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The following Notification is, by command of His Excellency the Governor-General, published for general information.

DIONNE TRACEY DANIEL, (MRS.)
Governor-General's Secretary.

GOVERNMENT NOTICE

MISCELLANEOUS

No. 95C

THE PROTECTED DISCLOSURES ACT, 2011 PROCEDURAL GUIDELINES

Section 1 of
the Act and
the Jamaica
Gazette Vol.
CXXXV, No.
115

The Protected Disclosures Act "the Act" came into effect August 7, 2012. This publication seeks to inform the public about the purpose and objects of the Act and to provide guidelines regarding the making, receiving, and investigation of disclosures.

1. *Purpose of the Act*

Sections 3, 15
and 24 of the
Act.

To encourage and facilitate the making by employees of specified disclosures of improper conduct in the public interest; to regulate the receiving, investigating or otherwise dealing with disclosures of improper conduct; to protect employees who make specified disclosures from being subjected to occupational detriment; to protect the confidentiality of the employee making the disclosure and any statement given, or document, information or thing provided; and to grant immunity from civil or criminal proceeding or any disciplinary proceeding to a person who makes a protected disclosure, or receives, investigates or otherwise deals with a protected disclosure.

2. *What is a disclosure?*

Section 2 of the Act.

Disclosure is the information given by an employee, regarding any conduct of an employer of that employee or another employee of the employer, where the employee has a reasonable belief that the information disclosed shows or tends to show that improper conduct has occurred, is occurring or is likely to occur, and “disclose” shall be construed similarly.

3. *What constitutes improper conduct?*

Section 2 of the Act.

This means—

- (a) criminal offence;
- (b) failure to carry out a legal obligation;
- (c) conduct that is likely to result in a miscarriage of justice;
- (d) conduct that is likely to threaten the health or safety of a person;
- (e) conduct that is likely to threaten or damage the environment;
- (f) conduct that shows gross mismanagement, impropriety or misconduct in the carrying out of any activity that involves the use of public funds;
- (g) act of reprisal against or victimization of an employee;
- (h) conduct that tends to show unfair discrimination on the basis of gender, race, place of origin, social class, colour, religion or political opinion; or
- (i) wilful concealment of any act described in paragraphs (a) to (h) above.

4. *Who is entitled to make disclosures?*

Section 2 of the Act.

Any employee that is to say—

- (a) any person who—
 - (i) works or has worked for another person; and
 - (ii) receives, received, or is entitled to receive, any remuneration for work done.
- (b) any person who in any manner assists or has assisted in the carrying on or conduct of the business of an employer, without any entitlement to receive remuneration or reward.
- (c) any person who is, or was, engaged or contracted under a contract for services to do work for another person, or any agent of the person.

5. *To whom shall disclosures be made?*

Sections 2 and 7 to 12 of the Act.

The Act provides for disclosure to be made to—

- (a) an employer or a designated officer appointed by the employer;
- (b) either the Minister with portfolio responsibility for that subject matter or the Prime Minister or both;
- (c) a prescribed person;
- (d) the designated authority;
- (e) an attorney-at-law with the object of obtaining, or during the process of obtaining legal advice.

6. *To whom should disclosures relating to threats to national security, defence or international relations be made?*

Section 12 of the Act.

Where an employee seeks to make a disclosure in relation to a matter that would prejudice the national security, defence or international relations of Jamaica, the disclosure shall be made to either the Minister with portfolio responsibility for that subject matter or the Prime Minister or to both.

The Prime Minister and each Minister shall establish and cause to be operated procedures for receiving, investigating or otherwise dealing with these disclosures.

7. *Who is an employer?*

Sections 2 and 14 of the Act.

An employer means anyone or entity who—

- (a) employs or has employed another person to carry out work or provide services and who remunerates, or expressly or tacitly undertakes to remunerate, that other person for the work carried out or services provided; or
- (b) permits or has permitted another person to assist in any manner in the carrying on or conduct of the business of that person, without any obligation to provide remuneration or reward to that other person.

8. *Who are prescribed persons?*

Section 9 and the First Schedule of the Act.

1. Auditor-General
2. Bank of Jamaica
3. Bureau of Standards
4. Children’s Advocate
5. Commission for the Prevention of Corruption
6. Commissioner of Police
7. Contractor-General
8. Director of Public Prosecutions
9. Electoral Commission of Jamaica
10. Fair Trading Commission
11. Financial Services Commission
12. Independent Commission of Investigations
13. Integrity Commission
14. Inland Revenue Department
15. National Environment and Planning Agency
16. Office of Utilities Regulation
17. Political Ombudsman
18. Public Defender

9. *When can disclosures be made to the prescribed persons?*

Section 14 of the Act.

