



Relate

The journal of developments in social services,
policy and legislation in Ireland

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Protection for whistleblowers

The Protected Disclosures Act 2014 came into effect on 15 July 2014. It is frequently referred to as the 'whistleblowers' legislation. The Act aims to protect people who raise concerns about possible wrongdoing in the workplace. It provides for remedies, including compensation of up to five years' pay, for employees who are penalised for raising concerns about wrongdoing.

Other whistleblower legislation

Before this law came into effect, some sectors were already covered by protected disclosures legislation. The Health Act 2004, as amended by the Health Act 2007, provides for the protection of employees and members of the public who disclose possible wrongdoing within the health sector. The Protections for Persons Reporting Child Abuse Act 1998 provides protection from victimisation and civil liability for people reporting the abuse of children. The Charities Act 2009 provides for the protection of people who report alleged breaches of the legislation to the Charities Regulatory Authority (see *Relate*, August 2014). There are also arrangements in place in a number of other sectors. These sectoral arrangements are generally not limited to disclosures by employees but may also cover disclosures by members of the public. These sectoral arrangements remain in place but are amended in some respects by the Protected Disclosures Act 2014. The specific arrangements for the Garda Confidential Recipient (see below) have been abolished and replaced by the new Act.

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This Protected Disclosures Act 2014 does not oblige anyone to make disclosures about wrongdoing. There is already legislation in place which obliges people to make specific disclosures. For example, employees have a duty under health and safety legislation to report to their employer or other appropriate person defects or breaches which might be a danger to health and safety, and employees of financial institutions are obliged to report suspicions of money laundering to the Gardaí.

Opting out

It is not possible to opt out of any of the provisions of the whistleblower legislation. Any provision in a contract which purports to limit any of the provisions of the Protected Disclosures Act 2014 is void.

Protected disclosures

You make a protected disclosure, for the purposes of this Act, if you are a worker and you disclose relevant information in a particular way. Information is relevant if it came to your attention in connection with your work and you reasonably believe that it tends to show wrongdoing. This wrongdoing may be occurring or suspected to be occurring either inside or outside of the country.

For the purposes of this legislation, the term 'worker' is widely defined. It is not limited to direct employees but includes trainees, people working under a contract for services, independent contractors and agency workers. The legislation does not specifically name volunteers as being covered but the Minister for Public Expenditure and Reform has said that the guidelines which will be developed for public bodies will include guidelines on how to treat disclosures by volunteers.

Wrongdoing is widely defined and includes the commission of criminal offences, failure to comply with legal obligations, endangering the health and safety of individuals, damaging the environment, misuse of public funds, and oppressive, discriminatory, grossly negligent or grossly mismanaged acts or omissions by a public body.

Any wrongdoing which is your or your employer's function to detect, investigate or prosecute does not come within the terms of this Act.

Your motivation for making a disclosure is not relevant to whether or not it is a protected disclosure. However, your motivation may be relevant if the issue of compensation arises (see below).

If an issue arises as to whether or not a disclosure is a protected disclosure, there is a presumption that it is unless the contrary is proven.

How protected disclosures are made

In order for a disclosure to come within the terms of the Act, it must be made to:

- The employer or other responsible person
- A prescribed person
- A Minister of the Government
- A legal adviser
- Another person (see 'Disclosure to an external person' below)

Different standards apply depending on the person or body to whom you disclose. In the case of your employer, you must have a reasonable belief that wrongdoing has occurred or is occurring; a disclosure to a prescribed person must involve substantially true allegations and information.

Disclosure to employer or other responsible person

A disclosure is regarded as being made to the employer if you make it to your direct employer. It is also regarded as a disclosure to the employer if you reasonably believe that the wrongdoing relates solely or mainly to the conduct of a person other than your employer, or to something for which a person other than your employer has legal responsibility and you make the disclosure to that other person. If you are authorised by your employer to use a procedure which involves making a disclosure to another person, that disclosure is also regarded as a disclosure to your employer.

