lawyer sent an email to a junior lawyer in his group, noting the privacy lawyer's opinion that the RCMP should seek an order to compel production of the CCHS data, and asking that lawyer to research what kind of order or other authority would allow the Ministry of Health to release information to the RCMP. On November 15, 2012, the junior lawyer provided the HSS lawyer with a memo that set out, among other things, the statutory authority of the RCMP to obtain a warrant to search and seize and to compel production of evidence. The HSS lawyer told us that he believes he gave a copy of this memo to the lead investigator. The lead investigator did recall receiving a copy of the memo.

On November 16, 2012, there was a conference call respecting the CCHS data issue with the HSS lawyer, the HSS Supervising Solicitor, the privacy lawyer, the lead investigator and other members of the investigation team. The notes of the HSS Supervising Solicitor indicate that some of the discussion related to the view that the province needed to keep the CCHS data for the potential criminal investigation, and questions of how to deal with Statistics Canada's position that the data should be returned to them. Her notes indicated that the lead investigator said that the ministry could return the original CCHS data to Statistics Canada, but the linked CCHS data was another matter.

On December 3, 2012, an RCMP member called the lead investigator and made arrangements to pick up the disks containing the CCHS data from the Ministry of Health the following week. On December 10, 2012, the RCMP member attended at the ministry office, met with a member of the investigation team, and took possession of the CCHS data and some other information contained on the disks retrieved from the fired employee's desk. At this time, the RCMP did not have judicial authorization to compel the ministry to provide it with the CCHS data. The ministry provided it voluntarily.

On December 17, 2012, there was a teleconference with an RCMP member, two HSS lawyers, and the lead investigator about the impact of the *Cole* decision. Following the call, the HSS lawyer wrote an email to the privacy lawyer noting that "apparently the RCMP already has the StatsCan information" and that the call related to whether there were any risks to the government providing the RCMP with "information on the government servers in relation to government work being done by the various employees and contractors." The privacy lawyer wrote to the lead investigator and the HSS lawyers noting that if the information was "core biographical data" then the police should seek judicial authorization to obtain it, rather than the ministry simply handing it over, and suggested that one of the constitutional lawyers could provide further advice as to whether the nature of the information engaged *Charter of Rights and Freedoms* issues.

The HSS lawyer told us that the ministry's desire to provide the CCHS data to the RCMP appeared to trouble Statistics Canada more than the alleged data breach that the ministry was investigating.

The RCMP member's notes indicate that on December 17, 2012, the RCMP completed a Form 5.2 (Report to a Justice) under s. 489.1 of the *Criminal Code* allowing it to continue to hold the disks. On September 4, 2013 the RCMP returned the CCHS disks to the lead investigator.

II.6.2 ANALYSIS: PROVIDING INFORMATION TO THE RCMP

Despite both Statistics Canada's position and the advice of LSB lawyers, the lead investigator made arrangements on behalf of the Ministry of Health to provide the CCHS data, along with other information, to the RCMP because in her view it was "evidence of the fact that the person had possession of, and was transferring data (evidence of the offence)." However, no one we spoke with, including the lead investigator, was able to explain why it was important for the RCMP to have any of the information, including the CCHS data, when they had indicated they would not make a decision whether to investigate the matter until they had received a final report from the investigation team.

We spoke with a member of the executive at the Ministry of Health who said that she understood from the lead investigator that the RCMP had an active investigation and wanted the CCHS data for that reason. She said she

later came to understand that the ministry was "burying them with data" the RCMP did not require and that the RCMP was never investigating the events at the ministry.

The information that the Ministry of Health provided to the RCMP, when they were under no legal compulsion to do so, contained the personal health information of thousands of Canadians and was provided over the objections of the federal agency that gathers the information. The provision of the CCHS data to the RCMP raises a number of issues including whether, in doing so, the ministry breached its agreement with Statistics Canada. That is a matter for Statistics Canada to consider.

FINDINGS

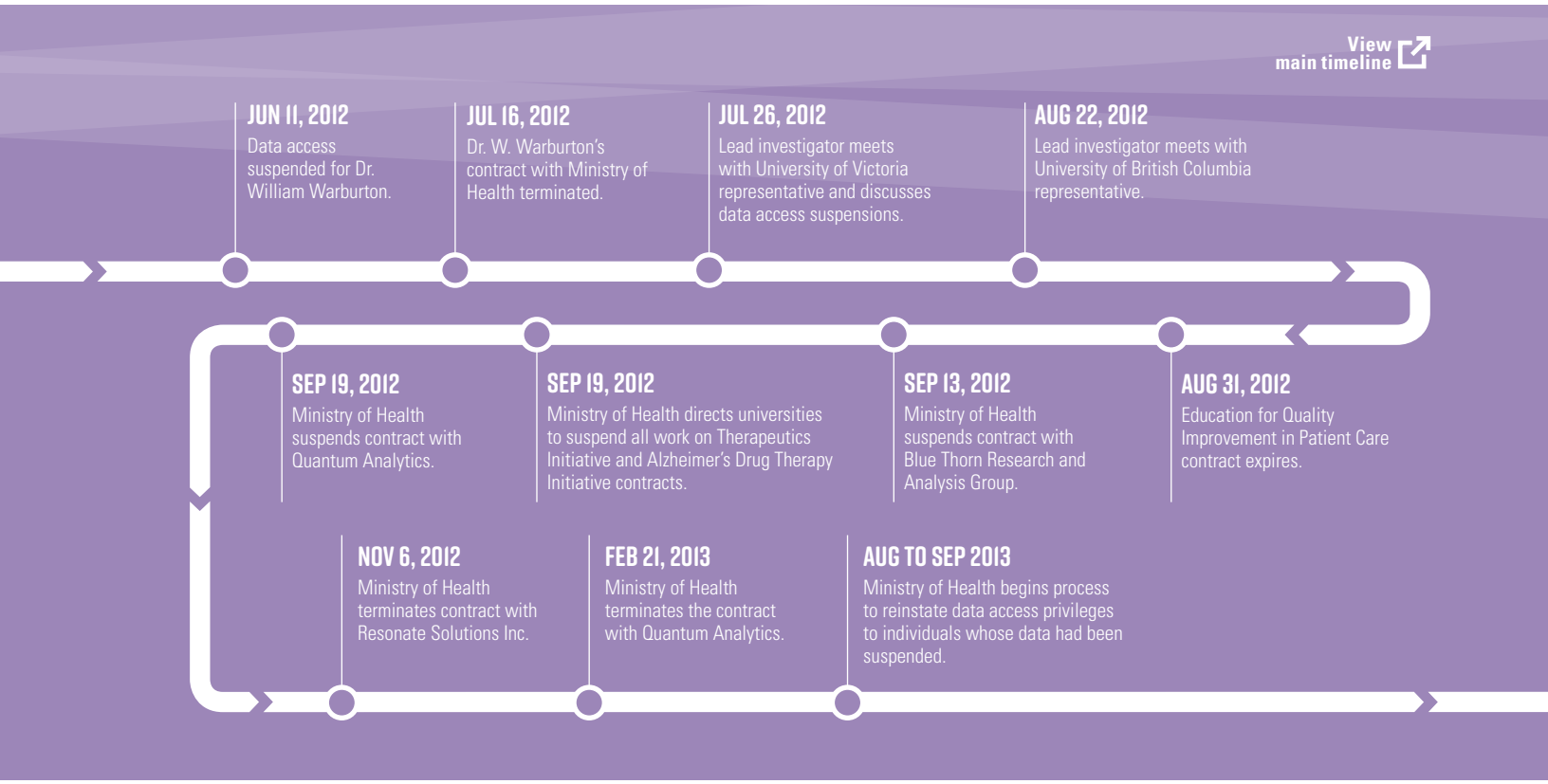
F 32 The grievances were settled on the basis of information provided by the province to the BCGEU before the government recognized that there were significant flaws in its own investigative process.

F 33 It was improper and contrary to legal advice for the Ministry of Health to proactively provide Canadian Community Health Survey data to the RCMP. It was also unnecessary because the RCMP had not decided whether to conduct an investigation at that time.

12.0 / MINISTRY OF HEALTH INVESTIGATION INTO CONTRACTORS AND EXTERNAL RESEARCHERS

12.1 INTRODUCTION

The Ministry of Health investigation team, at the direction of Deputy Minister Graham Whitmarsh, divided its investigation into two phases. In "Phase 1," the investigation focused on Ministry of Health employees resulting in the termination decisions in September and October 2012, and the later disciplinary measures taken against additional employees. In what was described as "Phase 2," the ministry intended to investigate a wide variety of contractors and researchers with respect to their access to and use of ministry data. For some contractors and researchers, the ministry developed a series of other data-related concerns that it believed needed to be investigated. Certain contract terminations occurred during Phase 1, such as that of Dr. W. Warburton. The investigation considered the contractors and researchers investigation in Phase 2, and as such we have decided to discuss these decisions together. It is this second phase of the investigation that we consider in the following pages.



The contractors and researchers who were investigated as part of "Phase 2", about 30 in all, came under investigation primarily because they were named in the initial complaint to the Office of the Auditor General or because they had professional connections to individuals named in the complaint. Once the investigation had identified potential subjects, it took steps to determine their data authorization and their access to and use of data, although those steps were incomplete. When it was unable to locate all of the agreements that it expected to find, the investigation team did not contact the contractors and researchers to try to track down appropriate agreements or understand their data access and use. Instead, based on mere suspicion, the Ministry of Health decided to suspend data access for most of the 30 contractors, impeding their ability to work – including their ability to complete deliverables under contract to the ministry.

In addition to suspending data access, the ministry decided to suspend, cancel or not renew seven contracts in various divisions of the ministry, including three sets of contracts between the Pharmaceutical Services Division and the University of British Columbia (UBC) and the University of Victoria (UVic). These contracts remained suspended for many months without any clear indication from the ministry what its concerns were or when the contracts and related work might be restarted. In addition, one contract, with Quantum Analytics, was suspended because the contractor was, through no fault of his own, involved in one of the privacy breaches described in Chapter 10.

Ms. Lindsay Kislock, as the Assistant Deputy Minister responsible for data access, appears to have been the unofficial executive lead of Phase 2. The information that the lead investigator was providing to ministry executives drove much of the decision making about which contracts should be suspended or terminated and which individuals should have their data access suspended. No Public Service Agency employees were involved in this phase of the investigation.

Phase 2 of the investigation happened simultaneously with the continuing investigation of ministry employees, which included dealing with the data breaches that were reported to the Office of the Information and Privacy

Commissioner and supporting the litigation and pending arbitrations. Weekly update summaries described some of the tasks being performed by the investigation team in Phase 2, which included summarizing data access, searching and reviewing relevant emails, and reviewing and summarizing computer drives.

One practical problem was that the more the team investigated without bringing issues to resolution, the more the work continued to grow. One of the investigators noted in June 2013, "The more emails we look for, the more things we find that need to be put in context with data access and potential issues." Meanwhile, the contractors and researchers had their data access suspended for over a year. The majority of those individuals were never interviewed by the ministry.

In February 2013, on the recommendation of the Legal Services Branch, Ms. Kislock determined that the ministry should retain outside counsel to assist with the second phase of the investigation, which was focused on contractors and external researchers. A lawyer in the Health and Social Services (HSS) group of the branch explained that this recommendation was based on discussions that he had with the HSS Supervising Solicitor about concerns they shared regarding the conduct of past interviews by the Ministry of Health investigation team. He said that they thought the past interviews were not "very fair" and more akin to "surprise interrogations" and that it would be a good idea to have a third party conduct further interviews.

The HSS lawyer said that he understood that the purpose of retaining outside counsel was to have the investigation carried out in an objective manner. He indicated that he had identified a concern that the previous phase of the investigation suffered to a degree from some of the hallmarks of tunnel vision, including holding investigative preconceptions, ignoring exculpatory evidence, and interpreting evidence in a manner that suggested a lack of objectivity.

Accordingly, outside lawyers were retained to assist government investigators with any further investigative steps. The services they were to provide under their February 13, 2013, retainer were as follows:

> *Provide legal advice and other legal services as required including gathering evidence, preparation and conduct of interviews along with government investigators of various persons and companies who may have breached contractual obligations and legally required privacy protection requirements.*

In August and September 2013, the ministry interviewed three of the contractors whose data access had been suspended. The two lawyers who had been retained in February 2013 attended and took notes but did not conduct the interviews.

At the same time, the ministry also sent letters to some of the individuals whose data had been suspended, requesting signed declarations with respect to data. At the conclusion of the interviews and after receiving the signed declarations, Ms. Kislock reinstated their data access. However, because Phase 2 of the investigation was never really completed as envisioned, some individuals we spoke with in the ministry continue to believe that there may have been inappropriate use of ministry data.

In this chapter of the report we describe the steps taken in Phase 2 of the investigation with respect to the conduct of certain contractors and researchers.

In this chapter in particular, we describe a number of longstanding contractual arrangements that had been approved and supported by executives in the ministry over many years. It appears to us that the investigators viewed these contractual arrangements as somehow improper. However, the investigators did not seek information from those individuals who had created and structured those agreements, nor did they properly assess the documentary records. In our investigation, we did speak with those individuals and did review the documentary records. We saw no evidence that any of the contractual arrangements investigated were anything other than consistent with government policy. While it was open to the ministry to take a different policy approach to health research, doing so through an investigation that singled out individuals was improper.

Ms. Kislock, the lead investigator and others described that they never completed Phase 2 of the investigation because their time and resources were otherwise occupied

with the ministry's continuing investigation of employees and supporting any related litigation and arbitrations. When the new Deputy Minister of Health, Stephen Brown, took over in June 2013, he directed the investigation to wind down. That included bringing Phase 2 to an end.

12.2 CONTRACTOR DATA SUSPENSIONS

About 30 Ministry of Health contractors and researchers were included in Phase 2 of the ministry's investigation. However, before beginning to investigate these individuals in earnest, the ministry suspended their data access. This was done out of an abundance of caution and without any supporting evidence. As described in Chapter 7, the first external people to have their data suspended were Dr. Colin Dormuth on June 7, 2012, and Dr. William Warburton on June 11, 2012.

The next several contractors to have their data access suspended were those associated with Dr. Dormuth, through their work on the Therapeutics Initiative (TI, with the PharmacoEpidemiology working group [PEG]), the Alzheimer's Drug Therapy Initiative (ADTI) and Education for Quality Improvement in Patient Care (EQIP) contracts.[1] Their access was suspended on July 17, 2012, without any notification. One more contractor also associated with PEG and EQIP had his data access suspended on July 30, 2012, again without notification. Furthermore, the employees of the contractors never received any direct notification from the ministry of the decision to suspend their data access or reasons for that decision.

Other data suspensions for contractors followed when the ministry suspended data access for Blue Thorn associates on September 13, 2012. While the ministry sent notification of the suspensions to the lead associate, it did not contact individual associates. The Blue Thorn contract and data suspensions are discussed further in section 12.4.3 below.

The lead investigator was aware of the multiple deficiencies in the Ministry of Health's data access systems, some of which she had described in completing the work on the Timely Access review for Ms. Kislock. The lead investigator also was aware that data access processes had changed over time and that some data access had been authorized prior to the use of Information Sharing Agreements (ISAs). Despite this, she and the team failed to take this knowledge under consideration. They did not take reasonable steps necessary to inform themselves about the contracts and agreements authorizing data access. Not speaking to the affected individuals was a significant failing.

12.2.1 DR. COLIN DORMUTH AND TI, ADTI AND EQIP DATA SUSPENSIONS

Dr. Dormuth and two of his colleagues (who we refer to here as Contractors 1 and 2 because they have not been previously publicly identified) were the focus of the ministry in Phase 2 of the investigation. With the exception of the Blue Thorn contractors, the contractors who lost data access during this time were associated with the TI, ADTI and EQIP contracts.

As the lead investigator told us:

> *Most of the work that we did … was relative to the relationship; right? That was our focus. We were never asked to do broader, does every person in government, in contract have appropriate data access; right? We always scoped it to the relationship math in terms of the initial identification.*

Because the ministry viewed Dr. Dormuth and his two colleagues as a trio and because they appeared to be central to the ministry's Phase 2 investigation, we discuss them here in detail. We do not discuss in detail the concerns about the other TI, ADTI and EQIP contractors largely because the concerns were themselves not detailed. The investigation team was generally concerned that data provided under the three contracts was being used inappropriately or without authorization. The investigation team had no evidence of this at the time of the data suspensions and did not gather evidence of this throughout the year or more of the Phase 2 investigation. There was also no allegation or evidence of a precise "incident" involving a data breach.

In 2012, Dr. Dormuth was a member of the Faculty of Medicine at UBC, working at the TI. He was the head researcher of PharmacoEpidemiology working group (PEG)

1 See Chapter 4 for a description of each of these programs.

within that initiative, responsible for analyzing "linked administrative data in British Columbia from PharmaNet, Medical Service Plan, and hospitals to answer important questions unaddressed in clinical trials." Dr. Dormuth was a highly respected researcher who had a longstanding relationship with the Ministry of Health.

Dr. Dormuth first came under suspicion by the ministry's investigation team because he was one of the five individuals named in the complaint to the Office of the Auditor General. He was named because he was involved in a variety of ministry contracts for health research. He was the lead researcher for PEG's deliverables under the TI's long-term service contract with the ministry. He was a subcontractor for EQIP and in one of five ADTI studies. He was also selected as the British Columbia representative for the Canadian Network for Observational Drug Effect Studies (CNODES), which is a federal collaborating centre of the Drug Effectiveness and Safety Network. In addition to his contractual relationships with the ministry, Dr. Dormuth had a long professional relationship with Dr. Malcolm Maclure, who was himself under investigation.

As mentioned, Dr. Dormuth and Contractors 1 and 2 were most often viewed by the investigation team as a group. The allegations against one were levelled against all three. It appears that the reason for grouping these three together was the fact that they, at one time, were all partners of a consulting firm called PFIA, through which they provided their contracted services in data analysis. PFIA was the main subcontractor to the EQIP contract.

As discussed in Chapter 7, Assistant Deputy Minister Barbara Walman suspended Dr. Dormuth's data access on June 7, 2012, by way of letter. Assistant Deputy Minister Lindsay Kislock then decided to suspend data access for the other two members of PFIA: for Contractor 1 on July 17 and Contractor 2 on July 30. As a result of these suspensions, data logins for PEG (which included access for the Drug Safety and Effectiveness Network [DSEN] and ADTI projects) and for EQIP were affected. Other contractors with data access for those projects also lost their access in July. The lead investigator made recommendations to the Assistant Deputy Ministers for data suspensions on the following basis:

> *… because we couldn't find the appropriate trail for all the data access, we couldn't identify who had access to what and where for some of these contracts. Again, that took time to find as we moved forward, but based on the time that we were given for a security provision our recommendation was that we revoke and reissue to get a good understanding of who has access to what.*

We interviewed both Ms. Kislock and Ms. Walman about the decisions to suspend data access to Dr. Dormuth and his colleagues. Neither was able to articulate a clear rationale for this decision. Prior to the suspensions, there was no specific allegation that the contractors had misused data. It is clear that the data suspension decisions were not based on an assessment of the data access in question, the security measures in place to protect that data, or the value of the work being done under the relevant contracts. As we described in Chapter 7, Ms. Kislock, who took responsibility for the decision to suspend data access, explained that evidence was not necessary.

> *I made my decision to suspend people's data access on the recommendation from the investigative team, right? We suspended access for people whose name appeared in the course of the investigation. My general approach was to suspend access and then figure it out. To limit the risk, I suspended access, knowing that an investigative process would go through and determine whether people should have access.*
>
> *…*
>
> *That was my overriding principle in making decisions. Suspending data, people – we suspended data for people whether or not – it wasn't – they weren't guilty of anything. If there was a concern, the data was suspended.*

Other than Dr. Dormuth, none of the individuals associated with the TI, ADTI and EQIP contracts were notified of their data suspensions or given reasons. The lead investigator expected UBC would notify the contractors directly on behalf of the ministry. The lead investigator communicated this to UBC:

> *Hi [UBC employee] … when we spoke, we discussed the suspension of data while we continue the review and that UBC through your office would be advising the researchers in PEG and related*

> *areas who are affected. I thought you were going to discuss with Colin for him to advise his team. It appears from the note below that some are not notified. Could you let me know status of notification to Colin or his team?*

After the ministry notified him that his data access was suspended, Dr. Dormuth immediately retained legal counsel, who wrote to Ms. Walman on June 14 and 15, 2012, requesting information about the complaint referenced in the data suspension letter. The letter stated that once Dr. Dormuth's legal counsel received that information, they would advise of his availability to meet with the ministry. The ministry engaged both the HSS and privacy lawyers to respond to this and other letters.

The HSS lawyer responded to Dr. Dormuth's counsel on June 21, declining to engage with Dr. Dormuth "as that is the party with whom the ministry has contracted in regard to this matter, the ministry has indicated to me that it will be dealing directly with the University of British Columbia."

Contractor 1 learned that the ministry had suspended his data access when he tried to log in on July 18, 2012. He immediately contacted the ministry and spent several weeks communicating with data access staff to try to determine what had happened, why his access had been cancelled and whether there were problems with their contracts or deliverables.

He also contacted the Executive Director of the ministry's Pharmaceutical Services Division (PSD) who managed the affected contracts to explain that the data suspension would make the contractors unable to meet their deliverables. The contractor asked a series of questions about the data suspension and what it meant for the project. He received no response, in part because the Executive Director had no information about the concerns that precipitated the data suspensions, and Ms. Walman did not clarify the rationale for the decision with her staff.

The contractor followed up again on August 3, 2012, attaching to his email a quarterly report showing that EQIP was on target to meet its deliverables by August 31, 2012. In his email, the contractor notified the ministry that "as of July 17, 2012 the Ministry of Health suspended EQIP access to Ministry of Health administrative claims data … as a result, the Implementation Team is unable to complete the final deliverables." The Executive Director responded, copying Ms. Walman, telling the contractor, "with regards to your question about data access being shut down, all that I know is that the review of PSD contracts and access continues."

Members of the investigation team and Ms. Kislock explained that Phase 2 was never completed, meaning they were not able to determine whether there was any wrongdoing. The ministry kept these individuals' data suspended for over a year without taking any real steps to determine whether there was any merit to the concerns that precipitated the suspensions.

Although the ministry did not interview Dr. Dormuth or Contractors 1 and 2 until the summer of 2013, there were some written communications between the three and the ministry. All three received data demand letters from Ms. Kislock on November 5 and 6, 2012 (as described in Chapter 10).

The letters themselves caused significant alarm, as all three contractors depended on accessing ministry data to perform their work. The ministry's rationale for sending the letters was that they were necessary to protect the personal information of British Columbians and to demonstrate to the Office of the Information and Privacy Commissioner (OIPC) that they were taking the appropriate steps. However, Dr. Dormuth and his colleagues had no involvement in the three incidents reported to the OIPC, nor were their contracts related to the incidents. The ministry cast its net too wide when it sent the letters. Given the ministry's lack of evidence of inappropriate disclosure or misuse of personally identifiable data by any of these three individuals, it was unreasonable to send them such letters.

Contractor 2 responded to his data demand letter on November 7, 2012, providing the ministry with assurances with respect to ministry data storage and use, including stating that he did not store any personally identifiable data outside ministry databases and that all documents relating to his Healthideas contract were securely destroyed from his computer.

Dr. Dormuth (through his legal counsel) and Contractor 1 responded to the demand letters on November 14, 2012, stating that the ministry's assertion that they were in

possession or control of ministry property was too vague. Their letters provided a variety of assurances, including confirming that they did not have any data or records that contained third-party information in their possession or control. They confirmed that no third-party information existed on any of their computers or devices.

Contractor 1's letter also explained that since his data access was disabled, "I have been effectively terminated from all consulting work with the Ministry, with no explanation. This has caused me financial loss and irreversibly tarnished my reputation." The letter concluded by requesting information related to the discontinuation of his access for PEG, EQIP and Healthideas and to his removal as a Resonate Solutions subcontractor on the Healthideas contract (discussed in section 12.4.1, below).

Though the ministry's lawyers worked on various draft responses to Dr. Dormuth's letter, it does not appear that the letter was ever sent. We found no evidence of the ministry responding to any of the contractor's letters.

Despite the assurances from Dr. Dormuth and his colleagues, the ministry maintained its data suspensions for 10 more months.

12.2.1.1 ANALYSIS: DR. COLIN DORMUTH AND TI, ADTI AND EQIP DATA SUSPENSIONS

After reviewing the information that the ministry had available to it, and interviewing members of the investigation team and the contractors, we have concluded that the ministry had no evidence that Dr. Dormuth or his colleagues misconducted themselves or misused ministry data. The ministry had a mere suspicion that Dr. Dormuth and his colleagues might be misusing data based on the fact that they had authorized access to a significant amount of data. The investigators viewed this as a risk, which was amplified – in their view – by the fact that the investigation team struggled to locate the agreements authorising access that the investigators expected to be in place.

As we described in chapter 7, there may be times when the ministry must act quickly to suspend data access before it has time to conduct an investigation into a suspected data breach. However, the ministry must have some evidentiary basis for its actions. In this case, the ministry had no evidence that Dr. Dormuth, his colleagues, and the other individuals associated with the TI, ADTI and EQIP contracts, had improperly disclosed or misused data. Therefore, the data suspensions were not justified. The ministry did not provide reasons for any of these data suspensions. This was unfair as it did not allow the contractors to understand why the decisions were made or give them information on which to refute or appeal the decisions.

In the circumstances, it was inadequate to only notify the universities that the contracts were suspended and not inform the individuals working on those agreements that their data was suspended. The individuals who had their data access suspended were not able to access ministry data during the period of suspensions even though they had been granted access under other contracts. That is to say, the individuals who were party to these contracts were under review and the ministry's decision to suspend their data access impacted their interests.

The overarching allegation against all three of the contractors was that they may have used data for unauthorized purposes. The investigators maintained this suspicion because they did not personally understand or know what was happening with the ministry's data

The investigators had a duty to inform themselves about the data access that was causing them concern. Absent any evidence of inappropriate use or disclosure of that data, the ministry cannot reasonably suspend someone's data access based simply on the risk that data could theoretically be misused in the future. This risk exists any time data is shared with anyone. However, the risk in these cases was mitigated by the fact that each of the three contractors had a long working relationship with the Ministry of Health as employees, contractors and researchers and were well respected in their fields.

The lead investigator was informed that Dr. Dormuth and the members of PEG accessed ministry data through unique logins that were partially auditable. Even more important to assessing the seriousness of the risk was the fact that the data access for all of their research-related work (TI, DSEN, ADTI and EQIP) was de-identified (meaning it included no names, Personal Health Numbers [PHNs] or addresses, and only partial birthdates and postal codes) and therefore could not be connected to any particular individual. Such information was readily available in the

Information Management and Knowledge Services Branch of the ministry.

When we spoke to Dr. Dormuth, he described his access through his PEG and EQIP views in Healthideas as follows:

> *… those were the first real efforts of the ministry of putting in a real good security solution of role-based access and so the kind of work that I did, and we did, did not require knowing someone's real PHN. I just needed to be able to link the same patient to the same patient in two different data sets. I didn't need to know who that person was. So we had role-based security since … 2006 or '05, something like that.*
>
> *And from that point forward everything would have been done with de-identified data. Virtually every paper I was on as lead after 2004 would have all been done with … de-identified information.*

We heard from many of the investigators about the intense time pressure and limited resources in conducting the investigation throughout the summer of 2012 and how difficult it was to find all of the information that they needed. However, resource pressure is not sufficient justification for suspending data access without evidence of any wrongdoing and keeping it suspended for over one year. If investigatory resources were the issue that problem needed to be addressed so that data suspensions could be lifted or confirmed in a reasonable time frame. On the other hand, if the delay was arising due to lack of knowledge of the details underlying the data access held by these contractors, that needed to be addressed. The ministry had clear documentation in its files that:

- the contractors were authorized to have access to administrative health data; this authorization had come from the Director of Data Access, Research and Stewardship and the PharmaNet Stewardship Committee
- the ministry had provided each individual on the subcontract with their own unique logins and approved "views" of the database that were specific to their work
- the contracts had Privacy Impact Assessments and/or information sharing agreements (ISAs) for their contracts that explained the security measures in place to protect the data
- in the case of EQIP, where the ministry had not finished drafting the ISA, the ministry had given explicit written direction to its staff to continue the contractors' data access, and to the contractors to continue using the EQIP data for EQIP work
- all those involved on the TI/PEG, DSEN, ADTI and EQIP initiatives were contractually required to follow strict privacy and confidentiality measures

It appears that the suspension decisions were made without a proper understanding of Dr. Dormuth's and his colleagues' data access. For example, even a year after the data suspension, it appears key individuals in the ministry did not understand that the contractors' data views for TI/PEG, DSEN, ADTI and EQIP were de-identified views, despite being informed of this early in the investigation.

Although Mr. Whitmarsh directed the team to focus on the employee matters until the terminations were completed, by the fall of 2012 the terminations had occurred and the investigators had begun to turn their attention to the universities. At this time, they could have contacted the contractors and sought further details, such as copies of the contracts or information sharing agreements (ISAs). Had they approached their investigation in an organized and thorough manner, there is no valid reason why the investigators responsible for looking at the data issues could not have determined, relatively quickly, whether the data access was authorized and the contractors complying with their requirements to maintain the data securely and confidentially.

Beyond the general misapprehension that Dr. Dormuth and Contractors 1 and 2 were using data inappropriately or without authorization, the investigation team also speculated that they may have been involved in a privacy breach involving a researcher from Harvard University. As part of its work, the team reviewed emails going back to the early 2000s when Dr. Dormuth and Contractor 1 were employees at the Ministry of Health. Contractor 2 was a contractor to the ministry in a senior analyst position at the time. The investigation team discovered emails involving Dr. Dormuth, Contractors 1 and 2 and a researcher at Harvard and these raised concerns. The

team believed the contractors might have provided data to the researcher without authorization. Also of concern was that the researcher was in the United States, and in 2012 the *Freedom of Information and Protection of Privacy Act* (*FOIPPA*) prohibited storing personally identifiable data outside Canada. In our view this concern was unfounded.

In the early 2000s, the Ministry of Health entered into an agreement with a Harvard researcher to conduct an evaluation of the ministry's newly formed Fair PharmaCare program. The Harvard researcher was to receive PharmaNet data from the ministry for this research. The rules under *FOIPPA* for storage of personal information outside Canada did not exist at the time. Dr. Dormuth and Contractors 1 and 2 were involved in extracting and providing the data to the Harvard researcher, and were directed to do that work in their ministry roles. There was evidence available to the investigation team demonstrating that people from senior levels of the ministry were involved in organizing, approving and facilitating the data transfer. Moreover, there is no evidence that any data was transferred after the *FOIPPA* provisions changed.

This example demonstrates two common problems in relation to the investigative approach to the contractors. First, those on the investigation team responsible for looking into the data issues did not interview the individuals about the allegations against them and therefore missed information vital to understanding the concerns. Second, the team did not consider the changing context, including that legislation, policies and practices had evolved over the years.

Another concern of the investigation team, and especially of the lead investigator, was that Dr. Dormuth and some of his colleagues had been copying data to create their own database and were storing it on a server. The investigation team had no evidence that this was happening. Rather, they had a concern that Dr. Dormuth was doing something unauthorized with data because he had multiple data accesses and a professional relationship with Dr. Maclure, who was also under investigation. The investigators had an unsupported theory that data was being sold and possibly leaving the country. They believed they had found proof of this theory when they discovered a series of emails referring to an EQIP "server."

On September 18, 2012, the lead investigator flagged an email about EQIP that was sent by Dr. R. Warburton to a staff member. It said, in reference to the paragraph below: "We need to ensure this is accurate after the move. I assume the bit about the server closet location will probably need to change. Can you update for me?":

> *Physical Security*
>
> *No detailed or sensitive data will be held or accessed outside Ministry of Health Services' servers. The only data with non-coded personal identifiers will be physicians' contact information and participation status, which are stored on the EQIP password-protected database server in the EQIP Implementation Team's office … The premises are protected by a Price's Alarm system, the office is locked with keys and an entry password code, and individual offices are locked with keys. The server is housed within a locked closet within the office, and infrequent visits into the closet – which also houses some long-term storage items such as Home Blood Pressure Monitors (physician participation incentives purchased by EQIP) – are recorded in an access log.*[2]

In forwarding this email to another investigator, the lead investigator remarked, "This explains where some of the data used by Colin and Malcolm may be stored."

Through the remainder of the investigation, the investigators responsible for looking into the data issue took no practical steps to determine whether such a server existed. Instead, the team spent considerable effort searching for additional email evidence that might confirm the existence of such a server, including seeking legal advice and drafting demand letters for return of any ministry data collected, accessed or stored on an EQIP server.

No one followed up to ask specifically about the server until August 2013, when the contractor explained that the "server" was in fact only a laptop that was storing a mailing list of physicians who had consented to participate in EQIP. When we interviewed an expert in the ministry's administrative databases, he explained that it would be an insurmountable task to create a database such as the one that the investigators had envisioned, because of its size:

2 This paragraph is from an information sharing agreement that Dr. R. Warburton was working on at the time.

> *It would not be a simple matter to, you know – so just guessing. PharmaNet would probably have in the neighbourhood of 50 million rows added to it every year; MSP would probably be in the neighbourhood of 80 million rows every year; hospitals is a smaller data set, but this would not be a trivial task to do this.*

Certain members of the investigation team developed other data-related concerns over time. The team compiled the concerns in spreadsheets and tables and added to them as they continued to collect emails during their email review. The concerns included sharing login credentials, overusing VPN access and logging in from various terminals. Listing the existence of concerns was not in itself a problem. However, rather than taking straightforward steps to determine whether there was any merit to the concerns, the team just kept adding items to their list. The result was a list of unsubstantiated concerns that were never truly investigated. Nevertheless, by virtue of a matter being identified as a concern, it began to be viewed by some as having merit.

Another set of concerns raised by members of the investigation team related to publications authored by Dr. Dormuth and his colleagues. Dr. Dormuth had written numerous academic publications that relied on his legitimate use of the ministry's administrative health data. The evidence we reviewed showed that these publications were completed in accordance with all contractual requirements. Most often, these requirements were that Dr. Dormuth submit a proposed publication to the ministry so that it would have the opportunity to ensure the data was used appropriately in the publication.

By failing to audit or verify the precise nature of Dr. Dormuth's data access, the data that had been used in the publications, and the fact that these publications had been pre-approved by the ministry, the investigators considered Dr. Dormuth's publication history as "proof" that he – and by extension the TI – had misused their data access contrary to their obligations to the ministry. This allegation was not borne out by the evidence.

In August and September 2013, Dr. Dormuth and Contractors 1 and 2 were interviewed by Ms. Kislock and Manjit Sidhu, the Ministry of Health's Assistant Deputy Minister of Finance and Corporate Services and Executive Financial Officer. In these interviews, the ministry received clear responses to several of its concerns, which could have been put to rest over a year prior had the investigators been allowed to interview them. We asked Ms. Kislock about her interview with Dr. Dormuth. She said:

> *… we seemed not to agree on one point but – but at the end of the day, there wasn't enough to – raised in the interviews to continue the data suspensions. So, you know, we – I believe that each one of them signed some statement saying they didn't have data in their possession and then that was the end of it.*

When we asked why the meeting could not have occurred a year earlier, she told us:

> *… in hindsight I can think of no reason that it couldn't have occurred. Right? Like, it's easy for us to say now. Because we – we, and we were, right? Focussing on work group one, then moving to work group two. Could you have parallel tracked that and got a different group working on group two and had – like, yeah. In retrospect. Like, it always seemed like we were going to get to that and then getting to that didn't – you know, that was September and we didn't really get to that until the spring and early summer.*

In our interviews with Dr. Dormuth and his colleagues, they were able to provide much the same information as they provided to the ministry in their interviews, as well as copies of requested contracts, data sharing agreements and publication reviews. We spoke with Dr. Dormuth about his experience in the interview. He told us:

> *… there was numerous papers where they said you didn't tell us about this paper and I was able to dig up, I think, the emails for all of them that were done by us – not Harvard – for all of them except for the 2004 paper which was just so long ago that I don't have the emails that I would have – they would have – I mean, which they for sure would have known about. So their own data access services branch that got these emails with the papers before publication, they weren't even [able] to look up their data access services account to see if these were sent in. And hopefully*

the tone of those email questions, hopefully you sensed, well, these people aren't trying to understand everything, there's an element of what can we throw at this guy to trip him up. For example, you didn't submit this paper to us, you broke the rules, or whatever.

In summary, given our assessment of the ministry's:

- lack of evidence
- failure to conduct a thorough and thoughtful investigation in a timely way
- failure to afford Dr. Dormuth and his colleagues an opportunity to know the case against them and to respond to the allegations until about a year after the suspension

we have concluded that the length of the data suspensions was unreasonable and unfair to Dr. Dormuth and Contractors 1 and 2. It also was unfair to a number of the contractors working on the TI, DSEN, ADTI and EQIP projects. The data suspensions had a negative effect on some of the individuals who lost their livelihoods for a year or longer. It caused personal and professional stress and tarnished reputations. One of the PEG contractors described the loss of productivity in the TI offices as affected staff spent months trying to figure out what they had been accused of doing.

The data suspensions also had a negative effect on some Ministry of Health research projects. More details of the impacts of the suspensions on individuals and public health research are discussed in Chapter 17.

12.3 SUSPENSION AND TERMINATION OF PHARMACEUTICAL SERVICES DIVISION CONTRACTS WITH UNIVERSITIES

As described above, Phase 2 of the Ministry of Health's investigation also led it to focus on specific contracts, resulting in suspensions or terminations. In this section of the report we focus on contracts between PSD and the University of British Columbia (UBC) and the University of Victoria (UVic).

In her March 2012 complaint to the Auditor General, the complainant made allegations about the Therapeutics Initiative (TI). During the ministry's initial review of the complaint in April and May 2012, the complainant brought forward additional allegations related to data access and use in relation to the Alzheimer's Drug Therapy Initiative (ADTI), TI and a third program, Education for Quality Improvement in Patient Care (EQIP). Each of these programs was carried out through longstanding contracts between the Ministry of Health and UBC and UVic.

The first action the ministry took with respect to these concerns was to suspend data access for particular individuals involved in the contracts (as described in Chapter 7 and above). Later in the investigation, the ministry suspended or cancelled the contracts. Because these contracts were with universities, much of the communication occurred between the ministry and university representatives. In the following section, we describe those communications as the universities tried to obtain information about the nature of the allegations and investigation and to determine an appropriate response.

12.3.1 MINISTRY OF HEALTH'S INTERACTIONS WITH THE UNIVERSITIES

In July 2012, the investigation began looking into how the TI and other contracts with the universities could be dealt with during the investigation.

12.3.1.1 PROVIDING THE UNIVERSITIES WITH INFORMATION ABOUT THE CONCERNS

It is unclear from the evidence when the ministry first gave the universities notice that its investigation included the universities' conduct under agreements between the universities and the ministry. The universities may have been notified as early as July 3, 2012 but we were not able to confirm this. It appears the ministry notified only certain individuals who were subject to the review and not the institutions themselves. Further, over the course of the review, the universities were never provided with written notice of specific allegations against the universities and were not provided sufficient particulars of the allegations against specific individuals who were their employees or faculty members. This is problematic in light of the HSS lawyer's position expressed to Dr. Dormuth's counsel, which was that the ministry would not deal directly with

the individuals, but only with the universities who were parties to the agreements.

On July 11, 2012, the lead investigator sent an email to the HSS lawyer asking whether the ministry could suspend, rather than cancel, its contracts with the universities pending the completion of the investigation. On July 12, the HSS lawyer replied:

> *They could be [suspended] by way of negotiation and mutual agreement with the universities. Without agreement, it could mean it would be perceived as a breach. I would think that the senior people (VP level) at UBC and UVic would be amenable to resolving this when they understand the potential impact and might be willing to suspend things for a period of time.*

According to the ministry's records, certain members of the investigation team met with the universities in person about the investigation in July and August 2012. We did not locate any notes or agendas maintained by the ministry about these early meetings. As well, the lead investigator communicated with representatives from the universities by phone.

In an email dated July 23, 2012, Ms. Walman described the outcome of the early meetings with UBC and UVic. She wrote, "we provided them with some background to explain why we suspended data access while investigation is underway. [The lead investigator] will meet with them again shortly to review the current contracts and data access to ensure we are all on the same page and the correct paperwork is in place to support the work."

On July 26, 2012, the lead investigator and a UVic representative had a discussion about the ministry's investigation. The UVic representative told us that at that meeting the lead investigator explained that the ministry had suspended data access for three people associated with UVic and that the ministry was conducting an investigation triggered by an anonymous complaint to the Office of the Auditor General.

The UVic representative followed up on the discussion with an email to the lead investigator on the day after the meeting. In the email, the UVic representative indicated UVic's willingness to assist in the ministry's "extensive internal review." The UVic representative sought information about the datasets included in the data suspension, as well as a time frame for the data suspensions. She wrote, "You will understand that we are concerned about the impact on the project of any suspension of data access, including the potential for delays in the delivery on our commitments under the Min of Health agreement." She also asked whether the lead investigator could share whether the ministry had any concerns about specific UVic processes or research personnel. UVic did not receive a written response to this request.

Also on July 27, 2012 the lead investigator reported to Ms. Kislock and Ms. Walman that her discussion with UVic went well, and that "they are supportive and prepared to work with us ASAP." Similarly, on August 22, 2012, the lead investigator wrote to the HSS lawyer indicating that she had just had a "great meeting" with UBC, and that UBC wanted a formal letter regarding the suspension of contracts but had already provided the ministry with some information and wanted to work with the ministry.

On September 10, 2012, the lead investigator and another member of the investigation team met with UVic. The lead investigator showed the UVic representatives the Relationship Web. When she spoke with us, the UVic representative said the Relationship Web was difficult to interpret because it showed "a complexity of the interrelationships that weren't set up by any university process" and the investigators had a "different way of looking at relationships" than UVic did. The representative understood that the ministry's concerns were about Dr. Maclure's familial connections to both Drs. Warburton and the fact that Dr. R. Warburton held a one-half-time position with the ministry.

At this meeting, UVic learned that the ministry was broadly concerned about unauthorized data transfers, primarily in relation to Mr. Roderick MacIsaac, but as discussed in Chapter 10, the ministry did not provide UVic with sufficient information to be able to follow up.

The UVic representative told us that following the September 10, 2012 meeting, UVic was concerned that the ministry's investigation team did not have a clear understanding of Dr. Maclure's relationship with UVic (and his other cross-appointments) and the relationships amongst the researchers. The UVic representative told us that she was concerned that the ministry did not appear interested

in UVic's perspective on the matter. At the meeting, UVic requested that the ministry describe in writing the scope of the review and the information that the ministry was seeking so that UVic could prepare a response. Not having received this information, on September 16, 2012, UVic again asked the ministry when it could expect to receive more detailed information about the ministry's concerns. By this time, UVic was fielding increasing questions from its own researchers which it was unable to answer. The UVic representative told us that they gleaned more information from reading a letter to the editor written by the Minister of Health than they received from the ministry directly.

UBC also lacked particulars about the nature of the ministry's investigation. One representative from UBC understood, based on the meeting with the investigation team, that the investigator's "primary concern" was proper access to and use of ministry data with "secondary issues related to conflict of interest and the appropriate processes for subcontracting."

12.3.1.2 CONTRACT SUSPENSIONS

On September 19, 2012, the universities received their first formal written communication from the ministry with respect to the investigation. The letters, based on draft letters prepared by the HSS lawyer in August, were sent from Ms. Walman to UVic and UBC.

The letters to both universities included the following language:

- *The ministry instructs you to suspend work on the contracts pending the results of the investigation into them*
- *Until the investigation is resolved, no contracts will be renewed and no work is to continue on them*
- *The ministry is aware that the contracts may not be completed and does not expect the work product specified in the agreements to be completed at this time*
- *The ministry appreciates the universities' cooperation with its review*

The letter to UBC also said that the TI, ADTI and EQIP contracts were suspended. The UVic letter also said that the ADTI contract was suspended.

12.3.1.3 ANALYSIS: INITIAL COMMUNICATION WITH THE UNIVERSITIES

The process that the ministry followed in its initial communications with the universities was unreasonable.

There is a dearth of documents about these early discussions with the universities. As noted above, we could not locate any meeting notes or written correspondence relating to these discussions. The absence of clear written information was one of UVic's primary complaints in relation to the challenges that it had in determining the nature of the allegations against it or its employees and in responding to the ministry. The absence of documentary evidence also created challenges for our office's investigation in terms of being able to establish the facts relating to the communications between the universities and the ministry in the summer of 2012. What is clear is that the ministry did not communicate adequately with the universities regarding the nature of the allegations, the scope of the investigation or what precisely the ministry was seeking in the way of information.

The ministry did not provide the universities with a timeframe or specific reasons for the contract suspensions. The contracts in question had no provisions for suspension. We note that it was open to UBC and UVic to take the position that the ministry was in breach of its contractual obligations when the ministry indicated its intention to suspend the contracts. Instead, however, both universities agreed to cooperate with the ministry and cease work under the agreements while the ministry conducted its investigation.

It was not reasonable for the ministry to decline to provide information in writing to the universities which set out the nature of its concerns, the information it was seeking, and the contractual provisions on which it relied on in seeking such information. Further, it was not reasonable for the ministry to not provide direct notice to the universities that it had suspended the university contractors' data access, especially once it took the position that it would not deal with the individuals but only directly with the universities as parties to the contracts.

The ministry's piecemeal and informal approach to requesting information from the universities meant the universities were unclear about the nature of the allegations against them or their employees or faculty members, about the nature of the information the ministry was seeking, and about the universities' authority to provide the information sought. This approach lacked the formality and diligence that the ministry should have exercised in conducting a large and complex investigation.

12.3.1.4 FURTHER COMMUNICATIONS WITH THE UNIVERSITIES

When the Office of the Comptroller General's Investigation and Forensic Unit (IU) began its investigation in October 2012, the Ministry of Health investigation team and the IU decided to approach the universities together, on the basis that there was overlap in some areas of their investigations and a combined approach avoided having to ask the universities for the same information twice. However, each team had different authority to obtain information from the universities.

The first joint meeting between UVic, the IU and the ministry took place in February 2013. The IU followed up by letter dated February 22, 2013, in which the IU requested specific financial records and policies and assistance in accessing email records held by the universities.[3] The IU Director sought the lead investigator's input on the letter and she contributed some suggested changes.

This was the first request that government made to UVic which identified with any degree of specificity the information it was seeking. A nine-month period had passed between the start of the ministry's investigation and government's first written request for information. During that time, contracts were suspended and research under those agreements had ceased. Once the IU put the information requests in writing, the universities responded to the requests in a timely and complete way.

A further meeting between UVic, the Ministry of Health and the IU was arranged for March 26, 2013. The day before the meeting, the lead investigator sent an email to the ministry's privacy lawyer to brief him on the purpose of the meeting:

> *The meeting tomorrow is to advise that we need to review data access and storage at UVIC with those identified under contracts and research agreements*
>
> *We need to have access to emails and file info re data that we are aware of through emails that may be at UVIC including the CCHS breach data and servers with data from contractors and fired employees*
>
> *We need to have info on who works on contracts and research and are they listed on our files and have appropriate agreements signed*
>
> *We need to find out how data is stored, accessed and shared*
>
> *For ex employees we need to track specific info related to what you saw on the data access return letters sent with declarations*

The privacy lawyer responded as follows:

> *Has anyone discussed with UVic what their authority under FOIPPA would be for any disclosure of personal information to MoH concerning UVic employees and/or other personal information not supplied by the Ministry, assuming that you would be requesting such personal information?*

The lead investigator responded, asking the privacy lawyer to call her, and asking whether the information would "be shareable with us for the purpose of this investigation and the research contracts etc we have in place?"

The privacy lawyer noted that the lead investigator was likely thinking of section 33.2 of *FOIPPA* which permits a public body to disclose personal information to another public body to assist in an investigation that is undertaken with a view to a law enforcement proceeding. The privacy lawyer noted that there was a question as to whether that provision could be relied on in the circumstances. He also noted that the Office of the Comptroller General (OCG) may have statutory power to compel the production of information that the ministry does not. He noted that UVic would have to be satisfied that providing information to the ministry was consistent with the provisions of *FOIPPA*.

The lead investigator asked, "The police will be getting this evidence from us for their investigation?" The privacy lawyer replied that if the police needed information for

3 The IU's dealings with the universities are described in greater detail in Chapter 14.

an investigation, then they should obtain it from UVic directly. We note that we did not find any evidence that the ministry ever indicated to UVic that it might provide the information that it received from UVic to the police.

The lead investigator sent a further query: "Don't we also have a [responsibility] under the investigation to collect, contain breach info etc?" The privacy lawyer replied that the ministry needed to collect "any personal information we need to ascertain the extent of any privacy breach, but whether UVic has the authority to share all of that personal information to MoH is another story. We need to be very sensitive to that issue tomorrow."

The lead investigator responded that she was "also checking re contract data sharing agreement and what authority we have to audit, review, and ask back data"; and the privacy lawyer noted that such an approach "was a good idea." The ministry would eventually adopt that approach.

The following day, on March 26, 2013, the meeting took place. In attendance were representatives of UVic, the IU, the Ministry of Health, the privacy lawyer and an HSS lawyer. The agenda for the meeting indicated that the meeting would include an explanation of the terms of reference of the IU investigation, a "discussion of OCG requirements for accessing and retrieving relevant email stores and LAN drives." The agenda also indicated that the lead investigator for the Ministry of Health investigation would explain the terms of reference for the privacy investigation and provide "a summary of requirements for data access, data use, data storage and data disclosure" and expectations of UVic staff.

At the meeting, it was agreed that a follow-up discussion would take place about the specific information that the ministry and the IU were seeking and their authority to request it. The follow-up call occurred on April 9, 2013, which was attended by the lead investigator, the privacy lawyer, members of the IU investigation team and representatives of UVic.

On April 10, 2013, the privacy lawyer consulted with a finance lawyer and followed up that discussion with an email to the lead investigator. The privacy lawyer noted that the finance lawyer had advised the IU that it could compel UVic to produce records only if the IU had a Treasury Board directive authorizing such action.[4] The privacy lawyer said:

> *… what it comes down to is that we have to satisfy UVic that they have authority under FOIPPA to assist in the investigation. In that respect, the ISA's are critical. I have advised [an official at UVic] of the relevant FOIPPA sections to consider. It is now up to them to determine if they are satisfied that they have the requisite authority, and, if they do, whether they want to assist in the investigation.*

On April 12, 2013, a further meeting was held with UVic. The agenda for that call included a "follow-up on Confidentiality Agreement discussion," a review of the terms of reference for the investigation, a review of the information required from UVic, and a discussion of legislative authority. The meeting was attended by two HSS lawyers, the privacy lawyer, the lead investigator, a member of the IU investigation team, UVic's general counsel and UVic's Manager of Privacy, Access and Policy. The privacy lawyer's notes of that meeting indicate that certain provisions of *FOIPPA* were discussed as "disclosure authorities" and that representatives of UVic indicated that the university would need to review the various relevant information sharing agreements and consider its own authority to provide information before asking questions of its researchers. The privacy lawyer's notes also indicated that the ministry needed to identify the relevant agreements for UVic and create a protocol for the investigation – adding "MOH protocol will be smaller" than the IU protocol.

On April 15, 2013, at the request of the lead investigator, a Ministry of Health contractor forwarded a document to the privacy lawyer which described the information request for UVic and which purported to describe the authority for UVic to provide this information. The privacy lawyer made some comments on the document, primarily to clarify the specific provisions of *FOIPPA* relied on and to encourage the Ministry of Health to provide further information to the universities as to the nature of the ministry's concerns.

On April 19, 2013, the privacy lawyer forwarded the draft document to UVic noting that it dealt with what information government was seeking and its authority to obtain

4 See Chapter 14.

this information under *FOIPPA*, as well as a comment that it was a "work in progress" and input by the university would be appreciated.

On April 22, 2013, a member of the OCG investigation team forwarded a copy of the draft Data Investigation Protocol that the team had separately had received from UVic on April 17, 2013. The IU and the lead investigator both viewed the protocol as setting unreasonable limits on the IU's investigation.

At this time, the Ministry of Health and its HSS lawyer formed the view that UVic was not being suitably cooperative. The HSS lawyer gave the lead investigator advice that the ministry should consider taking a more aggressive approach to the matter, and eventually obtained instructions from the Deputy Minister to adopt such an approach. A draft letter to UVic reflecting that approach was prepared by the lawyers.

The HSS lawyer gave evidence that he believed that UVic was "stonewalling" the Ministry of Health and he felt that there was "a lack of responsiveness" to the ministry's legitimate questions. He said that UVic was raising issues of academic freedom and "union issues," but that in his view UVic had contractual obligations to cooperate with the investigation. He said he did not have details of the specific information that the ministry was seeking, and that before they could get into a discussion of the nature of the information sought, the ministry first needed to secure UVic's cooperation, which in his view was not happening.

The draft letter reflecting the ministry's more aggressive approach was sent to the external lawyer who was conducting the litigation involving the former excluded employees. He suggested that the ministry should rely on the specific audit and investigation provisions in its contract with UVic to try to obtain the information that it was seeking. The ministry agreed with that approach and its legal counsel undertook a review of the relevant contracts between the ministry and UVic, as well as UBC, in an effort to identify those institutions' contractual obligations to provide the ministry with the information it was seeking. The review occurred in late May and throughout the first two weeks of June 2013. Further draft letters to UVic and UBC were prepared in which the ministry sought to invoke various contractual provisions to obtain information. The letters were also reviewed and revised by outside counsel. However, it appears that these letters were never sent, and this course of action was never followed.

12.3.1.5 ANALYSIS: FURTHER COMMUNICATIONS WITH UNIVERSITIES

It was reasonable for the ministry to put its requests in writing and to clarify the information it was seeking and the basis on which it made the requests. This approach should have been adopted much earlier.

Throughout the spring and summer of 2013, the ministry made requests to UVic and UBC for specific information. The evidence that we obtained indicated that the universities cooperated with the ministry during this process and provided information that was responsive to the ministry's requests in a timely way. The UVic representative gave evidence that the information UVic provided to the ministry included "a significant amount of financial information as a result of the specific requests that we received" and that "in the course of providing that information we reviewed it, [and] we did not identify any concerns."

After the ministry completed its investigation, it did not communicate to either university whether the ministry had actually found any issues or improprieties with universities' data access or the contracts under review. While Ms. Walman wrote to the Dean of the Faculty of Medicine at UBC in October 2013 to explain that the ministry had learned "lessons" from the contract reviews and that it had taken measures "to improve data security and privacy protection" it did not detail what those lessons were nor whether the ministry had discovered any wrongdoing. As a result, the universities were left in the dark as to whether the ministry had found any improprieties with respect to the universities' data access or contracts under review.

Later in this chapter we discuss how the Ministry of Health handled the three specific contracts with the universities: those related to the Therapeutics Initiative, the Alzheimer's Drug Therapy Initiative, and the Education for Quality Improvement in Patient Care initiative.

In her interview with us, the lead investigator said that that the investigation encountered challenges with the universities providing information. The contracts specialist said that he recalled meeting with UVic about the investigation, "but they were not willing to tell anything …They

protect those guys pretty good. The – their employees very, very well."

However, from our review of the records, we determined that the universities fully cooperated with the ministry. Any challenges that the ministry faced with respect to the universities were its own creation. The ministry failed to deal with the universities in the transparent, formal and professional manner we would expect of a public body.

12.3.2 THERAPEUTICS INITIATIVE (TI) CONTRACTS

As described in Chapter 4, by the time the Ministry of Health investigation began in 2012, its longstanding relationship with the TI had undergone significant changes, most of which arose from the 2008 Pharmaceutical Task Force report and the ministry's decision to implement its recommendations. Implementing these recommendations required substantial revisions to the TI contract, which altered the work the TI did for the ministry and reduced the initiative's funding. Nevertheless, by the time the amended contract was completed in March 2012, the TI believed they had received some measure of clarity about their ongoing relationship with the ministry.

The steps the ministry had taken to rework the TI agreement contributed to the complainant's decision to submit her initial complaint to the Office of the Auditor General. This partly explains the reason both Dr. Dormuth and the TI are named in the complaint.

As noted in Chapter 5, the complainant's initial complaint about the TI focused on concerns about contracting practices, data access issues and intellectual property rights. In her role completing data sharing agreements, the complainant had been exposed to some aspects of the ministry's relationship with the TI prior to making her complaint. At the time it was the ministry's practice not to provide its complete contracting file to the data stewards when they worked on the corresponding data or information sharing agreements. Lacking access to the ministry's program area files raised concerns within the DARS group because they were unable to see complete details about the contracts that supported the data access arrangements they were asked to approve. Nevertheless, the data stewards were aware that both Dr. Dormuth and the TI could access ministry data under the terms of several agreements, and they became concerned that the scope of their data access created risks of potential misuse.

The Ministry of Health's decision to suspend Dr. Dormuth's data access on June 7, 2012, and the data access for the remainder of TI's staff and researchers on July 17, 2012, brought a significant portion of the TI's work to a halt.

The ministry's decision to suspend the TI contract was a direct consequence of its concerns that Dr. Dormuth either had used, or was in a position to use, his data access improperly. As we have described in Chapter 7, at the time of the suspension the ministry did not have, nor did it ever find, evidence that Dr. Dormuth (or anybody else associated with the TI) used their data access inappropriately. In fact, although certain data stewards in the ministry had longstanding concerns that the scope of the TI's data access exposed the ministry to risk of data misuse, the ministry never verified whether there was any factual basis to support this suspicion. When this concern was presented to the ministry's investigators, they accepted the allegation of the potential risk as some evidence that the TI had actually misused its data access.

On September 19, 2012, Ms. Walman directed UBC to suspend its work on the TI contract "pending the result of the investigation into them. Until that investigation is resolved, no contracts will be renewed or work is to continue on them." At the time, the ministry did not provide UBC with any information explaining why the suspension was required, except to say that the contract would remain suspended pending investigation.

The suspension of the contract adversely impacted the TI because, in accordance with its recently completed agreement, ministry funding made up the large portion of the TI's annual budget. The absence of additional details explaining why the contract suspension was justified caused UBC uncertainty about whether the suspensions were intended to apply to data access only, or also to the contract funding arrangements. Once the ministry explained that the suspension was intended to cover both the data and financial components, UBC faced a significant funding problem regarding the TI. It had to decide whether to fund the TI out of its larger operating budget to prevent the TI from effectively ceasing operations while awaiting completion of the ministry's investigation.

UBC asked the ministry to clarify the substantive reasons for the contract suspension. This clarification was not forthcoming. In October 2012, UBC contacted the ministry to explain the steps it had taken on its own initiative in response to the notice of suspension. Since the ministry's suspension letter did not provide any indication of how long the suspension was expected to last, UBC performed its own review to try to gain a better understanding of the status of each TI project and the potential impact of the suspensions. From this review, UBC informed the ministry that the suspension impacted the TI's work differently depending on whether it was the TI's funding or data access arrangements that were suspended.

For example, the educational components of the TI agreement were not impacted by the data suspension because the TI did not need ministry data to carry out this work. Thus, UBC told the ministry that this part of the TI's work could continue, provided the funding for it was restored. On the other hand, approximately one-quarter of the funding the TI received from the ministry was earmarked to support the the TI's PEG group led by Dr. Dormuth. When it attempted to clarify the scope of the suspension, UBC also explained that the PEG group only used the de-identified data available through its pre-existing and ministry-approved data "views." UBC believed the TI could continue this aspect of its work in the short-term, despite the funding suspension, provided the suspension was only for a short period.

Having not provided UBC with more detail explaining why the contract suspension was justified, once the contracts were suspended the onus effectively shifted to UBC to demonstrate why the contracts should not have been suspended in the first place and to propose solutions to restart them to the ministry's satisfaction. Once it received UBC's proposals, the ministry took steps to verify whether, and to what extent, the TI's contractual funding could be restored. Although the ministry agreed to restart some of the TI's work connected with the the Alzheimer's Drug Therapy Initiative (ADTI) contract, that had been suspended simultaneously, the bulk of TI contract remained suspended until October 2013, during which time UBC was under pressure to fund the TI without the ministry's contribution.

Apart from some requests for financial and background information (described in 12.3.1, above), the ministry's substantive communication with UBC about issues specific to the TI was limited after December 2012. By April 5, 2013, UBC had received no further clarification from the ministry on the data access issue or on the longer-term funding status of the TI. Moreover, the ministry had still not fully articulated its specific concerns about the TI to UBC. Although UBC initially made the decision to fund the TI itself, pending further discussions with the ministry, by the spring of 2013, UBC officials worried that continuation of its bridge financing to keep the TI afloat was no longer tenable. UBC informed the ministry that without clarification of the ministry's residual concerns and restoration of the TI's core funding, it would have to discharge the faculty and staff funded through the TI's contract.

As discussed above, the ministry continued to have ongoing concerns about Dr. Dormuth, but it did not raise these concerns with UBC directly or ask UBC to take meaningful steps to assist it in dispelling these concerns. For the ministry, restoring the TI contract was inextricably tied to resolving their concerns about Dr. Dormuth. However (as we described in section 12.2), the ministry's investigation team took no meaningful steps to investigate these concerns until Stephen Brown, who became Deputy Minister of Health in June 2013, reconsidered the ministry's approach to the investigation. Further, in July 2013, Dr. Dormuth and the TI's Managing Director sought to clarify the ministry's position after more than one year of delay since the initial data suspension.

Dr. Dormuth met with the ministry in August 2013 and, by the end of September 2013, the ministry contacted UBC to signal its willingness to restart the TI contract. Shortly after that, the ministry began working with UBC to amend the TI's agreement to resolve the funding interruption and redefine some of the TI's deliverables. This process was ultimately completed by early 2014. Under this newly amended agreement, the ministry and UBC agreed to clarify the PEG's role within the TI and both sides agreed to certain governance changes. Significantly, while the agreement also reinstated the TI's core funding back to $550,000, over $288,000 in funding was not provided as a result of the suspension and interruption while the ministry's investigation was underway from 2012 to 2013.

12.3.3 ALZHEIMER'S DRUG THERAPY INITIATIVE (ADTI)

As we noted in chapter 4, the ADTI was established in 2007 following an announcement by then-Premier Gordon Campbell to address a clinical knowledge gap around the use and effectiveness of a specific class of drugs (cholinesterase inhibitors) for patients diagnosed with mild to moderate Alzheimer's disease.

The primary goal of ADTI was to enable the ministry to develop evidence to support a decision to list, or continue to refuse to list, these drugs for inclusion in the provincial drug formulary. Additionally, ADTI was intended to allow the ministry to engage with researchers, industry and patient groups to assist with the ministry's drug listing decisions. As a scientific research project, ADTI relied on significant input from researchers from the outset. Moreover, the ministry expected that its own employees would have a significant role in helping to shape ADTI through participation in its sub-studies and working groups.

ADTI consisted of five related projects that assessed the impacts of the drugs on patient outcomes as well as assessing the impressions of caregivers about the effectiveness of the drugs. In addition, one of the ADTI projects was intended to test the reliability and validity of two methodological measurement tools for assessing the progress of the disease. As such, the development of ADTI and the contract structure reflected both the project's complexity and the expectation that its structure would change over time as a result of the scientific research that was undertaken.

Although changes to the ADTI contract and funding structure over time were approved by the appropriate senior executives in the ministry, the many interlocking contracts and funding arrangements increased the complexity of the roles assigned to ministry employees and external researchers in the project. The complexity of the ADTI raised red flags with the complainant when she was unable to access all of the information about the program's genesis and structure. As a result, it became a significant focus of the concerns the complainant highlighted for the ministry when it began its initial review of her complaint to the Auditor General, and after the ministry had asked her subsequently to clarify her concerns. These concerns encompassed several issues, including:

- potential conflicts of interest between researchers and ministry staff
- whether the TI's role in ADTI resulted from "preferential treatment"
- whether the ADTI procurement process was structured to try to conceal which researchers received work on the project and the fact that the agreements with UBC and UVic had been direct awards
- whether the ADTI contracts improperly assigned intellectual property rights to the universities
- whether the agreements facilitated improper use of ministry data

Such concerns, which were later adopted by the Ministry of Health investigation team, arose in particular from the fact that four of the five ADTI sub-studies were led by UVic. UVic later agreed with UBC to subcontract work on one of those studies to UBC and the TI. Based on the complainant's allegations the investigators were concerned that this UBC subcontract was an attempt by the ADTI researchers to circumvent the ministry's contracting rules and data access protocols. However, the investigators failed to realize that each of these studies was included in the main ADTI agreement and its subsequent amendments, or was included in a separate agreement supported by the Ministry of Health.

As part of the Ministry of Health's initial review of the complaint, the complainant and other employees in the Data Access, Research and Stewardship division were asked to clarify their concerns using ADTI as an example. This resulted in the ADTI summary document.[5] Although that summary stated that it did not "necessarily paint the entire picture," it contained eight pages of serious allegations about the project. However, most of these allegations were incorrect and based on a misunderstanding of the events that led to the ADTI's creation.

One of the assertions focused on the complainant's concern that she had been asked to complete an information sharing agreement (ISA) to facilitate the researchers' access to data. The complainant maintained, however,

5 See Chapter 5.

that she could not find any legal authority enabling the ministry to provide the ADTI researchers with this data. This question arose in part from a misunderstanding about whether the ADTI was a ministry sponsored project, and the resulting concern about whether the ADTI researchers were trying get data access ahead of other external researchers. The ADTI summary document also raised concerns about the ADTI contracts, including an allegation that the ADTI was run under the auspices of the TI and formed part of Health Canada's pan-Canadian Drug Safety and Effectiveness Network (DSEN). Neither of these assertions was correct.

Although the complaint was worried that some wrongdoing was occurring inside the ADTI, during our interview she explained that she did not know with certainty whether this was actually the case. She also explained that others shared her concerns, which was another reason why she felt she should raise the issues so they could be examined.

The complainant had no control over how the investigation team subsequently treated the ADTI chronology she helped create. Nevertheless, as we have described in Chapter 7, the Ministry of Health investigation team accepted many of the assertions in the ADTI chronology as factual, and did not take sufficient steps to confirm whether the assertions in the ADTI chronology were accurate. As a result the errors in the ADTI chronology persisted and the document influenced the ministry's ongoing investigation of, and conclusions about, both employees and external researchers connected to the ADTI.

12.3.3.1 ADTI CONTRACT SUSPENSION WITH UVIC AND UBC

The ministry's suspension of the ADTI contracts occurred simultaneously with the TI contract largely because the ministry investigation treated them the same way. For each set of agreements, the ministry was concerned that Dr. Dormuth's data access and his relationship with Dr. Maclure, posed risks to the ministry. As a result, after Dr. Dormuth's individual data access had been suspended, the ministry's lead investigator contacted UVic and UBC in July 2012 to inform them that data access for ADTI was being suspended while the ministry's investigation was ongoing. Both UBC and UVic told the ministry they wanted to assist the investigation as much as possible. UVic asked the lead investigator to clarify the specific datasets covered by the suspension. UVic was also concerned about the impact of the data suspensions on its ADTI deliverable schedule and asked the ministry to clarify how long it expected the investigation to take.

In a pair of letters dated September 19, 2012, Ms. Walman directed UVic and UBC to cease all work on their respective portions of the ADTI contract pending the outcome of the investigation. The letters provided no new information about the substance of the allegations related to ADTI. Moreover, the ADTI contract did not have a suspension provision in it. Thus it was unclear whether the ministry actually had the power to suspend work on the contracts without triggering the 30-day termination provision. Regardless, both universities indicated that they still wished to cooperate with the ministry and agreed not to do additional work pending the investigation.

Since two of the four ADTI studies being done at UVic did not require ministry data, UVic submitted a proposal to the ministry on September 28, 2012 to try to get the projects restarted. In its proposal, the university included information highlighting the roles of each research team member connected with each project. When she received UVic's proposal, Ms. Walman asked her staff to explain which parts of the project required data access and which did not. She also sought a briefing on the financial implications of the proposed project restart. After consulting with her staff, Ms. Walman approved the proposal to restart the two studies, and the ministry and UVic continued to work together to allow for the continuation of approximately 65 per cent of the ADTI work.

For its part, UBC outlined its concerns about the suspension of its ADTI agreements at the same time it responded to the TI contract suspension in October 2012. As it had done with the TI agreement, UBC performed a program review to gain a better understanding of the status of each project and the potential impact of the suspension on each. UBC also informed the ministry that it had contacted each of the ADTI project leaders and requested that they suspend activities pending the ministry's review. UBC's ADTI program review report outlined the impacts of the suspensions and sought clarity from the ministry whether the scope of the suspension applied to the data or the funding arrangements. As it had done with its TI program

review, UBC also noted that the suspension impacted its three ADTI projects differently.

Between October and December 2012, UBC provided the ministry with details about which projects did not require data access and asked that the ministry restart those parts of the project. After considering UBC's review the ministry agreed to allow UBC to continue working on the ADTI sub-study, for which it was the lead contractor and on the education sub-study, because those parts of ADTI did not require ministry data. The parts of ADTI connected with the TI, however, remained suspended.

12.3.3.2 ANALYSIS: SUSPENSION OF ADTI AND TI CONTRACT

The ministry's decision to suspend both the ADTI and TI contracts was a direct consequence of its suspicions about Dr. Dormuth. Because the ministry viewed the ADTI and TI contracts as interrelated, it followed substantially the same approach when it suspended them. Once the ministry suspended the data access for Dr. Dormuth in June 2012, the investigation team widened its review until it ultimately included both the ADTI and TI contracts in their entirety.

When the investigation began, the TI's existing contribution agreement had been in place since 2004. The ministry's long experience with the TI, its policy advisory role, the changes arising from the Pharmaceutical Task Force, and the subsequent amendments to its contribution agreement all meant there was a large volume of material available in the ministry's files. This material should have enabled the investigation team to quickly examine both Dr. Dormuth's role and that of the TI. Moreover, both the TI and ADTI had a high profile within PSD for several years, and had a combined total budget allocation of over $80 million.

Although the ministry maintained that it intended to review its relationships with the TI and ADTI programs and their corresponding data and financial aspects during Phase 2 of the investigation, it appears clear that the ministry did not meaningfully assess these agreements on their own merits. Instead the investigation focused and relied on a series of unfounded allegations that wrongdoing had taken place within the ADTI. In our view, having established no evidentiary basis beyond the mere existence of the allegations to justify the suspensions, the ministry failed to follow a reasonable process when dealing with the TI and ADTI contract suspensions.

Similarly, once the ministry suspended the contracts, it should have acted in a timely way to investigate the veracity of the concerns raised. This partially occurred as the ministry restarted some components of both the TI and the ADTI contracts once it determined that those did not require or use administrative health data. However, from a fairness perspective and in order to achieve the ministry's research objectives, we would expect the ministry to have already identified which parts of the TI and ADTI projects used ministry data and which did not before suspending the agreements in their entirety.

Moreover, the ministry's actions unreasonably shifted the onus to Dr. Dormuth and the universities to demonstrate how and why the contracts should be left intact. The lack of clear notice of the reasons for the suspension put the universities in a position where they had to speculate about the ministry's concerns. As UBC's October 2012 response to the ministry made clear, the university was left to speculate whether the ministry intended to suspend the data portions of the agreements, the financial portions, or both. These distinctions were important because, as UBC noted, they had different impacts on the research programs and their own ability to fund the work.

In our view, the ministry's subsequent lack of timeliness was a significant problem with the ministry's treatment of the TI. To this extent, the ministry had difficulty separating its concerns about Dr. Dormuth's data access from the TI as a whole. As a result, large parts of the TI's data access and funding were adversely impacted while the ministry worked through its concerns about Dr. Dormuth. The ministry acted unreasonably through its lengthy delays assessing Dr. Dormuth's position. As we have noted this series of delays began from the time the ministry suspended Dr. Dormuth's data access (June 2012), suspended the TI agreements (September 2012), made its data demands of Dr. Dormuth (October–December 2012) and continued until it finally spoke with him directly about the concerns (August 2013) and took steps to restart the TI contract (October 2013).

12.3.4 EDUCATION FOR QUALITY IMPROVEMENT IN PATIENT CARE (EQIP) CONTRACT

As we described in chapter 4, EQIP was launched in 2006 as a partnership between the Ministry of Health, the BC Medical Association (as it then was), UBC and UVic. It was part of PSD's strategy to optimize physician use of prescription drugs and, as a result, maintain and improve the health of British Columbians. The EQIP agreement was the basis for a multi-faceted and collaborative initiative involving multiple partners over many years.

The EQIP initiative provided family physicians with personalized computer-generated prescribing portraits for a particular disease or health topic with educational messages and case studies that "encourage reflection on practice." These portraits were a "snapshot" of an individual physician's prescribing practices created by PFIA, one of the EQIP subcontractors, using de-identified administrative data. After the portraits were sent to the doctors, they were returned to researchers and scientifically evaluated to assess the impact of the portraits on physicians' prescribing practices.

When the first EQIP agreement was finalized, Dr. Maclure was on a leave of absence from the Ministry of Health and was working as a professor at UVic. The 2006 agreement provided that Dr. Maclure would be the Implementation Director for EQIP. As Implementation Director, Dr. Maclure oversaw the prescribing portraits by: determining how they would be presented, evaluating their accuracy, obtaining feedback from physicians, determining the costs of the portraits, reporting back to the working group, and general problem solving. In this role, he did not access the administrative health data nor create the actual portraits; these tasks were assigned exclusively to the PFIA contractor.

Soon after the contract was finalized, Dr. Maclure returned to the ministry full time, where he remained Implementation Director to ensure the EQIP initiative continued.

When the EQIP contract was renewed in 2009, the ministry routed the head contract with UBC through the office of the B.C. Academic Chair for Patient Safety. The main consideration in this decision was to allow the ministry to reduce overhead costs which are charged by the university in accordance with its policy.[6] In this case, the ministry expected that by routing the contract through the B.C. Academic Chair for Patient Safety, the EQIP initiative could potentially recapture funds that would otherwise go to overhead, for the benefit of the EQIP initiative.

The decision to reroute the contract was made by the executive director in coordination with the EQIP working group. The work done by EQIP was seen to be consistent with the role of the Chair for Patient Safety. Because Dr. Maclure occupied the Chair position, the parties provided in the contract that Dr. Maclure would not receive any remuneration from the EQIP contract.