Where an employee makes an internal disclosure in accordance with the established procedures and steps to deal with the disclosure have not been taken by the employer or the designated officer with thirty days, the employee may make an external disclosure to a prescribed person.

The person making a disclosure to any of the prescribed persons must reasonably believe that the conduct disclosed falls within the area of responsibility of the prescribed person.

10. *Who is the designated authority?*

Section 21 of the Act and the Jamaica Gazette Vol. CXXXV, No. 116.

The designated authority is an individual or entity designated by the Minister with the responsibility for monitoring compliance with the Act. The Minister has designated the Commission for the Prevention of Corruption to be the designated authority.

11. *When can disclosures be made to the designated authority?*

Section 10 of the Act.

The disclosures may be made to the designated authority if any of the following circumstances applies, namely—

- (a) at the time of the disclosure, the employee reasonably believed that he would be subject to an occupational detriment if he made the disclosure to his employer in accordance with the Act;
- (b) there is no prescribed person in relation to the relevant improper conduct;
- (c) the employee making the disclosure has reason to believe that it is likely that evidence relating to the improper conduct will be concealed or destroyed if he makes the disclosure to his employer;
- (d) the employee making the disclosure had made a disclosure on a prior occasion to his employer or to a prescribed person in respect of which no action was taken within thirty days.

12. *What constitutes occupational detriment?*

Sections 2 and 23 of the Act.

The Act makes it an offence for an employer (or former employer) to take detrimental action against an employee in reprisal for making a protected disclosure. Occupational detriment means any act or omission that results in an employee, in relation to his employment, being—

- (a) subject to disciplinary action;
- (b) dismissed, suspended, or demoted;
- (c) harassed, intimidated or victimized;

- (d) transferred against his will;
- (e) refused transfer or promotion;
- (f) subject to a term or condition of employment or retirement from employment, that is altered to his disadvantage;
- (g) provided with an adverse reference;
- (h) denied appointment to any employment, profession or office;
- (i) threatened with any of the actions specified in paragraphs (a) to (h); or
- (j) otherwise adversely affected in respect of his employment, profession or office, including employment opportunities and job security.

13. *What can I do if I suffer any occupational detriment as a result of making a disclosure?*

Sections 16, 17, 18, and 22 of the Act.

You may complain to your employer. The Act provides that the employer should receive, record, review, investigate and otherwise deal with complaints made in respect of reprisals as a result of a disclosure. The aggrieved employee may also refer the matter to the designated authority. This does not preclude the employee who had suffered occupational detriment from pursuing his/her concerns in the Courts or by any established grievance or disciplinary procedure set up under the Labour Relations and Industrial Disputes Act.

14. *When is a disclosure protected?*

Sections 7, 8, 9, 10, 11 and 12 of the Act.

A disclosure is protected if it is made—

- (a) substantially in accordance with the procedure established by the employer for the making of disclosures, where such a procedure is in operation, or
- (b) to the employer, where no procedure for making of disclosures is in operation. A disclosure is also protected if such disclosure is made to a prescribed person or to the designated authority.

Further a disclosure made by an employee to an attorney-at-law with the object of obtaining, or during the process of obtaining, legal advice is a protected disclosure. A disclosure made by an employee to a Minister qualifies for protection if his employer is—

- (a) a person appointed under any law by the Minister; or
- (b) a public body any of whose members is appointed by the Minister. The Prime Minister or other Ministers to whom disclosures are made shall establish and cause to be operated procedures for the receiving, investigating or otherwise dealing with the disclosures.

15. *When is a disclosure not protected?*

Sections 4 and 5 of the Act.

A disclosure does not qualify for protection under the Act—

- (a) unless it is made in good faith and in the public interest;
- (b) if the employee making the disclosure commits an offence by making it.

16. *What is the significance of a disclosure being protected?*

Sections 16 and 17 of the Act.

An employee shall not be subjected to any occupational detriment on the basis that the employee seeks to make, has made, or intends to make a protected disclosure. An employee who is dismissed as a consequence of seeking to make or intending to make a protected disclosure shall be treated as being unjustifiably dismissed. If an employee suffers occupational detriment at or at about the same time that he makes a protected disclosure, the occupational detriment shall be presumed to be as a consequence of the protected disclosure unless the employer shows that the act that constitutes the occupational detriment is otherwise justified.

17. *Immunity from civil and criminal proceedings?*

Section 15 of the Act.

A person who makes a protected disclosure, or receives, investigates or otherwise deals with a protected disclosure, shall not be liable in any civil or criminal proceeding or to any disciplinary proceeding by reason of having made, received, investigated or otherwise dealt with such disclosures.

