Protection for whistle-blowers disclosing information to the ICO

The Public Interest Disclosure Act 1998 (PIDA) and the Public Interest Disclosure (Northern Ireland) Order 1998

Introduction
If you are concerned that your employer may be contravening requirements of legislation relating to data protection and freedom of information (the 'Acts'), you may contact the ICO. The Commissioner has the power to investigate complaints about compliance with the Acts. Any information you provide about possible contraventions will help in our investigation.

If you are concerned that, as a result of disclosing information to the ICO, you may be penalised by your employer or dismissed from your job, you may wish to consider whether the 'whistle-blowing' provisions of employment rights legislation will protect you.

This note outlines the protection that may be available if you feel able to disclose information to the ICO. It gives only general information and does not attempt to offer definitive legal advice or details on how the whistle-blowing provisions work in practice.

The ICO is unable to tell you whether or not any disclosure you make will be protected under the employment rights legislation. You must satisfy yourself, perhaps with the help of independent legal advice, that the protection would cover you.

You can contact the independent charity Public Concern at Work on 0207 404 6609 for confidential advice about whether, and how, to raise a concern at any stage about potential wrongdoing.

A. What do the whistle-blowing provisions do?
The whistle-blowing provisions protect workers who make a **protected disclosure** of information – about certain types of matters relating to their employment – from being dismissed or penalised by their employers as a result of the disclosure.

If there is a **protected disclosure**, the whistle-blowing provisions also make confidentiality clauses unenforceable in agreements between workers and employers.

**B. Who may claim the protection of the whistle-blowing provisions?**

The protection is for employees and also for a wider group, referred to as **workers**.

Broadly speaking, a **worker** is an individual who works, or worked, under a contract of employment or any other contract under which they agree to do or perform personally any work or services for another party to the contract. The term includes home workers, casual workers and people involved in training programmes or work experience.

The protection applies to Crown servants (except those involved in national security matters) and members of the armed forces. It does not apply to police officers or people who normally work outside the UK.

The term **worker** does not cover individuals who are genuinely self-employed and provide services for clients or customers of their profession or business.

**C. What disclosures are protected?**

Not all disclosures of information are protected by the whistle-blowing provisions. Protection applies only to **protected disclosures**.

A protected disclosure is a **qualifying disclosure** (defined below) that is made:

- to an appropriate recipient (see section D below); and

- in accordance with the differing conditions that apply to each different type of recipient of the information (again, see section D below).

A **qualifying disclosure** is defined as:
“any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following –

- that a criminal offence has been committed, is being committed or is likely to be committed,

- that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

- that a miscarriage of justice has occurred, is occurring or is likely to occur,

- that the health or safety of any individual has been, is being or is likely to be endangered,

- that the environment has been, is being or is likely to be damaged, or

- that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.”

Qualifying disclosures may concern the employer’s activities anywhere in the world. They may involve a breach of the law of any other country or territory as well as that of the United Kingdom.

A disclosure will not be a qualifying disclosure if you commit an offence by making it.

A disclosure will not be a qualifying disclosure if the information in question is covered by legal professional privilege* that could be maintained in legal proceedings; in other words, if you disclose information you learned in the course of obtaining or providing legal advice for your employer. For example, an in-house legal adviser could not make a qualifying disclosure of information he had got from his employer when the employer was seeking legal advice from him.

(*In Scotland, a claim to confidentiality between a client and professional legal adviser.)

D. To whom may a disclosure be made?
You may make a protected disclosure to one of five types of recipient. These are:
- your employer (including any representative of your employer, such as a senior manager);
- a legal adviser;
- a Minister of the Crown (in certain circumstances);
- a regulatory body (referred to as a prescribed person – including the Information Commissioner); and
- a third party (for example, a member of the media).

The circumstances in which you may make disclosures vary depending on the recipient to whom you are making them.

Broadly speaking, you should seek to disclose in accordance with your employer's whistle-blowing policy. Such policies should identify:

• the senior manager to whom you should disclose your information; and

• an external party to whom you should turn with your disclosure if you have justifiable concerns about disclosing to your employer.

The Information Commissioner is one such external party to whom protected disclosures may, in certain circumstances, be made. This note only considers disclosures to the ICO.

**Disclosures to the ICO**

Disclosures may be made to **prescribed persons** (mainly regulatory bodies) prescribed by an Order of the Secretary of State.

The Information Commissioner has been so prescribed by the Public Interest Disclosure (Prescribed Persons) Order 1999 and the Public Interest Disclosure (Prescribed Persons) Order (Northern Ireland) 1999. Both these Orders have been amended by the Public Interest (Prescribed Persons) (Amendment) Orders made between 2003 and 2010.

Disclosures to the ICO will be protected by the whistle-blowing provisions where, in making the disclosure, you:

- act in good faith;
- reasonably believe that the act or omission of your employer amounts to a contravention of data protection or freedom of information legislation; and
- reasonably believe that the information disclosed, and any allegation contained in it, is substantially true.
You don’t have to tell your employer that you intend to disclose to the ICO.

E. **Duties of confidentiality**
The whistle-blowing provisions say that any condition in an agreement between you and your employer (whether a contract of employment or otherwise) is void (of no legal effect) in so far as it tries to prevent you making a protected disclosure.

F. **What protection is given to a worker making a protected disclosure?**
The whistle-blowing laws give you the right:

(a) not to be penalised or put at any disadvantage, short of dismissal, by your employer as a result of making a protected disclosure;

(b) to be automatically treated as having been unfairly dismissed if the reason for your dismissal was that you made a protected disclosure.

The whistle-blowing provisions also address the matter of compensation for suffering disadvantage or unfair dismissal as a result of making a protected disclosure.

G. **Complaint handling by the ICO**
It may be that you decide to disclose information to the ICO about non-compliance with the Acts, whether it is a protected disclosure or otherwise. If so, we will treat your disclosure either as:

- a request for us to assess whether your employer is likely or unlikely to be processing personal data in compliance with the Data Protection Act 1998, or (as the case may be)


Information we receive from would-be whistleblowers will be treated as confidential and we will not disclose it without lawful authority.

**More information**
You can find the full text of the whistle blowing provisions of the employment rights legislation on the legislation.gov.uk website.
