

Equivocal answers from NHS trusts and other bodies to the question:

“Question 5

If staff who have entered into a compromise agreement with the Trust were to voice concerns about reprisal by the Trust for whistleblowing, would the Trust consider this to be an actionable breach of non-disparagement clauses?

Or would it consider the raising of such concerns to be qualifying disclosures under PIDA?”

NHS Property Services FOI 281016 – 01, 16 November 2016:

“This would depend on the circumstances that relate to an individual case.”

NHS Blood and Transplant FOI 308019, 11 July 2016:

“Our standard agreement contains a clause which expressly permits an employee to make a protected disclosure, whether or not a disclosure is a qualifying disclosure governed by the Act.”

Health and Care Professions Council FOI response 7 July 2016:

“This would need to be considered on a case-by-case basis taking into consideration the specifics of the case.”

2gether NHS Foundation Trust FOI 036MA-1617, 7 July 2016:

“All our agreements state that nothing in the agreement will prejudice any rights that the Employee has, or may have, under the Public Interest Disclosure Act 1998 and therefore staff are free to raise such concerns.”

5 Boroughs Partnership NHS Foundation Trust FOI 16/105, 20 May 2016

“Each case would be assessed on a case by case basis. The Trust’s standard settlement agreement makes it clear that nothing in the agreement prevents the

**Barking Havering and Redbridge University Hospitals NHS Trust
FOI 3946, 13 September 2016:**

“There would be no breach of any settlement agreements/compromise agreements or COT3 agreements (including any non-derogatory statement clause), if the individual concerned makes a protected disclosure under the Public Interest Disclosure Act 1998. All settlement agreements/compromise agreements or COT3 agreements contain an express term clarifying that nothing in the agreement prejudices any rights that the employee has or may have under the Public Interest Disclosure Act 1998 (or any other enactment which PIDA amends) and/or any obligations that the employee has or may have to raise concerns about patient safety and care with regulatory or other appropriate statutory bodies pursuant to his/her professional and ethical obligations including those set out in guidance issued by regulatory or other appropriate statutory bodies from time to time. A further express statement clarifies that nothing in the agreement prevents the employee from disclosing information:

- pursuant to any order of any court of competent jurisdiction; or*
- which has come into the public domain otherwise than by breach of confidence by the Claimant or on his/her behalf.*

....We note that it is for an Employment Tribunal to determine whether or not "voic[ing] concerns about reprisal by the Trust for whistleblowing" amounts to a qualifying and protected disclosure under section 43A-43L Employment Rights Act 1996, and this will depend on the facts and circumstances of each individual case.

If an employee or ex-employee raised formal concerns with the Trust about alleged detrimental treatment after they had entered into a settlement agreements/compromise agreement or COT3

agreement (whether or not this was due to the fact the employee had entered into such an agreement), this would be investigated in accordance with the relevant Trust policy.”

Barnet Enfield and Haringey Mental Health NHS Trust FOI KL-666-13.06.16, 5 July 2017:

“Please see attached policy entitled “Raising Concerns at Work”.

Birmingham Children’s NHS Foundation Trust, FOI/2630 27 May 2016:

“The Trust would consider this on a case by case basis.”

Burton Hospitals NHS Foundation Trust FOI response RJF 3035, 31 May 2016:

“It would not be appropriate to make comments on a hypothetical situation. We would consider each case carefully and seek advice where necessary.”

Cheshire and Wirral Partnership NHS Foundation Trust FOI 16.127, 31 May 2016:

“Each case would need to be looked at individually, but the Trust makes clear to people signing settlement agreements their rights under PIDA and in no way seeks to discourage people from using them.”

Countess of Chester NHS Foundation Trust, FOI response 11 July 2016:

“Each case would be assessed on a case by case basis, our standard settlement agreement makes it clear that nothing in the agreement prevents settlement agreement makes it clear that nothing in the agreement prevents the employee or claimant from raising genuine concerns under PIDA.”

County Durham and Darlington NHS Foundation Trust, FOI 04.16.52, 31 May 2016:

“This would depend on terms of settlement agreement and individual circumstances”

Dorset Healthcare NHS Foundation Trust FOI 032-16-17, 25 May 2016:

“The Trust would consider all matters of this nature according to their individual circumstances, but would never take steps to discourage individuals from raising protected disclosures.”

East of England Ambulance NHS Foundation Trust FOI 6492, 8 July 2016:

“The Trust would review what has been raised against disclosures qualifying for protection. Nothing in settlement agreements generally, prejudices any rights that the employee has or may have under the PIDA 1998.”

