

Procedures for the Making of Protected Disclosures in the Department of Public Expenditure and Reform

October 2016

Introduction

1. The Secretary General and the Management Board of the Department of Public Expenditure and Reform are strongly committed to ensuring that the culture and working environment of the Department encourage, facilitate and support any employee of the Department to “speak up” on any issue that could impinge on the Department’s ability to carry out its roles and responsibilities to the high standard expected.
2. It is our expectation that any such issue raised by an employee of the Department will be dealt with professionally and appropriately by line managers, adhering to a high standard of both professional and personal conduct.
3. The Secretary General and Management Board of the Department are also fully committed to the Department maintaining the highest standards of integrity and probity. As servants of the public, people who work in and with the Department are required and expected to adhere to a high standard of both professional and personal conduct. In addition, the [Protected Disclosures Act 2014](#), requires Government Departments to put in place procedures for the making of protected disclosures in the Department.

Guiding principles

4. All disclosures of wrongdoing in the Department should, as a matter of routine, be the subject of an appropriate assessment and/or investigation and the identity of the discloser should be adequately protected.
5. These procedures set out the process by which a worker of the Department of Public Expenditure and Reform can make a protected disclosure, what will happen when a disclosure is made and what the Department will do to protect the discloser.

Commitment of the Management Board

6. The Management Board of the Department takes responsibility for the successful operation of this policy and is also fully committed to observing the spirit and purposes of the 2014 Protected Disclosures Act. Specifically, the Management Board is committed to the following:
 - (a) Facilitating, encouraging and promoting the disclosure of wrongdoing;
 - (b) Encouraging workers to make protected disclosures at the earliest possible opportunity;
 - (c) Assisting, supporting and protecting workers who make protected disclosures;
 - (d) Protecting a worker’s identity in a manner consistent with the requirements of the 2014 Act and taking action where those requirements have been breached;
 - (e) Assessing any disclosure made, conducting an investigation, where warranted, and addressing all findings that require attention;
 - (f) Providing that workers are not to be penalised for reporting relevant wrongdoings; and
 - (g) Providing workers with specific guidelines as set out in these procedures as to how to make protected disclosures.

Why are we encouraging disclosure of wrongdoing?

7. People who work in this Department will often be the first people to notice the signs of wrongdoing. They therefore play an essential part in early detection of behaviour that could damage the Department if it is allowed persist. Putting in place a receptive culture and appropriate procedures is central to encouraging members of staff to make disclosures directly to the Department rather than to a person outside the Department.
8. Internal disclosures facilitate the Department in, for example:-
 - deterring wrongdoing in the Department;
 - ensuring early detection and remediation of potential wrongdoing;
 - reducing the risk of leaking of confidential information;
 - demonstrating to interested stakeholders, regulators and the courts that the Department is accountable and managed effectively;
 - improving trust, confidence and morale of workers in the Department;
 - building a responsible and ethical organisational culture; and
 - limiting the risk of reputational and financial damage.

What is a protected disclosure?

9. A protected disclosure (per Section 5 of the 2014 Act) is a disclosure of information which, in the reasonable belief of the worker, tends to show one or more relevant wrongdoings (see paragraphs 16-19) and came to the attention of the worker in connection with the worker's employment (see paragraph 20). It is also important to note that workers must make a disclosure in the manner set out in the Act to gain the protections of the Act.
10. A protected disclosure should contain "information" which tends to show wrongdoing. The ordinary meaning of disclosing "information" is conveying facts, such as stating that particular events have occurred. This is different to simply making an allegation on the basis of a suspicion that is not founded on anything tangible.
11. Workers need not investigate matters themselves to find proof of their suspicion and should not endeavour to do so. All workers need to do, and should do, is disclose the information that they have, **based on a reasonable belief (see immediately following paragraphs)** that it discloses **a wrongdoing (see paragraph 19)** and, where the information relates to individuals, that it is necessary to disclose that information.

What is a Reasonable belief?

12. A worker must have a reasonable belief that the information disclosed shows, or tends to show, wrongdoing. The term "reasonable belief" does not mean that the belief has to be correct. Workers are entitled to be mistaken in their belief, so long as their belief was based on reasonable grounds.
13. It may be quite reasonable for a worker to believe that a wrongdoing is occurring on the basis of what he or she observes. A worker may not know all the facts of the case and as noted above at paragraph 11, the worker is not obliged to find proof of his / her suspicion. In such a case, the worker may have reasonable grounds for believing that some form of wrongdoing is occurring, but it may subsequently turn out that the worker was mistaken.