18. *What is the information to be supplied in a disclosure?*

Section 6 and the Second Schedule of the Act.

The information to be supplied in a disclosure should be in writing and contain as a minimum and as far as practicable the information below. Where the disclosure is made orally, the person receiving the disclosure shall within twenty-four hours after receiving the disclosure, cause the disclosure to be reduced into writing—

1. The full name, address and occupation of the person making the disclosure.
2. The nature of the improper conduct in respect of which the disclosure is made.
3. The name of the person alleged to have committed, to be committing or to be about to commit the improper conduct.

4. The time and place where the alleged improper conduct is taking place, took place or is likely to take place.
5. The full name, address and description of a person (if any) who witnessed the commission of the improper conduct.
6. Whether the person making the disclosure has made a disclosure of the same or of some other improper conduct on a previous occasion and if so, about whom and to whom the disclosure was made.
7. If the person is an employee making a disclosure about that person's employer or a fellow employee, whether the person making the disclosure remains in the same employment.

A sample form is attached. (See Appendix 1)

19. *How should internal disclosures be managed?*

Section 18 of
the Act.

Having received and recorded a disclosure and concluded that an investigation is warranted, the following guidelines should be adhered to—

- (a) commence investigations forthwith and issue periodic updates on the investigation to the employee making the disclosure, at intervals of thirty days;
- (b) ensure that investigations are carried out fairly;
- (c) review the results of investigations into disclosures and report the findings to the employee who made the disclosure and to anybody appearing to the person receiving the disclosure to be appropriate (having regard to the relevant improper conduct and the area of responsibility of that body);
- (d) make recommendations regarding the measures to be taken to correct the improper conduct;
- (e) take steps to remedy the improper conduct, provide redress where appropriate, take disciplinary action where appropriate, and reduce the opportunity for recurrence of the conduct;
- (f) ensure that the rights of the employee making the disclosure, any witness and any person alleged to be at fault are protected; and
- (g) receive, record, review, investigate and otherwise deal with complaints made in respect of reprisals as a result of a disclosure made under the Act.

20. *Must all internal disclosures be investigated?*

Section 19 of
the Act.

No. An employer or other person to whom a disclosure is made acting in good faith may refuse to deal with the disclosure or cease an investigation in the following circumstances—

- (a) the subject matter of the disclosure or the related investigation has been adequately dealt with, or could more appropriately be dealt with by another person;
- (b) the subject matter of the disclosure is frivolous or not sufficiently important to warrant an investigation;
- (c) the circumstances surrounding the subject matter of the disclosure have changed (whether by reason of a change in the circumstances of the employee or the employer, insufficiency of evidence or otherwise) so that it renders the investigation unnecessary.

Where an employer or other person to whom a disclosure is made decides to refuse to carry out an investigation such employer or other person shall provide reasons in writing to the employee who made the disclosure within fifteen days of decision not to proceed.

21. *May an employee make a disclosure otherwise than internally?*

Sections 10
and 14 of
the Act.

- (a) You may make your disclosure to a prescribed person if you reasonably believe that the disclosed conduct falls within that person's area of responsibility;
- (b) You may make your disclosure to the designated authority, if it is reasonable in all the circumstances of the case, to make the disclosure and if any of the following applies—
 - (i) you reasonably believe that you will be subjected to occupational detriment, if you make the disclosure to your employer;
 - (ii) there is no prescribed person with responsibility for the area in which the improper conduct occurred;
 - (iii) you have reason to believe that it is likely that evidence relating to the improper conduct will be concealed or destroyed, if the disclosure is made to your employer;

- (iv) you made the disclosure on a prior occasion to your employer or to a prescribed person, and no action was taken within thirty (30) days.

22. *Are there offences under the Act?*

Section 23 of the Act.

Yes. A person commits an offence if he—

- (a) prevents, restrains or restricts any employee from making a protected disclosure;
- (b) intimidates any employee who has made or intends to make a protected disclosure;
- (c) induces any person by threats, promises or otherwise to contravene the Act; or
- (d) being an employer—
 - (i) subjects an employee or former employee of that person to occupational detriment as a consequence of the employee or former employee making a protected disclosure;
 - (ii) refuses, in bad faith, to receive a disclosure or carry out an investigation in relation to a disclosure;
- (e) being an employee, purports to make a disclosure under the Act knowing that it contains a statement that is false or misleading, or reckless as to whether the statement is false or misleading;
- (f) aids, abets, procures or conspires with any other person to contravene the Act.

23. *What is the penalty?*

Section 23 of the Act.