Disclosure to prescribed person

The Act provides that the Minister for Public Expenditure and Reform may prescribe people to whom protected disclosures may be made. The Minister has made an order (SI 339/2014) which names a number of people, the heads or senior officials of a range of statutory bodies, to whom protected disclosures may be made. For example, the Secretary General of the Department of Education and Skills is the nominated person to receive disclosures in relation to all matters relating to the operation and development of the education system, and the Chief Executive Officer of Health Information and Quality Authority (HIQA) is the nominated person in relation to all matters relating to the standards of safety and health care of people receiving health and social care services in the public and voluntary health care sectors and social care services in the private health sector.

A disclosure you make to a prescribed person is a protected disclosure if:

- You reasonably believe that the relevant wrongdoing is within the remit of the prescribed person and
- The information you disclose and any allegation in it are substantially true (this is a higher standard than is required for disclosure to your employer)

Disclosure to Minister

If you are or were employed in a public body, you may make a protected disclosure to the Minister who has statutory functions in relation to that body.

Disclosure to legal adviser

This covers disclosures made in the course of getting legal advice from a barrister, solicitor, trade union official or official of an excepted body (an excepted body is a body which negotiates pay and conditions with an employer but is not a trade union).

Disclosure to an external person

A disclosure made to an external person, for example, a journalist, may be a protected disclosure if it meets a number of conditions:

- You must reasonably believe that the information disclosed, and any allegation contained in it, are substantially true
- The disclosure must not be made for personal gain
- At least one of these conditions must be met:
 - At the time you make the disclosure you must reasonably believe that you will be penalised if you make the disclosure to the employer, a prescribed person or a Minister
 - Where there is no relevant prescribed person, you reasonably believe that it is likely that the evidence will be concealed or destroyed if you make the disclosure to the employer
 - You have previously made a disclosure of substantially the same information to the employer, a prescribed person or a Minister
 - The wrongdoing is of an exceptionally serious nature
- In all these circumstances, it is reasonable for you to make the disclosure to an external person. The assessment of what is reasonable takes account of, among other things, the identity of the person to whom the disclosure is made, the seriousness of the wrongdoing, and whether any action had been taken in cases where a previous disclosure was made.

Garda whistleblowers

The Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007 provided for the appointment of an independent Confidential Recipient to whom Gardaí and civilian support staff could report instances which they believed constituted corruption or malpractice. These regulations have been revoked by the Act. The Gardaí now have the same rights as other workers in relation to whistleblowing. The Garda Síochána Ombudsman Commission (GSOC) is the prescribed body for such disclosures by Gardaí.

Redress for employees who make protected disclosures

The Act provides for redress for employees who are penalised because they made a protected disclosure. You are penalised if there is any act or omission that is detrimental to you. This includes, for example, dismissal, demotion, imposition of any discipline, unfair treatment and threats of reprisal.

Dismissal

If you are dismissed from your employment because of making a protected disclosure, that dismissal is regarded as unfair. You may take a case to the Employment Appeals Tribunal and you may be awarded compensation of up to five years' pay. (In general, the maximum compensation in unfair dismissal cases is two years' pay.)

In general, unfair dismissal protection does not apply to employees with less than one year's service, trainees or Gardaí. These restrictions do not apply where the dismissal is because of making a protected disclosure. (The restriction on members of the Defence Forces continues to apply).

As already stated, your motivation for making a protected disclosure is not relevant to whether or not it is a protected disclosure but the level of compensation may be affected. If the investigation of the wrongdoing was not your only or main motivation for making the disclosure, then the compensation awarded to you may be up to 25% less than it would otherwise be.

(The Workplace Relations Bill 2014 which is currently before the Oireachtas provides for a number of changes to the bodies involved in dealing with breaches of employment law including the Employment Appeals Tribunal and the Rights Commissioner Service.)