At the time the contract expired in 2012, the EQIP initiative had completed all the required portraits for all topics and mailed them out in accordance with the expected schedule, with the exception of two further planned mail outs that did not proceed.

The contractual framework for the EQIP initiative was a contribution agreement (also called a "transfer under agreement") between the Ministry of Health and UBC. The parties had approved two subcontractors to the agreement: UVic and PFIA (in which Dr. Dormuth and two of his colleagues were partners). The subcontractors performed different roles and only the PFIA contractors had access to de-identified administrative data. UVic handled most of the administrative aspects of the initiative involving the working group and confidential communications with physicians. PFIA's role was to create the prescribing portraits and conduct the evaluations.

In planning and implementing EQIP, the parties were careful to ensure sufficient measures were in place to secure the administrative health data and to maintain the privacy of physicians and their patients. These measures were set out in a Privacy Impact Assessment and a data sharing agreement. At the outset, the data access arrangement used by EQIP was reviewed by the Legal Services Branch of the Ministry of Justice to ensure it complied with legislation. At the time of the 2012 investigation, the data sharing agreement had expired and the Data Access, Research and Stewardship section was working on an information

6 University of British Columbia, "UBC Policy on Indirect Costs of Research," <https://ors.ubc.ca/proposal-development/ubc-policy-in-direct-costs-research>.

sharing agreement (ISA) to replace it, a process that was taking years to complete.

Even though the ISA was not complete, the Director of Data Access, Research and Stewardship had provided written authorization for the PFIA contractors to have ongoing data access so that they could complete their work. Since there was no legislative requirement for an ISA, the Director made this practical decision which allowed the EQIP initiative to proceed. In addition, the PharmaNet Stewardship Committee had reviewed and approved PFIA's administrative health data access until August 31, 2012, or until the expiry of the project. The evidence we reviewed in our investigation indicated that those engaged in the initiative were following the data access and security provisions as required.

12.3.4.1 EQIP SUSPENSION AND EXPIRATION

As described above, in June 2012, the ministry suspended data access for Dr. Dormuth, who was part of PFIA. In mid-July 2012, the ministry suspended data for the other two contractors involved in PFIA. At the same time, it also suspended the employment of Dr. Maclure, who was Director of Implementation for EQIP. It was the ministry's decision to suspend data access for the PFIA contractors that prevented the EQIP initiative from continuing. The initiative was unofficially suspended until it expired on August 31, 2012. The contract itself was not suspended as there was no provision for suspension in the agreement.

During a session of the Legislative Assembly in May 2016, the Minister of Health was asked why EQIP was stopped. He said:

> *I want to correct the member's inference that it was terminated as a result of what was going on in the Health Ministry. The reality is that that contract expired coincidently with all of the things that were happening in the Health Ministry.*
>
> *It has not been renewed. But we know that the College of Physicians and Surgeons is looking at a quality assurance program that would in many ways, potentially, mimic the prescriber portrait program, or the EQIP program, that we had.*[7]

While the Minister of Health was correct that the EQIP contribution agreement expired, it was not "coincidental." The end of EQIP was in fact the direct result of the investigation. All of the evidence we reviewed supports the conclusion that, but for the 2012 investigation, the ministry would have not only renewed the EQIP initiative, but expanded aspects of it, including other "best prescribing" initiatives.

After PFIA's data suspensions, PSD staff continued managing the contract for the next month and a half in an information void.

On August 14, 2012, with only two weeks left on the existing contract, the then-co-chair of the EQIP working group and the BC Medical Association representative on the working group contacted the ministry to urge it to make a decision about the future of EQIP. The Executive Director responded to explain that she was:

> *… not permitted to move on updating the EQIP contract until after the internal review of contracts, contracting processes, and data access is complete. When the review is complete, I will need to integrate any recommendations into how we go forward with managing this and other contracts. The review was supposed to be done already, so I am hopeful that we will hear results soon.*

When the EQIP matter was brought to her attention, Ms. Walman was on vacation. This put Ms. Walman in the position of having to deal with the matter remotely. Ms. Walman, who was new to the Pharmaceutical Services Division, was not familiar with EQIP and took steps to enquire into the matter. On August 15, 2012, Ms. Walman asked the Executive Director if a one-month extension to the EQIP agreement would "help us and them?" The Executive Director replied in the affirmative. Ms. Walman asked the Executive Director to provide a short "description of contract. Who it's with, current status of contract work, what we [need] done and why and request an extension for month of September, with cost." In response, the Executive Director provided a detailed written status update containing three options and recommendations:

7 Minister Terry Lake, British Columbia Legislative Assembly, Hansard, 4 May 2016, 12715-12716 <https://www.leg.bc.ca/documents-data/debate-transcripts/40th-parliament/5th-session/20160504pm-Hansard-v38n8#12715>.

Current status:

The following works are outstanding:

- *Mailing of the "Second-line therapy for patients with Type 2 diabetes"*
- *Completion of the "Angiotensin receptor blockers" portrait*
- *Impact evaluation for portraits as specified in the contract*
- *Final report (specifics described in contract) due 90 days after the end of Term*

Of note, EQIP Working Group (advisory function) meets monthly. Contractor has asked for directions on how to proceed, as physician members receive honoraria for attending from contractor.

Contractor's data access was turned off in approximately July. Work was continuing until then, but work has not been possible since data access was turned off.

. . .

Options:

1. *Reinstate data access and extend term to September 30, 2012 so that all deliverables can be completed. Specify that final report is required for full payment.*

. . .

2. *Reinstate data access and extend term to September 30, 2012 so that all deliverables except the final report can be completed.*

. . .

3. *Do not reinstate data access. . . . do not extend contract. Final deliverables will not be met.*

. . .

Recommendation:

Option 1) Reinstate data access and extend term to September 30, 2012 so that all deliverables can be completed. Specify that final report is required for full payment.

. . .

Whichever option is chosen, we would like to give the EQIP group some indication of whether PSD plans for their sort of work (ie/ prescribing portraits to physicians), to continue in the future – whether via Direct Award, RFP, or other method. Are we permitted to provide any response on this? If so, what can we say?

On August 16, 2012, Ms. Walman forwarded this email to the lead investigator.

Ms. Walman decided on August 17, 2012, not to renew or extend the contract because of the ongoing investigation. She informed Mr. Sidhu of her decision and, at the same time, forwarded the Executive Director's email containing the recommendations to Mr. Sidhu. Ms. Walman noted that as the ministry had suspended EQIP's data access, the contractors would be unable to complete their deliverables. She asked Mr. Sidhu to have a lawyer look at the agreement and consider whether "any liabilities might be incurred by MoH."

At the request of Mr. Sidhu, the HSS lawyer reviewed the EQIP agreement. He told Mr. Sidhu that the agreement could be terminated on 30 days' notice without cause, or terminated immediately with cause. He noted that the agreement that was set to expire on August 31, 2012, and had no provision for renewal or requirement of notice not to renew.

The HSS lawyer further noted that if the ministry wished to continue the work under the agreement, it could suspend data access to the individuals about whom it was concerned, ask UVic to get new subcontractors who were acceptable to the Ministry of Health, and then resume data access. He said that if UVic was not prepared to do that to the ministry's satisfaction, then the ministry should suspend work or terminate the agreement until "the matter is cleared up." He said it should be emphasized that the ministry owned the information produced and received under the agreement, and that UVic and its subcontractor were obligated by contract to protect it. He also said that if the ministry had reason to believe that persons who had access to the information under the agreement were misusing it, the agreement could be terminated immediately and data access cut off. He noted he was not sure if the

information provided under the agreement was personal information or "more generalized annonomized [*sic*] information." He further noted that, under the agreement, the parties were required to disclose any conflicts of interest. He suggested holding discussions with UVic to ensure that people the ministry were concerned about did not get data access indirectly if the agreement continued.

On August 21, 2012, the lead investigator followed up with the HSS lawyer in an email. Ms. Walman was still on her annual leave at this time. The lead investigator asked counsel whether there was "anything that says we must renew or notice not to renew?" The HSS lawyer responded in the negative. The lead investigator replied, "Thanks so we do not have to renew." These emails suggest that the lead investigator had assumed a role in seeking advice about renewal of the EQIP agreement.

On August 22, 2012, Ms. Walman wrote to the Executive Director responsible for EQIP to inform her that she (Ms. Walman) was "not proceeding with an extension. We will deal with this as part of review."

When we asked Ms. Walman about the decision to let the EQIP agreement expire without renewal, she told us, "the contract was done. The program – the project, was done, technically. I mean, there's always interest in continuing, obviously. It's been going on since 2006."

On September 19, 2012, in a letter that referenced the TI and ADTI contracts as well, Ms. Walman wrote to UBC:

> *… as a result of a review of certain contracts, the Ministry of Health hereby instructs you to immediately suspend work on the above-noted contract (EQIP-2010), no contract will be renewed or work is to continue on them. The Ministry of Health is aware that the contracts may not be completed at this time, and does not expect the final work product as specified in the contracts to be delivered at this time.*

At this point, however, the EQIP contract was over, having expired on August 31, 2012.

12.3.4.2 ANALYSIS: SUSPENSION AND EXPIRY OF EQIP CONTRACT

When the ministry was conducting its initial review of her complaint to the Office of the Auditor General, the complainant identified EQIP as a contract that should be added to the list of contracts under review. She identified EQIP primarily because of her concerns about individuals who were involved with the initiative. She made broad-based, vague allegations about favouritism and the data practices of individuals in relation to the EQIP initiative.

Aside from the general concerns articulated by the complainant, the Ministry of Health had no documentation showing specific allegations about the EQIP agreement or about the individuals who were doing work under the agreement. The investigators and decision-makers we interviewed did not articulate with any specificity their concerns related to data access, security or the specific data use.

The PSA investigator gave evidence that her general understanding of the concern was that external contractors (including those who were on EQIP) kept getting contracts and were potentially misusing their data access to get other contracts. The vague concern about "potential misuse" of data was not supported by any evidence.

Similarly, when we interviewed Ms. Walman, she did not articulate having any clear concern about EQIP. She told us:

> *… so, basically, EQIP – I mean, I think it was just – it was just one of the contracts that was suspended, pending kind of the investigation. So I don't think it ever – it – I don't – I don't think there was huge questions about it in particular – that I remember. But what happened is that it – during the – you know, it started in 2006, and it expired in August of 2012. So it was suspended for a very short period of time, and then expired.*

At the time, available information to inform a decision to cease or continue with the EQIP initiative included:

- EQIP documents that set out data access and security protocols
- program area documents (including briefing notes)
- a written submission from Dr. Maclure to the investigation team in June 2012, where he outlined the history of EQIP
- information gained from speaking with individuals involved in the initiative

The ministry did not follow a reasonable or fair process when dealing with the EQIP contract. Once it suspended data access for the EQIP contractors, we would have expected someone within the ministry to act in a timely way to determine, fairly and objectively, whether the data was at risk and if not, to resume work so the initiative could continue. That the ministry did not do so meant that a longstanding initiative was unnecessarily jeopardized and, ultimately, ended.

Because EQIP was a collaborative initiative involving multiple partners who had spent time and resources in developing and implementing EQIP we would have expected as part of the normal process the ministry to engage in some level of consultation with those stakeholders before determining whether or not to renew the contract. As we described in Chapter 4, the EQIP initiative was consistent with the evidence-informed policy-making approach that had been developed in PSD over the previous six years.

We expect any government decision-maker who is considering whether to continue a program to follow a reasonable process in coming to a decision.[8] This is particularly true when – in the case of EQIP – the program is longstanding and the sudden termination of the program could have significant impacts on the division's operations and relationships with key external stakeholders.

However, the timing in this case was unfortunate. The EQIP agreement lapsed in the wake of a multitude of other issues, particularly around the terminations, that the investigation team and decision-makers were concurrently handling at the time. In addition, Ms. Kislock, who had responsibility for data suspensions, was away from the office until after the EQIP agreement expired. Further, Ms. Walman was away on leave when the issue arose and at the point the agreement expired. While she took steps to enquire into EQIP, she would not have been in the best position to fully consider the matter given that she was on leave when the agreement lapsed. It was within the discretion of a decision-maker to suspend data access and to not renew the EQIP agreement. Unfortunately, the decision making process around the renewal lacked sufficient time and consideration to determine if there was any reasonable risk to privacy with respect to EQIP and of the initiative's value to the ministry's other public health objectives.

12.4 SUSPENSION AND TERMINATION OF OTHER MINISTRY OF HEALTH CONTRACTS

The Ministry of Health investigation team identified several contracts not associated with the PSD that came under scrutiny because of concerns about the contractors' or subcontractors' use of ministry data.

The ministry investigation team focused on four non-PSD contracts[9]:

1. contract between the Ministry of Health, Health Sector Information Management/Information Technology Division, and Resonate Solutions Inc.
2. contract between the Ministry of Health, Planning and Innovation Division, and Quantum Analytics
3. contract between the Ministry of Health, Population and Public Health Division, and Blue Thorn Research and Analysis Group Inc.
4. contract between the Ministry of Health, Primary Health Care and Specialist Services Branch and Dr. William Warburton.

12.4.1 CONTRACT WITH RESONATE SOLUTIONS INC.

Resonate Solutions Inc. (Resonate) held a contract with the Ministry of Health's Health Sector Information Management/Information Technology Division for the development and maintenance of a data warehouse called Healthideas.[10] Resonate had anywhere from 5 to 50 individual consultants at any given time. Resonate won the Healthideas contract through a competitive process in

8 See Chapter 3.

9 The Ministry of Health investigation team also focused on Dr. William Warburton's contract with the Primary Health Care Program of the Medical Services and Heath Human Resources Division of the Ministry of Health. The circumstances of the suspension of Dr. Warburton's data access and the subsequent termination of his contract are discussed in Chapter 7.

10 The publicly available version of Healthideas can be found at "Welcome to Healthideas" <http://public.healthideas.gov.bc.ca/portal/page/portal/HealthIdeas>.

2008, and since that date had received periodic contract extensions. The Healthideas contract was the company's main source of work.

The Resonate contract first came under scrutiny by the ministry's investigation team after the complainant forwarded an email related to the contract to the team on June 21, 2012, identifying the contract as one she believed should be investigated. Her concern arose because two of Resonate's contractors had professional and business associations with Dr. Colin Dormuth. They were Contractors 1 and 2 as described in section 12.2.1, above. Contractor 2 was both a contractor and director of Resonate.

When we asked Ms. Kislock why the Resonate contract was captured by the investigation, she said:

> *I think generally they were captured by the investigation because they had some involvement with either the TI or PEG or ADTI. They were involved doing work in that area. Or thought to have been involved. So their – their Resonate contract was suspended and their access was suspended.*
>
> . . .
>
> *I don't think we understood what they were doing. So for sure they were contracted to do IT-related work on the Healthideas database. But was that solely what that – what that access to the Healthideas data warehouse was allowing them to do?*

When the ministry suspended the data access for Contractors 1 and 2 in July 2012, it did not only suspend their research data accounts (for PEG, ADTI and EQIP), it also suspended their access to data for their Healthideas work. As we discussed in section 12.2.1there was no evidence that either of the contractors inappropriately used ministry data in either of their roles as external researchers or service providers.

On September 5, 2012, Resonate's president wrote to the lead investigator informing her that the data suspensions had affected the two contractors' Healthideas work. He said:

> *We are concerned that there is misinformation or an accusation that has not been stated to them. We would appreciate as much background as you can give on the nature of any accusations, who raised the accusations, on what evidence, and what timelines you would expect for resolution. We would also like to know why their Healthideas accounts have been disabled considering the Resonate contract is outside the scope of the PSD review.*
>
> *Losing database access for two of our key subject matter experts and business analysts has put Resonate in the difficult position of not being able to meet some of our contracted deliverables in a timely manner. Neither the decision nor the rationale was communicated and we find it difficult to plan a resourcing around this event. In addition, our ability to deliver joint Michael Smith Foundation/Ministry of Health deliverable … has been significantly affected by this occurrence.*

Following this letter, the Ministry of Health and Resonate's president discussed the next steps. The contracts specialist on the Ministry of Health's investigation team, suggested this response in an email:

> *These people are to be removed from this contract as the result of a ministry investigation currently underway. As a precaution there are a number of people who have had access removed to Ministry data until the investigation is complete.*

Resonate's president indicated that if the ministry wanted the two contractors removed from the contract without the 30 days' notice required by the contract, absent a written confirmation from the ministry that it had evidence that they had used data inappropriately, then he wanted a written statement that his request for 30 days' notice was denied. At the direction of the lead investigator, an employee at the Ministry of Health sought advice from an HSS lawyer because she was unable to locate a provision in the contract regarding the 30 days' notice requirement. The HSS lawyer pointed out that such a provision was contained in a schedule to the Resonate contract.

On September 17, 2012, Contractor 2 wrote an email to his Resonate and ministry colleagues informing them that he was being removed from the Healthideas contract without 30 days' notice. When we spoke with him, he said the president told him that it was best not to "rock the boat."

We understand that the other contractor was removed from the Healthideas contract also at that time.

On October 16, 2012, a member of the investigation team forwarded a copy of the Resonate contract to the HSS lawyer, noting that "we will want to discuss cancelation of the contract and the risks."

On November 1, 2012, an Executive Director in the ministry's Information Management and Knowledge Services Branch asked for advice from the Office of the Comptroller General's Investigation and Forensic Unit (IU) team on what steps would be appropriate for the ministry to take in relation to the Resonate contract. The IU manager informed the ministry that the IU was reviewing Resonate. One of the IU investigators told us that it was one of the approximately 50 contracts that was "originally pulled" for the IU to review. However, the IU never actually reviewed the Resonate contract.[11]

Despite the fact that it had not reviewed the contract, the IU decided it was appropriate to identify some potential risks related to data security it saw with the ministry's proposed plan to form a new contract with Resonate's subcontractors. One IU investigator suggested it was risky for the contractors to have continued access to government email or servers as Healthideas analysts because, as "technically sophisticated" individuals, they could delete, change or otherwise inappropriately use their emails and IDIR access.[12] It is not clear on what basis the IU identified such risks.

Ms. Kislock terminated Resonate's Healthideas contract in a letter dated November 6, 2012. The rationale provided to the president of Resonate was that the ministry was going "in a new direction." As she described in her internal communication to the contracts specialist:

> *I just delivered a letter to … Resonate – advising the ministry is cancelling their contract as provided for in the contract. I advised him that we were cancelling this contract as we were going in a new direction. To support that new direction – I indicated that I would like to do a 6 month direct award contract with Team Meta. I flag this for you as it may seem sudden from the Resonate perspective – [the president] seemed quite surprised at my action. If you would like to discuss further – I am in my office.*

Team Meta was the same group of individuals who carried out the Resonate contract, less the two contractors.

A briefing note with respect to the Resonate contract indicates that this approach was "screened" by the Ministry of Justice. The HSS lawyer told us that he could not say with certainty whether he gave advice on cancelling the Resonate contract. He said that if he gave advice on cancelling it, "it was strictly on the basis of what you have to do to cancel it," such as what kind of notice is required. He said that he may have given advice regarding how to continue the work of Resonate without the involvement of the two contractors. He said that the question he would have considered was how the Ministry of Health could structure the arrangement, not whether the arrangement was appropriate:

> *Well, I didn't give advice on the appropriateness. I don't think the appropriateness had anything to do with it, it's more just a question of the – you know, legally can you do it? Yeah, sure they can, so …*
>
> *So "appropriate" would have been an interesting question. If there was evidence of bad faith somehow, or some reason to think that it was inappropriate, but, you know, given – if they decided that they didn't want certain people with information, but they needed the work to get done, then they could certainly use that method to – to get the work done, until matters were resolved, and those people were either cleared or not.*

Although it had terminated the Resonate contract, the ministry still needed the services that Resonate had provided. As described in Ms. Kislock's email above, the ministry provided two short-term contracts to Team Meta as a stop gap while it developed a strategy moving forward.

The Ministry of Health received advice from the HSS lawyer and the Procurement Services Branch about how to structure a new contract while also avoiding contracting

11 This contract was outside the IU's terms of reference and no written analysis in relation to this contract was contained in the IU's file material or in the body of its report.

12 IDIR is the unique identifier government employees use to log on to their workstations and access many government applications.

with the individuals about whom it had concerns. The HSS lawyer advised the Acting Chief Data Steward that completing a direct award with a notice of intent was a good approach to addressing the matter.

In developing the notice of intent to direct-award the contract to Team Meta, Ms. Kislock maintained that the cancellation of the Resonate contract was to support a different direction. She said to the ministry's Communications Manager, "we cancelled Resonate cause we were going in a different direction. That different direction was building internal capacity. – this is our 2nd contract with team meta." However, she also stated that the "cancellation of resonate had nothing to do with the investigation. It was frozen because of the investigation but the cancellation had nothing to do with it." She also stated that "the Resonate contract was frozen by the Ministry at the direction of OCG." The IU did provide advice as set out above. However, it did not direct the ministry to freeze the contract. Rather, it advised the ministry that decisions about the course of action to be taken were up to the Ministry of Health.

After their interviews with Ms. Kislock and Mr. Sidhu in September 2013, the contractors had their data suspensions removed and were once again able to apply for and work on ministry service contracts and to use ministry data.

The RFP for the Healthideas contract went out in late 2013. Resonate bid on the RFP and won the competition. Work under the new contract started in early 2014.

12.4.1.1 ANALYSIS: TERMINATION OF RESONATE CONTRACT

Given the timing of the termination decision, drawing any conclusion is difficult other than the decision was directly related to the investigation into the two contractors. It was a member of the investigation team who initiated communication with legal counsel about the possible cancellation of the contract.

After terminating the Resonate contract, the ministry continued to use contracted services to build and support its Healthideas data warehouse. It signed a short-term contract with Team Meta and, once the investigation was complete, it accepted Resonate's proposal for a new contract.

The only way in which the ministry went "in a new direction" in its Healthideas contract was to (temporarily) not involve two specific subcontractors.

Moreover, the Resonate contract was identified as a problem not because of any issues with the contract itself but because the ministry had unsupported suspicions about two of the subcontractors. These unsupported suspicions also led to the suspension of data for the two contractors. As we have stated in previous chapters, the ministry's decisions to suspend data access without any evidence of data misuse, was arbitrary.

For Resonate's director, the Healthideas contract had been the bulk of his work. He was not otherwise employed as some of the other contractors were, for instance, employees of the Therapeutics Initiative at UBC. Resonate's director told us that he and the president used their own funds to keep the company afloat after their Healthideas contract was terminated. He said that the company almost went under and he put his own personal losses at around $100,000. He also explained that the work of rebuilding Resonate, including hiring and training a lot of personnel, and meeting the ministry's work demands – which were high to "make up for lost time" – was exhausting.

12.4.2 CONTRACT WITH QUANTUM ANALYTICS

Mr. Mark Isaacs, through his company Quantum Analytics, had a longstanding contract with the ministry to develop and maintain an information tool called Quantum Analyzer, which included built-in analytics tools to display, graph, compare and download health information. The software was created to give Ministry of Health employees the ability to review historical data to inform decision making. The information in the QA software was all summary information and not personally identifiable.

Services that Mr. Isaacs performed under the contract included acquiring and updating data and metadata for the QA software data library; installing the software on ministry computers and handling technical issues with software functionality; training staff in use; and working with the QA software steering committee to identify new data elements and develop screens to display data. With permission of the ministry, some of the data in the data library was made available to the health authorities.

Mr. Isaacs was planning to implement a new data analysis tool to the QA software that would offer graphing features the current program did not offer. He needed some test data to show how the new tool worked. As we described in Chapter 10, it was through this request that Mr. Isaacs was an innocent and accidental recipient of personally identifiable data in the first incident described in the report of the Office of the Information and Privacy Commissioner (OIPC). As we also described in Chapter 10, Mr. Isaacs immediately returned the personally identifiable data to the ministry employee.

On September 17, 2012, the lead investigator emailed Mr. Isaacs' contract manager and appended some communications between Mr. Ramsay Hamdi (a Ministry of Health employee) and Mr. Isaacs. She asked the contract manager to review the communications, which did not include the breach information, and to "get back to me on if you are aware of this, is it appropriate, and are you aware of Ramsay working on this." The contract manager responded that "the QA contract required Mark to get individual record level data (without personal identifiers)." However, she wrote that she was unaware of this particular project. On the same day, the lead investigator discovered the emails related to the privacy breach.

The contract manager asked Mr. Isaacs to meet with her on September 18, 2012, about an issue concerning the QA contract. He was not told that he was under investigation or that the ministry had any concerns. When he showed up for the meeting, the lead investigator and another member of the Ministry of Health investigation team met him with the contract manager. The contract manager promptly left, leaving the investigators with Mr. Isaacs.

Mr. Isaacs told us that the meeting "got strange very quickly." The lead investigator told him that this interview was part of a well-publicized investigation going on at the ministry. She told him his name appeared in some correspondence with Mr. Hamdi and that she wanted to discuss the whereabouts of a flash drive. He told us he tried to provide some context to the work he was doing, but the lead investigator dismissed him, saying she "knows all that." She asked if the contract manager knew about Mr. Isaacs' planned new tool, to which Mr. Isaacs said that she did not. He believed the lead investigator took this to mean that he did not have authorization to receive data, although it was the contract itself that provided authorization to receive person-level data. He found the process bewildering, as the events had happened three months prior, and was only able to figure out what happened after he went home and reviewed the emails himself. He said he felt "like a deer in the headlights."

According to Mr. Isaacs, the lead investigator told him at the end of the interview that the next step would entail lawyers drafting some papers for him to sign. He welcomed this because he thought it would allow him to see how they had interpreted what he said. When he returned home, he organized his own materials and forwarded them to the contract manager. Mr. Isaacs received the following email late that day:

> *Following our telephone conversation this morning, this email is to notify you that the Ministry has suspended the QA contract while it is reviewed under the current data access review process. Many contracts within the Ministry are under similar suspension while under review, and the suspension does not imply any wrong doing.*
>
> *Please do not complete any work on the contract deliverables while it is being reviewed. Your cooperation and detailed documentation should help the review proceed at a timely pace.*

Mr. Isaacs' never heard from the investigators again.

Both he and his wife were interviewed by the team on September 18, 2012. They were both shaken by the interviews and, given the September 6, 2012, announcement that the Ministry of Health had contacted the RCMP, worried that they would be the subjects of a criminal investigation.

On September 19, 2012, Heather Davidson, Assistant Deputy Minister of the Planning and Innovation Division in the Ministry of Health, asked Associate Deputy Minister Sandra Carroll to include the QA contract in the review of research contracts that was underway, understanding that the contract would remain suspended during the time of the review. Dr. Davidson told us that she understood that an expedited review was underway by the ministry on certain contracts.

In the meantime, Mr. Isaacs hoped that the matter would be resolved quickly. He thought it should only take about a week, but it took much longer.

When we spoke with the HSS lawyer, he said that he understood that the QA contract was caught up in the investigation because Mr. Isaacs was involved in one of the privacy breaches that became the subject of the OIPC's investigation and report. The HSS lawyer also told us that he understood that the ministry was winding down the use of the QA software in spite of the investigation, because it had a different system it was going to use.

On November 5, 2012, as part of the ministry's efforts to contain any breach and to demonstrate to the OIPC that it was taking steps to contain the privacy breaches, the ministry sent a letter to Mr. Isaacs demanding the return of any ministry data in his possession. The letter did not particularize the data that the ministry was seeking from Mr. Isaacs and made no mention of the flash drive that was at issue in one of the alleged privacy breaches.

Mr. Isaacs told us that upon receiving the letter he wondered how he could prove, to the ministry's satisfaction, that he didn't have any data. He was worried enough that he sought legal advice. When he contacted his contract manager, she was unaware of the letter.

On November 13, 2012, counsel for Quantum Analytics and Mr. Isaacs wrote to the Ministry of Health in response to the ministry data demand letter, noting that the language in the demand was broad and appeared to capture ministry information that Quantum Analytics was authorized to possess under its contract, and noting that the ministry provided information to Quantum Analytics "knowingly and willingly." The letter also noted that, to the extent the demand related to the flash drive and unencrypted PHN information, Mr. Isaacs had provided an explanation about that to the ministry in an interview in September 2012, and provided the ministry with related emails. The letter contained an offer to allow the ministry to have a computer forensic firm access Quantum Analytics' systems to satisfy itself that no potentially unencrypted PHNs remained.

The ministry did not respond to this letter or the offer.

Despite the suspension of the Quantum Analytics contract, the ministry did not take any steps to stop using the QA software. Employees continued to use and access the program as they always had. On November 26, 2012, counsel for Quantum Analytics sent a further letter regarding the suspension of the Quantum Analytics contract, noting that there was no provision in the contract authorizing a suspension, and that in spite of the suspension, the ministry continued to use the QA software.

On November 27, 2012, Dr. Davidson, the Assistant Deputy Minister responsible for the Quantum Analytics contract, contacted Ms. Kislock about the letter from Mr. Isaacs' counsel and stated, "we need to either 'un-suspend' or cancel contract." In response, Ms. Kislock recommended to Dr. Davidson that the ministry terminate the contract. Ms. Kislock also forwarded this email to the lead investigator. We were left unclear on what basis this recommendation was made. However, the contract was not cancelled at that time.

On January 12, 2013, one of the Ministry of Health investigators wrote to Dr. Davidson to inform her that the Quantum Analytics contract had been suspended pending an investigation by the Office of the Comptroller General.[13] Mr. Isaacs had heard that the Office of the Comptroller General may be getting involved but they never contacted him.

The HSS lawyer gave advice about the Blue Thorn contract and the Quantum Analytics contract. He said his advice related to how to keep the work of the Ministry going while the investigation was underway and while the Ministry had suspended some people's access to data.

On January 14, 2013, two HSS lawyers had a phone call with a member of the investigation team and other representatives of the Ministry of Health about moving forward with contracts affected by the ministry's investigation. On January 15, 2013, the HSS lawyer sent an email to Dr. Davidson, the lead investigator and another member of the investigation team outlining five options and the

13 The assertion that the OCG's IU team was investigating Quantum Analytics was inaccurate because the IU never began an audit or any other type of analysis of the Quantum Analytics or related contracts as part of its review. However, the IU had captured the physical Quantum Analytics file in September 2012 when it picked up all the contracts that were subject to the Ministry of Health review.

attendant pros and cons of each approach that had been discussed on the call, as summarized below:

1. *Continue with existing contracts and arrange for persons under investigation to not have access to data.*
2. *Direct award contracts to persons capable of doing the work who are not under investigation, in a manner which could be justified under the direct award guidelines*
3. *Move the work in-house.*
4. *Cease carrying out the work until the investigation is complete.*
5. *Procure new agreements by way of Request for Proposals.*

The five options outlined above were included in a Ministry of Health briefing note on how to deal with the Quantum Analytics contract.

On January 15, 2013, the HSS lawyer told the HSS Supervising Solicitor that the Ministry of Health had instructed him to refrain from sending a further letter to Quantum Analytics for the time being. He noted that the ministry was considering whether to reinstate the contract. He also noted that "Heather Davidson's group feels that they [Quantum Analytics] were without blame on this and should be reinstated and for work to recommence. MOH is to confirm this after they consider the recommendation."

On January 18, 2013, the HSS lawyers provided some further legal advice to a member of the investigation team about the risks associated with direct-awarding contracts.

The HSS lawyer gave evidence that he did not provide advice on whether the ministry should terminate the Quantum Analytics contracts. He said that he may have given advice as to how to implement the terminations once the ministry had decided to adopt that course of action.

On January 25, 2013, Dr. Davidson asked the contract manager to provide information about the impact on the ministry of not continuing with the QA contract. The four-page document the contract manager responded with recommended reinstating the contract and explained why it was necessary. The document stated:

Why this contract is necessary?

- *The Ministry needs one location where staff can access "official" numbers. This is especially important in the preparation, verification and sign-off of information in public-release documents.*
- *The Ministry has extensive data holdings in its administrative databases, but because of the complexity of the databases and the programming skills required to analyse the data, only a small number of trained analysts have access to these datasets.*
- *There is a separate need for easy access to key indicators/statistics data for a wide range of purposes such as preparing presentations, speaking notes, briefing notes, issue notes, and other communication pieces for the Minister, ministry executive, Government Communications and Public Engagement staff, and responses to media and public enquiries;*

  . . .
- *Need for one location for "official" numbers:*

  . . .
- *Quantum AnalyzerTM provides Ministry staff with "instant" access to a common data library of summary level, consistent, verified, up-to-date, documented data / information / indicators from Ministry databases and other data sources. QA is also a desktop analysis tool that can display information and meta data, and assist with analysis of information such as generating tables, charts, maps, and data extracts.*
- *The Ministry cannot easily replace the benefits gained from QA. QA contains over 170 different tables which display over 500 different categories of multiple year data from multiple sources. Plus, the built in analysis toolset means that staff can easily locate and analyse the desired statistic, supported by the necessary metadata and documentation . . .*

The document also outlined several risks of not reinstating the QA contract at that time, which included identifying

three major activities in the next six months that would have relied heavily on the QA software. It also outlined strategies to mitigate the risks that might be associated with providing ministry data to Mr. Isaacs.

Although the contract manager recommended reinstatement of the QA contract because of its unique capabilities, we also heard from other witnesses that the QA software was becoming out of date and that other tools coming to market were competitive.

On about February 7, 2013, the Ministry of Health contacted the OCG to ask whether it had any concerns with the QA contract or contractor, and to say that the ministry would like to reinstate the contract. One of the IU's investigators provided a briefing by email to the IU manager explaining that the contract was outside PSD, did not appear to have persons of interest on the file, and was not included in the IU's investigation scope. However, she then described a discussion with two of the Ministry of Health investigators about data security concerns related to the contract. She advised the IU manager that while it was not in the group's scope,

> *… the ministry needs to consider the contract risks, particularly the credibility of the contractor, the value for money provided by the contract, the business model for providing this information to the health sector, and the fact that the contractor obtained unauthorized data and that data remains unaccounted for.*

She further added, "an audit of this contract and related contracts is warranted to assess the business model, value for money, contract management and data access."

It is not clear on what basis the investigator made these assertions, other than that she had discussions with the Ministry of Health investigation team.

On February 18, 2013, Dr. Davidson wrote to the HSS lawyer noting that she did not think the Ministry of Health needed to proceed with a forensic audit of Quantum Analytics' systems (as offered in the November letter from Mr. Isaacs' counsel).

On February 21, 2013, just over five months after the contract was suspended, the HSS lawyer wrote a letter to Mr. Isaacs' counsel confirming that the ministry had decided to terminate its contract with Quantum Analytics. The letter also acknowledged that the ministry had continued to use QA software in spite of the ministry's earlier suspension of the services under the contract.

When we spoke with Dr. Davidson, she said the decision not to renew the QA contract was driven by the investigators:

> *Elaine [McKnight] called me to come into the meeting when they were talking about the Quantum Analyzer, because she knew that I had been concerned that [the lead investigator] was – that the investigators were misinterpreting what Mark had access to, and how he did his work. And I had raised that with [the lead investigator], and had not had any response from her. And so it was still an outstanding question to me. And so Elaine knew that, and so she called me in so that I could explain that to them.*
>
> *And basically they said, well, it says here, and they showed me the report that had been prepared by the investigators, which still said that he had inappropriate access to personal information. Which I had questioned that. That, first of all, yes, he should have not had the PHNs, but he raised that himself.*
>
> *But the personal level information was actually what he needed to do his job. He couldn't do the work he did for us without having it. So that was not inappropriate.*
>
> *And I had raised that, but and they basically said, "Well, we have to go by what the investigator said." And I was quite furious.*

Dr. Davidson was not able to identify the specific report that the investigators had shown her; she had not been given a copy. She said that after this meeting, she decided that the only option was to terminate the contract:

> *It was not going to be expedited, that was clear, it was going to take a long time, and because Mark's lawyer, you know, had raised the question of we really had no authority to suspend it in the first place. That really the only option we had was to keep it going or terminate it. And given I couldn't unsuspend it, and it didn't look like it*

was going to happen for a long time, the only alternative was to terminate it.

On April 2, 2013, counsel for Mr. Isaacs wrote a lengthy letter to the Ministry of Health and raised the following issues:

- Quantum Analytics was still awaiting confirmation that the Quantum Analyzer data library and the associated software and files were removed from the ministry
- the ministry had no right to "suspend" the contract, and Quantum Analytics should be compensated for its lost revenues during the suspension, in addition to being compensated for the ministry's continued use of the data library and software
- that although the contract had an arbitration clause, Quantum Analytics was considering bringing civil proceedings against the ministry because there were "a number of aspects to the manner in which Quantum Analytics and Mr. Isaacs have been treated by the Ministry since September 2012 which may be actionable"
- when Mr. Isaacs went to the ministry on September 18, 2012, he understood that he was meeting to discuss the contract, but "he was instead subjected to lengthy questioning" about the flash drive
- "Mr. Isaacs was extremely upset by what he considered to be an ambush-style tactic, and by the fact [the investigators] seemed to have started the interrogation under the assumption that he was 'guilty' of having improperly acquired data from a Ministry employee"
- The lead investigator had told Mr. Isaacs a lawyer would draw up a document for his signature outlining his dealings with the employee, but no such document was ever provided to him
- Mr. Isaacs would not sign the declaration provided by the ministry because it was too broad and would require him to return the emails between himself and the ministry about the flash drive, and he needed that information to protect himself in light of the ongoing investigations; and those emails were just as much Mr. Isaacs' property as the ministry's

The letter enclosed a form of declaration that Mr. Isaacs would execute on a "without prejudice" basis.

On April 8, 2013, the lead investigator, three HSS lawyers and Dr. Davidson met to discuss issues relating to Mr. Isaacs and Quantum Analytics. The HSS Supervising Solicitor, in notes taken at the meeting, said of a reference to a comment made by Dr. Davidson: "Lyr. correct re[lead investigator] not understanding fully the nature of data [Mr. Isaacs] was allowed to have."

The notes also indicate that Dr. Davidson made statements indicating that they "need to take Quantum Analyzer off min. databanks" and that Mr. Isaacs was "professional and cooperative" in finishing up the transition work, and that although the ministry would not necessarily renew the Quantum Analytics contract, Mr. Isaacs has "other skill and assets" that might "be useful to MOH."

A comment attributed to the lead investigator suggested that the investigation of Mr. Isaacs and Quantum Analytics had not yet been completed: "Priority list of Phase 2. Won't be prob. until the end of June."

On May 16, 2013, an HSS lawyer wrote to the lead investigator asking whether the ministry had compensated Mr. Isaacs for the continued use of the QA software and, if not, asking for instructions. The lawyer also sought confirmation that Mr. Isaacs was no longer under investigation, noting that "the longer Mr. Isaacs is kept in a state of uncertainty, the higher the legal risk to the province." The lawyer also noted a reminder letter from Mr. Isaacs' counsel had come because the ministry had not yet sent a reply to that counsel's letter of April 2, 2013. The HSS lawyer wrote, "we are concerned that if a response is not provided as soon as possible, there is a high risk the government may be faced with another lawsuit." The lead investigator told us that she had referred the issue to Ms. Kislock.

On May 22, 2013, an HSS lawyer sent an email to the Executive Director responsible for the Quantum Analytics contract, noting that the lead investigator had indicated that the Executive Director could advise whether compensation had been provided to Mr. Isaacs or whether arrangements to do so were in place. The Executive Director replied that the Ministry of Health had made two payments to Mr. Isaacs since September 2012.

On June 24, 2013, the HSS lawyer wrote to counsel for Mr. Isaacs, apologizing for the late response and explaining the ministry's understanding that Quantum Analytics had licensed the use of its tool through direct agreement with the health authorities, and that Mr. Isaacs would need to contact the health authorities directly. The letter noted that the investigation was ongoing, and that the ministry would not consider further work with Mr. Isaacs and Quantum Analytics until the investigation was completed and its findings reviewed. The letter noted that the ministry may consider compensating Quantum Analytics for the use of its tool from the date of its last invoice until the date of its removal from the ministry's system, and suggested that Mr. Isaacs contact the ministry's contract manager directly to see if a mutually agreeable figure could be reached.

In the same letter, counsel clarified that the demand for return of all government information related only to that received by Mr. Isaacs or his company from the Ministry of Health under the contract. The letter requested that Mr. Isaacs sign a declaration, enclosed in the letter, confirming he did not have that information in his possession.

Mr. Isaacs and his counsel reviewed the letter. They wrote their own declaration, signed it and sent it to the ministry on July 17, 2013. The ministry accepted this without complaint. Mr. Isaacs then began the process of monitoring the steps the ministry had to take to shut down the contract.

On July 11, 2013, Mr. Isaacs wrote to the Ministry of Health indicating that the ministry's assertion that he needed to contact the heath authorities about the use of the QA software was not correct. He wrote that Quantum Analytics had extended the ministry's licence to include five users in each health authority who could access a particular data library. He said that the data library was part of the ministry's contract, and when the ministry terminated its contract with Quantum Analytics, the ministry was obliged to contact the health authorities to tell them that the QA software was no longer available to them.

On July 30, 2013, Dr. Davidson wrote to the HSS lawyer indicating that she was unaware of the arrangement described above, and saying that the ministry would notify the affected users.

Between August and September 2013, there was no further correspondence between the ministry and Mr. Isaacs' lawyer.

12.4.2.1 SETTLEMENT OF QUANTUM ANALYTICS CONTRACT DISPUTE

In October 2013, Mr. Isaacs was attending his wife's long service award ceremony and happened to see the new Deputy Minister, Stephen Brown, who he knew from previous work at the Ministry of Health. Mr. Isaacs told us that while he did not make a habit of "ambushing" people, he spoke to Dr. Brown about his lingering issues with the ministry and the fact that the case had never been settled.

Dr. Brown told us that earlier he learned that Mr. Isaacs and his wife had been traumatized by the process. He had spoken to her and she explained that Mr. Isaacs was under tremendous stress, worrying that the RCMP might kick down the door to the home based on the ministry's public comments about an RCMP investigation. Dr. Brown told us that he had reviewed the facts and that it "looked as though [Mr. Isaacs] had done everything appropriate, it was the ministry that made the screw-up on including the PHNs, and he had addressed that issue immediately straight away." Dr. Brown recalled telling Mr. Isaacs, "I'm really sorry about the stress you're under. Come and talk to me. Let's talk this through."

Dr. Brown learned that there was some question about whether the ministry would continue to use the QA software. He told us that this did not have anything to do with any of the allegations, but was a business decision. He wanted the matter settled and passed it on to Mr. Sidhu for the calculations to be completed.

In late October 2013, Mr. Sidhu approached the HSS Supervising Solicitor, seeking her assistance in reaching a settlement with Mr. Isaacs. She wrote to the employment lawyer to see whether there were any issues with her working with Mr. Sidhu to achieve a settlement of the matter in light of the other outstanding litigation that the Ministry of Health was engaged in. The employment lawyer replied, noting that the Deputy Minister of Health had indicated on September 30, 2013, that he was interested in settling the litigation with Dr. W. Warburton, and that the Ministry of Health needed to be careful not to diminish its bargaining power, "assuming that all of these

individuals are talking to each other." The employment lawyer indicated that she would like further information about the proposed settlement, and would then consult with outside counsel as necessary.

On October 31, 2013, the employment lawyer and the HSS Supervising Solicitor had a conference call with Mr. Sidhu to discuss a possible settlement with Mr. Isaacs and Quantum Analytics. Following the call, the employment lawyer wrote to the HSS Supervising Solicitor to summarize the advice that they gave Mr. Sidhu that day, and to recommend next steps prior to Mr. Sidhu's meeting with Mr. Isaacs scheduled for the following week:

> *It is my understanding that the MOH believes that Mark Isaacs did nothing wrong and was improperly lumped into the MOH's investigation with other researchers.*
>
> *I don't have any information to suggest that the MOH had a proper basis to suspend its contract with Mr. Isaacs, however, it would be helpful if [an HSS lawyer] could confirm whether there is any reason why it should be entering into a settlement agreement.*

The employment lawyer went on to outline that she could draft a settlement offer between the Province of British Columbia and Mr. Isaacs that could include compensation for the time during which the contract was suspended and for legal fees, as well as an apology under the *Apology Act* and a release.

On November 1, 2013, the employment lawyer wrote to the HSS Supervising Solicitor recounting a discussion that she had with outside counsel that day regarding the prospective settlement. She wrote that outside counsel thought that the Ministry of Health should not apologize to Mr. Isaacs, "as this may prejudice the bargaining position of the MOH vis-à-vis the other cases it is facing" and that Mr. Sidhu should have "a communication strategy along the same lines of what was communicated in the TI media release" that was issued in October 2013.

On November 5, 2013, Mr. Sidhu wrote to the HSS lawyer advising that the Ministry of Health had agreed to a settlement with Mr. Isaacs, and asking the HSS lawyer to contact Mr. Isaacs' lawyer with respect to the release. As part of the settlement, the Ministry of Health agreed to facilitate the opportunity for Mr. Isaacs to meet with Ms. Davidson to discuss the prospect of re-establishing a contract with Quantum Analytics. Mr. Sidhu confirmed he had spoken with Dr. Davidson and she was willing to meet with Mr. Isaacs to give him "the opportunity to make [his] case." The settlement agreement was signed on November 25, 2013.

It appears that the advice discussed between lawyers on November 1, 2013, was not communicated to Mr. Sidhu, and Mr. Sidhu settled the matter directly with Mr. Isaacs without that advice. Dr. Brown told us that he was aware of the settlement with Mr. Isaacs, that Mr. Sidhu had walked him through the calculation, and that he was comfortable with the settlement.

Although he agreed to it, the settlement did not compensate Mr. Isaacs for the time that remained on the contract when it was cancelled. Because the QA software was specially designed for the Ministry of Health, he effectively mothballed it once the settlement occurred.

The HSS lawyer said that although he did not provide advice as to the appropriateness of the terms of the settlement, he gave the following evidence about the advice he gave to Dr. Davidson in February 2013 regarding the approach to settlement:

> *I didn't think that Mark Isaacs had been fairly treated by the ministry in this, and on the information side, information handling side, I don't think he ever did anything wrong, from anything I ever saw, he was clean as a whistle. I mean, if he got nailed, all the rest of us are doomed. So that – that's one thing.*
>
> *… it turned out … that despite the fact that supposedly, even after things were terminated, they kept using the Quantum Analyzer, which you sort of think to yourself, oh geez, you know …*
>
> *So … that came a little later when I discovered that they were still using it, and I said, well wait a minute, you know – here's a guy that's basically done nothing wrong, and on top of it we're using his – his product for free, and so then we had a number of discussions to try to make things right for the guy, which would mean, you know,*

reinstating him, mitigating, paying him for the use of the – of the Quantum Analyzer, you know.

This is one where I felt quite strongly that we should do the right thing by this guy, and I think we should do the right thing for everybody, but in this case he never did anything wrong, but we should certainly step up, and – and pay for whatever we – we had used, and – and protect his reputation.

The Quantum Analyzer software was never used by the Ministry again. The Ministry created its own way to generate reports, which previously would have been done by QA software, and never resumed using the program. Dr. Davidson told us that Mr. Isaacs was encouraged to apply for some contracts, and that "he had actually done some contracts for the Ministry." She went on to say, "he had chosen not to apply on one that we had suggested he could apply for and would have been good at because he just felt too traumatized."

12.4.2.2 ANALYSIS: SUSPENSION AND TERMINATION OF QUANTUM ANALYTICS CONTRACT

Mr. Isaacs was not treated fairly by the Ministry of Health. Through no fault of his own, he inadvertently received personally identifiable administrative health data. Once he realized this had occurred he ensured that it was immediately and safely returned to the Ministry of Health. His contract with the ministry was suspended and both he and his wife were interviewed by the investigation team. Both were shaken by their experiences.

The ministry did not conduct a reasonable and timely investigation into Mr. Isaacs' receipt of the data. Had it done so, the evidence would have demonstrated that the improper disclosure of data to Mr. Isaacs was due to the error of a ministry employee, and that Mr. Isaacs acted entirely appropriately in responding as he did.

The suspension and eventual termination of the contract created significant financial uncertainty for Mr. Isaacs. While there was no guarantee that the ministry would renew his contract once it was over, the term of the suspended contract went until December 31, 2014. The observations about alternatives to the QA software were somewhat speculative and preliminary. There is no evidence to suggest that the ministry did not value the service that Mr. Isaacs provided. His actions in safeguarding ministry data when he received the flash drive demonstrated his reliability.

The only reason for the suspension of the QA contract was Mr. Isaacs' receipt of the flash drive that accidentally contained personal information. It was unreasonable to suspend Mr. Isaacs' contract – first, because there was no suspension provision in the contract itself, and second, because there was no evidence that Mr. Isaacs had done anything wrong with respect to his contract. The ministry's response was entirely disproportionate and the delay in resolving the matter only compounded the ministry's mistake.

12.4.3 CONTRACT WITH BLUE THORN RESEARCH AND ANALYSIS GROUP INC.

Given the central role Blue Thorn Research and Analysis Group played in the basic functioning of the ministry's Population and Public Health Branch, the suspension of its contract on September 13, 2012, abruptly halted the epidemiological surveillance and research performed within the Branch.[14]

The investigation team first turned its attention to Blue Thorn as a result of the firm's relationship with Dr. W. Warburton. On reviewing Blue Thorn's contract, the investigators also suspected that two public servants were in a conflict of interest given their simultaneous association with Blue Thorn. These concerns led the investigators to recommend the suspension of both the Blue Thorn contract and data access for its associates.

The decision to suspend the contract was made by Assistant Deputy Minister Arlene Paton based on what she described to us as direction from the lead investigator and the then-Director of Data Access, Research and Stewardship. Ms. Paton explained to us that she was told that she needed "to stop the relationship" with Blue Thorn while the investigation proceeded. She understood that the concern about Blue Thorn was related to the recent public statements made by the Minister of Health about an alleged data breach and related RCMP investigation. While she did not know the reasons behind the decision to terminate Ministry of Health employees earlier

14 See Chapter 4 for a description of the public health analysis work carried out by Blue Thorn.

in September, she believed, as did many in the ministry, that the firings related to improper use of ministry data.

Ms. Paton understood the situation with Blue Thorn to be sufficiently serious that she had no choice but to act on the recommendations of the investigation team to suspend the contract to maintain data security while an investigation was conducted. Despite this, she believed at the time that the contract suspension would only be temporary and hoped it would not take long to restart the work done by the firm. While Ms. Paton did not recall whether the investigators presented her with specific evidence showing that Blue Thorn was engaged in any inappropriate actions, she recalled them informing her that they had concerns with Dr. W. Warburton's connections with the firm, the firm's data security practices, and the potential for a conflict of interest with two Blue Thorn associates. Notice of the suspension was provided to Blue Thorn by email, the wording of which was provided to Ms. Paton by the investigation team.

Blue Thorn's contract with the province did not include any suspension provisions. Rather, the province had the option to terminate the contract at its discretion by giving the contractor 10 days' notice. The ministry's unilateral decision to both suspend the contract without prior notice and allow it to expire without any further payment was contrary to the agreement.

The concurrent decision to suspend data access for Blue Thorn associates was made by Assistant Deputy Minister Lindsay Kislock based on what she described to us as the concerns of the investigation team. Ms. Kislock's decision to both suspend data access and maintain those restrictions throughout the investigation was made in the absence of any evidence suggesting improper use of data by any Blue Thorn staff. Ms. Kislock explained to us that she neither saw nor required such evidence to initiate or maintain the restrictions.

While the investigators had concerns with Dr. W. Warburton's contractual ties to the firm and, subsequently, with potential conflicts of interest for two of its associates, they had no evidence or allegation before them that data was being misused when access was suspended. As such, the decision was made on mere suspicion that data may have been at risk and without any preliminary assessment of whether or not this was the case. As discussed in chapter 7 of this report, suspending data access based on conjecture or mere suspicion, in the absence of any evidence, is improper. Additionally, the ministry's decision to suspend data access first and ask questions much later, caused significant harm to Blue Thorn's associates and resulted in the firm ceasing operations. A timely investigation could have mitigated these impacts.

12.4.3.1 CAUSES OF CONCERN

The Ministry of Health investigation team identified three reasons for focusing on the Blue Thorn contract. As we describe below, none of these was a reasonable basis on which to suspend the Blue Thorn contract.

12.4.3.1.1 RELATIONSHIP WITH DR. WILLIAM WARBURTON

We described in Chapter 7 that the investigators turned their attention to Dr. William Warburton early in their investigation in part because of the one dollar contract he held with the ministry for work on atypical antipsychotic drug research. The investigators then turned their attention to any other connections he may have had with other ministry work. In doing so, the investigators discovered Dr. W. Warburton's connection with Blue Thorn.

As explained below, Dr. W. Warburton had been included in Blue Thorn's contract with the ministry in order to accommodate Public Health Agency of Canada (PHAC) requirements for funding the Trajectories Project. This arrangement had been both advocated for and approved by the Ministry of Health, PHAC and Blue Thorn. Through an administrative error, Dr. W. Warburton's name was not added to the list of key individuals in the ministry's contract with the research firm. Given the suspicions already held by the investigators concerning him, the funding arrangement with PHAC for the Trajectories Project and the administrative error of not including Dr. W. Warburton's name in the amended Blue Thorn contract, led the investigators to extend their attention to Blue Thorn itself.

12.4.3.1.2 ALLEGED CONFLICTS OF INTEREST

As they examined the Blue Thorn contract, the investigators learned that two of the company's associates were also employed by the province. After the investigators interviewed the two associates and conducted documentary analysis, the ministry formed the view that both individuals were in a conflict of interest and required Blue Thorn to remove them from the contract. One of the two

associates also had additional disciplinary action taken against her in her role as a public servant.

While it was not unreasonable for the Ministry of Health to inquire into whether these employees were in a conflict of interest position (we determined they were not),[15] this was a concern that could have been investigated without having to suspend the Blue Thorn contract.

12.4.3.1.3 DATA HANDLING PRACTICES

The lead investigator was also concerned about Blue Thorn's data handling practices related to aggregate, summary-level data. Transcripts of interviews conducted by the lead investigator indicate that she consistently asserted that such data had to be treated in the same manner as personally identifiable data. This would only be correct if the information contained in the data could lead to the identification of an individual, which with aggregate summary level data is typically not the case.

Neither the ministry's investigation nor ours found any evidence to suggest that "personally identifiable data" (as the term was understood at the time of the investigation) was inappropriately accessed or transmitted by Blue Thorn staff, or that their method of accessing and handling data was either unsanctioned by the ministry or otherwise inappropriate. Ms. Paton confirmed with us that despite the concerns initially raised by the investigators, she never saw evidence to suggest that Blue Thorn did not have adequate security measures in place or that its staff ever mishandled data.

Concerns about data handling practices were not, therefore, a sufficient basis on which to suspend Blue Thorn's contract.

12.4.3.2 CONTINUING SUSPENSION

Ms. Paton understood that the investigators' concerns with Blue Thorn were peripheral to the focus of their broader investigation. She explained that she was told to ensure that Blue Thorn did not re-engage in work for the ministry while the investigation was underway; and that when the investigators had sufficient time, they would focus their attention on Blue Thorn.

Soon after the suspension, Ms. Paton asked the Population Health Surveillance and Epidemiology Branch to draft a memo describing the impacts of the Blue Thorn contract suspension. She then relied on this memo in consulting with other Assistant Deputy Ministers, the Deputy Minister and the internal investigators. This led to the temporary reinstatement of the Blue Thorn contract to allow three of its associates to re-engage on ministry projects for a brief period during the winter of 2012 and spring of 2013.

Prior to the contract suspension, Blue Thorn played a key role in provincial flu surveillance. This work informed the ministry about where in the province the flu was most prevalent, where delivery of the flu vaccine was most needed, and when and where the flu may spread or was otherwise likely to appear in the future. At the time of the suspension, the Population Health Surveillance and Epidemiology Branch made clear to the investigators and senior management that public health was at risk if flu surveillance was not restarted quickly. The ministry re-engaged one Blue Thorn associate to continue the flu surveillance work he had been doing prior to September 13, 2012. In October 2012, he was provided data access in order to both continue the work and to simultaneously prepare data reporting tools for the transfer of flu surveillance to the BC Centre for Disease Control (BCCDC). That individual's work on the project ended in March 2013.

In 2012, British Columbia was a signatory to a national project funded by PHAC, designed to track the prevalence and impacts of neurological disease across Canada. Following the Blue Thorn contract suspension, project partners from across Canada raised concerns that British Columbia would be unable to meet its obligations, which would threaten the entire multi-year project and its deliverables. To ensure that the province met its minimum obligations to the contract, and to avoid having to return funds already received from PHAC, the Population Health Surveillance and Epidemiology Branch re-engaged the services of two Blue Thorn associates to continue the work they had been doing before the Blue Thorn contract suspension. Ms. Paton explained to us that persuading the investigators, Ms. Kislock, and the Deputy Minister to allow this resumption, took considerable effort. Ultimately, the limited contract resumption allowed British Columbia to meet its minimum commitments to the national project without considerable

15 As discussed in section 11.3 of our report.

delay. Nevertheless the national project remained negatively impacted, the details of which are described in Chapter 17.

By early October 2012, the ministry's investigators determined that should Blue Thorn agree to remove Dr. W. Warburton and the two other employees they believed were in a conflict of interest from the contract, it could be reinstated. Except for concerns about those potentially conflicting roles, they did not find any other issues with the contract itself. First, however, the investigators sought the opinion of the Investigation and Forensic Unit (IU) of the Comptroller General's office as to whether it would be possible to "unsuspend" the Blue Thorn contract given the IU's ongoing parallel investigation (which had only just started).

The IU Director prepared an Investigation Issue Note dated October 4, 2012, to brief the Comptroller General on the Blue Thorn Contract. As the Issue Note explained, the "Ministry Investigation Team believes that if Blue Thorn signs a waiver that it will not have these three individuals involved in this work, then the work can proceed. We believe that their review is from the perspective of data access and not fiduciary responsibility or contract management." The Issue Note also explained that the IU has "not had the opportunity to thoroughly examine all the inter-relationships in their investigation and their findings could provide that this contract was also part of a fraud scheme or at a minimum, a serious conflict of interest."

One of the IU investigators told us that despite having no evidence of financial loss, the facts presented to them constituted an unacceptable risk because Dr. W. Warburton was a "party of interest" and was working on the contract. The Issue Note stated that the ministry told them about concerns there was a potential "funding scheme." What the ministry told the IU about the contract was speculative and based on no evidence. As such, the IU was hindered in its ability to provide informed advice on the contract.

Relying on the information they received from the ministry, the IU advised the ministry around October 9, 2012, that there was too much risk associated with the contract to reactivate it and that the IU intended to investigate issues related to Blue Thorn during its investigation. It also notified Ms. Paton, Mr. Sidhu, the lead investigator and the contracts specialist that the IU had identified "red flags" associated with the contract. While the ministry was not bound to follow the advice of the IU, it chose to maintain the contract suspension while the IU conducted its investigation with the exception of allowing the two limited re-engagements permitting flu surveillance and neurological disease reporting to temporarily resume. It appeared that until late November 2012, the ministry investigators believed that the IU would complete its investigation by December 2012.

As the suspension continued through December 2012, both Ms. Paton and her staff grew increasingly concerned about the impact of the investigation on Blue Thorn associates and on the ministry's ability to continue the work it was doing prior to the suspension. Ms. Paton explained that throughout the fall and winter of 2012 she was hearing from her staff that:

> *[Blue Thorn associates] who do this great work are all going to go find other jobs and then they are not going to be available to us. And if one of our strategies is to teach our own staff how to do this work and have that capacity built in here and at BCCDC, how do we do that if the people who know how to do this work were to go off and get other jobs? And then of course I heard they couldn't get other jobs … so I just remember both [the lead investigator] and Lindsay just saying, well, we are going as fast as we can, there is a lot of detailed work having to happen … despite bringing it up with Elaine McKnight as well, my associate deputy, there just didn't seem to be any way to move anything forward. And then when we finally did finally get … the green light to go ahead with the RFP, we got stalled again because all of a sudden the OCG was investigating the contracts. There was the sense that there were not only privacy breaches and data security issues but potentially financial mismanagement.*

The HSS lawyer gave some advice around the Blue Thorn contract. He said his advice related to how to keep the work of the ministry going while the investigation was underway and while the ministry had suspended some people's access to data. As we set out earlier, the lawyer's advice was to provide contracting options for the

ministry's consideration. The HSS lawyer gave evidence that he did not provide advice on whether the Ministry of Health should terminate the Blue Thorn contract. He said that he may have given advice as to how to implement the termination once the ministry had decided to adopt that course of action.

Ultimately, the Blue Thorn contract expired on March 31, 2013, and was not renewed.

12.4.3.3 ANALYSIS: SUSPENSION AND EXPIRY OF BLUE THORN CONTRACT

The ministry never explained the reasons for the suspension to Blue Thorn or to the ministry employees who oversaw the firm's work. The ministry's investigators said shortly after the contract suspension that the halt would be temporary. Expecting to return to work before long, Blue Thorn associates did not immediately seek employment elsewhere. Although the contract was briefly reinstated so that three Blue Thorn associates could re-engage in work necessary for the ministry to meet its contractual obligations to the federal government and to monitor flu trends during the height of the 2012/2013 flu season, the suspended contract was ultimately allowed to expire.

The ministry's decision to suspend the Blue Thorn contract was made on the recommendations and concerns expressed to senior management by the investigation team. These concerns were not supported by any evidence of wrongdoing. While Ms. Paton made the decision to suspend the contract, at the same time she also warned senior management of the potential impacts of an extended contract suspension and she repeatedly sought an early resolution of the issue. It appears little consideration was given to those warnings until the summer of 2013. By that time the ministry's epidemiological surveillance objectives were adversely affected and Blue Thorn had stopped functioning.

The Ministry of Health's reliance on the IU's representation that it was intending to investigate Blue Thorn and on the IU's recommendation to maintain the suspension was not wholly unreasonable given that the ministry expected the IU to complete its review by the end of December 2012. The ministry assumed the IU was well placed to identify financial management issues that the ministry may have overlooked. This was consistent with the reasons the IU was asked to do its own investigation in the first place. However, it appears clear that at the time the IU advised the ministry about the risks of restarting the Blue Thorn contract, the IU did not have the opportunity to review the contract in detail and it relied on the information it received from the Ministry. This created a circle of reliance in which both the IU and the ministry could point to the information received from the other to justify the steps they took.

We saw no evidence that the ministry investigation team conducted a preliminary assessment to determine whether there was enough evidence to warrant the initial or ongoing suspension of the contract. The IU did not ultimately review the Blue Thorn contract in detail as they originally intended. Regardless, the problems for both the ministry decision-makers and the IU arose from the fact that they each relied on the insufficient and speculative information the investigation team provided. Thus, the ability of both the ministry and the IU to effectively carry out their roles was hindered by the quality of the information they had been provided.

12.4.4 DR. WILLIAM WARBURTON'S INVOLVEMENT WITH THE MINISTRY OF HEALTH

In this section of the report we discuss Dr. W. Warburton's involvement with the Ministry of Health, including the nature of the health research he was conducting and his contract termination. As we set out in chapters 5 of our report Dr. W. Warburton's one dollar contract with the Ministry was identified in the complaint to the Auditor General. As a result, Dr. W. Warburton's data was suspended on June 11, 2012 and his contract terminated on July 16, 2012.

12.4.4.1 CONTRACT TERMINATION

In a letter dated July 16, 2012, the ministry terminated Dr. W. Warburton's contract to conduct research on atypical anti-psychotic drugs for an unspecified "failure to perform certain obligations under the contract including, but not restricted to, improper access to provincial data." The letter was signed by an acting executive director of Primary Health Care and Specialist Services Branch on behalf of the Assistant Deputy Minister. At the same time, his access to provincial data and to the ministry's facilities

were also terminated (his data access for this project was earlier suspended on June 11, 2012). This ended his research work for government, and impacted not only Dr. W. Warburton but also the physician with whom he was doing the atypical antipsychotics work, other research known as the Trajectories Project and, two months later, the contract between the ministry and Blue Thorn Research and Analytics Group Inc. The termination of Dr. W. Warburton's contract meant that his work was never completed and thus his results were never available to the ministry to inform policy making.[16]

12.4.4.2 ATYPICAL ANTIPSYCHOTICS CONTRACT: HISTORY AND PURPOSE

Dr. W. Warburton has significant experience and expertise in using large administrative health datasets to conduct social and health research. His research has focused primarily on issues related to the health and well-being of children in care, but his skills in statistical analysis of datasets have lent themselves to a wide variety of projects. Among many other things, he has done work for the Representative for Children and Youth, the Provincial Health Officer, and the Human Early Learning Partnership at UBC. He is formerly the Director of Research at what is now the Ministry of Social Development and Social Innovation.

Before the investigation, Dr. W. Warburton was involved in research prompted by the General Practice Services Committee (GPSC), a committee of representatives from the British Columbia Medical Association (now Doctors of BC), the Ministry of Health and the health authorities.[17] The GPSC is aimed at strengthening and supporting the practice of family medicine in the province. Through the committee process, issues of particular concern to family physicians are brought to the attention of the Ministry of Health.

In 2010, the GPSC heard concerns from these doctors about the use of atypical antipsychotic medications, and patients had "complained to the Ministry about weight gain, ill health, and poor quality of life following use of these medications." The GPSC wanted to develop a "full understanding of the impact of these medications on patient outcomes" so that physicians could be better educated and informed about them. Similarly, the ministry's Primary Health Care Division thought it essential to respond to physicians' and patients' concerns.[18]

The ministry did not have the expertise to conduct the necessary "complex and sophisticated data analyses" using its existing administrative health databases. Dr. W. Warburton was available, willing to conduct this work, and was not seeking reimbursement; rather, he had agreed to do the work for the contract price of one dollar. To do the work, he required access to ministry administrative health databases that required him to become a ministry contractor and have access to a workspace at the ministry. It was intended that Dr. W. Warburton would work with members of the Pharmaceutical Services Division who had a "business interest in the outcome of these analyses."[19]

The Ministry of Health's then-Chief Administrative Officer, Stephen Brown, approved the contract on the basis that it would inform the work of the GPSC, the Primary Health Care Branch, the administration of PharmaCare and mental health and addiction initiatives.

Dr. W. Warburton was willing to conduct this work for one dollar because he was already planning to work with a physician at BC Children's Hospital, which had received funding from the Provincial Health Services Authority (PHSA), for research pertaining to the impacts of atypical anti-psychotic drugs on children's health outcomes. Dr. W. Warburton would, therefore, already be paid with the PHSA funding. Although the contract did not provide for additional payment by the ministry, it did set out the deliverables that Dr. W. Warburton was required to produce for the ministry and established the mechanism through which he could then access the data necessary for his work. There was, and still is, no policy or legal reason preventing the ministry from signing a contract for this amount. Dr. W. Warburton remained bound by all of the provisions of the contract, regardless of the amount he was paid. The contract was a good deal for the province

16 These impacts are described in greater detail in Chapter 17.

17 Further information about the GPSC can be found at <http://gpscbc.ca/>.

18 Department of Primary Health Care, Ministry of Health, "Memorandum Re: Contract for Dr. Bill Warburton," 12 May 2010.

19 Department of Primary Health Care, Ministry of Health, "Memorandum Re: Contract for Dr. Bill Warburton," 12 May 2010.

as it allowed work to be done on an important issue at minimal cost to the ministry, and in conjunction with work already being funded by the PHSA.

Despite this, certain employees including the complainant and others in Data Access, Research and Stewardship questioned whether the contract was appropriate considering the nominal dollar figure.

The first contract, signed on August 9, 2010, initially ran from July 19, 2010, until March 31, 2011, but was subsequently amended to end on September 30, 2011. A second amendment was supposed to extend the contract until March 31, 2012, but due to an administrative error, this was not done, so a second separate contract was signed on April 4, 2012, with a term from May 15, 2012, to March 31, 2013.

The first contract stipulated that the province owned all intellectual property produced by Dr. W. Warburton under the contract. However, the ministry had made it clear to Dr. W. Warburton that it wanted and expected him to publish the results of his analysis. Publishing such research in peer-reviewed journals was consistent with the ministry's goals, and allowed it to demonstrate that any resulting policy decisions had a clear basis in scientific evidence. As such, the first contract did not fully represent the goals of the parties.

The first contract required Dr. W. Warburton to "conduct complex data analyses on the impact of atypical anti-psychotic medications on patient outcomes" and provide the ministry with the results. He was required to conduct these analyses at the Ministry of Health building. As is standard in such contracts, he was required to maintain confidentiality over any personal information that came into his possession as a result of his work.[20] It took more than seven months for Dr. W. Warburton to obtain access to some of the raw data he needed to do this work.

The second contract, signed on April 4, 2012, contained further deliverables related to atypical antipsychotics. It required Dr. W. Warburton to "conduct a thorough statistical analysis of the risks and benefits associated with atypical antipsychotics" by:

1. Identifying individuals treated with an antipsychotic
2. Identifying comparison groups of individuals treated with alternative therapies including antidepressants
3. Producing graphs and tables of the trends in the alternative treatments
4. Applying to, and linking health data, to ICBC and to the Ministry of Education database
5. Developing estimates of the impact of atypical antipsychotics and alternative therapies on health outcomes including diabetes, mortality, educational attainment, hospitalization and use of the health care system[21]

During the second contract phase the parties used different provisions around intellectual property rights and publishing from those contained in the first contract in order to bring them in line with their mutual goals.

12.4.4.3 ICBC RESEARCH AGREEMENT

In June 2011, as part of his research under the atypical anti-psychotic drugs contract, Dr. W. Warburton also entered into a research agreement with ICBC to obtain height and weight data. He intended to link this with Ministry of Health data for the atypical antipsychotics research. Adding the height and weight data would help Dr. W. Warburton and his research collaborators to better estimate health outcomes (such as weight gain) over time for individuals who were taking these drugs.

By entering into the ICBC research agreement, Dr. W. Warburton formalized the mechanism under which he would obtain this data. It is clear in the records that Dr. W. Warburton's plan to work with ICBC data was supported by both the ministry and ICBC. Employees from the program area (including the then-Executive Director and Assistant Deputy Minister responsible for the Primary Care Branch) and the ministry's Data Access, Research and Stewardship section knew of and approved of Dr. W. Warburton's intent to enter into the research agreement with ICBC. Moreover, ICBC was also very supportive of linking ICBC data to administrative health data. No linked data had been used by the time Dr. W. Warburton's contract was terminated.

20 Ministry of Health, General Service Agreement 2011-212.

21 Ministry of Health, General Service Agreement 2011-212, amendment 3.

12.4.4.4 THE TRAJECTORIES PROJECT

Given his extensive experience in complex data analysis for health research, it is not surprising that Dr. W. Warburton was involved in other projects as well as the atypical anti-psychotic drugs research.

In the fall of 2011, a Director from the ministry's Population and Public Health Branch and a senior epidemiologist from the Provincial Health Services Authority (PHSA) discussed a proposed project with Dr. W. Warburton to identify health trends in early childhood that statistically correlated with academic performance in later life. The Trajectories Project, as it would later be known, sought to link existing administrative health, education and ICBC data to conduct a retrospective longitudinal study of the health and well-being of young British Columbians as they progressed from infancy through high school graduation. It would do this by using more than 20 years of existing administrative health data. The project was motivated by the idea that if it was possible to identify health interventions in early life that correlated with an increased likelihood of graduation, it may be possible for government to target its efforts on such early interventions.

The PHSA agreed to provide some funding to Dr. W. Warburton for preliminary work on the project. The ministry also agreed to support the project but did not have any funds available in its budget to pay for the work. Therefore, with the support of the Ministry of Health's Director of Information and Program Support, the Population Health Surveillance and Epidemiology Branch and the PHSA, Dr. W. Warburton contacted the Public Health Agency of Canada (PHAC) to inquire if federal government funding could be made available to support the project.

The Trajectories Project fit within PHAC's mandate and it agreed in January 2012 to support the project through funds from its 2011/12 budget. As stand-alone financial arrangements require many months to establish, PHAC, the ministry and Dr. W. Warburton sought a way to secure the funding available until March 31, 2012, through an existing contract between PHAC and the ministry. An existing contract with the firm Blue Thorn fit this requirement as this company had engaged in similar work in the past. Moreover, its contractual service commitments to the ministry at the time already included those necessary to produce deliverables for the Trajectories Project.

With the support of the Director of Information and Program Support and the Population Health Surveillance and Epidemiology team, Dr. W. Warburton approached Blue Thorn's principal operator in late January 2012 with a proposal for Dr. W. Warburton to join the firm. The proposal did not impact the work Blue Thorn was doing for the ministry. Blue Thorn's principal operator saw it as a means for the province to secure federal funding for a project that PHAC supported and it was designed to serve a valuable public purpose. On this basis, Blue Thorn's principal operator agreed to amend Blue Thorn's existing contract with the ministry to include Dr. W. Warburton and the Trajectories Project. This amendment subsequently went through all the necessary approvals within the ministry. No pre-existing Blue Thorn associate benefited directly from the amendment.

The Blue Thorn contract was near expiry when the amendment to accommodate the Trajectories Project was approved. As Blue Thorn was successful in securing a contract extension, funding for the Trajectories project was included within Blue Thorn's contract renewal proposal, which was approved by the ministry on March 27, 2012. Dr. W. Warburton and his consulting company performed over $16,000 worth of work under the PHAC contract. The work involved writing a project proposal, conducting a feasibility study and drafting the Privacy Impact Assessments (PIAs) required before data could be accessed and the research performed. Although Dr. W. Warburton performed and invoiced for this work through Blue Thorn prior to his contract termination, because of the investigation the ministry never paid out the funds to Blue Thorn to pay Dr. W. Warburton.

Dr. W. Warburton did not conduct any data analysis or access data for the Trajectories Project. He and the other parties involved understood that he would require authorization to be able to use his existing data access for the Trajectories Project. This is why his initial contracts with the PHSA and the ministry included funding to draft the PIAs and the necessary work to get the data authorizations in place. There is no evidence that Dr. W. Warburton accessed and used the data before receiving this authorization.

12.4.4.6 WORK ON ALZHEIMER'S DRUG THERAPY INITIATIVE (ADTI)

In 2012, Dr. W. Warburton signed a contract with the University of Victoria (UVic) to do some statistical data analysis that was part of the ADTI project. Bringing Dr. W. Warburton on as a subcontractor was well within UVic's authority under the larger ADTI contract it held with the ministry. The work that Dr. W. Warburton was planning to do required access to data that UVic received from the ministry.

