

# Ofgem External Whistleblowing Policy

## PUBLIC INTEREST DISCLOSURE (WHISTLEBLOWING)

This policy applies to external whistleblowers (individuals who do not work for Ofgem) who wish to disclose certain information to Ofgem about the activities of companies or individuals operating in the electricity and gas industries.

### Background

1. The Public Interest Disclosure Act 1998 (PIDA) is commonly referred to as the whistleblowing legislation. It came into force on 2nd July 1999 following a series of well documented incidents. It amends the Employment Rights Act 1996. It creates a framework to enable individuals<sup>1</sup> across private and public sectors to make disclosures of certain information, which are in the public interest, by giving them protection from victimisation or unfair dismissal by their employer<sup>2</sup>.
  2. The PIDA permits individuals to make disclosures to employers, to prescribed organisations such as Ofgem, and certain other persons or organisations in limited circumstances. It encourages employers to establish clearly defined processes for employees to make disclosures to them in the first instance by providing an easier test for individuals to satisfy in order to make protected disclosures to their employer than the more stringent tests for disclosures to other organisations, such as to the media. There are several benefits to an organisation in having internal whistleblowing procedures in place which are known to and understood by all of its employees:
    - They help deter malpractice; and
    - They increase the likelihood of senior management being alerted to problems in time to prevent serious damage.
- Ofgem's policy and procedure for employees to make internal disclosures about people or activities within Ofgem can be found in the Ofgem Staff handbook on its intranet.
3. Ofgem is an independent regulator and a body corporate constituted by the

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<sup>1</sup> The PIDA applies to an individual or 'worker', which is defined to include (but not limited to) a person who has entered into or works under a contract of employment.

<sup>2</sup> The definition of 'employer' in the PIDA includes the person who substantially determines or determined the terms on which an agency worker is or was engaged and, in the case of trainees on work experience or vocational schemes, the person providing the work experience or training.

Utilities Act 2000. Its functions and duties are set out in the Electricity Act 1989 and the Gas Act 1986. In order that Ofgem can carry out its functions and duties, it invites information from industry participants. This includes any information that any person may wish to provide as a whistleblower in compliance with the requirements of PIDA.

What information can be disclosed?

4. The information which can be disclosed under the PIDA is information which, in the reasonable belief of the whistleblower, tends to show one or more of the following relevant failures:
  - That a criminal offence has been committed, is being committed, or is likely to be committed;
  - That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he/she is subject;
  - That a miscarriage of justice has occurred, is occurring, or is likely to occur;
  - That the health and safety of any individual has been, is being, or is likely to be endangered;
  - That the environment has been, is being or is likely to be damaged; or
  - That information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed.

Tests to be satisfied

5. The individual making the disclosure must always act in good faith.
6. In the case of disclosure of information to Ofgem and organisations other than his or her employer additional tests must also be satisfied before the whistleblower will be protected for his or her disclosure.
7. The additional tests which must be satisfied before a person disclosing information to Ofgem will be protected are that the person must hold a reasonable belief that the relevant failure falls within the following prescribed matters and that the information disclosed or allegation made is substantially true:
  - The generation, transmission, distribution and supply of electricity, participation in the operation of an electricity interconnector (as defined in section 4(3E) of the Electricity Act 1989) and activities ancillary to these matters; or
  - The transportation, shipping and supply of gas through pipes, participation in the operation of a gas interconnector (as defined in section 5(8) of the Gas Act 1986) and activities ancillary to these matters.
8. The types of concerns which a whistleblower might wish to disclose to Ofgem in accordance with the above could include:
  - criminal offences;
  - breach of licence conditions;
  - failure to comply with a legal obligation or statute; or

- improper conduct or unethical behaviour of an electricity or gas company or individual operating in the industry.

### Confidentiality

9. Ofgem treats all disclosures made through the whistleblowing policy in a confidential and sensitive manner. The identity of the individual making an allegation is kept confidential and will only be disclosed with the whistleblower's consent or on directions of a Court.

