

Public Interest Disclosure Procedure (‘Whistleblowing’)

1 Overview

The law seeks to protect **workers**¹ who, out of a sense of public duty, reveal serious wrongdoings in the workplace (‘Whistleblowers’).

Broadly speaking, a worker must usually make a disclosure to their employer, their legal adviser or to an appropriate public authority and it is only if the suspected malpractice is exceptionally serious, that a worker is then justified in disclosing the information to the general public.

Legislative amendments have been introduced with the aim of increasing protection for ‘genuine’ Whistleblowers as well as addressing a loophole that protected workers who effectively complain about personal grievances rather than matters in the public interest.

2 Definition of whistleblowing

The law does not define the term ‘Whistleblowing’. However, Whistleblowing can be described as the action of an individual exposing evidence of wrongdoing by employers or third parties in the context of the workplace.

3 Relevant legislation

The Public Interest Disclosure Act 1998 (‘PIDA’) inserted Part 4A into the Employment Rights Act 1996 (‘ERA 1996’) to provide protection, in certain circumstances, for Whistleblowers.

The Employment Rights Act 1996 defines the type of disclosures that are protected and also seeks to regulate to whom the disclosures can be made.

More recently, the Enterprise and Regulatory Reform Act 2013 (‘ERRA’) has amended the Whistleblowing provisions of the Employment Rights Act 1996 and these amendments will only apply to ‘Protected Disclosures’ made after 25 June 2013.

¹ The definition of “worker” covered by the whistleblowing legislation is broad and includes employees, agency workers, home-based workers, freelance workers, seconded workers and trainees but not job applicants – this document thereby uses this term throughout.

For a worker to bring a successful whistleblowing claim against the College, the worker would need to prove that their disclosure amounted to a '**Protected Disclosure**' and in order to do so, the worker would first need to prove that their disclosure was a 'Qualifying Disclosure'.

The different types of disclosure are detailed in **Appendix 1**.

4 Introduction

- 4.1 Middlesbrough College is committed to operating in an ethical and principled way and the primary aim of the Public Interest Disclosure Procedure is to provide workers with a means for raising genuine concerns of suspected bribery, breaches of the law and other serious wrongdoings.
- 4.2 The Public Interest Disclosure Procedure is intended to provide safeguards to enable workers to raise concerns about malpractice in connection with the College.
- 4.3 The Public Interest Disclosure Procedure aims to encourage workers to raise genuine concerns through internal College procedures without fear of adverse repercussions being taken against them. The law allows workers to raise such concerns externally and the Public Interest Disclosure Procedure details how this can be done. However, a failure to raise a concern under this procedure may result in a disclosure losing its protected status under the law.
- 4.4 The Public Interest Disclosure Procedure seeks to balance the need to allow a culture of openness against the need to protect other workers against vexatious allegations or allegations which are not well-founded.
- 4.5 The principles of openness and accountability, which underpin legislation protecting Whistleblowers, are reflected in this procedure.
- 4.6 The College is also committed to ensuring compliance with the Bribery Act 2010.
- 4.7 Students at the College are encouraged to raise genuine concerns about suspected wrongdoing by making a complaint using the appropriate Complaints Form, which is available from Main Reception or is located on the College's Website.

5 Who does the Procedure Apply to?

- 5.1 The Public Interest Disclosure Procedure applies to all employees of the College, including Apprentices; and
- 5.2 Workers, which includes any casual workers, home-based casual workers and employees of subcontractors; and
- 5.3 Agency workers engaged by the College.
- 5.4 Workers might be unsure whether it is appropriate to raise their concern under this policy and procedure or whether it is a personal grievance, which is more appropriate to raise under the College's Grievance Procedure.

Any worker in this situation is encouraged to approach the Clerk to the Corporation in confidence for advice.

6 Designated Assessors

The Principal / Chief Executive will ensure that three members of staff of appropriate experience and standing within the College are designated at any time to be Assessors, with one being designated as the Lead Assessor.

As at 9 July 2018, the Assessors are:

Assessor	Name	Position	Contact
1 (Lead)	Richard Atkinson	Clerk to the Corporation	(01642) 333269
2	John Chance	Vice Principal	(01642) 333386
3	Jane Steel	Assistant Principal	(01642) 333775

The Principal / Chief Executive may revoke any such designation from time to time and appoint new Assessors, and this will be reported to the next meeting of the Governing Body, together with brief reasons for the revocation. Where a revocation arises from the termination of an Assessor's employment, brief reasons for the termination will be given to the Governing Body.