The ADTI project did not receive any data throughout the fall of 2012.[22] Dr. W. Warburton worked part-time for a couple of months on ADTI, but without data access, there was little work for him to do. By early October he was let go from the project. He never accessed any data for the ADTI project.

12.4.4.6 LEGAL ADVICE ON CONTRACT TERMINATION

The Ministry of Health and the lead investigator sought some advice from the Legal Services Branch (LSB) regarding the termination of Dr. W. Warburton's contract with the Province in relation to the study of atypical antipsychotic medications. The evidence we obtained regarding the nature and scope of the advice provided was not entirely consistent and is described below.

On July 12, 2012, the Health and Social Services (HSS) lawyer prepared some draft language for use in a letter to Dr. W. Warburton from the Ministry of Health setting out that the ministry was terminating his contract for "failure to perform certain obligations under the contract including, but not restricted to, improper access to provincial data."[23] The HSS lawyer said that the lead investigator told him that Dr. W. Warburton had accessed data inappropriately. He said he advised the lead investigator that improper use of data was "an event of default" under the agreement and as such constituted cause to terminate the agreement. He told us that he did not advise the ministry to terminate the contract on that basis but that he indicated that it was open to the ministry to do so. The HSS lawyer said that he did not have any of the information that the Ministry of Health investigation team had gathered with respect to Dr. W. Warburton's actions and indicated that his advice as to whether Dr. W. Warburton's conduct was a breach of the contract was based on what the lead investigator had told him.

The lead investigator gave evidence that Dr. W. Warburton had told her that he was not currently doing work for the ministry, and that she conveyed that information to the HSS lawyer. She gave evidence that the HSS lawyer told her that if there was no active work being done under the contract, then it should be concluded.

The weight of the evidence, including the language of the contract termination letter and the correspondence to Dr. W. Warburton which followed, as well as the evidence of the HSS lawyer, leads us to conclude that the lead investigator advised the HSS lawyer that the investigation was concerned that Dr. W. Warburton had accessed data inappropriately. Dr. W. Warburton's contract was terminated on that basis.

On July 17, 2012, Dr. W. Warburton sought a meeting with the Ministry of Health because he did not understand why his contract had been terminated. On July 20, 2012, Dr. W. Warburton's lawyer wrote to the Ministry of Health stating that there were no grounds to terminate the contract, and seeking additional information about the basis for the province's position that it was authorized to terminate the contract. The lead investigator sought the assistance of the HSS lawyers in preparing a response. The HSS lawyer who assisted in drafting the contract termination letter was on vacation and so the Supervising Solicitor for the HSS group began advising on the matter.

The Supervising Solicitor was of the view that Dr. W. Warburton had not received an adequate explanation as to why the contract was terminated. She advised the lead investigator that the province should provide Dr. W. Warburton with specifics about his failure to perform his obligations under the contract in sufficient detail to allow Dr. W. Warburton to respond.

The Supervising Solicitor, in addition to the privacy lawyer and the employment lawyer, attended a July 30, 2012, conference call with the lead investigator. The Supervising

22 This was a result of the ADTI contract being suspended.

23 The HSS lawyer is the lawyer from the Health and Social Services group at the Legal Services Branch of the Ministry of Justice who advised the Ministry of Health.

Solicitor was hoping to gain additional information about the investigation and the basis for the termination of Dr. W. Warburton's contract.

The Supervising Solicitor and the privacy lawyer were unable to recall the content of the call in any detail. However, the employment lawyer took extensive notes of the call, which included the following excerpts of statements that the employment lawyer attributed to the lead investigator:

- *[the lead investigator] also explained relationships as between the parties and some circumstances which caused her to be suspicious — namely Malcolm had while being at the Smith Foundation had facilitated some monies from the government to go a chair position at UBC which Malcolm held (not quite clear on hold [*sic*] this worked). Grant came from Ministry and Malcolm was beneficiary of grant.*
- *Malcolm also an adjunct professor at Harvard.*
- *[the lead investigator] also explained that Rebecca Warburton is married to Bill Warburton who is Malcolm's cousin.*
- *Bill and Rebecca are co-owners of a company.*
- *Key third party is a person named Colin who is Rebecca's friend and was also Malcolm's PhD. student. Colin is an Adjunct Professor at Harvard.*
- *[the lead investigator's] position is very clear that these three individuals have engaged in a conflict of interest and have breached confidentiality.*
- *[the lead investigator] said that the amount of collusion is mind blogging [*sic*] both internal and exclusion [*sic*]. Malcolm appears to be pulling the strings.*

When asked about the comments that the employment lawyer attributed to her, the lead investigator said that she did not recall using terms such as "conflict of interest" or "breaching confidentiality," although perhaps she would have said "data breach." She said that based on her personal style, she would have said "concerns around data access" and "based on what we preliminarily have seen here or based on what we have found to date, I have concerns about the following." Her view was that in the summer of 2012 it was still "early days" in the investigation and no findings had been made.

The privacy lawyer who attended the call could not remember its content. We asked him whether, around the end of July 2012, the lead investigator had indicated that it was still "early days" in the investigation, or if she had reached conclusions that something inappropriate had occurred. He told us that based on comments the lead investigator had made to him he understood that at that time the lead investigator thought there was strong evidence that inappropriate things had happened.

Following the conference call, the Supervising Solicitor told the employment lawyer she would continue to press the lead investigator for information about the grounds to terminate Dr. W. Warburton's contract.

On July 31, 2012, the Supervising Solicitor sent an email to the lead investigator indicating that she still needed to understand "in much more detail than I currently have, the exact basis for concluding that there was an 'Event of Default' committed by W. Warburton in connection with his terminated contract." She also sent the employment lawyer an email as follows:

> *I'm expecting to meet with some resistance from [the lead investigator] in response to my request. I don't think it's that she wants to keep anything from us, so much as that she's flying so fast on so many fronts that she is reluctant to take the time to sit down and sift through all of this information to provide me with what I need. She certainly much prefers to communicate by phone than in writing.*

On July 31, 2012, the lead investigator sent the Supervising Solicitor an email indicating that she believed sharing information with Dr. W. Warburton, other than at a "high level," would jeopardize the investigation. The lead investigator instructed the Supervising Solicitor not to provide Dr. W. Warburton with any additional information, and similarly did not provide the Supervising Solicitor with any additional information about the basis for terminating Dr. W. Warburton's contract for cause.

On August 3, 2012, the Supervising Solicitor received instructions from the lead investigator and the Assistant Deputy Minister of the Medical Services and Health Human Resources Division, which was responsible for the contract, to send a response to Dr. W. Warburton's lawyer again citing "improper access to provincial data" as the basis for the contract termination, and providing no additional information.

12.4.4.7 ANALYSIS: CONTRACT TERMINATION DECISION

The contract between Dr. W. Warburton and the Ministry of Health provided that the ministry could terminate the contract for cause in certain circumstances, or without cause given at least 10 days' written notice. The ministry's decision to terminate the contract for cause was made by an Assistant Deputy Minister previously uninvolved in the investigation.

Despite advice from the LSB lawyers, the ministry did not tell Dr. W. Warburton what "event of default" triggered his contract's termination. Based on the information we have reviewed, however, we believe that the reasons for terminating Dr. W. Warburton's contract originated in the suspicions and concerns raised in the complaint to the Office of the Auditor General and coming from the data access area of the ministry.

A concern articulated in the drafts of the Internal Review report described in Chapter 7 was that a one dollar contract was inappropriate. There was no legal or policy reason to support the investigation team's belief that the amount of the contract was, in itself, inappropriate. The investigators failed to consider information about the rationale for approving the contract, the approvals that it did go through, or the benefits to the ministry of the work that was being done under the contract.

Apart from general concerns about the amount of the contract, it appears that the decision to terminate the contract was based on the investigation team's conclusion that Dr. W. Warburton had inappropriately received or attempted to receive ministry data as a contractor for ADTI after his access to ministry data was suspended. Dr. W. Warburton's evidence was that he did not understand his access to ministry data to be completely banned. He believed it to be project-specific, and related only to his work on the atypical anti-psychotic drugs contract. He also believed the data suspension to be both temporary and a mere precaution. He fully expected the issue to be resolved and to have his work resume.

Neither the ministry nor the investigation team spoke with Dr. W. Warburton about data use or access. While the team spoke with Dr. W. Warburton in June 2012, it did not interview him about his data use or access, his understanding of his June 11, 2012, data access suspension or his work for ADTI, the Trajectories Project, or the atypical anti-psychotic drugs contract. Nor did the investigation team provide him with any particulars to augment the little information contained in his June 11, 2012, data access suspension letter and his July 16, 2012, contract termination letter. LSB lawyers suggested to the Ministry of Health that the investigation team provide Dr. W. Warburton with more information, however, no further information was provided.

The team continued to investigate Dr. W. Warburton after his contract was terminated, primarily relying on emails to construct "storyboards,"[24] which detailed their concerns. Through the storyboards the team postulated that Dr. W. Warburton had inappropriately sought to use his existing data access for an external grant, that he entered into an improper research agreement with ICBC, and that his work arrangement for the Trajectories Project was inappropriate.

We gathered evidence and analyzed each of these allegations of misconduct, including those that were proposed after the termination of his contract.

We did not find evidence to support the allegations against Dr. W. Warburton that the ministry used as a basis to terminate his contract. Put simply, they had no factual basis. Dr. W. Warburton did not receive or use data as a contractor on the ADTI project. His one dollar contract was fully approved and not considered inappropriate by the ministry at the time. Moreover, he did not seek to circumvent data access procedures with respect to his contractual work. To the contrary, he consistently sought to carry out his research work in the manner that he believed best reflected the ministry's policies, procedures and his contractual obligations.

24 The "storyboards" were litigation support documents described in Chapter 11.

When Dr. W. Warburton's contract was terminated, he was no longer permitted in the building. The discs with the ICBC data were left in a locked cabinet in his ministry workspace and were confiscated by the investigation team. We were not able to locate these discs or a record of what happened to them, although we received some evidence that the discs were returned to ICBC and destroyed.

The decision to terminate Dr. W. Warburton's contract was not only based on an inaccurate understanding of the relevant facts, the way in which the Ministry of Health responded when he sought more information was unfair and improper. Particularly in light of the public health value of the work Dr. W. Warburton was doing, it was incumbent on the Ministry of Health to ensure its decision was based on a reasonable assessment of the facts. Moreover, it should have provided Dr. W. Warburton with an adequate opportunity to respond to the allegations against him. It did not do so.

12.5 DATA DECLARATIONS

By the summer of 2013, almost a year had passed since the Ministry of Health had suspended access to administrative health data for contractors and external researchers. These suspensions were a result of recommendations made by the investigation team in the summer and early fall of 2012.

Following the release of the Office of the Information and Privacy Commissioner's report on June 26, 2013, the newly appointed Deputy Minister, Stephen Brown, issued what both he and Assistant Deputy Minister Lindsay Kislock described to us as clear instructions to wrap up any unresolved data access issues related to the investigation. In order to do this, Ms. Kislock followed ministry policy to send letters to those who had their access to data removed, requesting they sign declarations attesting to the fact that they no longer possessed ministry data. These declarations, sent out in August 2013, were attached to "demand letters" similar to those sent to external contractors in November 2012.

The purpose of the data demand letters and declaration forms was for the ministry to be able to confirm, in writing, that individuals of concern to the investigation team – those who had accessed or received Ministry of Health administrative health data – had surrendered or destroyed any such data in their possession. This was intended to mitigate the risk of future breaches related to that specific data. However, whereas the November 2012 letters sought both to secure existing data in the recipients' possession and to ensure it was preserved as evidence for potential legal action, the August 2013 letters were concerned only with having recipients declare that they no longer had any data in their possession.

The demand letters were drafted by Legal Services Branch counsel and the investigation team. Ms. Kislock signed and sent these letters to 16 individuals on August 1 and 2, 2013. The recipients included seven Blue Thorn associates, six Therapeutics Initiative researchers or former researchers, two University of Victoria researchers, and one independent researcher from BC Children's Hospital. While all 16 individuals had their ability to access administrative health data restricted a year before, some had never accessed data to begin with and so were surprised to learn, upon receiving the letters, that they were the subjects of an ongoing review. For others, such as the Blue Thorn associates, the letters were the first communication from the ministry that hinted at the reasons for their data access suspensions. The letters did not specify whether the recipient was individually suspected of wrongdoing.

Researchers with the Therapeutics Initiative received similar letters, although related to work that the ministry understood they were doing with "the Pharmaceutical Epidemiology Group, and work undertaken under the Therapeutics Initiative, the Alzheimer Drug Therapy Initiative or other associated Ministry projects." The letters to researchers at the University of Victoria specified it was the researchers' involvement with the Education for Quality Improvement in Patient Care (EQIP) project that was at issue. The letters ended by stating that the ministry's receipt of a signed declaration would "allow the ministry to grant you data access privileges."

For Dr. Dormuth and two of his colleagues, the letters were particularly odd, as those individuals had already provided data declarations to the ministry in November 2012 in response to the first set of data demand letters.

Those who signed and returned declaration forms received follow-up letters from Ms. Kislock explaining that "the

receipt of the signed declaration concludes the review as it related to your involvement in these contract(s) and/or project(s)." These follow-up letters provided no additional information about the review or the reasons for the data suspension. While the letters went on to state that, "In future, if you wish to apply for data access privileges from the Ministry of Health, you can find information on the Ministry of Health's Data Central Website," they did not explicitly state that the recipients had their data access restriction lifted.

The only way that individuals definitively learned that their data access privileges had been reinstated was when they were successful in obtaining employment with the ministry or when their names were included in subsequent data access requests that the ministry approved. As one Blue Thorn associate explained to us, "at some point I am assuming a switch happened and I was deemed to be [okay] again. Beats me when that happened. I have no clue … no one ever communicated to me that the problem was corrected."

Ms. Kislock reinstated data access privileges to all 12 of the individuals who returned their signed declaration forms. Of the remaining four individuals, one never received the letter as it was sent to an old address. By the time that person learned about it, she had already decided to cut all ties with the ministry and so chose not to respond.

The University of Victoria's Associate Vice-President of Research Operations responded to Ms. Kislock's letters on behalf of two university employees who received the August 2013 letters. Ms. Kislock's letter stated the ministry had:

> *… identified situations of inappropriate or unauthorized access, use, storage and disclosure of Ministry data and information, including third party personal information … related to contracts and projects with the Ministry that you were involved and had access to Ministry data and information in relation to your involvement with work undertaken by you under the Education Quality Improvement in Patient Care project …*

In fact, no "situations" of inappropriate data access or use had been discovered that related to UVic or the EQIP project. As explained elsewhere in this report, the ministry's concerns with the EQIP project, which ultimately resulted in the termination of the project, were groundless.

One of the UVic researchers who received a letter had never before been identified as one of the subjects of any of the allegations relating to the misuse of data. This individual had no ministry data access, a fact that the ministry knew or should have known, at the time. This individual was given no notice or chance to respond to the ministry's suggestion in the letter that he had been involved in "situations of inappropriate or unauthorized access" with respect to data. One of the UVic researchers (a professor) we spoke with who received a data demand letter in 2013 explained that he had never personally had access to the province's administrative health data and, as such, did not understand the ministry's rationale for requiring his declaration.

UVic's response to the ministry explained that the university had used, stored and shared all ministry administrative health data in accordance with the university's agreement with the ministry. UVic agreed to return all remaining data in the university's possession, none of which contained personally identifiable health information, while expressing hope that it might be retained for possible future reference as was originally intended. UVic also pointed out that the ministry's agreement with UVic contained "the grant of a perpetual, non-revocable license to use, reproduce, modify and distribute the EQIP data for research purposes to UVic" and that the ethics approval for the project required that the data be retained for at least seven years. The letter ended by requesting further discussions on the matter. The ministry never responded to this letter.

The last individual to not return a signed declaration was an independent medical researcher and physician with the BC Children's Hospital. Through legal counsel retained to respond to the August 2013 letter, she explained to Ms. Kislock that she could not sign the declaration form as its wording was so broad that it could conceivably relate to the health data that she retained for her own patients. While she sought additional clarification from Ms. Kislock, no response was provided. A letter the researcher had sent a year earlier to Ms. Kislock, in which she requested urgent assistance in re-obtaining access to administrative

health data critical to her medical research, also went unanswered. Disillusioned by her experience working with administrative health datasets, the researcher told us she has chosen never to rely on the ministry again and so remains uncertain as to whether her access to ministry administrative health data remains blocked.

When asked whether receipt of the signed declarations satisfied the remaining concerns that the ministry had with the recipients' use of data, Ms. Kislock explained to us:

> *… at that point in the process, it just needed to be done. There wasn't anything – you know, I have an individual telling me they don't have data anymore, and I've got a signed statement from them, and I've questioned them. I had to take them at their word, right? So I felt that I had fulfilled my obligations with respect to ensuring that there wasn't a data breach and that there wasn't ministry data out there that we didn't have control – that I couldn't get my arms around.*

Given that signed declaration forms satisfied Ms. Kislock's concerns, we asked whether the letters could have been sent earlier and data access reinstated much sooner, thereby mitigating the harms many of the August 2013 letter recipients suffered. Ms. Kislock responded:

> *… in hindsight I can think of no reason that it couldn't have occurred. Right? Like, it's easy for us to say now … In retrospect. Like, it always seemed like we were going to get to that and then getting to that didn't – you know, that was September [of 2012] and we didn't really get to that until the spring and early summer [of 2013].*

The ministry sent the letters in August 2013.

For over a year, the ministry prevented these 16 individuals from accessing ministry administrative health data even though it had no evidence or even allegations of data misuse to base these decisions on. Over the time access was suspended, important public health research was halted, families and careers were impacted due to job loss, and reputations were tarnished.

FINDINGS

F 34 Regarding the investigation of contractors and researchers:

- **a.** The Ministry of Health's decisions about which contracts and researchers to include as part of the investigation were wrong as they lacked adequate evidence or justification.
- **b.** The investigation team failed to adequately familiarize itself with the contractual relationships between the ministry and its contractors.
- **c.** The Ministry of Health unduly delayed its investigation into the matters relating to the contractors, researchers, and universities without due regard for the impacts of the delay on health research and individual livelihoods.

F 35 In most cases, the ministry suspended data access of contractors and researchers on suspicion alone.

F 36 Regarding contract suspensions and terminations:

- **a.** The ministry wrongly suspended the ADTI, TI, and Blue Thorn contracts and wrongly effectively suspended the EQIP contract in the absence of evidence of wrongdoing.
- **b.** The ministry's decision to suspend the ADTI and TI contracts were wrong as they were based on suspicions about data use by Dr. Dormuth and there was no evidence that he had inappropriately used ministry data.
- **c.** The suspension of the Blue Thorn contract was not based on evidence of wrongdoing and was not in the ministry's own best interests.
- **d.** The ministry's Blue Thorn contract administrator was improperly led to believe by ministry officials that the suspension would be short-lived, and through no fault of his own advised the Blue Thorn associates of this. As a result, some Blue Thorn associates did not look for alternate employment sooner.
- **e.** The ministry's decision to terminate the Resonate contract was wrong because it was based on suspicions regarding Contractor 1 and Contractor 2. There was no evidence that either had inappropriately used ministry data.
- **f.** The ministry improperly suspended the data access for Contractor 1 and Contractor 2.
- **g.** The Ministry of Health acted improperly when it terminated Dr. W. Warburton's contract based on a misunderstanding of the relevant facts and by treating him unfairly.
- **h.** It was wrong for the ministry to suspend and later terminate the Quantum Analyzer's contract, based on an incorrect determination that Mr. Isaacs had done something wrong. The software was in active use at the time and the ministry had no replacement product ready. As a result, terminating the contract was not in the ministry's own interest.
- **i.** The EQIP initiative was not renewed as a result of the ministry's investigation. Minister Lake was wrong when he suggested that the decision not to continue EQIP beyond August 31, 2012 was a timing coincidence.

13.0 / WINDING UP THE MINISTRY OF HEALTH INVESTIGATION AND SETTLING THE LITIGATION

13.1 INTRODUCTION

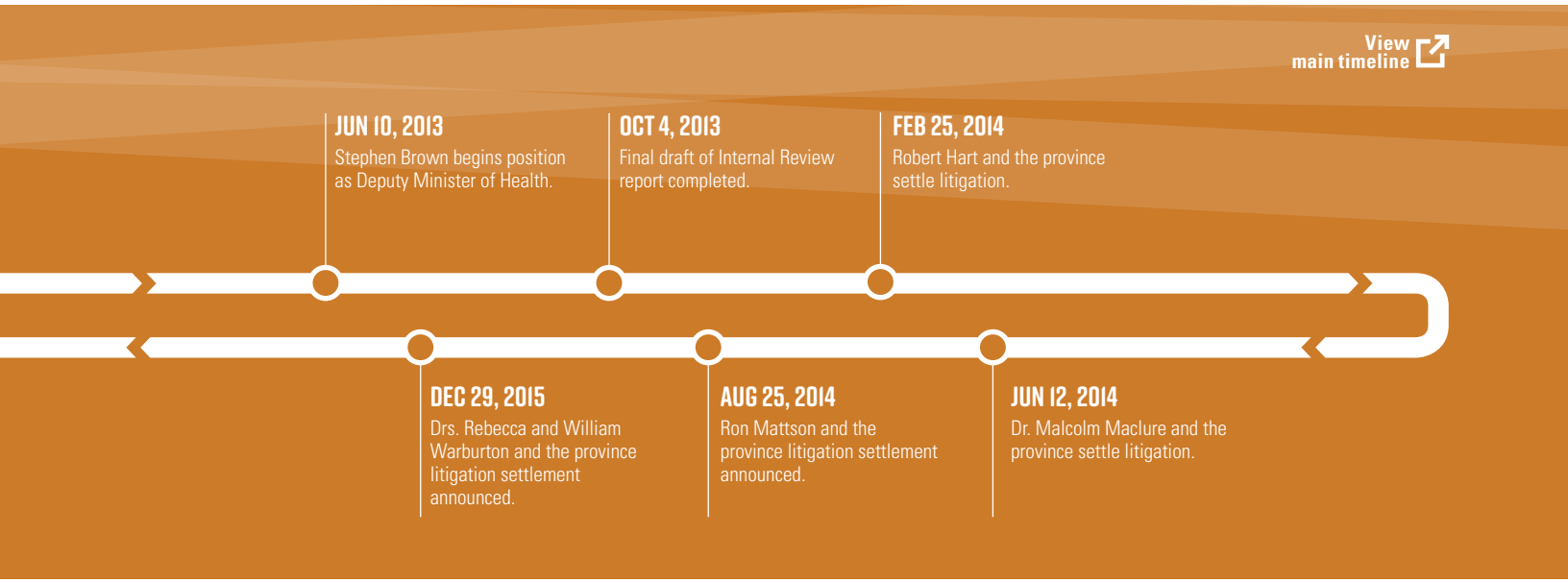
On June 10, 2013, Stephen Brown replaced Graham Whitmarsh as Deputy Minister of Health. At that time the investigation was still ongoing, and government faced four outstanding wrongful dismissal lawsuits in relation to the termination decisions made in 2012.[1] In addition, none of the grievances filed by the three unionized employees had yet been settled.[2]

In this chapter, we describe the steps taken by Deputy Minister Brown to end the investigation and reach settlements with the terminated employees. The restoration of contracts and settlements with former contractors that also accompanied Dr. Brown's decision to end the investigation were discussed in Chapter 12.

1 There was also one lawsuit related to contract termination brought by Dr. William Warburton.

2 The BCGEU and the province settled Dave Scott's and Roderick MacIsaac's grievances on June 25, 2013. The union and the province settled Ramsay Hamdi's grievance on September 10, 2013. These are discussed in greater detail in Chapter 11.

View main timeline



13.2 REVIEW BY DEPUTY MINISTER STEPHEN BROWN

After he became Deputy Minister of Health, Dr. Brown began a process to assess the ongoing investigation. This work was done at the request of John Dyble, then-Deputy Minister to the Premier.

We spoke with Mr. Dyble about the extent to which he provided direction to Dr. Brown about reviewing the investigation. He recalled thinking it was "really weird" that the investigation was still ongoing and instructed Dr. Brown to "take a look at this and try to figure out what needs to happen." He said he still did not have a clear understanding of what had happened, and was not getting clear answers from the people he had asked.

At the time, the Investigation and Forensic Unit (IU) of the Office of the Comptroller General was also working on its investigation into contracting issues, as set out in the terms of reference issued by the Comptroller General in October 2012. Based on his understanding of that office's powers and expertise, Dr. Brown assumed that the IU would be able to do a "more structured inquiry" into those questions.

Concurrently, the Office of the Information and Privacy Commissioner (OIPC) was in the process of finalizing its report into the three suspected data breaches that the Ministry of Health reported back in the summer of 2012. The OIPC report was released on June 26, 2013. This, in combination with the work done by Deloitte (see Chapter 10), meant that the privacy issues arising from the investigation had in the Deputy Minister's view, been addressed adequately.

Shortly after Dr. Brown's appointment as Deputy Minister, the lead investigator briefed him on the Ministry of Health investigation. Dr. Brown told us "the material didn't make sense to me how it was presented" by the lead investigator. He described how, for a termination, he was used to seeing a binder containing evidence, a recommendation, information about consultations with the PSA and any legal advice. In this case, however, "that's what I didn't get. I got these big binders of an ongoing investigation." He wondered why the investigation was continuing a year after the terminations. He recalled learning, for example, that the investigation team was trying to get information from a password-protected file that one of the fired employees had created in 2002 or 2003. He said that the investigation team:

> *… were trying to break into [the file] to see was there some evidence there that [the employee] could have been doing something back then, and without relating it at that time to, you know, the wrongdoing piece … I was trying to make sense of this, how is that relevant to the proximate*

decision to terminate [the employee]? It made no sense to me as – it just made no sense to me in terms of the relevance.

Dr. Brown began to wonder, based on the binders he had been given and the "complicated narrative" the lead investigator was telling him, if the investigation had lost focus and moved to matters that were far out of scope.

Approximately one year after the ministry's investigation ended, an October 2014 government news release stated that Dr. Brown "reviewed the terminations made in 2012 by the ministry and has determined that serious breaches of policy occurred, but some of the employment terminations were unwarranted or were considered excessive."[3] Dr. Brown told us that he had not conducted a formal review himself and, as we describe in detail below, he relied primarily on outside legal counsel who had already been retained by the province in the litigation to review the facts underlying the terminations and provide recommendations on next steps.

Some of the investigation team members and Assistant Deputy Ministers involved in the ministry's investigation expressed a concern to us that Dr. Brown might have been in a conflict of interest, given his previous involvement with some of the projects and individuals subject to the investigation, when he was an Assistant Deputy Minister in the Ministry of Health.[4] However, we found no evidence of any conflict of interest. Dr. Brown's eventual decision to end the investigation and begin settling the litigation was reasonable given the information about the investigation that he was presented with by the lead investigator and others, and the advice he received from legal counsel at the time.

Dr. Brown began to inquire further into the evidentiary material that the investigation team had compiled. He learned that the lead investigator "was finding pieces – bits and pieces in thousands of pages … and she was inferring a narrative on it … there was a sense that [the lead investigator] was trying to dig for a bigger narrative." He questioned the value of this work, given the parallel investigation the IU was conducting, and its reliability in terms of describing what was actually happening in the Ministry of Health. He was also concerned that it appeared the lead investigator was the only person who seemed to understand the narrative. He determined that he "did not see the value in [the lead investigator] continuing to dig to try and find information to support the decision[s]."

The lead investigator had intended to draft a report at the end of the investigation. Instead, Dr. Brown directed her to cease investigating and not finalize any report. Following this decision, the Assistant Deputy Minister of Health Services Information Management and Information Technology at the Ministry of Health, Lindsay Kislock, worked on a draft final report that included specific findings relating to contracting, data access and standards of conduct issues. This report, dated October 4, 2013, focused on actions that had been taken in the year since the investigation began. Manjit Sidhu, the ministry's Assistant Deputy Minister for Finance and Corporate Services and Executive Financial Officer, questioned whether the ministry had sufficient evidence to support some of the findings in this draft. He said:

… not sure we have the evidence to support most of the key findings in the report, particularly given the responses we received during the contractor interviews.

When we spoke with her, Ms. Kislock believed that there was evidence to support most of the findings. Ultimately, however, Dr. Brown directed that the report not be finished. As described by Ms. Kislock:

[The lead investigator] was writing her final report … it was always [the lead investigator's] expectation that she would write a final report. She did a first draft of the final report and gave it to me. Then it was communicated to me that [the lead investigator] shouldn't write that report. So then I thought that I would write that report. So I attempted a couple of drafts of that report. And then I was told that there would be no report. My

3 Ministry of Health, "Government apologises to family; reviews HR policy," news release, 3 October 2014.

4 Stephen Brown was Associate Deputy Minister and Chief Administrative Officer in the Ministry of Health Services (as it was then called) from July 21, 2008, to March 14, 2011: Orders-in-Council 611/2008 and 69/2011.

> *report became a briefing note. And so the Minister of Health was given a briefing note.*

Around the same time, Dr. Brown decided to rely more heavily on outside counsel, who was by then responsible for defending the wrongful dismissal lawsuits brought by the excluded employees. Dr. Brown believed that outside counsel would offer an objective perspective on the evidence and the termination decisions. The ministry's outside counsel, in turn, had his own doubts about the evidentiary basis for the termination decisions and began to review the material collected by the investigation in detail. This review deepened his concerns. Beginning in October 2013, counsel provided government with legal opinions that strongly questioned government's position in the litigation and recommended settlement.

13.3 SETTLEMENTS

The outside counsel who defended the wrongful dismissal litigation told us that when he was first told by the lead investigator about the investigation, he believed the province would have a strong defence to the lawsuits. He drafted the responses to civil claims on that basis. However, that opinion gradually changed as it became clear to him that the investigation had not actually found sufficient evidence to justify the terminations. When the litigation was underway, the lawyer prepared written opinions for the province with respect to its exposure to liability in each case. He told the province it was his opinion that there was insufficient evidence to establish that the province had just cause to terminate any of the employees in any of the cases. Relying on the advice from its lawyer, and on the instructions of Dr. Brown, the ministry began the negotiation process to settle the lawsuits. For each of the excluded employees the province agreed to settle the lawsuits. The details of the litigation for each of the individuals are summarized below.

13.3.1 THE LAWSUIT BETWEEN DR. MALCOLM MACLURE AND THE PROVINCE

On September 14, 2012, Dr. Malcolm Maclure filed a lawsuit against the province seeking damages for defamation and breach of his employment contract, including damages for constructive dismissal, bad faith, mental distress and loss of opportunity, as well as punitive and aggravated damages.

Some steps were taken in the litigation, including the exchange of particulars and mediation.

In June 2014, outside counsel provided a written opinion on the province's exposure to liability in the lawsuit. He advised that the province's evidence relating to the allegations of just cause against Dr. Maclure "was either weak or non-existent." However, he thought the court would find that Dr. Maclure had fully mitigated his wrongful dismissal damages and accordingly would not award damages for severance pay. He noted that there was a considerable risk the court would award Dr. Maclure damages for the province's breach of its duty of good faith and fair dealing, as follows:

> *In relation to the allegation of bad faith conduct and aggravated and punitive damages there was considerable risk that given the lack of evidence in support of the allegations made against the Plaintiff that the Court would award aggravated damages and damages for breach of duty of good faith and fair dealing at the time of termination. In our opinion, in circumstances where an employer alleges it has cause but there is no evidence to support such an allegation the Court would likely find such conduct to be egregious and compensate the Plaintiff for being the victim of such conduct. In addition, although there was no damage suffered as a result of the breach of contract the Court could still award punitive damages in relation to the breach on the basis that the defamation constituted a separate cause of action related to the termination and there is some risk that the Court would find the conduct of the Province of alleging cause without sufficient evidence and issuing a press release unnecessarily referring to an RCMP investigation was egregious enough to award punitive damages.*

With respect to defamation, he advised that there was a substantial risk that a court would find that the province's reference to the RCMP at the September 6, 2012 press conference was innuendo that the plaintiff had committed a criminal offence, and that Dr. Maclure would be able to prove the defamatory sting of the words. Outside counsel

opined that the province would likely not succeed in establishing a defence to Dr. Maclure's defamation claim.

On June 12, 2014, Dr. Maclure and the province reached a settlement, and the lawsuit was dismissed with the consent of the parties on August 11, 2014.

On July 18, 2014, the province publicly announced that the Ministry of Health had hired Dr. Maclure as a consultant in research and evidence development. A news release noted that Dr. Maclure had worked with the ministry over the past 20 years and had made contributions to improvements in health data privacy protection in ways that allowed researchers to analyze datasets. The release noted that Dr. Maclure would be working with the ministry on projects that would provide doctors "with confidential information about their prescribing and how to optimize use of medications." The release stated that Dr. Maclure is "renowned in his use of data for evidence-based evaluation" and that he was fully eligible to access ministry data.[5]

13.3.2 THE LAWSUIT BETWEEN ROBERT HART AND THE PROVINCE

On March 11, 2013, Robert Hart filed a lawsuit against the province seeking damages for defamation and breach of his employment contract, including damages for mental distress, as well as punitive and aggravated damages.

Few formal steps were taken in the litigation. In February 2014, government's outside counsel opined that the province would be unable to prove its allegations of just cause against Mr. Hart and that the court would award Mr. Hart damages for breach of his employment contract. He also noted that there was a significant risk that Mr. Hart would be able to establish that, if he had had an opportunity to respond to the allegations against him, he would have been able to explain why the investigators' conclusions were wrong, and that the court would award him aggravated damages as a result.

Outside counsel advised that there was also a potential risk that the province would be liable for defamation. He noted that there was no evidence that anyone at the ministry believed that Mr. Hart had committed a criminal offence. Accordingly, he advised that if Mr. Hart was able to establish that the defamatory sting of the ministry's reference to the RCMP at the September 6, 2012 press conference was that Mr. Hart had committed a criminal offence, the province would be liable to pay damages for defamation. He had also previously advised that it was likely that the court would find the witness the investigation team relied on with respect to many of the allegations against Mr. Hart "entirely incredible."

On February 25, 2014, Mr. Hart and the province reached a settlement. The lawsuit was dismissed with the consent of the parties on April 15, 2014. As a condition of the settlement, Mr. Hart was reinstated to a position at the Ministry of Health.

13.3.3 THE LAWSUIT BETWEEN DR. REBECCA WARBURTON AND THE PROVINCE

On March 8, 2013, Dr. Rebecca Warburton filed a lawsuit against the province and Minister of Health Margaret MacDiarmid seeking damages for breach of contract, including damages for loss of reputation, and aggravated and punitive damages.

In October 2015, following the examinations for discovery of the lead investigator and Dr. R. Warburton, the province's outside counsel provided a written opinion with respect to the province's exposure to liability in the lawsuit. He opined that the court would likely find that the province did not have just cause to terminate Dr. R. Warburton and that the most serious allegations against her were not well supported by the evidence. He advised that for many of those instances, Dr. R. Warburton had an innocent explanation that he thought the court would likely accept. He also opined that there was a significant risk that the court would award damages for the province's breach of its duty of good faith and fair dealing, as well as punitive damages, owing to the flawed investigation that led to Dr. R. Warburton's termination.

Outside counsel thought there was some evidence that Dr. R. Warburton had committed some breaches of policy and procedure, but that a court "would likely conclude that the breaches committed by Dr. Warburton were committed in furtherance of the wider objectives of the Ministry to provide better data access to medical health researchers."

5 Ministry of Health, "Ministry of Health hires consultant on evidence-based evaluation," news release, 18 July 2014.

In late December 2015, Dr. R. Warburton and the province reached a settlement and the lawsuit was dismissed with the consent of the parties shortly thereafter.

13.3.4 THE LAWSUIT BETWEEN DR. WILLIAM WARBURTON AND THE PROVINCE AND MINISTER MACDIARMID

On May 6, 2013, Dr. William Warburton filed a lawsuit against the province and Minister MacDiarmid seeking damages for breach of contract, unlawful interference with contract, and defamation, including aggravated and punitive damages.

Some steps were taken in the litigation, including the exchange of documents and attempts at reaching a mediated settlement.

Dr. W. Warburton discontinued his lawsuit against the province on June 11, 2015, but his lawsuit against former Minister MacDiarmid remained outstanding. The settlement of Dr. W. Warburton's lawsuit was ultimately concluded as part of the settlement negotiations between the province and Dr. R. Warburton. Although outside counsel did not provide an extensive written opinion on Minister MacDiarmid's exposure to liability in that litigation, he noted that in his view, the amount of the settlement reached was less than the damages the court might have awarded if the matter went to trial.

On December 29, 2015, the Deputy Attorney General issued a statement on behalf of the province announcing that the province had settled its lawsuits with Drs. R. and W. Warburton. The statement indicated that the province recognized that there were flaws in the investigation, as identified by the McNeil review. It indicated that both Drs. R. and W. Warburton "acknowledge that they did breach some rules and procedures" and that the "Province recognizes that such breaches were motivated by their intention to further the research goals of the Ministry of Health and not for their own personal gain." The statement indicated that both Drs. R. and W. Warburton "are welcome to apply for access to health data for research purposes, or to apply to participate in contracted projects" and that "their requests will be dealt with in the same manner as all similar requests."[6]

13.3.5 THE LAWSUIT BETWEEN RON MATTSON AND THE PROVINCE AND MINISTER MACDIARMID

Before Mr. Ron Mattson commenced a lawsuit against the province, his counsel sent the province certain demands and settlement proposals. On October 25, 2012, counsel for Mr. Mattson sent a letter to the employment lawyer seeking an apology from the Minister of Health for public statements she had made, and indicated he intended to send another letter seeking compensation for Mr. Mattson for breach of contract and defamation. The government's Legal Services Branch employment lawyer forwarded this letter to the then-Deputy Minister of Health, Graham Whitmarsh, and indicated that she expected to receive a claim for compensation for Mr. Mattson shortly. Mr. Whitmarsh replied, "I guess we just deny it all and throw the ball back to them."

As we describe in Chapter 9, Mr. Whitmarsh already knew that the PSA investigator believed the ministry did not have just cause to terminate Mr. Mattson's employment, but he had decided to terminate Mr. Mattson with cause, and negotiate later. Mr. Whitmarsh believed he was supported in this approach by the PSA's then-Deputy Minister Lynda Tarras.

The employment lawyer replied to Mr. Whitmarsh on October 26, 2012, as follows:

> *Yes, the onus is on Mr. Mattson to show i) that he was defamed (MoH denies defamation occurred); and ii) that he suffered any damages. So, our position on a response is that he can't pass either hurdle.*
>
> *Based on the information I have seen thus far, however, it is less clear whether the MoH's defence of just cause to the wrongful dismissal claim would be successful if Mattson pursued his claim to litigation.*

On November 7, 2012, the employment lawyer sent an email to the PSA investigator seeking details about Mr. Mattson's past employment with the Ministry of Health and inquiring whether the investigation team had discovered anything that the ministry might rely on as after-acquired cause for Mr. Mattson's termination. The PSA investigator replied that she had not seen anything

6 Ministry of Justice, "Deputy Attorney General's statement on Warburton settlement," news release, 29 December 2015.

"particularly glaring" with respect to Mr. Mattson's conduct that they could rely on as after-acquired cause.

Also on November 7, 2012, the employment lawyer had a phone call with the Health and Social Services (HSS) Supervising Solicitor. On that call they discussed the weakness of the province's defence against Mr. Mattson's case and the employment lawyer's view that the province should give him 18 months of severance pay, or at least indicate that "we are working towards that."

On November 8, 2012, the employment lawyer wrote to the HSS Supervising Solicitor about Mr. Mattson's potential claim:

> *I will be speaking to [the PSA investigator] about the evidence of misconduct, but if this is all we have, I would recommend that we strongly consider trying to avoid litigation over the wrongful dismissal since our chances of a successful defence are slim.*

On November 16, 2012, the employment lawyer and HSS Supervising Solicitor had a phone call. Among other things, they discussed Mr. Mattson. The HSS Supervising Solicitor's notes state the following with respect to Mr. Mattson:

> *Have no decent wrongful dismissal evidence on him. Wd be losing battle if litigated*

On November 16, 2012, counsel for Mr. Mattson sent a letter to the employment lawyer seeking funds to settle his complaint.

On November 20, 2012, the employment lawyer and HSS Supervising Solicitor spoke again. The HSS Supervising Solicitor's notes from that call provide the following with respect to Mr. Mattson:

> *gut reaction: prob. has a good case for wrongful dismissal*
>
> *[PSA investigator] +[lead investigator]– some smoke we can throw up*
>
> . . .
>
> *mt. want to throw some $ at him just to get it completed*

We asked the HSS Supervising Solicitor to explain the exchange, and she gave the following evidence:

> *. . . yeah, so I think [the employment lawyer's] response is that he probably has a good case for wrongful dismissal and that [the PSA investigator] and [the lead investigator] are maintaining that they can throw up some smoke.*

The employment lawyer explained that the reference to throwing up smoke meant that "I want to pretend that I have some negotiating power, but we may not."

On December 3, 2012, counsel for Mr. Mattson called the employment lawyer seeking an offer from the Ministry of Health to settle his prospective claim. Counsel for Mr. Mattson indicated that if an offer was not forthcoming within one hour, Mr. Mattson would hold a press conference the following day. The employment lawyer wrote to the HSS Supervising Solicitor that in her view the amount suggested by Mr. Mattson's lawyer was unreasonable given the lack of evidence of damage to Mr. Mattson's reputation. She wrote that she did not recommend that the Ministry of Health take steps toward negotiation, especially given Mr. Mattson's decision to call a press conference. She also wrote that negotiations might be premature, as the investigation was ongoing, and although the province's defence of just cause was not strong, further evidence might be gathered that would bolster the province's defence. In any event, the lawyers were unable to speak with Mr. Whitmarsh within the hour allotted to make a settlement offer.

That same day, Mr. Mattson filed a lawsuit against the province and Minister MacDiarmid seeking damages for wrongful dismissal and defamation. The province retained outside counsel to defend the litigation.

On May 3, 2013, outside counsel provided Mr. Whitmarsh with a written legal opinion setting out his view that Mr. Mattson's wrongful dismissal claim would succeed and that there was a considerable risk that the courts would award damages for breach of the province's duty of good faith and fair dealing in the manner of his dismissal. This opinion did not address the merits of the defamation claim.

In December 2013, the employment lawyer provided the Deputy Attorney General with a memo respecting outside counsel's opinion on the strength of the province's case.

Outside counsel's view was that at trial the court would likely find the province liable for breach of contract and defamation. He thought that the province would not be able to prove that it had just cause to suspend and terminate Mr. Mattson and would have to pay him damages for severance as well as lost compensation during the course of Mr. Mattson's suspension.

He advised that the province's only arguable position related to the defamation claim. However, he opined that the province's weak evidence on the grounds for termination would likely influence the court's view of the legal issues in the defamation claim in Mr. Mattson's favour. He advised that there was a substantial risk that the court would find that the province's reference to the RCMP in the September 6, 2012 press release constituted innuendo that Mr. Mattson had committed a criminal offence. He was of the view that there was no evidence that the province ever suspected that Mr. Mattson had committed a criminal offence. He also indicated that Mr. Mattson's role as municipal councillor for View Royal, and Mr. Mattson's position that his reputation had been diminished by the province's conduct, would add to the amount of damages the court would award for defamation. Outside counsel indicated that he did not think that the court would award aggravated or punitive damages in relation to the defamatory comments, as there was no evidence of malice or ill intent on the part of the province.

The lawsuit lasted for approximately two years. Various steps were taken in the litigation, including the production of documents, a court application, examinations for discovery, and attempts at reaching a mediated settlement.

A settlement between Mr. Mattson and the province was ultimately reached on about August 22, 2014, and the lawsuit was dismissed with the consent of the parties on September 12, 2014.

On August 25, 2014, the province publicly announced that it had reached a settlement of Mr. Mattson's lawsuit. A press release issued by the province noted that Mr. Mattson had been employed by the province for 28 years and that the decision to terminate him was a "regrettable mistake." The government thanked him publicly for his long years of dedicated service and stated that it "regrets any hardship and possible loss of reputation which Mr. Mattson endured."[7]

13.4 HANDLING OF EMPLOYEE BELONGINGS

When the employees were suspended from the Ministry of Health in July and August 2012, personal belongings in their offices were boxed up primarily by the investigation team and some belongings were returned to the employees. The manner in which the belongings were handled resulted in some employees' belongings going missing. It was not clear that the investigators took sufficient steps to secure the contents in the former employees' offices in the months before the contents were packed up. When packing up the belongings, employees did not always have the opportunity to look through their offices to determine what was their property as opposed to the ministry's.

Communication between the investigators indicates that it was the investigation team members who determined what were personal belongings as opposed to ministry property. The ministry property was not packed up in the boxes. The team members' determination about ownership was not necessarily correct. One ministry employee who helped pack up an employee's office did not create an inventory, nor was she asked to.

During the process of packing and returning the personal belongings, the investigation team and the former employees and contractor exchanged multiple emails concerning their belongings. In October 2012, one of the former employees wrote to the Strategic HR Manager and itemized several personal items that were not returned. In response, the Strategic HR Manager followed up with the investigation team to try and locate the missing items. Some were located, but many were not.

This former employee raised the concern about these missing personal items with us during our investigation and identified some specific belongings that were missing. We learned that the boxes containing the contents of the employees' offices were stored in a room in the basement of the Ministry of Technology, Innovation and Citizens' Services. We went through the contents of these boxes

7 Ministry of Health, "Ministry of Health settles with former employee," news release, 24 August 2015.

but were unable to locate the missing items. However, the boxes did appear to contain some personal effects, including books, photos, articles and personal items that had not been returned.

FINDINGS

F 37 Deputy Minister Stephen Brown acted appropriately when he discontinued the Ministry of Health investigation.

F 38 By late 2013, government had sufficient information (notwithstanding the outstanding Comptroller General report) to raise serious questions about the Ministry of Health investigation, yet it did not at that time initiate a structured and comprehensive review and reassessment as to whether those affected had been treated fairly and reasonably. Rather, the ministry addressed issues as they arose.

F 39 The government's reappraisal of the Ministry of Health investigation was largely initiated by the external legal counsel retained to defend government in the litigation brought by the excluded employees.

14.0 / OFFICE OF THE COMPTROLLER GENERAL INVESTIGATION AND REPORT

14.1 INTRODUCTION

Under the authority of the *Financial Administration Act (FAA)* the Office of the Comptroller General (OCG) is responsible for the overall quality and integrity of the financial management and control systems within government. Although the office is formally situated inside the Ministry of Finance, under the *FAA* the Comptroller General exercises power in a quasi-independent fashion. As currently constituted, the Office of the Comptroller General (OCG) has five formal branches responsible for: financial management, financial reporting and advisory services, corporate accounting services, corporate compliance and controls monitoring and procurement governance. Within this overall financial management framework, since 2007, the Office of the Comptroller General has had an Investigation and Forensics Unit (IU) responsible for investigating allegations of: suspected financial wrongdoing, suspected misuse of government property, or fraudulent activity made against government employees and contractors. From 2012 to 2015 the Director of the IU reported directly to the Comptroller General.

As we discuss in this chapter, the ministry contacted the Office of the Comptroller General soon after it was notified of the initial complaint to the Office of the Auditor General. The Comptroller General referred the matter to the IU, which began monitoring the ministry's investigation as it unfolded over the summer of 2012.

In September 2012, the IU was considering conducting its own investigation into the allegations of financial improprieties. By October 2012, the Comptroller General formally approved terms of reference acknowledging the ministry's investigation team "requested the Office of the Comptroller General's IU to assist in their overall investigative efforts by performing a specific examination of the suspected procurement and contract irregularities involving" the Pharmaceutical Services Division (PSD).

View main timeline

MAY 2012
May 2012: Comptroller General informed of Ministry of Health investigation.

MAY 2012
Office of the Comptroller General's Investigation and Forensics Unit (IU) begins monitoring Ministry of Health investigation..

AUG 27, 2012
Members of the IU attend meeting with RCMP and Ministry of Health lead investigator.

OCT 3, 2012
Comptroller General signs terms of reference to begin IU investigation.

NOV 2012
Communications between IU and University of Victoria (UVic) begins regarding access to records.

DEC 2012 TO JAN 2013
IU conducts information interviews with three Pharmaceutical Services Division (PSD) Executive Directors.

APR 2013
Initial discussions take place between Office of the Comptroller General, UVic and the University of British Columbia (UBC) regarding IU requests for unfettered access to university records including employee emails.

JUL 31, 2013
IU provides summary of its investigation to RCMP.

NOV 2013
One of two principal investigators leaves IU.

NOV 28, 2013
Treasury Board approves request for authority under the *Financial Administration Act* to compel the universities to produce and/or provide access to specific records and information.

JAN 2014
IU Manager leaves the Office of the Comptroller General.

MAY 2014
Lone remaining principal investigator leaves IU.

MAY TO SEP 2014
No investigators are assigned to IU investigation and no work is done.

SEP 2014
Investigator who departed in May 2014 returns to IU and is reassigned to investigation.

JAN 2015
IU hires contractor to assist with report writing and quality assurance.

APR 8, 2015
First draft report given to RCMP.

APR 21, 2015
Second draft report given to Stephen Brown, Deputy Minister of Health.

JUL 14, 2015
Comptroller General advised of government legal council's view that IU report contained inaccuracies.

JUN 25, 2015
IU Director provides final report to Comptroller General.

APR 29, 2015
IU meets with Deputy Minister Stephen Brown and Assistant Deputy Ministry Manjit Sidhu.

APR 22, 2015
Second draft report given to RCMP.

FEB 2016
The government learns the Investigation and Forensics Unit report was leaked to the media.

The ensuing IU investigation lasted two and a half years. It culminated in a draft report that the Comptroller General and the IU Director provided to the Deputy Minister of Health and the RCMP in April 2015, before finalizing it in June 2015.

In its final Internal Review report, the IU stated that it examined five initiatives administered by PSD, including some identified in the complainant's initial complaint to the Office of the Auditor General. The IU concluded that "the results of the investigation confirm the ministry's concerns of PSD's inappropriate procurement practices and contracting irregularities, including suspected conflicts of interest."[1] Although this part of the final Internal Review report's language is somewhat ambiguous, during our

1 Investigation and Forensic Unit, Office of the Comptroller General, Ministry of Finance, *Project No.: 026115 Pharmaceutical Services Division Investigation,* 3.

investigation both the Comptroller General and the IU Director told us they believed this report demonstrated that the IU investigation had uncovered both specific conflicts of interest of individual PSD employees and the existence of inappropriate procurement practices within PSD.

Due to the unauthorized disclosure of the Internal Review report to the media, made public in early 2016, the IU's final report received significant public attention. To the extent the report concluded or inferred that some PSD employees had engaged in wrongdoing, its leak raised renewed questions about whether the ministry had actually been correct in the first place to terminate some of the employees and suspend some of the research contracts in 2012. During our investigation, many of the people involved in the ministry investigation, and dismissal decisions, relied on the report (or for those who had not seen the report itself, on the media stories following the leak) to defend their decisions. Some witnesses told us the IU's Internal Review report vindicated the ministry's investigation and the termination decisions that followed.

Based on our investigation we concluded that the IU's investigation was beset with a number of problems that undermined the accuracy and reliability of many of the conclusions they reached in the final report. We also determined that, in many instances, the report inaccurately concluded, or drew incorrect inferences, that certain PSD employees and the others named in the report, had acted improperly in connection with the financial matters and research contracts the IU examined. Moreover, after the IU had completed its report and gave a copy to the Ministry of Health and the RCMP, the ministry's outside legal counsel expressed concerns that the Internal Review report contained inaccuracies. Based on this advice, government lawyers were also concerned there was a risk the Internal Review report might be defamatory against some of the people it named, because government knew that many of the conclusions in the report were untrue. Although legal counsel alerted the Office of the Comptroller General to these concerns in July 2015, the IU did not make inquiries to determine what parts of the report the ministry's legal counsel thought might be untrue. It is our view that the inaccuracies in the report pose a real risk of reputational harm to those it incorrectly concluded committed wrongdoing, and against whom negative inferences were drawn.

In this chapter of our report, we describe the work done by the IU during its investigation and when producing the Internal Review report.

14.2 THE INVESTIGATION CONDUCTED BY THE INVESTIGATION AND FORENSIC UNIT OF THE OFFICE OF THE COMPTROLLER GENERAL

14.2.1 MONITORING STAGE

The Office of the Comptroller General's involvement with the ministry's investigation began in May 2012 when Manjit Sidhu, the ministry's Assistant Deputy Minister of Financial and Corporate Services and Executive Financial Officer, contacted the Comptroller General and told him about the initial complaint. At the time, the ministry sought the Office of the Comptroller General's assistance with its investigation because the initial complaint contained allegations of financial and contracting improprieties against several employees and contractors in PSD.

The Comptroller General initially decided to monitor the ministry's investigation and asked the IU Director to liaise with the ministry's lead investigator. This monitoring phase lasted from May 2012 until October 2012, during which time the IU Director and other members of the IU team gave the ministry investigation team "functional advice, guidance and support, including attendance at informational meetings, conference calls and liaising/involving the RCMP." The IU Director spoke with the ministry's lead investigator many times during the summer of 2012. In turn, the ministry investigators provided the IU with documents that highlighted the wrongdoing they believed they had uncovered, including the draft July 18, 2012 Internal Review report, the Alzheimer's Drug Therapy Initiative (ADTI) chronology and a file of emails related to conflict of interest concerns.

Based on the information they received from the ministry investigators between May and August 2012, the IU became concerned about potentially serious problems with PSD's contracting practices and the existence of possible conflicts of interest. The IU was also concerned about

the potential existence of a widespread fraud scheme within PSD.

Members of the IU received information from the ministry's investigation team throughout the summer. For example, the Director and another representative of the IU attended a conference call on July 30, 2012 with the ministry's investigative team, representatives of the Public Service Agency (PSA), and government legal counsel, where the lead investigator described her concerns relating to collusion, breaches of confidentiality, and conflict of interest. They were also briefed on the employee suspensions that had occurred. Members of the IU also attended an August 23, 2012 meeting with the ministry investigation team and PSA representatives, at which time the IU heard about the ministry investigators' theory of the case and the ministry's plans to terminate employees.

Around this time the lead investigator asked the IU Director to assist her with contacting the RCMP. As we described in Chapter 8 the IU Director facilitated the initial referral to the RCMP. He and other members of the IU joined the lead investigator at the initial August 27, 2012 meeting with the RCMP where the lead investigator outlined her concerns, explained her understanding of the wrongdoing the investigation team believed it had uncovered, and identified some of the people under investigation. As noted, in the aftermath of this meeting the RCMP opened an investigation file, but the RCMP told the lead investigator and the IU Director in attendance that it did not intend to commence an active investigation and indicated they would wait for a final report before deciding whether to commence an investigation. The RCMP did not ever commence an active investigation.

On September 5, 2012, the day before the ministry made its public announcement of the dismissals and the data breaches, the IU Director emailed the Comptroller General to discuss the contents of the ministry's news release and to summarize what he had learned about the ministry investigation. The Director described the alleged problems at the ministry to the Comptroller General:

> *Based on my discussions and meetings with lead investigator ([lead investigator], OCIO) and various officials to date, the news release appears to be accurate. The terminations were to commence shortly after our meeting with the RCMP on August 27th I believe the first termination was scheduled for August 31st. The terminations and suspensions were based on available evidence (predication established). I have been involved in discussions of evidence and predication, leading up to the ministry decisions to suspend/terminate.*
>
> . . .
>
> *At the ministry's request I consulted with the RCMP and arranged a hand off of a preliminary evidence package being put together by [the lead investigator's] team. The RCMP advised it would take on the investigation and understands that there is additional evidence that needs to be gathered by the government. The first hand-off is only the preliminary evidence.*
>
> . . .
>
> *You were first advised of the allegations at the end of May 2012 … you forwarded the summary of allegations and the TOR, and I provided you an opinion on the issues at my regular update with you … my comments to you at that time stand … it is big, messy and very sensitive, there will be many more terminations before the dust settles … our unit has been providing [the lead investigator] and her team with functional advice, guidance and support, including attendance at meetings, conference calls and liaising/involving the RCMP … I advised the ministry that the evidence gathered to date was more than sufficient to involve the RCMP.*
>
> . . .
>
> *To summarize … the investigation is not complete… [The ministry's] team has not tackled the conflicts of interest piece and wants some assistance. They understand we have a resourcing issue and I said I would talk to you upon your return from vacation. I do not know if she has sought out other avenues to assist in that area since we last met. I know that she had several more interviews to conduct after we last met so I would not imagine she has had time to do anything else other than keep the ministry briefed on the investigation, including this press release.*

I advised [the lead investigator] last Friday (August 31st) that I would be speaking to you about trying to get the necessary resources to help her team out in the contracting area. I have not heard back from [her] this week. However, we have received considerable documentation from her to date including emails involving the persons of Interest … which would assist us in the contracting piece … ie, establishing actual conflicts of interest that are fraudulent and thus criminal.

That should give you a high level overview of OCG's involvement to date. At this point, it could be characterized as fulfilling your monitoring role. It could become more based on resourcing discussions/decisions. … and would be characterized as a 'collaborative effort' of various investigative units which is what one would expect when you have an investigation this complex.

Shortly, thereafter, the Comptroller General approved a larger role for the IU and asked the IU to formalize its changed role in connection with the ministry's investigation, which led to the creation of the IU's formal terms of reference in October 2012.

14.2.2 TERMS OF REFERENCE

On October 3, 2012, the Comptroller General signed the terms of reference and the IU formally began its investigation. Under the terms of reference the IU's investigative mandate was to "confirm or dispel the allegations" made by the complainant to the Office of the Auditor General through a "comprehensive examination of suspected procurement and contracting improprieties involving the Pharmaceutical Services Division."[2] The IU described its specific objectives as follows:

To determine the propriety of specific procurement and payment practices of PSD staff (past and present) involving certain entities, as identified by the anonymous complainant and subsequently requested for follow up by the ministry's internal investigation team; and determine the appropriateness of PSD staff (past and present) relationships with specific individuals, businesses and other entities to assess the allegations involving conflict of interest situations.[3]

According to the terms of reference, the IU expected its investigative approach would include gathering information related to contracting practices, processes and financial controls; reviewing documentation and records on specific contracts, grants and agreements as necessary; obtaining and analyzing emails of ministry staff and other public sector officials; conducting interviews as necessary; and performing any necessary corporate registry searches.[4]

The IU anticipated that it would provide interim reports to the Comptroller General and the ministry investigation team, and provide a final report to the Comptroller General, the Deputy Minister of Health and "other appropriate officials."

14.2.3 THE IU'S INVESTIGATIVE APPROACH

14.2.3.1 ASSOCIATION OF CERTIFIED FRAUD EXAMINERS

The IU Director had extensive experience conducting investigations into allegations of financial impropriety. The IU Director was a professional accountant, a certified fraud examiner and a member of the Association of Certified Fraud Examiners (ACFE). Based on both his experience and his ACFE accreditation, the IU Director characterized the IU approach as a fraud investigation. He told us he conducted his work in accordance with the ACFE investigative standards, which were the standards the IU generally used at the time for its complex investigative work. The ACFE standards outline a process for conducting fraud examinations based on the principle of "professional skepticism." The ACFE defines this approach as:

- Beginning with the belief that something is wrong or that someone is committing fraud;
- Ensuring that the skepticism can be dispelled only by the evidence; and

2 Office of the Comptroller General, Ministry of Finance, "Terms of Reference, Ministry Pharmaceutical Services Division Investigation," 1.

3 Office of the Comptroller General, Ministry of Finance, "Terms of Reference, Ministry Pharmaceutical Services Division Investigation," 1.

4 Office of the Comptroller General, Ministry of Finance, "Terms of Reference, Ministry Pharmaceutical Services Division Investigation," 2-3.

- Absolutely prohibiting opinions or attestations about the existence of a fraud-free environment.[5]

The IU Director also told us using the ACFE standards was consistent with the IU's primary role to investigate allegations of suspected financial wrongdoing, suspected misuse of government property, or fraudulent activity made against government employees and contractors.

By October 3, 2012, when the terms of reference were finalized, the IU did not have any evidence that the Ministry had either experienced any direct financial losses with respect to the contracts under review, or had failed to receive the deliverables for which it had contracted. However, the IU was concerned that both the information they received from the ministry investigators and the complainant's initial allegations raised serious questions about potential conflicts of interest within PSD. The IU Director told us that in his view the seriousness of potential conflicts of interest were a "red flag" that a fraud might be occurring.

The IU Director envisioned the investigation as a "collaborative effort of various investigative units," which included the ministry investigation team and the RCMP. He told us that he had a standing instruction from the Comptroller General to cooperate with the RCMP in relation to all IU investigations in which the RCMP have been notified. Accordingly, the IU provided periodic updates to the RCMP upon request throughout the IU's investigation. This information included detailed outlines of the wrongdoing the IU believed it had uncovered, and eventually, a copy of the draft IU report. The Director told us he understood the RCMP might use the information his team provided, and ultimately the IU's final report, as a basis to start a criminal investigation.

14.2.3.2 AUDIT-STYLE APPROACH

Throughout the first year of the IU's investigation, the IU lead investigators conducted an audit-style analysis of three contracts the ministry investigators had identified: Alzheimer's Drug Therapy Initiative (ADTI), Education for Quality Improvement in Patient Care (EQIP) and Academic Detailing Evaluation Partnership Team (ADEPT). This analysis compared the contracts and the procurement process to the government's Core Policy and Procedures Manual (CPPM) and the Research Relationships Tool Kit to confirm whether the research agreements were consistent with government policy. The CPPM is the key resource for government on matters related to procurement. It is augmented by specific government policy, such as the Tool Kit, which was developed to provide policy guidance on contracting with universities.[6]

The IU principal investigators described this work of comparing the contracts to the CPPM, as examining the contracting controls to determine whether gaps existed that could have allowed improper practices to have occurred. The IU investigators also reconciled the financial accounts related to the contracts, using extracts from the government's Central Accounting System (CAS) and financial information obtained from the University of Victoria (UVic) and the University of British Columbia (UBC). This method of assessment allowed the investigation team to capitalize on the extensive audit experience the principal investigators had, and enabled them to use a standardized model to create a common baseline from which to evaluate the agreements and identify any areas of concern. This approach also allowed the IU investigators to use their audit experience to develop initial lists of questions and concerns and identify the types of information they would need to answer those questions.

Through the audit-style assessment, the investigators familiarized themselves with how PSD procured and structured its contracts in relation to the CPPM and the Tool Kit. Of equal importance, the investigators gathered a large amount of background information that explained how and why PSD chose to establish its research programs as it had. Their approach allowed the investigators to determine whether there were any financial control gaps, to reconcile financial details, and to understand the context of research agreements and individuals' roles in relation to those agreements. This was significant because when it received this file, the IU investigation team was generally unfamiliar with government policy on contracting with universities and the common forms of research agreements

5 Association of Certified Fraud Examiners, Fraud Prevention and Deterrence, 2016 <http://www.acfe.com/uploadedFiles/ACFE_Website/Content/review/examreview/19-fraud-prevention->programs.pdf>.

6 See Chapter 4.4 for a detailed description of the Research Relationships Tool Kit. The 2010 version of the Tool Kit is in Appendix C.

the ministry typically used with those institutions, such as contribution agreements.

The reports generated through this audit-style analysis also showed that the IU investigators determined that many of the contracts it examined appeared to comply with the applicable government procurement policies. In our view commencing the investigation with this audit-style approach was a reasonable approach because it provided valuable information to assist the investigators in evaluating and drawing conclusions about the specific allegations. By approximately the end of 2013, the IU Director felt that the seriousness of the allegations required the IU to move beyond the audit assessment to focus more closely on the specific allegations themselves.

14.2.3.3 FOCUS ON EMAILS

While they were conducting their audit-style analysis, the IU investigators also examined emails sent and received by the parties of interest. Once the IU ceased its audit-style assessment the investigators began to focus more heavily on emails. The IU Director told us that increasing the focus on emails was necessary to determine "what was actually going on." One of the investigators explained that in addition to the information they gathered through the audit process, they were "looking at the emails for clues" that might illuminate the allegations of wrongdoing. In this way, the IU's investigative approach effectively mirrored the approach used by the ministry investigators and exposed the IU investigation to the same risks that they might misinterpret the content of those emails.

The IU investigators told us that analyzing the contract documents against the requirements of the CPPM was unlikely to uncover the wrongdoing that they believed was occurring below the surface of the contracts. In our interviews with IU investigation team members, they reasoned that they could "follow the money" more effectively through a "forensic analysis" of emails because they believed the emails might show the real decision-making processes within PSD, the relationships between the people of interest, and how contract funds were being used and distributed. One of the investigators explained to us that without the emails, they could not know what the universities or researchers were hiding.

Of course, emails are a form of evidence that can be important to explaining the nature of relationships, the extent of communication between various parties, or the reasons why decisions were made. The IU provided us with numerous examples from their other investigations where emails allowed them to understand allegations of questionable transactions. While reviewing emails are a helpful investigative step, they were insufficient in this context to support proper investigative conclusions. The IU needed to assess whether the information contained in emails was accurate, complete, reliable and corroborated by additional evidence (where possible) and consider whether the totality of the available information tended to prove or disprove any material facts at issue.

During our investigation we determined that some of the incorrect conclusions the IU reached arose from an over-reliance on emails. For example, the IU reported it could "confirm" that PSD transferred funds to an outside entity before a contract was in place authorizing the transfer. In reaching this conclusion, the IU relied on an email from the complainant in which she referred to a discussion she had overheard that money was being transferred without an agreement. The IU also relied on a note about the transfer of funds in a meeting minute that appeared to support the email. When we examined the transaction, however, we determined the funds in question were transferred in accordance with a duly authorized agreement between the ministry and the outside entity. Our investigation also found there was a large volume of documentation explaining the history of the transaction that, when viewed as a whole, demonstrated that the complainant misunderstood the information she believed supported her assertions.

It appeared that the IU reached this conclusion by focusing too heavily on the email while placing insufficient weight on the other evidence that it had gathered. In this case, the IU had asked at least two Executive Directors within PSD to explain the structure of this particular contract. Having received this information, the IU should have been in a position to understand the full scope of this agreement by reconciling what they were told with the contract documents. The IU's initial draft report also showed that the team had reviewed the ministry's financial information that demonstrated how the funds associated with the project had been used. The final Internal Review report

refers to the agreement that authorized the fund transfer, while at the same time asserting that the funds were transferred without an agreement in place.

14.2.3.4 GAPS IN THE IU'S INTERNAL PROCESSES

Based on our review, we determined that the IU's investigation suffered from several significant gaps in their internal processes that hampered the investigators' ability to conduct an investigation that was consistent with the standards we would have expected the IU to apply. The IU had also identified several gaps themselves, which they set out in the report to notify the reader of the limitations of their work. The more problematic gaps that we identified included:

- insufficient resources to conduct an investigation of this length and complexity
- no investigative policies and a lack of training provided to the IU investigators
- lack of substantive interviews

These internal process gaps, in conjunction with some other problems we identified with the IU's investigative approach, ultimately undermined the accuracy of the conclusions the IU reached.

14.2.3.4.1 INSUFFICIENT RESOURCES

During our interviews, nearly everyone associated with the IU investigation acknowledged that resource constraints imposed limits on the IU's investigation. It was noted that the size of workload of both the IU Director's and the Manager's workloads was an impediment to conducting the investigation in a timely fashion because they had to balance overlapping commitments across multiple complex investigations.

Another constraint we identified was the IU's inability to recruit and retain trained investigators to conduct the investigation. The IU Director told us recruiting qualified staff was a consistent challenge he faced. He also told us he took several steps to add resources to the IU team, including having discussions with the Office of the Auditor General to determine whether they were willing to assist the IU by providing experienced investigators to assist with the investigation. The IU Director also ran two competitions during the investigation to try to add more investigators, but the applicants were not sufficiently qualified. The IU Director and the Comptroller General also discussed the possibility of adding outside contracted resources to the team, but they were unable to do so with the exception of a contracted computer analyst, who was experienced using the specialized software the team used to manage the large volume of digital records they obtained.

The IU also had difficulty retaining the staff who were assigned to the investigation. This caused significant difficulties, particularly given the small size and limited resources of the IU to begin with. The core of the IU investigation team was assembled by November 2012. It initially comprised three investigators and a Manager. One of the original investigators retired and left the team in December 2012. The IU was unable to find a replacement for the position. Thereafter, between December 2012 until the end of 2014, the IU had no more than two investigators at any one time. One of the team's two principal investigators left the team in November 2013 and she was not replaced. The Manager left the IU in January 2014. These departures limited the amount of hands-on investigative work the team was able to perform. As a consequence, between November 2013 and September 2014 the IU investigation team was reduced from an initial complement of five full-time staff (including the IU Director) to two staff (one principal investigator and the IU Director) and a contracted analyst responsible for digital records management. The remaining principal investigator also left the IU for a period between May and September 2014, leaving the IU Director with no staff for approximately four months. The Director confirmed that no work was done on the investigation during that time because he was unable to find a replacement during her absence.

14.2.3.4.2 ABSENCE OF INVESTIGATIVE POLICIES AND TRAINING

The two principal investigators who conducted the majority of the investigation were professional accountants with extensive audit experience, having worked in the Ministry of Finance for many years. However, they told us they had relatively little recent experience in conducting an investigation of this size and complexity and neither was accredited by the ACFE. One of the two principal investigators told us she had not done hands-on investigative work for approximately 10 to 15 years before being

assigned to the team. The other principal investigator said she had not done any hands-on investigative work for "several years." The Director told us it was "tough" having inexperienced investigators on his team and acknowledged that this limited their investigation. For example, he said one of the reasons the team did not conduct detailed interviews was that the Director lacked confidence in their ability to do them effectively unless he also participated.

Despite existing as a separate unit within the Office of the Comptroller General since 2007, by 2012 the IU had not developed any training materials for its investigators. Accordingly, although the IU's principal investigators lacked recent investigative experience, the IU did not provide them with any supplementary investigative training. The IU also had not yet developed a written set of investigative policies, standards, guidelines or procedures. This meant that neither of the two principal investigators had access to guidelines to assist them with their work. In our view, the absence of specific training and clear policy or guidelines meant the principal investigators lacked a basic set of investigative tools to conduct the investigation.

In the absence of training materials and investigative policies, the principal investigators relied on the training, knowledge and experience of both the IU Director and the IU Manager, both of whom were ACFE accredited. However, both the IU Director and the IU Manager told us that the ministry investigation was not the only large investigation the IU was conducting at the time. As a result, they needed to manage a significant investigative workload and were often not available to oversee the investigation. Without adequate resources and guidance, the principal investigators told us they were at times uncertain as to how the ACFE standards applied to their investigative work.

The IU investigation team also lacked policy about the circumstances under which a matter should be referred to the RCMP. The IU Director told us he did not think there was a particular standard to apply, and the decision to refer would be based on the IU's past experience with similar investigations. The IU Manager also confirmed that there were "no clear guidelines and policy" outlining exactly what evidence warranted contacting the police. He told us a mere allegation of wrongdoing, without supporting evidence, could be sufficient to justify contacting the police.

Within the constraints they encountered, it was clear to us that the two principal investigators did their utmost to conduct the investigation in a detailed and organized way so as to address the questions in the IU's terms of reference. The two principal investigators did a lot of good work gathering and organizing a large volume of information. Both investigators had a reasonably well-developed understanding of the types of information they needed and the kinds of questions they needed to ask to advance their inquiry. As well, despite the lack of developed policies, training or oversight, the principal investigators' work was structured, thoroughly documented and demonstrated awareness of the relevant government policies.

14.2.3.4.3 LACK OF SUBSTANTIVE INTERVIEWS

The IU conducted very few interviews as part of its work. At the outset of its investigation, the IU team spoke with a handful of Ministry employees including two executive directors in PSD and an acting executive director. All of these executive directors had extensive first-hand knowledge of the research programs and the specific contracts under investigation. But other than to obtain some initial basic background information about the PSD program areas it was investigating, the IU did not ask detailed questions about the concerns they had identified about the programs.

The IU also interviewed the complainant in May 2013, approximately seven months after its investigation began. We were told by one of the IU investigators that when it came to drafting the report, the IU focused primarily on allegations the complainant made during her interview. This focus is reflected in the body of its report. Apart from these interviews, the IU did not conduct other detailed interviews with any of the individuals subject to the investigation or with any current or former ministry staff or executives familiar with the relevant research programs and the contracts.

The Comptroller General told us that he had understood for several years that his office did not have the legislative authority to interview anybody who was not actively employed in the public service. He understood this meant that the IU could not compel people who no longer worked with the public service to attend an interview and, as a

result, the terminated employees and others who had left government were unavailable. Similarly, the IU Director told us that he also understood that the IU did not have the authority to interview former public servants. The IU Manager told us he was also uncertain about the breadth or limits of the Comptroller General's authority in this area.

The evidence we obtained indicates that both the Comptroller General and the IU Director sincerely believed the IU lacked the authority to interview people no longer employed in government. Nevertheless, it is clear that the IU had this authority under the *FAA* and it was unclear to us why this mistaken perception persisted in light of the legal advice the Office of the Comptroller General obtained on the point.

For example, in 2007 the Ministry of Finance's legal counsel wrote a detailed legal opinion discussing several different aspects of the Comptroller General's authority under the *FAA*, which the Comptroller General said he became aware of after his appointment. The lawyer explained that the Office of the Comptroller General had very broad powers under section 8(2)(d) of the *FAA* to examine "any person," provided the matter under investigation related to something the office was otherwise "required or authorized to check, examine or control." This meant the office was not limited to interviewing people actively employed in the public service, but could interview anybody during an investigation, provided the subject matter fell within the Comptroller General's jurisdiction.

Similarly, in August 2012, approximately two weeks before the terminations took place, the IU Manager asked government lawyers to clarify the then-suspended employees' obligations to attend the ministry's investigation interviews and answer questions. It is unclear why the IU sought advice on this point instead of the ministry's investigators. Regardless, the substance of the legal advice emailed to both the IU Director and the IU Manager reaffirmed the breadth of the Comptroller General's information-gathering powers:

> *I do note however, that beyond employment related consequences, the Comptroller General has power to compel any person to be examined with respect to matters that the Comptroller General is required or authorized to check under any Act. The Comptroller General can apply to the Supreme Court to direct a person to comply with an order to be so examined, and if the person fails to comply with the order, on further application to the Supreme Court, that person could be committed for contempt as if in breach of an order of the Supreme Court.*

Having received this advice, both the IU Director and Manager should have understood the scope of their information-gathering powers. If they continued to have uncertainty, it is our view that they bore responsibility to ensure they clarified the scope of their authority. The IU did not act on the advice it received highlighting its ability to conduct interviews with any person it thought necessary. Further, although the IU believed it could not compel non-government employees to speak with them, it also did not ask whether former employees, such as Mr. Nakagawa, the former Assistant Deputy Minister of PSD, would agree to speak with them voluntarily.

