

Whistleblowing Policy

Prescribed Person - Scottish Information Commissioner



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Introduction

1. The Scottish Information Commissioner (the Commissioner) is the independent public official responsible for promoting and enforcing Scotland's freedom of information law, i.e.:
 - (i) the Freedom of Information (Scotland) Act 2002. FOISA is an act of the Scottish Parliament. It gives everyone the right to ask for any recorded information held by a Scottish public authority.
 - (ii) the Environmental Information (Scotland) Regulations 2004. The EIRs give everyone the right to ask for environmental information held by a Scottish public authority (and some other bodies).
 - (iii) the INSPIRE (Scotland) Regulations 2009. The Commissioner can also receive applications about the view and discovery provisions of the INSPIRE Regulations. These give a right to discover and view spatial datasets (e.g. map data) held by Scottish public authorities (and some other bodies).
2. The main functions of the Commissioner are: investigating appeals, promoting the public's right to know, promoting good practice to public authorities and intervening when public authority practice is not compliant with freedom of information law.
3. Under section 43F of the Employment Rights Act 1996, whistleblowers may qualify for employment protections if they disclose information to a "prescribed person". The Commissioner is a "prescribed person" in relation to compliance with Scotland's freedom of information law (see The Public Interest Disclosure (Prescribed Persons) Order 2014).
4. The Commissioner must report annually on the number of relevant workers' disclosures received under The Prescribed Persons (Reports on Disclosures of Information) Regulations 2017.

Purpose of this policy

5. The purpose of this policy is to:
 - outline the protection that may be available if you feel able to make a disclosure to us, and
 - describe how we handle disclosures from a whistleblower.
6. If you are concerned that your employer (or ex-employer) has committed (or may have committed) an offence under freedom of information law or may be failing to comply with freedom of information law, you can contact us.
7. If you are concerned that, because of disclosing information to us, you may be penalised by your employer or dismissed from your job, the whistleblowing provisions of employment rights legislation may protect you.
8. This guidance does not give a full analysis of the whistleblowing provisions. We can only give general advice about how they work in practice and we cannot advise you or confirm whether any disclosure you make will definitely be protected. You should also think about getting independent legal advice or you can contact Protect (the UK's whistleblowing charity) on their free, confidential [Advice Line](#).

What is whistleblowing?

9. Whistleblowing is the term used when a worker passes on information concerning wrongdoing. In this guidance, we call that “making a disclosure”. The wrongdoing will typically (although not necessarily) be something they have witnessed at work.
10. To be covered by the protection under whistleblowing law, the disclosure must be a ‘qualifying disclosure’. This is any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that one or more of the following has occurred, is occurring or is likely to occur or that there is the deliberate covering up of wrongdoing in these areas:
 - a criminal offence;
 - non-compliance with a legal obligation;
 - a miscarriage of justice;
 - danger to the health or safety of any individual;
 - damage to the environment; or

How is a qualifying disclosure protected?

11. Generally, for a qualifying disclosure to be protected, it must be made by a worker by one of the following permitted methods of disclosure:
 - disclosure to the employer or other person responsible for the matter;
 - disclosure to a Minister of the Crown, in relation to certain public bodies;
 - disclosure to a Prescribed Person designated for the purpose by the Order (for example, the Commissioner);
 - in the course of obtaining legal advice;
 - other disclosures may be protected where in the particular circumstances they are reasonable;
 - special provision is made for disclosures relating to exceptionally serious problems.

What do the whistleblowing provisions do?

12. The whistleblowing provisions protect any worker who makes a protected disclosure of information from being dismissed or penalised by their employer because of the disclosure.
13. ‘Worker’ has a broad definition and applies to anyone who works (or worked) under a contract in the UK. It extends to include home workers, casual workers, temporary or agency workers, people who work via personal service companies and people involved in training programmes or work experience. However, it does not generally apply to the self-employed or to Crown servants involved in national security.¹
14. For a disclosure to be protected, it must be made to an appropriate recipient.

¹ See sections 193 and 230(3) of the Employment Rights Act 1996

15. A disclosure will not qualify if a worker commits an offence by making it, or if the information is subject to a claim to confidentiality (legal professional privilege) between a client and professional legal adviser.

What is the role of a prescribed person?

16. The role of a prescribed person is to provide workers with a mechanism to make their disclosure to an independent body where the worker does not feel able to disclose directly to their employer and the body might be in a position to take some form of further action on the disclosure.
17. If a protected disclosure is made, the worker may have a right to redress through the employment tribunal should they suffer a detriment or be dismissed from work as a result of making that disclosure.
18. When a worker makes a disclosure to a prescribed person they escalate the issue beyond their employer, as those with investigatory and regulatory functions can consider acting upon the information that has been disclosed to them. In particular, whistleblowers can provide an important source of information to prescribed persons, which will enable prescribed persons to gain a greater understanding of the sectors they regulate.

Disclosures to the Commissioner

19. The Commissioner is a “prescribed person” for freedom of information law in Scotland (see paragraph 1 above).
20. If you believe that an act or omission by your employer amounts to an offence under, or a failure to comply with, freedom of information law in Scotland, you can tell us about it. To raise a matter under the whistleblowing provisions, please contact us by email or by post. Our details are:

Email: enquiries@itspublicknowledge.info

Scottish Information Commissioner
Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS

21. All of our contact details are on our [website](#).
22. If you make a disclosure it must meet one of five criteria, as set out paragraph 10 above. In practice, disclosures are most likely to be made to the Commissioner where a worker reasonably believes their employer (or ex-employer):
 - has committed, or is likely to commit, a criminal offence under section 65 of FOISA or under regulation 19 of the EIRs. These make it a criminal offence to alter, deface, block, conceal, destroy, etc. a record with the intention of preventing information being disclosed in response to an information request made under FOISA or the EIRs.
 - has failed to comply (or is likely to fail to comply) with a (non-criminal) legal obligation, where this has been (or is likely to be) deliberately concealed. This may be relevant where, for example, an authority deliberately:

- (a) charges for responding to information requests when it knows the charge is contrary to charging rules in FOISA or the EIRs
- (b) fails to comply with its publication scheme duties under section 23 of FOISA
- (c) delays responding to a request.