The Lead Assessor will co-ordinate the training of the Assessors (as necessary) and will ensure that the Assessors use the correct documentation, with an annual report being shared with Governing Body, normally in its October meeting.

An Assessor may decline to become involved on reasonable grounds.

Such grounds may include:

- Previous involvement.
- Interest in the matter concerned.
- Incapacity or unavailability.
- That an Assessor is satisfied, after consulting the Lead Assessor, that another Assessor would be more appropriate to consider the matter in accordance with this procedure.

7 Protected Disclosures

- 7.1 The law protects workers who, out of a sense of public duty, want to reveal suspected wrongdoing or malpractice.
- 7.2 The law allows workers to raise what it defines as a '**Protected Disclosure**', and in order to be a Protected Disclosure, it must relate to a specific subject matter as detailed in section 8, and the disclosure must also be made in an appropriate way, as detailed in section 9.
- 7.3 A 'Protected Disclosure' must, in the reasonable belief of the employee or the worker making it, also be made in the public interest. A Protected Disclosure must consist of information and not merely be allegations of suspected malpractice.

8 Specific Subject Matter

If, in the course of employment, a worker becomes aware of information that they reasonably believe tends to show one or more of the following, they must use this Public Interest Disclosure Procedure.

- That a criminal offence has been committed, is being committed or is likely to be committed.
- That an individual has failed, is failing or is likely to fail to comply with any legal obligation to which they are subject to.
- 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.
- That information tending to show any of the above, is being, or is likely to be, deliberately concealed

9 Procedure for Making a Disclosure

- 9.1 The worker making the disclosure should, as soon as practicable, disclose in confidence the grounds for the belief of malpractice to any of the Assessors, and any disclosure to an Assessor under this procedure shall, wherever possible, be in writing.
- 9.2 In certain circumstances, it may be inappropriate to make such a disclosure to the Line Manager and, in that instance, the issue should be raised with the Lead Assessor in order that appropriate advice and guidance can be obtained.
- 9.3 If the disclosure relates to the Principal / Chief Executive, then the issue should be raised with the Clerk to the Corporation (*Lead Assessor*).
- 9.4 In the event that the disclosure relates to the Clerk of the Corporation, then the issue should be raised with either, the Chairman of Governors or, in their absence, the Vice Chairman of Governors.
- 9.5 If an anonymous disclosure is made, the College will not be in a position to notify the individual making the disclosure of the outcome of action taken by the College and anonymity also means that the College will have difficulty in investigating such a concern.

The College reserves the right to determine whether to apply the Public Interest Disclosure Procedure in respect of an anonymised disclosure in light of the following considerations:

- The seriousness of the issues raised in the disclosure.
- The credibility of the concern.
- How likely it is that the concern can be confirmed to be from credible sources.

10 Procedure for Investigation of a Disclosure

- 10.1 When a disclosure is made, the College will acknowledge its receipt, in writing, within a reasonable time - normally within five working days.
- 10.2 The College will then determine whether or not it believes that the disclosure is wholly without substance or merit, and advice should be taken from the Lead Assessor as appropriate.

If the College considers that the disclosure does not have sufficient merit to warrant further action, the person making the disclosure will be notified in writing of the reasons and will also be advised that no further action will be taken by the College. In making this decision, consideration will take into account the following:

- If the College is satisfied that there is not reasonable belief that suspected malpractice is occurring; or
 - If the matter is already the subject of legal proceedings or appropriate action by an external body; or
 - If the matter is already subject to another, appropriate College procedure.
- 10.3 When the College believes that the disclosure has sufficient substance or merit warranting further action, then the College will take action it deems appropriate, and this will include action under any other applicable College policy or procedure.

Possible actions at this stage could include:

- Internal investigation and interview.
(see 10.5).
 - Referral to the College's Internal or Financial Statements Auditors.
(see 10.6).
 - Referral to relevant external bodies such as (*not an exhaustive list*) the Police, Skills Funding Agency (SFA), Education Funding Agency (EFA), Ofsted, Health & Safety Executive (HSE) or the Information Commissioner's Office.
(see 10.6)
- 10.4 If appropriate, any internal investigation would be conducted by one of the Designated Assessors without any direct association with the individual to whom the disclosure relates, or by an External Investigator appointed by the College as appropriate. This will be determined by the Lead Assessor, unless the investigation is in relation to the Clerk to the Corporation and, in that case, this will be the Chairman of Governors.