The Comptroller General and the IU Director told us they believed it would have been inappropriate to speak with the terminated employees while they were engaged in active litigation or arbitration against the province after the terminations occurred. This was a reasonable position for the IU to take while those proceedings were ongoing. However, this does not explain why the IU did not interview individuals who were not engaged in litigation or with current employees within PSD who had detailed information about the research programs and contracts under investigation.

The IU Director told us he believed the decision whether to conduct interviews was a question of professional judgment and he also said he was concerned that the IU investigators could "tip their hand" about the nature of their concerns and the focus of their investigation. He also emphasized that his investigators were inadequately trained to conduct detailed interviews. He felt that due to the serious nature of the allegations any interviews would require his presence and his heavy workload would have prevented him from participating effectively.

In the normal course of an investigation, evidence should be tested by providing individuals who are the subject of allegations with an opportunity to know and respond to the allegations before any conclusions are drawn. By providing individuals with an opportunity to hear and respond

to the allegations, an investigation team can determine whether it is necessary to reassess any of its preliminary conclusions and identify additional issues for inquiry. Sometimes it may not be possible or appropriate to give an employee the opportunity to respond to the allegations directly, because they are engaged in legal proceedings against government or because of a real risk that doing so might compromise an investigation.

In our view, the seriousness of the allegations of widespread financial misconduct and the fact that the allegations were directed against specific people inside PSD required the IU to conduct more comprehensive interviews. While it was reasonable for the IU to not interview the terminated employees while legal proceedings were ongoing, it was clear to us that the failure to conduct more extensive interviews of people with direct knowledge of the program areas deprived the IU of information that would have enabled it to reach accurate conclusions. Moreover, despite the misunderstanding that both the Comptroller General and the IU Director had about the limits of the IU's power to conduct interviews, interviewing current public servants was always within the authority they both understood the IU possessed. Not doing so compromised the investigative process because the IU was unable to fully assess the validity of the allegations the complainant had made, to ensure they had all of the relevant information about PSD's procurement practices and were properly informed about the conduct of the suspected individuals.

Not conducting interviews limited the IU's understanding of the context and history of PSD's research programs and why the Ministry of Health had structured its research programs and contracting the relationships as it did. This undermined the accuracy and reliability of many of the conclusions it reached.

The risks posed to the accuracy of the IU's conclusion run throughout the final report. For example, in one instance, the IU team identified a potential conflict of interest situation involving a PSD employee who had not been identified by the complainant or the ministry investigators. In this case, the IU was concerned that the employee worked within PSD while also being a significant shareholder of a ministry contractor. Part of the employee's ministry role included managing this contractor's ministry contract. The employee's supervisor did not believe the employee's relationship with the contractor represented an impermissible conflict of interest and wanted this employee to continue to act on the ministry's behalf. In its review the IU learned that the employee had declared the conflict of interest, as was required under the Standards of Conduct, and that the ministry's legal counsel recommended that PSD advise the Deputy Minister of this situation, and seek his approval. The approval of the Deputy Minister was sought. In its final report the IU ended its analysis of this situation by saying only that the Deputy Minister did not approve of the employee acting in the conflict of interest position, and noted that she remained in the position for several years until she took a job outside of government. The IU noted it did not know what, if any, steps were taken to mitigate the conflict of interest.

The IU's discussion of this example invited a negative inference that the employee had remained in a conflict of interest position. This was not the case. By failing to speak to the employee, or anybody else inside government with knowledge of the situation, the IU did not learn that the employee's responsibility for the contract was removed after the Deputy Minister made his decision, and the shares had been promptly sold in order to eliminate the conflict. This information was available at the time and easily discoverable. By inviting an incorrect negative inference the IU unjustifiably risked damaging the employee's reputation when it was clear that the conflict of interest had been addressed.

14.2.4 COLLABORATION WITH THE MINISTRY INVESTIGATION TEAM

The evidence we gathered demonstrates that the IU and ministry investigation team had a collaborative relationship. The ministry investigation team regularly shared information with the IU from the start of the IU's involvement in 2012 until the ministry investigation was disbanded in the fall of 2013.

As we have described above, before it formally began its investigation, the IU received a significant amount of information from the ministry investigators and had offered its opinion that the alleged wrongdoing merited a referral to the RCMP. The IU continued to have regular contact with the ministry investigators after its investigation began.

From October 2012 to June 2013, the IU investigators communicated with the ministry investigators to gather documents, provided input on the scope of the government's document disclosures decisions in the wrongful dismissal litigation brought by the dismissed employees, and provided advice around the suspension and termination of some of the ministry's contractors. The teams also held joint update and strategy meetings, and discussed the disclosure of information to the RCMP and access to university documents. The lead investigator from the ministry collaborated with the IU in its requests for documentation from the universities.

Between July and October 2013, the ministry and IU teams met on at least four occasions and the teams shared information about who was an appropriate focus of the IU's investigation. An internal IU note dated July 31, 2013, stated, in part, that the ministry lead investigator "wants us to focus on [three individuals – two employees and a researcher] w/goal of getting info to RCMP." The individuals identified in this exchange and the projects with which they were associated formed a core part of the IU's final report.

In this case, it not unreasonable for the IU to believe that the ministry investigators had already done significant investigative work to allow it to come to its conclusions. For example, the IU Manager told us he understood the findings contained in the July 18, 2012 draft of the Internal Review report that he received from the Ministry of Health were true and that "anything that they put in [the] document is well supported with evidence."[7] This was a reasonable assumption based on the way the report was presented to the IU. Unfortunately, because the report presented a developed theory of the alleged misconduct and described unproven allegations as "findings," it created the risk of compromising the objectivity of the IU investigation to the extent that it informed the lens through which the IU investigators assessed issues. This risk was compounded by the fact that there had already been employment termination decisions and contact with the RCMP.

Given the number of times the two teams met and shared information and discussed investigation strategy, it is our view that the IU lost some of the independence it would have otherwise had. The evidence we reviewed demonstrated that two teams developed a common view of the alleged wrongdoing, including who was responsible, and the means by which it should be investigated.

The existence of a relationship between the IU and the ministry teams was not in itself a problem. The IU envisioned a collaborative relationship with the ministry team from the outset and cooperation between different investigative bodies is often essential to conducting an effective investigation. Particularly in the early planning stage, cooperation between investigators can avoid duplication of effort and can help to ensure that each investigation is properly focused and dealing with discrete issues.

At the time, neither investigation team had guidelines or formal policies for collaborating on an investigation of this nature. In this case, the collaboration lacked an appropriate structure such that the IU team was not sufficiently at arm's length from the ministry investigation. We found that the collaboration between the investigative teams impacted the objectivity of the IU's investigative conclusions.

14.2.5 OBTAINING INFORMATION FROM UNIVERSITIES

The IU believed that obtaining information from the universities was an important step in enabling it to understand the ministry's research contracts and its wider relationship with the universities. It took early steps to engage with the universities and from approximately November 2012 until mid-2013 the IU spoke with university representatives several times to facilitate access to the relevant information they held regarding the research programs and contracting relationships.

Although the IU understood that the universities intended to cooperate with its investigation, the IU was concerned about whether it had the authority to obtain all of the records it sought. Therefore, beginning in February 2013, the IU began a months-long process to obtain greater legal authority in order to compel the universities to provide unfettered access to their electronic and financial information. The universities were willing to provide the financial records but were understandably hesitant to provide the IU with unfettered access to their employees' emails, because they were concerned that doing so would breach

7 See Chapter 7 for a detailed discussion of the draft Internal Review report.

their own contractual and privacy obligations to their staff and researchers.

Later a government lawyer told the IU that obtaining a Treasury Board Directive could overcome many of the obstacles the IU faced in gathering information from the universities. But the lawyer made clear that obtaining the directive did not remove the IU's obligations to respect the legitimate interests the universities sought to protect. The lawyer's advice included a practical recommendation that the IU continue to work with the universities to try to develop a process to access their information in an orderly way. The advice also highlighted the need for the IU to consider the potential negative impacts to public perception that could arise if the two sides failed to agree on an acceptable process:

> *However, that [statutory] power is also not unlimited and given possible arguments respecting personal privacy and/or academic freedom that could be made, I think a court might consider imposing limits or conditions on the use of the power if UVIC legally challenged a broadly worded order issued by the Comptroller General. For that reason even if an order is to be issued, it may be advisable to endeavour to work with UVIC to see if some kind of protocol relating to the implementation of the order can be worked out that both serves your investigative needs and respects to the extent possible the privacy interests and academic freedom of the individuals involved. Reaching an agreement on a protocol (if that can be achieved) also seems far preferable from a public perception perspective to the possibility of the Province being legally challenged by one of its own institutions.*

Throughout the spring and summer of 2013, the IU held talks with the universities to try to secure access to their records. When the universities proposed an access protocol that they believed satisfied their need to protect the contractual and privacy rights of their employees and researchers, the IU rejected it as unworkable. The IU described the universities' proposed data collection and examination protocols as too restrictive and believed a protocol would have prevented the investigation team from meeting their professional examination standards.

Thereafter, it appeared the IU did not take meaningful steps to work with the universities to try to develop an information access protocol acceptable to both sides. While there was no guarantee that the IU and the universities could have reached a mutually acceptable agreement, a major sticking point appeared to be the IU's decision to keep the focus of its investigation secret. This limited the universities' ability to fully assess the IU's information request. The lack of information from the IU also prevented the universities from effectively checking their own internal controls for data and research funds to determine whether there were potential problems with their contracts or the financial control systems. This concerned university staff, who thought that if there were in fact problems with the universities' handling of contracts, they should be made aware of them. The IU's request for unfettered access to the universities' records arose, in part, from IU's uncertainty about whether the university administrators were participants in the alleged research contracting improprieties.

14.2.5.1 PURSUIT OF TREASURY BOARD DIRECTIVE

The IU's internal records indicate that as early as November 2012 it began considering whether it needed to obtain a Treasury Board directive to obtain information from the University of British Columbia (UBC) and the University of Victoria (UVic). The Comptroller General told us that even considering obtaining a Treasury Board directive was unusual and that this was the first time he had sought a directive to compel an entity to provide information to his investigators.

Pursuing the directive took a long time, and one of the IU's principal investigators told us that she worked on completing the necessary paperwork for at least six months, which left her with very little time to do any investigative work during that period. As part of the Treasury Board submission process, the IU was asked to submit a legal opinion to show how the relevant provisions of the *FAA* supported the application for the directive. It took several months for the opinion to be completed, which confirmed the Office of the Comptroller General could obtain the directive it sought. The content of the opinion reveals, however, the complex nature of the IU's request and discusses the many factors the Treasury Board needed to consider in its deliberations.

When the IU made its submission to the Treasury Board, on November 20, 2013, it emphasized the critical importance the IU placed on getting unfettered access to the universities' digital and financial information. Further, the IU repeatedly highlighted the fact that, without the Treasury Board directive, it would be "unable to adequately conclude on the allegations due to a significant scope limitation," and that "limiting access to key evidence would obstruct the conduct of a professional investigation."

On November 26, 2013 the Comptroller General met with the Minister of Finance and made submissions in person to facilitate the IU's request. When the Treasury Board issued its directive on November 28, 2013, it gave the IU full authority to obtain records from both universities in the manner it determined appropriate.

Coincidentally, the IU was just finalizing its Treasury Board submission as the Ministry of Health decided to end its own investigation in October 2013. When UVic learned that the ministry's investigation was completed, it asked the IU whether its review was also completed. In November 2013, the IU told UVic that its investigation was ongoing and reiterated its position that it might require additional information. The IU had analyzed the information received from the universities up to the point when the Treasury Board directive was obtained and formed the opinion that the information was inadequate to fully answer its questions.

14.2.5.2 DECISION NOT TO USE THE TREASURY BOARD DIRECTIVE

Although the IU originally sought the Treasury Board directive because it believed it would be unable to fulfill its mandate without it, the IU decided not to use the directive once it was granted. As a result, it did not compel the universities to provide the digital and financial records it had said were required to fully conduct their investigation. We sought to understand the rationale for the decision not to use the directive given the long time and significant effort expended to obtain it.

The IU's final report stated that using the directive "would not be practical."[8] Both the Comptroller General and the IU Director agreed that the IU did not yet have sufficient information to conclude the investigation when the decision was made not to use the authority the directive provided. The IU Director told us that several considerations went into the decision not to use the directive including the potential impracticality of implementing it, the length of time it took to obtain it and concerns about the IU's own lack of resources, given the departures one of the principal investigators and the IU manager in November 2013 and January 2014 respectively. Whatever the reason underlying the IU's decision, the IU Director repeatedly told us that the absence of more detailed information from the universities hampered the investigation.

14.3 THE FINAL REPORT

14.3.1 PROBLEMS WITH THE CONTENT OF THE REPORT

On June 25, 2015 the IU finalized its report in the form of a memorandum to the Comptroller General from the IU Director. In our view, the limitations we discussed above compromised the IU's fact finding and led it to reach many incorrect conclusions based on mistakes of fact that run through the entire report. While the IU's final report is careful to alert the reader to the limitations it encountered during its investigation, the IU report is more like a working paper than a final report. From this perspective, it is not that there were no issues meriting further inquiry but rather that it was not a completed report. We reviewed a number of the issues covered in the IU report and identified material inaccuracies. Because of those inaccuracies, to the extent that the report contains findings of fact and conclusions that are presented in final form, it cannot be relied on.

Overall, we found that many of the IU's conclusions were based on mistaken facts or an incomplete understanding of the evidence to such an extent that the conclusions (and inferences) the report draws are incorrect. In addition, significant sections of the report contain imprecise language that imply wrongdoing on the part of PSD employees in a way that falls short of reaching a clear conclusion, but makes it appear clear that the IU believed wrongdoing had occurred.

8 Investigation and Forensic Unit, Office of the Comptroller General, Ministry of Finance, *Project No.: 026115 Pharmaceutical Services Division Investigation,* 10.

Further, we found that in many cases, the IU had obtained evidence that could have dispelled allegations that the IU was investigating, but the report appeared not to include an analysis of this evidence. In other cases, even when the report correctly described the facts, the IU reached incorrect conclusions or drew unjustified negative inferences by failing to adequately consider the Ministry of Health's research objectives, the prevailing health research policy environment in existence at the relevant time, the complete history and context of the research agreements, the timeline of events, or some combination of all of these factors.

Much of the IU report focused heavily on the role Dr. Maclure played in the PSD programs that had been established. As we described in Chapters 4 and 7 of our report, Dr. Maclure's role at the Ministry of Health arose inside a structural framework that was unusual within the government context as the ministry sought to bring together government (and its data) with the academic research community (and its expertise). From our interviews with the IU team members, it did not appear that they appropriately weighed the extent to which the senior executives inside PSD understood Dr. Maclure's role, or the extent to which senior executives up to the deputy minister level, had expressly approved the unique structure of his position and the role they expected him to play.

This, of course, is not to suggest that the IU needed to agree in every case that the ministry used best practices in the way it structured its affairs. Indeed, the IU may have disagreed or disapproved of the structure that the ministry had put in place. It was open to the IU to be critical of the novelty of the approach or the checks and balances the ministry put in place. However, in the context of its investigation into specific allegations against specific people, the IU investigation needed to fulfil two roles. First, the IU needed to ensure that it understood how this novel structure was created, who approved it and for what purpose. Second, the IU needed to direct any concerns it might have had about the appropriateness of this structure within government toward those who created and approved it. This would have enabled the IU to direct any questions of accountability to the appropriate management level within the ministry.

We determined that the IU did not discharge these roles in this investigation which undermined the conclusions in the final report.

14.3.2 ALLEGATIONS OF CONFLICT OF INTEREST

According to the terms of reference, the IU intended to "determine the appropriateness of PSD staff (past and present) relationships with specific individuals, businesses and other entities to assess the allegations involving conflict of interest situations."

The IU interviewed the complainant in May 2013. The records of the IU's interview notes with the complainant show that she had made wide-ranging allegations about relationships and conflict of interest situations involving various individuals throughout government, even outside the ministry. The IU generally limited the analysis in its report to a representative sample of PSD initiatives that it believed were representative of the problems the complainant raised. Some of its more substantial sections, like that dealing with the ADTI, directly address concerns the complainant raised in her initial complaint.

From the outset it is clear that the report focuses heavily on allegations of wrongdoing against Dr. Maclure. The report begins by highlighting its conclusion that Dr. Maclure was in an actual conflict of interest due to his "multiple incompatible roles" as both a ministry employee and external researcher on PSD initiatives. In coming to this conclusion we found that the IU relied primarily on its interpretation of emails and the contractual documents it had reviewed. For the reasons we described previously in this chapter, the IU did not interview Dr. Maclure or conduct substantive interviews with any other individual with program area knowledge. This is unfortunate because it could have helped the IU better understand the nature of Dr. Maclure's roles and involvement in the initiatives under investigation and how they were supported by his superiors.

As we have described in Chapter 3, the standards to apply when assessing whether a public servant is in a conflict of interest are found in the Standards of Conduct for public service employees. It is our view that the IU was obliged to apply these standards because it was assessing the conduct of individual public servants.

The Standards of Conduct state:

> *A conflict of interest occurs when an employee's private affairs or financial interests are in conflict, or could result in a perception of conflict, with the employee's duties or responsibilities in such a way that:*
>
> - *the employee's ability to act in the public interest could be impaired; or*
> - *the employee's actions or conduct could undermine or compromise:*
>   - *the public's confidence in the employee's ability to discharge work responsibilities; or*
>   - *the trust that the public places in the BC Public Service.*[9]

Accordingly, we would expect the IU's analysis of conflict of interest to focus on these standards by analyzing the nature of Dr. Maclure's duties in relation to his role as a PSD director, his research role, and in relation to the specific initiatives where he is alleged to have been in an actual or perceived conflict of interest. We would also expect the analysis to consider what "private affairs or financial interests" are in actual or perceived conflict with his ministry roles. The mere fact that a government employee has an external interest or outside employment, by itself, does not mean that they are in a conflict of interest position. Each case must be assessed on its particular facts and weighed against the test established by the Standards of Conduct. In this case, the IU report indicates early on that Dr. Maclure is an "external researcher" and that he has "private interests" in relation to the various research initiatives described. The IU does not clearly explain how it defined "external," how it determined that Dr. Maclure was an external researcher on the initiatives, or identify what private interests he held that conflicted with his duties as a public servant. The IU report also does not explain how his interests or activities impaired his ability to act in the public interest, or how his actions might compromise public confidence or trust.

Questions of conflict of interest can often be complex and nuanced and this was particularly the case for Dr. Maclure. It was clear to us that Dr. Maclure had spent most of his career in government building bridges between the ministry and the wider research community, to focus on public health issues of interest and to benefit the ministry. The former Assistant Deputy Minister of PSD, Bob Nakagawa, described Dr. Maclure's role as creating an "exquisite synergy" between the ministry's interests and the broader research community. However, the type of embedded researcher position that Dr. Maclure occupied at the Ministry of Health, which might be common in the larger culture of health science, was unusual within the provincial government, and certainly unfamiliar to the IU. Being unfamiliar with this culture, the IU's analysis lacked understanding of how Dr. Maclure's position was structured. The IU also lacked the historical context within which Dr. Maclure's position and work with the Ministry of Health had evolved.

As we discussed in Chapter 7, Dr. Maclure's work in this area was a central feature of his ministry role for most of the nearly 20 years he worked at the ministry. The explanations for how his role developed, how senior executives viewed it, and how they had approved it, was well documented in his employee file and job description and documented in connection to the ministry projects he worked on. However, to Dr. Maclure's detriment, the PSD did not have one overall document that articulated the way in which the Ministry of Health might have considered potential conflict of interest issues with respect to placing Dr. Maclure in such a role within the PSD. There was also not one document, per initiative, to specifically detail the decision-maker's assessment of whether Dr. Maclure was in any potential conflict of interest. Instead, answers were embedded in various documents, indicating that the decision-makers had considered the question in specific reference to each of the initiatives. Mr. Nakagawa, as well as certain executive directors, came to the ministry from the clinical setting of a hospital, where we have learned that dual roles and cross-appointments are normal. Until the events of 2012, individuals working in PSD had not necessarily anticipated that others looking into PSD from the outside, might not appreciate its framework or the rationale for Dr. Maclure's role within the division. The failure to ensure that better documentation was available to

9 British Columbia, "Conflicts of Interest," *Standards of Conduct for Public Service Employees*.

transparently demonstrate the rationale for Dr. Maclure's role within PSD was problematic.

When assessing the specific allegations against Dr. Maclure, the report does not fully consider the extent of the evidence that shows Dr. Maclure had disclosed potential conflicts of interest as he was required to do, nor the extent to which his involvement on the initiatives were approved and potential conflicts were managed by his superiors. This is a problem because it leaves the reader with the inference that Dr. Maclure might have done something improper when the evidentiary basis to support such a conclusion is lacking. What the evidence shows is that Dr. Maclure often was involved in facilitating the work of various partners on collaborative projects, the success of which often involved dealing with various issues including funding from a variety of sources.

As we will discuss below, in relation to the four initiatives (ADTI, EQIP, ADEPT and PhORSEE) in which the IU concluded Dr. Maclure was in an actual or perceived conflict of interest, we determined that in some cases, the alleged conflict of interest did not exist. In one case we found evidence that a potential conflict of interest did exist but that Dr. Maclure identified the conflict and ministry officials took steps mitigate or remove the conflict, whether through policy, contract or other means, as they were required to do. In all cases, we found that Dr. Maclure's roles with respect to the initiatives were known to and condoned by his superiors. In the following sections we highlight some of the problems with the conclusions of the IU report with respect to each of these initiatives.

14.3.2.1.1 ALZHEIMER'S DRUG THERAPY INITIATIVE

The report notes that the complainant alleged that Dr. Maclure was "in a conflict of interest with respect to his duties involving ADTI. Specifically, that Dr. Maclure was involved in ADTI negotiations as a ministry employee, and at the same time, he was acting on behalf of UBC and Uvic as a university researcher." At the conclusion of its discussion of Dr. Maclure's role in this initiative the report says the IU team "confirmed that the [complainant's] allegations respecting Dr. Maclure's conflict of interest involving ADTI 'have merit.'"

As we discussed in Chapter 5, the complainant lacked knowledge of the ADTI initiative and did not understand Dr. Maclure's roles within it. The details the IU chose to cite in the Internal Review report to support their conclusions, also suggest that the IU reached its conclusion because it included several mistakes of fact in its analysis and it did not appear to know, or appropriately weigh, the full extent of the knowledge, purpose and approval of Dr. Maclure's role with the Ministry or the universities in connection with this project.

In assessing Dr. Maclure's role, the IU focused heavily on the fact that he prepared a draft of the ADTI contract in 2007, at a time when the ministry envisioned him acting as a principal researcher on some of the program's sub-studies as a ministry employee. When the IU assessed this aspect of Dr. Maclure's role, they concluded he was in a conflict because he held a position in government and was affiliated with UVic at a time the ministry knew it intended to enter into an agreement with UVic to lead the study. In reaching this conclusion, the IU inaccurately described Dr. Maclure as an "external researcher," when his involvement on ADTI was entirely connected to his role as a ministry employee. While it was true that Dr. Maclure prepared a draft of the ADTI contract, he did so as a ministry employee at the request of the ministry's project manager.

One of the concerns the IU identified arose from the fact that Dr. Maclure would (or could) benefit from his connection to UVic, because UVic was receiving research funding from the ministry and (because Dr. Maclure's) name would appear on the publications arising from the study. In our interviews with the IU team, they told us that being placed in a position to benefit from the ministry contract was one way to identify an impermissible conflict in this case.

In conducting its assessment, however, it did not appear that the IU appropriately weighed the fact that publishing the study results was one of the ministry's goals of the ADTI. The IU did not appear to consider that Dr. Maclure was not personally receiving any of the research funds intended for the university. The IU report also did not mention that the formal project planning documents discussed the ministry's goal of ensuring the study would be methodologically sound and fit for publication. Both of these ministry goals fell within Dr. Maclure's academic speciality and were what he was expected to contribute to the project.

Further, the formal project planning documents identified him by name and highlighted the role the ministry expected him to play to bridge the ministry's interest with the interests of the researchers included in the study. Dr. Maclure's bridging role on ADTI was consistent with the role the ministry had asked him to fill in his government role for at least the preceding decade (when he was not on leave to universities) and was extensively documented in his personnel file.

The ADTI planning documents also highlighted the ADTI project goals, which included building a new collaborative relationship with the university, industry and the research community. The IU report did not include a consideration that any potential conflict Dr. Maclure might have had was addressed through the fact that he was not the final decision-maker and did not determine whether the project proceeded, and he did not approve the research budget, the final content of the contract or the project deliverables schedule.

By focusing on his connection with UVic and his role writing a draft of the agreement, in our view, the IU insufficiently considered other facts that outlined the history, context and purpose of Dr. Maclure's role in the project and showed that his interests in the project were not incompatible with his ministry role. In our view, it appeared Dr. Maclure's role furthered the ministry's interests (as they described in their program planning documents) by helping ensure the scientific rigour of the ADTI, which the ministry believed was a key component of this complex collaborative government-patient-industry-researcher initiative.

To summarize, with respect to the Standards of Conduct, the evidence supports that, regarding ADTI:

1. Dr. Maclure's involvement as a ministry employee in ADTI and his concurrent role as a researcher was disclosed, known and explicitly condoned by his superiors,
2. Dr. Maclure's ability to act in the public interest was not impaired by his role as a researcher; and
3. Dr. Maclure's conduct in carrying out his responsibilities in relation to ADTI could not be said to undermine or compromise the public's confidence in his ability to discharge work responsibilities; or the trust that the public places in the BC Public Service.

14.3.2.1.2 EDUCATION FOR QUALITY IMPROVEMENT IN PATIENT CARE

In its report the IU noted the complainant's allegation that Dr. Maclure "received remuneration as a ministry employee and "a contractor" under the Education for Quality Improvement in Patient Care (EQIP) program because "he ran things, decided who got funding, and what initiatives went forward.... because he was on the working group and implementation group and these groups made decisions on which research projects go ahead." At the conclusion of its discussion into Dr. Maclure's role the IU stated it had "confirmed that some of the [complainant's] allegations respecting conflict of interest situations involving EQIP have merit."

As described earlier in our report it was clear that Dr. Maclure was actively involved in the EQIP initiative in several ways. He played an active role creating the initiative while he was on an approved leave of absence from government and remained actively involved in it once his employment with the ministry resumed. However, the complainant's allegations contained important misstatements of fact, including the incorrect assertions both that Dr. Maclure received remuneration as contractor under the EQIP agreement and that he had final decision-making responsibility. Dr. Maclure was not a subcontractor to the EQIP project and he received no remuneration apart from his regular ministry salary after he returned to government. The Transfer Under Agreement document explicitly provided that Dr. Maclure would receive no financial remuneration and we saw no evidence that he received any additional remuneration.

While Dr. Maclure held an important role as Implementation Director of the project, it was the director and executive director of the Ministry of Health's Drug Use Optimization (DUO) branch and the ADM of PSD who were the final decision-makers for EQIP. Further, most decisions about the direction of EQIP were made through a group that included external stakeholders. This evidence is extensively documented in the ministry's program area files including the group's meetings minutes.

In our view, the ministry's records showed that the ministry openly turned its mind to consider whether Dr. Maclure was in a conflict of interest in his role in the EQIP

project, and actively took steps to address the conflict questions in an appropriate fashion.

The IU report further states that in "the IU team's opinion, Mr. Maclure's involvement in EQIP demonstrates that his efforts were not singularly focused on serving the interests of his employer (the province)." We are unclear how the IU could have come to this conclusion particularly in the absence of substantive interviews with the individuals involved in the initiative. Based on the evidence we obtained, we determined that Dr. Maclure's focus remained on advancing the ministry's interest in EQIP including the public policy goals of the initiative at all times.

Overall, IU's analysis of the conflict of interest allegation did not include consideration of the following important facts:

- the public policy rationale for the ministry engaging in the project, and the close integration between government's policy objectives and the research project[10]
- the Ministry initiated its involvement with EQIP while Dr. Maclure was on a leave of absence from the Ministry
- it was a condition of his leave of absence required by the then-Deputy Minister that Dr. Maclure demonstrate how his work advanced the research interests of PSD, of which EQIP formed a part
- government legal counsel and Ministry finance staff were involved in the development of the EQIP transfer under agreement and ensured the agreement expressly addressed the risks of any potential conflict of interest involving Dr. Maclure when he returned to the ministry from his leave of absence, and he was not paid under the project
- the Ministry benefited from Dr. Maclure's involvement through his role in assuring the validity of the study design and his ability to ensure the project was delivered

Through our interviews with individuals who were the EQIP decision-makers we learned they considered the objectives of Dr. Maclure's role BC Academic Chair for Patient Safety Office to be compatible with the ministry's objectives. Moreover, the IU report appeared not to consider that Dr. Maclure was not acting in a personal capacity in relation to EQIP but as a public sector employee in his two roles – as the publicly funded B.C. Academic Chair in Patient Safety at UBC, which is a public institution, and as a ministry employee.

To summarize, with respect to the Standards of Conduct, the evidence supports that, regarding EQIP:

1. Dr. Maclure's multiple roles as an employee, researcher and the BC Academic Chair for Patient Safety were disclosed and explicitly condoned and supported by his superiors in relation to his involvement on EQIP,
2. Dr. Maclure's ability to act in the public interest was not impaired by his role as a researcher generally or as the BC Academic Chair for Patient Safety specifically; and
3. Dr. Maclure's conduct in carrying out his responsibilities with respect to EQIP could not be said to undermine or compromise the public's confidence in his ability to discharge work responsibilities, or the trust that the public places in the BC Public Service.

14.3.2.1.3 ACADEMIC DETAILING EVALUATION PARTNERSHIP TEAM

The IU concluded that Dr. Maclure was in a conflict of interest with respect to his dual roles as a ministry employee and his involvement on the Academic Detailing Evaluation Partnership Team (ADEPT). Although we describe the ADEPT initiative generally in Chapter 4 of our report, we have not addressed Dr. Maclure's involvement in it because it was not one of the initiatives examined during the Ministry of Health investigation.

As a member of the Canadian Academic Detailing Collaboration, Dr. Maclure teamed with a group of academic detailers and researchers and they applied for and obtained a grant from Health Canada to evaluate academic detailing programs across Canada. He commenced this process while on his leave of absence from the ministry.

10 A letter from the then-Acting Director of Pharmacare dated April 29, 2005, stated in part, "although the Ministry Services has often collaborated with researchers, this initiative is unique in how the research is an integral part of the policy. Our policy to re-invest savings on drugs requires scientific measurement. To measure savings accurately, there is a need for a control group and statistical techniques. The policy cannot succeed without the research, nor can the research succeed without the policy."

When Dr. Maclure returned to the Ministry of Health he approached the executive director of PSD's DUO branch (which was not his home branch) in 2007, to make her aware that he was applying for external funding, including from the Canadian Institutes for Health Research (CIHR) to conduct evaluations of academic detailing. He asked the executive director whether the ministry wished to provide support for the partnership's initiative. Dr. Maclure disclosed his potential conflict of interest in making this request. In his email he stated:

> *POTENTIAL CONFLICT:*
>
> *Until now I haven't asked you to support the Canadian Academic Detailing Collaboration's proposal for impact evaluation (attached), because I thought it might be a conflict of interest (as I am principal investigator). Also we hoped to get MSFHR matching funds if CIHR approves.*

He also forwarded the executive director all the documentation relevant to the proposal, including a description of his role as the principal investigator for the project. Following his conflict of interest disclosure, his own executive director in the POER branch and the PSD Assistant Deputy Minister, Bob Nakagawa were also made aware of the relevant details with respect to Dr. Maclure's involvement in ADEPT.

Separately, but around the same time, the ministry commenced its Provincial Academic Detailing Service which was launched by the PSD in March 2008. Thereafter PSD decided to partner with ADEPT in order to allow it to obtain an independent evaluation of the provincial program as part of the broader pan-Canadian study.[11] As part of its commitment to ADEPT, the ministry agreed to a three year commitment in the form of a combination of cash and in-kind support (e.g. staff time). These funds were matched dollar-for-dollar with funding from an outside funder, CIHR, to support this pan-Canadian initiative.

On February 2, 2009, the executive director of PSD's DUO branch issued a grant to the University of Victoria to support ADEPT, that Dr. Maclure signed on behalf of UVic as the Principal Investigator. Both sets of grant monies, from the ministry and CIHR were paid directly to the university and held in the university accounts to be disbursed as required for the project according to the stipulations set by the CIHR. The CIHR funding stipulations provided that the Principal Investigator, in this case Dr. Maclure, could not be paid under the grant. UVic's records show that Dr. Maclure did not receive any personal financial benefit from the funds.

The potential conflict that Dr. Maclure disclosed was that if the Ministry of Health agreed to partner with the initiative, the addition of British Columbia to the broader study could enhance the proposal's success. The potential conflict was not that Dr. Maclure would receive any direct financial benefit himself. The CIHR policy prevents the Principal Investigator from being paid from the grant monies and this restriction extends to payment received from a partner's matching funds.

A 2009 briefing note approved by Mr. Nakagawa documents that the decision to engage in ADEPT was made based on PSD's own consideration of the benefit to the ministry from its participation in this initiative. However, neither the briefing note, nor any of the other documents that we reviewed, make clear how the decision-makers resolved the potential conflict question that Dr. Maclure had disclosed. We asked both the executive director of the DUO branch and the then-Assistant Deputy Minister, Mr. Nakagawa how they considered the conflict of interest issue with respect to ADEPT. Unfortunately, due to the passage of eight years, they did not recall how the question was resolved. However, what was clear to us through our investigation was that Mr. Nakagawa, the executive director of the DUO branch and Dr. Maclure's supervisor were attuned to issues of conflict of interest and how they ought to be addressed.

This is an example where written documentation recording the analysis and decision would have been useful to explain how the executives in PSD had exercised their discretion under the Standards of Conduct following Dr. Maclure's disclosure of his potential conflict of interest.

In 2011, the initiative was extended by two years and the ministry had not yet met its original funding commitment to the initiative. The PSD decided to contribute $24,000 from its budget to make-up for the deficiency and meet its original funding commitment. Rather than issue a grant to

11 This evaluation is described in Chapter 4

fund the initiative as occurred when the initiative started, PSD entered into a direct awarded service contract with UVic on March 31, 2011 for $24,000.

The draft contract was reviewed by the Ministry of Health's Finance Division and staff raised the potential conflict of interest issue before it was approved. As a result, PSD and the Finance Division took a number of steps to remove the potential conflict of interest from the final contract. In the end, both the final contract document package and the direct award justification forms were reviewed and approved by representatives of both the Finance and Pharmaceutical Services Divisions. As a result of these changes, Dr. Maclure was not named in the contract between the Ministry of Health and UVic.

According to a 2010 briefing note signed and approved by Mr. Nakagawa, the PSD decided that its participation in the initiative would lead to improvement of the provincial academic detailing service and would be useful to guide future academic detailing endeavours. The clear benefit of PSD partnering and supporting ADEPT was that the province obtained an independent evaluation of the effectiveness of its own academic detailing service at a very low cost.

To summarize, the evidence supports that with respect to the Standards of Conduct regarding ADEPT:

1. In 2009 Dr. Maclure was in a potential conflict of interest regarding the province's decision to contribute matching funds to support the ADEPT initiative.
2. The nature of the Dr. Maclure's interests were not financial. Dr. Maclure would not receive any payment from the funding, but were related to his interest in the success of the ADEPT initiative.
3. PSD decided to support ADEPT on the basis that it would benefit from an evaluation of the provincial academic detailing program known as PAD.
4. Dr. Maclure disclosed the conflict to ministry officials as required under the Standards of Conduct. In 2009 the ministry ought to have better documented the steps it took at the time to assess and address Dr. Maclure's potential conflict of interest.
5. Regarding the 2011 contract for ADEPT:
   a. the ministry identified the potential conflict of interest.
   b. the ministry documented the steps it took to remove the conflict.
   c. As in 2009, Dr. Maclure was not in a personal financial conflict of interest. Rather the nature of his interest as Principal Investigator was that ADEPT include British Columbia in its pan-Canadian evaluation of academic detailing. The Ministry of Health's interest to have its PAD service independently evaluated was similar and not in conflict.
6. We concluded that with respect to the ADEPT initiative:
   a. Dr. Maclure's multiple roles as an employee and Principal Investigator on ADEPT was disclosed, condoned and supported by his superiors in relation to his involvement on ADEPT.
   b. Dr. Maclure's ability to act in the public interest was not impaired by his role as the Principal Investigator on ADEPT.
   c. Dr. Maclure's conduct in carrying out his responsibilities as the Principal Investigator on ADEPT could not be said to undermine or compromise the public's confidence in his ability to discharge work responsibilities; or the trust that the public places in the BC Public Service.

14.3.2.1.4 PHARMACEUTICAL OUTLOOK RESEARCH SPECIAL AUTHORITY EPRESCRIBING AND EEDUCATION

The IU report says it found that Dr. Maclure was in an "actual conflict of interest" in relation to Pharmaceutical Outlook Research Special Authority ePrescribing and eEducation (PhORSEE), which the IU describes as a PSD initiative. The IU finds that two other individuals were also in conflicts of interest with respect to PhORSEE.

Unlike the other initiatives examined by the IU, PhORSEE was not a ministry contract. As we described in Chapter 4, the College of Pharmacists of BC created PhORSEE after receiving a grant from the ministry. The college is a self-regulating health profession and is independent of the ministry. Once the funds were distributed to the college it had control over the disbursement of the funds so long as it satisfied the terms and objectives of the grant, which were stated "to support patient safety through evidence based research of pharmaceutical services delivery in the

province." To meet this objective the college created a committee with terms of reference to guide the distribution of the funds to support research in the area.

The decisions to grant funds were made by the Registrar of the College. At the request of the College, Dr. Maclure and several PSD executive directors sat on a committee as external stakeholders. According to the terms of reference their role was to provide "strategic advice to the Registrar on the dispersal of grant funds." In this role they were required to review the proposals, seek advice from experts and engage with the researchers where amendments or additional proposals were requested. Dr. Maclure sat on the committee in his capacity as a ministry employee. As an expert in methodology, he was expected to provide his opinion on the proposals and to engage with the researchers.

In some cases, Dr. Maclure and other PSD employees perceived themselves to be in conflicts of interest with respect to their role on the committee because they were named on the proposals or cited as authors in the researchers' publications submitted to support grant applications. The reason these employees were named on the proposals or publications was because PSD was structured so that their employees engaged in ministry approved external research projects in various capacities. For example, PSD employees regularly engaged as "knowledge users" on external research where the ministry hoped it would be able to use the results to make informed public policy decisions. Their participation allowed the ministry to participate in the research process to the extent that they could bring their branch's perspective and interests to inform the process to varying degrees.

The committee established by the College of Pharmacists of BC had terms of reference. Those terms of reference set out the provisions for handling such conflicts of interest. The evidence we reviewed showed that the employees, including Dr. Maclure complied with these provisions. In particular, the committee meeting minutes show that in each case of an actual or perceived conflict of interest, the PSD employee declared the conflict and abstained from the committee's deliberations when making its non-binding recommendation to the Registrar.

We have not summarized PhORSEE in point form in respect to the Standards of Conduct as we did for the initiatives above because the employees were involved with PhORSEE to provide their input to the College on behalf of the government as external stakeholders. For the reasons summarized above, the evidence as documented in the meeting minutes show that the employees participated in accordance with the terms of reference in relation to conflicts of interest.

14.3.3 REPORT QUALITY ASSURANCE AND FACT-CHECKING

The IU hired an outside contractor to perform quality control on its final report. The IU Director told us he had used this contractor in the past and felt he could provide "seasoned expertise" and who was well-placed to provide an independent "challenge" of the report's conclusions.

When we talked to the contractor, he said he did not play a large role reviewing the IU's evidence to ensure the report's conclusions were correct. He explained that the majority of his work was concentrated in January and February 2015 and said his role was largely limited to giving advice about how certain issues could be framed in the report. He also said he was involved in discussions about the sufficiency of some of the evidence supporting the conclusions, but that the IU Director made the final decisions about what was included in the final report.

The contractor told us that in his role, he had a limited opportunity to access or review the materials the IU had gathered. He said he was briefed by the remaining principal investigator, the IU Director and the IU's contracted data management person. When we asked him what documents he was given as part of this review he told us:

> *What did I look at? I looked at the report, which was not really a report, it was more a working paper summary. Which continued to be – it was like a living document. … there's a whole series of issues around that. I saw it as a form of summary working paper.*
>
> *At the time it was my observation it was a good deal of material that was not fully developed. Some findings were clear, but not precise. Others were less well developed.*

Regarding the report's content he said he believed that the layout of some parts of the report risked creating the

impression that the IU had uncovered more wrongdoing than it actually had. For example, he told us that he felt the IU focused too heavily on inferences that research money had been misused when there was no clear evidence that any financial wrongdoing actually occurred. In his view, greater emphasis should have been placed on the fact that there was:

> *… no evidence of anyone actually receiving any money … or great personal benefit, like the actual – the actual nexus of the thing.*

In his view the IU reports should have contained a "louder statement"outlining that there was no evidence that anybody benefitted financially. He said such a statement would have countered the incorrect impression he felt the report created.

Yet he also told us that some of the wording in the report reflects his suggestions that the evidence to support some of the conclusions was not very strong and that more restrained language should be used:

> *In some cases I'll say things like, "there is evidence that," that can be – in some cases that can be one email, right? There doesn't have to be a lot of evidence like, but there's some evidence. And I'm not – I'm not frivolous with that, right?*
>
> *So sometimes you can say there is – there is evidence that.*
>
> *…*
>
> *[In another case] We did enough work to satisfy ourselves that the – the concerns expressed by the [complainant] were plausible, and the conclusion reads that way. Right? We didn't try and take that any further. We – I – I did not feel that we were – I had the information or were qualified to further develop that – that as a – as a line of inquiry.*

The IU's decision to have the final report reviewed by an external experienced contractor was a positive step that could have helped the IU reach more accurate conclusions. However, in our view, the contractor did not have a full opportunity to perform the function the IU expected of him. Given the length and complexity of the IU's investigation, the contractor did not have enough time to familiarize himself with the facts. Consistent with the beliefs of the IU team he felt the fact that more information was not obtained from the universities impeded the IU's ability to fully investigate the financial questions, and that "the scope limitations here are so great that it's my job just to say what we know. To conclude based on what we've got."

Although it appeared the contractor performed a limited quality control function in relation to the report, it was not his role to ensure the IU met the objectives established by the terms of reference to "confirm or dispel" the complainant's allegations. Within the short window he had in 2015 the contractor's work could not make up for the significant challenges the IU was facing generally and in their report. The contractor was not in a position to redo the IU's analysis, nor was he asked to do so. He had a limited time to review a very large volume of investigative material the IU had gathered and understandably his recommendations were predicated on the information he received from the IU.

14.3.4 DISTRIBUTION OF THE REPORT

In April 2015, the IU provided a draft of the report to the RCMP. In reviewing the report the RCMP completed a detailed analysis to determine whether it should start its own investigation. The RCMP report concluded that no criminal investigation was warranted.

In April 2015, the IU also gave a copy of the draft report to the Deputy Minister of Health Stephen Brown in April 2015 and met with Dr. Brown and Assistant Deputy Minister of Financial and Corporate Services and Executive Financial Officer Manjit Sidhu to discuss the conclusions. The IU Director told us he expected the ministry to respond to the report before he formally finalized the document. Although the IU Director told us that Dr. Brown instructed Mr. Sidhu to respond to the report's conclusions, both Dr. Brown and Mr. Sidhu denied this instruction was given. In any event, between April 2015 and July 14, 2015, the ministry did not provide the IU with any feedback about the report and, having not heard back from the ministry, the IU finalized its report to the Comptroller General on June 25, 2015.

By the time the ministry received an initial copy of the IU's report, it had already received extensive legal advice, which resulted in decisions to settle most of the wrongful

dismissal cases that had been brought against it in the wake of the terminations. When the ministry's outside counsel received a copy of the IU's draft report, he advised that he had serious concerns about the IU's conclusions. Counsel expressly cautioned the ministry that the IU's report contained factual inaccuracies and could expose government to new legal claims of defamation if it was released publicly, because it asserted conclusions certain branches of government knew were untrue.

Although we do not know the exact date the ministry's counsel expressed his concerns about the IU report, it appears counsel gave this advice to the ministry shortly after receiving the IU's draft report. However, the ministry did not share it with the Comptroller General until July 14, 2015 when he was considering whether to proactively release the IU's report.

Thus it was not until three months after the draft report had been provided to the Ministry of Health that the Comptroller General was advised of concerns about the report. The Comptroller General told us he was concerned that it had taken so long for the ministry to respond, during which time the report had been finalized.

In our view the Comptroller General's concern was reasonable. The delay in informing the Comptroller General about the potential problems with the report proved to be a missed opportunity for the ministry to provide important feedback to the Comptroller General and the IU before the report was finalized.

In our view the IU was deprived of the opportunity to make inquiries of the ministry about the full scope of the potential concerns its counsel had raised. It also deprived the IU of the opportunity to either revisit their conclusions before they incorrectly determined that wrongdoing had occurred within PSD, or make a notation on the report itself that its conclusions were not yet finalized because it did not yet have all of the information it would need to complete the report.

14.4 CONCLUSION: IU INVESTIGATION AND REPORT

The Office of the Comptroller General and the IU play an important role superintending financial controls across government, assessing the effectiveness of these controls and investigating allegations of potential wrongdoing when they arise. Senior public servants need to be able to rely on the Comptroller General to provide it with fair, accurate and reliable advice about procurement, contracting and related financial matters. It is a critically important office.

During our investigation we found that the IU lacked sufficient resources, clear policies, adequate training and performed too few interviews, all of which hampered its ability to do its work well. Although the IU team worked hard to try to investigate this complex matter thoroughly, in our view the IU was unable to overcome its resource limitations and other internal process gaps, all of which led to the creation of a report containing many inaccuracies and incorrect inferences.

When the report was completed, and later leaked to the media, its conclusions created considerable doubt and uncertainty about whether the initial investigation into the allegations of wrongdoing in support of the dismissal decisions had, in fact, been correct. This increased the risk of reputational damage to those people mentioned in the report due to the seeming inconsistency between the IU's conclusions and government's public position on the settlements.

14.5 PROACTIVE STEPS TAKEN BY THE MINISTRY OF FINANCE

The Ministry of Finance has recognized the shortcomings in the operations of the IU. In 2015, the Ministry of Finance contracted with KPMG to conduct a "strategic initiatives review" of the IU. KPMG reviewed the IU's organizational structure, design and general business and investigation approaches. It also reviewed a sample of the IU's investigation and monitoring cases to evaluate its investigative practices. In its May 10, 2016, report, KPMG made several observations arising from its assessment of the IU's processes:

- *General Business Practices: The IU has neither a formally documented mandate nor strategy. In keeping with leading practice we*

recommend developing a formal mandate and a strategy that aligns with the mandate.

- *Documented Policies and Their Use: There are few, if any, documented policies and processes specific to the IU and how it does investigations. Consistent with leading practice we recommend that documented policies and processes be developed and implemented in appropriate areas. We recognize that the future direction, and in particular the size of the team, will impact on the practicality of this recommendation.*
- *Resourcing Expertise: The number and experience of investigators and the timeliness of investigations are two matters that, in our view, are closely related. We heard consistently from interviewees that there is a perception that the IU is significantly understaffed, resulting in delays to the investigation and reporting process. In our view the size of the team is not commensurate to the size and complexity of the organization. Further, we recommend consideration be given to adding to the depth and breadth of experience on the team. More senior resources with significant experience would allow for more fulsome quality assurance reviews, particularly of reports.to complete an investigation*
- *Outreach and Communication: Leading practice highlights the importance of consultation with individuals from various disciplines or departments in planning investigations. We heard mixed views with respect to the effectiveness of the collaboration with other departments. Generally, we heard from interviewees that collaboration with the Office of the Chief Information Officer ("OCIO") works well, while communications and collaboration with the BC Public Service Agency ("PSA") was identified as an area for improvement. We understand that this has been recognized by the parties and that a Memorandum of Understanding has been established to address this matter. We also recommend that consideration be given to involvement of legal counsel in investigations.*[12]

Since the KPMG review was completed, the Ministry of Finance has taken steps to begin implementing these recommendations. Among these steps, the IU has developed the *Investigation and Forensic Unit Policy and Procedures Manual*, which we received in its draft form in October 2016. This manual adopts principles of fairness in its work that are consistent with the standards we would expect will be applied to their future work including: "respecting the rights of individuals, with fair investigation practices." We consider it a positive step that the IU is working on including these principles in its policy manual. We believe this will result in more reliable investigative outcomes.

We endorse the direction of the KPMG recommendations. They are consistent with our own observation that a lack of resources and a number of other shortcomings impaired the IU's ability to complete its report in a timely manner and do so with accurate and reliable conclusions. If fully implemented, the KPMG recommendations will go some distance to addressing the challenges facing the IU.

12 KPMG: Ministry of Finance: Strategic Initiatives Review of the British Columbia Ministry of Finance Investigation and Forensic Unit May 10, 2016.

FINDINGS

F 40 The IU investigation suffered from numerous internal process gaps including insufficient resources, lack of policies and training, and lack of substantive interviews that undermined the accuracy of the conclusions contained in the IU report.

F 41 The unstructured collaboration between the Ministry of Health and IU investigations created objectivity risks.

F 42 The IU had an insufficiently robust quality assurance process.

F 43 The IU final report contained inaccurate statements and improper inferences.

F 44 The scope limitations cited in the report were significant and limit the utility of the report. The quality assurance advisor who internally reviewed the report for the Comptroller General considered the document more in the nature of a summary working paper than a final report.

F 45 The universities were co-operative and responsive to the IU's requests for information.

F 46 The Ministry of Health failed to give timely and effective feedback on the draft IU report when it was provided to them in April 2015. This was a missed opportunity for both the ministry and the IU to address shortcomings in the report.

F 47 Since 2015, the Ministry of Finance has taken some steps to address the shortcomings in the operations of the IU.

15.0 / GOVERNMENT'S INTERACTIONS WITH THE FAMILY OF RODERICK MACISAAC

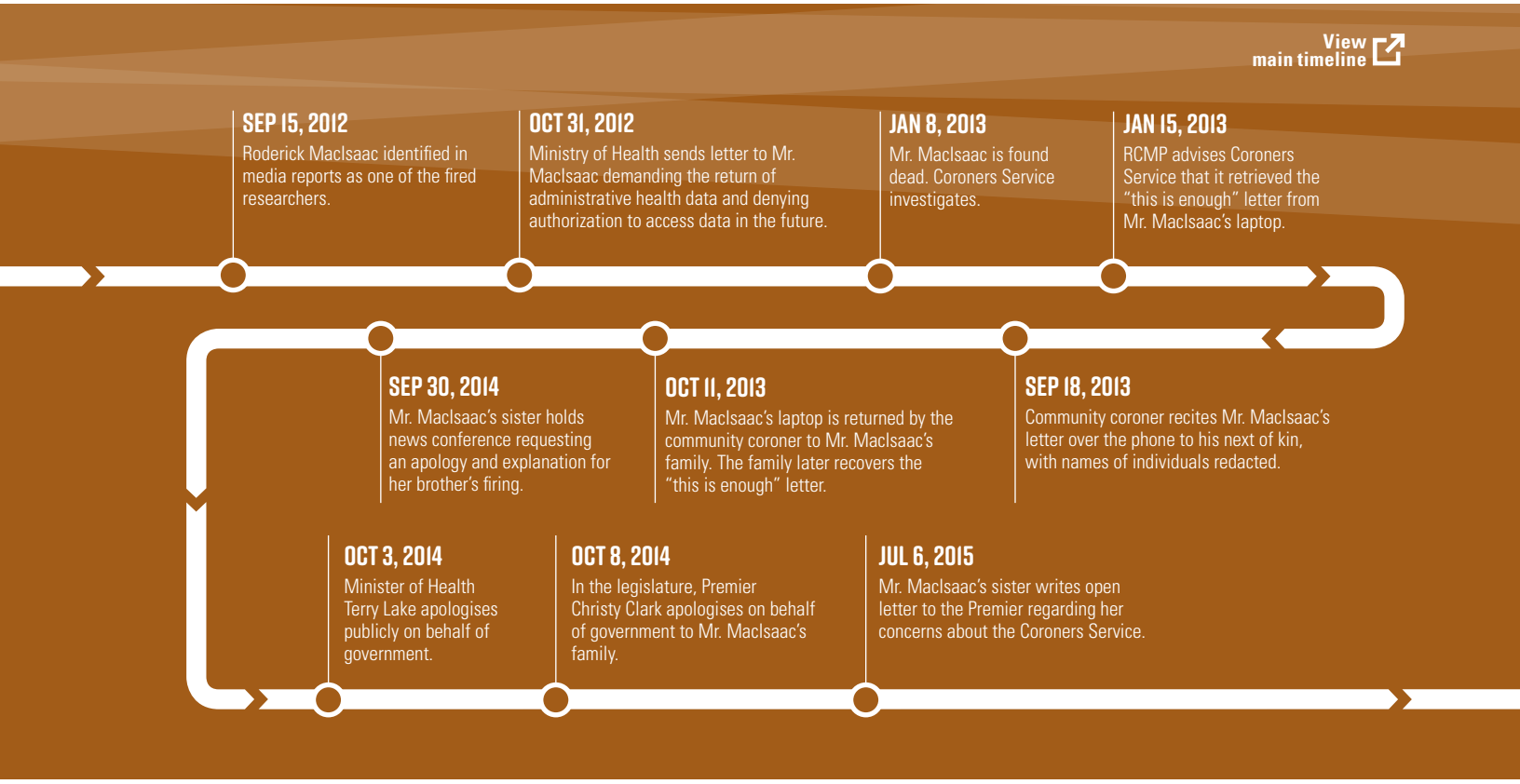
15.1 INTRODUCTION

As we discussed in Chapter 9, the Ministry of Health investigation team directly implicated Roderick MacIsaac's PhD research in the alleged wrongdoing, even though they had no evidence that he had done anything wrong.

When Mr. MacIsaac was terminated his dismissal stated he was "unfit" for public service employment and accused him of "routinely attempt[ing] to manipulate the investigative process by providing misleading and incomplete information." In a subsequent letter sent to him by the ministry in November 2012, the ministry told Mr. MacIsaac that he could not access ministry data in the future.

Mr. MacIsaac suffered other consequences as well. Later in September, the media reported that Mr. MacIsaac was one of the individuals fired from the ministry, which meant that from that point forward his name was associated in the public discourse with the allegations of wrongdoing that accompanied the other public terminations. During the summer and fall, Mr. MacIsaac applied for other positions in government. However, he was not shortlisted or successful in any of these competitions, despite being well-qualified, because of the circumstances surrounding his dismissal. Mr. MacIsaac also withdrew from the PhD program for the fall 2012 semester.

Mr. MacIsaac was found dead on January 8, 2013, and the BC Coroners Service later determined that his death was a suicide. Based on our investigation, it is an inescapable conclusion that the Ministry of Health's investigation into Mr. MacIsaac's conduct, the decision to suspend and later fire him, and the decision to ban him from any future access to data had a significant negative impact on Mr. MacIsaac's well-being. Mr. MacIsaac never had an opportunity to fully understand why he was fired. After his death, his family – and in particular, his sister Linda Kayfish – continued to look for answers.



15.2 CORONER'S INVESTIGATION AND DOCUMENT ON MR. MACISAAC'S LAPTOP

Part of this search for answers involved the community coroner who investigated Mr. MacIsaac's death. As part of the investigation, the community coroner took possession of Mr. MacIsaac's laptop, which she then turned over to the RCMP for forensic analysis. The purpose of the analysis was to determine whether any information on the laptop could shed light on the manner and cause of Mr. MacIsaac's death. The RCMP examination of the laptop ended up taking several months.

Early in the coroner's investigation, Ms. Kayfish learned that the RCMP examiner had discovered documents on the laptop. One document in particular, which was discovered in January 2013, was entitled "this is enough" and appeared to be the last record created on the computer. The letter described Mr. MacIsaac's concerns about the Ministry of Health investigation and his firing, and named a number of individuals involved in that investigation.

In March 2013, the community coroner told Ms. Kayfish that those documents would be returned to the family at the end of the Coroners Service investigation. Over the summer, Ms. Kayfish continued to question why the laptop analysis was taking so long and whether she could receive a copy of the documents already located. The community coroner sought direction on this question from her supervisors, who confirmed that the documents could not be released until the investigation was complete. The community coroner communicated this to Ms. Kayfish and provided links to the *Coroners Act* and *Freedom of Information and Protection of Privacy Act*. However, Ms. Kayfish remained dissatisfied with the response and continued to seek additional information.

It was clear from the evidence we reviewed that the reason it took so long for the community coroner to complete her investigation report was the time it took to complete the forensic analysis of the laptop. We heard evidence from the RCMP examiner who completed the forensic

analysis that he had many competing priorities, so was not always able to give this work his full attention.

Finally, in a conference call with Ms. Kayfish and her husband, Doug Kayfish, on September 18, 2013, the community coroner read the "this is enough" letter to the family, but did so with all other names that were included in that document redacted. The family did not receive a copy of the document (either redacted or unredacted) at that time. At the direction of her supervisors, the community coroner took the position that, although she could return the laptop to the family at the end of the investigation, the documents retrieved from the computer – including the "this is enough" letter – would only be released under a freedom of information request, with the names of any other individuals redacted.

On September 24, 2013, the community coroner advised Ms. Kayfish that her report had been approved for release. The community coroner retrieved the laptop from the RCMP on October 9, 2013, placed it in secure storage, and returned it to Mr. MacIsaac's family on October 11, 2013. The community coroner did not provide the family with a copy of the letter or other documents retrieved from the laptop. The family was, however, able to retrieve a copy of the letter from the laptop using specialized software.[1]

In an open letter to the Premier dated July 6, 2015, Ms. Kayfish expressed her concern that "government, through the Coroner" had deleted the document from the laptop before returning it to the family.[2] In their joint submission to the Select Standing Committee on Finance and Government Services dated July 27, 2015, Ms. Kayfish and the seven individuals whose employment or contacts were terminated, stated that any investigation or inquiry needed to consider:

> *Who made the decision to withhold Roderick MacIsaac's final words from his family? Why was that decision made? How did the file come to be deleted from his personal laptop?* [3]

Although we extended several invitations to hear from her, Ms. Kayfish chose not to participate in our investigation.

Nonetheless, in light of our mandate to investigate "actions taken by Government following the terminations,"[4] we believed it was important to examine the chain of events through which the Coroners Service took possession of the computer and returned it to the family, with the aim of answering the questions above and determining whether this concern was substantiated. We did not review the fatality investigation conducted by the community coroner or the conclusions she reached.

15.2.1 RCMP FORENSIC ANALYSIS OF LAPTOP

The community coroner took possession of the laptop on January 9, 2013, and kept it overnight in secure storage. Because Mr. MacIsaac's laptop was password-protected, the community coroner requested that an RCMP computer forensic specialist determine if the laptop contained anything of relevance to the investigation. The RCMP examiner received the laptop on January 10, 2013, and on January 15, 2013, he advised the community coroner that he had located a document in the computer, which he determined had been created by Mr. MacIsaac on December 7, 2012. This is the "this is enough" letter described above. The RCMP examiner completed his work on September 16, 2013, and returned the laptop to the community coroner on October 9, 2013.

We investigated whether either the Coroners Service or the RCMP had deleted the document in question from the laptop. Our investigation into this issue involved interviewing, under oath and pursuant to a summons, both the community coroner and the RCMP officer who conducted the forensic examination. We also received and reviewed relevant documents from both the Coroners Service and the RCMP.

The RCMP examiner told us that to conduct his work, he made an "image" of the laptop's hard drive. This meant that he could access the contents of the laptop without altering anything on the laptop itself. It was by using this "image" that the examiner located the document and provided it to the community coroner. The examiner confirmed to us that he placed the laptop itself in a secure evidence

1 As described in an open letter to Premier Clark. Letter to Hon. Christy Clark, Premier, from Linda Kayfish, 6 July 2015.

2 Letter to Hon. Christy Clark, Premier, from Linda Kayfish, 6 July 2015.

3 Letter to Chair and Deputy Chair, "Re: Submissions Regarding a Referral to the Ombudsperson", 27 July 2015.

4 See Appendix A Special Directions, at para 4(c).

storage facility while he conducted his work. He did not use the laptop itself at any point.

The RCMP examiner was not able to confirm whether the laptop was working when he returned it to the community coroner. He did tell us, however, that if the computer was working, without knowing Mr. MacIsaac's password it would not be possible to access the files on the computer without using specialized equipment.

In July and August 2015, the Coroners Service exchanged email and verbal communication with the family about how they could have come to believe that the document was deleted. These notes described how the family questioned the integrity of the information provided by the Coroners Service when they could not immediately locate the letter on the returned laptop. The Coroners Service employee who spoke with the family at this time recorded in his notes that he "discussed other alternatives that we could have considered at the time such as receiving a copy of the letter that was redacted."

When we interviewed the community coroner, who confirmed that she was the only member of the Coroners Service who had physical custody of the laptop. She also told us that she did not attempt to examine, access, or in any way alter the contents of the computer after receiving it back from the RCMP forensic examiner. Further, while the laptop was in her possession it was kept in a secure location to which no one else had access. The community coroner did not turn on the computer when it was returned from the RCMP or have Mr. MacIsaac's computer password.

Based on the evidence we received from both the community coroner and the forensic examiner, we are satisfied that neither the RCMP forensic unit nor the Coroners Service deleted the document in question from Mr. MacIsaac's laptop.

15.2.2 LACK OF POLICY ON ELECTRONIC DOCUMENTATION

The *Coroners Act* prohibits the disclosure of information obtained in the course of an investigation, unless disclosure of the information or record is "necessary or incidental to the carrying out of an investigation" or is allowed under other sections of the *Coroners Act* or another enactment (such as the *Freedom of Information and Protection of Privacy Act*).[5] Section 64 gives the coroner discretion to refuse to disclose information collected in the course of an investigation until the investigation is completed. This provision applies despite the *Freedom of Information and Protection of Privacy Act*.[6]

We requested that the Coroners Service provide us with copies of its policies relevant to the release of information to the next of kin. Chapter 7 of the Coroners Service policies, entitled "File Management – Release of Information," indicates that a final coroner's report may be released to the personal representative or nearest relative upon request and once an investigation is complete. All other information requests are to be referred to headquarters. The policy also sets out a matrix of responsibility for the release of information; however, it does not describe any criteria to be considered and applied in determining whether information should be released.

Without clear policy direction, the Coroners Service wrestled with the issue of disclosing the letter to Mr. MacIsaac's family.

The letter was undeniably important to the Kayfish family. In the absence of a well-articulated policy direction applicable to such circumstances arrived at in advance, the Coroners Service made a good faith effort to respond to the family in a manner consistent with their legal obligation. However, it is also understandable that the Kayfish family was not satisfied with having the letter read to them over the phone, with part of the content redacted, instead of receiving a copy of it.

In our view, the lack of clear policy direction to guide the Coroners Service decisions about whether and how to disclose these kinds of materials collected during a coroner's investigation was the primary cause of the uncertainty that led to the family's concerns. Given that personal documents are stored increasingly on password-protected electronic devices and cloud storage servers, it is important for the Coroners Service to develop a comprehensive policy framework that takes into account this trend. The

5 *Coroners Act*, S.B.C. 2007, c. 15, s. 63(2).

6 *Coroners Act*, S.B.C. 2007, c. 15, s. 64(1)(b).

Coroners Service should develop more robust policies to provide clear guidance on the steps a coroner can and should take to disclose documents obtained during an investigation to the deceased individual's family or the personal representative of the estate of the deceased, including documents obtained through a review of a deceased individual's computer, other electronic devices or digital storage services. Such policies should consider how disclosure may occur in cases where a coroner has taken temporary possession of the electronic device containing the record. In our view, any such policy should also clearly address disclosure of information both during and after an investigation.

15.3 FALL 2014 NEWS CONFERENCE AND APOLOGY

While the conclusion of the Coroners Service investigation in September 2013 provided some answers to Mr. MacIsaac's family, it did not answer the underlying questions about why he was fired.

By the summer of 2014, government had settled with all but two of the fired employees and contractors who took action against government after their firings. As described in Chapter 11, Mr. MacIsaac's grievance was settled relatively early, on June 25, 2013. A reappraisal of the excluded staff terminations was occurring in the context of the ongoing litigation through the latter half of 2013 and in 2014. Significantly however, that reappraisal did not include the bargaining unit staff (which included Mr. MacIsaac) because their grievances had been concluded earlier.

A news conference held by Ms. Kayfish on September 30, 2014, caused government to take action. At that news conference, Ms. Kayfish, accompanied by the Leader of the Opposition, called on government to issue "an apology, and an explanation" for her brother's firing.[7] Three days later, Minister of Health Terry Lake offered condolences for the firing of Mr. MacIsaac, and told reporters:

> *We have come to the conclusion that other types of actions should have been considered rather than firing him. What happened to Mr. MacIsaac, of course, was a tragedy. I want to personally express my condolences.*[8]

When we interviewed Minister Lake he confirmed that he spoke with Ms. Kayfish to convey an apology on behalf of government.

In a news release issued the same day, government stated:

> *Minister Terry Lake has asked his Deputy Minister Stephen Brown to send a letter conveying the government's apology to the family for Roderick MacIsaac for terminating his employment, given his status as a co-op student and under the supervision of ministry staff. In the letter, the government also expresses sympathy and condolences for the stress and sadness that they have endured as a result of Mr. MacIsaac's death in December, 2012.*[9]

In the same news release, government maintained that "there was a series of breaches of data and inappropriate use of private information … serious breaches of policy occurred, but some of the employment terminations were unwarranted or were considered excessive."[10]

Deputy Minister of Health Stephen Brown told us that for him this was the first time the matter had moved into the political realm, because the Leader of the Opposition had appeared at the news conference and was "representing … the voices of some of the people who have been terminated."

In the three days between Ms. Kayfish's news conference and the Minister of Health's public apology and news release, there was significant discussion involving Dr. Brown, the Deputy Minister to the Premier John Dyble and staff from Government Communications and Public Engagement (GCPE) and the Premier's Office about whether government should apologize to Mr. MacIsaac's family. Concerns were raised about whether, given the ongoing

7 Justine Hunter, "Sister of fired B.C. researcher who killed himself seeks apology from government," *Globe and Mail*, 30 September 2014.

8 Tamsyn Burgmann, "B.C. Health Minister apologizes to the family of fired worker who killed himself," *Globe and Mail*, 3 October 2014.

9 Ministry of Health, "Government apologises to family; reviews HR policy," news release, 3 October 2014.

10 Ministry of Health, "Government apologises to family; reviews HR policy," news release, 3 October 2014.

litigation with Dr. Rebecca Warburton, government could "acknowledge that [Mr. MacIsaac] should not have been fired." On October 2, 2014, GCPE staff developed wording for a public question and answer document that stated, in part:

> *… the ministry was dealing with a number of very real and ongoing privacy breaches that included the personal information of many British Columbians. Public servants were acting on the information that they had available to them to make the decisions they made and took actions at the time to stop the flow of personal data outside the ministry. However, for some of the employees that were terminated, the disciplinary actions that the ministry took were in some cases unwarranted, and we have taken steps to resolve the concerns through settlements.*

Ultimately, it was the Premier's Executive Director of Communications and Issues Management, Ben Chin, who pushed the issue of an apology forward, believing that concerns coming from the Ministry of Health, particularly as they related to ongoing litigation, were overly cautious. Two minutes after receiving a message containing the above language suggested by GCPE staff, Mr. Chin wrote to John Paul Fraser, Deputy Minister of GCPE:

> *Never mind this crap. I've talked to Dyble about taking responsibility for wrongly dismissing with cause. And apologizing for it.*

When we spoke with Mr. Chin, he told us that he was "shocked" to hear that Mr. MacIsaac's suspension occurred so close to the end of his contract. He said, "I felt then … as I do now which is that Ms. Kayfish deserves nothing less than our most honest sympathy and regret and apology."

The decision about whether government would apologize rested with Premier Christy Clark. She explained to us that she was ultimately responsible for an apology on the government's behalf, and that she approved this one. After the October 3, 2014 news release, both the Minister of Health and the Premier also apologized through their statements in the Legislature.

On October 7, 2014, Minister Lake said:

> *I've apologized to Ms. Kayfish … I personally regret that the situation occurred … I sincerely apologize for the actions that occurred at that time … I should have reached out sooner. For that, too, I am truly sorry that I didn't.*[11]

On October 8, 2014, Premier Clark said:

> *First, let me again reiterate on behalf of the government and myself our deepest, heartfelt sympathy and apology to Linda Kayfish and her family. It is a terrible, tragic loss to lose anyone to suicide. In these circumstances, it was very appropriate that government apologize for what the Health Minister I think appropriately characterized as very heavy-handed actions. I'm glad that we were able to do so, and I'm very grateful, as well, that Ms. Kayfish has accepted those apologies as graciously as she has.*[12]

In the next sentence, however, the Premier went on to state, "but this is also a matter where there was a very serious breach of the public's privacy."[13]

Dr. Brown, who met with Ms. Kayfish at this time, acknowledged that government should have addressed this matter a lot earlier than it did. He said Mr. MacIsaac's firing "had kind of gone below the radar," but when it arose on September 30, 2014 it was clear there was a problem: "you get the gut reaction … this is what we did to a student?" He told us he felt "a level of guilt" that he had not reached out earlier and recognized that the news conference "shouldn't have been the way she had to try to get some answers."

The government's decision to apologize to Mr. MacIsaac's family was the right thing to do. However, Ms. Kayfish should not have had to hold a press conference almost

11 Minister Terry Lake, British Columbia Legislative Assembly, Hansard, 7 October 2014, 4541 and 4543 <https://www.leg.bc.ca/documents-data/debate-transcripts/40th-parliament/3rd-session/20141007pm-Hansard-v15n3#4541>.

12 Premier Christy Clark, British Columbia Legislative Assembly, Hansard, 8 October 2014, 4587 <https://www.leg.bc.ca/documents-data/debate-transcripts/40th-parliament/3rd-session/20141008pm-Hansard-v15n4#4587>.

13 Premier Christy Clark, British Columbia Legislative Assembly, Hansard, 8 October 2014, 4587 <https://www.leg.bc.ca/documents-data/debate-transcripts/40th-parliament/3rd-session/20141008pm-Hansard-v15n4#4587>.

two years after Mr. MacIsaac's death in order for government to have addressed Mr. MacIsaac's circumstances. By the latter half of 2013 there was already an awareness within government of significant concerns arising from the investigation.

Mr. Chin argued convincingly that government should issue the apology as the right thing to do and the Premier agreed. The public statements are clear that government was apologizing for some of the actions taken with respect to some of the employees. There was no public apology extended at that time to any other person who had been fired.[14] While the apology to Ms. Kayfish represented an acknowledgment that Mr. MacIsaac's firing was "heavy-handed," it did not conclude – as we have – that Mr. MacIsaac had done nothing wrong. Indeed, the Premier's apology was immediately followed by a statement about the privacy breaches. Had government began its reappraisal of the circumstances earlier, then it would have been in a position to issue a more timely and better informed apology to Mr. MacIsaac's family and others. Nevertheless, the fact that government apologized following Ms. Kayfish's press conference, reflected government's willingness to publicly express its regret as to what happened in the aftermath of the 2012 investigation and it indicated a more public phase of the reappraisal. This took the form of the McNeil Review which will be discussed in the next chapter.

FINDINGS

F 48 The process followed by the Coroners Service to disclose the contents of the document on Mr. MacIsaac's laptop to his family represented a good faith effort to provide the family with information. However, the absence of a publicly-available written policy regarding disclosure of retrieved password-protected documents located on electronic devices was insufficient.

F 49 Government took too long to issue an apology to the family of Mr. MacIsaac. The apology was in response to the family's September 30, 2012 press conference, and in issuing the apology government did not clearly state that Mr. MacIsaac had done nothing wrong.

14 As we discussed in Chapter 13, when it settled with Mr. Mattson in August 2014, government issued a news release which said that the decision to terminate Mr. Mattson was a "regrettable mistake" and that it "regrets any hardship and possible loss of reputation."