Interim relief

If you are dismissed wholly or mainly because you have made a protected disclosure, you may apply to the Circuit Court for

interim relief within 21 days of your dismissal (the court has the power to extend this period). You must give your employer written notice of your intention to apply for interim relief. If the court considers it likely that there are substantial grounds for contending that the dismissal was wholly or mainly due to the making of a protected disclosure, it may ask the employer to reinstate you or re-engage you in another position on terms and conditions not less favourable than those applicable prior to your dismissal pending the final decision on your case. If the employer is willing to reinstate you, the court will make an order to this effect. If the employer is willing to re-engage you and you are willing to accept this offer, the court will make an order to that effect. If you do not accept the offer of re-engagement and the court considers your refusal to be reasonable, it will make an order for the continuation of your contract of employment. If the employer does not appear in court or if they are unwilling to reinstate or re-engage you, the court will make an order for the continuation of your employment contract.

Penalties other than dismissal

If you make a protected disclosure, your employer is prohibited from penalising or threatening to penalise you or causing or permitting anyone else to do so. If you are penalised or threatened you may complain to a Rights Commissioner within six months (or within one year if there are exceptional circumstances). Again, this right is available to Gardaí who do not generally have the right to use the services of Rights Commissioners.

The Rights Commissioner decides whether or not the complaint is well founded. They may then require the employer to take a specific course of action and/or may award compensation. The compensation may be reduced by up to 25% if the investigation of the wrongdoing was not the only or main motivation for making the disclosure.

You or your employer may appeal the decision of the Rights Commissioner to the Labour Court. The Labour Court may refer a question of law arising in the case to the High Court. The High Court's decision on the matter is final – there is no appeal to the Court of Appeal.

You or your employer may appeal the Labour Court's decision to the High Court. Again, the decision of the High Court is final.

If the decision of the Rights Commissioner is not implemented (and has not been appealed) you may complain to the Labour Court.

If your employer does not implement a Labour Court decision, you may apply to the Circuit Court within 28 days. The Court may order your employer to implement the decision.

Civil actions

The Act provides for immunity from civil actions for damages – in effect, you cannot be successfully sued for making a protected disclosure. You may sue a person who causes detriment to you because you made a protected disclosure. You may not do this and also look for redress under the unfair dismissals legislation or make a complaint to a Rights Commissioner. If you are charged with unlawfully disclosing information, it is a defence that you were making what you reasonably thought to be a protected disclosure.

Retaining anonymity

In general, people who receive protected disclosures or who subsequently deal with them may not disclose any information to another person which may identify the person who made the disclosure. There are some exceptions to this, for example, if identifying the whistleblower is essential to the effective investigation of the matter or is required in order to prevent crime or risks to State security, public health or the environment.

Special cases

Law enforcement

There are special arrangements for disclosures of information that may reasonably be expected to facilitate the commission of an offence or to prejudice or impair law enforcement generally.

If there is a prescribed person in respect of the information concerned, it is not a protected disclosure unless:

- It is made to the employer, the prescribed person or a legal adviser
- If it is taxpayer information it is made to the Comptroller and Auditor General as an external person
- In other cases, it is made in the same way as to an external person but may be made only to a member of the Dáil or Seanad and certain other conditions are met

These other conditions are that a disclosure had already been made to the prescribed person and, after a reasonable period, you reasonably believe that no action or inadequate action has been taken.

If there is no prescribed person, the disclosure is not a protected disclosure unless it is made to the employer or a legal adviser or it is made in the same way as a disclosure to an external person but may be made only to a member of the Dáil or Seanad and certain other conditions are met.

Security, defence, international relations and intelligence

Particular conditions attach to a disclosure of information which might reasonably be expected to:

- Adversely affect the security, defence or international relations of the State or
- 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.

Examples of such information are set out in the Act.