10.5 Initial Interview

On receipt of the disclosure and subject to 10.3, the Assessor will offer to interview, in confidence, the person making the disclosure. Such an interview will take place as soon as practicable after the initial disclosure and normally within five working days.

All communications by the Assessor should be in writing, to the home address rather than via internal College communication channels, and consideration should be given to the timing, location and potential duration of any such interview, as well as any special requirements i.e. refreshments, access to toilets, disabled facilities, privacy and involvement of an advocate etc.

The purpose of the interview will be for the Assessor to obtain as much information as possible about the grounds for the belief of malpractice and to consult about any further steps, that could be taken, if any.

The person making the disclosure may be accompanied at the interview by a Trade Union Representative or work colleague if they so wish.

The Assessor may be accompanied by an Administrative Assistant, or another Assessor, to take notes.

The notes will not identify the person making the disclosure, unless this is so permitted and it is also preferable, but not necessary, for the relevant parties to sign and date the notes as a true and accurate record.

10.6 Next Steps

Within two working days of the interview taking place as detailed in 10.5, or after the initial disclosure has been received if no interview takes place, the Assessor will recommend, perhaps following consultation with the Lead Assessor, what further steps should be taken.

Such recommendations may include one or more of the following:

- That the matter should be more appropriately investigated internally by the College and/or by the Internal Auditors or Financial Statement Auditors or other investigators appointed by the College.
- That the College's Disciplinary Procedures should be invoked.
- That a member of staff or a student should be given the opportunity to seek redress through the College's Grievance or Complaint's Procedures.
- That the matter should be reported to the Police.

- That the matter should be reported to the Skills Funding Agency (SFA), Education Funding Agency (EFA), the Department for Business Innovation & Skills (BIS), the National Audit Office or some other appropriate public authority.
- That no further action is taken.
- That simultaneous investigations should be undertaken through the Public Interest Disclosure Procedure and the Disciplinary Procedure.

The grounds on which the Assessor may recommend that **no** further action by the College should be taken are as follows:

- That the Assessor is satisfied that the person making the disclosure does not have a reasonable belief that malpractice within the meaning of this procedure has occurred, is occurring or is likely to occur; or
- That the Assessor is satisfied that the person making the disclosure is not acting in good faith; or
- That the matter concerned is already the subject of legal proceedings, or has already been referred to an External Body such as the Police, Skills Funding Agency (SFA), Education Funding Agency (EFA) or other public authority; or
- That the matter is already (or has already been) the subject of appropriate proceedings under one of the College's other procedures relating to staff or students.

- 10.7 It is the responsibility of the Assessor to keep the worker making the disclosure informed, on a timely basis, of any progress as a result of the initial disclosure and this should be done normally every five working days.
- 10.8 Any recommendations for further action made by the Assessor following the disclosure will be addressed in the first instance to the Principal / Chief Executive or to the Chairman of Governors, should the disclosure be about the Principal / Chief Executive or the Clerk to the Corporation.
- 10.9 If the Principal / Chief Executive (*or the Chairman of Governors in such circumstances*) decides not to implement any of the recommendations, that decision will be notified in writing to the Chairman of Governors no more than a further five working days after recommendations have been received from the Assessor.
- 10.10 The Assessor will also notify the worker making the disclosure of the outcome of any action taken by the College under the Public Interest Disclosure Procedure normally within five working days of completion of any investigation.

10.11 If the worker making the disclosure is not satisfied that their concern has been appropriately addressed, they can appeal against the outcome by raising the issue directly with the Principal / Chief Executive (or the Chairman of Governors in such circumstances) within five working days, who will then make a final decision, which will normally be communicated within ten working days.