16.0 / MCNEIL REVIEW AND REPORT

16.1 INTRODUCTION

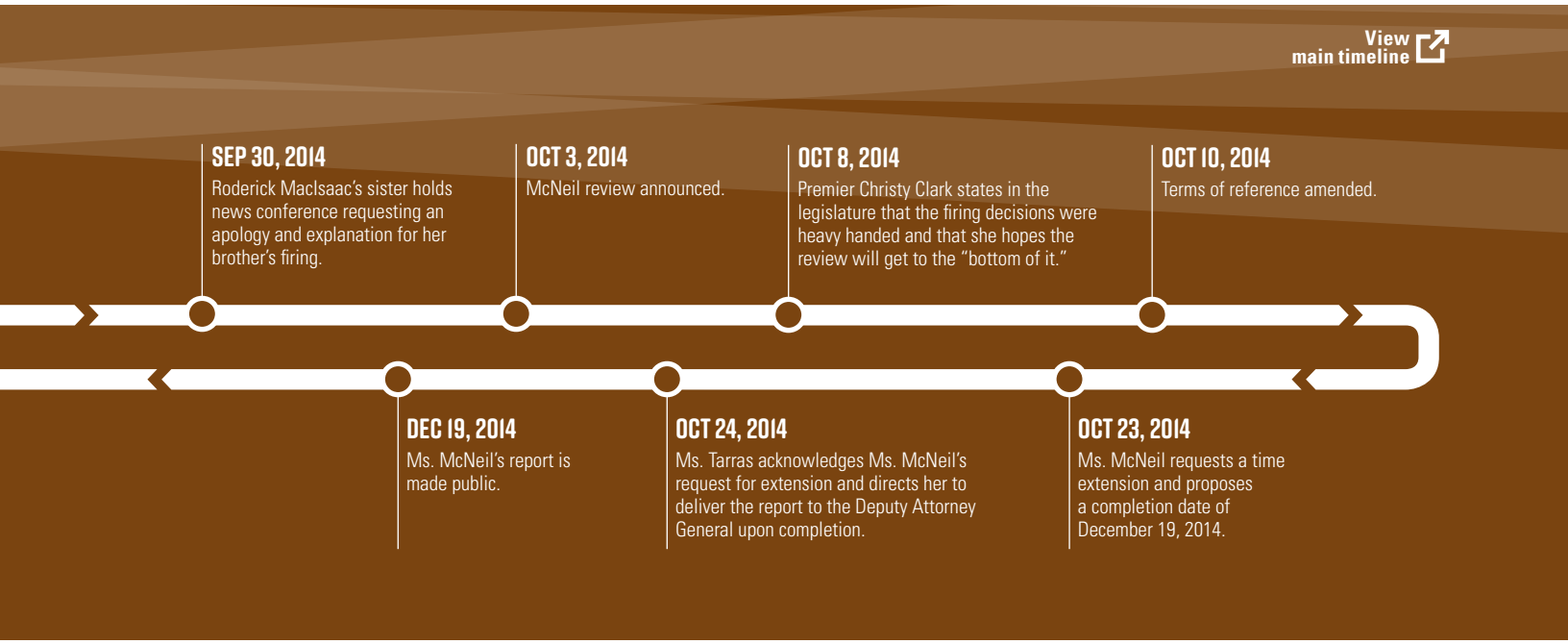
On October 3, 2014, government announced that Deputy Minister Lynda Tarras, head of the Public Service Agency (PSA), had been asked to "conduct a review of the steps taken to investigate these allegations of inappropriate conduct and practices, and the process taken to arrive at the decision. The information gathered from this review will be used to make recommendations to improve how the public service responds to allegations of employee misconduct in the future."[1] Even though the press release said Ms. Tarras had been asked "to conduct" the review, the announcement stated that the PSA had engaged labour relations lawyer Marcia McNeil to complete the work. Government's announcement of this review came at the same time it apologized to the family of Roderick MacIsaac "for terminating his employment, given his status as a co-op student and under the supervision of ministry staff."[2]

In this section of the report, we describe how the review came about, the terms of reference and public expectations about what the review would achieve and how the review was conducted.

1 Ministry of Health, "Government apologises to family; reviews HR policy," news release, 3 October 2014.

2 Ministry of Health, "Government apologises to family; reviews HR policy," news release, 3 October 2014.

View main timeline



16.2 DISCUSSIONS ABOUT A REVIEW

In December 2013, senior government officials had a discussion about the possibility of a review of the 2012 Ministry of Health firings. Deputy Minister of Health Stephen Brown was meeting with John Dyble, Deputy Minister to the Premier. They called the Premier's Executive Director of Communications and Issues Management, Ben Chin, into the meeting to tell him that there would likely be a number of settlements with terminated employees over the following year, which would need to be managed from a communications perspective. During that conversation, Mr. Chin said he asked Mr. Brown and Mr. Dyble to consider a third-party review of the matter, "to at least look at why it is that there is a lack of proper procedures and protocols in place, why there aren't checks and balances in place when an investigation is going off the rails, and how you're going to fix that."

No action was taken on this for a further 10 months. The news conference held by Linda Kayfish on September 30, 2014, (discussed in Chapter 15) prompted government to take action. Three days after Mr. Kayfish's press conference, government announced the review. There is no indication that, but for Ms. Kayfish's press conference, government would have established the review at that time, if ever.

Emails between communications staff in the Office of the Premier and Government Communications and Public Engagement (GCPE) show that government began considering a review of the human resources practices that led to the terminations on October 1, 2014, the day after Ms. Kayfish held her news conference. The following day, GCPE developed a package of material that included the initial terms of reference drafted by the PSA (discussed below).

Ms. Tarras, who initially was responsible for the review, told us she was aware that the terminations were attracting significant attention from the opposition during question period. "There's lots of pressure being put on the government," she said. She told us that:

> *John [Dyble] … comes to me and says, 'I would like a review done of this, and I would like you to do it.' And I said, well okay, but I'll be clear though that really the only thing that I am prepared to look at is the process pieces because you know these cases are in front of the courts.*

Ms. Tarras agreed to take on the review, even though she planned to retire from the public service by the end of October 2014.

Elaine McKnight, Associate Deputy Minister of Health, told us about a teleconference involving her, Dr. Brown and Mr. Dyble. At the time, she was still at the Ministry of Health but was scheduled to become head of the PSA after Ms. Tarras' retirement. Ms. McKnight said:

> *John [Dyble] phoned us up and said he had asked Lynda [Tarras] to go out and do this review. And to be honest with you, both Stephen [Brown] and I kind of gasped and said, 'Don't do this. Like don't do this. This is going to be challenging.' But he felt that he needed to, and so then I reminded him, I said, 'John, Lynda has less than a month to do something.' Because if I'm going there and I can't receive that report, I can't have anything to do with it. So he agreed and he said that, you know, the goal was for Lynda to be done in a month.*

When we asked Mr. Dyble if the review was "an issues management situation," he told us, "it became that I guess." He said:

> *I thought we've got to figure out a better, like we can't have this happen again. And that's when the idea of a review first was discussed. But it wasn't gonna be an internal one [*sic*]. I think it became an issues management piece when it was floated out there externally.*

When he spoke with us, Mr. Dyble presented the McNeil review as a response to a long-standing concern about how the PSA conducted its investigations. While such concerns may have existed, the evidence is clear that government's decision to conduct the review was – in October 2014 – prompted by the need to manage the larger political issue created by Ms. Kayfish's news conference. As we describe below, the initial terms of reference were drafted and finalized within the space of two days – from October 2 to October 3, 2014.

16.3 ORIGINAL TERMS OF REFERENCE

The PSA contacted Marcia McNeil on October 2, 2014, about working on this investigation. Ms. Tarras and one of her Assistant Deputy Ministers created the initial draft of the terms of reference for the review. They were reviewed by Mr. Dyble, GCPE and Deputy Attorney General Richard Fyfe. Rather than delving into the reasons behind the terminations, the review and report were intended to inform investigative policy and practice at the PSA in the future. The terms of reference stated:

> *This is a review of the public service response to allegations of inappropriate conduct, contracting and data-management practices involving employees and drug researchers for Ministry of Health in 2012. The purpose is to review the steps taken to investigate these issues and the process taken to arrive at the termination decisions. The information gathered from this review will be used to make recommendations to improve how the public service responds to allegations of employee misconduct in the future.*[3]

The scope of the review included two points:

- *the circumstances surrounding the process for investigating the allegation against ministry personnel and the decisions and actions taken in response to the allegations*
- *the practices, policies, procedures and training in place in the public service for responding to complaints about government personnel*[4]

The use of the phrase "circumstances surrounding the process" suggested only a procedural review of the type that Ms. Tarras had told Mr. Dyble could be done given that there was still outstanding litigation. Out of scope were Ministry of Health policies and practices relating to contracting and data, privacy breaches, data access, and decisions made following the terminations regarding

3 Ministry of Health, "Government apologises to family; reviews HR policy – Backgrounder: Terms of Reference," news release, 3 October 2014.

4 Ministry of Health, "Government apologises to family; reviews HR policy – Backgrounder: Terms of Reference," news release, 3 October 2014.

settlements.[5] This focus on process was echoed in an October 24, 2014, letter from Mr. Fyfe to counsel for former Deputy Minister of Health Graham Whitmarsh, where Mr. Fyfe stated that "the review is expressly not a fault-finding mission, nor is it second-guessing the termination decisions. It is the process that is under review, not the decisions that were made."

Mr. Chin, who had initially suggested a review in 2013, also reviewed the terms of reference. He told us he believed the review should have been broader in scope.

The terms of reference were attached as an appendix to the press release issued on October 3, 2014.

The initial terms of reference had an aggressive timeline, because of Ms. Tarras' impending scheduled retirement at the end of October 2014. In order that the report be completed before her retirement, the original terms of reference provided that "a final report will be submitted to the head of the Public Service Agency no later than Oct. 31, 2014."[6]

16.4 PUBLIC EXPECTATIONS ABOUT THE REVIEW

The review had a dual purpose. From the PSA's perspective, the review was intended to be process-focused and assist it with making practice and policy changes. At the same time ordering the review allowed government to indicate that it had commissioned an external review of the firings. Public statements by both Minister of Health Terry Lake and Premier Christy Clark raised public expectations about the scope of the review. On October 7, 2014, Minister Lake emphasized in the Legislature that Ms. McNeil would have "a very broad mandate" to:

> *… confirm the actions and events that took place. Not some of the actions and events – it will confirm the actions and events that took place during the investigation from when the allegations occurred through to when the terminations took place.*[7]

These statements created the impression that Ms. McNeil would provide a detailed accounting of what happened and why. The following day, on October 8, 2014, Premier Clark continued this message. She said publicly, "I'm certain in my own heart that many people were not dealt with fairly … It was a heavy-handed answer to the mistakes that were made."[8] In the Legislature, she continued:

> *It's important that this review be thorough. It's important that we get to the bottom of it, and that is what, by the end of October, we hope we're able to do.*[9]

We asked Premier Clark if she understood that the review would not re-examine the decisions to terminate the employees and that it was limited to a review of government policy. She told us that she was aware of the limited nature of the review. When we asked what she meant when she said that the review would get to the "bottom of it," she told us:

> *… the purpose of the review was to examine the method, or I guess, the quality of the investigation that was done and whether or not it was done properly, and to take any lessons from it if it wasn't done properly, and apply that across the civil service. And it did seem like that was an important thing to do.*

When we interviewed him, Mr. Chin reiterated the Premier's assertion that policy changes meant getting to the "bottom" of the issue.

5 Ministry of Health, "Government apologises to family; reviews HR policy – Backgrounder: Terms of Reference," news release, 3 October 2014.

6 Ministry of Health, "Government apologises to family; reviews HR policy – Backgrounder: Terms of Reference," news release, 3 October 2014.

7 Minister Terry Lake, British Columbia Legislative Assembly, Hansard, 7 October 2014, 4544 <https://www.leg.bc.ca/documents-data/debate-transcripts/40th-parliament/3rd-session/20141007pm-Hansard-v15n3#4541>.

8 Justine Hunter, "Clark admits B.C. Health Ministry firings were 'heavy-handed,'" *Globe and Mail,* 8 October 2014.

9 Premier Christy Clark, British Columbia Legislative Assembly, Hansard, 8 October 2014, 4587 <https://www.leg.bc.ca/documents-data/debate-transcripts/40th-parliament/3rd-session/20141008pm-Hansard-v15n4#4587>.

Premier Clark also commented publicly about her expectations concerning the breadth of the investigation, and Ms. McNeil's ability to speak with whoever was necessary to complete the investigation. Despite Ms. McNeil having no power to compel witnesses to speak with her, Premier Clark said in the Legislative Assembly:

> *As the Health Minister said, the investigator has full authority to speak with anyone that she wants in the government. I have directed all members of the government, and this certainly includes myself, to speak to her if requested. I have full confidence, as well, that people who once worked for government who no longer do will also make sure that they participate, cooperate and speak with her.*[10]

Premier Clark's statement reinforced public expectations about both the scope of the review and the extent to which Ms. McNeil would be able to obtain evidence. Ms. Tarras was sensitive to the risk of increased public expectations arising from the Premier's statement in the Legislature. Ms. Tarras told us that after she heard the Premier's statements during question period, she called Mr. Dyble to express concern about the Premier's characterization of the McNeil review. Mr. Dyble acknowledged having received Ms. Tarras' call, but said he did not pass on those concerns to the Premier.

16.5 CONDUCT OF THE REVIEW AND REVISED TERMS OF REFERENCE

Ms. Tarras told us that although Ms. McNeil was retained to conduct the investigation, Ms. Tarras intended to be involved in the investigative process at the outset. She explained that she understood the conduct of the review fit within her responsibilities as the Head of the PSA and that the review was not intended to be completely independent.

Initially, Ms. Tarras and Ms. McNeil worked together to draft a list of people to be interviewed. Ms. Tarras told us, "the way we initially set out on doing this, it was really going to be a joint – like, I was going to sit in on the interviews." Ms. McNeil initially agreed with the scope of Ms. Tarras' participation in the review and Ms. Tarras participated in two early interviews.

In early October, Ms. McNeil sent an email to Mr. Whitmarsh inviting him to be interviewed. Ms. Tarras was copied on the email. In his response, Mr. Whitmarsh expressed considerable misgivings about participating in the process, and about Ms. Tarras' role in the review. He asserted several reasons why he believed that Ms. Tarras was in a conflict of interest as a result of her involvement with the 2012 investigation.

Ms. Tarras responded to Mr. Whitmarsh on October 7, 2014:

> *Our original work plan called for me to sit in on the interviews, and I did participate in two preliminary meetings with the investigators yesterday. I also planned to be in the meeting with you, hence the meeting request you received. However, given the concerns that you have raised in your email to Marcia, I have reconsidered. I do not want any perception of bias in this review. I have withdrawn from the initial stages of this process and have directed Marcia to move forward with the fact stages of this review on her own.*

Mr. Whitmarsh continued to raise concerns about Ms. Tarras' role and the scope of the review, to which Ms. Tarras continued to respond. On October 10, 2014, she wrote to Mr. Whitmarsh:

> *In light of the concerns that you have expressed … and in order to avoid even a perception of conflict of interest, I have formally amended the Terms of Reference for this review to provide that Marcia McNeil will come to a completely independent finding of the facts related to the processes followed in this case.*

Ms. Tarras told us that she did not believe she was in a conflict of interest but that she hoped Mr. Whitmarsh would participate if she modified her role in the review. Ms. McNeil told us that she was sympathetic to Ms. Tarras' position because she also understood that the purpose of the review was a policy review for the benefit of the PSA. However, Ms. McNeil told us that she also felt

10 Premier Christy Clark, British Columbia Legislative Assembly, Hansard, 8 October 2014, 4587 <https://www.leg.bc.ca/documents-data/debate-transcripts/40th-parliament/3rd-session/20141008pm-Hansard-v15n4#4587>.

that if Ms. Tarras' participation was a distraction, then it could impede the outcome of the review. Ms. McNeil told us that she and Ms. Tarras both agreed that Ms. Tarras should step away from active involvement in the investigation phase of the review.

The terms of reference were revised to reflect the change in Ms. Tarras' role and were reissued on October 10, 2014.[11] The original terms of reference stated that the "final approach to the review will be agreed to by Marcia McNeil and the Head of the Public Service Agency." The revised terms stated that "the review will be conducted independently by Ms. McNeil" and deleted the reference to Ms. Tarras' participation. The evidence indicates that Ms. Tarras still intended to be involved in responding to the findings in Ms. McNeil's report and in any recommendations which might have followed. However, this did not occur because Ms. Tarras had retired from the PSA before Ms. McNeil's report was complete.

At the same time, another change was made to the scope of the terms of reference. The original terms provided for a review of:

> *The circumstances surrounding the process for investigating the allegations against ministry personnel and the decisions and actions taken in response to the allegations*

The above reference to a review of the decisions and actions taken was replaced by a review of:

> *The process for investigating the allegations against ministry personnel*

The deliverables were amended to include a chronology, rather than a review, of actions and decisions taken.

Mr. Whitmarsh also told us he believed that Mr. Dyble was "in a serious conflict," because both he and Ms. Tarras were briefed about the issue. In the end, Mr. Whitmarsh met with Ms. McNeil off the record, but decided not to participate in a formal interview. Mr. Whitmarsh's decision not to participate in the process meant that in her report, Ms. McNeil wrote, "no one has taken responsibility for making the effective recommendation to dismiss the employees. Instead, those most likely to have made the effective recommendation all pointed to someone else."[12] When we spoke to Ms. McNeil, she told us that she was not able to conclude who made the substantive decision to terminate the employees because Mr. Whitmarsh did not formally participate, and because she was unable to compel witnesses to testify under oath.

It became evident to Ms. McNeil early in the process that she would need more time to complete the report than was allotted, and she asked Ms. Tarras for an extension. By October 24, 2014, Ms. Tarras wrote Ms. McNeil to confirm that an extension would be granted until December 19, 2014. Simultaneously, the Premier's Office was told of the extension request and Mr. Chin prepared a public announcement confirming the extension. Ms. McNeil told us that she chose the date herself, based on the amount of work left to do and her work schedule.

The extension created an internal problem concerning who would receive the report, as Elaine McKnight was scheduled to become Deputy Minister of the PSA on November 3, 2014, replacing Ms. Tarras. Ms. McKnight had been an Associate Deputy Minister at the Ministry of Health in 2012. Given her involvement in the Ministry of Health investigation, Ms. McKnight was reluctant to receive the report, even considering its limited scope. Ms. McKnight told us:

> *We were at the point in time when Marcia had requested the extensions and Lynda got me involved with the discussion with Richard Fyfe and JAG and Neil Sweeney. Because there was a conversation about, if we allow the extension, who is going to receive the report? And I declared adamantly again that I was not only in a perceived conflict, I was in actual conflict, so I could not be the person to receive the report. And it was difficult because it was the type of report that, you know, it did need to go to the agency. Like, it made sense for it to be delivered there. And that went on for a couple of days and I said to Richard and to Neil, "I can't accept this report. Like I will not accept it." And so the decision was made to have the report go to Richard [Fyfe]."*

11 It is this version of the Terms of Reference that are contained in an Appendix to the McNeil Report.

12 Marcia McNeil, *Investigatory Process Review: 2012 Investigation into Employee Conduct in the Ministry of Health*, December 2014, 32.

When Ms. Tarras agreed to the extension request she directed Ms. McNeil to deliver the final report to the Deputy Attorney General, Richard Fyfe.

In the course of her review, Ms. McNeil interviewed 36 people involved in or affected by the investigation. She met in person with only one of the terminated employees and, as noted above, she did not formally interview Mr. Whitmarsh, the statutory decision-maker. Ms. McNeil received a significant amount of material from government, including documents created by the Ministry of Health investigation team, PSA documents, and emails that the Ministry of Health investigation team had reviewed. Ms. McNeil also reviewed solicitor-client privileged documents from the Legal Services Branch (LSB) at the Ministry of Justice.

The report was delivered to the Deputy Attorney General as stipulated for following the change to the Terms of Reference. The report was released publicly on December 19, 2014.[13]

16.6 MCNEIL REVIEW CONCLUSIONS

In her report, Ms. McNeil made 12 findings about the process followed by the investigation team in responding to the allegations and investigating the complaints about ministry employees.[14] Ms. McNeil concluded that the investigation "was not conducted with a suitably open mind," that suspending employees without pay was detrimental to the investigation process and that the complexity of the investigation indicated the need for an experienced external investigator.

Ms. McNeil also made a number of findings in relation to the conduct of the interviews. She found that the number of interviewers impaired the effectiveness of the interview process, that the interviews did not always provide an adequate opportunity for employees to review documents, respond to questions and provide full and fair responses. Moreover, she found that government should have provided an opportunity for employees to respond to the investigation report and any recommendations before any disciplinary decisions were made. Finally, she found that the decision-maker would have "benefitted from" receiving a written analysis of the case before making any decision.

Government accepted all 12 of Ms. McNeil's findings.

Notwithstanding the many challenges she faced, Ms. McNeil prepared a credible and very useful report on a number of policy and systemic human resource issues as set out in the amended terms of reference.

Ms. McNeil's report identified a number of important shortcomings in the Ministry of Health investigation. These related particularly to the conduct of interviews, the decisions to suspend employees without pay and the lack of meaningful opportunities for employees to respond to the allegations against them. The thoughtful findings made by Ms. McNeil are echoed in our own report. Her very helpful work has meant that many of the issues that would otherwise have been the subject of recommendations have already been addressed by PSA in responding to her report.

16.7 CHANGES TO PSA PRACTICES RESULTING FROM MCNEIL REPORT

Ms. McNeil's report was released publicly on December 19, 2014. A year later the PSA provided a report to the Minister of Finance (who is the member of the Executive Council responsible for the PSA) about changes to its employee investigation, suspension and termination policies and practices resulting from the findings made in Ms. McNeil's report.[15]

The PSA had already taken some steps to improve its practices prior to the issuance of the McNeil report. Following receipt of the McNeil report, it made further changes in respect of its response to allegations against employees, the conduct of investigations, suspensions, and decision-making processes. The PSA also introduced additional training for its staff.

13 An appendix containing a chronology of legal advice provided by the Legal Services Branch of the Ministry of Justice was redacted in the version of the review report released by government but was later leaked and made public.

14 The findings of the McNeil Report are set out in Appendix D.

15 This December 14, 2015 report from Deputy Minister of the PSA Lori Halls to the Minister of Finance is set out in Appendix E.

The PSA changed its policy regarding suspensions without pay pending investigation. The PSA's guideline on suspensions pending investigation now provides that:

> *"The employer has the right to suspend an employee pending investigation if the employee's continued presence in the workplace constitutes a serious and immediate risk to the employer's legitimate interests."*

The PSA changed its default position from suspending employees without pay to suspending employees with pay, except in certain circumstances and only with the approval of PSA's applicable Assistant Deputy Minister, in addition to the applicable official in the line ministry.

The PSA also created checklists regarding investigative best practices and implementing disciplinary decisions, which must be completed before an employee can be terminated for cause. The investigative checklist refers to the hallmarks of a fair investigation, including impartiality, providing the employee with notice of allegations, allowing the employee to respond to the allegations, and interviewing all relevant witnesses. The disciplinary decisions checklist documents whether certain steps have been observed prior to termination, including whether the investigative report has been provided to the ministry, whether legal or labour relations advice was sought, and whether the documentation reflects a thorough assessment of all of the relevant circumstances of the case. The PSA requires that the Deputy Minister of the PSA confirm that due process was followed prior to the Deputy Minister of the line ministry terminating an employee for cause.

The PSA also implemented a practice that in the event of a disagreement between a Deputy Minister and the Deputy Minister of the PSA regarding the process of an investigation or its outcome, the matter will be advanced to the Deputy Minister to the Premier.

In formulating our own recommendations, we assessed the extent to which these changes addressed the systemic problems that both we and Ms. McNeil identified.

FINDINGS

F 50 The rushed development of the Terms of Reference for Ms. McNeil's review resulted in confusion about the purpose of the review. The amendments to the Terms of Reference, time extension and change in who Ms. McNeil should provide her report to, reflect this hurried process. This confusion was compounded by overly broad statements by Premier Clark and Minister Lake about the purpose and anticipated outcome of the review.

F 51 Ms. McNeil's review and report was credible and useful as to the human resources processes followed by PSA during the investigation.

F 52 The Public Service Agency has made a number of positive improvements to its investigative and advisory processes in response to Ms. McNeil's review.

17.0 / IMPACT ON MINISTRY OF HEALTH STAFF AND HEALTH RESEARCHERS

17.1 INTRODUCTION

This chapter recounts the impacts on individuals, programs and institutions arising from the 2012 investigations.

The first two parts of this chapter are about impacts as they have been felt by individuals (in section 17.2) and at the organizational level within the ministry (section 17.3). Much of these descriptions are about perceptions and the statements are included for that purpose. What the facts were and whether particular actions were or were not proper was addressed in previous chapters of this report. Having addressed those matters, the purpose of this chapter is to allow for a clear public acknowledgement, without specific attribution to any one individual, of the different ways in which those affected by and even involved in the investigation feel it has impacted them, including perceptions of the lasting organizational and public policy impacts of the events discussed in this report. In short, these two sections are not about the facts but rather about how the facts made people feel.

When we interviewed him, Deputy Minister Stephen Brown told us that he was aware that the investigation impacted his organization and his employees. He expressed his desire to find ways to try to remedy the impacts and told us of certain personal steps he had already taken to engage with employees at the ministry.

On behalf of the Ministry of Health, Dr. Brown provided us with further information about various actions the ministry had taken to address issues which arose as a result of the events in 2012 and to try to remediate those impacts. Through its involvement in our investigation, senior officials of the ministry became aware of additional impacts to be addressed.

In addition to describing the impacts, in this section we summarize the information obtained from the ministry related to the steps it has taken or plans to take to address the impacts. We include the information on this point as an acknowledgement of the ministry's commitment to move forward in a positive direction to remediate the impacts, a direction we support.

We then describe (in section 7.4) the impacts beyond the ministry itself. We look at how the 2012 investigation has affected various research, evaluation and public health initiatives. Many important programs and research initiatives were interrupted or cancelled. Those interruptions and cancellations had impacts which we enumerate.

17.2 INDIVIDUAL IMPACTS

Each person who we spoke with in the course of our investigation whose conduct had been investigated by the Ministry of Health or the Office of the Comptroller General – whether directly or indirectly – described significant consequences. In this section of the report we describe the kinds of impacts that the investigation has had on individuals.

The investigation affected individuals differently. There were, however, some common themes: fear, anxiety, loss of income and resulting financial uncertainty, harm to reputation and careers, harm to relationships, and, for some, health problems.

One witness told us, "I was excessively worried about being able to continue to provide for my family, my reputation." In some cases, the family members of the individuals under investigation had to cease their own work or educational commitments to provide emotional support. As one witness told us she "couldn't keep up" her business because "my husband needed me." One witness told us his spouse described him as "absent, unhappy, stressed."

Another witness explained that the stress she incurred by being treated unfairly through the investigation process and the loss of a job she loved caused her to break down physically and emotionally and was the "tipping point" for the dissolution of her marriage.

Another witness told us that they suffered from recurring nightmares. One witness said that she was unable to return to the Ministry of Health building for almost a year due to the anxiety and trauma she suffered.

A number of witnesses related instances of colleagues – locally, nationally and internationally – questioning their integrity as a result of their public connection to this matter and the implication that they had engaged in criminal conduct. They described how this affected their ability to participate fully in their communities.

Some of the affected employees and contractors have cited significant difficulties finding other sources of employment. Some individuals described the impact of the 2012-2013 investigation as career-ending.

One witness described how he had applied for various jobs for which he was well-qualified on the recommendation of others in the field. He believed he was not successful in any of those competitions due to the stress he was under or the public knowledge about the manner in which he had lost his work with the ministry.

Another witness described how the experience of the investigation had destroyed her ability to work for about three years, and with it, her ability to support her family and pay down her mortgage. This witness told us she didn't think she and her family would ever recover financially.

One former associate of a ministry contractor whose data was suspended for a long time and who had expertise in working with a software program used almost exclusively by the ministry, described his inability to retain employment as essentially career-ending. While the ministry asked him to return to work temporarily in the early spring of 2013 to help transition an epidemiological surveillance project out of ministry control, he told us he was unable to find work in his area of expertise thereafter.

Some associates of the same contractor told us they relied on that contract work as their only source of income. For one, we were told it was the sole source of support for a family of four. That individual sought alternative employment in the fall of 2012 and had at least one promising interview. However, an offer of employment never materialized. She learned later that she and her fellow associates were unable to obtain government IDIR accounts, something that would have been necessary for her to be offered the position.[1]

One person who did contract work for the ministry said:

> *… [the loss of the contract] caused stress on me. It caused concern. It caused uncertainty about my future. I lost 40, maybe 50 percent of my income that's never recovered to this day … of course it doesn't physically exist, but there's a black-list in the industry. I'm not getting the same phone calls … since 2012 nobody's coming to me except for little, very small pieces of work.*

Many expressed frustration that their years of contributions to the public service or work in the public interest

1 An IDIR is the unique identifier government employees use to log on to their workstations and access many government applications.

had ended so abruptly and negatively. One witness explained how his experience with the investigation had undermined his belief in the values of the public service. Another witness told us, "I lost faith in the government … when it's your own government that's really unsettling. Not just any government. This is a government in Canada. This is Canada." Another witness expressed how "hard it is to raise teenagers to believe in government when this is going on, and we had a house full of teenagers at the time that this is all happening … and they are interested. How do you defend the role of government when this is going on?"

Other witnesses we spoke with expressed continued frustration with how they had been swept up in the investigation. One explained:

> *… to lose my source of income for nothing that I had actually done when I had actually been working very hard on the projects I'd been working on … I was putting lots of energy and effort into the work I was doing at the Ministry of Health … I just did not want to put in any more time or effort.*

A contractor related that despite both the ministry and Statistics Canada repeatedly telling their firm that their work was greatly improving the information government used to make health-related decisions, the speed with which the contract was suspended made him question just how important it had all really been.

We heard how stopping one long-standing program impacted the careers and finances of the individuals engaged with the initiative. The contractors who worked on that program told us they had lost income that they were not able to replace, and employees of the subcontractors lost their jobs entirely because their employment was completely tied to this initiative. Because the contract was not renewed due to the investigation, these individuals never learned what it was that perhaps they were alleged to have done. They were never able to defend their reputations. They recounted the emotional stress that resulted from the uncertainty and reputational harm.

One researcher who relies on access to ministry data to conduct his work told us that he remains afraid to connect to the ministry's system, and has not done so, because he fears being accused of wrongdoing again. Instead, others who work for him access the data.

We sought to understand why the investigation had such a profound impact well beyond the initial individuals it targeted. Below we describe two key factors that witnesses repeatedly described as contributing to the significant impacts of the investigation.

17.2.1 MANNER OF INVESTIGATION AND DECISION MAKING

Many affected individuals we spoke with acknowledged that the ministry could have ended their employment without cause by providing notice, or for contractors, in accordance with the notice provisions set out in the contract. That the ministry chose not to do so and instead asserted that individuals had engaged in wrongdoing, without providing details of what that wrongdoing was, amplified the individual impacts of the investigation.

As we have described throughout this report, the ministry provided little or no information to people whose employment or data access was suspended, who were interviewed, who were dismissed from their employment or whose contracts were terminated. In the absence of such information, people wondered what they could have possibly done wrong.

One witness described spending "months, and months, and months, trying to imagine" what the wrongdoing could possibly be. One witness explained how in the absence of a clear explanation of possible wrongdoing, he second-guessed his own past actions and felt a sense of responsibility for others who had been affected.

An associate of one of the contractors described in Chapter 12 whose data was suspended related to us:

> *It was never communicated and no one ever, ever, communicated to me that there would be implications for my future data access as a result of my, and I'll put in air quotes … 'involvement' in this which … was peripheral. I used aggregate level data. It was ridiculous. That I won't put in air quotes.*

Another individual whose contract was suspended told us, "nobody ever, ever, ever clarified [how] any kind of suspension was authorized or legal."

One individual whose work in the ministry ended as a result of the investigation told us, "there was just a void of information. No one was really told why. It was always just there was this tip, anonymous tip, something about contracting and data. That is the most we got." Another witness who had been interviewed by the investigation team told us how they "heard absolutely nothing… nobody could find out anything" and in the absence of information spent months speculating about what could have gone wrong. This witness talked about the "extremes that your mind goes to when you can't make sense of what's going on."

Another described a perception that, "it wasn't just dangerous to work with us. It was dangerous to even just to be associated with us …"

One witness described how, upon receiving a data demand letter, "it felt like they were going to swoop in, scoop everything up, break the front door down if they had to … we were just terrified from that point forward."

The fact that there is a significant power imbalance between government and the affected individuals compounded the effects of a lack of information. As one witness commented, government "had unlimited resources on their side. We had very limited resources on our side."

17.2.2 PUBLIC STATEMENT ABOUT THE RCMP REFERRAL

The decision to refer publicly to police involvement contributed significantly to the negative impacts we have described above. It created a sense of fear and undermined people's reputations in the community.

One of the fired employees told us, "we were always scared … when the doorbell rings, I get a jolt of I'm scared … I never used to feel that way. It's just very bizarre." This witness described how another fired employee returned home from work to see police cars on his street and thought the RCMP had come to arrest him. This witness continued, "we were all petrified. I had nightmares for months."

Another witness whose data access was suspended told us, "I worried about the Mounties showing up at my door for a long time. My lawyer was sufficiently worried about it, too, because he gave me instructions in case they did."

Even those who were not connected to the public announcement, and who had not been part of the initial investigation, told us they wondered "if the RCMP were going to appear at the front door and remove all the computers from our home." This witness told us, "I was surprised how stressed I was" and decided to end all ties with the ministry. When she made the decision she felt:

> *… a sense of relief because then I felt like I was a little bit removed from, you know, if I tell myself that it doesn't matter to me then, I think if I was pinning all my hopes on getting back there and getting data again it would have continued to be more stressful.*

Following the initial media coverage and the government news release, this matter has remained in the public sphere. In addition to continued media attention, matters relating to the investigation were publicly reported on by the Office of the Information and Privacy Commissioner and as part of the McNeil review. Issues relating to the legal proceedings were the subject of media attention and government press releases. The leak of the Office of the Comptroller General report gave renewed life to allegations against some of the employees. Similarly, our investigation and the release of this report will continue to keep this matter in the public domain.

17.3 MINISTRY OF HEALTH IMPACTS

Throughout our investigation, we spoke with current and former Ministry of Health employees, including Deputy Ministers and the senior executive, Executive Directors, Managers, Policy Analysts and others. These ministry employees consistently described the ways in which the investigation and the events which followed affected their workplace. In this section of the report we describe the effect that the investigation created amongst employees at the time and the resulting impacts of the investigation on employee productivity, particularly amongst those who handle or work with data. We also describe some of the ways in which the public servants who were part of the investigation team told us they have been affected. We describe what this has meant for the organizational culture of the ministry. We also describe the impacts on evidence-based decision-making within the ministry.

17.3.1 MINISTRY OF HEALTH STAFF

During the 2012 investigation, the Ministry of Health investigation team was physically situated within the ministry, amongst staff who were under investigation. This caused distress for some employees. One employee who assisted with the investigation described his view of the problems that arose as a result of where the investigative team was situated:

> *The spaces that we were using allowed for a fair bit of noise bleed, if you will. People may have heard snippets of conversations from the rooms, perhaps laughter and other kinds of expressions that they would have found perhaps unsettling or disturbing. And so I don't believe that our presence there was a good experience for the … division, especially for the people who were closest to those spaces.*

Perhaps not surprisingly, we heard that people found it difficult to work under such circumstances. One person we spoke with said that having colleagues investigate one another created "deep scars" that still exist today.

After seeing well-respected colleagues interviewed and then dismissed or otherwise disciplined without explanation, some employees became fearful that their conduct might come under scrutiny. The lack of any meaningful explanation about what happened during the investigation in the time that followed perpetuated a sense of fear and risk aversion that, according to many who we interviewed, continues to this day.

Moreover, executives in the ministry were often unable to reassure their employees that they were "safe" from the investigation as they themselves did not always know what had led to the suspensions and dismissals. One witness, who was a senior executive in the ministry at the time, gave evidence that the lack of information about the investigation, the manner in which it was carried out, and the subsequent terminations, fostered a climate of fear amongst some ministry employees:

> *… so many people were afraid because they didn't actually know what happened and why people were let go … [a] number of these individuals had worked with the ministry for a very long time. So they were, you know, known individuals. And so because there wasn't a clear explanation of what had been done … kind of panic almost set in with the number of individuals. Lots of people work… in the data analysis area. And so the feeling was people would say, "Like, my god. What did they do? I do the same kind of work as they do or they did, and I don't understand and so am I going to be next?"*
>
> *There was also… quite a concern around… feeling and the tone of the investigations.*

An Executive Director that we spoke with gave evidence that her staff feared that they could lose their jobs. She said that these fears were echoed in other branches at the ministry:

> *… it was a very emotional time for staff. Yes, I did talk with my colleagues and peers about the feelings about all of this and what was happening and the fact that we didn't know anything. We didn't know what the allegations were. We didn't know what was happening. And there was from certainly the conversation I had with my colleagues, there was a lot of emotion, disappointment, fear, concern, helplessness. Feeling of not really knowing what to do about it. And fear was probably the biggest emotion, I would say. People just didn't know what was going on. And … [employees had] huge fear of their own jobs. Because it wasn't known what had happened. And so that just creates fear. When you don't know, you become afraid because it could happen to you because you don't know.*

A different Executive Director told us that staff continue to worry about job security, four years later:

> *Like, if someone is let go for another reason, everyone just starts, "Holy cow, what's happening?" Must be the investigation all over again and it brings up scars.*

We heard that the investigation and subsequent terminations particularly impacted ministry staff who worked with data. We were told that fear caused some people who worked with data to get less work done. They did not know why people were being terminated, and were afraid to work with the data because they suspected it

may jeopardize their employment. We were told that this created some organizational paralysis because employees were afraid that their actions could be reviewed or impugned by the investigative team. One of the Executive Directors that we spoke with described the problem as follows:

> *People didn't want to do their jobs. They didn't have any idea. They were scared that they were – I mean people saw all their colleagues being fired with no explanation. Like, there was no real detailed explanation about what happened. I mean, I think it still exists to this day, people are concerned about it.*

We heard this from many of the individuals we interviewed. One Director told us that the approach to sharing data between offices is simply, "don't let any data go out the door because that's the safest way to actually handle it." Another Director related her opinion that even for management it is often "impossible to get data to do your job." Some complained of administrative hurdles to access even aggregate data while others complained about the confusion that persists regarding what is, or might be, considered personally identifiable data.

We heard that the sudden removal of a particular software tool left a gap in the ministry's data accessibility. That software had allowed ministry employees to access specific useful datasets which did not contain personally identifiable data. The removal of the software has made it necessary, in certain situations, for employees to work with raw data to come up with the same information. As one senior executive explained to us:

> *[The Ministry has] spent millions and millions and millions on these databases and they still have not implemented a system where you can link between those databases and not use a PHN … So the structure of the database has never enabled analysts to do their work using anonymized PHN or any other client identifier.*
>
> …
>
> *[The removal of the software] means that if you go ask [a] question to three different people, no one knows where the answer is and all three people could go count differently … there is no gold standard … It is inefficient because you can't figure out where the data is, it's not accessible to everyone, you have to go through a [programmer] to touch the data and you don't necessarily get the right answer.*

An Executive Director gave more general evidence about her view of the impact of the investigation and terminations on the productivity of staff who worked with data:

> *The fear through my staff was huge. So I had at that time data analysts who were pulling and sharing data with all the other data sets, and the fear was basically, "Should I put my pen down and not do anything because I could be next?"*
>
> *And that was real and palpable. It was a very, very challenging time for the staff. So and I couldn't help them.*
>
> …
>
> *I would agree that there was an impact on productivity. Any time you have that kind of emotional experience for people, absolutely, it has an impact on the workload and workplace, the culture and the environment and just the feeling of negativity. All of those things would have a negative impact.*

She told us that following the investigation the ministry sought to review and improve existing policies and practices with respect to data access and that the ministry's efforts resulted in improved clarity for staff. Nonetheless, she said that "there still is an underlying fear about data sharing and data access. And I can't quantify what the impacts would have been to productivity, but it was real." Later in her interview with us she explained:

> *I mean, to me, in general, really, staff are very worried. The people who generally work with data are very analytical, detailed … They are very, very process people. And they like to get things right. They don't like to do things wrong … And so they're very, very conscientious to doing the right thing. And so I find, in general, the staff are very conscientious in this area to the point, actually to the point of actually putting the pen down and not wanting to do anything because they're not clear, right? So they actually slow work down because they're trying very hard to get it right.*

When we spoke with one Director about the challenges her staff face today with obtaining administrative health data, she explained that the investigation and its fallout have significantly impacted the ability of her staff to do their jobs:

> *… basically you've gone from we're all in it together, we're trying to do a job good, we're going to do our job, you know, as a team, regardless if you're in the division that I'm in or not, to even if we're in the same division I'm not sure what's going to happen to me if I share any personally identified data (internally) … you can't even get unidentified data … the end effect is I would say that if you ask most people at my level or higher at the ministry that it's impossible to get data to do your job. And that in part, it's due to the scandal. … it was very intimidating and scary for anybody that had anything to do with data, going, okay, where is it going to go next? And who is going to be on the hot seat next, and who is going to get fired and have their career destroyed?*

An Assistant Deputy Minister echoed this view that both employee fear and the contract and data suspensions negatively impacted her employees' productivity:

> *They didn't – the data wasn't there, so that they could use it. So there was delays in getting data. There was also, like, a total – I mean, they were risk-averse to begin with. But they became even more cautious about, you know, not doing anything that would get them in any trouble, which was practically anything at that point. They were really worried about – people were worried about, you know, they would be next.*

We heard that the impacts of the organizational uncertainty about data access extended to contractors doing data analysis. A witness described that "people are so scared… they go backwards right? You don't want me to link data? Sure. I won't link the data. Right? So the whole analysis is moving backwards now."

One employee explained how those not directly under investigation had felt the impacts:

> *… everybody feels they have a job, you do a good job and your employer's going to value you and that's kind of a mutual reciprocity going on there. And then suddenly to be just pulled out of that and treated really brutally, like bullied, and really brutally. And I think that the people who I was involved with never recovered from that. They're still kind of reeling and they don't have anywhere near the commitment to the ministry that they used to have.*

He explained that "people left. A lot of people left. Everybody [doing data analysis] will tell you they haven't recovered."

In addition to the impacts on productivity, the investigation and the terminations caused some employees to lose faith in senior leadership at the ministry and in the government as their employer. This theme emerged consistently in the testimony of employees and the executive. An Assistant Deputy Minister described the loss of confidence that her staff experienced:

> *So from a productivity – it was definitely impacted, and reputationally, and I think emotionally, our staff were really – and just like total distrust in management. Which not that that's always a problem. But it was – I've never seen such low scores, and it was, you know, I felt personally bad, to be leading an organization that was so distrusted by its staff. It's not something that makes you proud.*

The current Deputy Minister of Health told us that ministry staff are angry with the executive about how the investigation was allowed to unfold and that a lack of trust in the executive has resulted. One of the Executive Directors that we spoke with told us that she is "the face of government" to her staff and that she has to "pretend that the Public Service Agency and government are a fair and good employer" but that is not her experience.

We heard from a Ministry of Health employee who attended some of the investigative team's interviews in her capacity as a union shop steward. She told us that as a result of the manner in which the investigation at the Ministry of Health was carried out she has lost motivation at work and quit her role with the union. She said bluntly that she does not believe that anyone within the ministry

cares about the employees, and that she believes her view is widely shared amongst her colleagues.

17.3.2 INVESTIGATION TEAM AND DECISION-MAKERS

The investigation team and the executive who were involved in the investigation and the terminations have also been affected. While the impacts on the employees involved in the investigation are different from those who were disciplined or fired as a result of the investigation, they should not be ignored. Certainly, no employee expects that their work will become the subject of repeated reviews and investigations, or make headlines in the press for years to come. We heard evidence that the ongoing public scrutiny of the investigation and the terminations is a source of great stress for those who were involved in conducting the investigation and who made decisions as a result of that investigation.

Some of the actions of the investigation team were the subject of Marcia McNeil's review. The conclusions reached by the investigation team and executives were also at issue in the wrongful dismissal lawsuits and grievances, and were reviewed by outside counsel for the government. Some members of the investigation team gave evidence about their role in the investigation to Ms. McNeil, as part of the litigation, and to us. These reviews constitute an exhaustive and repeated exploration of the steps that they took. It cannot be said that the investigators and decision-makers have been allowed to brush off their mistakes and move on. Their conduct has been the subject of rigorous and repeated analysis over the past four years.

We also heard from members of the investigation team that they believe that government has allowed them to unfairly shoulder the blame for what occurred. One member of the investigation team told us that she viewed government's approach to the McNeil review as "hey let's throw all of you guys under the bus and let you carry it and hope that that makes it go away." She told us that although she viewed most of the findings in the McNeil review as fair, she felt that the limited terms of reference resulted in the investigation team bearing a disproportionate share of the blame for the errors that were made:

> *[The McNeil review] felt like such as scapegoating exercise, like we know there were massive problems with the investigation so let's just focus it on that and hope it all goes away, meanwhile we're going to let these four people who you know did the investigation, who overall are low men on the totem pole, we're going to let them publicly bear the brunt of everything that went wrong with no accountability for people making the decisions and setting the terms of the investigation …*
>
> …
>
> *I take a lot of responsibility for, for my part in [the investigation] but overall it was, it was doomed to fail, not because of the investigators, because of all of the circumstances and the way it was handled, and the fact that decisions were made prior to even going ahead with the investigation, and all of us … felt like we just got hung out to dry …*

In addition to the formal reports and legal proceedings, the people involved, including the investigation team and decision-makers, have been identified in the media and on social media over the last number of years.

17.3.3 LONG TERM IMPACTS ON THE CULTURE AT THE MINISTRY OF HEALTH

A consistent theme from the evidence described above is that the culture at the Ministry of Health was damaged by the events of 2012 and subsequent years. The current Deputy Minister of Health told us that a kind of trauma has resulted within the ministry. Several witnesses gave evidence that the investigation had left a "scar" on ministry employees. An Assistant Deputy Minister we spoke with described the investigation and resulting decisions as a "stain" on the ministry:

> *… it had a very strongly negative impact in terms of morale, ability to get work done, and … for me, personally, I had to go in front of my staff multiple [times] – like every time something would happen I would have a standup to tell my staff, like when Roderick committed suicide and there was a couple of incidents because I wanted them to hear it from me. And I always said to them I don't really know what happened but I have faith in the process. We have a really solid process*

here in government and like I just felt personally betrayed …

. . .

And so what had ever had happened … I felt confident had been followed and it wasn't. So that to me, in addition to all the suffering that the people that were part of the reviews experienced, I think it was negative for people in the public service as well. Because we've all, especially at the Ministry of Health, been stained by it.

Culture is powerful in an organization. Although the investigation and the terminations occurred over four years ago, and although those matters have been formally settled, as the evidence we heard demonstrates, the effects of what happened continue to resonate within the ministry. A paper on post-conflict organizational rebuilding illustrates the challenges that organizations in such circumstances face:

Formal or informal resolution of serious or extended conflict within or across organizational units often leaves the actors … in a stressed state … [parties] must interact professionally in an environment alive with the tensions springing from suspicion, accusations, identity loss, embarrassment, resentment, anger and betrayal. Moreover, because the work unit is a system, those employees not directly involved in the conflict are often drawn into the conflict via the general departmental tension … and, perhaps most significantly, the role these employees are asked to play in providing interviews, testimony, or documents in the context of the formal investigation. Particularly when conflicts become public battles played out in the media or in the organizational grapevine, there is a loss of privacy and often a loss of 'face' for the parties and for the organizations.[2]

We note that the ministry has taken important steps to remediate some of the damage caused by the investigation and its aftermath. It has done so by implementing an internal engagement process which included the establishment of an Employee Advisory Forum to work with the Deputy Minister to facilitate an environment of open communication and collaboration across the ministry. Among other initiatives the ministry also launched the "Ministry Checkup" which is a tri-annual week-long process aimed at improving communication and engagement. Work is being done to develop a "How We Work" initiative in the ministry to promote working across and within teams.

A number of factors have impacted the ministry's ability to fully address the damage to its organizational culture: the extended time it took for the leadership in the ministry to reassess the investigative approach; the reluctance to discuss the matter given ongoing litigation; the legitimate need to protect people's privacy which limited what could be said; and the lack of a clear understanding of what happened. We are also aware that our ongoing investigation has made it difficult for the impacted employees and organizations to move on. We hope that this report provides clarity with respect to what occurred and that the ministry and its employees can build on what they have done so far and find a better way forward.

17.3.4 STEPS TAKEN BY THE MINISTRY OF HEALTH TO IMPROVE DATA HANDLING AND ACCESS

On behalf of the Ministry of Health, Dr. Brown told us that the ministry has taken a number of steps to address the concerns regarding data access. In the years since the investigation, the ministry has taken steps to improve the security practices and protection of personally identifiable information by reducing unnecessary access to identifiable data. It has done this while at the same time broadening access to non-identifiable data in an effort to better utilize what it recognizes to be a critically valuable resource.

Dr. Brown told us that in the summer of 2016 the ministry launched a "consolidated analytics" strategy and an organizational division to provide clarity in data management practices and analytics. The goal of the strategy is to ensure that ministry executives and program divisions receive "quality, timely, accurate and consistent information and analysis that support health system performance, management oversight, the delivery of ministry strategic priorities, and divisional mandates."

2 Katherine Hale and James P. Keen, "The Ombudsman and Post Conflict Department Rebuilding", *Journal of the International Ombudsman Association*, Vol 6, No. 2(2013): 68-69.

Further, in response to the June 2013 report of the Information and Privacy Commissioner and the conclusions of the Deloitte review, the ministry told us it has taken steps to:

- clarify roles and responsibilities with respect to data analytics and establish a related governance program
- publish a privacy policy and establish mandatory training for employees
- improve processing times for health research centralized through PopDataBC's secure research environment
- implement standard security roles and technical controls for Ministry of Health employee and contractor data access through Ministry of Health's Data Warehouse

Together, these measures provide improved clarity about appropriate data access and use. As such, we recognize the significant and commendable work done by the ministry and its staff.

17.3.5 EVIDENCE-BASED DECISION MAKING IN THE MINISTRY

The effect of firing individuals in Pharmaceutical Services Division (PSD) and suspending data access to employees and contractors was to dismantle a significant part of the evidence-based work that the division was supporting. The change in the programs delivered through or supported by that division was not based on an assessment of whether those programs were effective and meeting their deliverables. It was also not based on an assessment of whether these programs were providing information that allowed the ministry to more cost-effectively manage PharmaCare. For the programs we identify earlier in this report, it was simply the inevitable outcome of the Ministry of Health's employment and data decisions.

Witnesses we spoke with who had worked in PSD said that before the investigation it was an exciting place to work with excellent employee morale. In 2012 the Policy Outcomes, Education and Research Branch was recognized as one of the ten best places to work in the B.C. Public Service based on the previous year's employee engagement survey results.

As one employee of PSD explained:

> *… the foundation is cracked … it [structure of PSD prior to 2012] was just this moment in time where there was an opportunity, the window opened, we had the leadership to do this type of thing and we went for it and now I think … I don't know if government would still support it because of … all the stuff that's happened.*

By no longer having academic researchers internal to the division in a liaison role, we have been told that the division's knowledge exchange capacity that was facilitated by people familiar with both PSD's needs and priorities as well as research processes has diminished.

The ministry informed our office that it is in the process of rebuilding some of this kind of knowledge exchange work outside of that division. Through its reorganization, the ministry created the new Stakeholder Engagement, Research and Innovation Division and have advised us that it has a strong evidence-based mandate. We were informed of plans to use research as a means to inform the division's decisions, including collaborating with researchers, industry and health authorities. The ministry also informed us that it will also have a senior pharmacist from the Medical Beneficiaries and Pharmaceutical Services Division (the former PSD), working closely with its new research function. In addition, the ministry told us it continues to engage with research organizations to obtain independent evidence on pharmaceutical evaluations and to foster pharmaceutical related education.

17.4 IMPACT ON RESEARCH, EVALUATION, EDUCATIONAL INITIATIVES AND PUBLIC HEALTH EPIDEMIOLOGY AND ANALYSIS

In the following sections of the report we discuss the impacts of the 2012 Ministry of Health investigation on the researchers who engaged in various research, evaluation, educational and public health work and whose data access had been suspended. We cover the impact on several initiatives that we have discussed at length in other sections of the report. Its purpose is to provide examples

of the impacts of the investigation on health research, evaluation, education and surveillance in the province.

In discussing the impacts on various programs, we are not suggesting that all ministry sponsored health research came to a halt in 2012. The work that stopped represented only a portion of the engagement of the ministry in health research in B.C. The ministry continued to engage in other research and areas focused on safe patient care.

17.4.1 DATA ACCESS REQUESTS FROM IMPACTED RESEARCHERS

When making a data access request (DAR) to the ministry, external applicants are required to disclose the names of individuals associated with their projects regardless of whether or not those individuals will access ministry data themselves.

As is detailed in previous chapters, shortly after the investigation began the investigators identified a number of individuals who they believed should not access ministry data while their review was underway. This list quickly expanded to include not just the principal targets of the investigation, but also analysts and contractors peripheral to the work done by the core group under scrutiny. Those individuals were effectively barred from being involved in any projects where the ministry's administrative health data was to be used, regardless of whether they would actually access the data or not. For reasons explained elsewhere in this report, this practice was improper as the decision to suspend data access was, in many instances, made in the absence of any evidence that it was being used or accessed inappropriately.

Our investigation heard evidence about some instances where DARs went unapproved without explanation from the ministry. One data analyst who had worked for Blue Thorn Research and Analysis Group Inc. explained to us that subsequent to the collapse of Blue Thorn as a result of its contract suspension and default termination, she was listed on two academic DARs that went unapproved without any explanation. On a hunch that her previous work with Blue Thorn might be the cause of the delays, she called the ministry's data access office to inquire if this was the case. Her hunch was confirmed. She was told that if she removed her name from both applications they would be approved.

One project intending to study the impact of maternal drug exposure on infant and child health development was denied access to data while the investigation was underway due to the identity of an individual whose data access had been suspended being listed as a research associate. Unlike with some DAR requests, the ministry did communicate this to the applicant who subsequently took steps to ensure the individual would not access any data on the project and adjusted the proposal accordingly. As the Chief Data Steward then clarified:

> *Principal investigators are authorized to collaborate with experts in their field on their statistical approaches – either before, during, or after the work is executed, without granting access to the research data itself.*

However, data was still not released to the project.

Another project that was already underway in 2012 was studying the education, health and wellbeing outcomes of children born to immigrant and refugee families. The project which was being conducted through a research agreement with the province was described as follows:

> *… this study will afford the first comprehensive picture of the forces that influence the lives of immigrant children and provide a strong evidence base for the BC Settlement and Adaptation program as well as furthering the objectives of the Canadian Children's Agenda more broadly.*

When the project lead submitted a new DAR in November 2012, its ethics application listed an individual whose data access had then been suspended as a study team member. When the Chief Data Steward was made aware of this, the DAR was placed on hold. Despite the lead researcher subsequently writing to the ministry to explain that the individual would not be accessing any data in his role with the project, the DAR was not approved before the project was cancelled in February 2013 because the lead researcher had passed away.

A project that listed another individual whose data had been suspended as a co-investigator received similar treatment. The project, designed to study the impacts of psychotropic drug use during pregnancy on the health of newborn children and infants, had its DAR placed on hold in November 2012. When notice of the hold was

communicated to the lead researcher, no explanation for the decision was provided. The lead researcher twice wrote to the ministry asking for clarification and offering to accommodate the ministry's requirements to allow data access to proceed. The first of these letters explained:

> *I would like to discuss this situation with you as I am very concerned and puzzled by this decision. I do not understand why I and my co-investigators have been refused access to data to carry out this research on a class of medications that are being used increasingly often in pregnancy, and for which there are serious safety concerns.*

Data access was not granted for this project until February 2014.

17.4.2 THERAPEUTICS INITIATIVE WORK AND FUNDING

The government's October 22, 2013 announcement that it was taking steps to reinstate its contract with the University of British Columbia's Therapeutics Initiative did not resolve the ministry's ongoing concerns about the TI's data access and use. Although the ministry still had no evidence that Dr. Colin Dormuth or anybody at the TI had engaged in wrongdoing, one of the direct outcomes of the ministry's investigation was that the ministry took additional steps to restrict the TI's ability to access data and curtailed the TI's ability to provide input to ministry decision-makers.

As we discussed in Chapter 12, the TI's March 2012 contract amendment was completed contemporaneously with the ministry's receipt of the initial complaint to the Office of the Auditor General. As a result, one of the initial impacts of the ministry's decision to effectively suspend the TI's contract between July 2012 and February 2014 was that the TI did not have an opportunity to work under the 2012 agreement for very long before its work was suspended.

Prior to restarting work in 2014 the ministry indicated it wanted to amend the TI's contract again to address its lingering concerns. The specific amendments to the TI's agreement reflected the ministry's ongoing concerns about data access, intellectual property and publication rights, and work planning. The amendments also reinforced the ministry's intent to have a greater say in the TI's activities. In part because of this, under the 2014 agreement the TI was required to submit more detailed work plans to the ministry for pre-approval.

Similarly, although the TI had historically submitted its articles to the ministry prior to publication, the new agreement contains provisions that reinforce the ministry's ability to review the TI's proposed publications in advance and review the underlying data the researchers relied upon in reaching their conclusions. Perhaps the largest structural change was the creation of a new contract management committee. The committee, which is comprised of members of both the UBC Faculty of Medicine and the ministry, is empowered to direct the TI's commissioned contract work through the establishment of terms of reference, working groups and the development of other resources to govern the TI's work under the contract.

When we spoke with Dr. Dormuth he emphasized the fact that the TI had historically viewed its relationship with the ministry as a partnership in which they collaborated to ensure the relevance of the TI's work to ministry objectives. He also noted that the functioning of the TI's prior agreements with the ministry allowed them considerable independence to raise public health issues that they believed would benefit the ministry and to meet the deliverables established by their contract. Dr. Dormuth told us that the way their relationship functioned changed significantly under the new agreement:

> *Just to point out to you, the original schedule A was the basis under which we did all the work up until – essentially until the scandal happened, right, because we were operating under that old schedule A up until March 31st, 2012. I mean, one of the things … there was basically a clause saying we would do our work at arms-length through the government which we always interpreted for the 15 years before that as meaning the government will not interfere. So that was taken out.*
>
> *And then there were clauses in here that we used and it was never an issue before the scandal…*

He also felt that the TI's relationship with the ministry became unworkable because the ministry was unwilling to approve the suggested projects the TI brought forward. As he told us:

But the idea even with this new schedule A was that we would sit down together with the ministry and discuss what projects we could do and choose them together and we do sit down but – for the first two years I guess after the restart it was just unworkable. The things we would say we thought we could work on and were important, almost every single time were declined. And the projects we were sent were I would classify as pretty useless.

The changes to the TI's agreement have, in the view of the TI, negatively impacted the TI's ability to independently highlight important public health issues. Dr. Wright told us that several potential studies, including a study about the smoking cessation program, had been proposed to the ministry but were ultimately rejected. Dr. Dormuth told us he encountered situations in which the ministry asked the TI to undertake a study and expend the associated resources, without first knowing whether sufficient data would make the work feasible.

As a result, even in situations where the ministry asked the TI to investigate certain questions, the TI told us its ability to do so is limited because it lacks the independence to assess whether the project is feasible and whether it is actually able to contribute to a constructive analysis that will benefit the province.

Given the length of the TI's contractual relationship with the ministry it is unsurprising that the ministry's needs and expectations changed over time. These changes were reflected in the six amendments to the TI's contract between 2004-2014. The ministry's decision in 2014 to decrease the TI's independence and curtail its ability to provide meaningful input to ministry decision-makers was based on ongoing concerns arising from the 2012-2013 investigation.

The ministry points to a number of helpful signs that the relationship with the TI is on the mend. A change in ministry executive responsibility for liaison with the TI, the willingness of the ministry to entertain new grant proposals from the TI and the Reference Based Drug work being done by the TI were all identified by the ministry as important improvements. Dr. Brown does however acknowledge that the two parties to the relationship need to continue to rebuild trust and effective working relationships.

17.4.3 ALZHEIMER'S DRUG THERAPY INITIATIVE

The ministry received the final Alzheimer's Drug Therapy Initiative (ADTI) report in August 2015, almost eight years after former Premier Gordon Campbell pledged government's commitment to advancing scientific knowledge of Alzheimer's disease care.[3]

As the ADTI researchers noted in their report, all research conducted in the "real world" will be impacted by outside events as they unfold during the course of the study. In this case, by 2012 the ADTI had already been affected by unanticipated events, including the B.C. Medical Association's initial reluctance to participate in the study and delays in the ministry approving of the researchers' data access. Unfortunately, these unanticipated challenges were compounded when as part of its investigation, the ministry suspended the researchers' data access and contracts. These suspensions interrupted the ADTI at a critical juncture.

The suspensions adversely impacted the researchers' ability to address all of the questions they sought to examine. For example, in the final ADTI report the researchers noted that portions of the study were lost because of the contract suspensions. They specifically cited the loss of the part of the ADTI study that was intended to develop clinically meaningful measures for evaluating dementia therapy.

Of equal importance, the ministry's actions negatively impacted a central goal of the ADTI, which was to build formal bridges between the pharmaceutical industry, patient groups, researchers and ministry decision-makers to develop PSD's "coverage with evidence development" model. This model was intended as a test vehicle for future collaborations toward evidence-based policy development. The history of the ADTI demonstrates that the ministry wanted to develop avenues for collaboration between researchers, patient groups, the pharmaceutical industry and its decision-makers to inform drug listing decisions and the development of pharmaceutical policy more broadly. To do this the ministry spent several years

3 Neena Chappell et al., *Alzheimer's Drug Therapy Initiative (ADTI): Research Report* (Victoria: University of Victoria), 12 August 2015 < http://www2.gov.bc.ca/assets/gov/health/health-drug-coverage/pharmacare/adtiresearchstudiesuvic.pdf>.

engaging with these stakeholder groups to find common ground that would enable a study like the ADTI to occur. Although the immediate goal of the ADTI was to address questions connected to Alzheimer's research, the ministry's broader goals were to test this collaborative model as a way to address complex policy questions.

The lead ADTI researcher told us that the way the Ministry treated the ADTI researchers, both in connection with granting their data access prior to 2012 and with the interruptions that occurred from the 2012 data and contract suspensions, negatively impacted university researchers' willingness to participate in future Ministry of Health initiatives. The pool of researchers available to work with the ministry on these types of complex questions is relatively small. Indeed, for the ADTI it had taken the ministry several years to persuade Alzheimer's disease experts to participate in the study. The lead ADTI researcher told us the Ministry's actions created a chilling effect amongst researchers beyond ADTI. This decreased the pool of available talent available to the Ministry to address public health concerns more generally.

In general, the researchers in the Alzheimer's disease field did not depend on the ADTI to be able to conduct their broader research activities. They agreed to participate in the project because they could see the potential benefits to public policy making and to the specific drug listing questions at issue. Thus, the interruption of the ADTI caused the researchers to question their ongoing involvement with the ministry. This, in turn, wasted the resources the ministry had expended cultivating relationships with researchers to initiate the ADTI.

The ADTI lead researcher also indicated that the data suspensions broke the ADTI into different parts, some of which were allowed to continue after a short interruption, while others remained suspended for a longer period of time. These interruptions meant that knowledge creation opportunities were lost, which could not be made up later on, because the ministry appeared not to appreciate that many aspects of the study were time sensitive or relied on the researchers' ability to engage with the targeted patient group on an ongoing basis to ensure they did not fall out of the study. Similarly, some of the study components could not be restarted easily once the data suspension issues were resolved, which squandered the resources that had been expended getting the studies to the place they were in 2012.

The ministry's suspension and investigation of parts of the ADTI project also raised questions among researchers about the ministry's role in fostering research and trying to implement new forms of policy development, such as the "coverage with evidence development" model. Since the ministry did not fully evaluate the effectiveness of the ADTI study model, it has lost the opportunity to learn how the "coverage with evidence development" approach could further the ministry's ongoing goal of ensuring quality and cost-effective health services. For its part, the ministry says it remains open to the "coverage with evidence development" approach.

17.4.4 EDUCATION FOR QUALITY IMPROVEMENT IN PATIENT CARE

The ministry ceased its involvement in the Education for Quality Improvement in Patient Care (EQIP) initiative as a direct result of the investigation and no similar initiative has since replaced it. While it is difficult to measure the precise impacts of cancelling this initiative, it is clear that the ministry abandoned a collaborative evidence-based educational initiative that was aimed at improving both the quality and cost-effectiveness of physicians' prescribing practices. The ministry and its partners in the initiative had invested significant time and cost in creating prescribing portraits for physicians. The value of those portraits was significant enough that the BCMA intended to expand their educational use to other similar initiatives.

Soon after EQIP started, the ministry explained the purpose of the project to a legislative committee:[4]

> *We are undertaking a project with the BCMA and UBC on education for quality improvements in patient care that we call EQIP. That project is underway now. We've received extremely strong endorsement from physicians groups, and we do engage them in the detailed development of this program.*

4 Select Standing Committee on Public Accounts, "Reports of Proceedings, Friday, February 2, 2007 a.m.", British Columbia Legislative Assembly, Hansard, 38th Parliament, 2nd Session.

EQIP was aimed at educating physicians to provide the best patient care while also achieving the ministry's goals of ensuring patient safety and cost-effectiveness. EQIP provided physicians with evidence-based information about the therapeutic value or costs of a drug that they prescribe. This is information that they cannot otherwise readily access. EQIP was a recognition that physicians are often reliant on anecdotal experience from their patients, or information from pharmaceutical companies, which may be valuable but may not leave them fully informed.

The annual report produced by EQIP at the time the contract was unofficially suspended indicated that it was developed as a "recognizable brand and is becoming a trusted source of unbiased, evidence based messaging. This is evidenced by the ongoing positive comments from the feedback forms, interviews and OPUS learning sessions."[5] The evidence we reviewed overwhelmingly suggests that there was no comparable replacement for the educational materials being prepared through EQIP.

The ministry stopped the EQIP initiative before it had evaluated the impact of the initiative on doctors' prescribing practices. The ministry lost an opportunity to learn how EQIP, or an educational initiative such as EQIP, could be used to further the ministry's goal of ensuring quality and cost-effective provision of health services.

While we have highlighted EQIP in our report, other educational based initiatives in PSD were stopped as a result of the investigation. Where these initiatives were not resumed, such as the ministry's participation in the Academic Detailing Evaluation Partnership Team (ADEPT), the ministry did not meet its commitments or deliverables.[6]

Initiatives such as EQIP are started because the ministry believes that they will benefit the health of the citizens it serves or allow it to more cost-effectively manage the health care system. Some initiatives do not live up to their initial expectations, while others succeed beyond what was originally anticipated. As we have described above and in Chapter 12, getting these initiatives running requires a significant investment of time and money. The ultimate impact of EQIP being ended was to undermine both the collaborative relationships that the ministry had developed and the opportunity to evaluate the program's effectiveness at meeting the ministry's broader public health goals.

17.4.5 ATYPICAL ANTI-PSYCHOTIC DRUGS RESEARCH

As we described elsewhere in the report, in the summer of 2012 the B.C. Children's Hospital-led research team studying the correlation between atypical antipsychotic prescribing trends and diabetes in children, submitted an abstract for presentation at the Canadian Diabetes Association's annual professional conference as the first step to publishing their findings. At this point, however, the ministry's decision to suspend the data access of Dr. W. Warburton, Mr. Scott and Mr. Hamdi meant the lead researcher on the project had to withdraw the abstract before it could be presented. Those data suspensions meant the researcher would be unable to access the datasets used to conduct the research should a journal or researcher ask for work to be done to further verify the findings. The researcher explained this to us as follows:

> *… the way it works is, you can submit something in abstract form and present it at a conference but it's not considered acceptable literature until you submit it to a peer reviewed journal, you have all that reviewed, they ask you questions, they may ask you to do some re-analysis of the information, verify your methods and I knew there was no way that I was going to be able to do any of that. And I have to be able to say I have access to the data for at least five years in case there is any question about the methodology. And I knew that I wasn't*

5 OPUS stands for Optimal Prescribing Updates and Support. This is a group of physicians who are supported by the GPSC Practice Support Program to participate in a related educational initiative based on the EQIP profiles. The Practice Support Program is a quality improvement-focused initiative that provides a suite of evidence-based educational services and in-practice supports to improve patient care and doctor experience. It is funded by a partnership between the Ministry of Health and Doctors of BC. It is an example of EQIP expanding beyond PSD - this initiative was supported through Primary Care.

6 The Academic Detailing Evaluation Partnership Team (ADEPT) was a pan-Canadian, external evaluation of academic detailing programs that was expected to include B.C.'s Provincial Academic Detailing (PAD) program. Information about the PAD program can be found at Ministry of Health, "Provincial Academic Detailing (PAD) Service," <http://www2.gov.bc.ca/gov/content/health/practitioner-professional-resources/pad-service>.

> *going to be able to do that. So I had no choice but to withdraw the abstract … it was extremely embarrassing. I have never had to withdraw an abstract from a scientific meeting. And then we never published that information …*

As the firings of the researcher's close associates and the possibility of an RCMP investigation were publicized, the researcher explained that she "had this terrifying vision that the RCMP was going to … accuse me of having breached someone's privacy." In an attempt to re-obtain the finalized data files the researcher wrote to the ministry, but never received a response.

The researcher explained to us that "all the information I got was from the media … I lost a lot of sleep over it." Forced to explain the reasons for the collapse of the research project to colleagues and professional bodies, the researcher was both embarrassed and distracted from her research efforts.

Approximately one year after the researcher had intended to present and publish the findings of the atypical antipsychotics project, another team of researchers did so with a peer-reviewed paper that demonstrated a three-fold increase in the likelihood of children developing diabetes if prescribed atypical antipsychotic medications.[7]

Frustrated, embarrassed and disillusioned by her experience with the ministry, the researcher, a respected expert in the field of children's health, has chosen not to work with the ministry's administrative datasets again. As she told us:

> *In the long term I had a lot of hopes and aspirations related to [administrative data] … I was hoping ultimately we could follow prescription trends over time to see if we've improve the appropriate use of [atypical anti-psychotic drugs] and potentially decrease the use of them to see if our efforts had made a difference but I've been traumatized … I was so traumatized that if you offered me free data today from the Ministry of Health I'd say no thanks. I just felt like the ministry turned on people. … I thought I was doing good, I thought I was helping children and I felt like somehow peripherally I was doing something bad. It made me feel like I was doing something bad. It really made me feel stressed and guilty. I lost sleep over it. I just didn't want to have anything to do with it ever again.*

17.4.6 DRUG SAFETY AND EFFECTIVENESS NETWORK

Dr. Dormuth is British Columbia's lead on the Canadian Network for Observational Drug Effects Studies (CNODES) collaboration. The goal of CNODES is to "use collaborative, population-based approaches to provide rapid answers to questions about drug safety and effectiveness."[8] By conducting research using multiple healthcare databases from different jurisdictions, CNODES can provide "precise estimates of medication risks and benefits"[9] that can then inform public health decisions. CNODES is part of the larger Drug and Safety Effectiveness Network (DSEN), funded by the Canadian Institutes for Health Research. Six other provinces have CNODES leads and together, they contribute to interprovincial studies.

When Dr. Dormuth's access to health data was suspended in June 2012, his work as the provincial lead for British Columbia on CNODES was impacted. This in turn impacted the ability of the national group to report on its work in a timely and effective way.

DSEN is structured so that researchers with access to the largest and most important administrative health databases can use that access to produce timely studies. As we described in Chapter 4, British Columbia has a robust set of administrative health data that makes it a useful contributor to national studies of pharmaceutical use and effectiveness.

For DSEN studies reliant on BC data, however, data delays have meant the British Columbia components of the studies have not been occurring quickly. This undermines a core DSEN objective of making research results available in a timely way.

7 William V. Bobo et al. "Antipsychotics and the Risk of Type 2 Diabetes Mellitus in Children and Youth," *Journal of the American Medical Association, Psychiatry* 70(10) (August 2013).

8 Canadian Network for Observational Drug Effect Studies, "About CNODES" <https://www.cnodes.ca/about-cnodes/>.

9 Canadian Network for Observational Drug Effect Studies, "About CNODES" <https://www.cnodes.ca/about-cnodes/>.

While the ministry's 2012 investigation was ongoing, an important public health study was hampered by the data delays that Dr. Dormuth described. In the summer of 2012, CNODES was planning a study of the prescribing trends of isotretinoin (brand name Acutane) by younger women. Isotretinoin is used to treat severe and scarring cystic acne and was first approved for use in Canada in 1983. Isotretinoin is a "potent teratogen" that can cause severe birth defects such as craniofacial, cardiac and central nervous system abnormalities and can lead to spontaneous abortion. The risks to fetal development have been well known for 30 years and there are a number of published studies on the topic. As a result, women who are on isotretinoin should not become pregnant. Because of this, physicians have long been instructed to follow a stringent protocol when prescribing the drug to their female patients of childbearing age.

The objective of the CNODES study was to use administrative health data to "estimate the frequency of pregnancy during and immediately after treatment with isotretinoin, the number of potentially exposed pregnancies that go to term, the number of resulting fetal abnormalities and whether these rates have changed over time."[10] Thus the purpose of the proposed study was not to comment on the drug's safety when used by pregnant women but rather to gauge the effectiveness of the cautionary protocol in use in Canada. The resulting information would assist health officials in determining whether a "re-fresh alert" was necessary to promote physicians following established protocols.

In a letter to the ministry dated August 23, 2012, Dr. Sammy Suissa and Dr. David Henry on behalf of the CNODES executive, outlined their concerns about Dr. Dormuth's suspended data access. They noted that in denying Dr. Dormuth access to data, the ministry would in turn be denying CNODES access to BC data. The letter noted that CNODES is central to monitoring the safety of prescription medicines in Canada and that it would be unfortunate if BC was not an active member and willing participant in the work.

In an email to the ministry dated September 24, 2012, the project manager of the PharmacoEpidemiology Group (PEG) (Dr. Dormuth's group) at the Therapeutics Initiative, expressed concern about delays in the processing of PEG's data applications for two DSEN-CNODES projects including the isotretinoin study.

The PEG project manager's email described that the ministry had notified PEG that these two projects would be put on hold and not forwarded to the Data Stewardship Committee for consideration without indicating who made that decision or why. The projects needed to be forwarded to the Committee to obtain data access. The PEG project manager requested that the ministry restore PEG's data access by September 28, 2012 as PEG was required to report to the DSEN-CNODES national coordinating office about B.C.'s willingness to participate in the two studies. The project manager described to us how he had emphasized to the ministry the importance of the isotretinoin study for public health outcomes:

> *A really, really important study coming up on the use of Accutane and pregnant women, and I specifically brought that up. With everything going on, that was a really important project to get done. I asked them if I could proceed with it.*
>
> . . .
>
> *That's probably the most important thing – and I had all of the evidence – was that project right there. I pleaded with [the ministry] to put the investigation aside and give us the – allow us to stay for the project. We knew that that was important. And [the ministry] rejected it. So we had to wait two years for that.*

The ministry responded on September 26, 2012 stating that, due to the ministry's comprehensive review of contracts and data access, they would not be in a position to approve PEG's request.