Frimley Health FOI 0679 -15, 24 December 2015

“The trust would seek advice”

George Eliot Hospital NHS Trust FOI GEH/1617/043, 26 May 2016

“The Trust takes the view that nothing in any compromise/settlement agreement or COT 3 shall prejudice any rights that the Employee has or may have under the Public Interest Disclosure Act 1998 and/or any obligations that the Employee has or may have to raise concerns about patient safety and care with regulatory or other appropriate statutory bodies pursuant to their professional and ethical obligations including those obligations set out in guidance issued by regulatory or other appropriate statutory bodies from time to time.”

Hinchingbrooke Healthcare NHS Trust FOI 2016 – 184, 2 June 2016

“Individuals will always be encouraged to freely speak up about legitimate concerns, whether they are current or ex-employees of the organisation.”

Hull and East Yorkshire Hospitals NHS Trust FOI 3268, 6 July 2016

“Any such concerns raised would be considered on a case by case basis however the Trust would in general consider the raising of such concerns to be qualifying disclosures under PIDA”

Leeds and York Partnership NHS Trust FOI-1628, 27 May 2016:

“As per the Francis report, whistleblowing would not be discouraged where there is a genuine concern particularly in the interests of patient care.”

Lewisham and Greenwich NHS Trust, FOI RFI-001375, 23 June 2016:

“Nothing in the agreement is intended to or shall prevent the employee from making a lawful protected 'whistleblowing' disclosure (such as raising concerns regarding patient safety issues) within the meaning of section 43A of the Employment Rights Act 1996”

London Ambulance Service NHS Foundation Service FOI 2178, 23 June 2018:

1. *“As standard practice in all settlement agreements/COT3 3 agreements, the following clause is used:*

DISCLOSURE OF INFORMATION

For the avoidance of doubt, nothing in this Agreement shall prevent you disclosing information:

pursuant to any order of any Court of competent jurisdiction;

or

which has come into the public domain otherwise than by a breach of confidence by you or on your behalf.

Equally, nothing in this Agreement, including but not limited to clauses 9, 10 and 11, shall prejudice any rights that you have or may have under the Public Interest Disclosure Act 1998

("PIDA") (or any other enactment which PIDA amends) and/or any obligations that you have or may have to raise concerns about patient safety and care with regulatory and other appropriate statutory bodies pursuant to your professional and ethical obligations including those obligations set out in guidance issued by regulatory or other appropriate statutory bodies from time to time.

We believe this affords protection to all individuals in terms of their rights to make protected disclosures without concern of action by the Trust for breach of a settlement agreement/COT3 agreement or similar."

Royal Marsden NHS Foundation Trust FOI 2570, 31 May 2016:

"The Trust ensures that any settlement agreement it enters into with staff contains a clause setting out that the individual is not restricted in respect of raising concerns which are qualifying disclosures under PIDA. In the above circumstances, the Trust would consider all matters of this nature according to their individual circumstances but would never take steps to discourage individuals from raising protected disclosures."

Mersey Care NHS Foundation Trust FOI, 27 July 2016:

"This would need to be assessed on an individual basis."

Newcastle Upon Tyne Hospitals NHS Foundation Trust FOI response 10 February 2016:

"Currently, nothing in a Settlement Agreement with the Trust shall prejudice any rights an employee has or may have under the Public Interest Disclosure Act 1998 and/or obligations that an employee has or may have to raise concerns about patient safety and care with regulatory, or other appropriate statutory bodies pursuant to their professional and ethical obligations including those obligations set out in guidance issued by regulatory, or other appropriate statutory bodies from time to time."

North Bristol NHS Trust FOI response 8 July 2016:

“Agreements do not prevent making a protected disclosure within the meaning of Part IVA of the Employment Rights Act 1996”

North Cumbria NHS Trust FOI 003139, 19 May 2016:

“Yes”

North Essex Partnership University NHS Foundation Trust FOI 333, 6 July 2016

“This has not been the case to date and therefore the Trust is unable to answer this question. The Trust also believes this to be too speculative, as it would depend on the relative merits of individual cases.”

North Staffordshire Combined Healthcare NHS Trust FOI 100.16, 11 July 2016:

“Where Trust employees, or former Trust employees raise a concern that is deemed to be a qualifying disclosure under the PIDA, the Trust would not consider this to be to be an actionable breach of a non-disparagement clause

Nottinghamshire Healthcare NHS Foundation Trust

“The Trust would not discourage the raising of any concern under the PIDA, whether they had signed any such non-disparagement clause or not.”