11 Safeguards

- 11.1 A worker who makes a disclosure under the Public Interest Disclosure Procedure can expect their matter to be treated confidentially by the College and, where applicable, their name will not be disclosed to anyone implicated in the suspected wrongdoing, without their prior approval.
- 11.2 The College will take all reasonable steps to ensure that any report of recommendations, or other relevant documentation, produced by the College does not identify the person making the disclosure without their written consent, or unless the College is legally obliged to do so, or for the purposes of seeking legal advice.
- 11.3 No formal disciplinary action will be taken for making a disclosure but this does not prevent the College from bringing disciplinary action where the College has grounds to believe that a disclosure was made maliciously or vexatiously, or where a disclosure is made outside the College without reasonable grounds.
- 11.4 A worker will not suffer dismissal or any detrimental action or omission of any type (including informal pressure or any form of victimisation) by the College for making a disclosure in accordance with the procedure. Equally, where the worker making the disclosure is threatened, bullied, pressurised or victimised by a colleague for making a disclosure, disciplinary action will be taken by the College against the colleague in question.
- 11.5 Any documentation (including computer files and discs) kept by the Assessor relating to the matter will be kept secure, as far as is practicable and only the Assessor and his or her administrative assistant shall have access to it.

12 Disclosure to External Bodies

- 12.1 The Public Interest Disclosure Procedure has been implemented to allow disclosures to be raised internally within the College, but there are rights to make a disclosure outside of the College where there are reasonable grounds to do so and in accordance with the law.
- 12.2 A disclosure may be made direct to an appropriate external body as prescribed by the law and a list of these 'prescribed' organisations and bodies can be found on the GOV.UK website.
- 12.3 A disclosure can also be made on a confidential basis to a practising solicitor or barrister.
- 12.4 Should advice be sought outside of the College, the worker making the disclosure must be careful not to breach any confidentiality obligations or damage the College's reputation in so doing.

13 Accountability

The College will keep a record of all concerns raised under the Public Interest Disclosure Procedure, including cases where the College deems that there is no case to answer and therefore that no action should be taken. This will be reported to the Governing Body on an annual basis.

14 Advice & Guidance to Assessors

As each disclosure will be unique, the Assessors will have automatic access to advice and guidance from the Principal / Chief Executive and from the Chairman of Governors or the Chairman of the Audit & Risk Committee, as appropriate. For more detailed and complex referrals, the Assessors should also have access to the College's Internal Auditors and to its legal representatives.

15 Amendments / Review

The Public Interest Disclosure Procedure may be amended by the Governing Body from time to time, particularly following any disclosure, and will be reviewed every twelve months.

Appendix 1

Types of Disclosure

Types of Disclosure

What is a Qualifying Disclosure?

Under Section 43B(1) of the Employment Rights Act 1996 a disclosure will be a **'Qualifying Disclosure'** if it discloses information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the prescribed 'relevant failures' stipulated in Section 43B(1)(a)-(f) of the Employment Rights Act 1996.

A 'Qualifying Disclosure' means any disclosure which, in the reasonable belief of the worker making it, 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 - S.43B(1)(a).
- That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he or she is subject - S.43B(1)(b).
- That a miscarriage of justice has occurred, is occurring or is likely to occur - S.43B(1)(c).
- That the health or safety of any individual has been, is being or is likely to be endangered - S.43B(1)(d).
- That the environment has been, is being or is likely to be damaged - S.43B(1)(e).
- That information tending to show any matter falling within any one of the above has been, is being or is likely to be deliberately concealed - S.43B(1)(f).

Requirements of Qualifying Disclosures

Disclosure of Information

To be a **'Qualifying Disclosure'**, the disclosure must consist of information, rather than merely being an allegation. The disclosure must convey information in the form of facts and the disclosure must also identify which of the above situations the worker is relying on.

Reasonable belief held by the Whistleblower

The Whistleblower must prove their 'reasonable belief' that the information being disclosed 'tends to show' one or more of the situations specified above. Reasonable belief relates to the worker's belief in the accuracy of the information about which he or she is making the disclosure. The focus is on what the worker in question believed rather than what anyone else might or might not have believed in the same circumstances. There must be some substantiated basis for the worker's belief. Rumours, unfounded suspicions or uncorroborated allegations would not be sufficient.

It does not matter, however, if the reasonable belief turns out to be mistaken.

In *Babula v Waltham Forest College* 2007 ICR 1026 the Court of Appeal held that B, who informed the police and other enforcement agencies that he believed that an act of racial hatred had been committed, could rely on the protection of the whistleblowing provisions to argue that his dismissal was automatically unfair even though his belief was mistaken. The Court held that a belief may be reasonably held and yet be wrong. Provided the Whistleblower's belief is objectively reasonable, the fact that it turns out to be wrong is not sufficient to render it unreasonable and thus deprive the Whistleblower of protection.