The disclosure of such information is not a protected disclosure unless it is made to your employer, a Minister, a legal adviser or is made to the Disclosures Recipient. In effect such disclosures are not protected if they are made to other people, for example, to the media. The Disclosures Recipient is a new office. A serving or retired High Court judge will be appointed by the Taoiseach to fill this role.

Freedom of Information (FOI)

The Freedom of Information Act 2014 came into effect on 14 October 2014. Freedom of Information (FOI) legislation first came into effect in 1998. Originally the legislation applied to government departments. Later it became applicable to the health boards (now the Health Service Executive – HSE) and local authorities. Over the years it became applicable to a large number of other bodies including publicly-funded third-level educational institutions, most of the non-commercial State bodies, the voluntary hospitals and some of the large voluntary health service providers.

The 2014 Act repeals the previous FOI legislation – the Freedom of Information Act 1997 and the Freedom of Information (Amendment) Act 2003. Any actions which were started under the previous FOI legislation will continue to be dealt with under that legislation.

If the Disclosures Recipient considers that the information comes into this category, they must report it to the appropriate public body and make appropriate recommendations for action. The Disclosures Recipient must make an annual report to the Taoiseach.

Duties of public bodies

Every public body is obliged to establish and maintain procedures for the making of protected disclosures by workers who are or were employed by it and for dealing with such disclosures.

Public bodies are government departments, local authorities, publicly-funded higher education bodies, bodies established under statute or set up by government, companies where the majority of shares are held by the Government (for example, the commercial State bodies) and the subsidiaries of these bodies.

The public body must provide its employees with written information relating to these procedures. It must also publish an annual report setting out the number of protected disclosures made to it and the action taken in respect of these disclosures.

There is no similar obligation on private sector employers. The Labour Relations Commission is preparing a statutory code of practice that will set out in practical terms how a disclosure might be made and how an employer ought to handle such a disclosure.

The Department of Public Expenditure and Reform has published a code of practice for the operation of FOI. This aims to ensure consistent standards across all the public bodies concerned. It covers a range of issues including records management and training in dealing with FOI requests. It also encourages public bodies to make routine information more easily available and to proactively publish information so that the need for requests under FOI is reduced. **Website: foi.gov.ie**

Here we summarise the main provisions of the Act and describe the main changes that have been introduced.

The main aspects of FOI

The basic aspects of FOI remain in place:

- You have the right to access records held by the public bodies which are subject to FOI, with some exceptions

- You may be refused access to records for a range of reasons including that the record:

- Contains personal information about another person
 - Is information that was given in confidence
 - Relates to government meetings, the courts, law enforcement, security, research and natural resources
 - Relates to the financial interests of the State
 - Relates to the deliberations of a public body
 - Is commercially sensitive
 - Is such that its disclosure is prohibited by another law
- You have the right to access your own personal information and, if it is incomplete, incorrect or misleading, you are entitled to have it amended
 - If you are affected by an act of an FOI body you are entitled to be given the reasons for the act and any findings on any material issues of fact made for the purposes of the act
 - Public bodies must publish information about their activities (the precise requirements here are changed somewhat)
 - Each public body must have a person appointed to deal with FOI requests and must have an internal review process in place
 - You may appeal to the Information Commissioner if you are refused access to records; the Information Commissioner has a new power to apply to the courts to require an FOI body to comply with the Information Commissioner's decision

Exempt records

In general, the Act does not apply to records:

- Held by the courts, tribunals, commissions of investigation, Oireachtas inquiries
- Relating to the investigation of crime
- Relating to defence
- Relating to the President
- Held by the Attorney General, the Director of Public Prosecutions (but records relating to general administration are covered by FOI)
- Held by the Comptroller and Auditor General and relating to an audit, inspection, investigation or examination
- Given by an FOI body to a Minister for the purposes of proceedings in the Dáil or Seanad (including parliamentary questions)
- Relating to the private papers of members of the Dáil and Seanad or certain official Oireachtas documents
- Relating to information whose disclosure could reasonably be expected to reveal the identity of a person who has provided information in confidence in relation to the enforcement or administration of the law to an FOI body

There are some exceptions in some of these cases. In general, records relating to general administration are accessible under FOI.