14. No worker will be penalised simply for getting it wrong, so long as the worker had a reasonable belief that the information disclosed showed, or tended to show, wrongdoing.

Who can make a disclosure?

15. Wrongdoing may come to the attention of, and a disclosure can be made by, any worker. In line with the inclusive approach, which underpins this disclosure policy, a worker is broadly set out so that any current and former employee, independent contractor, trainee, agency staff member and, where applicable, a volunteer should be considered a worker for the purposes of this policy.

Personal complaints vs disclosures of wrongdoing

16. It is important to note that the Protected Disclosures process set out in this document does not take the place of the normal channels for raising issues of concern. It is important also to note the distinction between a personal employment complaint and a disclosure of wrongdoing (or protected disclosure). This policy is not intended to provide for an avenue for complaints about the employee's own position or a failure by the Department to comply with the member of staff's contract of employment, work or services. In those cases, the normal HR or grievance procedures will apply.
17. Personal employment complaints will generally be dealt with under the internal grievance, or dignity at work, procedures. For example, a member of staff may complain that there is a breach of their own terms and conditions. That type of complaint will generally be dealt with under the grievance (or equivalent) procedure. Alternatively, a member of staff may claim that they are being bullied or harassed by a colleague. That type of complaint will generally be dealt with under the dignity at work (or equivalent) procedure.
18. If a complaint is made of penalisation contrary to the 2014 Act, then that complaint will be dealt with, having regard to the continued obligation to protect the identity of the discloser under the Act.

What wrongdoing can be the subject matter of a protected disclosure?

19. Section 5(3) of the 2014 Act provides protection for employees of the Department who disclose information in relation to the following wrongdoings:
 - (a) The commission of an offence;
 - (b) The failure of a person to comply with any legal obligation, other than one arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services;
 - (c) A miscarriage of justice;
 - (d) A danger to the health and safety of any individual;
 - (e) Damage to the environment;
 - (f) An unlawful or otherwise improper use of funds or resources of a public body, or of other public money;
 - (g) An act or omission by or on behalf of a public body that is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement; or
 - (h) Information tending to show any matter falling within any of the preceding paragraphs (a) to (g) has been, is being, or is likely to be concealed or destroyed.

20. The information must come to the attention of the worker in connection with his/her employment. However, if the disclosure involves either the employee's or the employer's function to detect or investigate or prosecute, the protections of the 2014 Act do not apply, unless it involves an act or omission on the part of the employer. A protected disclosure is voluntary.

To whom can a disclosure be made: Disclosures to the Department

21. This procedure identifies how a worker can make a protected disclosure within the Department. Within the Department, a worker can make a protected disclosure to a "Recipient". A Recipient can be:
- (a) a line manager; or
 - (b) a member of the PO Recipients Panel who will have received dedicated training in how to handle protected disclosures.
22. While the Act provides for making disclosures within the Department and outside it, and the various options are set out below, the Department is strongly committed to encouraging and facilitating the making of disclosures within the Department.

To whom can a disclosure be made: Disclosures outside the Department

23. The Act identifies the following avenues for making a protected disclosure outside the employer (in this case, the Department of Public Expenditure and Reform):

A responsible person outside the Employer, if the employee reasonably believes that the wrongdoing relates to a person other than the employee's Employer or where that responsible person has legal responsibility for something in respect of which a wrongdoing may have occurred.

A prescribed person (i.e. as prescribed by Statutory Instrument 339/2014¹) such as the Comptroller and Auditor General, the Data Protection Commissioner, the Chief Executive of the Health and Safety Authority etc. In such cases, an additional requirement applies: the discloser must believe that that the information disclosed and any allegations contained in it are substantially true.

A Minister of the Government on whom any function relating to the public body (i.e. the Department of Public Expenditure and Reform) is conferred or imposed by or under any enactment.

A legal adviser (e.g. in the context of obtaining legal advice, a solicitor, a barrister, a trade union official).

Alternative external disclosures (in very limited circumstances) (Section 10). It should be noted that there are stringent requirements for alternative external disclosures (for example seeking to disclose directly to the media) to qualify as protected disclosures under Section 10 of the Act.