### Protection of a Whistleblower

10. Any person who approaches Ofgem with information as a whistleblower who complies with the requirements of PIDA will be protected in accordance with the PIDA, for example, from victimisation or unfair dismissal by his or her employer.

### Independent Legal Advice

11. If you are unsure whether to use this procedure, or if you want advice at any stage, and feel that you can only get the answers by disclosing the information, you have three options. You may obtain legal advice:
  - a) independently from a lawyer;
  - b) from a lawyer at Public Concern at Work. This is an independent charity and is a leading authority on public interest whistleblowing. They can be contacted on 020 7404 6609. Their web address is [www.pcaw.demon.co.uk](http://www.pcaw.demon.co.uk) or [www.pcaw.co.uk](http://www.pcaw.co.uk) their email addresses for advice are [helpline@pscaw.demon.co.uk](mailto:helpline@pscaw.demon.co.uk) or [whistle@pcaw.demon.co.uk](mailto:whistle@pcaw.demon.co.uk); or
  - c) from a lawyer who is referred to you by a trade union official from the nominated list which is available from the Trade Union Side office. A nominated trade union official will advise you on how to proceed in general terms but will not be able to give you legal advice.

### Procedure for disclosures

12. Step 1: Any person communicating to Ofgem, through whatever medium should be referred to the Chief Investigation Officer.
13. Step 2: If the above channel is not appropriate, or the matter is so serious they feel they cannot discuss it with Ofgem, or they want independent advice on whether an outside body such as the police should be contacted, they should contact the independent charity, Public Concern at Work, details of which are shown above.

### Investigation Procedure

14. Ofgem recognises that it is not always possible to follow exactly the same procedure as circumstances change in each case. However, the investigation generally follows the steps set out below:

- The CIO will obtain full details of the allegation, as soon as is practicable, by speaking directly with the whistleblower, normally by phone.
- The CIO will make an initial assessment of the allegation made.
- The CIO will identify who is to lead on the formal meeting with the whistleblower.
- The appointed investigators ( there will always be two investigators) will make arrangements to meet the whistleblower at a neutral location identified by the whistleblower; i.e. a solicitors office, hotel lounge area, BUT NOT the whistleblower's or other person's home location or work premises.
- A full meeting will then take place.
- The investigators will then make a judgement, consulting with appropriate person at Ofgem, on the way forward.
- The investigators will probably require and therefore request more specific information of the whistleblower.
- A full investigation is then undertaken with the assistance, where appropriate, of other individuals/bodies.
- Before the investigation is concluded a report is made for consideration by Ofgem's Legal Directorate who advise on how to proceed.
- The investigators conclude the investigation by writing a report setting out findings in relation to the allegation, a conclusion as to the validity of the allegation and a recommendation for further action.
- The report is then passed to the Chief Executive and Executive Board who decide what action, if any to take.
- The whistleblower will be kept informed of the progress of the investigation and subsequently of the final decision and any action to be taken.
- Should at any time it be assessed that the information being supplied is not appropriate to Ofgem then the person supplying the information will be informed directly.

#### Timescales

15. Due to the varied nature of potential allegations under the whistleblowing policy and Ofgem statutory and published policies it is not possible to lay down precise timescales for investigations. Ofgem's Chief Investigation Officer will ensure that the investigators will use all reasonable speed to complete any inquiries that need to be undertaken as expeditiously as possible without affecting the quality and depth of the investigation.

#### Further Concerns

16. If the investigation finds that the allegations are unsubstantiated and all internal procedures have been exhausted, but the complainant is not satisfied with the outcome, staff may report the matter in writing to the Civil Service Commissioners, 35 Great Smith Street, London, SW1P 2BQ.
17. Ofgem also recognise the lawful rights of complainants to make disclosures to prescribed persons such as the Health & Safety Executive and the National Audit Office, or where justified, to other bodies.