Using FOI

The new Act outlines the procedure for accessing records under FOI. There are no significant changes to this procedure. In summary, you must apply in writing to the body concerned specifying that you want access to particular records under the FOI Act. There are time limits for the processing of these requests. If you are refused access to some or all of the records, you may seek an internal review. If the outcome of the internal review is unsatisfactory, you may appeal to the Information Commissioner. You or the FOI body may appeal the Information Commissioner's decision to the High Court.

Main changes

The main changes are:

- FOI applies to all public bodies unless they are specifically exempt; previously, FOI applied to specifically designated public bodies
- Bodies that are controlled or partly controlled by a public body which is itself subject to FOI are also subject
- The Act allows for the inclusion of bodies which are significantly funded by the State
- The restrictions on access to information which were introduced in 2003 (these mainly related to government records) are changed
- The duty on public bodies to publish information is changed somewhat
- The arrangements for charging fees are changed

Bodies subject to FOI

FOI now applies to all public bodies unless they are specifically exempted by the legislation. Any public body which was subject to FOI before 14 October 2014 remains subject to it and the provisions of the 2014 Act apply to it from 14 October 2014. Other bodies which come within the 2014 Act will become subject to it on 14 April 2015 or such later date (but not later than 14 October 2015) which the Minister for Public Expenditure and Reform may decide. It is expected that about 70 new bodies will become subject to FOI. Their records from 21 April 2008 will become accessible under FOI unless an order is made to the contrary. These bodies include, for example, the Gardaí, the Central Bank and the National Asset Management Agency (NAMA). (However, many of the records held by some of these new FOI bodies are exempt.) New public bodies will be automatically subject to FOI unless orders are made to exempt them.

Public bodies include entities established by or under any legislation (other than the Companies Acts) and any entities directly or indirectly controlled by these bodies.

In general, commercial State bodies are not subject to FOI (they are exempt bodies). However, some of them are subject to FOI in respect of functions where they have a monopoly. For example, Irish Water is subject to FOI (and has been since March 2014); ESB is an exempt body but the records of ESB Networks relating to its functions as the distribution system operator are accessible under FOI.

Prescribed bodies

The Minister has the power to prescribe bodies as being subject to FOI. In general, such bodies will become subject to FOI six months after they are prescribed. Bodies which are wholly, partly, directly or indirectly financed from public funds could be prescribed. This means that a number of charities could be brought within the remit of FOI. It is likely that FOI will apply to their administrative records only.

Limited application of FOI

The Minister may make an order limiting the extent to which FOI applies to any particular public body. In making such an order, the Minister must consider the need:

- To ensure openness, accountability and transparency in relation to the activities and performance of public bodies, and in relation to services provided by the State
- To ensure that public bodies are subject to FOI to the maximum extent feasible
- To protect the public interest by restricting access to certain records

The Act limits the application of FOI in a number of cases. The following are examples of such limitation:

- Adoption Authority of Ireland: records in relation to adoption orders are not covered
- Central Bank of Ireland: a range of records are excluded from FOI. For example:
 - Records containing confidential personal information relating to the financial or business affairs of any individual
 - Confidential financial, commercial or regulatory information relating to individuals and bodies regulated by the Central Bank
 - Records on the proposed new Central Credit Register (see *Relate*, September 2013)
 - Records the disclosure of which is prohibited by EU law