Certain Special Cases - Defined Categories of information

24. In order to take account of certain special cases, the Protected Disclosures Act provides, under Section 17, for disclosure of information that might reasonably be expected to facilitate the commission of an offence or to prejudice or impair a) the prevention, detection or investigation of offences, the apprehension or prosecution of offenders or the effectiveness

¹ As amended by SI 448/2015

of lawful methods, systems, plans or procedures employed for any of those matters, (b) the enforcement or administration of, or compliance with, any law, c) lawful methods, systems, plans or procedures employed for ensuring the safety of the public or the safety or security of persons or property, (d) the fairness of proceedings before a court or tribunal, (e) the security of a relevant institution, or (f) the security of any system of communications of the Garda Síochána, the Defence Forces or a relevant institution. **Section 17 should be consulted further when a disclosure of such information is contemplated.**

25. The Act also provides, under Section 18, for disclosure of information that might reasonably be expected (a) to affect adversely—(i) the security of the State (ii) the defence of the State or (iii) the international relations of the State, or (b) to reveal, or lead to the revelation of, the identity of a person who has given information in confidence to a public body in relation to the enforcement or administration of the law or any other source of such information given in confidence. In such case, the Act provides for disclosure to be made to the Disclosures Recipient appointed by the Taoiseach for this purpose in accordance with Schedule 3 of the Act.

Protecting disclosers from penalisation: Definition of penalisation for having made a disclosure

26. Penalisation of a person who makes a protected disclosure will not be tolerated by the Department. The definition of penalisation includes:
- (a) suspension or dismissal;
 - (b) demotion or loss of opportunity for promotion;
 - (c) Transfer of duties, changes of location of place of work, reduction in wages or change in working hours (jurisprudence, subsequent to the enactment of the legislation, clarifies that transfer of duties in the Civil Service context does not necessarily amount to penalisation under the Act);
 - (d) the imposition or administering of any discipline, reprimand or other penalty (including a financial penalty);
 - (e) Unfair treatment;
 - (f) Coercion, intimidation or harassment;
 - (g) Discrimination, disadvantage or unfair treatment;
 - (h) Injury, damage or loss; and
 - (i) Threat of reprisal.

Anonymous disclosures

27. An anonymous disclosure is where a discloser withholds their identity, and a confidential disclosure is where identity is protected by the recipient. Anonymous disclosures made by workers are not excluded from the protection of the 2014 Act. Anonymous disclosures will be acted upon to the extent that this is possible, although the ability to investigate may be constrained in the absence of the knowledge of the identity of the discloser.
28. It should be noted that keeping the discloser informed and protecting a discloser from penalisation may be difficult or impossible to apply unless the worker's anonymity lifts. Furthermore, a worker cannot obtain redress under the 2014 Act without identifying themselves.

Protecting disclosers from penalisation: Redress avenues for disclosers (key features)

29. Sections 11-16 of the Protected Disclosures Act 2014 provide for specific remedies for workers who are penalised for making a protected disclosure.

Protecting the identity of the maker of a protected disclosure

30. There is a legal obligation on the Recipient of a disclosure to keep the discloser's identity confidential. A discloser whose identity has been compromised can take an action if the discloser suffers any loss by reason of such a compromised identity. The identity of the discloser must be protected. Those involved in the processing of a protected disclosure must take care that in relation to document security and filing (whether digital or manual) the discloser's identity is protected.
31. Where action is to be taken following a protected disclosure, it is recommended that a process is put in place for consulting with the discloser and, where possible, for gaining the informed consent of the discloser, prior to any action being taken that could identify them. This may include when disclosures are being referred by the public body to an external party.
32. The Recipient of a disclosure must not disclose to another person any information that might identify the discloser except when:
- (a) The Recipient shows that he or she took all reasonable steps to avoid disclosing the identity of a discloser;
 - (b) The Recipient has a reasonable belief that the discloser does not object to the revelation of identity;
 - (c) The Recipient had a reasonable belief that it was necessary for
 - a. the investigation of the wrongdoing concerned,
 - b. to prevent serious risk to State security, public health, public safety and the environment, or
 - c. to prevent crime or the prosecution of a criminal offence crime or is warranted by the public interest;
 - (d) Where the disclosure is otherwise necessary in the public interest or is required by law.
33. Where it is decided that it is necessary to disclose information that may or will disclose the identity of the discloser, the discloser should be informed of this decision in advance of the disclosure, except in exceptional cases. The discloser should also be informed of the applicable review process, which may be invoked by the discloser in respect of this decision.

Annual report

34. No later than 30th June each year the Department will publish a report on protected disclosures in the previous year. Specifically, such a report will outline:
- (a) The number of protected disclosures made to the body;
 - (a) The resulting action; and
 - (b) Any other action and information requested by the Minister for Public Expenditure and Reform.