Disclosure is made in the 'Public Interest'

In the past, case law has established that breaches of a contract of employment by an employer could count as 'a failure to comply with any legal obligation' under Section 43B(1)(b) of the Employment Rights Act 1996. In turn, this meant that a much wider range of disclosures were protected than was envisaged when the Public Interest Disclosure Act was drafted.

Since the Enterprise and Regulatory Reform Act amendments, any disclosure made after 25 June 2013 will only be a Qualifying Disclosure if the worker reasonably believes that the disclosure is in the 'public interest'. The effect of the amendments enacted by the Enterprise and Regulatory Reform Act is to ensure that whistleblowing claims which can be characterised as being of a personal nature rather than public interest will not be protected. For example, if a worker does not receive the correct amount of holiday pay (which might be a breach of their contract of employment) this is a personal grievance rather than a disclosure made in the wider, public interest.

The worker must also show that the belief that the disclosure was made in the public interest was reasonable in the circumstances. Currently, there is no case law guidance on what amounts to 'reasonable belief' in this context. If the approach is similar to that taken when assessing the reasonable belief of the worker of the existence of one of the scenarios set out in Section 43B(1)(a)-(f) of the Employment Rights Act 1996, the worker will have to point to some substantiated basis for their belief that the disclosure was made in the public interest.

Arguably, criminal offences, miscarriages of justice, matters of health & safety and damage to the environment are, by nature, matters of public interest. Accordingly, a worker may genuinely believe that raising a concern about a health and safety breach is in the 'public interest', even though the worker's motivation for making the disclosure is actually personal in nature and it is in fact a personal grievance. It follows that the introduction of this public interest test might not reduce the number of whistleblowing claims filed at employment tribunals.

No 'good faith' requirement after 25 June 2013

Since 25 June 2013, disclosures do not need to be made in 'good faith' to be Qualifying Disclosures. The requirement that all qualifying disclosures had to be made in 'good faith' requirement was removed by Section 18 of the Enterprise and Regulatory Reform Act 2013.

Protected Disclosures

If a worker successfully proves that they made a Qualifying Disclosure, they will only be protected by the Whistleblowing legislation (i.e. protected from suffering an unlawful detriment or dismissal) if the disclosure is made in a way prescribed by the law.

Qualifying Disclosures that are disclosed in an acceptable manner are called 'Protected Disclosures' under Section 43A of the Employment Rights Act 1996.

There are seven permissible methods of disclosure, which are set out in Sections 43C - 43H of the Employment Rights Act 1996:

1. Disclosure to the Employer - S.43C(1)(a)

The Employment Rights Act 1996 specifies that a Qualifying Disclosure is a Protected Disclosure if the Whistleblower makes it to the employer.

2. Disclosure to the person believed to be responsible for the relevant failure - S.43C(1)(b)

Where a worker reasonably believes that a third party (such as a charity or public authority where they might be based) is responsible for the suspected wrongdoing, they can report it to the third party without notifying their employer.

3. Disclosure to a Legal Adviser - S.43D

Workers can disclose matters to their legal adviser in the course of obtaining advice.

4. Disclosure to a Minister of the Crown - S.43E

This provision applies to workers in government departments and bodies.

5. Disclosure to a Prescribed Person - S.43F

Parliament has approved a list of 'prescribed people' to whom any worker can make a disclosure, provided the worker believes the information is substantially true and concerns a matter within that person's area of responsibility. This list includes bodies such as the HMRC, the Health & Safety Executive (HSE) and the Office of Fair Trading.

6. External Disclosure in other cases - S.43G

The range of people falling under this provision is potentially vast. It could include the media, the police, a professional body, a regulatory body that is not in the list of 'prescribed people', a union official, or a Member of Parliament.

7. Disclosure of exceptionally serious failures - S.43H.

A worker would be expected, in the first instance, to turn to their employer when making a disclosure; then their legal adviser, and so on through the seven methods of disclosure in the order set out above. A worker who makes a Qualifying Disclosure to their employer or their legal adviser will have fewer hoops to jump through in order to secure protection under the Whistleblowing legislation than someone making a disclosure to a complete outsider.

The Public Interest Disclosure Act encourages disclosure to be made to the employer as the primary method of disclosure and a 'Qualifying Disclosure' made to an employer would certainly be a 'Protected Disclosure'.

Appendix 2

Public Interest Disclosure Procedure - Flowchart