A person who commits an offence as outlined under paragraph 22 is liable upon—

- (a) summary conviction in a Resident Magistrate's Court to a fine not exceeding two million dollars or to imprisonment for a term not exceeding two years or to both such fine and imprisonment; or
- (b) conviction on indictment in a Circuit Court to a fine or to imprisonment for a term not exceeding five years or to both such fine and imprisonment.

There are further offences and consequential penalties which will be mentioned in paragraphs 24 and 25.

24. *Is there any other offence and penalty?*

Section 23 of the Act.

Yes. A person who, without reasonable excuse, fails to comply with a requirement imposed by the designated authority in the lawful exercise of the functions of the authority under the Act, commits an offence and is liable on summary conviction in a Resident Magistrate's Court to a fine not exceeding two hundred and fifty thousand dollars or to imprisonment for a term not exceeding three months.

25. *Is there any confidentiality in respect of disclosure?*

Section 24 of the Act.

Yes. Every person receiving, investigating or otherwise dealing with a disclosure under the Act shall regard and deal with such disclosure as secret and confidential in respect of—

- (a) the identity of the employee making the disclosure and any disclosure made; and
- (b) any statement given, or document, information or thing provided, to the person in the carrying out of an investigation, except that any statement given, or document, information or thing provided, given in furtherance of an investigation or any legal or disciplinary proceedings shall not be regarded as being inconsistent with the obligation for secrecy and confidentiality.

A person who contravenes the confidentiality requirement commits an offence and is liable upon summary conviction in a Resident Magistrate's Court to a fine not exceeding two million dollars or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

26. *Establishing a confidential electronic and paper filing system*

To prevent breaches of the confidentiality requirements of the Act and to minimize the possibility of detrimental action, employers must necessarily establish a secure electronic and/or paper filing system. Therefore, employers must ensure that:

- (a) all paper and electronic files are secure and can only be accessed by authorized officers;
- (b) all printed material is kept in files that are clearly marked as a protected disclosure matter and include a prominent warning on the front of the file that penalties apply to any unauthorized divulging of information concerning a protected disclosure;
- (c) any electronic files saved are password protected or have limitations on access rights;

- (d) any other material, such as tapes from interviews, are stored securely with access only to authorized officers;
- (e) the security of communications i.e. sensitive information or documents, are not mailed or faxed to a machine to which staff have general access; personal delivery of documents is the best way to ensure confidentiality.

27. *Establishing written procedures*

Sections 12,
13 and 21 of
the Act.

Each employer is required to establish written procedures for handling disclosures. The procedures must facilitate the making of disclosures, the investigation of disclosures, and the protection of persons making disclosures from detrimental actions by the employer or any officer, member or employee of the employer. The procedures, in the relevant ministries must also set out the steps necessary for an employee to make disclosures pertinent to national security, defence or international relations of Jamaica. The procedures must be in accordance with the Act and these guidelines.

The designated authority may review the written procedures of an employer and their implementation. The designated authority may make recommendations to an employer as a result of such a review. It is the responsibility of the employer to ensure that its policies and procedures reflect the Act, Regulations (if any) and Guidelines. Each employer should review its policies and procedures if amendments are made to the Act, Regulations or the designated authority's Guidelines.

An employer must make a copy of its written procedures available to each of its members, employees or officers, and must have a copy available for inspection by members of the public during normal office hours free of charge. The procedures should also be located or linked on any website maintained by the employer.

The following list of matters should be included in the written procedures of an employer to establish an effective internal reporting system for the Act—

Issues to be addressed in establishing protected disclosure procedures:

1. Appointment of a designated officer
2. Statement of support for persons making protected disclosures
3. Purpose of the procedures
4. Objects of the Act
5. Definitions of terms
6. The reporting system
7. Roles and responsibilities
8. Confidentiality
9. Collating and publishing statistics
10. Receiving and assessing disclosures
11. Preventing detrimental actions
12. Criminal offences.

28. *Establishing a reporting system*

An employer must establish a reporting system for the receipt, assessment and investigation of protected disclosures. The chief requirements of any reporting system are:

- (a) ensuring that the confidentiality of the information and the identity of the persons making protected disclosures are maintained throughout the process;
- (b) identifying clear contact points for reporting protected disclosures, including all relevant disclosures made in person or by mail, phone calls and emails;
- (c) ensuring a disclosure about the head of entity is immediately notified to the relevant prescribed person or the Designated Authority.

An effective internal reporting system will address the following:

- (a) encouraging staff to raise matters of concern internally;
- (b) providing a reporting channel for disclosures that may otherwise never be reported;
- (c) ensuring disclosures by such persons are properly and appropriately assessed and acted upon;

- (d) ensuring the protection of the Act is fully available to all persons making protected disclosures.