As a result of the data access suspensions, the CNODES research related to the effectiveness of the cautionary protocol was delayed for about 18-24 months. Dr. Dormuth told us that DSEN wanted the B.C. data to be included in the study so that the full impacts of the use of this drug in Canada could be understood. As we described in Chapter 12, the ministry took no meaningful steps to inquire into

10 David Henry et al., "Occurrence of pregnancy and pregnancy outcomes during isotretinoin therapy" *Canadian Medical Association Journal*, 25 April 2016 <http://www.cmaj.ca/content/early/2016/04/25/cmaj.151243>.

whether it had a factual basis for Dr. Dormuth's ongoing data suspension, and the initial decision was based on a mere allegation. Once the data suspension was lifted and Dr. Dormuth was able to proceed with the application to the Data Stewardship Committee, he received the data for the study.

Dr. Dormuth and his colleagues completed the study and submitted it for publication on January 22, 2016; it was published in the Canadian Medical Association Journal on April 25, 2016.[11] Their study described serious public health risks that arose from poor pregnancy prevention for women treated with this drug. The paper concluded that "adherence to the isotretinoin pregnancy prevention program in Canada was poor during the 15-year period of this study."[12] Among other findings the study noted that pregnant women were prescribed this drug frequently, which posed an elevated risk of harm to their unborn children. It is our understanding that the delay in receiving B.C. data resulted in a delay in completing the report and publicly releasing the results.

The cooling of the ministry's relationship to the DSEN arising from the 2012 investigation has impacted the ministry as well as the academic community. The ministry's ability to assume a national leadership role on drug safety and effectiveness, as well as its ability to identify gaps in scientific knowledge that it could address through its administrative health data have been reduced by the problems encountered since 2012.

The ministry informed us that it recognizes the impact on this relationship and is currently working to find a solution to improve B.C. data access for DSEN.

17.4.7 PUBLIC HEALTH EPIDEMIOLOGY AND ANALYSIS

The suspension and effective termination of the Blue Thorn contract temporarily but significantly undermined the Ministry of Health's ability to conduct its own population health surveillance to fulfill its role of monitoring, understanding and improving the health of British Columbians. As such, the ministry's ability to support program and policy decision making through the timely provision of data and information was harmed.

When the Blue Thorn contract was suspended, at least 18 initiatives were negatively impacted or otherwise cancelled outright. This was in addition to numerous *ad hoc* projects and requests that could not be accommodated once the ministry lost the expertise provided by Blue Thorn associates.

17.4.7.1 FEDERAL PROJECTS AND INITIATIVES

As we described in Chapter 12, B.C. was able to meet its basic project commitments to the National Population Health Study of Neurological Conditions by temporarily bringing back two former Blue Thorn associates to produce necessary data reports, albeit after those reports had been due. Producing the reports allowed the ministry to retain the funding it received for the project. The delay in producing the reports attributed to the national project being pushed back by approximately four months.

The project was designed to build upon the knowledge acquired through the Canadian Chronic Disease Surveillance System to determine how other conditions could be tracked in similar ways. Doing so promised to improve the understanding of rarer health conditions suffered by relatively small portions of the population. As explained to us by the two individuals who returned to the ministry to produce the basic reports, in their opinions the real value of the project was not in the production of the reports, but in the collaboration and knowledge dissemination between regions that improved the tools and algorithms by which researchers could better use administrative health data sets. B.C. was unable to participate in those discussions and collaborative meetings after September 13, 2012, including a major conference. As such, whatever improvements were made to the analytical tools at the core of the project after September 13, 2012, were accomplished without the input of Blue Thorn staff representing B.C., or the data validation they could provide.

B.C.'s participation in other national studies was impacted including:

11 David Henry et al., "Occurrence of pregnancy and pregnancy outcomes during isotretinoin therapy" *Canadian Medical Association Journal*, 12 July 2016, 188 (10):723-730 <http://www.cmaj.ca/content/early/2016/04/25/cmaj.151243>.

12 David Henry et al., "Occurrence of pregnancy and pregnancy outcomes during isotretinoin therapy" *Canadian Medical Association Journal*, 12 July 2016, 188 (10):723-730 <http://www.cmaj.ca/content/early/2016/04/25/cmaj.151243>.

- B.C.'s role in the Canadian Chronic Disease Surveillance System, which estimates the incidence and prevalence of chronic conditions and related risk factors and use of health resources, was compromised as a result of its temporary inability to produce required project data.
- A project examining health care costs by Body Mass Index (BMI) category was cancelled.
- A project anticipated to identify intentional injury cases and utility of physician billing data in the Canadian Chronic Disease Surveillance System that was to be funded by the federal government was not approved.
- B.C. was likewise unable to participate in a National Unintentional Injury Pilot Project.

17.4.7.2 PROVINCIAL PROJECTS AND INITIATIVES

A number of projects at the provincial level were impacted

- The Provincial Chronic Disease Surveillance program, designed to serve similar purposes as the national project described above, was delayed by seven months. This delay subsequently impacted other ministry information products such as First Nations annual chronic disease reports.
- Various reports by the Provincial Health Officer were delayed due to the ministry's limited ability to provide technical and data-related support, including reports detailing the health impacts of problem gambling and a surveillance of mental health and substance abuse disorders. Other joint PHO/Ministry reports detailing Child/Maternal Health Risk Analysis conducted with the support of the Child Health Program, Health Surveillance for Seniors and Risk Factors and Health Care Costs did not proceed or were delayed.
- The Representative for Children and Youth's Pathways Research Initiative, which was anticipated to provide chronic disease information about mothers and children among specific demographic groups, was not completed.
- Particularly relevant in the context of the current fentanyl crisis, an opiates addiction surveillance project, designed to supplement other addictions research by providing regularly updated and reported data to track opiate addiction among specific demographics and geographic regions, to a degree not possible through the use of PharmaNet data or physician reporting alone, did not proceed. The ministry did not do other similar work until the 2015/16 fiscal year.
- A program running parallel to the National Population Health Study of Neurological Conditions project, the ministry's own Surveillance of Neurological Conditions project, experienced delays equivalent to those of the national project.

17.4.7.3 CONCLUSION

These project delays and cancellations had a negative impact on the ministry's ability to provide key provincial health information to public decision-makers. Assistant Deputy Minister Arlene Paton alerted the investigation team and senior officials in the ministry to the likely impacts of the continued suspension of the Blue Thorn contract. However, we found little other evidence to suggest that other senior decision-makers or the investigation team meaningfully identified the impacts of the data suspension on provincial epidemiological research and surveillance and actively sought early resolution.

FINDINGS

F 53 Many staff across the Ministry of Health were negatively affected by the investigation, the dismissals, and the aftermath. Common impacts included fear, anxiety, loss of productivity at work, risk-aversion and, for some, health problems.

F 54 A number of projects in the fields of health research, evaluation, health education and public health were delayed or never completed due to suspension of data access.

18.0 / RECOMMENDATIONS

18.1 INTRODUCTION

Section 23 of the *Ombudsperson Act* provides that, after an investigation, the Ombudsperson may make "any recommendation the Ombudsperson considers appropriate." Without limiting this broad power, the Act lists the kinds of things the Ombudsperson can recommend:

(a) a matter be referred to the appropriate authority for further consideration,
(b) an act be remedied,
(c) an omission or delay be rectified,
(d) a decision or recommendation be cancelled or changed,
(e) reasons be given,
(f) a practice, procedure or course of conduct be altered,
(g) an enactment or other rule of law be reconsidered, or
(h) any other steps be taken.

Section 23 does not apply to investigations conducted pursuant to a referral from the Legislative Assembly or one of its committees. However, as I explained in Chapter 2, this exclusion, set out in section 10(5) of the Act, was intended to reflect that an investigation resulting from a referral by the Legislative Assembly or one of its committees involves a different kind of reporting process than is involved in the usual complaint process machinery set out in sections 23 to 26.

As the referral in this case made clear, the Select Standing Committee on Finance and Government Services (the Committee) fully expected me to make recommendations. Paragraph 7 of the Committee's Special Directions Regarding Referral to Ombudsperson (the Special Directions) states explicitly that this should be done: "Without limiting the Ombudsperson's reporting authority or purporting in any way to fetter the Ombudsperson's independent mandate to make the findings and recommendations he considers appropriate in accordance with his usual review standards regarding any matter arising from this referral in his final report ..."

Maladministration in public administration may impact a specific individual, a group of individuals, or be systemic and potentially impact many individuals or even the public at large. Similarly, a recommendation can be individually focused or be systemic in nature. A recommendation is not a legal remedy, although an accepted recommendation may sometimes result in an outcome that is similar to that which a person may have achieved had they pursued litigation or other adjudicative mechanisms to address their complaint. Because a specific recommendation is not an order, its efficacy depends on my ability to provide an informed, reasoned and responsible basis for making the recommendation. Its efficacy also obviously depends on the good faith of government to be willing to accept the recommendation as being reasonable.

In this chapter, I describe the recommendations that I believe are necessary to address the findings and conclusions I made as a result of the investigation referred to my office by the Committee. These recommendations fall under two broad categories: individual-specific and systemic.

Many individuals have been impacted, and even harmed, by events described in this report. Those harms are not easily addressed. Some of the individuals affected have already sought and received remedies through the courts and collective agreement processes.

My individual-specific recommendations may fall short of what some of the individuals think is appropriate and necessary to address their experience. Others may believe that court litigation or collective agreement grievance outcomes should represent the last word and that it is not appropriate for this report to recommend anything further. However, as required by the independent and impartial role of Ombudsperson, I have sought to make recommendations that I believe appropriately reflect the events described in this report and my findings.

I am confident that my recommendations regarding individuals will also have a broader effect. I believe that if government implements each of these recommendations focused on the impacted individuals it will contribute to the broader organizational reconciliation process that needs to occur.

In addition to the individual-specific recommendations, I have made recommendations that speak directly to systemic issues that came to light in this investigation. Some of these recommendations are aimed at preventing the events described in this report from recurring. As such, those recommendations relate to:

- standards for the conduct of public service investigations, including
  - government-wide investigation standards
  - investigations conducted by the Investigation and Forensic Unit of the Office of the Comptroller General
  - referral of matters under investigation to the RCMP
- Standards of Conduct for public service employees
- data access suspensions
- public service employment suspension and dismissal decisions, including:
  - dismissal for just cause
  - suspensions without pay of excluded public servants
  - independent oversight of dismissal decisions
  - public announcements about employee discipline decisions and referral to police
- the process for obtaining and responding to legal advice
- the BC Coroners Service policy on disclosure of personal records of deceased persons

Others of the systemic recommendations are aimed at remedying some of the broader impacts of the 2012 investigation. Those recommendations address:

- public interest disclosure legislation
- organizational reconciliation in the Ministry of Health
- evidence-informed research, evaluation and decision making

18.2 RECOMMENDATIONS PERTAINING TO EMPLOYEES, CONTRACTORS AND RESEARCHERS

In this report I made findings about the suspension and dismissal of the seven individuals whose employment was terminated, including the one who was constructively dismissed. I found that the government did not have sufficient cause to dismiss any of the employees. The decisions to do so were based on mistakes of fact and unreliable evidence following a flawed and unfair investigation process, a failure to consider whether certain conduct was condoned, an unnecessarily hurried decision-making process and misunderstandings about the stage of the investigation and the advice provided about the terminations. The public manner of their dismissal was disrespectful. The decision to publicly reference the involvement of the RCMP in a manner linked to their dismissal was wrong.

Contractors and researchers had their contracts and data access suspended primarily because of their professional connection to individuals named in the complaint. Based merely on suspicion, the Ministry of Health suspended data access for most of the contractors, and decided to suspend, cancel and then not renew a number of contracts. The process used to reach the suspension and cancellation decisions was unfair. The ministry's responses were excessive and the delays in resolving the contracting and data matters only compounded the unfairness of the ministry's decisions.

18.2.1 EX GRATIA PAYMENTS

An *ex gratia* payment is a discretionary payment made "out of goodwill" and where no legal obligation exists. There are examples of governments across Canada and internationally making such payments from a sense of moral obligation rather than because of any legal requirement.

In light of my findings about government conduct in this investigation – some of which that has only come to light as a result of this investigation – I am recommending *ex gratia* payments by government to individuals in the categories described below, as a concrete and meaningful acknowledgement by government that its conduct has caused harm to identifiable individuals.

In making this recommendation, I took into account the reality that each of the excluded employees and Dr. William Warburton brought litigation against government and each has settled that litigation with some payments involved. I have recognized that all such settlements represent a compromise, and that each of these parties in settling the litigation signed a release of any future claims. With regard to bargaining unit staff, I also considered that settlements were reached between the union and the government in respect of the grievances filed under the collective agreement in relation to their terminations.

These settlements do not, of course, preclude government from making *ex gratia* payments based on the information that has come to light in this investigation. That is particularly so where, as here, those who "settled" did so under a cloud of possible criminal investigation. In pursuing and settling civil claims while under the threat of a purported criminal investigation, these individuals and their families were in a particularly vulnerable position.

The amounts I am recommending below reflect my policy assessment as to what degree of *ex gratia* payment would appropriately respond to the circumstances of the individual in a particular class.[1] My purpose is not to add to settlements already concluded or to put individuals in the position they might have been if a court had ruled in their favour and made an award. Indeed, I recognize that some individuals will never fully recoup the financial losses they suffered as a result of the investigations and decisions made about them, and that some harms done cannot be quantified or fully resolved by an amount of money. Rather, what follows is recommended in the true spirit of an *ex gratia* payment: that it, viewed on its own terms and irrespective of any other payment made or not, is a discretionary payment made out of a sense of moral obligation, in solemn recognition of significant harms that have been brought to light and suffered by those affected.

1 I note that, even in the realm of civil damages, courts recognize that in the assessment of certain types of damages, such as non-pecuniary damages, there is no purely objective yardstick: *Andrews v. Grand & Toy (Alberta)*, [1978] 2 S.C.R. 229 at 261-62.

R 1

By June 30, 2017, government make an *ex gratia* payment in the amount of $75,000 to each of Dr. Malcolm Maclure, Dr. Rebecca Warburton, Ron Mattson, Robert Hart, Ramsay Hamdi, David Scott, and the estate of Roderick MacIsaac.

This recommendation is based on my view government conducted itself in an unfair manner in dealing with these employees and that they suffered as a result. Government has a responsibility to treat its employees fairly. Government's unfair conduct in relation to the investigative process, the suspensions and the public manner of the dismissals, including the press conference and the reference to the RCMP, were particularly significant in the case of these seven individuals. Also relevant for these individuals is the length of time government took to realize that its own actions were wrong, which prolonged the length of time that these individuals had a cloud of suspicion hanging over them. Finally, in a manner that is unusual for matters of employment discipline, all of this occurred in the public spotlight.

R 2

By June 30, 2017, government make an *ex gratia* payment in the amount of $50,000 to each of Mark Isaacs, Dr. Colin Dormuth and Dr. William Warburton.

This recommendation is based on my view that government conducted itself in an unreasonable manner in dealing with these contractors and that its actions harmed them. All of these contractors were told that they were the subject of the Ministry of Health investigation, but none was provided with adequate notice of the allegations against them or with the particulars about their impugned conduct, and none was given a fair opportunity to respond to the ministry's concerns. I also considered the length of time government took to address the issues that led to these contractors being identified as subjects of the investigation, as well as the impacts that this delay had on the contractors' professional standing and reputation.

R 3

By June 30, 2017, government make:

a. an *ex gratia* payment in the amount of $15,000 to each of six public servants who were also subjects of the investigation; and,

b. in the case of the three individuals in paragraph (a) who were disciplined, reverse the financial impact of that discipline and remove the disciplinary findings from their employment record.

This recommendation is to recognize that government conducted itself in an unfair manner in dealing with these public servants and that its actions harmed them. In reaching the amount recommended, I considered that, as a result of government's conduct, these public servants suffered various harms, including loss of career opportunities and unjustified employment discipline.

The three individuals who were disciplined are not identified by name in this report, but their circumstances are generally described. The identities of these individuals will be provided to government along with this report.

R 4

That government:

a. By September 30, 2017:

   i. Establish a compensation fund in an amount not less than $250,000

   ii. Identify and contact individuals (other than individuals identified in the other *ex gratia* payment recommendations) who were employees, associates or research subcontractors of:

      1. Resonate

      2. Blue Thorn Research and Analysis Group

      3. the Therapeutics Initiative

who were impacted by the data and contract suspensions and cancellations and invite them to make applications to the fund.

b. By March 31, 2018 make *ex gratia* payments to the applicants from the fund on a fair and equitable basis, taking into account the impact the data and contract suspensions and cancellations had on them.

These payments are to recognize that government conducted itself unreasonably and unfairly in how it dealt with these contracts, and that individuals who worked on the deliverables under those contracts suffered as a result. The individuals working on these contracts were fulfilling a role critical to the ministry, in some cases akin to that of a government employee. Because of the investigation, these individuals not only lost their direct income, but they were deliberately prevented from accessing ministry data, which impacted their ability to obtain gainful future employment in their areas of expertise, some for a lengthy period of time. Thus these payments are to be made to the individual associates impacted rather than to the corporate entity that employed them.

I appreciate that complexities can arise in the development of such a compensation process. If in establishing the overall terms of the compensation scheme the ministry is unclear as to the purpose or intent, I am prepared to provide my advice, if asked.

R 5

By June 30, 2017, government make an additional *ex gratia* payment in the amount of $50,000 to each of Ron Mattson and Mark Isaacs.

This recommendation is based on my view that Ron Mattson and Mark Isaacs were treated in a manner that so departed from the standard expected of government that it was oppressive. Mr. Mattson was dismissed from employment for cause even though it was apparent at the time there was not just cause. This was wrong. Mr. Isaacs, a long-time, highly regarded and trusted contractor, was very badly treated by the ministry even though his conduct was completely proper which was apparent at the time.

18.2.2 REOPENING THE SETTLEMENT OF THE GRIEVANCES

Each of the excluded public servants who had been dismissed in 2012 sued government. That litigation settled on various dates from February 2014 to December 2015.

As outlined in Chapter 11, and consistent with the collective agreement process, grievances were initiated by the BCGEU on behalf of the three bargaining unit staff who had been dismissed. The grievances did not proceed through to arbitration. They were settled in June and September, 2013.

At the time the grievances were resolved, government was only just beginning to reappraise the dismissals and related government conduct. Furthermore this reappraisal was, in its initial stages, primarily occurring in the context of the excluded staff litigation which, on behalf of government, was handled separately from the bargaining unit staff grievances. It was only over the ensuing months beginning in the latter half of 2013 that government began to view the dismissals in a different light.

In my view, had the grievances of the three bargaining unit staff taken longer to resolve, it is likely that the terms of the resolutions of the grievances would have taken into account government's broader reappraisal which informed its handling of the litigation involving the excluded employees.

Some might argue a settlement is a settlement, and that whatever the knowledge and circumstances that prevailed at the time, the parties must, in the interests of finality, live with the outcome of the resolution of employment disputes. Legally, that position is unassailable. However, I am aware of nothing in the law preventing the parties to a collective agreement, in exceptional circumstances, from agreeing to set aside their settlement, enter into a new agreement or ask an arbitrator to make a ruling based on facts agreed to by the parties.

In my view, the circumstances here are exceptional. Since the 2013 settlements were entered into, there has been a fundamental reappraisal of the underlying issues, both within government and in this report. In

these circumstances, an unbending reliance on finality would serve to prevent, rather than permit, the ability of government to put things right.

I make this recommendation with two important qualifiers. First, I am well aware that this is not a matter on which government can act alone – both the union and the government must agree if the previous settlement is to be set aside in favour of another process. Second, I think it would be going too far to recommend a re-opening that would expose all parties – both the employees and the government - to the prospect of fully re-litigating all of the evidentiary issues that would inform "just cause" proceedings. That would just promote more positional and adversarial conduct, could result in more harm to individuals and would inevitably prolong what has already gone on for far too long.

I appreciate that the *ex gratia* payments I have recommended above may complicate any new resolution and the parties will have to decide how such payments affect a new agreement. I would say that, as noted earlier, the *ex gratia* payments are based on different considerations, and they are the same for both the excluded employees and the bargaining unit staff regardless of the settlements in each case. The current recommendation is based on my view that the bargaining unit settlements themselves should be revisited.

R 6

If by June 30, 2017 the BCGEU, following consultation with David Scott, Ramsay Hamdi, and a representative of the estate of Roderick MacIsaac, approaches government about revisiting any or all of the June and September 2013 grievance settlements, that government:

a. Enter into good faith negotiations with the BCGEU concerning the replacement of the existing settlements with new settlements, and

b. If new settlements cannot be reached (or the parties prefer this option as their primary option), make its best efforts to work with the BCGEU to develop a Statement of Agreed Facts concerning the circumstances of the dismissals, which Statement the parties can agree to place before a labour arbitrator pursuant to the collective agreement, in order to allow for a proper adjudication of damages. Whether the existing settlements would terminate upon tendering the Statement of Agreed Facts, or after the labour arbitrator's decision, can be addressed by the parties as a matter of labour law.

18.2.3 APOLOGIES

An apology is often an important step in allowing a party that has been wronged to move forward and even to forgive. In our 2006 report, *The Power of an Apology*, we wrote:

> *Empathy is expressed when a person expresses regret for harm to another and acknowledges the other's hurt. When a person apologizes for harm done to another, it is implied that the person acknowledges the wrongdoing and is taking responsibility for what happened. It is the combination of acknowledging the wrongdoing and accepting responsibility that seems to give strength to an apology.*[2]

With the exception of the apology made in 2014 to the family of Roderick MacIsaac, government has not apologized for what happened. It is time that it do so. Apologizing will serve to clear the path to reconciliation, a matter that is dealt with elsewhere in this report.

R 7

By May 31, 2017, government make a public statement that acknowledges and apologizes for the harm caused by the Ministry of Health

2 Office of the Ombudsperson, *The Power of an Apology: Removing the Legal Barriers*, Special Report No. 27 (Victoria, BC: February 2006), 4 <https://bcombudsperson.ca/sites/default/files/Special%20Report%20No%20-%2027%20The%20Power%20of%20an%20Apology-%20Removing%20Legal%20Barriers.pdf>.

investigation and the decisions that resulted, including the employee suspensions, employee discipline and terminations, contract suspensions and terminations, and unwarranted data suspensions.

R 8

By July 31, 2017, government issue a personal apology to each of Dr. Malcolm Maclure, Dr. Rebecca Warburton, Ron Mattson, Robert Hart, Ramsay Hamdi, David Scott, Dr. William Warburton, the family of Roderick MacIsaac, Mark Isaacs, Dr. Colin Dormuth, Contractors 1 and 2, and the six public servants referred to in recommendation R3.

The apologies referred to in the above recommendation should not be written as form letters. They should recognize each individual's circumstances and the harm caused to him or her by the investigations and resulting decisions. This should include government's willingness to consult with the individual to whom it is apologizing in order to write a letter that is appropriate to that person's circumstances.

R 9

By March 31, 2018, the Ministry of Health issue a written apology to each of the individuals to whom an *ex gratia* payment is made from the compensation fund established in recommendation 4.

R 10

By March 31, 2018, the Ministry of Health issue a written apology to each person not included in the above recommendations, to whom it sent a data demand letter in 2012 and 2013 as a consequence of the investigation.

18.2.4 PERSONAL PROPERTY OF THE TERMINATED EMPLOYEES

The Ministry of Health did not ensure that the fired employees and one contractor had adequate opportunity to identify personal belongings before the investigation team packed up the contents of these individuals' offices.

R 11

By May 31, 2017, the Ministry of Health make arrangements for each of Dr. Malcolm Maclure, Dr. Rebecca Warburton, Ron Mattson, Robert Hart, Ramsay Hamdi, David Scott, Dr. William Warburton and a representative for the estate of Roderick MacIsaac to review the contents of the boxes of material packed up from their offices for the purpose of identifying, and having returned to them, any books, papers, articles or other personal belongings.

18.2.5 INVESTIGATION CONDUCTED BY THE INVESTIGATION AND FORENSIC UNIT OF THE OFFICE OF THE COMPTROLLER GENERAL

I found that the investigation conducted by the Investigation and Forensic Unit (IU) of the Office of the Comptroller General had procedural flaws and the IU's final report contained a number of inaccuracies and unsupported findings and inferences.

By naming a number of individuals in its final report, the IU implicated them in potential wrongdoing and invited negative inferences about their conduct. Many of these suggestions and negative inferences were unjustified and not supported by the evidence. Fortunately, most of these individuals have not been publicly identified in connection with that report. When the report was leaked, however, government was required to inform all of these people that they had been named in the report. For many of them, it was the first time they became aware they had been subject to any investigation or otherwise implicated in the Ministry of Health investigation.

As described in Chapter 14, the impacts arising from the report were magnified when the report was disclosed to the media and then published, months after the terminated

employees had settled their litigation and after government had received advice from its legal counsel that the report contained statements that were untrue and were potentially defamatory. Despite its awareness that the report contained inaccuracies, government did not publicly defend the individuals named in the articles.

Key components of the settlement agreement reached between the government and both Dr. Maclure and Dr. R. Warburton focused on the reputational damage the government's action had caused them and on mitigating and containing that damage. The subsequent publication of some of the content of the IU report and the failure of government to publicly defend Dr. Maclure and Dr. R. Warburton undermined the settlements the parties reached and threw the government's earlier positive statements about their conduct into question.

In my view, government needs to take steps to acknowledge and address the impacts on these individuals resulting from the public disclosure of the report.

R 12

By June 30, 2017, government issue a public statement confirming that the ministry has withdrawn the final report of the Investigation and Forensic Unit, and acknowledge that the report contains inaccuracies and will not be relied on.

R 13

By June 30, 2017, the Ministry of Finance send a letter of apology to each of the individuals named in the report of the Investigation and Forensic Unit, who it notified following the unauthorized disclosure of the report, confirming that the ministry has withdrawn the report and that the report will not affect the ability of those individuals to work for or with government in the future should they wish to do so.

R 14

By June 30, 2017, government make an additional *ex gratia* payment in the amount of:

a. $25,000 to Dr. Malcolm Maclure

b. $25,000 to Dr. Rebecca Warburton

I recommend this *ex gratia* payment knowing that it may remain open for both Dr. Maclure and Dr. R. Warburton to begin legal proceedings seeking damages alleging injury to reputation arising from the leak of the IU report. Whether such litigation is commenced, and what result it might have, is at this stage speculative. In my view, *ex gratia* payments are appropriate.

While this is implicit in an *ex gratia* payment, I will add, for clarity, that in my view government ought not to require Dr. Maclure or Dr. R. Warburton to sign a release as a condition of obtaining this payment. Should either of them successfully bring an action concerning the impact on their reputation (an action that would have to be decided on its own terms), it will be for the court to determine whether it is appropriate to set off any amount paid to these individuals according to this recommendation against any damages award the court makes.

18.2.6 HONOURING RODERICK MACISAAC'S MEMORY

Before he was suspended and then ultimately fired from his co-op position, Mr. MacIsaac was a PhD student at the University of Victoria who hoped to have a career in the public service. I found that Mr. MacIsaac was treated unfairly in the investigation and that the decisions to suspend and then terminate his employment were wrong. Mr. MacIsaac was poorly served by the public service he hoped to one day join on a permanent basis.

In my view, an appropriate way to honour the memory of Mr. MacIsaac is for the province to provide a financial endowment for a scholarship for doctoral studies at the University of Victoria.

R 15

By September 30, 2017, government provide funding in the amount of $500,000 to endow a scholarship for PhD candidates at the University of Victoria.

An endowment of this amount will generate an annual scholarship consistent with other doctoral student awards. I anticipate that the University of Victoria would consider public administration, health research, statistical or quantitative analysis as potential areas of focus for the scholarship, and would consult with Mr. MacIsaac's family, to the extent that they wish to be involved, in establishing the scholarship.

In working as a co-op student, Mr. MacIsaac was part of a long tradition in the B.C. public service of supporting cooperative education by students – including at the Ministry of Health. Students and the public service alike benefit from the contributions that co-op students make during their work terms.

R 16

By September 30, 2017, the Ministry of Health establish an annual staff award for excellence in training, mentoring and supporting co-op students.

18.3 SYSTEMIC RECOMMENDATIONS

18.3.1 STANDARDS OF CONDUCT FOR PUBLIC SERVICE EMPLOYEES

Government requires its employees to comply with its Standards of Conduct as a condition of employment.[3] Those standards include the disclosure of any potential conflicts of interest.

Assessment of conflict of interest can, depending on the circumstances, be complex. Neither the Ministry of Health investigation team nor the Office of the Comptroller General's Investigation and Forensic Unit (IU) team carried out a reasonable assessment of whether the facts gathered pointed to an actual or perceived conflict of interest; and if the facts did suggest that, whether the employee had disclosed the conflict such that the ministry was aware of and had condoned the circumstances giving rise to the conflicts. As a result, the investigators and decision-makers incorrectly concluded that employees were in conflicts of interest or otherwise in breach of the Standards of Conduct. Additionally, the investigators and decision-makers we spoke with had vastly different, and sometimes erroneous, views about what constitutes a conflict of interest and how, where one might exist, it can be properly managed.

What is clear is that the best approach to address potential conflicts of interest involves early identification, a reasoned and careful consideration about the nature, scope and severity of the conflict, clear direction and complete and accessible documentation. By putting everything on the table, employees can ensure that they are not inadvertently contravening the Standards of Conduct and, where appropriate, government and employees can take steps to mitigate conflicts. Requiring employees to disclose conflicts of interest promotes public confidence that government employees are solely acting in the public interest.

As discussed in detail in Chapter 3, the existing Standards of Conduct require employees to disclose potential conflicts of interest, but do not provide sufficient guidance as to the steps government should take once a potential conflict is disclosed. The information we received from the Public Service Agency (PSA) made clear that it is up to employees and their supervisor to resolve the matter on a case-by-case basis. While it is correct that conflict of interest must be dealt with on an individualized basis, the underlying process to arrive at those individualized decisions ought not to be vague or ad hoc. The current lack of process for considering and addressing questions of conflict of interest is not helpful.

With regard to assessing conflicts of interest, I find the following approach instructive:

> *A conflict of interest is not an actual occurrence of bias or a corrupt decision but, rather, a set*

3 British Columbia, "Conflicts of Interest," *Standards of Conduct for Public Service Employees.*

> *of circumstances that past experience and other evidence have shown poses a risk that primary interests may be compromised by secondary interests. The existence of a conflict of interest does not imply that any individual is improperly motivated. To avoid these and similar mistakes and to provide guidance for formulating and applying such policies, a framework for analyzing conflicts of interest is desirable.*[4]

In my view, analyzing conflicts of interest within an appropriate framework promotes analytically sound and more consistent decision making. It also increases the likelihood that decision-makers can document and communicate their reasons clearly and effectively.

R 17

By March 31, 2018, the Public Service Agency develop and implement a policy framework for assessing situations to determine whether a real or perceived conflict of interest exists. The framework should:

a. Require employees to disclose circumstances that may give rise to a real or perceived conflict of interest, including any outside remunerative work.

b. Specifically require issues of conflict of interest to be addressed at the outset of employment and on an ongoing basis where the employee's job function or less than full-time employment necessarily contemplates external remunerative work or external affiliation.

c. Where a disclosure is made by an employee under paragraph (a), the employer shall identify the specific work duties of the employee and the underlying government interests that are relevant to the circumstances.

   i. Identify the specific personal interests of the employee that are relevant to the circumstances.

   ii. Analyze whether those interests conflict, or could be perceived to conflict, in a way that impairs the employee's ability to act in the public interest, undermines the public's confidence in the employee's ability to discharge work responsibilities, or undermines the public's trust in the public service.

   iii. Decide whether the circumstances give rise to a perceived or actual conflict of interest, and, if they do, consider whether there are steps that government or the employee must take to address or mitigate the conflict such that it does not pose an unacceptable risk to government or the public interest.

   iv. Document, on the employee's personnel file, and elsewhere as is required in the circumstances, the reasons for the conclusion reached and the directions, if any, to be followed. A copy of the reasons should be provided to the employee.

   v. To the extent reasonable and necessary, be transparent within the organization about how the conflict of interest has been addressed so that misunderstandings are minimized.

4 National Center for Biotechnology Information, *Conflict of Interest in Medical Research, Education, and Practice* <https://www.ncbi.nlm.nih.gov/books/NBK22937/>. Accessed 27 February 2017.

R 18

By March 31, 2018, every ministry and government agency whose employees are subject to the public service Standards of Conduct assign a senior and fully trained staff member the task of assessing and providing advice to the employee and their supervisor about disclosed prospective conflicts of interest in their organization.

In making these two recommendations, I am mindful that the March 2013 Report of the Review of the *Members' Conflict of Interest Act* (conducted by the province's Select Standing Committee on Parliamentary Reform, Ethical Conduct, Standing Orders and Private Bills) made two recommendations concerning senior public servants' compliance with the Standards of Conduct. Those two recommendations have not been implemented. I believe that the two recommendations I have made do not preclude implementation of the 2013 recommendations.

As well, I am mindful of the March 2017 report of the Auditor General, *An Audit of BC Public Service Ethics Management*, in which the Auditor General makes recommendations about the Standard of Conduct and ethics. I am of the view that the two recommendations I make work well with those of the Auditor General, and that implementation of one office's recommendations does not preclude implementation of the other office's recommendations.

18.3.2 STANDARDS FOR THE CONDUCT OF PUBLIC SERVICE INVESTIGATIONS

I found that the investigations by the Ministry of Health and IU teams were conducted unfairly and ineffectively and resulted in decisions being made on the basis of unreliable, incorrect and incomplete conclusions. Neither team used or applied acceptable investigative standards, including principles of administrative fairness.

The Ministry of Health investigation team had no unifying standard or policy to guide them through a multi-faceted investigation. The PSA did not yet have in place its policy to guide the human resources component of the investigation, and even many of the practices that had been developed were not followed. Neither the Office of the Chief Information Officer nor the ministry articulated principles of administrative fairness for the investigation team to follow.

18.3.2.1 STANDARDS FOR HUMAN RESOURCE INVESTIGATIONS

In response to the findings made by Marcia McNeil in her December 2014 review report, the PSA has implemented new policies governing the conduct of investigations. The PSA has created an Investigation Best-Practice Protocols Checklist which emphasises key administrative fairness and natural justice principles. The checklist asks the following:

- Was the investigation conducted in an impartial manner by someone who is neutral?
- Was the investigation conducted objectively without having a pre-determined hypothesis or outcome in mind?
- Were respondents provided with the opportunity to have representation, e.g. a union shop steward, or an analogous representative for management respondents, during interviews?
- Were the parties and witnesses properly informed of their rights and responsibilities during the investigation process, including expectations surrounding confidentiality and retaliation?
- Was the respondent given sufficient details about the nature of the allegations prior to being asked to respond?
- Did the interviews include a sufficient level of open-ended questions to encourage full disclosure?
- Was the respondent given a full opportunity to respond to all allegations that could form the basis of disciplinary action?
- Did the investigator examine and assess all the relevant evidence that was uncovered or disclosed during the investigation, including potential alibis, alternate explanations, and/or mitigating circumstances?
- Were all relevant witnesses (as identified by the parties, other witnesses or the investigator) interviewed?

- Based on all the evidence, has the investigator determined that all or some of the allegations made against the respondent have been proven on a balance of probabilities (51% or greater)?

PSA policy requires that this checklist be completed and submitted prior to the dismissal for cause of a public service employee.

In addition to the checklist, the PSA has developed and implemented new training materials that were not in place prior to this investigation. These materials address many of the same administrative fairness and natural justice principles in the checklist.

Together, the checklist and the training materials have gone a considerable way to addressing the systemic issues around the conduct of PSA investigations that we identified in this report.

The changes made by the PSA since the McNeil report have, understandably, focused primarily on the details of human resource investigations. We also saw in this investigation that there was confusion or difference of opinion about who was responsible for ensuring human resource investigatory processes were observed. Clarifying executive accountability between the PSA and the ministry that employs the individual who is the subject of the investigation would be beneficial going forward.

R 19

By March 31, 2018, the Public Service Agency revise its existing Accountability Framework for Human Resource Management to ensure a clear allocation of responsibility among senior executives of PSA and of line ministries responsible for ensuring that any internal human resource investigations occurring under their leadership:

a. are conducted in accordance with the principles of administrative fairness,

b. have a clearly articulated scope and focus, both of which are reassessed on a regular basis, and

c. have appropriate lines of reporting.

R 20

By March 31, 2018 the Public Service Agency undertake, and publish the results of, an independent compliance review of its investigatory policies established in response to the McNeil Review.

18.3.2.2 INVESTIGATIONS CONDUCTED BY THE OCG INVESTIGATION AND FORENSIC UNIT

Ensuring that the Investigation and Forensics Unit of the Office of the Comptroller General is able to carry out fair, effective and accurate investigations is vital. Public confidence in government's financial probity and integrity relies on a number of institutions including the Office of the Comptroller General. For this reason the IU's limitations identified in this report need to be addressed.

As described in Chapter 14, the IU has undergone a review by KPMG since its report into the Pharmaceutical Services Division was completed. KPMG highlighted some of the same deficiencies as we identified in this report and made recommendations to address those issues. Since KPMG issued its report, the IU has begun to implement those recommendations. Those KPMG findings and recommendations are broadly consistent with what we observed.

One of the positive steps the IU has taken since KPMG finalized its report is to begin to develop a policies and procedures manual. A solid investigative manual will result in more reliable investigative outcomes. More work needs to be done on the draft manual to integrate administrative fairness, but it is a good start. Administrative fairness needs to be understood as integral to all aspects of the IU's work. The language of fairness needs to be integrated meaningfully with the IU's understanding of how the IU assesses and determines the reliability of evidence.

R 21

By September 30, 2017, to ensure that the principles of administrative fairness are appropriately exercised by the Investigation and Forensic Unit (IU):

a. The IU implement a program of ongoing professional development on administrative and procedural fairness for its investigators and any employees leading an investigation.

b. The IU revise its draft policies and procedures manual to adequately integrate the principles of administrative fairness into its investigative approach.

c. The Comptroller General review each investigative plan developed by the IU to ensure that the plan's scope is appropriate, and within jurisdiction, and the office can adequately resource the investigation as set out in the plan.

d. The Comptroller General reassess the investigative plan on a regular basis, in consultation with the IU, and authorize adjustments to investigative scope or resources as necessary.

R 22

By September 30, 2017 the Ministry of Finance provide a report to the Auditor General on the progress of implementing each recommendation of the KPMG report. Such reporting is to continue quarterly or on such other schedule and for as long as specified by the Auditor General.

18.3.2.3 REFERRING MATTERS UNDER INVESTIGATION TO THE POLICE

The Ministry of Health and the IU first contacted the RCMP in August 2012. At the first meeting, the RCMP made it clear that it would decide whether or not to conduct an investigation only after receiving a final report from the ministry's investigation team. The RCMP did not commit to conducting an investigation nor did it ask the ministry to take any specific steps on its behalf.

Reporting a matter of employee misconduct to police for the purpose of criminal investigation is a serious matter. Of course there are circumstances where it is necessary and in the public interest to do so. However, in my view the decision-making structure for doing so is inadequate. There are various ways in which this can be addressed including refining the criteria to be applied to such decisions as well as creating an approval process that requires the reasons be documented for a senior decision maker. The balance for government to strike is to avoid creating too high a threshold for reporting a matter to the police (that would discourage appropriate cases being reported) while building in safeguards to avoid unnecessary, excessive and potentially damaging reporting.

At the risk of stating the obvious, the above comments are directed to reporting non-urgent matters. Matters of public safety or emergency raise different issues.

As detailed in this report, despite being advised by the RCMP that no decision about whether the RCMP would commence an investigation until a final report was received from the ministry, the RCMP were repeatedly provided with significant amounts of personal information about employees. The IU also maintained regular contact with the RCMP during its investigation.

Given the significant consequences that can flow from a decision to refer a matter to the police, public service investigators should have clear guidelines to assist them in determining:

- when it is appropriate to refer a matter to the police
- what information can and should be provided to police absent a legal obligation
- the pre-conditions that must be established prior to sharing information with the police

Government has recent experience addressing similar concerns. For example, after two sawmill tragedies, steps were taken by government to improve the investigation processes used by WorkSafeBC in cases that may lead to criminal proceedings. It is my belief that such an approach would be helpful in establishing ways for ministries to

work more appropriately with police. This type of policy guidance is important not only to prevent the unnecessary handing over of sensitive information to the police, but also to ensure that authorities are provided with evidence that would be admissible at a potential future criminal trial, in cases where charges are laid.

R 23

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.

18.3.3 DATA ACCESS SUSPENSIONS

The problems with the process that the Ministry of Health followed in making determinations to suspend a number of individuals' access to data are identified earlier in this report.

We identified the following flaws in the process that the Ministry of Health followed in relation to the data access suspensions:

- There was insufficient evidentiary basis for the decisions;
- In a number of cases, the Ministry of Health failed to notify individuals that their data access had been suspended, did not provide reasons for the suspension, and did not provide the individuals with an opportunity to respond to the allegations against them;
- The investigation was not conducted in a timely way and, as a result, the suspensions went on for much longer than was reasonable or necessary; and
- The Ministry of Health did not adequately consider the impacts of many of the data access suspensions on health research and whether and how those impacts could be mitigated or addressed.

R 24

By December 31, 2017, following consultation with the Information and Privacy Commissioner, the Ministry of Health create new guidelines for making decisions about suspending access to administrative health data. The guidelines should address the flaws in ministry practice that we identified in this report including better defining the threshold for data suspensions in cases where there is only an unconfirmed suspicion of a data breach.

18.3.4 PUBLIC SERVICE EMPLOYMENT SUSPENSION AND DISMISSAL DECISIONS

18.3.4.1 DISMISSAL FOR JUST CAUSE

In response to Marcia McNeil's report, the PSA made a number of changes to its policies and practices regarding investigations and employee discipline. For example, the PSA has established practices requiring that ministries seek PSA advice prior to terminating employees, and requiring the Deputy Minister of the PSA to confirm that "due process" has been followed prior to the termination of employees for just cause. The PSA representative must also indicate whether legal or labour relations advice has been sought before a Deputy Minister terminates an employee for cause.

These are commendable changes. Nevertheless, we also heard evidence that the PSA does not always follow these policies. Obtaining legal or labour relations advice prior to terminating employees for just cause is an important step toward ensuring that government conducts itself in accordance with its contractual obligations to its employees

and that government does not assume undue exposure to wrongful dismissal claims.

R 25

By June 30, 2017, the Public Service Agency (PSA) and the Head of the Public Service develop and implement a policy that requires the following steps to take place before a Deputy Minister dismisses an employee for just cause under section 22(2) of the *Public Service Act*:

a. In relation to excluded employees, the PSA obtain a written legal opinion about whether there are sufficient grounds to support the termination. The PSA should provide its lawyer with sufficient background and file material for the lawyer to assess the evidentiary strength of the government's just cause position.

b. In relation to included employees, the PSA obtain written senior labour relations advice about the strength of government's just cause position from one of its senior labour relations advisors. The PSA should provide its advisor sufficient background and file material for the advisor to assess the evidentiary strength of the government's just cause position.

c. The Deputy Minister with authority to dismiss be required to review and consider the PSA's advice, and the legal advice, prior to making a decision about whether to terminate an employee for cause. Such consideration should be confirmed in writing.

18.3.4.2 SUSPENSIONS WITHOUT PAY OF EXCLUDED PUBLIC SERVANTS

The law provides that it is not open to an employer to suspend an employee without pay in the absence of statutory or contractual authority to do so. No such authority existed here.

The *Public Service Act* provides that an employee may be suspended "for just cause from the performance of his or her duties." The Act does not expressly address suspensions without pay, nor does it address suspensions in the absence of just cause, such as suspensions "pending investigation" which were imposed in this case.

As described in this report, suspensions without pay pending investigation are problematic because they may place undue pressure on the investigator and the decision-maker to act quickly. Suspensions without pay may also increase the prospect of an employer becoming wedded to the allegations against an employee because the employer has already taken the significant steps of denying the employee the ability to carry out his or her employment duties and of ceasing to pay his or her salary. Moreover, excluded employees have no mechanism – other than litigation – to challenge a decision to suspend their employment without pay.

The PSA has indicated that it has changed policy to generally suspend employees with pay rather than without pay. They indicate there may be circumstances where suspension without pay is justifiable. There is no current express legal foundation for this approach. Depending on the exception the PSA wishes to maintain, regulations under the *Public Service Act* or an amendment to that Act may be required and appropriate safeguards included. I note that this has not been done to date.

R 26

Effective immediately, government cease its practice of suspending excluded employees without pay pending an investigation in the absence of authority in the *Public Service Act* to do so.

18.3.4.3 OVERSIGHT OF DISMISSAL DECISIONS

As described in this report, a number of issues arose in the conduct of the 2012 investigation that led to the employee dismissals. I believe the public service would benefit from a process of regular oversight of dismissal practices, aimed at identifying systemic issues and recommending improvements. This oversight process would not act as a barrier requiring termination decisions be approved

through the process in advance, nor as an appeal mechanism for a terminated employee after a termination decision has been implemented. Instead, it would serve as an after-the-fact compliance assessment of whether government has complied with its legal (and, as applicable, collective agreement) requirements and policy requirements.

I believe this oversight function is best provided by someone who is independent from the public service and can provide impartial and objective recommendations for systemic improvement. In my view, this expanded oversight role should be conducted by the Merit Commissioner, who is an independent Officer of the Legislature and is already empowered under the *Public Service Act* to conduct reviews and audits to ensure that the merit principle is upheld in public service hiring decisions. The Merit Commissioner's existing expertise in overseeing the PSA's compliance with its legal and policy requirements makes it the best fit among the independent officers to oversee similar compliance when employment is ended.

In this context, oversight by the Merit Commissioner would not grant additional remedies to individuals whose employment has been terminated. The role would not be to determine whether a just cause existed for the termination. Both bargaining-unit employees and excluded employees would continue to benefit from the remedies provided in the applicable collective agreements (for unionized staff) or through the express and implied terms of the applicable employment agreement (for non-unionized staff).

As such, the findings of any review conducted by the Merit Commissioner would be inadmissible in any proceedings brought under the collective agreement or in a wrongful dismissal action. Moreover, neither the Merit Commissioner nor their staff should be subject to being compelled to be witnesses in any proceeding in connection with this expanded oversight role. The Merit Commissioner's reviews should occur *after* any individual remedies have been completed or the time for seeking such remedies has expired. In this way, the role of the Merit Commissioner would be to provide independent assurance that the process followed complied with all requirements arising from law or government policy without disrupting the existing legal or collective agreement process that apply to a specific case.

This newly proposed role for the Merit Commissioner would expand the scope of the position's current jurisdiction and would impact the workload of that office and the staff. As a result, government would need to ensure that adequate resources are provided to the Merit Commissioner to enable the office to act in this new role. As well, government would need to consult with the Merit Commissioner on the details of the required legislative changes, including whether the review should be of all dismissals or just those selected by the Commissioner.

R 27

By March 31, 2018, government introduce legislation for consideration by the Legislative Assembly to amend the *Public Service Act* to provide the Merit Commissioner with the authority to:

a. Conduct reviews of all public service dismissals for just cause, to ensure adherence to public service standards and legal requirements. Such reviews are to take place following the completion of all labour relations or litigation proceedings related to the termination.

b. Publicly report the results of these reviews, along with whatever recommendations the Merit Commissioner considers appropriate in the circumstances.

18.3.4.4 ANNOUNCEMENTS ABOUT EMPLOYEE DISCIPLINE

By announcing publicly that it had dismissed individuals and had reported this matter to the police, government wanted to show that it took the matters under investigation seriously. I concluded that government, in taking this approach while the investigation was still ongoing, did not give enough consideration to the impact the announcement would have on the ongoing investigation and on individuals or the potential for such an announcement to create unnecessary public alarm.

Following the McNeil review, the Public Service Agency and Government Communications and Public Engagement developed guidelines for government communications

regarding personnel matters. These guidelines address how to manage both public and internal communications about human resource matters consistently with government's legal obligations to protect individual privacy, while also supporting confidence in public administration. According to the guidelines, government should not disclose – during or after an employee investigation – the name of the individual being investigated and any disciplinary consequences that result unless there is a compelling reason for doing so. This is important guidance for public servants considering recommending a public announcement in human resource situations.

Making such guidelines public would increase employee awareness about how and when government will communicate internally and publicly about personnel and employee discipline matters, and would promote public accountability and transparency.

The absence of a written policy regarding public disclosures of police involvement in employment matters meant that the issue was dealt with in a "one off" manner. Questions of whether to disclose initial contact with police, particularly at an early stage, ought to be dealt with in a structured, principled, and rigorous manner that considers the various competing interests. Such a policy would also allow government to take into account the communications policies in use at law enforcement agencies so that where a police service would refuse to confirm or deny a matter is under investigation, that policy is not rendered meaningless by government's disclosure. This is particularly the case where, such as occurred in this case, the police had expressly indicated they would not even determine whether to initiate an investigation until government's internal investigation was complete.

Government communications policy should directly address the question of whether, and if so when, referral to the police ought to be included in a public announcement.

R 28

By June 30, 2017, the Public Service Agency and Government Communications and Public Engagement make public their policies regarding internal and external communications about personnel matters.

R 29

By June 30, 2017, the Public Service Agency and Government Communications and Public Engagement develop and make public a policy on announcing police referrals related to the conduct of a public servant. The policy should clearly state that unless there is an immediate risk to public health, safety or other similar exceptional circumstances, government should not publicly announce that it has referred the conduct of a public servant to the police prior to Crown Counsel approving charges.

18.3.5 ENSURING EFFECTIVE EXECUTIVE TRANSITIONS

The senior executive of the provincial public service is composed of Assistant Deputy Ministers, Associate Deputy Ministers and Deputy Ministers, and is an ever-changing complement of dedicated and hard-working public servants. Individuals move within the executive and new individuals join as others leave the public service.

These transitions are, by and large, well supported by the professional public service. Incoming leaders meet with outgoing ones, briefing binders are prepared, meetings with key stakeholders are arranged, and a professional and orderly transition occurs. All of this is important so that corporate memory is maintained. New leaders may change programs, establish new priorities or change organizational structure or personnel. However, an effective transition ensures that as new executives make these changes, they do so with a full appreciation of the policy-related, organizational and strategic factors arising from the ministry's history.

While these transitions are typically well managed, I learned in this investigation that, for at least one of the transitions, difficulties were encountered with the availability of records and contact with a predecessor executive. Concerns were raised with us about whether it would have been legally appropriate to contact executives no longer in the public service due to privacy concerns.

In identifying this issue, I want to avoid suggesting an overly complicated or bureaucratic remedy. Transitions

usually work well. In the interests of effective public administration, it is critical that a transition occurs effectively every time.

R 30

By September 30, 2017, the Public Service Agency provide a report to the Head of the Public Service on ensuring excellence in executive transitions so that senior executives new to their portfolio are appropriately and effectively supported to immediately carry out their new responsibilities.

18.3.6 OBTAINING AND RESPONDING TO LEGAL ADVICE

In our report we noted occasions when legal advice provided to government was not followed. There are whole treatises on the role of the Attorney General and it is not my intention to reproduce them here. The broad role of the Attorney General is to ensure that the administration of public affairs by the provincial government is conducted in accordance with the law.[5] Thus, when government receives legal advice that a proposed course of conduct is clearly unlawful, government is, bound by the rule of law, obliged to heed that advice and not engage in the unlawful conduct unless government has a legitimate basis for questioning the Attorney General's opinion. When government receives legal advice that a proposed course of conduct is not clearly unlawful but does have legal risks, government is entitled to act in spite of the legal risks if it chooses to do so. However, that choice should not be made lightly, as the actions in question may have unintended consequences, including undermining public confidence in government. Such decisions should be made by someone in a client ministry who is sufficiently senior and well positioned to consider the impact on prudent public administration of acting in a particular way despite the risks identified in legal advice.

We also noted a number of instances where there was confusion about the scope of the legal advice that had been provided. One notable instance was the then-Deputy Minister of Health's understanding that legal advice had been provided on whether just cause existed with respect to the employees whose employment he terminated. I note that my earlier recommendations regarding pre-conditions to an employment termination will eliminate the potential for such confusion in future dismissals. However, the issue could still arise in other legal advice contexts.

R 31

By March 31, 2018, the Head of the Public Service establish written protocols that address:

a. Who has the authority to decide that government will not follow risk-based legal advice;

b. The process to be used when ministries decide to act contrary to legal advice, including how decisions in such situations are to be escalated, disputes resolved and outcomes documented; and

c. The process to be followed when limited legal advice is obtained, including who needs to be advised that the scope of the advice is limited.

18.3.7 PUBLIC INTEREST DISCLOSURE LEGISLATION

It is important for government to consider the question of how to build a public service that is more robust and has the institutional knowledge, capacity and processes to mitigate and address the risk of the events in this matter occurring again.

One way that government can strengthen public confidence in the administration of public affairs is by establishing a clear and comprehensive scheme for handling so-called "whistleblower" complaints. British Columbia is one of only two provinces in Canada that do not have comprehensive whistleblower legislation (also known as public interest disclosure legislation). The lack of public interest disclosure legislation in B.C. has been raised on numerous occasions, but government has maintained that

5 *Attorney General Act*, R.S.B.C. 1996, c. 22, s. 2(b).

existing mechanisms offer sufficient options for whistleblowers to report alleged wrongdoing.

While it is true that the Public Service Agency has established pathways in the Standards of Conduct for public employees to bring forward allegations of wrongdoing, the current system lacks an appropriate framework for the assessment of those complaints. A properly enacted public interest disclosure scheme can not only protect those who raise alarms about wrongdoing from reprisal, but also protect public servants who may be unjustly the subject of such allegations.

The way in which the initial complaint was dealt with in this case illustrates serious problems with the existing scheme, and supports the conclusion that British Columbia would be best served by having a comprehensive legislative framework for receiving and responding to public interest disclosure complaints. In this case, the failure to adequately assess and respond to the original allegations allowed the scope of the concerns and the number of people implicated to expand in the absence of an appropriate evidence-based foundation.

Public interest disclosure legislation at once protects whistleblowers who come forward in good faith, and supports the principles of public service accountability, integrity and transparency.

- *Accountability:* Public interest disclosure legislation is consistent with an open government in which knowledge of government conduct promotes political and legal accountability. Providing protection for those who come forward in good faith with allegations of wrongdoing increases the likelihood that government will be held to account for its actions.
- *Integrity:* Public interest disclosure legislation can enhance the integrity of government and the public service by more clearly establishing a sense of responsibility to: first, identify and report alleged wrongdoing; and second, take appropriate steps to address those allegations within a reasonable timeframe.
- *Transparency:* Independent oversight of a public interest disclosure scheme, and the public reporting of that scheme's operation, can increase public confidence in public sector institutions.

Public interest disclosure legislation and an associated scheme must balance competing interests, such as the duty of loyalty that employees owe their employer versus individuals' freedom of speech. Importantly, in light of our investigation, this legislation and scheme must encourage individuals to come forward with disclosures while also providing government and its employees with sufficient protection against inaccurate, false or misleading disclosures.

British Columbia's current approach is a patchwork of legislation and policy that addresses some specific issues but falls short of a comprehensive framework for addressing whistleblower complaints. As a result, the patchwork approach does not foster the principles that should inform whistleblower legislation and fails to achieve an appropriate balance of the interests at stake.

The *Freedom of Information and Protection of Privacy Act* protects employees who, acting in good faith and on the basis of reasonable belief, report contraventions or intended contraventions of that legislation.[6] The *Financial Administration Act* imposes a duty on employees to report financial wrongdoing, but provides no protections for those who do report.[7]

The Standards of Conduct also address some matters related to public servants who disclose wrongdoing. The standards impose a duty on all public servants to report any situation relevant to the public service 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."[8] As well, the standards state that employees will not be subject to reprisal for bringing forward allegations of wrongdoing in good faith.

Union members must make an allegation report in accordance with their collective agreements. For example, members of the BC Government and Service Employees

6 *Freedom of Information and Protection of Privacy Act*, s. 30.3.

7 *Financial Administration Act*, s. 33.2.

8 British Columbia, *Standards of Conduct for Public Service Employees*, 6.

Union (BCGEU) must make a report first to their immediate supervisor, next to an excluded manager, and third to their Deputy Minister.[9] Non-unionized employees must report in writing to their Deputy Minister or member of the executive or, where the matter involves their Deputy Minister, to the Deputy Minister to the Premier. The individual who receives the complaint must acknowledge receipt and review and respond to the matter, all within 30 days.[10]

Any employee who believes that his or her concerns about wrongdoing have not been "reasonably resolved" by the ministry may refer the matter to an outside authority, including the police, Auditor Genera or a health authority depending on the nature of the alleged wrongdoing.[11]

Government has considered the necessity of a legislated public interest disclosure scheme on several occasions over the last decade, and in each instance has concluded that public servants are already adequately "protected by the terms of their employment" through the legislation and policies described above.

The above provisions demonstrate that government is of the view that promoting disclosure of possible wrongdoing is in the public interest. However, in my view there is a dearth of law and policy in British Columbia that addresses how a public interest disclosure complaint will be handled once it is received. The current approach under the Standards of Conduct provides no direction about how the Deputy Minister or the person receiving the complaint will assess, respond to and investigate the matter. There is no framework for assessing whether a complaint requires investigation or for addressing complaints that lack merit or are made frivolously or in bad faith. There is no requirement that an investigation into such a complaint be in accordance with principles of administrative fairness. There are no laws or policies that address how government will report on the results of its assessments of public interest disclosure complaints. There is no oversight of the process.

Limitations with the current approach were highlighted in the Auditor General's 2017 report on public sector ethics management.[12] That report recommended a method of reporting unethical conduct where the process and protections are transparent and easy to understand. I agree with this approach and my recommendation below is consistent with that made by the Auditor General.

The legislative regimes in Alberta and Saskatchewan both reflect international best practices regarding public interest disclosure legislation. According to best practices, the legislation should:

- strike an appropriate balance between encouraging individuals to come forward with disclosures and providing sufficient safeguards against inaccurate or misleading disclosures
- establish an external body responsible for receiving, assessing, investigating and reporting on public interest disclosures
- require government to establish internal procedures for addressing public interest disclosures
- require government to establish internal policies, procedures and standards of assessment for addressing public interest disclosures
- require government to make public the procedures and standards of assessment it has developed, in order to foster confidence that public interest disclosures will be addressed appropriately.

Independent oversight of a public interest disclosure scheme is a feature in all provincial statutes and at the federal level. The Government of Canada's model for the federal public service incorporates an independent oversight authority dedicated exclusively to the receipt, investigation and review of alleged wrongdoing in the public service. With its unique mandate, the Office of the Public Service Integrity Commissioner has the capacity to extend its attention to preventative initiatives such as education

9 17th Master Agreement between the Government of the Province of British Columbia and the B.C. Government and Service Employees' Union, 1 April 2014, s. 32.13.

10 Standards of Conduct, 6.

11 Standards of Conduct, 7.

12 Auditor General of British Columbia, *An Audit of BC Public Service Ethics Management*, March 2017.

and proactive reporting. Ideally, British Columbia should consider instituting a comparable independent agency.

Another option is to add the role of independent oversight to the function of an existing legislative officer. Reasonable arguments could be made for assigning this new role to the Auditor General, the Information and Privacy Commissioner, or the Ombudsperson. The important principle to be established for a credible public interest disclosure regime is putting in place independent oversight. If this oversight function is assigned to an existing legislative officer, consultation with that officer would be important during policy and legislative development.

R32

By March 31, 2018, government introduce, for consideration by the Legislative Assembly, public interest disclosure legislation that provides for the reporting, assessment, fair investigation, resolution and independent oversight of allegations about wrongful conduct within the government of British Columbia.

18.3.8 ORGANIZATIONAL RECONCILIATION AT THE MINISTRY OF HEALTH

Chapter 17 described how the Ministry of Health investigation created fear and anxiety across the ministry – a situation that has not yet been fully addressed. We heard from many individuals how this has hurt morale, employee engagement and productivity. Re-establishing the confidence, trust and respect of ministry staff and its contractors should be a key part of the ministry's strategy moving forward.

Many of the individuals terminated or otherwise disciplined during the investigation were well liked and respected across the ministry and the academic community. Seeing how they were treated by the investigators and senior management was demoralizing and trust-shattering for colleagues. As we heard repeatedly throughout our investigation, a common fear pervading the ministry was that "if it could happen to them, I could be next."

With no assurances from supervisors or senior management that anyone who worked with administrative health data was safe from the investigation's reach, staff minimized their work with data and interpreted relevant policies and legislation as conservatively as possible to limit their chances of being implicated in some perceived wrongdoing.

Simplifying and clarifying policies and procedures to guide all ministry employees who work with administrative health data is a necessary step in reversing the negative impact arising from the 2012 investigation. The ministry has already begun this process and, through a newly emerging B.C. data platform initiative, has committed to improving the tools and policies by which administrative health data is used in the future. This step alone, however, will not address the underlying anxiety, distrust and loss of respect that lingers in the ministry today.

We heard that the inadequate explanation for what happened in the past four years caused this risk aversion to spread to other parts of the ministry. The lack of any meaningful explanation for what happened after the investigation, combined with the public knowledge that the investigation focused on the disclosure and use of ministry data, caused the anxiety and fear felt by many in this group to transform into professional ambivalence. During our investigation, we heard that individuals otherwise motivated by a desire to improve public health became reluctant to carry out their work in ways not expressly permitted by policy or as explicitly directed by management.

The current Deputy Minister of Health, Stephen Brown, has demonstrated an awareness of the need to address the ongoing organizational challenges caused by the investigation. To the extent possible within the context of litigation, he took unusual and commendable steps to engage in personal reconciliation with some of the fired employees. Were it not for his actions to both bring the investigation to an end and seek to restore relationships with some of those harmed by it, it is likely that the impacts of the investigation would have been more long-lasting.

While the announcement of legal settlements provided some ministry employees with insight into the reassessment of the matter that their employer had carried out, the ministry did not provide any explanation for the basis of those settlements or the validity of the concerns at the heart of the investigation. It would not have been easy to do so given that protecting the privacy of the individuals

involved would have made such an explanation very difficult. The media stories following the leak of the report by the IU only served to perpetuate confusion. One official from the Ministry of Health described the confusion in the following way:

> *… people aren't infallible and things can happen. And rather than dismissing them or, you know, holding them totally responsible, maybe there should be some organizational responsibility … I never heard anyone say now that there's problems at any level. I heard that there was a bunch of staff that were fired and then it was reconsidered. … It's like we've gone from black to white … no shades of grey and everything's good.*

As outlined in Chapter 17 the Ministry of Health has taken a number of steps in the past few years to support employee morale and engagement. These are good and commendable steps. I believe there is more that can be done to support the Ministry of Health and its employees in acknowledging, from an organizational perspective, the impacts of what happened and in finding a way forward. This way forward must focus neither on retributive fault finding nor on forgetting what happened. Instead, a "measured approach that is honest about the need to move forward without burying the past and that is appropriate to the particular situation" is most likely to be successful.[13]

This type of organizational reconciliation is an ongoing process of establishing and maintaining respect – one where acknowledging responsibility, repairing trust and taking meaningful action to effect change are critical to restoring healthy relationships. As relationships are re-established, open and honest conversations can take place to help all stakeholders identify barriers to meeting organizational objectives.

Borrowing from the work of other ombudspersons with expertise in post-conflict organizational rebuilding,[14] I propose the following as some of the factors that should be considered when deciding the steps to take to re-establish meaningful, conciliatory relationships within an organization:

- Before individuals are capable of engaging in structural rebuilding, organizations need to acknowledge and pay attention to the personal stress and trauma caused by the events and ensuing conflicts.
- Efforts at reconciliation cannot be about assigning blame or conducting a fact-finding mission akin to another investigation.
- For reconciliation to succeed, all those involved and impacted by the investigation need to be engaged by the organization in a recovery process that avoids "scapegoating" while at the same time recognizing the real impacts of past events: "the more explicitly organizational … leadership facilitates such a process, and the more seriously individual department members take responsibility for their own willingness to engage in the process, the better the results will be."[15]
- Such a process should not be a form of individual redress for employees, but a means to hear from them directly about their concerns and experiences rather than learning about that through reports such as ours.
- The reconciliation process should include facilitated, supported sessions where people discuss what happened and employees can express their past and present concerns to the organization. These sessions should provide an opportunity for individuals to disclose and discuss both the personal and organization impacts of the investigation and its fallout.

For a reconciliatory endeavour to have lasting positive influence on the culture of the Ministry of Health, that effort should involve the BCGEU and BC Excluded Employees' Association. Given the role that these employee representatives play in addressing and resolving employee–employer

13 This spectrum of approaches to peace building is described by Timothy Garton Ash and cited in Katherine Hale and James P. Keen, "The Ombudsman and Post Conflict Department Rebuilding," *Journal of the International Ombudsman Association*, Vol. 6, No. 2(2013): 77.

14 Katherine Hale and James P. Keen, "The Ombudsman and Post Conflict Department Rebuilding," *Journal of the International Ombudsman Association*, Vol. 6, No. 2(2013)

15 Katherine Hale and James P. Keen, "The Ombudsman and Post Conflict Department Rebuilding," *Journal of the International Ombudsman Association*, Vol. 6, No. 2(2013): 78.

conflicts, including them in the process would improve conflict resolution moving forward.

Moreover, reconciliation can best be effected by hearing all perspectives. We heard expressions of regret from some public servants who had been involved in carrying out aspects of the investigation, and about what had occurred. For many of them recounting their involvement to us was the first time they had spoken about the matter. The Ministry of Health should extend an invitation to current public servants who were part of the investigation team to participate in the reconciliation process, to the extent they wish and in a manner that is appropriate.

R 33

By September 30, 2017, and following consultation with the BCGEU and BC Excluded Employees' Association, and in a manner consistent with its privacy obligations, the Ministry of Health develop and implement a carefully designed organizational reconciliation program with the goal of re-establishing positive, respectful professional relationships with staff and contractors who will productively support the mandate of the ministry moving forward. This program should:

a. build on the recent ministry initiatives to support employee morale and engagement, invite the participation of ministry staff and contractors,

b. involve the active participation of management,

c. include clear objectives and deliverables, and

d. be completed within 12–18 months by providing a final report to all ministry staff and contractors.

18.3.9 AN EVIDENCE-INFORMED APPROACH TO PHARMACEUTICAL MANAGEMENT

This investigation has made clear that the Ministry of Health, in administering the provincial health system, has had a longstanding commitment to making policy decisions that are informed by evidence. For example, the ministry's Reference Drug Program requires policy-makers to have evidence about the effectiveness of pharmaceutical therapies to determine, among many factors, whether the province will pay the cost of those therapies. Similarly, the ministry recently developed a new collaborative strategy for patient-oriented research[16] and continues to support evidence-informed initiatives such as those around chronic disease management.[17] The ministry also engages in epidemiological surveillance and research to estimate the prevalence of diseases and other health conditions across the population to inform decisions-makers on how to best support public health.

The ministry's continued commitment to using evidence to inform its policy initiatives is positive. Evidence-based approaches help ensure that the decisions guiding the provincial health system are rationally based, objective and transparent – principles that are the cornerstones of an administratively sound health care system.

As described in this report, several of the ministry's initiatives that supported evidence-informed outcomes in pharmaceutical management came to an end as a result of the investigation into employees, contractors and external researchers. These initiatives formed some of the Pharmaceutical Services Division's management strategy, which was developed in part to address recommendations from the Auditor General and the national pharmaceuticals strategy. In the wake of the investigation, the ministry's commitment to and engagement with the quality control or evaluation components of these initiatives were also compromised. Prior to 2012, the division had strongly supported evidence-informed evaluations to monitor initiatives for quality control in order to ensure these programs

16 The BC Support Unit is a multi-partner organization created to support, streamline and increase patient-oriented research throughout B.C. < http://bcsupportunit.ca/>.

17 BC Ministry of Health, "Self-Management Support: A Health Care Intervention" 10 June 2011 <http://www.selfmanagementbc.ca/uploads/What%20is%20Self-Management/PDF/Self-Management%20Support%20A%20health%20care%20intervention%202011.pdf>. For more information about B.C.'s chronic disease self-management program see <http://www.selfmanagementbc.ca/SelfManagement>.

met their objectives, were cost effective and were having positive, not adverse, impacts on the target populations.

The Ministry of Health did not end these initiatives because it determined, after an objective review, they were no longer useful or meeting their goals. Instead, the ministry's decision to end these initiatives were, as outlined throughout this report, informed by investigative conclusions that were based on mere allegations about the conduct of individuals associated with the initiatives. The evidence we reviewed indicated that these initiatives were broadly seen as useful, valid and consistent with the ministry's obligations to ensure high-quality, appropriate, cost-effective and timely health services for British Columbians.

While policy-makers always retain the discretion to end or change programs they have previously supported, prudent and effective public administration requires that changes be implemented after a reasoned consideration of the costs and benefits such a decision. That was not the case with the initiatives that the ministry ended as a result of the 2012 investigation.

In summary, the investigation and the resulting decisions about data and contracts resulted in an arbitrary dismantling of some of the ministry's engagement in evidence-informed pharmaceutical management and related health services. This was perceived by some as a weakening of the ministry's commitment to evidence-informed evaluation of its pharmaceutical initiatives.

R 34

By September 30, 2017, the Ministry of Health review and assess the extent to which the termination of evidence-based programs during the internal investigation may have created gaps that now remain in providing evidence-informed, safe, effective and affordable drug therapy and related health care services to British Columbians.

R 35

By December 31, 2017, to the extent that such gaps are found to exist as a result of the review under the preceding recommendation, the Ministry of Health publicly release a plan, with a reasonable timeline and transparent objectives and deliverables, to address the gaps.

These two recommendations are not to be interpreted as implying that any particular method or provider of evidence-based drug policy research or program development is to be used. The selection of particular providers is for the Ministry of Health to determine in the public interest.

18.3.10 POSITIVE AFFIRMATION OF EVIDENCE-INFORMED APPROACHES

We heard from several witnesses that the 2012 investigation had a broad, chilling effect within the public service. One of the aspects of that concern related to the perception that government's commitment to evidence-based decision making had diminished. While we did not investigate whether this perception was widely held, taking a practical, visible step to reinforce with its own workforce government's commitment to evidence-based decision-making would appear advisable. A clear statement from leadership in government that evidence-based decision-making by public servants is still highly valued is both timely and worthwhile.

R 36

By March 31, 2018 government establish a new category of Premier's Awards (in addition to the existing categories of leadership, innovation, legacy and partnership) to recognise public servants whose work is outstanding in the area of evidence-based or evidence-informed policy or program development.

18.3.11 UBC'S B.C. ACADEMIC CHAIR IN PATIENT SAFETY

As discussed in Chapter 7, the B.C. Academic Chair in Patient Safety at the University of British Columbia (UBC) was created in 2005 as part of a broader government initiative focused on improving patient safety throughout the province. As a sign of its commitment to patient safety, the Ministry of Health provided UBC with a $3 million endowment to fund the work of the Chair on an ongoing basis. In the cover letter to UBC providing the grant funding, the Deputy Minister wrote that the grant was intended:

> *. . . to support the development of leadership capacity in the field of patient safety and through research and education the provision of safe and appropriate care to patients in British Columbia and Canada.*

The ministry's initial $3 million endowment grant was less than the usual amount required to support an academic chair position at UBC. The position was not filled until Dr. Maclure agreed to accept the role in 2009. At that time, UBC and the ministry agreed that Dr. Maclure would work part-time in the Chair position while continuing part-time in his prior position at the ministry. When Dr. Maclure's ministry employment abruptly ended in 2012, UBC agreed to make his Chair position a full-time role. This meant that UBC was required to pay his full-time salary rather than paying only a part-time salary. UBC's decision had the effect of mitigating any damages Dr. Maclure had arising from his constructive dismissal by the province.

However, to pay Dr. Maclure his full-time salary, the Department of Anaesthesiology, Pharmacology & Therapeutics in the Faculty of Medicine had to divert about $40,000 a year from its departmental budget to fund the Chair position. This has created an accumulated $200,000 budget deficit since 2012. The department told us that its budget deficit will continue to accumulate because of the interruption of the funding model, which means that the funds it would otherwise use to support additional research is not available.

R 37

By March 31, 2018, government grant $200,000 to the University of British Columbia (UBC), Faculty of Medicine, Department of Anaesthesiology, Pharmacology & Therapeutics.

In 2012 just as the events at the Ministry of Health were beginning to unfold, UBC wrote to the ministry regarding the financial challenges of the 2005 endowment. That issue was not addressed at the time, quite possibly because of the investigation.

It is outside the scope of my investigation to consider whether the endowment is sufficient. However, to the extent it was not considered earlier, it should be dealt with now.

R 38

By March 31, 2018, UBC and the government meet to discuss the sufficiency of the 2005 endowment regarding patient safety.

18.3.12 BC CORONERS SERVICE POLICY ON DISCLOSURE OF ESTATE RECORDS

As described in Chapter 15, the BC Coroners Service did not have clear policy guidance in responding to Mr. MacIsaac's family's request for access to a document that RCMP computer specialists, in support of the Coroners Service, had discovered on Mr. MacIsaac's password-protected computer in the course of the investigation.

R 39

By September 30, 2017, the BC Coroners Service develop a policy about disclosure, to a deceased's family or personal representative, of documents discovered on the deceased person's electronic devices, including password-protected and cloud-stored documents.

18.4 GOVERNMENT'S CONSIDERATION OF RECOMMENDATIONS

In many reports by Officers of the Legislature, including by the Ombudsperson, the public authority to which recommendations are directed is given the recommendations in draft form. Doing this allows the authority to provide feedback on the overall advisability of the recommendation or on a specific detail. It also offers the public authority an opportunity to respond to the report – with the response included in the report, thus providing a transparent accounting of whether the authority accepts the recommendations.

I did consider following this practice for this investigation. However, after much deliberation, I concluded that, in the unique circumstances of this referral from a legislative committee, including the fact that government as a whole (rather than a specific ministry) must be the body that responds to some of these recommendations, the better course was to provide the recommendations only at the time of this report's issuance.

This means that government has not had an opportunity to learn of, let alone reflect on, these recommendations before the deposit of the report. Nevertheless, I do not believe that an extended time for providing an overall response on the recommendations is necessary. Even in cases where recommendations are provided in advance of publication of a report, a two week response time is sometimes required.

R 40

By April 20, 2017, government provide, in a single document, a response to each of the preceding recommendations, including stating whether it does or does not accept the recommendation. In the event government is of the view it cannot give due consideration to any particular recommendation within that time, it may identify the recommendation, the reason further time is required and the timeline within which it will respond.

My office will post this response on the Ombudsperson website.