Receipt of disclosures within the Department

35. It is the policy of the Department that a panel of Recipients (to consist of nine Principal Officers and one internal auditor at AP level) will be nominated to act as the dedicated panel of preferred recipients of protected disclosures. Details of the Panel will be maintained on the Department's intranet. A disclosure can be made to a member of the Panel where a discloser wishes to do so in preference to making a disclosure to a line manager. The Recipient Panel will receive appropriate and tailored training. Where a disclosure is made to someone other than a person on the dedicated panel of Recipients, immediate guidance and assistance will be provided to such a recipient.

Content and detail of Disclosures

36. Disclosures should ideally be made in writing and at a minimum:
- (a) State that the disclosure is being made under the Protected Disclosure procedures;
 - (b) Provide the discloser's name, position in the organisation, place of work and confidential contact details;
 - (c) the date of the alleged wrongdoing (if known) or the date the alleged wrongdoing commenced or was identified;
 - (d) Whether or not the wrongdoing is still ongoing;
 - (e) Indicate whether the wrongdoing has already been disclosed and if so to whom, when and what action was taken; and
 - (f) Provide relevant information in respect of the relevant wrongdoing.
37. The Recipient must keep a detailed record of the assessment process, particularly in respect of verbal disclosures. In cases of verbal protected disclosures, the Recipient should capture the above information in a record, again in such a manner as protects the identity of a Discloser. The Recipient should show the draft record of the assessment to the discloser to provide the discloser an opportunity to comment on it before finalising it.
38. The Recipient must make all reasonable efforts to ensure that the identity of the discloser is protected unless the discloser consents to disclose his or her identity or unless other conditions in the Act are met (see paragraph above).

Assessment by a Recipient: Process

39. The Recipient must carry out an assessment as soon as practically possible and inform the discloser of the result or progress and keep the discloser periodically apprised of progress. The Recipient must apprise the Chief Operations Officer and Head of Internal Audit of the fact of having received a protected disclosure and subsequently of any assessment by the Recipient that further action or investigation is not warranted. The Recipient should assess the disclosure to determine whether or not it should be treated as a protected disclosure
40. Where a Recipient forms the view that a full investigation is required, the Recipient must ensure that the matter is immediately referred to
- (a) The Chief Operations Officer, who shall ensure that the Secretary General is informed; and
 - (b) The Head of Internal Audit, who shall ensure that the Chairperson of the Audit Committee is informed.

The Recipient will make the discloser aware of the outcome of the assessment.

Assessment: consideration to inform a Recipient while making an assessment

41. The screening process by a Recipient should involve an assessment of the disclosure to seek to determine whether or not it should be treated as a protected disclosure, having regard to the provisions of the 2014 Act. If it is unclear whether the disclosure qualifies as a protected disclosure, the recipient should treat the disclosure as a protected disclosure (and protect the identity of the discloser in accordance with the Procedures) until satisfied that the information is not a protected disclosure.
42. It may be necessary, as part of the screening process, to differentiate between protected disclosures and personal employment complaints. In some cases, the information provided may involve both a personal employment complaint and a protected disclosure. The disclosure should be assessed to determine the nature of the information disclosed and the procedure or procedures that is/are most appropriate to be used to investigate the matter.
43. It may be necessary to separate the different elements of the complaint/disclosure and determine whether any specific disclosure of information relating to a relevant wrongdoing has taken place. If, having assessed the disclosure, it is deemed to relate solely to a personal employment complaint, then the discloser should be encouraged to utilise other processes (for example, the grievance or dignity at work policy) so that that complaint can be dealt with in an appropriate manner. If, having assessed the disclosure, there is a mix of different issues (some involving a protected disclosure, some involving a personal employment complaint) then an appropriate process / processes should be applied to deal with the issues. The process to be applied may differ from case to case.
44. The assessment should consider whether the alleged wrongdoing is something that can or should be investigated or not, and, if so, what steps should be taken as part of such an investigation. If an investigation is required, the public body should consider the nature and extent of the investigation. This could consist of an informal approach for less serious wrongdoings, a detailed and extensive investigation of serious wrongdoings, or an external investigation by another body.

Motivation

45. Motivation is irrelevant when determining whether or not it is a disclosure protected by the 2014 Act. All protected disclosures will be dealt with regardless of the worker's motivation for making the disclosure, and the worker should be protected so long as the worker reasonably believes that the information disclosed tended to show a wrongdoing.
46. However, a disclosure made in the absence of a reasonable belief will not attract the protection of the 2014 Act and, may result in disciplinary action against the discloser. In addition, disclosure of a wrongdoing does not necessarily confer any protection or immunity on a worker in relation to any involvement they may have had in that wrongdoing.