29. *What reporting structure to adopt*

Section 13 of
the Act.

The Act requires that employers appoint at least one person with the required competences as “Designated Officer.” The appointee/s should be granted the requisite authority to receive, investigate and otherwise deal with disclosures. There are a number of benefits in restricting the number of persons involved in handling the disclosures:

- (a) Fewer people handling disclosures enhance confidentiality and thereby reduce the likelihood of reprisals being taken against persons making protected disclosures;
- (b) It provides for better management and reporting of the disclosures received;
- (c) It provides for easier sensitization of staff as to whom a disclosure can be made;
- (d) Liaison with designated authority and other investigative agencies can be clearly defined and information flows can be better managed.

30. *Roles and responsibilities of those involved in the internal reporting system*

There are a number of ways an employer can set up a reporting system. The number of officers and their respective roles will depend on the size of the body and its structure in terms of regions or organizational units. An internal reporting policy should identify the officers who will be involved in the internal reporting system and clearly describe their individual roles.

31. *Education and training to ensure knowledge by personnel*

All personnel should be provided with all relevant information and given appropriate training to ensure they are familiar with policies, procedures, the relevant parts of the legislation, particularly their confidentiality obligations and resulting consequences of a breach of the Act. If an employer has a separate complaints system, then those officers who deal with the receipt and assessment of complaints must be trained to identify matters that may fall under the Act.

Similarly mail centers, front desk staff, online services units and other employees must also be trained to recognize the general nature of protected disclosures matters and the established reporting channels so that identified disclosures are dealt with appropriately.

32. *Collating and publishing statistics*

Section 21 of
the Act.

Section 21(2) of the Act requires that the designated authority monitors compliance with the Act. Section 21(4) of the Act requires the designated authority to include in its annual report information dealing generally with the activities of the authority during the preceding year. As a result the designated authority would need to collect certain data from employers. To facilitate this process employers are required under these guidelines to:

- (a) maintain a log of the disclosures received as outlined in the Protected Disclosures Log (Form PDA2)—Appendix 2;
- (b) make monthly reports electronically and/or in print of the disclosures received to the Designated Authority in the format set out in the Protected Disclosures Summary Report (PDA3)—Appendix 3. This should include the date of updates given to the person who made the disclosure, which should be in intervals no greater than 30 days.

33. *Where can I get help in understanding the operation of the Act?*

From the designated authority which is the Commission for the Prevention of Corruption whose contact information is—

Address:—45-47 Barbados Avenue, Kingston 5

Telephone numbers are—968-6227,960-0470

Fax number is—960-5617

Email address is—corruptionprevention@yahoo.com

Website address is—www.cpcpd.gov.jm

PROTECTED DISCLOSURES FORM

APPENDIX I

The Protected Disclosures Act, 2011—Procedural Guidelines

FORM PDA1

First Name	Middle Name	Surname	TRN
Address			
Occupation			
Nature of Improper Conduct			

FORM PDA1, *contd.*

Name of Alleged Party of Improper Conduct	
Time and Place of Alleged Party of Improper Conduct	
Name of Witness	Name of Witness
Address of Witness	Address of Witness
Brief Description of Witness	Brief Description of Witness
Previous Disclosures Made (State about whom and to whom the disclosure was made) <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>	
State whether still in employment (Where the disclosure is about the employer or fellow employees)	

I make this disclosure in good faith and in the public interest. I believe it to be true and accurate to the best of my knowledge and I know that I would be liable for prosecution if this disclosure contains any statement that I know to be false or misleading.

Signature of Person making Disclosure

Date

Name of Witness

Signature of Witness

Date

PROTECTED DISCLOSURES LOG
The Protected Disclosures Act, 2011—Procedural Guidelines

APPENDIX 2

FORM PDA2

Agency: _____

Date Received	Disclosure No.	Summary of Improper Conduct Disclosed	Date and Entity of Referral	Date Closed	Decision Taken

FORM PDA2

PROTECTED DISCLOSURES SUMMARY REPORT

The Protected Disclosures Act, 2011—Procedural Guidelines

FORM PDA3

Agency: _____

Date	Disclosure No.	Date Received	Summary of Improper Conduct Disclosed	Actions Taken (Brief Description)	Days Since last Notification to the Discloser	Date and Entity of Referral	Date Closed	Decision Taken

FORM PDA3

THE HON. MR. JUSTICE FERDINAND SMITH (RETIRED), C.D.,
 Chairman
 Commission for the Prevention of Corruption.