18.5 ONGOING MONITORING

When the Ombudsperson issues a major systemic or other special report, we normally monitor implementation of accepted recommendations for up to five years. We publish periodic updates on the progress of public authorities in implementing those recommendations that were accepted, and indicate whether, in our view, the public authorities' implementation satisfies the letter and spirit of our recommendations.

I intend to monitor government's implementation of these recommendations in a similar manner.

R 41

By April 30, 2018, government provide a written status report to the Ombudsperson on the implementation of the recommendations made in this report, and at such other times as required by the Ombudsperson.

APPENDICES

APPENDIX A
SEPTEMBER 9, 2015: SPECIAL DIRECTIONS REGARDING REFERRAL TO OMBUDSPERSON

1. On July 29, 2015, the Select Standing Committee on Finance and Government Services (the Committee) adopted a motion pursuant to s. 10(3) of the *Ombudsperson Act*[1] to:

> *"… refer the Ministry of Health terminations file to the Ombudsperson for investigation and report as the Ombudsperson may see fit; including events leading up to the decision to terminate the employees; the decision to terminate itself; the actions taken by government following the terminations and any other matters the Ombudsperson may deem worthy of investigation. The Committee trusts that his investigation can conclude in a timely manner."*

2. The Committee considers it helpful to provide these special directions to the Ombudsperson, without purporting to limit any subject matter or line of inquiry the Ombudsperson may consider appropriate to investigate in relation to this referral.

3. The Committee's referral is predicated on the Government of British Columbia acting in accordance with its representations to the Committee that the Government will take the following steps ("Government Actions") to facilitate the Ombudsperson's investigation of this referral, namely:

(a) Proclaim into force the *Ombudsperson Amendment Act*, 2015, S.B.C. 2015, c. 30;

(b) Provide the Ombudsperson with complete access to all required and relevant information, without limitation, in accordance with established protocols;

(c) Apply the Protocol Agreement between the Ombudsperson and the Government of British Columbia (2011), covering written and electronic records described in s.18 of the *Ombudsperson Act*, to all matters covered by s. 18 including oral statements;

(d) Apply the existing Memorandum of Understanding between the Ombudsperson and the Government of British Columbia relating to legal advice, to ensure that the Ombudsperson has access to all relevant legal advice provided to Government in relation to the subject matter of this referral;

(e) Release terminated employees and contractors from any confidentiality provisions including those entered into as part of the resolution of any litigation, in order to support their full participation in the investigation; and

(f) Approve the budget recommended by the Committee arising from this referral.

SUBJECT MATTER

4. Without limiting the matters the Ombudsperson considers appropriate to investigate arising from the Committee's referral, the Committee directs that the matters subject to investigation will include:

(a) The Ministry of Health's employment terminations of Ramsay Hamdi, David Scott, the late Roderick MacIsaac, Dr. Malcolm Maclure, Robert Hart, Dr. Rebecca Warburton and Ron Mattson;

(b) The termination of the contract of Dr. William Warburton and, to the extent the Ombudsperson determines the issues to be related, the termination of the contracts of other contract researchers;

(c) The events leading up to the terminations, the terminations themselves, decisions to suspend and/or reinstate data access and actions taken by Government following the terminations referred to in (a) and (b), including statements regarding the involvement of the Royal Canadian Mounted Police in relation to the terminations;

(d) To the extent the Ombudsperson determines that it is related to (a), (b) or (c) above, any matter related to provincial Government involvement with the following pharmaceutical research organizations, including matters related to funding, contracts and data access:

1 Section 10(3) of the *Ombudsperson Act* states:
The Legislative Assembly or any of its committees may at any time refer a matter to the Ombudsperson for investigation and report.

(i) University of British Columbia Therapeutics Initiative;

(ii) University of Victoria Alzheimer's Drug Therapy Initiative;

(iii) British Columbia Centre for Excellence in HIV/AIDS.

(e) The nature and extent of the involvement of the following in the matters described in (a), (b), (c) and, if applicable, (d) above at any relevant time:

(i) any member of Executive Council;

(ii) the Ministry of Health;

(iii) the Ministry of Finance;

(iv) the Ministry of Justice;

(v) the Government Communications and Public Engagement Office;

(vi) the BC Public Service Agency;

(vii) the Office of the Premier; and

(viii) the Office of the Deputy Minister to the Premier.

INVESTIGATIVE PROCESS

5. Without altering or limiting the Ombudsperson's authority to conduct his investigation in private subject to section 9 of the *Ombudsperson Act* and to otherwise control his process, develop an investigation plan and carry out his procedures in the fashion he considers necessary or appropriate, the Committee recognizes and directs as follows with regard to the Ombudsperson's investigation process:

(a) The Ombudsperson may in his discretion limit the scope of the investigation where he considers it would unnecessarily or improperly duplicate any other investigation, report or statutory process under the mandate of an Officer of the Legislature.

(b) The Ombudsperson may in his discretion defer any portion of the investigation or report where he determines that this is appropriate or necessary in light of some other investigatory or adjudicative process.

(c) The Ombudsperson may in his discretion refer any matter to the appropriate oversight, investigatory, or regulatory body in accordance with the *Ombudsperson Act* where the Ombudsperson has reasonable grounds to believe an offence or professional or ethical misconduct may have occurred.

BUDGET

6. The Ombudsperson is directed at the earliest opportunity, and prior to undertaking his investigation, to submit to the Committee for approval a detailed supplementary budget submission for 2015-2016 arising from this referral, which budget is intended to ensure that the Ombudsperson is able to conduct this investigation thoroughly without impairing his ability to carry out his other work under the *Ombudsperson Act* in response to complaints and in the public interest. Additional 2016-2017 budgetary funding, as required, shall be considered in conjunction with the Committee's regular annual budgetary submission process.

REPORTING

7. Without limiting the Ombudsperson's reporting authority or purporting in any way to fetter the Ombudsperson's independent mandate to make the findings and recommendations he considers appropriate in accordance with his usual review standards regarding any matter arising from this referral in his final report, the Committee directs as follows:

(a) The Ombudsperson may in his discretion provide such interim reports to the Committee as the Ombudsperson considers necessary on any administration or budgetary matter, any material impediment to the investigation, or any other matter.

(b) Should the Ombudsperson determine that:

i. records including documentation and correspondence related to the subject matter referred are unavailable due to records destruction or other reason;

ii. the Ombudsperson does not have access to a key witness or witnesses; or

iii. the Government Actions referred to in paragraph 3 have not been satisfactorily met, the Ombudsperson's Final Report shall include a description of the nature, extent and apparent cause of such unavailability or insufficient Government Actions and the impact on the investigation if that can be assessed.

(c) In order to make the report public, the Ombudsperson shall deposit the Final Report with the Speaker of the Legislative Assembly in accordance with the *Ombudsperson Act*. The report shall be provided to the Office of the Speaker whether the Legislative Assembly is in session, adjourned or dissolved.

(d) The Ombudsperson shall publish and publicly distribute the Report, in print and electronic format, following its release by the Speaker of the Legislative Assembly of British Columbia.

APPENDIX B
ACRONYMS USED IN THE OMBUDSPERSON'S REPORT

Acronym	Full Term	Description of Term
ACFE	Association of Certified Fraud Examiners	The Association of Certified Fraud Examiners describes itself as "the world's largest anti-fraud organization and premier provider of anti-fraud training and education." The ACFE has developed a process for assessing and qualifying "Certified Fraud Examiners" through administering an exam. It was founded in 1988, and is a private, international organization, headquartered in Texas with chapters in 60 countries.
ADEPT	Academic Detailing Evaluation Partnership Team	Academic detailing is a method of continuing education in which a trained health care professional meets with a prescriber in their practice setting to provide one-on-one evidence-based information. It is intended to provide objective, evidence-based information, and it is used to influence changes in prescribing practices to improve patient outcomes. ADEPT was a national initiative formed by the Canadian Academic Detailing Collaboration in 2008 to evaluate how academic detailing in Canada had affected real-world physician prescribing patterns. See Chapter 4 for further details.
ADTI	Alzheimer's Drug Therapy Initiative	A multi-study, multi-year research program coordinated by the Ministry of Health to assess the effectiveness of cholinesterase inhibitors, a class of drugs prescribed to treat Alzheimer's disease. See Chapter 4 for further details.
BCGEU	BC Government and Service Employees' Union	The main labour union representing bargaining unit staff employed by the Government of British Columbia.
BCMA	British Columbia Medical Association (now known as Doctors of BC)	The professional association for physicians in British Columbia. It advocates for physicians, develops health policy position papers, and maintains collaborative committees with representation from physicians and government.
CCHS	Canadian Community Health Survey	A cross-sectional survey created by Statistics Canada that collects information related to health status, health care utilization and health determinants for the Canadian population. The primary use of the CCHS data is for health surveillance and population health research.
CG	Comptroller General	The Office of the Comptroller General is responsible for the overall quality and integrity of the government's financial management and control systems.

Acronym	Full Term	Description of Term
CIHI	Canadian Institute for Health Information	An independent, not-for-profit national organization created in 1994 that incorporates pan-Canadian health databases and provides information to decision-makers to inform improvements in health care systems across the country.
CIHR	Canadian Institutes of Health Research	The independent federal agency for health research investment. The CIHR's mission is to create new scientific knowledge and to enable its translation into improved population health, and more effective health services and products.
CNODES	Canadian Network for Observational Drug Effect Studies	The Canadian Network for Observational Drug Effect Studies is a pan-Canadian collaboration of researchers that was created as part of the Drug Safety and Effectiveness Network (DSEN) to coordinate and harness the information contained in various healthcare databases across multiple jurisdictions. This allows for greater evaluation and more precise estimates of drug safety and effectiveness because it is based on larger population datasets across all participating provinces and territories. See Chapter 4 for further details.
CPPM	Core Policy and Procedures Manual	The Core Policy and Procedures Manual is the reference source for government-wide financial administration and management policy and procedures. It outlines government financial management and administration objectives, standards, directives and practices.
DARS	Data Access, Research and Stewardship	In 2012, this was a section of the Office of the Chief Data Steward and the Information Management and Knowledge Services branch of the Health Sector Information Management and Information Technology division of the Ministry of Health.
DBC	Drug Benefits Committee	An independent advisory body, made up of 12 members, that makes evidence-informed recommendations to the Ministry of Health about the listing of drugs on the PharmaCare program formulary. Their recommendations form part of the Drug Review Process.
DI	Drug Intelligence	In 2012, this was a branch of the Pharmaceutical Services Division of the Ministry of Health that was tasked with basing PharmaCare coverage decisions on a critical assessment of the available clinical evidence.

Acronym	Full Term	Description of Term
DSEN	Drug and Safety Effectiveness Network	An initiative by the Canadian Institutes for Health Research to build a coordinated national research network and develop evidence on the real-world safety and effectiveness of pharmaceuticals, and make the results available to regulators, policy-makers, health care providers and patients in Canada. See also CNODES.
DUO	Drug Use Optimization	In 2012, this was a branch of the Pharmaceutical Services Division of the Ministry of Health, tasked with reviewing prescription drug use patterns and comparing them with evidence-based best practices to design better and more cost-effective programs.
EQIP	Education for Quality Improvement in Patient Care	An initiative developed between the Pharmaceutical Services Division, Ministry of Health, the BC Medical Association (now Doctors of BC), UVic and UBC beginning in 2006 to provide family physicians with personalized computer-generated prescribing portraits for a particular disease or health topic with educational messages and case studies that "encourage reflection on practice." These portraits were intended to create a "snapshot" of an individual physician's prescribing practices to improve overall patient care, safety and cost-effectiveness. See Chapter 4 for further details.
GCPE	Government Communications & Public Engagement	The agency responsible for coordinating media contact for client ministries and communicating information on government programs, services, policies and priorities to the public.
HSIMIT	Health Sector Information Management and Information Technology	In 2012, a division of the Ministry of Health, within which was housed the Information Management and Knowledge Services branch, and the office of the Chief Data Steward.
HSS	Health and Social Services	The group of solicitors within the Legal Services Branch, Ministry of Justice, whose client ministries include the Ministry of Health and Ministry of Children and Family Development.
IAAS	Internal Audit and Advisory Services	A branch of the Ministry of Finance which conducts operational, financial management and compliance audits of ministry programs across government.

Acronym	Full Term	Description of Term
IMKS	Information Management and Knowledge Services	In 2012, a branch of the Health Sector Information Management/Information Technology division of the Ministry of Health. Data Access, Research and Stewardship (DARS) was a section of the IMKS branch. IMKS was previously known as the Strategic Policy, Information Management and Data Stewardship Branch (SPIMDS).
ISA	Information Sharing Agreement	A document which sets out the terms and conditions under which a ministry releases administrative health data to other public bodies or to an external agency. It is meant to describe the responsibilities of the parties in relation to the shared data, including a variety of security measures and steps required of the receiving party. An ISA includes the provisions listed in a Privacy Impact Assessment (PIA) developed by government.
IU	Investigation and Forensics Unit	A unit under the Office of the Comptroller General, Ministry of Finance, which conducts investigations into allegations of fraudulent activities within ministries of government, and other provincial public bodies.
LSB	Legal Services Branch, Ministry of Justice	Serves as the legal advisor to the Government of British Columbia. The Legal Services Branch is divided into the Barrister Division, which conducts civil litigation and appears on behalf of government for constitutional and administrative law matters, and the Solicitor Division, which is further divided into groups which support and advise related ministries.
MMP	Medication Management Project	The Medication Management Project is a collaboration between the Pharmaceutical Services Division of the Ministry of Health and the BC Pharmacy Association related to pharmacist involvement in managing prescriptions for patients.
MSP	Medical Services Plan	The Medical Services Plan covers much of the cost of health care for residents of British Columbia. It pays for medically required services of physicians, and provides coverage for other health benefits.

Acronym	Full Term	Description of Term
MTICS	Ministry of Technology, Innovation and Citizens' Services	The ministry responsible for technological services provided by government, including Service BC, BC Online, and the BC Services Card, and also tasked with encouraging innovation and investment in the province by the technology sector. In 2012, it was known as the Ministry of Labour, Citizens' Services and Open Government and was responsible for the Office of the Chief Information Officer
OCIO	Office of the Chief Information Officer	Responsible for the strategic direction of policy, standards and management of information technology across the provincial government. This includes security of government information and technology infrastructure. In 2012, the OCIO was part of the Ministry of Labour, Citizens' Services and Open Government. Since September 2015, it has been part of the Ministry of Finance.
PAD	Provincial Academic Detailing	A method of continuing education for clinical practitioners in which a trained health care professional meets with a prescriber in their practice setting to provide one-on-one, objective and evidence-based information, with the goal of effecting changes in prescribing practices that can improve patient outcomes.
PEG	PharmacoEpidemiology Group	The PharmacoEpidemiology Group is a working group of the Therapeutics Initiative. PEG uses epidemiological methods to analyze linked administrative data from PharmaNet, the Medical Service Plan and hospitals. PEG evaluates, analyzes and monitors the use and outcomes of prescription drugs.
PhORSEE	Pharmaceutical Outlook Research on Special Authority	A $2.1 million grant from PSD to the College of Pharmacists of BC in March 2008 to improve patient safety through evidence-based research on pharmaceutical services delivery in British Columbia. See Chapter 4 for further details.
PHN	Personal Health Number	A unique lifetime identifier for health care given to each resident of British Columbia enrolled with the Medical Services Plan. Because it remains the same, regardless of any changes to personal status, it is considered identifiable health data.

Acronym	Full Term	Description of Term
PIA	Privacy Impact Assessment	An assessment tool used by provincial government ministries to evaluate privacy impacts, including compliance with the privacy protection responsibilities under the *Freedom of Information and Protection of Privacy Act*. Conducting a Privacy Impact Assessment is a requirement whenever a ministry embarks on a new initiative or updates a current initiative.
POER	Policy Outcomes, Evaluation and Research	In 2012, a branch of the Pharmaceutical Services Division of the Ministry of Health, tasked with supporting the other branches in PSD by providing advice and assistance through research and analysis.
PSA	BC Public Service Agency	The government agency responsible for developing human resource services within government and providing advice to ministries on the management, development and recruitment of employees, including hiring, and disciplinary actions including dismissal.
PSC	PharmaNet Stewardship Committee	Committee established to oversee PharmaNet, a computerized pharmacy database that stores information about medication dispensed to patients in order to prevent harmful drug interactions, and make decisions about the release of patient record information for use in health research. The committee was composed of representatives from the Ministry of Health, the BC College of Pharmacists, an academic health researcher, and a representative of the general public. The PharmaNet Stewardship Committee was dissolved on May 31, 2012, and its role and responsibilities amalgamated into the Data Stewardship Committee, an up to seven member committee appointed by the Minister of Health.
PSD	Pharmaceutical Services Division, Ministry of Health	The division within the Ministry of Health which in 2012 was responsible for assessing and evaluating drug effectiveness and physician prescribing practices, pharmaceutical research and evidence development, and other related research and analysis. Now titled Medical Beneficiary and Pharmaceutical Services Division (MBPSD).

Acronym	Full Term	Description of Term
PSLT	Pharmaceutical Services Leadership Team	In 2012, a team composed of the ADM and executive directors within the Pharmaceutical Services Division to coordinate administrative activities and communications and share information within the division.
PSRT	Pharmaceutical Services Research Team	A committee of Pharmaceutical Services Division directors and managers that would meet regularly to exchange information, coordinate the research activities of the Pharmaceutical Services Division, and liaise with external researchers.
RDP	Reference Drug Program	An example of evidence-based policy making in British Columbia. Administrative health data was used to assess drug therapies and ensure the most cost-effective drugs received coverage and were prescribed, thus managing costs to the province without loss of therapeutic effectiveness.
RFP	Request for Proposal	A manner of soliciting bids from potential suppliers, companies or researchers to perform work for a particular service, project or program, usually because the in-house capacity or technical expertise to conduct the work does not exist.
SDWG	Study Design Working Group	The Study Design Working Group was a committee created as part of the Alzheimer's Drug Therapy Initiative (ADTI). It was responsible for advising on aspects of the study design such as what data to collect, outcome measures and measurement tools.
TI	Therapeutics Initiative	An independent organization established in 1994 by the Department of Pharmacology and Therapeutics at the University of British Columbia to develop evidence-based information on prescription drug therapies and provide it to physicians, pharmacists and policy-makers.
TUA	Transfer under Agreement	A type of contribution agreement whereby government agrees to transfer funds to a third party for which it expects certain deliverables or outcomes to be met, but not in the form of a direct provision of goods or services.

APPENDIX C
GOVERNMENT'S RELATIONSHIPS WITH UNIVERSITIES – FINAL REPORT, 2008
RESEARCH RELATIONSHIPS TOOL KIT, 2010

RESEARCH RELATIONSHIPS

Between the Province of British Columbia and British Columbia's Universities

Final Report

JANUARY 2008

BRITISH COLUMBIA
The Best Place on Earth

THE University Presidents' Council OF BRITISH COLUMBIA

Table of Contents

Introduction

The Province of British Columbia and the six public universities have enjoyed a long relationship of research collaboration. In fiscal year 2004/05, the total value of these research relationships reached $33 million. However, negotiation of research agreements between universities and the Province has been challenging at times as the different parties endeavor to adhere to their respective policies and regulations, many of which can appear to conflict.

In June 2006, a working group was formed comprised of representatives from the Ministries of Health, Education, Advanced Education, Children and Family Development, Finance, the University of British Columbia, University of Northern British Columbia and the University Presidents' Council of British Columbia. The stated purpose of the working group was to streamline the process of arriving at research agreements between the Province and BC's public universities.

This document provides the working group's final report as well as a set of "tools" designed to guide the development of research relationships and the legal instruments that support them. The context for research relationships between the Province of British Columbia and universities is described, as well as the most common objectives of each party and a set of principles that should guide these research relationships. More specific guidelines, sample agreements and other tools for developing agreements that govern research relationships are also included.

These resources were developed through a collaborative process involving all the members of the working group. (Refer to Appendix 1 for the Terms of Reference that guided this work). The tools and sample agreements have all been endorsed by both parties. For the Province, the tool kit was approved by the Ministry of Advanced Education, Legal Services Branch, the Intellectual Property Program and Risk Management Branch. For the universities, these tools were endorsed by the Vice Presidents, Research.

Scope

This document and its associated resources address those situations where the Province of British Columbia enters into an agreement directly with a university (or universities) to have research conducted in an area directly related to government priorities, policies or individual Ministry mandates. More specifically,

- Research services, investigation, testing, analysis and evaluation to
  - > Increase generalized knowledge or understanding, or
  - > recommend advice or solutions for a particular subject matter/issue for overall benefit to the Province of BC; or
- A defined research project with specific objectives and deliverables that is for the direct benefit or implementation in ministry programs or operations.

These documents and tool kit do not address:

- Research funding provided by independent research funding agencies such as the Michael Smith Foundation for Health Research, Genome BC;
- The Forest Investment Account and the British Columbia Knowledge Development Fund;
- Staffing, secondments or hiring of co-op students;

- Purchase of finished research papers, reports, or products;
- Websites or training delivery programs;
- Personal consulting arrangements between individual faculty members and the Province, and;
- Educational Services contracts (e.g., for the development of curriculum).

The Value of Research Relationships to the Province of British Columbia and Universities[1]

Governments and universities are natural partners. They are both designed to serve the public interest and both have an interest in conducting research. For universities, research is integral to their mandates and forms part of their legislated mandates. Governments have an interest in supporting a capacity for pure and applied research to drive innovation and knowledge transfer, as well as an interest in more directed research targeted to specific public policy issues. The benefits that accrue to the participants of provincial government-university research relationships, as well as to society as a whole, are substantive, ranging from an increase in the stock of new knowledge, to rich educational experiences for students, to new and improved public policies, services and products. These benefits result in improved social, economic and environmental conditions for Canadians.

Governments and universities also differ in important ways. For example, their cultures and their missions differ. Government bureaucracies are hierarchical, with clear chains of command that culminate in democratically elected representatives. Some of the government's underlying goals are to protect the public interest, responsibly manage public resources and develop and administer sound public policies. Standards for ethical behavior and financial accountability are growing increasingly stringent. Governments must ensure that all of their activities are carried out in a transparent fashion and that any public expenditure can be demonstrated to result in a direct public benefit or that it contributes to the broad public interest.

In contrast, the organization of a university is generally more dispersed, with significant authority given to individual schools, faculties and departments. Universities' missions are to educate, to develop and disseminate new knowledge and to provide community service. Academic intellectual independence is highly valued; the ability of researchers to discuss their work with colleagues and to publish their results is a cornerstone of the academic enterprise and supports the creation of new scientific and other knowledge. Universities are accountable to multiple stakeholders including students, provincial and federal governments and the communities in which they reside.

The commonalities and differences between universities and governments offer the potential for a range of successful research collaborations. The academic independence of university researchers can provide government with valuable, objective assessments of policies and practices. In addition, provincial government jurisdiction in a wide range of social, economic and environmen-

1 While university colleges, colleges and provincial institutes are not specifically addressed in this document, much of the framework described here could provide a basis for preparing research agreements involving these post-secondary education institutions.

tal matters can present university researchers with important research opportunities.

In British Columbia, universities receive their mandates from the provincial government through provincial legislation. The relevant Acts provide universities with their mandates for research, as well as considerable autonomy with which to carry out their mandates.

The Province of British Columbia, by virtue of its responsibility for post-secondary education and provincial economic development, has an interest in fostering knowledge development, transfer and commercialization. The Province demonstrates its support for university research in many ways, including financial support for organizations such as the Michael Smith Foundation for Health Research, the BC Knowledge Development Fund, Genome BC and the Leading Edge Endowment Fund. These organizations play a critical role in building pure and applied research capacity for British Columbia and typically have broad mandates to fund research based on traditional peer reviewed assessments.

In addition to supporting these research organizations, the Province of British Columbia will enter into research agreements directly with universities on matters related to individual Ministry mandates. It is these types of relationships that this document is primarily concerned with.

Objectives

The Provincial Government and Universities have different reasons for entering into research relationships. The Working Group identified the following objectives in order to develop proposed approaches that would meet the needs of both parties.

Researcher Objectives

- To validate the applicability of a researcher's interests to society;
- To address and to potentially inform important public policy questions;
- To have access to challenging and vexing problems;
- To receive financial support for research programs;
- To obtain valuable educational experience for students; and
- To gain access to government-held data.

Province of British Columbia Research Objectives

- To enhance British Columbia's economy, society, culture and/or the environment;
- To inform the Provincial Government's strategic priorities;
- To validate and/or assess provincial government programs and policy decisions; and
- To support the informed development and management of provincial government standards and regulations.

General Principles Governing Research Relationships between the Province of British Columbia and Universities

While the approach taken on any given project will need to consider the specifics of that project, in general the following principles govern most research relationships involving Universities and the Province of British Columbia:

- Both groups operate in complicated and constrained environments that are bounded by legislation, standard operating procedures, and prescribed authorities. Universities and the Province of British Columbia shall endeavor to understand each other's environments and work within the existing systems on projects that provide mutual benefit;
- Both groups acknowledge the need for timeliness and transparency and to ensure that funds are controlled, accounted for and well-managed within generally-accepted financial, procurement and reporting frameworks;
- Both groups are subject to the *Freedom of Information and Protection of Privacy Act*, and respect the need to adopt appropriate measures to protect personal information;
- All agreements will be made in the corporate name of the partners and in the case of Universities, not in the name of faculties, schools, institutes or individual researchers;
- The nature of individual research relationships between the Province of British Columbia and Universities may take many different forms including grants, transfer under agreements (also known as contribution agreements) and contracts for service. It is critical that the appropriate legal instrument be chosen for each project;
- Ownership and access rights to research outputs including intellectual property, reports and data will be determined at the project outset and will be appropriate to the research relationship and the legal instrument employed in creating the relationship. These decisions will be guided by the need for researchers to retain reasonable freedom to operate in relation to intellectual property (i.e. to use the knowledge or intellectual property generated in teaching, in future research, publications and in the practice of their professions), and the Province of British Columbia's need to receive project reports in forms and on terms of use that suit its purpose;
- Funds provided for the indirect costs of research will vary according to the nature of the research relationship;
- The core values of academic freedom must be maintained. Universities do not conduct secret research, and scientifically significant advances must be publishable in the open literature without unwarranted delay or editorial restrictions. Publications will not contain sponsor confidential information or personal information;
- Since much university research is actually performed by graduate students, it is also important to keep their academic needs in mind. Undergraduate and graduate students, postdoctoral fellows, and university faculty must ultimately be free to disseminate their research results, and students must be permitted to defend and publish their theses;

- Proprietary and sensitive data and information belonging to each party must be protected from unauthorized, inadvertent, or untimely disclosure;
- Future public use of certain research outputs by the university or researcher will acknowledge the financial contribution of the Province of British Columbia;
- Conduct of research will be in accordance with the university's research policies regarding the use of human subjects, animals, radioactive materials and biohazards; and
- The Province of British Columbia does not assume risk for commercial use of research results or intellectual property developed in the course of carrying out a research project. The University's licensing of intellectual property developed with financial support of the Province of British Columbia shall be structured so as to not expose the Province to third party liability.

Results

The key outcome of the working group's work is the development of a tool kit to assist the Province and universities in arriving at mutually agreeable research agreements. The tool kit consists of:

- Sample agreements
- Reference Table
- Reference documents

SAMPLE AGREEMENTS

The Working Group developed sample agreements that it recommends for use in Province-funded research projects conducted at BC universities.

Documents were developed for use in the following situations:

- Research Grants (Sample Grant Letter);
- Sponsored Research Agreements (Transfer Under Agreement); and
- Service Contracts (Schedule F for use in a General Service Agreement).

There are number of elements that are common to all three types of relationships. In each case, one party to the resulting agreement is the relevant Ministry and the other is the University; the agreement may also include an affiliated teaching hospital as a third party. The University is always provided with the right to publish all non-confidential information that results from its research. In all cases, the Ministry normally requires appropriate acknowledgement in publications. Indemnification is addressed through a standard set of mutual indemnification clauses. In all cases overhead may be included in the total price, as per University policy.

There three types of relationships are summarized below.

Research Grants (STOB 77)

These are the simplest form of research relationship and have the least number of specified deliverables and terms and conditions. Normally initiated by the researcher, in this form of relationship, no specific result is specified and no financial reporting is required. Payment is received up-front as a lump sum and no budget is normally required, except as part of an application, if required. The Grant does not include terms relating to intellectual property and the University retains unrestricted publication rights.

Sponsored Research Agreements (STOB 80; Contribution Agreement; Transfer Under Agreement)

These research relationships are often the most complex. Projects defined by these types of agreements may be initiated by either party and are defined in a detailed work plan; researchers report on the research results as per a Statement of Work that is attached in the agreement as Schedule A. A detailed financial report is also required. A budget is either included in Schedule B or is included in a proposal developed by the university researcher. Payment schedules are linked to reporting, milestones or deliverables that are well described in Schedule B. An up-front payment for a portion of the budget should be included to prevent such research projects from operating in deficit.

In Sponsored Research Agreements, the university or researcher owns all results, data, inventions, improvements and other IP produced by the project in accordance with the university's policies. The Province is granted rights/licenses to use intellectual property for non-commercial uses.

Confidentiality provisions are included that require all confidential information provided by each party to remain confidential.

Service Contracts (STOB 60 or 61; General Service Agreement; Service Contract)

Service Contracts are normally initiated by the Province. These relationships are referred to as General Service Agreements when the value of the contract is below $250,000 or Service Contracts when the value is over $250,000. These research projects often arise as a result of a need for advisory services or specific expertise for the direct use or benefit of the Province. A payment schedule is negotiated and included as Schedule B.

In these contracts, the Province purchases rights to all new intellectual property and may therefore use the intellectual property without restriction. The Province may provide the university with a royalty-free perpetual license to use the intellectual property for academic and educational purposes. A waiver of moral rights by the researcher(s) may be required. The Province will determine the nature of release of data and/or reports.

In these contracts a budget is not required, however, a Statement of Work is required and constitutes Schedule A.

REFERENCE TABLE

A Reference Table was also developed as a guide to help Ministry representatives and University research administrators determine:

- The appropriate document to be employed for a particular research relationship; and
- The principles behind each section of the document.

REFERENCE DOCUMENTS

A set of Reference Documents were also collated, some of which were created by the group, for convenient consultation by parties involved in developing agreements. The documents are:

- Excerpts from the Province's Core Policy and Procedures Manual on transfer payments, procurement and advance payments;
- Fact Sheet on Personal Consulting Activities of Academics;
- Provincial government policy on reimbursable GST

- Fact Sheet on Produced Materials and Intellectual Property
- Sample Employee/Research Confidentiality Agreement
- Glossary

Conclusion

There was excellent consensus within the Working Group that the Provincial Government-University research relationship resulted in a high degree of mutual benefit and there was a strong willingness by all participants to ensure that the relationship continued to develop in the most efficient and effective manner possible.

It is expected that the Tool Kit developed by the Working Group will ease the development of agreements to support research relationships between the provincial government and universities. Feedback regarding the Tool Kit may be directed to the contacts identified on this page.

Recommendations

As a result of the series of discussions and meetings, the Working Group has made the following recommendations:

1. That the Final Report and the documents be disseminated to all Ministries of the Province of British Columbia as provincial government policy and practice, effective January 30, 2008;
2. That the Vice Presidents of Research of British Columbia universities adopt the Final Report and the documents produced by the Working Group as guidelines when conducting research sponsored by Ministries of the Province of British Columbia effective January 30, 2008;
3. That a review of the proposed Implementation Plan be conducted 24 months after implementation.

Contact for Ministries

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Contact for Universities

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APPENDIX 1

Terms of Reference

Working Group on Provincial Government—University Research Agreements

PURPOSE

To develop a set of principles and recommend contract language templates and/or guidelines for research agreements that are satisfactory to both the Province of British Columbia and the Universities of British Columbia. While university colleges, colleges and provincial institutes are not represented on this Working Group, it is anticipated that this work should provide a good basis for preparing research agreements involving these public post-secondary education institutions as well.

MEMBERSHIP

- Christine Massey, Director, Policy & Research, The University Presidents' Council of British Columbia (TUPC);
- Diana Lucas, BC Ministry of Advanced Education and Ministry of Education;
- Spencer Payne, BC Ministry of Children and Family Development;
- Brenda Rafter, BC Ministry of Health;
- Dave Collisson, Deputy Chief Procurement Officer, Office of the Comptroller General;
- Tamsin Miley, Research Services Manager, University of Northern British Columbia (until March 2007);
- Angus Livingstone, University-Industry Liaison Office, The University of British Columbia; and
- Mario Kasapi, University-Industry Liaison Office, The University of British Columbia.

TERM

The Working Group will be constituted for a time-limited period, meeting over a period of 4 months, with a goal to complete its work and make recommendations to TUPC and to the Province of British Columbia by September 30, 2006.

BACKGROUND

Universities and the Province of British Columbia regularly enter into agreements for research. The primary value is in new knowledge and solutions generated by the research that directly benefits social, economic and cultural needs, with the added value of training students in the advancement of research and development.

A variety of instruments has been used, including contracts for services, contribution agreements and custom-built research agreements. Alternatively, the Province of British Columbia has provided grant funding to particular research projects that may also be co-funded by other governments and/or industry.

Both parties agree that the diversity and substance of legal instruments used to implement research initiatives are unsatisfactory. For a number of reasons, these instruments do not appropriately reflect the nature of the collaborative relationship between the parties, the particular operating environment of universities or the range of possible research work that can be undertaken. The impact for both parties to date has been stalled agreements, repeated or protracted revision/approval cycles and use of poor fit "boilerplate" agreements.

In their research efforts, universities and the Province of British Columbia share the same vision, however a great deal of business diversity exists within these two cultures in terms of policies, approvals and data and intellectual property ownership requirements. There may be a latent lack of common understanding or accommodation of natural differences between the parties on an administrative level.

As a result, representatives from TUPC, two universities and the Province of British Columbia have agreed to come together and recommend more appropriate legal instruments for use in drafting research arrangements. The desired outcome will see reduced time and effort required to secure agreements and a greater understanding of the framework of provincial government-university research agreements.

APPROACH AND DELIVERABLES

1. **Establish Membership:** A Working Group will be established with representatives from TUPC, the Province of British Columbia and the universities;
2. **Determine Terms of Reference:** The Terms of Reference will be developed and approved by the Working Group. The group will also determine an approval or decision-making process at its first meeting, for its output deliverables and recommendations;
3. **Clarify Needs and Principles:** The Working Group will meet and develop a set of principles to govern provincial government-university research relationships. The purpose of the principles is to ensure that the Province of British Columbia and universities start from a common basis of understanding for the concerns, issues and interests of the other party;
4. **Establish Types of Relationships and Key Issues:** Using a collaborative approach, the Working Group will identify the range of possible provincial government-university research relationships and identify and describe the key issues that can hamper the relationships or the efficient formation of written agreements;
5. **Recommend Solutions:** The group will develop and recommend improved approaches used for these research relationships. This could include: development of a toolkit, a decision guide ("menu" of scenarios and contract language to handle key issues), educational primers on various topics or other suggested approaches that can minimize or avoid unnecessary challenges in entering into provincial government-university research agreements;
6. **Communication and Consultation:** The group will seek support and/or approval for its recommendations from key stakeholders. For the Province of British Columbia, these stakeholders include the Procurement Council, the Ministry of Advanced Education Executive, Ministry of Finance Risk Management Branch (with respect to indemnity issues) and Ministry of Attorney General Legal Services Branch (with respect to contract language) and the Intellectual Property Program. For TUPC, key stakeholders include University-Industry Liaison Offices at member institutions and the Vice-Presidents Research Committee. The group may also consult with other public post-secondary institutions. The Working Group will also identify opportunities for provincial government and university research managers

to build relationships and communicate on an ongoing basis regarding common matters of concern; and

7. **Implementation and Accountability:** The group will develop an implementation plan for the recommended solutions including recommended timelines and the identification of any "quick wins". The implementation plan will incorporate accountability and review mechanisms so that progress can be assessed against stated goals and solutions and plans may be adjusted as necessary.

ISSUES

The new approach will address a number of issues identified by both parties, such as (but not limited to):

- **Intellectual Property:** Policies that respect the ownership and intellectual property interests of both parties and are appropriate to the type of research being undertaken. This includes formal types of intellectual property such as patents, copyright, and trademarks as well as information, results and data;
- **Parties:** Appropriate legal entities that can sign university-provincial government research agreements. The *University Act* empowers a public university to enter into agreements in its name, but not in the name of a faculty or individual researcher. This distinction is a critical one since identifying the legal party at the university level also defines the appropriate and meaningful thresholds for conflict of interest, intellectual property and moral rights;
- **Conflict of Interest:** Conflict of interest policies that are appropriate to universities and that protect the interests of the Province of British Columbia;
- **Waiver of Moral Rights:** An approach to moral rights appropriate to the role of university faculty and the research relationship in question;
- **Indemnity:** An indemnity clause that reflect the status of British Columbia's universities as government corporations under the provincial *Financial Administration Act* (FAA). According to the FAA *Guarantees and Indemnities Regulation* ministries and government corporations may only give an indemnity with the prior written approval of the Minister of Finance, or her representative, the Director of the Risk Management Branch. Therefore, the standard provincial indemnity provision is incongruous to provincial government-university research agreements and either needs to be revised or made subject to the limitations of the FAA and its regulations;
- **Good and Services Tax (GST):** Clear policies for the payment of GST. Universities receive 67% rebate for GST paid on purchases. The provincial government of British Columbia is immune from paying GST, and its private sector contractors can seek reimbursement from CRA for GST paid in fulfilling their provincial contract. Can this be reconciled so universities can seek CRA reimbursement or so that the Province of British Columbia can reimburse that amount by which the universities cannot recover (e.g. 33%), as an eligible contract budget expense, with the necessary evidence to support reimbursement?;
- **Confidentiality:** Clear policies on who owns and controls the use of confidential information used during, and produced as a result of, research activities, subject to the provisions for

the protection of privacy or confidentiality of data as outlined in British Columbia's *Freedom of Information and Protection of Privacy Act*;

- **Publication:** Clear policies setting out when university students and faculty are permitted to publish the results of the research both in academic journals and in student thesis; and
- **Overhead / Indirect Costs:** Policies that clearly outline the circumstances in which overhead charges would apply and ideally, at what rate.

RESOURCES

TUPC offers administrative support; the Province of British Columbia offers meeting facilities and administrative support as back-up to TUPC.

REFERENCE MATERIALS

- *The Lambert Model Agreements*, endorsed by the government and key university and business stakeholders in the United Kingdom: http://www.innovation.gov.uk/lambertagreements/
- Task Force on University-Industry Sponsored Research Arrangements. Final Report. University of British Columbia, University-Industry Liaison Office. 2006.

RESEARCH RELATIONSHIPS

Between the Province of British Columbia and British Columbia's Universities

Tool Kit

VERSION 1.3 SEPTEMBER 2010

www.researchrelationships.bc.ca

BRITISH COLUMBIA
The Best Place on Earth

THE Research Universities' Council OF BRITISH COLUMBIA

This toolkit forms an integral part of the Research Relationships Between the Province of British Columbia and Universities: Final Report (January 2008).

The toolkit consists of a set of sample agreements and reference documents that should help you to use and understand research agreements with universities. The toolkit was prepared by the Province-University Research Agreements Working Group.

The objectives of the toolkit are to:

- facilitate negotiations between the Province's ministries and its public universities;
- reduce the time and effort required to secure an agreement; and
- provide educational material and examples of best practice.

This document and its associated resources address those situations where the Province of British Columbia enters into an agreement directly with a university (or universities) to have research conducted in an area directly related to government priorities, policies or individual Ministry mandates. More specifically,

- Research services, investigation, testing, analysis and evaluation to
  - > Increase generalized knowledge or understanding, or
  - > recommend advice or solutions for a particular subject matter/issue for overall benefit to the Province of BC; or
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- Purchase of finished research papers, reports, or products;
- Websites or training delivery programs;
- Personal consulting arrangements between individual faculty members and the Province, and;
- Educational Services contracts (e.g., for the development of curriculum).

Feedback regarding the Tool Kit may be directed to the contact below.

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Table of Contents

Sample Grant Letter

[Ministry Letterhead]

Date

Recipient/Dept.
University Name
and Address

Dear Recipient Name:

We are pleased to inform you that <university name>, with you as principal investigator, has been awarded the sum of $_____ for the <name of project, or describe program target or research activity> (the "Project"), as outlined in your proposal dated <date>.

As a condition of assistance, please provide a copy of the research report generated by the Project upon completion. In addition, please acknowledge the Ministry's assistance on all written materials relating to the Project, by using the following acknowledgment:

> "We gratefully acknowledge the financial support of the
> Province of British Columbia through the Ministry of < >."

We trust that you will use your best efforts to ensure a successful outcome as a result of this undertaking.

Yours truly,

<name>

Deputy Minister <or Minister of <ministry name>

Sample Sponsored Research Agreement

Contract #

Province of British Columbia
Ministry of _____

Transfer Under Agreement for Research at a B.C. Public University

THIS AGREEMENT dated for reference the ___ day of _____ , 201___

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA,
represented by the Minister of _____

(the "Province")

OF THE FIRST PART

AND:

<NAME OF UNIVERSITY HERE>

(the "University")

OF THE SECOND PART

The parties to this Agreement agree as follows:

SECTION 1—DEFINITIONS

1.01 Where used in this Agreement:

(a)	"Commercial"	means being able to yield or make a profit, prepared, done, or acting with sole or chief emphasis on saleability, profit, or success;
(b)	"Financial Contribution"	means the total aggregate funding value stipulated in Schedule B;
(c)	"Intellectual Property"	means intangible (non-physical) property which includes scientific or scholarly discoveries, copyright, computer software, moral rights related to copyrighted materials, trademarks, official marks, domain names, patents, industrial designs, literary, artistic, musical or visual works and know-how;
(d)	"Material"	means all findings, data, reports, documents, records and material, (both printed and electronic, including but not limited to, on hard disk or diskettes), whether complete or otherwise, that have been produced, received, compiled or acquired by the University, or provided by or on behalf of the Province to, the University as a direct result of this Agreement, but does not include property owned by the University;

(e)	"Non-Commercial"	means not being able to profit financially at any time from the Material under this Agreement between the Province and University, in the use of the Material by the following non-commercial users and their employees: government ministries, agencies, boards and commissions; educational institutions (such as public school boards, public post-secondary institutions, community and technical institutes); and non-profit organizations (such as public libraries, charities, and other organizations created for the promotion of educational, health or social services purposes);
(f)	"Personal Information"	means recorded information, not including business contact information, about an identifiable individual;
(g)	"Principal Investigator"	means the individual identified by the University as the person primarily responsible for the Research Project;
(h)	"Rebate"	means a rebate on Federal Harmonized Sales Tax applicable to the University;
(i)	"Research Project"	means the research project described in Schedule A; and
(j)	"Term"	means the period commencing on the start date and expiring on the end date of the Agreement stipulated in the Schedule A.

SECTION 2—APPOINTMENT

2.01 The Province retains the University to conduct the Research Project during the Term, both described in Schedule "A".

SECTION 3—PAYMENT OF A FINANCIAL CONTRIBUTION

3.01 Subject to the provisions of this Agreement, the Province will pay the University, in the amount and manner, and at the times set out in Schedule "B" attached to this Agreement.

3.02 Notwithstanding any other provision of this Agreement the payment of the Financial Contribution by the Province to the University pursuant to this Agreement is subject to:

(a) there being sufficient monies available in an appropriation, as defined in the *Financial Administration Act* ("FAA"), to enable the Province, in any fiscal year when any payment of money by the Province to the University falls due pursuant to this Agreement, to make that payment; and

(b) Treasury Board, as defined in the FAA, not having controlled or limited, pursuant to the FAA, expenditure under any appropriation referred to in subparagraph (a) of this paragraph.

3.03 The University is entitled to a Rebate from the Federal Government and may, therefore, charge to the Province only the non-refundable portion of Harmonized Sales Tax, as applicable to the Research Project, and as provided for within the Financial Contribution.

SECTION 4—REPRESENTATIONS AND WARRANTIES

4.01 Subject to paragraph 4.04 (Disclaimer), the University represents and warrants to the Province with the intent that the Province will rely thereon in entering into this Agreement that:

(a) all information, statements, documents and reports furnished or submitted by it to the Province in connection with this Agreement are true and correct;

(b) it has no knowledge of any fact that materially adversely affects, or so far as it can foresee, might materially adversely affect, its properties, assets, condition (financial or otherwise), business or operations or its ability to fulfill its obligations under this Agreement; and

(c) it is not in breach of, or in default under, any law, statute or regulation of Canada or of the Province of British Columbia applicable to or binding on it or its operations.

4.02 All statements contained in any certificate, application, proposal or other document delivered by or on behalf of the University to the Province under this Agreement or in connection with any of the transactions contemplated hereby will be deemed to be representations and warranties by the University under this Agreement.

4.03 All representations, warranties, covenants and agreements made herein and all certificates, applications or other documents delivered by or on behalf of the University are material and will have been relied upon by the Province and will continue in full force and effect during the continuation of this Agreement.

4.04 **Disclaimer**. The University makes no representations or warranties, either express or implied, regarding data or other results arising from the Research Project. The University specifically disclaims any implied warranty of non-infringement or merchantability or fitness for a particular purpose and the University will, in no event, be liable for any loss of profits, be they direct, consequential, incidental, or special or other similar damages arising from any defect, error or failure to perform, even if the University has been advised of the possibility of such damages. The Province acknowledges that the Research Project is of an experimental and exploratory nature, that no particular results can be guaranteed, and that the Province has been advised by the University to undertake its own due diligence with respect to all matters arising from this Agreement.

SECTION 5—RELATIONSHIP

5.01 No partnership, joint venture, agency or other legal entity will be created by or will be deemed to be created by this Agreement or any actions of the parties pursuant to this Agreement.

5.02 Each party will be an independent contractor and not the servant, employee or agent of the other party.

5.03 The University will not in any manner whatsoever commit or purport to commit the Province to the payment of money to any person, firm or corporation.

5.04 The Province may, from time to time, give reasonable instructions to the University in relation to the carrying out of the Research Project, and the University will comply with those instructions but will not be subject to the control of the Province regarding the manner in which those instructions are carried out except as specified in this Agreement. Notwithstanding the foregoing, all changes to the scope and direction of the Agreement will be made with mutual agreement between the parties.

SECTION 6—UNIVERSITY'S OBLIGATIONS

6.01 The University will:

(a) carry out the Research Project in accordance with the terms of this Agreement during the Term stated in Schedule "A" of this Agreement;

(b) comply with the payment requirements set out in Schedule "B", including all requirements concerning the use, application and expenditure of the payments provided under this Agreement;

(c) comply with all applicable laws;

(d) hire and retain only qualified staff;

Drafter to choose one of the following options:

Option 1

(e) unless agreed otherwise supply, at its own cost, all labour, materials and approvals necessary to carry out the Research Project;

(f) co-operate with the Province in making such public announcements regarding the Research Project and the details of this Agreement as the Province requests; and

(g) acknowledge the Financial Contribution made by the Province to the University for the Research Project in any Materials, by printing on each of the Materials the following statement: "We gratefully acknowledge the financial support of the Province of British Columbia through the Ministry of _____."

Option 2

(e) unless agreed otherwise supply, at its own cost, all labour, materials and approvals necessary to carry out the Research Project; and

(f) subject to obtaining the prior written approval of the Province concerning form, content and location, the University may post signs acknowledging the Province's participation in the Research Project.

SECTION 7—RECORDS

7.01 The University will:

(a) establish and maintain accounting and administrative records to be used as the basis for the calculation of the Financial Contribution;

(b) establish and maintain books of account, invoices, receipts and vouchers for all expenses incurred; and

(c) permit the Province, for contract monitoring and audit purposes, at all reasonable times, upon reasonable notice, to enter any premises used by the University to conduct the Research Project or keep any documents or records pertaining to the Research Project, in order for the Province to inspect, audit, examine, review and copy any findings, data, specifications, drawings, working papers, reports, surveys, spread sheets, evaluations, documents, databases and other Material, (both printed and electronic, including, but not limited to, on hard disk or diskettes), whether complete or not, that are produced, received or otherwise acquired by the University as a result of this Agreement.

7.02 The parties agree that the Province does not have control, for the purpose of the *Freedom of Information and Protection of Privacy Act*, of the records held by the University.

SECTION 8—STATEMENTS AND ACCOUNTING

8.01 Within 3 months of being requested to do so by the Province in writing, the University will provide to the Province a financial statement documenting the expenditure of the Financial Contribution under this Agreement.

8.02 At the sole option of the Province, any portion of the Financial Contribution provided to the University under this Agreement and not expended at the end of the Agreement shall be:

Drafter to choose one of the following options:

Option 1

returned by the University to the Minister of Finance as requested by the Province.

Option 2

retained by the University for supplemental research activities related to the Research Project.

Option 3

deducted by the Province from any future funding requests submitted by the University on behalf of the same Principal Investigator involved in performing the Research Project within [a defined time period] and approved by the Province.

Option 4

used to conduct additional research at the discretion of the University.

SECTION 9—CONFLICT OF INTEREST

9.01 The University must not knowingly allow its research personnel involved in performing the Research Project, to provide any services to any person in circumstances that could give rise to a conflict of interest between their duties to that person and their duties to the Province under this Agreement.

SECTION 10—CONFIDENTIALITY

10.01 The University will treat as confidential all information or material which are clearly marked as confidential or proprietary when first disclosed ("Confidential Information") by the Province and supplied to or obtained by the University, or any subcontractor, under this Agreement and will not, without the prior written consent of the Province, except as required by applicable law, permit its disclosure except to the extent that such disclosure is necessary to enable the University to fulfill its obligations under this Agreement. Confidential Information may also include information furnished during discussions or oral presentations if it is conspicuously identified as proprietary at the time and then transcribed or confirmed in writing within thirty (30) days, specifically describing what portions of such information is considered to be proprietary or confidential. However, the University is under no obligation to maintain the confidentiality of Confidential Information which the University can show:

(a) is or subsequently becomes generally available to the public through no act or fault of the University;

(b) was in the possession of the University prior to its disclosure by the Province to the University;

(c) was lawfully acquired by the University from a third party who was not under an obligation of confidentiality to the Province;

(d) is required by an order of a legal process to disclose, provided that the University gives the Province prompt and reasonable notification of such requirement prior to disclosure; or

(e) was independently developed by employees, agents or consultants of the University who had no knowledge of or access to the Province's information as evidenced by the University's records.

10.02 The University will ensure that the Principal Investigator of the Research Project acknowledges the confidentiality provisions in this Agreement and it is the responsibility of the Principal Investigators to ensure that all other employees engaged in the Research Project are aware of the confidentiality provisions in this Agreement.

SECTION 11—DEFAULT

11.01 Any of the following events will constitute an Event of Default, namely:

(a) the University fails to comply with any material provision of this Agreement;

(b) subject to paragraph 4.04, any representation or warranty made by the University in accepting this Agreement is untrue or incorrect; or

(c) any information, statement, certificate, report or other document furnished or submitted by or on behalf of the University pursuant to or as a result of this Agreement is untrue or incorrect.

SECTION 12—TERMINATION

12.01 Either party may terminate this Agreement for any reason by giving at least thirty (30) days prior written notice to the other.

12.02 Upon the occurrence of any Event of Default and at any time thereafter the Province may, notwithstanding any other provision of this Agreement, at its option, elect to do any one or more of the following:

(a) terminate this Agreement, in which case the payment of the amount required under paragraph 12.04 of this Agreement will discharge the Province of all liability to the University under this Agreement;

(b) require the Event of Default be remedied within a time period specified by the Province;

(c) suspend any instalment of the Financial Contribution or any amount that is due to the University while the Event of Default continues;

(d) waive the Event of Default; and

(e) pursue any other remedy available at law or in equity.

12.03 The Province may also, at its option, terminate this Agreement immediately if the Province determines that the University's failure to comply places the health or safety of any person conducting the Research Project at immediate risk, and the payment of the amount required under paragraph 12.04 of this Agreement will discharge the Province of all liability to the University under this Agreement.

12.04 Where this Agreement is terminated before 100% completion of the Research Project, the Province will pay to the University all costs and liabilities, including uncancellable commitments, relating to the Research Project up to but no more than the Financial Contribution which have been incurred by the University as of the date of receipt of notice of termination or the date of termination, whichever is later.

SECTION 13—DISPUTE RESOLUTION

Drafter to choose one of the following options:

Option 1

13.01 In the event of a controversy or dispute between the parties arising out of or in connection with this Agreement, or regarding its interpretation or operation, the parties will use reasonable efforts to resolve the dispute amicably but if the parties, acting reasonably, are unable to resolve their dispute within thirty (30) days after the beginning of the consultation process, then:

(a) either party may serve written notice on the other party requiring that they submit the dispute to non-binding mediation;

(b) the parties will select a single mediator to mediate the dispute in accordance with the *Commercial Arbitration Act* of British Columbia;

(c) the language of the mediation proceeding will be English and the place of mediation will be Vancouver, British Columbia;

(d) the parties will use reasonable efforts to participate in the mediation process and to resolve their dispute;

(e) each party will pay its own costs and an equal share of all other costs of the mediation; and

(f) should no amicable settlement be reached by the parties within sixty (60) days from the commencement of the mediation, either party may initiate judicial proceedings to resolve the dispute.

Option 2

13.01 All disputes arising out of or in connection with this Agreement or in respect of any defined legal relationship associated with it or derived from it must, unless the parties otherwise agree, be referred to and finally resolved by arbitration under the *Commercial Arbitration Act*.

SECTION 14—INDEMNITY

14.01 The Province will indemnify and save harmless the University, its Board of Governors, directors, officers, employees, faculty, students and agents from and against any and all losses, claims, damages, actions, causes of action, costs and expenses that the University, its Board of Governors, directors, officers, employees, students and agents may sustain, incur, suffer or put to at any time either before or after the expiration or termination of this Agreement, where the same or any of them are based upon, arise out of or occur, directly or indirectly, by reason of any act or omission of the Province, or of any agent, employee, officer or director of the Province pursuant to this Agreement.

14.02 The University will indemnify and save harmless the Province, its officers, directors, employees and agents from and against any and all losses, claims, damages, actions, causes of action, costs and expenses that the Province may sustain, incur, suffer, or be put to at any time, either before or after the expiration or termination of this Agreement, where the same are based upon, arise out of or occur, directly or indirectly, by reason of any act or omission of the University or its Board of Governors, directors, officers, employees, faculty, contractors, students or agents pursuant to this Agreement.

SECTION 15—ASSIGNMENT AND SUBCONTRACTING

15.01 The University will not, without the prior, written consent of the Province:

(a) assign, either directly or indirectly, this Agreement or any right of the University under this Agreement; or

(b) subcontract any obligation of the University under this Agreement.

15.02 No subcontract entered into by the University will relieve the University from any of its obligations under this Agreement or impose upon the Province any obligation or liability arising from any such subcontract.

15.03 This Agreement will be binding upon the Province and its assigns and the University, the University's successors and permitted assigns.

SECTION 16—OWNERSHIP AND PUBLICATION OF RESULTS AND INTELLECTUAL PROPERTY

16.01 Any equipment, machinery, data or other property, provided by the Province to the University for the conduct of the Research Project under this Agreement will:

(a) be the exclusive property of the Province; and

(b) forthwith be delivered by the University to the Province on written notice to the University requesting delivery of the same at the Province's costs, whether such a notice is given before, upon, or after the expiration or sooner termination of this Agreement.

16.02 The University will retain title to any equipment purchased with funds provided by the Province under this Agreement and the Province acknowledges that the University's insurance is applicable only to such equipment owned by the University.

16.03 The Province acknowledges and agrees that the University owns all right, title and interest in the Material produced under this Agreement and Intellectual Property arising from the Research Project under this Agreement.

16.04 The University hereby grants the Province a perpetual non-exclusive, irrevocable, world-wide, fully paid up and royalty-free license to use, make, copy, distribute, translate, practice, and reproduce the Material produced under this Agreement and Intellectual Property arising under this Agreement for scientific, educational, public good and other Non-Commercial uses. In addition, the University grants the Province the additional rights to incorporate all or portions of the Material produced under this Agreement in any reports created by the Province and to further develop the Research Project reports provided that the content of the Research Project reports is not materially modified without the written approval of the University. Upon the Province's request, the University will deliver documents satisfactory to the Province that waive in the Province's favour any moral rights to Research Project reports, as defined in "Schedule A", which the University's employees or contractors may have in said Research Project reports.

16.05 The University and its employees will not be restricted from presenting publications at symposia, national or regional professional meetings, or from publishing in journals or other publications, accounts of the work pertaining to this Agreement. Publications, conference presentations, symposia and all other dissemination of material pertaining to the work of this Agreement will recognize the Ministry of _____.

SECTION 17—OTHER FUNDING

17.01 The University will ensure that if the University's research personnel, involved in performing the Research Project, receives funding for or in respect of the Research Project from any person, firm, corporation or other government or government body, then the University will immediately provide the Province with details thereof.

SECTION 18—NOTICES

18.01 Any written communication from the University to the Province must be mailed, personally delivered, faxed, or electronically transmitted to the following address:

(Specify mailing address, fax number and/or other electronic means for the Province, and name and title of contract manager.)

18.02 Any written communication from the Province to the University must be mailed, personally delivered, faxed or electronically transmitted to the following address:

(Specify name and mailing address including fax number and/or other electronic means for the University, and name and title of contact.)

18.03 Any written communication from either party will be deemed to have been received by the other party on the fifth business day after mailing in British Columbia; on the date of personal delivery if personally delivered or on the date of transmission if faxed (*or sent by email if applicable*).

18.04 Either party may, from time to time, notify the other party in writing of a change of address and, following the receipt of such notice, the new address will, for the purposes of paragraph 18.01 or 18.02 of this Agreement, be deemed to be the mailing address of the party giving notice.

SECTION 19—NON-WAIVER

19.01 No term or condition of this Agreement and no breach by the University of any such term or condition will be deemed to have been waived unless such waiver is in writing signed by the Province and the University.

19.02 The written waiver by the Province or any breach by the University of any term or condition of this Agreement will not be deemed to be a waiver of any other provision of any subsequent breach of the same or any other provision of this Agreement.

SECTION 20—ENTIRE AGREEMENT

20.01 This Agreement including the Schedules constitutes the entire agreement between the parties with respect to the subject matter of this Agreement.

SECTION 21—SURVIVAL OF PROVISIONS

21.01 All of the provisions of this Agreement in favour of the Province including, without limitation, paragraphs 3.02, 4.04, 7.01, 7.02, 8.02, 10.01, 12.04, 13.01, 14.01, 14.02, 16.01, 16.02, 16.03, 16.04, and all of the rights and remedies of the parties, either at law or in equity, will survive any expiration or sooner termination of this Agreement.

SECTION 22—MISCELLANEOUS

22.01 This Agreement will be governed by and construed in accordance with the laws of the Province of British Columbia.

22.02 The Schedules to this Agreement are an integral part of this Agreement as if set out at length in the body of this Agreement.

22.03 No amendment or modification to this Agreement will be effective unless it is in writing and duly executed by the parties.

22.04 If any provision of this Agreement or the application to any person or circumstance is invalid or unenforceable to any extent, the remainder of this Agreement and the application of such provision to any other person or circumstance will not be affected or impaired thereby and will be enforceable to the extent permitted by law.

22.05 Nothing in this Agreement operates as a consent, permit, approval or authorization by the Government of the Province of British Columbia or any Ministry or Branch thereof to or for anything related to the Research Project that by statute, the University is required to obtain unless it is expressly stated herein to be such a consent, permit, approval or authorization.

22.06 This Agreement may be executed by the parties in separate counterparts each of which when so executed and delivered shall be an original, and all such counterparts may be delivered by facsimile transmission and such transmission shall be considered an original.

22.07 Time is of the essence of this Agreement.

22.08 For the purpose of paragraphs 22.09 and 22.10, an "Event of Force Majeure" includes, but is not limited to, acts of God, changes in the laws of Canada, governmental restrictions or control on imports, exports or for-

eign exchange, wars (declared or undeclared), fires, floods, storms, strikes (including illegal work stoppages or slowdowns), lockouts, labour shortages, freight embargoes and power failures or other cause beyond the reasonable control of a party, provided always that lack of money, financing or credit will not be and will not be deemed to be an "Event of Force Majeure".

22.09 Neither party will be liable to the other for any delay, interruption or failure in the performance of their respective obligations if caused by an Event of Force Majeure, in which case the time period for the performance or completion of any such obligation will be automatically extended for the duration of the Event of Force Majeure.

22.10 If an Event of Force Majeure occurs or is likely to occur, then the party directly affected will notify the other party forthwith, and will use its reasonable efforts to remove, curtail or contain the cause of the delay, interruption or failure and to resume with the least possible delay compliance with its obligations under this Agreement.

The parties hereto have executed this Agreement the day and year as set out above.

SIGNED AND DELIVERED by the University or an Authorized Representative of the University	)	SIGNED AND DELIVERED on behalf of the Province by an Authorized Representative of the Province
_____	)	_____
Print Name of University Authorized Representative)	)	Print Name of Authorized Representative)
_____	)	_____
(Signature)	)	(Signature)

SCHEDULE A—RESEARCH PROJECT AND TERM

1. Notwithstanding the date of execution of this Agreement, the term of this Agreement will start on _____ and end on _____.

2. [*Research Project Details*]

SAMPLE SCHEDULE B—FINANCIAL CONTRIBUTION

1. The Province agrees to provide to the University the amount of $_____ during the Term of the Agreement.

2. Payments will be made as follows:

   [*The payment schedule is often linked to project reporting, deliverables or milestones.*]

   (a) an initial payment of $_____[*small percentage of total contribution, to help with start up costs, if applicable*]_____ within [*30 or 60*] days of the start date of this Agreement;

   (b) upon receipt by the Province of [*specify a particular phase, service, result, deliverable or status report*], a payment amount of $_____;

   (c) upon receipt by the Province of [*specify a particular phase, service, result, deliverable or status report*], a payment amount of $_____; and

   (d) on completion of the Research Project and upon receipt by the Province of the final [*specify by name—a deliverable(s) or written report(s)*], a final payment not to exceed $_____.

3. The University will submit to the Province <specify timing, e.g., upon completion of each phase of the Research Project specified in Schedule "A", or upon completion of the Research Project, for example>, a written statement of account showing:

   (a) the University's legal name and address;

   (b) the date of the statement and a statement number for identification;

   (c) the calculation of the Financial Contribution being claimed, with reasonable detail of the applicable part of the Research Project completed to statement date; and

   (d) any other billing information reasonably requested by the Province.

General Service Agreement

Also available at, including optional schedules:
http://www.pss.gov.bc.ca/psb/gsa/gsa_index.html

For Administrative Purposes Only

Ministry Contract No.: _____
Requisition No.: _____
Solicitation No. (if applicable): _____
Commodity Code: _____

Contractor Information

Supplier Name: _____
Supplier No.: _____
Telephone No.: _____
E-mail Address: _____
Website: _____

Financial Information

Client: _____
Responsibility Centre: _____
Service Line: _____
STOB: _____
Project: _____

TABLE OF CONTENTS

SCHEDULE A–SERVICES

Part 1–Term
Part 2– Services
Part 3–Related Documentation
Part 4–Key Personnel

SCHEDULE B–FEES AND EXPENSES

Part 1–Maximum Amount Payable
Part 2–Fees
Part 3–Expenses
Part 4–Statements of Account
Part 5–Payments Due
Part 6–Goods and Services Tax

SCHEDULE C–APPROVED SUBCONTRACTOR(S)

SCHEDULE D–INSURANCE

SCHEDULE E–PRIVACY PROTECTION SCHEDULE

SCHEDULE F–ADDITIONAL TERMS

SCHEDULE G–SECURITY SCHEDULE

THIS AGREEMENT is dated for reference the ___day of _____, 20__.

BETWEEN:

@LEGAL NAME AND, IF APPLICABLE, DESCRIPTION, OF CONTRACTOR (the "Contractor") with the following specified address and fax number:

@ADDRESS
@POSTAL CODE
@FAX NUMBER

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, as represented by _____ (the "Province") with the following specified address and fax number:

@ADDRESS
@POSTAL CODE
@FAX NUMBER

The Province wishes to retain the Contractor to provide the services specified in Schedule A and, in consideration for the remuneration set out in Schedule B, the Contractor has agreed to provide those services, on the terms and conditions set out in this Agreement.

As a result, the Province and the Contractor agree as follows:

1 DEFINITIONS

General

1.1 In this Agreement, unless the context otherwise requires:

(a) "Business Day" means a day, other than a Saturday or Sunday, on which Provincial government offices are open for normal business in British Columbia;
(b) "Incorporated Material" means any material in existence prior to the start of the Term or developed independently of this Agreement, and that is incorporated or embedded in the Produced Material by the Contractor or a Subcontractor;
(c) "Material" means the Produced Material and the Received Material;
(d) "Produced Material" means records, software and other material, whether complete or not, that, as a result of this Agreement, are produced by the Contractor or a Subcontractor and includes the Incorporated Material;
(e) "Received Material" means records, software and other material, whether complete or not, that, as a result of this Agreement, are received by the Contractor or a Subcontractor from the Province or any other person;
(f) "Services" means the services described in Part 2 of Schedule A;
(g) "Subcontractor" means a person described in paragraph (a) or (b) of section 13.4; and
(h) "Term" means the term of the Agreement described in Part 1 of Schedule A subject to that term ending earlier in accordance with this Agreement.

Meaning of "record"

1.2 The definition of "record" in the Interpretation Act is incorporated into this Agreement and "records" will bear a corresponding meaning.

2 SERVICES

Provision of services

2.1 The Contractor must provide the Services in accordance with this Agreement.

Term

2.2 Regardless of the date of execution or delivery of this Agreement, the Contractor must provide the Services during the Term.

Supply of various items

2.3 Unless the parties otherwise agree in writing, the Contractor must supply and pay for all labour, materials, equipment, tools, facilities, approvals and licenses necessary or advisable to perform the Contractor's obligations under this Agreement, including the license under section 6.4.

Standard of care

2.4 Unless otherwise specified in this Agreement, the Contractor must perform the Services to a standard of care, skill and diligence maintained by persons providing, on a commercial basis, services similar to the Services.

Standards in relation to persons performing Services

2.5 The Contractor must ensure that all persons employed or retained to perform the Services are qualified and competent to perform them and are properly trained, instructed and supervised.

Instructions by Province

2.6 The Province may from time to time give the Contractor reasonable instructions (in writing or otherwise) as to the performance of the Services. The Contractor must comply with those instructions but, unless otherwise specified in this Agreement, the Contractor may determine the manner in which the instructions are carried out.

Confirmation of non-written instructions

2.7 If the Province provides an instruction under section 2.6 other than in writing, the Contractor may request that the instruction be confirmed by the Province in writing, which request the Province must comply with as soon as it is reasonably practicable to do so.

Effectiveness of non-written instructions

2.8 Requesting written confirmation of an instruction under section 2.7 does not relieve the Contractor from complying with the instruction at the time the instruction was given.

Applicable laws

2.9 In the performance of the Contractor's obligations under this Agreement, the Contractor must comply with all applicable laws.

3 PAYMENT

Fees and expenses

3.1 If the Contractor complies with this Agreement, then the Province must pay to the Contractor at the times and on the conditions set out in Schedule B:
(a) the fees described in that Schedule;
(b) the expenses, if any, described in that Schedule if they are supported, where applicable, by proper receipts and, in the Province's opinion, are necessarily incurred by the Contractor in providing the Services; and
(c) any applicable taxes payable by the Province under law or agreement with the relevant taxation authorities on the fees and expenses described in paragraphs (a) and (b).
The Province is not obliged to pay to the Contractor more than the "Maximum Amount" specified in Schedule B on account of fees and expenses.

Statements of accounts

3.2 In order to obtain payment of any fees and expenses under this Agreement, the Contractor must submit to the Province a written statement of account in a form satisfactory to the Province upon completion of the Services or at other times described in Schedule B.

Withholding of amounts

3.3 Without limiting section 9.1, the Province may withhold from any payment due to the Contractor an amount sufficient to indemnify, in whole or in part, the Province and its employees and agents against any liens or other third-party claims that have arisen or could arise in connection with the provision of the Services. An amount withheld under this section must be promptly paid by the Province to the Contractor upon the basis for withholding the amount having been fully resolved to the satisfaction of the Province.

Appropriation

3.4 The Province's obligation to pay money to the Contractor is subject to the Financial Administration Act, which makes that obligation subject to an appropriation being available in the fiscal year of the Province during which payment becomes due.

Currency

3.5 Unless otherwise specified in this Agreement, all references to money are to Canadian dollars.

Non-resident income tax

3.6 If the Contractor is not a resident in Canada, the Contractor acknowledges that the Province may be required by law to withhold income tax from the fees described in Schedule B and then to remit that tax to the Receiver General of Canada on the Contractor's behalf.

Prohibition against committing money

3.7 Without limiting section 13.10(a), the Contractor must not in relation to performing the Contractor's obligations under this Agreement commit or purport to commit the Province to pay any money except as may be expressly provided for in this Agreement.

Refunds of taxes

3.8 The Contractor must:

(a) apply for, and use reasonable efforts to obtain, any available refund, credit, rebate or remission of federal, provincial or other tax or duty imposed on the Contractor as a result of this Agreement that the Province has paid or reimbursed to the Contractor or agreed to pay or reimburse to the Contractor under this Agreement; and

(b) immediately on receiving, or being credited with, any amount applied for under paragraph (a), remit that amount to the Province.

4 REPRESENTATIONS AND WARRANTIES

4.1 As at the date this Agreement is executed and delivered by, or on behalf of, the parties, the Contractor represents and warrants to the Province as follows:

(a) except to the extent the Contractor has previously disclosed otherwise in writing to the Province,
(i) all information, statements, documents and reports furnished or submitted by the Contractor to the Province in connection with this Agreement (including as part of any competitive process resulting in this Agreement being entered into) are in all material respects true and correct,
(ii) the Contractor has sufficient trained staff, facilities, materials, appropriate equipment and approved subcontractual agreements in place and available to enable the Contractor to fully perform the Services, and
(iii) the Contractor holds all permits, licenses, approvals and statutory authorities issued by any government or government agency that are necessary for the performance of the Contractor's obligations under this Agreement; and

(b) if the Contractor is not an individual,
(i) the Contractor has the power and capacity to enter into this Agreement and to observe, perform and comply with the terms of this Agreement and all necessary corporate or other proceedings have been taken and done to authorize the execution and delivery of this Agreement by, or on behalf of, the Contractor, and
(ii) this Agreement has been legally and properly executed by, or on behalf of, the Contractor and is legally binding upon and enforceable against the Contractor in accordance with its terms except as enforcement may be limited by bankruptcy, insolvency or other laws affecting the rights of creditors generally and except that equitable remedies may be granted only in the discretion of a court of competent jurisdiction.

5 PRIVACY, SECURITY AND CONFIDENTIALITY

Privacy

5.1 The Contractor must comply with the Privacy Protection Schedule attached as Schedule E.

Security

5.2 The Contractor must:
(a) make reasonable security arrangements to protect the Material from unauthorized access, collection, use, disclosure, alteration or disposal; and
(b) comply with the Security Schedule attached as Schedule G.

Confidentiality

5.3 The Contractor must treat as confidential all information in the Material and all other information accessed or obtained by the Contractor or a Subcontractor (whether verbally, electronically or otherwise) as a result of this Agreement, and not permit its disclosure or use without the Province's prior written consent except:
(a) as required to perform the Contractor's obligations under this Agreement or to comply with applicable laws;
(b) if it is information that is generally known to the public other than as result of a breach of this Agreement; or
(c) if it is information in any Incorporated Material.

Public announcements

5.4 Any public announcement relating to this Agreement will be arranged by the Province and, if such consultation is reasonably practicable, after consultation with the Contractor.

Restrictions on promotion

5.5 The Contractor must not, without the prior written approval of the Province, refer for promotional purposes to the Province being a customer of the Contractor or the Province having entered into this Agreement.

6 MATERIAL AND INTELLECTUAL PROPERTY

Access to Material

6.1 If the Contractor receives a request for access to any of the Material from a person other than the Province, and this Agreement does not require or authorize the Contractor to provide that access, the Contractor must promptly advise the person to make the request to the Province.

Ownership and delivery of Material

6.2 The Province exclusively owns all property rights in the Material which are not intellectual property rights. The Contractor must deliver any Material to the Province immediately upon the Province's request.

Matters respecting intellectual property

6.3 The Province exclusively owns all intellectual property rights, including copyright, in:
(a) Received Material that the Contractor receives from the Province; and
(b) Produced Material, other than any Incorporated Material.
Upon the Province's request, the Contractor must deliver to the Province documents satisfactory to the Province that irrevocably waive in the Province's favour any moral rights which the Contractor (or employees of the Contractor) or a Subcontractor (or employees of a Subcontractor) may have in the Produced Material and that confirm the vesting in the Province of the copyright in the Produced Material, other than any Incorporated Material.

Rights in relation to Incorporated Material

6.4 Upon any Incorporated Material being embedded or incorporated in the Produced Material and to the extent that it remains so embedded or incorporated, the Contractor grants to the Province:
(a) a non-exclusive, perpetual, irrevocable, royalty-free, worldwide license to use, reproduce, modify and distribute that Incorporated Material; and
(b) the right to sublicense to third-parties the right to use, reproduce, modify and distribute that Incorporated Material.

7 RECORDS AND REPORTS

Work reporting

7.1 Upon the Province's request, the Contractor must fully inform the Province of all work done by the Contractor or a Subcontractor in connection with providing the Services.

Time and expense records

7.2 If Schedule B provides for the Contractor to be paid fees at a daily or hourly rate or for the Contractor to be paid or reimbursed for expenses, the Contractor must maintain time records and books of account, invoices, receipts and vouchers of expenses in support of those payments, in form and content satisfactory to the Province. Unless otherwise specified in this Agreement, the Contractor must retain such documents for a period of not less than seven years after this Agreement ends.

8 AUDIT

8.1 In addition to any other rights of inspection the Province may have under statute or otherwise, the Province may at any reasonable time and on reasonable notice to the Contractor, enter on the Contractor's premises to inspect and, at the Province's discretion, copy any of the Material and the Contractor must permit, and provide reasonable assistance to, the exercise by the Province of the Province's rights under this section.