Review of an assessment

47. Where a Recipient has made an assessment that further action or investigation is not warranted, the Discloser has the right to ask the Recipient that that assessment be reviewed. In such an event, the Recipient shall communicate to the Chief Operations Officer that a review has been asked for but shall not give the Chief Operations Officer any information that could identify the discloser. The Chief Operations Officer shall arrange that an Assistant Secretary shall review the assessment and advise the Recipient. The Recipient will send the disclosure file to the Assistant Secretary assigned to carry out the review.

48. The Chief Operations Officer, having consulted with the Secretary General, shall let the Recipient know which Assistant Secretary will carry out the assessment and the Recipient shall forward to the Reviewer the disclosure file for his or her decision. The Assistant Secretary Reviewer will carry out the review of assessment as soon as practically possible and inform the discloser of the result or progress as soon as practicable.
49. Where an Assistant Secretary Reviewer forms the view that a full investigation is required, the Assistant Secretary Reviewer must ensure that the matter is immediately referred to:
 - (a) The Chief Operations Officer, who shall ensure that the Secretary General is informed; and
 - (b) The Head of Internal Audit, who shall ensure that the Chairperson of the Audit Committee is informed.

Investigation

50. Where a Recipient (or a subsequent Assistant Secretary Reviewer) reports that an investigation is warranted in respect of a disclosure, the Chief Operations Officer and the Head of Internal Audit, will together arrange as soon as is practicable, that an investigation is commenced.
51. Investigations in case of an alleged serious wrong-doing will be carried out, as appropriate depending on the nature and scale of the alleged wrongdoing (the Secretary General having the ultimate authority and direction in this regard), by:
 - (c) A person at Assistant Secretary level or Principal Officer level nominated by the Secretary General; or
 - (d) In cases where the matters may be of such seriousness that that the investigation will more appropriately be carried out externally or by professional experts in a particular area; this could include investigators from any approved framework in place for the Civil Service/Public Service;
 - (e) in some areas the matter may need to be reported too, and investigated by, An Garda Síochaná or another body with the power with the statutory power and function of investigation of particular; or
 - (f) The Internal Audit Unit; or
 - (g) In the case of a relatively minor alleged wrong-doing, however, the investigation will in general be carried out at the level appropriate and in the departmental framework most appropriate and suitable.

Feedback to the discloser

52. The overriding requirement when providing feedback is that no information is communicated that could prejudice the outcome of the investigation or any action that ensues (e.g. disciplinary, or other legal action, including prosecution) for example, by undermining the right to fair procedures enjoyed by the person against whom a report or allegation is made.
53. Subject to the previous paragraph, workers making protected disclosures should be provided with periodic feedback in relation to the matters disclosed and be advised when consideration of the disclosure is complete, except in exceptional cases. This does not require the public body to give a complete account of what the situation is at a particular point in time in terms of progress, but public bodies should generally give reassurance and affirmation that the matter is receiving attention.

54. Any information and feedback should be provided in confidence. There is no obligation to inform the discloser of the progress, or outcome, of any disciplinary process involving another worker which may arise on foot of an investigation occasioned by a protected disclosure. In general, such information is confidential between the employer and the worker who is the subject of a disciplinary process. A discloser should be informed that appropriate action has been taken but is not generally entitled to know what that action was.

Rights of the respondent in an investigation

55. The principles of natural justice will apply in respect of any employee of the Department who is the subject (the respondent) of any investigation. The Head of Human Resources will arrange that appropriate supports and protections are available as and when appropriate.

Review of investigations carried out under these procedures

56. A discloser may seek a review of the outcome of an investigation. In consultation with the Secretary General, the Chief Operations Office and the Head of Internal Audit will together arrange for a review of the outcome of the investigation by a person who has not been involved in the initial assessment and/or review of the initial assessment and/or the investigation.

Protection of a discloser; Right of a discloser to ask for a review of a decision to disclose the identity of the discloser (except in exceptional cases)

57. If a discloser

- (a) considers that he or she has been penalised as a result of having made a protected disclosure, or
- (b) wishes to appeal a decision to disclose his or her identity,

the discloser should inform the Head of Strategic HR and/or the Head of the Division in which the employee works. The Head of Strategic HR and/or such a Head of Division will arrange for the matter to be considered, remediated where appropriate, investigated as necessary and assess if and what appropriate disciplinary proceedings are necessary.