23. There is, however, a difference between:

- a worker making a protected disclosure under the whistleblowing provisions, and
- an individual contacting us in their personal capacity because they think their employer has committed an offence or has failed to comply with freedom of information law with regard to them personally, and want us to help put things right for them.

24. For the whistleblowing provisions to apply, you must reasonably believe that the information you are giving us falls within the matters the Commissioner is responsible for and that the information disclosed, and any allegation contained in it, are substantially true.

25. You should seek to make disclosures in accordance with your employer's whistleblowing policy, if they have one. However, you don't have to tell them that you intend to make a disclosure to the Commissioner about their information rights practices. Any condition in an agreement between you and your employer has no legal effect if it tries to stop a protected disclosure.

What happens once a disclosure has been reported to the Commissioner?

26. It can be a difficult decision for a worker to make a disclosure and the Commissioner understands and is sensitive to this.

27. We will direct your email/correspondence to a Head or Deputy Head of Department who is familiar with the whistleblowing provisions and our related case handling procedures. In order to make sure that your disclosure is dealt with in line with this policy, you should make it clear that you consider yourself to be making a protected disclosure under the whistleblowing provisions.

28. All disclosures will be dealt with on a case-by-case basis and in accordance with our guidance and procedures. We will manage the initial contact with you to clarify and understand the nature of the disclosure and then take a decision about what action to take.

29. We will treat the information you provide as confidential and will not disclose it without lawful authority. However, for us to be able to look into a matter properly, we will usually need to disclose some information to the organisation concerned. If your disclosure includes an allegation that an offence has been committed, we may also refer the matter to Police Scotland.² We can discuss this with you, but you should clearly indicate any information that you do not want us to share from the outset.

30. You can contact us anonymously if you prefer but we are more likely to be able to investigate potential wrongdoing where we are confident that the party making the disclosure is in a

² The Commissioner has a Memorandum of Understanding with Police Scotland and the Crown Office in relation to the investigation of criminal offences under freedom of information law. It is published on our website: [here](#).

position to make an informed disclosure. It will also mean we are better able to feedback information about any action we have taken, if we are in a position to do so.

What feedback will the Commissioner provide to you concerning the disclosure?

31. Where possible, we will give you feedback about any action we take as a result of your disclosure. However, this feedback may be restricted as, depending on the circumstances, we may be legally prevented from disclosing information we obtain from the authority following your disclosure.
32. We will also publish information about the action we take as a result of disclosures made by whistleblowers in a yearly report (see below "[Annual Reporting Requirements](#)"). This report will not contain any information which will identify individual whistleblowers or their employers (including ex-employers).

What action can the Commissioner take?

33. If, having looked into the matter, we believe we have an opportunity to improve your employer's information rights practices or we have a concern about your employer's information rights practices, there is a range of regulatory action we can take, from recommending changes to policies and procedures to taking formal enforcement action if there is evidence of wrongdoing.
34. For more information about our regulatory powers and how we use them, please see the Commissioner's:
 - (i) [Enforcement Policy](#) and
 - (ii) [Intervention Procedures](#).

Issues raised outside of the whistleblowing provisions

35. If you have a personal complaint about your employer concerning your information rights (for example, if you think they have not properly responded to a freedom of information request you have made), you do not have to report it under the whistleblowing provisions. We regularly deal with such employee/employer complaints under our routine case handling processes and you can appeal to us under our general [processes](#).
36. In these cases, we will disclose your name and the details of your appeal to your employer (although we should still be able to withhold non-essential information if you request it) and the protection of the whistleblowing provisions will not apply. We still, however, have the range of powers available to us as described above and, in relevant cases, we can require your employer to take steps to comply with FOI law.
37. The Commissioner is unable to become involved in a grievance between workers and employers, other than to confirm that a disclosure was made.

Annual reports on whistleblowing disclosures

38. Prescribed persons are required to report in writing annually on whistleblowing disclosures made by workers to them.³

³ The Prescribed Persons (Reports on Disclosures of Information) Regulations 2017

39. The aim of this duty is to increase transparency in the way that whistleblowing disclosures are dealt with and to raise confidence among whistleblowers that their disclosures are taken seriously.
40. The reporting period runs from 1 April to 31 March each year. The report must be published within six months of the end of the reporting period.
41. The Commissioner publishes his annual report on the Commissioner's website and the latest report can be found [here](#).
42. The annual report covers the following:
 - the number of disclosures of information made by workers to the Commissioner in the twelve month period which the Commissioner reasonably believes are qualifying disclosures falling within the matters for which the Commissioner has been prescribed
 - out of the total number of qualifying disclosures made, the number of those disclosures where the Commissioner decided to take further action in that period (whether or not that action was actually undertaken within that period).
 - an explanation of the Commissioner's functions, objectives and statutory powers.
 - a summary of the action taken by the Commissioner in respect of qualifying disclosures of information during the reporting period.
 - a summary of how the disclosures have impacted on the Commissioner's ability to perform its functions and meet its objectives during the reporting period.
 - an explanation of the Commissioner's functions and objectives.
43. In order to protect the confidentiality of whistleblowers and other parties involved, the Commissioner will not include any information in the annual report that would enable a worker who has made the disclosure or the employer or person about whom a disclosure has been made to be identified.

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