9 INDEMNITY AND INSURANCE

Indemnity

9.1 The Contractor must indemnify and save harmless the Province and the Province's employees and agents from any losses, claims, damages, actions, causes of action, costs and expenses that the Province or any of the Province's employees or agents may sustain, incur, suffer or be put to at any time, either before or after this Agreement ends, including any claim of infringement of third-party intellectual property rights, where the same or any of them are based upon, arise out of or occur, directly or indirectly, by reason of any act or omission by the Contractor or by any of the Contractor's agents, employees, officers, directors or Subcontractors in connection with this Agreement, excepting always liability arising out of the independent acts or omissions of the Province and the Province's employees and agents.

Insurance

9.2 The Contractor must comply with the Insurance Schedule attached as Schedule D.

Workers compensation

9.3 Without limiting the generality of section 2.9, the Contractor must comply with, and must ensure that any Subcontractors comply with, all applicable occupational health and safety laws in relation to the performance of the Contractor's obligations under this Agreement, including the Workers Compensation Act in British Columbia or similar laws in other jurisdictions.

Personal optional protection

9.4 The Contractor must apply for and maintain personal optional protection insurance (consisting of income replacement and medical care coverage) during the Term at the Contractor's expense if:
(a) the Contractor is an individual or a partnership of individuals and does not have the benefit of mandatory workers compensation coverage under the Workers Compensation Act or similar laws in other jurisdictions; and
(b) such personal optional protection insurance is available for the Contractor from WorkSafeBC or other sources.

Evidence of coverage

9.5 Within 10 Business Days of being requested to do so by the Province, the Contractor must provide the Province with evidence of the Contractor's compliance with sections 9.3 and 9.4.

10 FORCE MAJEURE

Definitions relating to force majeure

10.1 In this section and sections 10.2 and 10.3:
(a) "Event of Force Majeure" means one of the following events:
(i) a natural disaster, fire, flood, storm, epidemic or power failure,
(ii) a war (declared and undeclared), insurrection or act of terrorism or piracy,
(iii) a strike (including illegal work stoppage or slowdown) or lockout, or
(iv) a freight embargo
if the event prevents a party from performing the party's obligations in accordance with this Agreement and is beyond the reasonable control of that party; and
(b) "Affected Party" means a party prevented from performing the party's obligations in accordance with this Agreement by an Event of Force Majeure.

Consequence of Event of Force Majeure

10.2 An Affected Party is not liable to the other party for any failure or delay in the performance of the Affected Party's obligations under this Agreement resulting from an Event of Force Majeure and any time periods for the performance of such obligations are automatically extended for the duration of the Event of Force Majeure provided that the Affected Party complies with the requirements of section 10.3.

Duties of Affected Party

10.3 An Affected Party must promptly notify the other party in writing upon the occurrence of the Event of Force Majeure and make all reasonable efforts to prevent, control or limit the effect of the Event of Force Majeure so as to resume compliance with the Affected Party's obligations under this Agreement as soon as possible.

11 DEFAULT AND TERMINATION

Definitions relating to default and termination

11.1 In this section and sections 11.2 to 11.4:

(a) "Event of Default" means any of the following:
  (i) an Insolvency Event,
  (ii) the Contractor fails to perform any of the Contractor's obligations under this Agreement, or
  (iii) any representation or warranty made by the Contractor in this Agreement is untrue or incorrect; and
(b) "Insolvency Event" means any of the following:
  (i) an order is made, a resolution is passed or a petition is filed, for the Contractor's liquidation or winding up,
  (ii) the Contractor commits an act of bankruptcy, makes an assignment for the benefit of the Contractor's creditors or otherwise acknowledges the Contractor's insolvency,
  (iii) a bankruptcy petition is filed or presented against the Contractor or a proposal under the Bankruptcy and Insolvency Act (Canada) is made by the Contractor,
  (iv) a compromise or arrangement is proposed in respect of the Contractor under the Companies' Creditors Arrangement Act (Canada),
  (v) a receiver or receiver-manager is appointed for any of the Contractor's property, or
  (vi) the Contractor ceases, in the Province's reasonable opinion, to carry on business as a going concern.

Province's options on default

11.2 On the happening of an Event of Default, or at any time thereafter, the Province may, at its option, elect to do any one or more of the following:

(a) by written notice to the Contractor, require that the Event of Default be remedied within a time period specified in the notice;
(b) pursue any remedy or take any other action available to it at law or in equity; or
(c) by written notice to the Contractor, terminate this Agreement with immediate effect or on a future date specified in the notice, subject to the expiration of any time period specified under section 11.2(a).

Delay not a waiver

11.3 No failure or delay on the part of the Province to exercise its rights in relation to an Event of Default will constitute a waiver by the Province of such rights.

Province's right to terminate other than for default

11.4 In addition to the Province's right to terminate this Agreement under section 11.2(c) on the happening of an Event of Default, the Province may terminate this Agreement for any reason by giving at least 10 days' written notice of termination to the Contractor.

Payment consequences of termination

11.5 Unless Schedule B otherwise provides, if the Province terminates this Agreement under section 11.4:

(a) the Province must, within 30 days of such termination, pay to the Contractor any unpaid portion of the fees and expenses described in Schedule B which corresponds with the portion of the Services that was completed to the Province's satisfaction before termination of this Agreement; and
(b) the Contractor must, within 30 days of such termination, repay to the Province any paid portion of the fees and expenses described in Schedule B which corresponds with the portion of the Services that the Province has notified the Contractor in writing was not completed to the Province's satisfaction before termination of this Agreement.

Discharge of liability

11.6 The payment by the Province of the amount described in section 11.5(a) discharges the Province from all liability to make payments to the Contractor under this Agreement.

Notice in relation to Events of Default

11.7 If the Contractor becomes aware that an Event of Default has occurred or anticipates that an Event of Default is likely to occur, the Contractor must promptly notify the Province of the particulars of the Event of Default or anticipated Event of Default. A notice under this section as to the occurrence of an Event of Default must also specify the steps the Contractor proposes to take to address, or prevent recurrence of, the Event of Default. A notice under this section as to an anticipated Event of Default must specify the steps the Contractor proposes to take to prevent the occurrence of the anticipated Event of Default.

12 DISPUTE RESOLUTION

Dispute resolution process

12.1 In the event of any dispute between the parties arising out of or in connection with this Agreement, the following dispute resolution process will apply unless the parties otherwise agree in writing:
(a) the parties must initially attempt to resolve the dispute through collaborative negotiation;
(b) if the dispute is not resolved through collaborative negotiation within 15 Business Days of the dispute arising, the parties must then attempt to resolve the dispute through mediation under the rules of the British Columbia Mediator Roster Society; and
(c) if the dispute is not resolved through mediation within 30 Business Days of the commencement of mediation, the dispute must be referred to and finally resolved by arbitration under the Commercial Arbitration Act.

Location of arbitration or mediation

12.2 Unless the parties otherwise agree in writing, an arbitration or mediation under section 12.1 will be held in Victoria, British Columbia.

Costs of mediation or arbitration

12.3 Unless the parties otherwise agree in writing or, in the case of an arbitration, the arbitrator otherwise orders, the parties must share equally the costs of a mediation or arbitration under section 12.1 other than those costs relating to the production of expert evidence or representation by counsel.

13 MISCELLANEOUS

Delivery of notices

13.1 Any notice contemplated by this Agreement, to be effective, must be in writing and delivered as follows:
(a) by fax to the addressee's fax number specified on the first page of this Agreement, in which case it will be deemed to be received on the day of transmittal unless transmitted after the normal business hours of the addressee or on a day that is not a Business Day, in which cases it will be deemed to be received on the next following Business Day;
(b) by hand to the addressee's address specified on the first page of this Agreement, in which case it will be deemed to be received on the day of its delivery; or
(c) by prepaid post to the addressee's address specified on the first page of this Agreement, in which case if mailed during any period when normal postal services prevail, it will be deemed to be received on the fifth Business Day after its mailing.

Change of address or fax number

13.2 Either party may from time to time give notice to the other party of a substitute address or fax number, which from the date such notice is given will supersede for purposes of section 13.1 any previous address or fax number specified for the party giving the notice.

Assignment

13.3 The Contractor must not assign any of the Contractor's rights under this Agreement without the Province's prior written consent.

Subcontracting

13.4 The Contractor must not subcontract any of the Contractor's obligations under this Agreement to any person without the Province's prior written consent, excepting persons listed in the attached Schedule C. No subcontract, whether consented to or not, relieves the Contractor from any obligations under this Agreement. The Contractor must ensure that:

(a) any person retained by the Contractor to perform obligations under this Agreement; and
(b) any person retained by a person described in paragraph (a) to perform those obligations fully complies with this Agreement in performing the subcontracted obligations.

Waiver

13.5 A waiver of any term or breach of this Agreement is effective only if it is in writing and signed by, or on behalf of, the waiving party and is not a waiver of any other term or breach.

Modifications

13.6 No modification of this Agreement is effective unless it is in writing and signed by, or on behalf of, the parties.

Entire agreement

13.7 This Agreement (including any modification of it) constitutes the entire agreement between the parties as to performance of the Services.

Survival of certain provisions

13.8 Sections 2.9, 3.1 to 3.4, 3.7, 3.8, 5.1 to 5.5, 6.1 to 6.4, 7.1, 7.2, 8.1, 9.1, 9.2, 9.5, 10.1 to 10.3, 11.2, 11.3, 11.5, 11.6, 12.1 to 12.3, 13.1, 13.2, 13.8, and 13.10, any accrued but unpaid payment obligations, and any other sections of this Agreement (including schedules) which, by their terms or nature, are intended to survive the completion of the Services or termination of this Agreement, will continue in force indefinitely, even after this Agreement ends.

Schedules

13.9 The schedules to this Agreement (including any appendices or other documents attached to, or incorporated by reference into, those schedules) are part of this Agreement.

Independent contractor

13.10 In relation to the performance of the Contractor's obligations under this Agreement, the Contractor is an independent contractor and not:

(a) an employee or partner of the Province; or
(b) an agent of the Province except as may be expressly provided for in this Agreement.

The Contractor must not act or purport to act contrary to this section.

Personnel not to be employees of Province

13.11 The Contractor must not do anything that would result in personnel hired or used by the Contractor or a Subcontractor in relation to providing the Services being considered employees of the Province.

Key Personnel

13.12 If one or more individuals are specified as "Key Personnel" of the Contractor in Part 4 of Schedule A, the Contractor must cause those individuals to perform the Services on the Contractor's behalf, unless the Province otherwise approves in writing, which approval must not be unreasonably withheld.

Pertinent information

13.13 The Province must make available to the Contractor all information in the Province's possession which the Province considers pertinent to the performance of the Services.

Conflict of interest

13.14 The Contractor must not provide any services to any person in circumstances which, in the Province's reasonable opinion, could give rise to a conflict of interest between the Contractor's duties to that person and the Contractor's duties to the Province under this Agreement.

Time

13.15 Time is of the essence in this Agreement and, without limitation, will remain of the essence after any modification or extension of this Agreement, whether or not expressly restated in the document effecting the modification or extension.

Conflicts among provisions

13.16 Conflicts among provisions of this Agreement will be resolved as follows:
(a) a provision in the body of this Agreement will prevail over any conflicting provision in, attached to or incorporated by reference into a schedule, unless that conflicting provision expressly states otherwise; and
(b) a provision in a schedule will prevail over any conflicting provision in a document attached to or incorporated by reference into a schedule, unless the schedule expressly states otherwise.

Agreement not permit nor fetter

13.17 This Agreement does not operate as a permit, license, approval or other statutory authority which the Contractor may be required to obtain from the Province or any of its agencies in order to provide the Services. Nothing in this Agreement is to be construed as interfering with, or fettering in any manner, the exercise by the Province or its agencies of any statutory, prerogative, executive or legislative power or duty.

Remainder not affected by invalidity

13.18 If any provision of this Agreement or the application of it to any person or circumstance is invalid or unenforceable to any extent, the remainder of this Agreement and the application of such provision to any other person or circumstance will not be affected or impaired and will be valid and enforceable to the extent permitted by law.

Further assurances

13.19 Each party must perform the acts, execute and deliver the writings, and give the assurances as may be reasonably necessary to give full effect to this Agreement.

Additional terms

13.20 Any additional terms set out in the attached Schedule F apply to this Agreement.

Governing law

13.21 This Agreement is governed by, and is to be interpreted and construed in accordance with, the laws applicable in British Columbia.

14 INTERPRETATION

14.1 In this Agreement:
(a) "includes" and "including" are not intended to be limiting;
(b) unless the context otherwise requires, references to sections by number are to sections of this Agreement;
(c) the Contractor and the Province are referred to as "the parties" and each of them as a "party";
(d) "attached" means attached to this Agreement when used in relation to a schedule;
(e) unless otherwise specified, a reference to a statute by name means the statute of British Columbia by that name, as amended or replaced from time to time;
(f) the headings have been inserted for convenience of reference only and are not intended to describe, enlarge or restrict the scope or meaning of this Agreement or any provision of it;
(g) "person" includes an individual, partnership, corporation or legal entity of any nature; and
(h) unless the context otherwise requires, words expressed in the singular include the plural and vice versa.

15 EXECUTION AND DELIVERY OF AGREEMENT

15.1 This Agreement may be entered into by a separate copy of this Agreement being executed by, or on behalf of, each party and that executed copy being delivered to the other party by a method provided for in section 13.1 or any other method agreed to by the parties.

The parties have executed this Agreement as follows:

SIGNED on the _____ day of _____, 20__ by the Contractor (or, if not an individual, on its behalf by its authorized signatory or signatories):

_____
Signature(s)

_____
Print Name(s)

_____
Print Title(s)

SIGNED on the _____ day of _____, 20__ on behalf of the Province by its duly authorized representative:

_____
Signature(s)

_____
Print Name(s)

_____
Print Title(s)

GENERAL SERVICE AGREEMENT
SCHEDULE F—ADDITIONAL TERMS

Contract #

(Version for use with General Service Agreement, between the Province and B.C.'s Public Universities)

1. Despite Section 13.16 of this Agreement, the Contractor and the Province agree that Sections 3.6, 3.8, 5, 6.4(b), 11, and 13.14 of the Agreement are deleted.

2. The Province will indemnify and save harmless the Contractor, its Board of Governors, directors, officers, employees, faculty, students and agents from and against any and all losses, claims, damages, actions, causes of action, costs and expenses that the Contractor, its Board of Governors, directors, officers, employees, faculty, students and agents may sustain, incur, suffer or put to at any time either before or after the expiration or termination of this Agreement, where the same or any of them are based upon, arise out of or occur, directly or indirectly, by reason of any act or omission of the Province, or of any agent, employee, officer, or director of the Province pursuant to this Agreement.

3. The Contractor will treat as confidential all information or material which are clearly marked as confidential or proprietary when first disclosed ("Confidential Information") by the Province and supplied to or obtained by the Contractor, or any sub-contractor, under this Agreement and will not, without the prior written consent of the Province, except as required by applicable law, permit its disclosure except to the extent that such disclosure is necessary to enable the Contractor to fulfill its obligations under this Agreement. Confidential Information may also include information furnished during discussions or oral presentations if it is conspicuously identified as proprietary at the time and then transcribed or confirmed in writing within thirty (30) days, specifically describing what portions of such information is considered to be proprietary or confidential. However, the Contractor is under no obligation to maintain the confidentiality of Confidential Information which the Contractor can show:

   (a) is or subsequently becomes generally available to the public through no act or fault of the Contractor;
   (b) was in the Contractor's possession prior to its disclosure by the Province to the Contractor;
   (c) was lawfully acquired by the Contractor from a third party who was not under an obligation of confidentiality to the Province;
   (d) is required by an order of a legal process to disclose, provided that the Contractor gives the Province prompt and reasonable notification of such requirement prior to disclosure; or
   (e) was independently developed by the Contractor's employees, agents or consultants who had no knowledge of or access to the Province's information as evidenced by the Contractor's records.

4. The Contractor is entitled to a Harmonized Sales Tax rebate from the Federal Government and will, therefore, charge to the Province only the non-refundable portion of the Harmonized Sales Tax, as applicable to the Services.

5. The Contractor must not knowingly allow its research personnel involved in performing the Services, to provide any services to any person in circumstances that could give rise to a conflict of interest between their duties to that person and their duties to the Province under this Agreement.

6. Any of the following events will constitute an Event of Default, namely:

   (a) the Contractor fails to comply with any material provision of this Agreement;
   (b) any representation or warranty made by the Contractor in accepting this Agreement is untrue or incorrect; or
   (c) any information, statement, certificate, report or other document furnished or submitted by or on behalf of the Contractor pursuant to or as a result of this Agreement is untrue or incorrect.

7. Either party may terminate this Agreement for any reason by giving at least thirty (30) days written notice to the other party.

8. Upon the occurrence of any Event of Default and at any time thereafter the Province may, notwithstanding any other provision of this Agreement, at its option, elect to do any one or more of the following:
   (a) terminate this Agreement, in which case the payment of the amount required under Section 10 of this Schedule will discharge the Province of all liability to the Contractor under this Agreement;
   (b) require the Event of Default be remedied within a time period specified by the Province;
   (c) suspend any instalment of the payments under Schedule B or any amount that is due to the Contractor while the Event of Default continues;
   (d) waive the Event of Default; and
   (e) pursue any other remedy available at law or in equity.

9. The Province may also, at its option, terminate this Agreement immediately if the Province determines that the Contractor's failure to comply places the health or safety of any person conducting the Services at immediate risk, and the payment of the amount required under Section 10 of this Schedule will discharge the Province of all liability to the Contractor under this Agreement.

10. Where this Agreement is terminated before 100% completion of the Services, the Province will pay to the Contractor all costs and liabilities, including uncancellable commitments, relating to the Services which have been incurred by the Contractor, not to exceed the Maximum Amount specified in Schedule B, as of the date of receipt of notice of termination or the date of termination, whichever is later.

11. The Province hereby grants the Contractor a perpetual non-exclusive, irrevocable, world-wide, fully paid up and royalty-free license to use, make, copy, translate, practice, produce, distribute, or further develop the Produced Material for scientific, educational, public good and other non-commercial uses.

12. In addition to Section 11, with the prior approval of the Province, which will not be unreasonably withheld, the Contractor may present publications at symposia, national or regional professional meetings, or publish in journals or other publications, accounts of the work pertaining to this Agreement. Publications, conference presentations, symposia and all other dissemination of material pertaining to the Services will recognize the Ministry of <fill in ministry name>.

13. At the expiry or earlier termination of this Agreement, the Province may, at its sole discretion, negotiate with the Contractor to provide to the Contractor a license (which may be exclusive or non-exclusive) for the Contractor to use, reproduce, modify or distribute some or all of the Produced Material for commercial purposes.

14. In addition to Section 13.8 of this Agreement, the provisions contained in this Schedule continue in force indefinitely even after this Agreement ends.

15. The indemnity granted by the Contractor under this Agreement has been approved in accordance with the Financial Administration Act, Guarantees and Indemnities Regulation 1.1(b) under Indemnity No.100969. The indemnity granted by the Province to the Contractor is approved in accordance with the Financial Administration Act, Guarantees and Indemnities Regulation 1(b) under Indemnity No. 080497.

16. The Contractor makes no representations or warranties, either express or implied, with respect to any data or results arising from the services. The Contractor specifically disclaims any implied warranty of non-infringement or merchantability or fitness for a particular purpose and will in no event be liable for any loss of profits, be they direct, consequential, incidental, or special or other similar or like damages arising from any defect, error or failure to perform, even if the institution has been advised of the possibility of such damages. The Province hereby acknowledges that the services are of an experimental and exploratory nature, that no particular results can be guaranteed, and that it has been advised by the Contractor to undertake its own due diligence with respect to all matters arising from this Agreement. This section 16 will survive termination or expiration of this Agreement.

Reference Table | Version 1.3 September 2010

	Type of Research Relationship	Grant	Sponsored Research Agreements	Service Contracts
WHO & WHAT	Legal Instrument	Grant Letter (STOB 77)	Transfer Under Agreement (also known as Contribution Agreement – STOB 80)	General Service Agreement [under $250,000] or Service Contract [over $250,000] (STOB 60 or 61) with Schedule F to address issues specific to university research
	REFERENCES	Refer to Sample Grant Letter	Refer to Sample Sponsored Research Agreement ("Transfer Under Agreement for Research at a BC Public University")	Refer to General Service Agreement (GSA) Template with Sample Schedule F ("General Service Agreement Schedule F—Additional Terms for Research Services provided by a Public University")
		Reference Document 1—Core Policy Manual Chapter 4.3.14—Transfer Payments [1]		Reference Document 2—Core Policy Manual Chapter 6—Procurement [2]
	Parties	Province of British Columbia and the University (may include affiliated teaching hospitals as a third party).	Province of British Columbia and the University (may include affiliated teaching hospitals as a third party to the Agreement).	Province of British Columbia and the University (may included affiliated teaching hospitals as a third party to the Contract.) Note that these guidelines are not intended to cover personal consulting arrangements between individual university faculty members and the Province.
	REFERENCE			Reference Document 3—Fact sheet on personal consulting activities of academics
	Purpose	Performs investigator defined research, sometimes in response to a government-issued call for proposals or in accordance with government criteria.	Contribute to research project/program as per project description.	Provision of research, advisory services or specific expertise for the direct use or benefit of the Province.
DELIVERABLES	Research Reporting	No specific result is specified. Researcher may be required to report, present or otherwise demonstrate the results of the grant.	Research conducted in accordance with the work plan and Researcher reports on research results as per research project description in Schedule A.	As per services described in Schedule A.
	Financial Reporting	None.	Financial reporting as defined in Section 8 of the Sample Agreement.	Usually none except on an "as requested" basis if defined in the contract.

1 http://www.fin.gov.bc.ca/ocg/fmb/manuals/CPM/04_Expense_Mgmt.htm#4314
2 http://www.fin.gov.bc.ca/ocg/fmb/manuals/CPM/06_Procurement.htm

	Type of Research Relationship	Grant	Sponsored Research Agreements	Service Contracts
FINANCIAL	Payment	Lump sum.	Payment schedule linked to reporting, deliverables or milestones as per Schedule B.	Typically fixed prices, but may vary as per negotiated Schedule B.
	REFERENCE		Refer to Sample Schedule B included as part of Sample Sponsored Research Agreement	Reference Document 4—Sample Schedule B for General Service Agreement http://www.pss.gov.bc.ca/psb/GSA/docs/GSA.doc
	Overhead	Included in the lump sum.	Included in the pricing as per University policies or procedures.	Included in the price.
	Payment Timing	In advance. Funds provided along with or shortly after grant letter.	Upon invoice. May be timing- or milestone-based, as per Schedule B. An advance payment may be negotiated.	As per negotiated schedule outlined in Schedule B. An advance payment may be negotiated.
	REFERENCE		Reference Document 5—Government policy on advance payments: http://www.fin.gov.bc.ca/ocg/fmb/manuals/CPM/04_Expense_Mgmt.htm#439d	
	Use of Funds	The Province issues no specific guidelines on use of funds. Universities are expected to apply internal financial control policies to ensure that funds are applied to expenses directly attributable to the project.	Funds applied as per Schedule B.	Funds applied as per Schedule B.
	Harmonized Sales Tax (HST)	Payment is all-inclusive. No separate provision for HST required.	The portion of HST not recoverable by the universities is reimbursable and is specified in the Sample Agreement in Section 3.	Applicable to time and materials contract. The portion of HST not recoverable by universities is reimbursable, as specified in Sample Schedule F, Section 4.
	REFERENCE		Reference Document 6—Procurement Guidelines on Reimbursable HST	

	Type of Research Relationship	Grant	Sponsored Research Agreements	Service Contracts
RESEARCH OUTPUTS	Intellectual Property (IP)	Letter does not include IP provisions. The University or Researcher owns all results, data, inventions, improvements and other IP produced by the grant project in accordance with its policies.	In most cases, the University or Researcher owns all results, data, inventions, improvements and other IP produced by the project in accordance with its policies. The Province is allocated rights/license for non-commercial uses. However, arrangements for specific projects can vary and will depend on the particular circumstances.	Government owns the IP and will require assignment of the IP.
	REFERENCE	Reference Document 7—Fact Sheet on Research Materials and Intellectual Property		
	Right to Use and Commer-cialization	The Province may receive a report on research results but normally does not have rights to use research results, data or other IP. The Province may, in some circumstances, use the research results and data for internal purposes.	In most cases, the University or Researcher owns all results, data, inventions, improvements and other IP produced by the project in accordance with its policies. The Province is allocated rights/license for non-commercial uses. However, at a minimum, universities retain the right to use Research Materials for scholarly and academic purposes.	Province purchases rights to all new IP and therefore may use without restrictions. The Province may provide the university with a royalty-free perpetual license for academic and educational purposes.
	Indemnity	No indemnity provisions included.	Mutual indemnity.	Mutual indemnity.
	REFERENCE		Refer to Sample Sponsored Research Agreement, Section 14	Refer to GSA Template, Sample Schedule F, Section 2
	Insurance	No insurance provisions included.	Section 12 of the Sample Sponsored Research Agreement identifies insurance held by universities. No further provisions required.	Universities have sufficient liability insurance to cover research activites including those which the Province purchases. No Schedule D required.
	Waiver of Moral Rights	No waiver of moral rights required, as per IP provisions.	Waivers may be required by the Province for project reports. Waivers should be obtained prior to finalizing the agreement and do not extend beyond these project reports.	A waiver(s) may be required from individual researcher(s). Waivers should be obtained prior to finalizing the contract.

	Type of Research Relationship	Grant	Sponsored Research Agreements	Service Contracts
PUBLICATION & CONFIDENTIALITY	Release of Information & Public Acknowl-edgement	Universities are required to make publicly available basic information on the project.	Universities are required to make publicly available basic information on the project.	Universities are required to make publicly available basic information on the project.
		Researcher should acknowledge support of the Province.	Researcher should acknowledge support of the Province.	Government determines release of data and/or reports. Parties may negotiate government acknowledgement of the contribution of the university.
	Publication	The University has unrestricted rights.	University reserves the right to pub-lish accounts of the research; certain terms may be subject to negotiation.	University reserves the right to publish accounts of the research; certain terms may be subject to negotiation.
	REFERENCE		Refer to Sample Sponsored Research Agreement, Section 16	Refer to GSA Template, Sample Schedule F, Section 12
	Confi-dentiality (Universities do not conduct secret research)	Normally, no confidential-ity provisions included. If necessary, confidential-ity provisions should be addressed in a separate agreement, such as a data-sharing or non-disclosure agreement.	The Province and the University must keep each other's confidential information confidential. Both the Province and BC's public universities are bound by the Freedom of Information and Protection of Privacy Act.	The Province and the University must keep each other's confidential information confidential. Both the Province and BC's public universities are bound by the Freedom of Information and Protection of Privacy Act.
	REFERENCE	Reference Document 8—Sample employee/researcher confidentiality agreement		
PRIVACY & ACCESS TO INFORMATION	Privacy, Access to, and Use of Personal Information	If access to Ministry data is required, or, if exchange of personal or confidential information will occur, a separate agreement is required. Ministry officials should consult with their Ministry's Data Steward or Freedom of Information and Privacy Branch for assistance. Universities should consult with the office responsible for access to information and protection of privacy at their institution.		

	Type of Research Relationship	Grant	Sponsored Research Agreements	Service Contracts
ADMINISTRATION	Statement of Work	Researcher-generated proposal constitutes statement of work.	Required and constitutes Schedule A. Sufficient detail to ensure appropriate conduct and oversight.	Required and constitutes Schedule A. Sufficient detail to ensure appropriate conduct and oversight.
	Budget	Only if required as part of an application process.	Required in proposal. May be included in Schedule B, depending on terms of payment.	Not required. Budget is as per the price.
	Conflict of Interest	No conflict of interest provisions included.	Conflict of interest provisions apply to the research personnel involved in research project.	Conflict of interest provisions apply to the research personnel involved in providing the services.
	REFERENCE		Refer to Sample Sponsored Research Agreement, Section 9	Refer to GSA Template, Sample Schedule F, Section 5.
	Dispute Resolution	No dispute resolution mechanism required.	Parties can choose one of two options. (1) Any disputes will first be addressed through mediation. Should no amicable settlement be reached by the parties within 30 days, either party may initiate judicial proceedings. OR (2) Disputes will be resolved by arbitration. The preferred option can vary by university. One option should be selected before the agreement is finalized.	Parties initially attempt to resolve the dispute through collaborative negotiation. Should no amicable solution be reached within 15 business days, mediation must be used under the rules of the BC Mediator Roster Society. If not settled within 30 business days by mediation, the dispute must be resolved by arbitration.
	REFERENCE		Refer to Sample Sponsored Research Agreement, Section 13	Refer to GSA Template, Section 12

REFERENCE DOCUMENT 1

Core Policy Manual Chapter 4.3.14—Transfer Payments

Also available at: http://www.fin.gov.bc.ca/ocg/fmb/manuals/CPM/04_Expense_Mgmt.htm#4314

4.3.14 TRANSFER PAYMENTS

Transfer payments are transfers of money from the Province to an individual, an organization or another government for which the Province does not receive any goods or services directly in return, does not expect to be repaid in the future, and does not expect a financial return. Transfer payments are distinct and separate in this respect from other acquisitions by government where it receives goods or services directly in exchange for a payment.

Accounting and Classification

1. Transfer payments must be defined in accordance with the criteria described in Appendix 1 as one of three payment categories:
   - Grant;
   - Entitlement; or
   - Transfer Under Agreement (including shared cost).

2. Transfer payments must be recorded and reported accurately, completely and on a timely basis to comply with government's accounting policy as described in Appendix 2.

General Payment Standards

3. Transfer payments must support approved ministry service plans and program objectives.

4. A transfer payment must be authorized by a ministry official who has been delegated expense authority for this purpose.

5. A transfer payment shall only be made:
   - for specified purposes in accordance with established eligibility criteria;
   - under a statutory authority, formula or regulation; or
   - in accordance with a formal agreement, or a shared-cost agreement for the purposes specified in an agreement.

Documentation and Payment Management

6. Written documentation between the Province and the recipient is required in support of a transfer payment. For Grants and Entitlements, the use of an application form or correspondence with the recipient may be sufficient. For a Transfer Under Agreement, a formal written agreement must be used that clearly identifies the terms and conditions (see Appendix 3 for guidance). Where it is necessary, ministries are to seek legal counsel in developing a transfer agreement.

7. Transfer payments must be managed in a manner that:
   - is open and transparent to the public;
   - provides for government independence and objectivity;
   - clearly identifies roles and responsibilities;
   - provides adequate administration and documentation; and
   - takes into consideration economy, efficiency and effectiveness.

8. The responsible ministry must undertake measures to conduct appropriate due diligence on a prospective transfer payment recipient, including, where applicable, credit and background checks on key signatories, verification of business references and other certifications.

9. The engagement of a Transfer Under Agreement must demonstrate accountability and economic efficiency. The choice of a service provider shall follow government's competitive selection process unless a direct award condition applies, or where
   - financial assistance is provided to a specified target group or population (e.g., a First Nation, or a direct beneficiary—individual or family or legal guardian of that individual under a community/social service program); or
   - it is a shared cost agreement or a public private partnership where a competitive selection is not appropriate.

10. Records of transfer payments, and an appropriate management information system and monitoring strategy must be maintained by the responsible ministry to ensure the terms and conditions for the transfer payment are met.

11. The performance review of a recipient must be carried out with independence and objectivity. An employee shall not take part in a performance review if he/she is exposed to an actual, perceived or potential conflict of interest in relation to a performance review.

Repayment of a Transfer Payment

12. Where a transfer payment is paid

    - after the expiry of eligibility;
    - on the basis of fraudulent or inaccurate information;
    - in error; or
    - the recipient has not complied with the terms and conditions for the payment,

13. the ministry executive financial officer or other designated ministry official will determine the extent of repayment with reference to the nature and severity of the situation, and record the amounts owing as a debt receivable to the government.

14. Refund of an overpayment is required immediately or reasonable arrangements must be made to ensure repayment in due course.

REFERENCE DOCUMENT 2

Core Policy Manual Chapter 6—Procurement

Full chapter available at http://www.fin.gov.bc.ca/ocg/fmb/manuals/CPM/06_Procurement.htm

Table of Contents

REFERENCE DOCUMENT 3

Fact Sheet on Personal Consulting Activities of Academics

Academics may engage in outside professional activities by way of personal consulting arrangements, which, by university policy, are personal to them and do not include the material use of university facilities, staff or students, or services.

When negotiating terms with academics for the conduct of research projects or for professional services, it is important to be aware of the distinction between:

- an individual acting in his or her personal capacity; and
- the same individual acting in his or her capacity as an academic employee of a university.

It is usual for universities to encourage faculty members to engage in outside professional activities, both paid and unpaid, that involve the application of special skills and knowledge within the researcher's particular academic competence. Universities recognise that outside professional activities, conducted with professional and academic responsibility, accrue indirect benefits to the university as well as enhancing the professional, scholarly and scientific strengths of the individual.

Faculty members may engage in outside professional activities under the following guidelines. The activities:

- do not impinge on employment duties at the university;
- do not give rise to conflicts of interest;
- do not make material use of university facilities, staff or students, services, or intellectual property;
- are covered under agreements which are personal arrangements between the faculty member and the third party; and,
- do not purport to represent the university in any manner.

Similar guidelines (contained in the Standards of Conduct for Public Service Employees, revised September 2003) govern employees of the Province of British Columbia in conducting outside remunerative and volunteer work.

It is therefore essential, when discussing a project with a university researcher, to be clear on whether the professional services of the researcher are requested and offered in an external consultant or a university capacity. If university facilities, employees or services are necessary to complete the contract or the reputation and endorsement of the university is a factor, then the activities are university activities and must be addressed through negotiation with the university, leading to an agreement to which the university is a party. If, however, the participation of the individual faculty member properly qualifies as his or her outside professional activities, then the Province and individual are free to develop their own contractual terms without recourse to the Reference Table, which does not apply.

REFERENCE DOCUMENT 4

Sample Schedule B—Fees and Expenses for General Service Agreement

Also available at: http://www.pss.gov.bc.ca/psb/GSA/docs/GSA.doc

[A customized form of Schedule B is always attached to the GSA.]

1. MAXIMUM AMOUNT PAYABLE

Maximum Amount

Despite sections 2 and 3 of this Schedule, $_____ is the maximum amount which the Province is obliged to pay to the Contractor for fees (exclusive of applicable taxes) and expenses under this Agreement.

2. FEES *[Choose one or a combination of the following and delete the rest.]*

Daily Rate

Fees: at a rate of $____ per day (based on a day of ___ hours) for those days during the Term when the Contractor provides the Services. If the Contractor provides the Services for less than the required hours on any day, then fees for that day will be reduced proportionally.

Hourly Rate

Fees: at a rate of $____ per hour for those hours during the Term when the Contractor provides the Services.

Rate per Unit/Deliverable

Fees: at a rate of $____ for each [unit/deliverable] provided by the Contractor as Services during the Term up to ___ [units/deliverables].

Flat Rate

Fees: $__ for performing the Services during the Term.

3. EXPENSES

Expenses: *[If the Contractor is not to be paid for any expenses, delete paragraphs a. to c. below and insert* "None."*]*

a. travel, accommodation and meal expenses for travel greater than _____ [*insert* "32 kilometers" *or other agreed distance*] away from _____ [*insert place in which Contractor is located or other agreed location*] on the same basis as the Province pays its _____ [*insert* "Group I" *or* "Group II" *or ? to complete this paragraph*] employees when they are on travel status; and

b. the Contractor's actual long distance telephone, fax, postage and other identifiable communication expenses; and

c. *[Describe here if any other type of expense to be permitted.]*

4. STATEMENTS OF ACCOUNT

[If daily, hourly or unit rate use the following section 4.]

Statements of Account: In order to obtain payment of any fees and expenses under this Agreement for [*insert description of billing period here—see examples below*] (each a "Billing Period"), the Contractor must deliver to the Province on a date after the Billing Period (each a "Billing Date"), a written statement of account in a form satisfactory to the Province containing:

[*Examples of billing period descriptions:* "a period from and including the 1st day of a month to and including the last day of that month" OR "a period from and including the 15th day of a month to and including the 14th day of the next month."]

(a) the Contractor's legal name and address;

(b) the date of the statement, and the Billing Period to which the statement pertains;

(c) the Contractor's calculation of all fees claimed for that Billing Period, including a declaration by the Contractor of
[Choose one of the following:
For Daily Rate situations
- "all hours worked on each day during the Billing Period";
For Hourly Rate situations
- "all hours worked during the Billing Period";
For Rate per Unit/Deliverable situations
- "all (units/deliverables) provided during the Billing Period"] for which the Contractor claims fees and a description of the applicable fee rates;

(d) a chronological listing, in reasonable detail, of any expenses claimed by the Contractor for the Billing Period with receipts attached, if applicable;

(e) the Contractor's calculation of any applicable taxes payable by the Province in relation to the Services for the Billing Period;

(f) a description of this Agreement;

(g) a statement number for identification; and

(h) any other billing information reasonably requested by the Province.

[If flat rate, use the following section 4.]

Statements of Account: In order to obtain payment of any fees and expenses under this Agreement, the Contractor must deliver to the Province at the end of the Term or, if the Contractor completes the Services before that time, on the completion of the Services, a written statement of account in a form satisfactory to the Province containing:

(a) the Contractor's legal name and address;

(b) the date of the statement;

(c) the Contractor's calculation of all fees claimed under this Agreement, including a declaration that the Services for which the Contractor claims fees have been completed;

(d) a chronological listing, in reasonable detail, of any expenses claimed by the Contractor with receipts attached, if applicable;

(e) the Contractor's calculation of all applicable taxes payable by the Province in relation to the Services;

(f) a description of this Agreement to which the statement relates;

(g) a statement number for identification; and

(h) any other billing information reasonably requested by the Province.

5. PAYMENTS DUE

Payments Due: Within 30 days of our receipt of your written statement of account delivered in accordance with this Schedule, we must pay you the fees (plus all applicable taxes) and expenses, claimed in the statement if they are in accordance with this Schedule. Statements of account or contract invoices offering an early payment discount may be paid by us as required to obtain the discount.

REFERENCE DOCUMENT 5

Government Policy On Advance Payments

Also available at: http://www.fin.gov.bc.ca/ocg/fmb/manuals/CPM/06_Procurement.htm#1636b

Core Policy Manual
Chapter 6—Procurement

SECTION 6.3.6—CONTRACT ADMINISTRATION AND MONITORING

b. Payment

1. A contract summary record must be maintained for all service contracts, either by using a contract summary sheet, or equivalent electronic record.

2. A contract cannot include a cost overrun clause. If a cost overrun is unavoidable, ensure the costs are justified. Any overrun is to be authorized in advance using a modification agreement form. There may be additional approval requirements triggered by cost overruns.

3. Fees, Expenses, Maximum Amount, Statements of Account, and Payments Due, must be contained in Schedule B to contracts. This applies whether the contract is established on the basis of Daily Rate, Hourly Rate, Rate per Unit/Deliverable or Flat Rate. (For contractor travel, refer to Travel, Contractors.)

4. All contract quotations must exclude the HST. Statements of accounts must include a calculation of fees (plus applicable taxes, such as HST) and expenses.

5. Ministries must ensure that payments made to contractors who are non-residents of Canada comply with the withholding tax provisions of the federal *Income Tax Act*.

6. Payments made in advance must be specifically provided for in the contract or in accordance with a formal modification agreement. The contract or modification agreement must specify how the advances are:

    - to be deemed to be earned; or
    - if the services are not subsequently rendered, to be repaid; and
    - what interest rate, if any, must apply.

REFERENCE DOCUMENT 6

Government Procurement Guidelines on Reimbursable HST

REFERENCE DOCUMENT 6.1.docx

(A comprehensive review of government policy on reimbursable HST is underway. That review may result in changes to this reference document.)

Non-Profit** and Public Sector Organizations

Ministries might have contracts with non-profit organizations, municipalities, schools, hospitals or universities for the provision of goods or services to government or third parties. These types of organizations may ask the government to share their HST burden as part of the contract cost.

In cases where these types of organizations are contracting with government on a shared cost basis or a full-cost recovery basis, contract administrators may be asked to include HST costs in amounts eligible for reimbursement. This can be agreed to, but note that these organizations may be eligible for a rebate of part of their HST burden (as outlined in CPPM M.6).

If the provincial government were to share the cost of a municipal works project on a 50/50 basis, the government's 50% share should be calculated net of the 50% federal portion of the HST and net of the 57% rebate on the provincial portion of the HST which the municipality is eligible for (CPPM M.6). When contracting with the types of organizations listed above, ensure that all eligible HST rebates have been (or will be) claimed prior to final determination of the provincial government's share of costs.

If the provincial government provided a grant simply to assist toward the cost of a project, HST costs would not be added to the amount of the grant.

** Non-profit organizations must have at least 40% of their total revenue funded by government to qualify for this rebate.

HARMONIZED SALES TAX (HST)

Reimbursing HST to Non-Employees

As a general government practice, HST paid by a contractor on travel costs is not reimbursed. Suppliers of taxable goods and services should be registered with Canada Customs and Revenue Agency and can claim a recovery of HST paid as an input tax credit.
There are several exceptions to note:

Small Suppliers

Small businesses or business persons with annual sales of less than $30,000 are not required to register with Canada Customs and Revenue Agency. If a ministry chooses to contract with a small supplier because it is cost effective, the ministry will reimburse the small supplier for the HST paid in providing the service.

Supplier of Exempt Services

HST is not payable on exempt services and suppliers of exempt services would not charge HST on their billings or claim input tax credits. Examples of exempt services are health care services (e.g., sessional doctor services), some educational services, and personal and child care services.
As a supplier of exempt services cannot recover the HST as input tax credits, the government will reimburse the supplier for the HST paid on travel and other reimbursable expenses.

Volunteers

Volunteers are reimbursed for the HST paid on travel and other reimbursable expenses. Where possible (see CPPM D.7 Travel Charge Direct Billings), direct billings of travel expenses to the ministries will minimize the amount of HST to be reimbursed by the government.
Appointees to Agencies, Boards and Commissions
OIC appointees are reimbursed for the HST paid on their travel and other reimbursable expenses.

REFERENCE DOCUMENT 7

Fact Sheet on Research Materials and Intellectual Property

Research Materials and Intellectual Property

The conduct of academic research may result in the production of a range of research materials including:

1. Ideas, research findings, software, data, specifications, drawings, documents ("Research Materials");
2. Interim and final project reports ("Project Reports"); and
3. Academic publications, academic presentations, and theses ("Academic Reports").

Intellectual Property ("IP") is defined in the Glossary (Reference Document 9) as:

> Intangible (non-physical) property which includes scientific or scholarly discoveries, copyright, computer software, moral rights related to copyrighted materials, trademarks, official marks, domain names, patents, industrial designs, literary, artistic, musical or visual works and know-how. Although intellectual property rights are associated with a wide range of products of the human intellect, such as training manuals, publications, map products, videos and computer software, they are distinct from the physical medium on which these products are produced. The intellectual property is the set of rights arising from the creation and development of these products. For example, if a physical book is produced, the author's copyright in that book is the intellectual property.

Attributes of IP rights include:

1. Ownership—legal title to the IP, and subject to an agreement to the contrary, all of the following rights;
2. Rights to use:
   - for scholarly and academic purposes;
   - for public purposes (by the Province, its contractors, or the general public); and
   - for commercial purposes (by the private sector);
3. Control—the ability to decide where and when to file IP protection, if/how to develop IP into products/services, where to market products, etc.;
4. Economic—revenue and costs related to IP protection, development and marketing;
5. Attribution—who claims credit for inventing and/or developing IP; and
6. Risk—product liability, infringement claims, and regulatory compliance.

In general, under the terms of a Grant letter (STOB 77), ownership of Research Materials, Project Reports, Academic Reports and IP will vest with the recipient and the Province receives no rights. Under the terms of a General Services Agreement (STOB 60 or 61) the opposite is true and ownership of Project Reports and IP vests solely in the Province. With Sponsored Research Agreements (Contribution Agreements, STOB 80), ownership and rights to use Research Materials, Project Reports, Academic Reports and IP varies, and depends on the particular circumstances.

While the approach taken under a Sponsored Research Agreement/Contribution Agreement will vary, in general, the following general principles should be considered:

- The six attributes of IP rights (see above) will be determined at the project outset and will vary according to the class of material (Research Materials, Project Reports, and Academic Reports);
- Ownership of Research Materials, Project Reports, Academic Reports and IP vests, in the absence of an agreement to the contrary, in the creator/inventor or his/her employer;
- While the Sponsored Research Agreement may stipulate that ownership of Research Materials, Project Reports, Academic Reports and IP vest in either the Province or the recipient, academic institutions prefer to retain all ownership rights and may provide the Province with a royalty

free, perpetual license to use Research Materials, Project Reports, and IP for public purposes. This may include a waiver of moral rights by the authors of the Project Reports;

- In all research projects, it is essential to the academic institutions that, at a minimum, they retain the right to use Research Materials for scholarly and academic purposes and that they retain for the authors ownership of copyright of Academic Reports; and

The owner of the IP rights retains the authority to issue licences to third parties, including for-profit corporations, for academic, research, and/or commercial purposes. Academic institutions do not assume risk for commercial use of research results. IP is provided to companies on an "as is" basis, and the companies will be required to indemnify the academic institution for their use.

The parties may negotiate the transfer of all or some of the IP rights from one party to another on a case-by-case basis.

REFERENCE DOCUMENT 8

Sample Employee/Researcher Confidentiality Agreement

Employee/Researcher Confidentiality Agreement

Sample provided for illustrative purposes only. For assistance, consult with your organization's office responsible for administration of the Freedom of Information and Protection of Privacy Act.

I, _____, do solemnly swear/affirm that:

1. I am an employee/secondee/graduate research assistant employed by _____ and as such have access to student, teacher and school records and data as defined in the *School Act*, R.S.B.C. 1996, c. 412, and to data acquired by _____ and the Province of British Columbia. I understand and acknowledge that such data is subject to the provisions of the *Freedom of Information and Protection of Privacy Act* and/or the Protection of Privacy Act, of British Columbia.

2. I will not disclose to any organization, company or person any personal information from these records and data sets unless I am permitted or compelled to do so by legislation of British Columbia or Canada.

3. I will report any and all requests, demands or requirements by foreign entities made upon me or my employer for disclosure of personal information to which I may have access to_____ and the Office of the Information and Privacy Commissioner for British Columbia.

4. I acknowledge that I have read and will abide by the terms and conditions of the contractual agreement, instructions and/or policies of _____ with respect to the use, security and protection of the personally identifiable data.

5. I have read, acknowledge and understand the provisions of sections 30, 30.1, 30.2, 30.3 and 30.4 of the Freedom of Information and Protection of Privacy Act and, by signature, agree to adhere to these provisions. I also acknowledge that a breach by me of any of those sections could result in the penalties as outlined in section 74 being applied against myself or _____ as may be appropriate through process of law. I also acknowledge that a breach by me of these sections 30 through 30.4 will also be deemed a breach of the agreement under which either myself or my employer are engaged to the Ministry and may result in its immediate termination.

Signed: _____ Date: _____

A copy of the FOIPPA sections referred to above has been provided to me _____ (initials).

I make this declaration knowing it is of the same legal force and effect as if I made it under oath.

Sworn before me (witness signature): _____

Witness Name: _____

Witness Position: _____

REFERENCE DOCUMENT 9

Glossary

Assignment of Intellectual Property Rights

Assignment means to transfer all or part of one's property, interest or rights to another party. Payment may be received up-front or at some later date.

Audio-Visual and Computer Materials

These materials include, but are not limited to, audio and video tapes, films, slides and photographs, computer programs and computer-stored information.

Background Intellectual Property

Background intellectual property is intellectual property that was created *prior* to a specific date and is normally relevant to the contract or agreement being entered into. Background intellectual property is normally owned by the person or entity that creates it and usually continues to be so owned, although cross-licensing may be necessary to support the use of intellectual property developed during the research project (Foreground Intellectual Property).

Commercial

Being able to yield or make a profit; prepared, done, or acting with sole or chief emphasis on saleability, profit, or success: *a commercial product*. Source: commercial. Dictionary.com. *Dictionary.com Unabridged (v 1.1)*. Random House, Inc. http://dictionary.reference.com/browse/commercial (accessed: February 14, 2007)

Examples of Commercial use include, but are not limited to:

- use at or for a commercial enterprise;
- use for financial gain, personal or otherwise;
- use at home, for which an individual will be paid in connection with its use;
- use in connection with administering a commercial website;
- use in connection with the provision of services for which an individual or firm is compensated in excess of operating costs.

Confidential Information

Confidential information is information that is disclosed by one party to another and is not intended for disclosure to any other party. It may include trade secrets, know-how, show-how, concepts, discoveries, inventions, research or technical data and other proprietary information or material (biological or otherwise). Confidential Information does not include information that:

- is or subsequently becomes generally available to the public through no act or fault of recipient;
- was in the possession of recipient prior to its disclosure by the provider to the recipient;
- was lawfully acquired by recipient from a third party who was not under an obligation of confidentiality to provider;
- is required by an order of a legal process to disclose, provided that recipient gives provider prompt and reasonable notification of such requirement prior to disclosure; or
- independently developed by employees, agents or consultants of the recipient who had no knowledge of or access to the discloser's information as evidenced by the recipient's records.

Conflict of Commitment

A conflict of commitment is a situation where the external professional activities of a member are so substantial or demanding of the member's time and attention as to interfere or adversely affect the discharge of the member's responsibilities to the University, or where the non-University activities of a member involve the use of University resources.

Conflict of Interest

Conflict of interest means a situation where a person is in a position to influence, either directly or indirectly, University business, research, or other decisions in ways that could advance the researcher's own interests or the interests of a related party, to the detriment of the University's interests, integrity or fundamental mission. In the research context, conflict of interest includes a situation where financial or other personal consider-

ations may compromise, or have the appearance of compromising, an investigator's professional judgment in conducting or reporting research. Conflicts of interest may be potential, actual or apparent.

The Provincial Government views Conflict of Interest occurring when an employee's private affairs or financial interests are in conflict, or could result in a perception of conflict, with the employee's duties or responsibilities in such a way that the employee's ability to act in the public interest could be impaired, or the employee's actions or conduct could undermine or compromise:

- the public's confidence in the employee's ability to discharge work responsibilities, or
- the trust that the public places in the public service.

Copyright

The exclusive right of the creator, or subsequent copyright holder, to copy, produce, reproduce perform or publish a work. Copyright exists as soon as an artistic, literary or musical work or software is created; it arises automatically when an original work is created, and does not need to be granted by any authority. This differs from patents, for example, which must be applied for and issued by federal governments.

Data

Representations of recorded information or concepts prepared in a form suitable for use. This includes, but is not limited to, technical data, computer software and computer databases. Data does not include data incidental to the administration of a contract such as financial, cost and pricing, administrative or management information.

Financial Reporting

Refers to the production of unaudited financial reports by the University. These reports should be a full accounting of the receipt and expenditure of the Province's financial contribution. They should include project summary, budget variance, expenditure details, salary details, federal cost share, contributions in kind, and revenue details, if any.

Foreground Intellectual Property

Foreground intellectual property is new intellectual property that is created *after* the start date or effective date of a contract or agreement.

Freedom to Operate

Freedom to operate refers to the ability to commercially produce, market or use a product, process or service without infringing the intellectual property rights of others.

Indemnification

Indemnification refers to protection from harm or cost. An indemnifying party guarantees to pay or take care of any debt, lawsuit or claim that may arise as a result of a contract or contract performance on behalf of the indemnified party.

Indirect Costs

Indirect costs (or overhead) are those costs that cannot be identified readily and specifically, but are nonetheless associated with a particular activity. For example, indirect costs to universities of conducting research include heat, power, administration, library and computing facilities.

Intellectual Property

Refers to intangible (non-physical) property which includes scientific or scholarly discoveries, copyright, computer software, moral rights related to copyrighted materials, trademarks, official marks, domain names, patents, industrial designs, literary, artistic, musical or visual works and know-how. Although intellectual property rights are associated with a wide range of products of the human intellect, such as training manuals, publications, map products, videos and computer software, they are distinct from the physical medium on which these products are produced. The intellectual property is the set of rights arising from the creation and development of these products. For example, if a physical book is produced, the author's copyright in that book is the intellectual property.

Intellectual Property Rights Ownership

Intellectual Property rights vest with the creator(s) of that intellectual property. Those rights may be transferred to another party under contract or via university policy.

Invention or Discovery

At the University, "invention or discovery" includes databases, audio and video tapes, films, slides and photographs, computer programs and computer-stored information or equivalent circuitry, biotechnology and

genetic engineering products and all other products of research which may be licensable. Inventions do not include traditional scholarly works such as books, lecture notes, laboratory manuals, artefacts, visual art and music.

Know-how

Know-how is normally unwritten information that is needed to achieve a significant development, production, or use.

Matching Funds Programs

Numerous government provincial and federal programs exist that contribute a certain amount of research funds to the University for every dollar contributed by an industry sponsor. The largest sources of these funds are administered federally by the Natural Sciences and Engineering Research Council of Canada, and the Canadian Institutes of Health Research.

Material

All findings, data, reports, documents, records and material, (both printed and electronic, including but not limited to, hard disk or diskettes), whether complete or otherwise, that have been produced, received, compiled or acquired by, or provided by or on behalf of the Province to, the University as a direct result of this Agreement, but does not include:

i. Client Case Files or Personal Information which could reasonably be expected to reveal the identity of clients;

ii. Property owned by the University.

Non-Commercial

Means not being able to profit financially at any time from materials, results and products ("outputs"), produced under contract between the Province and University, in the use of these outputs by the following non-commercial users and their employees: government ministries, agencies, boards and commissions; educational institutions (such as public school boards, public post-secondary institutions, community and technical institutes); and non-profit organizations (such as public libraries, charities, and other organizations created for the promotion of educational, health or social services purposes);

Overhead (see Indirect Costs)

Patent

A patent is a right granted by a national government, upon application and in exchange for a complete disclosure of an invention. The disclosure is initially a confidential disclosure to the patent office, which later becomes a non-confidential disclosure to the public at large. A patent gives the applicant the right to prevent others from making, using, or selling the claimed invention for a limited period of time. Subject to the payment of the prescribed annual fees, patents generally have a life of 20 years depending on the jurisdiction. In order to be patentable, an invention must be novel, useful and not obvious to a person skilled in the field of the invention.

Principal Investigator

The individual identified by the University as the person primarily responsible for a research project.

Protected

A security category assigned to documents, files or records series containing confidential and/or sensitive information.

Publication

Publication is disclosure that gives the public or third parties knowledge or details of an item of information. Publication may be made by way of speech, written materials, tape, video recording or other electronic means, drawing, photograph, printed work, or any other disclosure given or distributed. Publication does not include disclosures of information made on a confidential basis. Depositing a thesis in a library constitutes publication and may prejudice the ability to obtain a patent unless appropriate measures are taken to limit access to the thesis during the critical patent application period. At the University, a public thesis defence is considered public disclosure and may also prejudice the ability to obtain a patent.

Secret Research

University facilities may not be used for secret or classified research. Results of research undertaken at the University are ultimately publishable at the discretion of the principal investigator.

The University must be able to disclose the following five items related to research projects:

- Name of sponsor
- Title of project (non-confidential)
- Award amount
- Name of principle investigator
- Contract period

Scholarly Integrity

At the University, the following policy applies as it relates to Scholarly Integrity:

1. Researchers are personally responsible for the intellectual and ethical quality of their work and must ensure that their scholarly activity (which includes teaching, research, scholarship or artistic/creative activity carried out in the course of a faculty, staff or student's work or studies at the University and includes activities that would be appropriate for inclusion on a curriculum vitae or in an annual report to a Department Head) meets University standards.
2. Researchers involved in scholarly activity must not commit scholarly misconduct.
3. The University will investigate allegations of scholarly misconduct in a timely, impartial and accountable manner and take appropriate action, including any necessary steps to preserve evidence, when it becomes aware of allegations of scholarly misconduct.

Sensitive Information

Personal, confidential or protected information whose release is unauthorized i.e., information which is reasonably likely to be excepted or excluded from access under the Freedom of Information and Protection of Privacy Act.

REFERENCE DOCUMENT 10

Record of Changes to the Tool Kit

The tool kit and sample agreements were first distributed in January 2008. This document records all subsequent changes made to the tool kit and sample agreements. Changes are made after they have been reviewed by and approved by representatives of the provincial government and the universities.

Changes approved March 2009

Sample Sponsored Research Agreement, section 16.01 reference to "data" added as follows: "Any equipment, machinery, data or other property, provided by the Province to the University for the conduct of the Research Project under this Agreement will: ...".

Reference Document 7, under item 3, changed to "defined in Appendix <6> (Glossary) of the Final Report as:" to "defined in the Glossary (Reference Document 9) as:"

Updated version labeled "Version 1.2".

Changes approved September 2010

1. All documents: All headers changed from "Version 1.2 March 2009" to "Version 1.3 September 2010"

2. Tool Kit cover page: Version 1.2 changed to "Version 1.3 September 2010"

3. Tool Kit cover page: TUPC logo replaced with RUCBC logo

4. Tool Kit, Sample Grant Letter: first sentence replaced with the following:

   We are pleased to inform you that <university name>, with you as principal investigator, has been awarded the sum of $_____ for the <name of project, or describe program target or research activity> (the "Project"), as outlined in your proposal dated <date>.

   Signature block replaced with the following:
   <name>
   Deputy Minister <or Minister of <ministry name>

5. Sample Sponsored Research Agreement, end of first sentence:
   THIS AGREEMENT: "200__" changed to "201__".

   1.01 (g): "Rebate" definition changed to:
   "means a rebate on Federal Harmonized Sales Tax applicable to the University".

   3.03: Changed to read:
   "The University is entitled to a Rebate from the Federal Government and may, therefore, charge to the Province only the non-refundable portion of Harmonized Sales Tax, as applicable to the Research Project, and as provided for within the Financial Contribution."

   6.01(g): Defined term capitalized:
   "…Financial Contribution…".

6. Sample Schedule B—Financial Contribution: Added new section 3:

   3) The University will submit to the Province <specify timing., e.g., upon completion of each phase of the Research Project specified in Schedule "A", or upon completion of the Research Project, for example>, a written statement of account showing:
   (a) the University's legal name and address;
   (b) the date of the statement and a statement number for identification;
   (c) the calculation of the Financial Contribution being claimed, with reasonable detail of the applicable part of the Research Project completed to statement date; and
   (d) any other billing information reasonably requested by the Province.

7. Tool Kit Page 13–16, General Service Agreement Template:

   Weblink at the top of Page 13, updated as follows:
   Also available at, including optional schedules:
   http://www.pss.gov.bc.ca/psb/gsa/gsa_index.html

   Deleted General Service Agreement on pages 13–16 and replaced with pages 1–12 of the new government General Service Agreement available at: http://www.pss.gov.bc.ca/psb/GSA/docs/GSA.doc.

8. Tool Kit Page 17–18, deleted Schedule F—Additional Terms and replaced with new Schedule F—Additional Terms:

<<General Service Agreement-Schedule F—REVISED September 2010.doc>>

9. Reference Table, Legal Instrument: Hyperlink corrected for two web addresses in the Tool Kit reference table at www.researchrelationships.ca.

10. Reference Table, Payment: Web address updated to: http://www.pss.gov.bc.ca/psb/GSA/docs/GSA.doc

11. Reference Table, Goods and Services Tax: Deleted and replaced with:

    Harmonized Sales Tax (HST)
    REFERENCE Payment is all-inclusive. No separate provision for HST required. The portion of HST not recoverable by the universities is reimbursable and is specified in the Sample Agreement in Section 3. Applicable to time and materials contract. The portion of HST not recoverable by universities is reimbursable, as specified in Sample Schedule F, Section 4.
    Reference Document 6—Procurement Guidelines on Reimbursable HST

12. Reference Table, Dispute Resolution, Service Contracts: Deleted and replaced with:

    Parties initially attempt to resolve the dispute through collaborative negotiation. Should no amicable solution be reached within 15 business days, mediation must be used under the rules of the BC Mediator Roster Society. If not settled within 30 business days by mediation, the dispute must be resolved by arbitration.

13. Reference Table, Dispute Resolution, Service Contracts, Reference: Deleted and replaced with: Refer to GSA Template, Section 12

14. Reference Document 1, last section under Repayment of a Transfer Payment: Deleted 12 and 13 and replaced with the following policy update:

    Repayment of a Transfer Payment
    12) Where a transfer payment is paid
    - after the expiry of eligibility;
    - on the basis of fraudulent or inaccurate information;
    - in error; or
    - the recipient has not complied with the terms and conditions for the payment,

    13) the ministry executive financial officer or other designated ministry official will determine the extent of repayment with reference to the nature and severity of the situation, and record the amounts owing as a debt receivable to the government.

    14) Refund of an overpayment is required immediately or reasonable arrangements must be made to ensure repayment in due course

15. Reference Document 2, Page 26: Deleted and updated with newest Table of Contents available at website indicated on the page: http://www.fin.gov.bc.ca/ocg/fmb/manuals/CPM/06_Procurement.htm

16. Reference Document 4, Page 28:

    Updated with newest weblink in header: http://www.pss.gov.bc.ca/psb/GSA/docs/GSA.doc

    Deleted content of page 28 and 29, and replaced with the new Schedule B content on page 15 and 16 from the GSA master at: http://www.pss.gov.bc.ca/psb/GSA/docs/GSA.doc

17. Reference Document 5, Page 30:

    Deleted Section 4 and replaced with the following:

    4. All contract quotations must exclude the HST. Statements of accounts must include a calculation of fees (plus applicable taxes, such as HST) and expenses.

    Link updated to: http://www.fin.gov.bc.ca/ocg/fmb/manuals/CPM/04_Expense_Mgmt.htm#439d

18. Reference Document 6, re GST: Deleted weblink in header and content and replaced with:

    <<REFERENCE DOCUMENT 6.1.docx>>

APPENDIX D
MCNEIL REPORT FINDINGS

INVESTIGATORY PROCESS REVIEW

2012 INVESTIGATION INTO EMPLOYEE CONDUCT IN THE MINISTRY OF HEALTH

Review conducted by: Marcia McNeil, Sheen Arnold McNeil
December 19, 2014

LIST OF FINDINGS

1. I find that the Ministry should have begun its formal review of employee misconduct at the same time as, but separately from the Ministry Review.
2. I find that the inclusion of the Ministry Review Team members on the Investigation Team did not meet best practices in that the Investigation was not conducted with a suitably open mind.
3. I find that the nature of the Investigation warranted consideration of the use of an external investigator with significant experience in complex investigations.
4. I find that the initial internal disclosure of the name of at least one of the suspended employees, and the later public statements regarding the suspensions and dismissals of Ministry employees, did not meet best practices. The internal disclosure naming a suspended employee should not have occurred. Employees should know that their privacy will be respected, even if it is determined that misconduct has occurred.
5. I find that suspending the employees without pay pending investigation in this case negatively impacted the quality of responses of both the suspended employees and their co-workers. I find that if the affected employees had not been suspended without pay, the Investigation Team would have received more open responses from employees.
6. I find that the Investigation Team had adequate resources to review and understand the complex web of issues which generated its creation.
7. I find that the number of interviewers participating in employee interviews was detrimental to conducting an effective interview.

8. I find that the Ministry should have been aware that the Ministry Review might point to some level of employee misconduct. Had the Ministry began its formal review of the employee misconduct in concert with the Ministry Review, it is more likely that the issue of employee representation would have been addressed in accordance with the PSA's practice.
9. I find that the interviews did not always give an adequate opportunity for employees to provide a full and fair response.
10. I find that interviewees did not have an adequate opportunity to review documents and respond to questions arising from them.
11. I find that because the employees were told that they would have an opportunity to respond to the Investigation Report and any recommendations regarding their employment, such opportunity should have been provided before a final decision regarding discipline was made.
12. I find that the decision-maker in this case would have benefited from receipt of a written analysis of the case (in the form of supporting advice, investigation report or briefing note) before making any decision. Had any of these documents been generated, some of the flaws I have found in the Investigation may have been identified before the final decisions regarding employee dismissals were made.

APPENDIX E
DECEMBER 14, 2015: LETTER FROM HEAD OF THE PUBLIC SERVICE AGENCY REGARDING IMPLEMENTATION OF MCNEIL REPORT

BRITISH COLUMBIA
BC Public Service

Where ideas work

December 14, 2015 CLIFF # 5783

The Honourable Michael de Jong
Minister of Finance and Government House Leader
Room 153 - Parliament Buildings
Victoria, BC V8V 1X4

Dear Minister de Jong:

Re: Response to ministerial direction to recommend and implement actions that address McNeil report on Health firings

On July 27, 2015, my predecessor, Elaine McKnight, wrote to you with an update on the Agency's implementation of the steps being taken in response to the findings of Marcia McNeil report. Government received a report from Marcia McNeil on December 19, 2014, that identified 12 findings from her review of the process that led to the dismissals in the Ministry of Health. All 12 findings were accepted by the government.

I am pleased to advise that as of today's date, the BC Public Service Agency has completed the implementation of all action items identified in response to the McNeil report.

Overall, the Agency's aim was to help government improve its ability to respond by:

- Improving the way ministries initially respond upon receiving a serious allegation.
- Ensuring investigations are conducted in a manner that conforms to existing policies and best practices.
- Ensuring proper decision-making processes are followed.
- Improving communication practices related to the investigation process.

Please refer to the attached appendix for the full list of the actions completed by the BC Public Service Agency. If you have any questions, please don't hesitate to contact me.

The BC Public Service Agency takes allegations of employee misconduct seriously and I can assure you, remains committed to ongoing and lasting improvements to how these allegations are dealt with.

Sincerely,

Lori Halls

Lori Halls
Deputy Minister

BC Public Service Agency
Mailing Address:
PO Box 9404 Stn Prov Govt
Victoria BC V8W 9V1
Telephone: 250 952-6296
Facsimile: 250 356-7074
http://www.bcpublicserviceagency.gov.bc.c

Appendix

Actions completed/implemented in response to findings from the Marcia McNeil review:

- Establishment of clear Agency and ministry roles and accountabilities for investigations. A ministry must promptly notify the Agency of any allegation of employee misconduct prior to taking action so that the appropriate level of Agency involvement is determined before the ministry responds. All investigations of alleged serious misconduct must be led by the Agency or Agency-approved investigators.
- Enhanced investigation and discipline decision-making information provided on *MyHR* so management employees understand the process and know what to do when they are initially confronted with an issue (e.g. who to call, what steps to take if there is an immediate concern/threat, etc.).
- Implementation of an investigations-specific training course for excluded managers in government.
- Ongoing reinforcement of existing investigation protocols of informing employees at the start of the investigation of what happens during the investigation, their rights, and points of contact for questions or concerns.
- Ongoing reinforcement of employees' entitlement to due process in an investigation. Where it is deemed necessary due to safety concerns, etc. that an employee cannot remain in the workplace while an investigation is carried out, the employee should be suspended from the workplace. Investigations are to be carried out as promptly as possible in recognition of the impact of the suspension on the employee.
- Ongoing reinforcement of existing practice of considering suspensions with pay for investigations where doing so without pay may compromise the investigation.
- Implementation of mandatory enhanced investigations training program for Agency investigators.
- Implementation of a mentor program for Agency investigators that requires new investigators to be teamed up with an experienced colleague for several investigations prior to leading an investigation.
- Ongoing reinforcement of existing Agency policy requiring that the investigative and decision-making parts of the process are kept separate and decision makers remain at arm's length until the findings have been rendered. Disciplinary decisions also must only be made after the investigation has been completed and labour relations and/or legal advice has been received and documented.

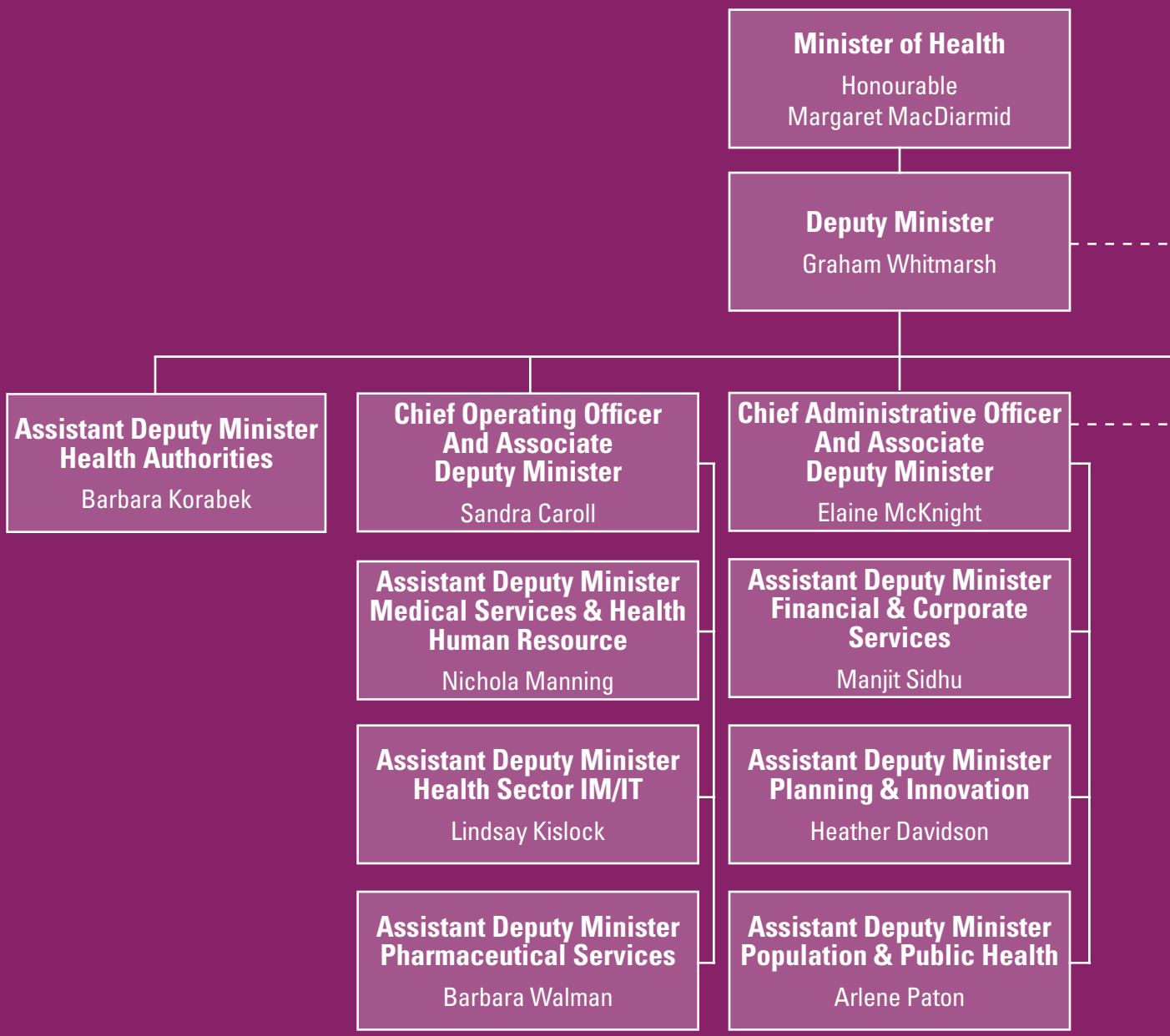
.../3

- Establishment of oversight and escalation protocols for investigations that are sensitive and/or have potentially significant outcomes. In the event of a disagreement between a Deputy Minister and the Deputy Minister, BC Public Service Agency, regarding the investigation process or outcomes, the matter will be advanced to the Deputy Minister to the Premier.
- Mandatory education sessions provided for Deputy Ministers, Assistant Deputy Ministers and senior managers on investigations and making disciplinary decisions. In addition we plan to roll out these education sessions to all other excluded managers.
- Internal investigation protocols updated, including assessment tools to ensure:
    - Lead investigators on complex/sensitive investigations have significant experience leading progressively more challenging investigations.
    - Investigative teams are appropriate given the nature of the investigation, conform to best practices, and continue to be adequately resourced, and;
    - Highly specialized internal or external investigators are preferred for high-profile/contentious cases or investigations that are likely to involve specialized expertise or legal analysis, as per Agency policy.
- Development of clear and comprehensive investigation and information-sharing protocols for multi-branch, cross-government undertakings to ensure that roles and responsibilities are clearly defined and investigations are completed in a timely fashion without unnecessary overlap.
- Development and implementation of a communications and change management strategy to improve awareness of investigative information, training, tools, resources and protocols.
- The Agency and GCPE have completed a review of the appropriate role of communications in employee investigations/discipline and establish protocols clearly defining roles, responsibilities and the appropriate timing of communication activity.
- The Agency completed a review of proposed amendments to the *Public Service Act* Regulations to clarify ministry and Agency authorities in relation to the investigation, suspension and discipline of employees and determined that changes to the regulation were not necessary.

APPENDIX F
MINISTRY OF HEALTH ORGANIZATION CHART

MINISTRY OF HEALTH EXECUTIVE LEVEL ORGANIZATION CHART

SEPTEMBER 5, 2012



CONTENT SOURCE: MINISTRY OF HEALTH, 2012

APPENDIX G
EXECUTIVE VACATION LEAVES – MINISTRY OF HEALTH

EXECUTIVE VACATION LEAVES – MINISTRY OF HEALTH
AUGUST – SEPTEMBER 9, 2012*

	August																
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F
Arlene Paton		●	●				●	●	●	●			●	●	●	●	●
Heather Davidson																	
Sandra Carroll							●	●	●	●			●	●	●	●	●
Elaine McKnight							●	●	●	●			●	●	●	●	●
Barbara Walman							●	●	●	●			●	●	●	●	●
Lindsay Kislock																	
Nichola Manning							●	●	●	●			●	●	●	●	●

* Does not include ministry executives not on vacation during this time period or those executives not involved in the matters under investigation. Does not include leaves other than vacation (e.g. absence due to illness).

															September									
	18	19	20	21	22	23	24	25	26	27	28	29	30	31	1	2	3	4	5	6	7	8	9
	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S	S
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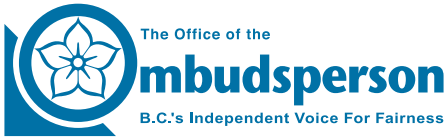
			●	●	●	●	●																

CONTENT SOURCE: MINISTRY OF HEALTH OUTLOOK CALENDARS



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