Northumberland Tyne and Wear NHS Trust FOI 2508, 7 March 2018

“No”

Oxford Health NHS Foundation Trust FOI 16170078, 6 July 2016

“It would depend on the individual circumstances. It is, however, likely for the Trust to consider this as a qualifying disclosure under PIDA.”

Poole Hospital NHS Foundation Trust FOI 3769, 31 May 2016

“None of the above”

Rotherham NHS Foundation FOI 2586, Trust 31 May 2016

“The Trust would seek legal advice on each individual case”

Royal Berkshire NHS Foundation Trust FOI 3616, 11 July 2016

“All cases would be considered by the Trust on an individual basis.”

Royal Free London NHS Foundation Trust 1086, 15 February 2016

5) If staff who have entered into a compromise agreement with the Trust were to voice concerns about reprisal by the Trust for whistleblowing, would the Trust consider this to be an actionable breach of non-disparagement clauses, or would it consider the raising of such concerns to be qualifying disclosures under PIDA?

All agreements state the following clause:

constitute a breach by the Employee of this Agreement. For the avoidance of doubt, nothing in this Agreement is intended to or shall prevent the Employee from making a lawful protected 'whistleblowing' disclosure within the meaning of section 43A of the Employment Rights Act 1998.

**Royal Surrey County Hospital NHS Foundation Trust FOI 1799
2016, 11 July 2016:**

‘The Trust takes all whistleblowing concerns very seriously. Whether a staff member’s comments about reprisals for whistleblowers was a breach of a non-disparagement clause or the agreement more generally would depend upon the comments and the allegations/ claims that had been compromised by the agreement. The Trust’s compromise agreements, whilst containing confidentiality clauses, do not seek to prevent public interest disclosures. The Trust’s use of confidentiality clauses and non-disparagement clauses is in accordance with NHS Employers’ guidance. Since January 2012 and upon receipt of the issue of Sir David Nicholson’s letter to Chairs of all NHS organisations on 11 January 2012, the Trust’s compromise agreements all make it explicitly clear that nothing in the agreement prevents an employee from raising legitimate concerns about patient safety, or other

issues, in the public interest under the terms of PIDA. The wording used by the Trust is: “ For the avoidance of doubt, nothing in this Clause [x] specifically and nothing in this Agreement generally, shall prejudice any rights that the Employee has or may have under the Public Interest Disclosure Act 1998 and/or any obligations that the Employee has or may have to raise concerns about patient safety and care with regulatory or other appropriate statutory bodies pursuant to his or her professional and ethical obligations including those obligations set out in guidance issued by regulatory or other appropriate statutory bodies from time to time.”

Royal Wolverhampton NHS Trust FOI 3530, 13 June 2016

“The circumstances of each case would be considered alongside the definition of a qualifying disclosure. A number of the agreements reference the employee’s ability raise legitimate concerns about malpractice.”

South Coast Ambulance Service NHS Foundation FOI1617-028, Trust 1 June 2016:

“The Trust would consider all matters of this nature according to their individual circumstances, but would never take steps to discourage individuals from raising protected disclosures.”

Worcester Acute Hospitals NHS Trust 4055, 25 May 2016:

“Unable to say as this has never happened. We would deal with each case on its merits at the time.”

Worcester Health and Care NHS Trust FOI 838, 27 May 2016:

“The Trust specifically includes in agreements a provision to ensure the settlement agreement is not intended to restrict rights under the Public Interest Disclosure Act, in respect of whistleblowing. No action has been taken against any former member of staff who have signed settlement or compromise agreements.”

Wye Valley NHS FOI response 27 May 2018:

“This would be a qualifying disclosure under PIDA provided the appropriate procedural steps were undertaken.”

Yeovil District Hospital NHS Foundation Trust FOI 309, 4 January 2016:

“Compromise agreements do contain a clause stating that staff should not make disparaging comments about the Trust. However, they also contain the following wording: "For the avoidance of doubt, nothing in this Agreement shall prejudice any rights that the Employee has or may have under the Public Interest Disclosure Act (PIDA) 1998 and/or any obligations that the Employee has or may have to raise concerns about patient safety and care with regulatory or other appropriate statutory bodies pursuant to her professional and ethical obligations including those obligations set out in guidance issued by regulatory or other appropriate statutory bodies from time to time.”

Therefore it is made clear to staff that they are permitted to raise issues under PIDA 1998 despite having entered into the compromise agreement.”