- The Commission to Inquire into Child Abuse, the Residential Institutions Redress Board, the Residential Institutions Redress Review Committee, the Office of the Commissioner for Environmental Information, the Data Protection Commissioner, the Director of Corporate Enforcement, Insolvency Service of Ireland: only the records related to administration are covered. (The situation of the Director of Corporate Enforcement will be reviewed within a year and more of its records may then become fully subject to FOI).
- Education and training boards: records enabling the compiling of information on the comparative academic performance of schools (league tables) are not covered
- Labour Relations Commission (including the Rights Commissioner Service), the Equality Tribunal and the Labour Court: records relating to the voluntary mediation and conciliation services of these bodies are not covered
- Garda Síochána: only its administrative records relating to human resources or finance or procurement matters are covered
- National Treasury Management Agency (NTMA) and associated agencies: a number of records held by the NTMA, the National Assets Management Agency (NAMA), National Pensions Reserve Fund Commission and the National Development Finance Agency are not covered by FOI. The records mainly relate to commercial operations.
- Revenue Commissioners: certain records relating to tax avoidance transactions are not covered

Publication schemes

Every organisation which is subject to FOI is obliged to prepare and publish a 'publication scheme'. The requirement will apply from 14 October 2015 or earlier if the Minister so decides.

Under the previous legislation, bodies were obliged to publish what were known as 'Section 15' and 'Section 16' manuals. The Section 15 manual contained information about the activities of the organisation and the Section 16 manual contained the rules, procedures, guidelines and practices used by the organisation when making decisions, and information on how schemes were administered.

Under the new Act, the publication scheme must include:

- The classes of information that the FOI body has published or intends to publish
- The terms under which it will make such information available and the amount of any charge
- A general description of its structure and organisation, functions, powers and duties, any services it provides for the public and the procedures by which any such services may be availed of by the public

The Citizens Information Board provides independent information, advice and advocacy on public and social services through citizensinformation.ie, the Citizens Information Phone Service and the network of Citizens Information Services. It is responsible for the Money Advice and Budgeting Service and provides advocacy services for people with disabilities.

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- A general description of the classes of records held by it with such particulars as are reasonably necessary to facilitate the exercise of the right of access
- The rules, procedures, practices, guidelines and interpretations used by it, and any precedents kept by it for the purposes of decisions, determinations or recommendations in relation to rights, privileges, benefits, obligations, penalties or other sanctions
- Appropriate information in relation to the manner in which these rules etc are administered
- The names and designations of the members of the staff responsible for carrying out the rules
- The address or addresses to which requests for records or applications for the correction of personal information should be sent
- Appropriate information concerning rights of review or appeal including time limits

The Minister for Public Expenditure and Reform will publish a model publication scheme and guidelines for publication schemes. The schemes must be reviewed and updated regularly.

Records relating to meetings of the Government

The Act provides that Cabinet records may now be released after five years. This was in the original 1997 legislation and was changed to 10 years in 2003. The definition of a Cabinet record is also changed back to the 1997 definition. The 2003 Act provided that access to documents relating to Government meetings must be refused. The new Act provides that access may be refused.

Fees

There are no fees for personal information. The 2014 Act provides for the abolition of the €15 application fee which applied to non-personal information; this came into effect on 14 October 2014. New arrangements for fees are set out in SI 531/2014. For non-personal information, the fees to be charged are as follow:

- The search and retrieval fee is set at €20 an hour (it was €20.95). There is a charge of 4 cent a page for photocopying; €10 for a CD and €6 for an x-ray. There

is a minimum threshold of €101 below which no search, retrieval and copying fees can be charged. Once the charge reaches €101, full fees apply.

- There is a cap of €500 on the fees that can be charged
- There is a further upper limit of €700 on estimated fees; an FOI body can refuse to process a request which would incur fees of more than this, unless the requester is prepared to refine the request to bring the fees below the limit
- The fee for an internal review by the body is €30 (€10 for medical card holders and their dependants)
- The fee for appeals to the Information Commissioner is €50 (€15 for medical card holders and their dependants)

Correction

In the November 2014 issue of *Relate*, under the heading "Standard Rate Band", we said that "a two-earner married or civil partnership couple will pay tax at the standard rate on up to €77,600 ...".

This should have read "a two-earner married or civil partnership couple will pay tax at the standard rate on up to €67,600".

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