CONGRESS' OBLIGATIONS WHEN WORKING WITH WHISTLEBLOWERS

This document addresses common questions House offices may have when working with whistleblowers, including requirements and best practices for handling restricted information. The Office of the Whistleblower Ombuds is available for case-specific confidential consultations. For legal advice, contact the House Office of General Counsel.

APPROACHES TO MITIGATE RISK

Congress cannot provide legal advice to whistleblowers. However, it is appropriate to recommend that the whistleblower consult knowledgeable counsel before sharing restricted documentation.

As a rule, whistleblowers are bringing forward information that needs to be handled with caution. To mitigate potential risk to the whistleblower and your office, avoid requesting documentary evidence. Rather, first ask the whistleblower for a summary of the underlying issue they want to disclose and how they learned about it. Ask follow-up questions to help verify their allegations, including how you can safely obtain supporting evidence. Consult with the whistleblower and receive their consent before acting on information that they have shared to avoid exposing them to unintended harm.[1]

Due to limited legal protections, the whistleblower could still face forms of criminal retaliation for sharing evidence with your office (e.g., an employer may claim "theft" of their documents). Private sector whistleblowers may also be targets of civil retaliation (e.g., an expensive defamation or "SLAPP" suit). Even where these retaliatory lawsuits are meritless, they can greatly disrupt the whistleblower's career and personal life. Congressional offices that engage with a whistleblower could potentially have staff called as witnesses or otherwise be required to produce documents or other records in connection with either a related criminal proceeding or related civil litigation. There may be alternative methods to confirm the whistleblower's allegations without associating them. When in doubt, consult respective legal counsel for guidance.

Once a House office has material that is in any way sensitive, it is advisable to exercise caution with respect to the use, storage, and further dissemination of that information. House offices, if they intend to use or otherwise release such information, should do so in a manner that is protected by the Speech or Debate Clause, thus limiting potential liability. Communications are generally protected by the Speech or Debate Clause insofar as they involve a legislative act (activities related to legislation or legislative fact findings, including investigations and oversight).

USE HOUSE EQUIPMENT AND ACCOUNTS

It is important to use official House equipment and House-contracted accounts for whistleblower-related communications and documentation. For example, rather than retrieving the evidence from the whistleblower's Dropbox account, send the whistleblower a link to share the evidence directly into your House Dropbox account. By using House-contracted accounts, the House Office of General Counsel will be notified of any subpoenas and can initiate a related defense. Conversely, in most situations it is advisable for the source to communicate from their personal (non-work) devices and accounts to better protect their communications.

COMPLIANCE WITH THE HOUSE CODE OF CONDUCT

The House Code of Official Conduct includes requirements for working with whistleblowers from the public and private sectors.[2] Clause 20 prohibits the House from engaging in retaliation against individuals because of truthful disclosures made to certain congressional offices or to law enforcement. Clause 21

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prohibits the House from publicly disclosing the identity of, or personally identifiable information about, an individual who has engaged in protected whistleblowing with Congress, without their prior voluntary written consent. Some additional exceptions exist, and the Office of the Whistleblower Ombuds is prepared to assist House offices with compliance.

NON-DISCLOSURE AGREEMENTS

House offices might receive information from a whistleblower that is governed by a non-disclosure agreement (NDA) or other employment contract. Notably, any nondisclosure policy, form, or agreement created by the federal government or a federal contractor must notify employees that their right to blow the whistle to Congress supersedes the employer's restrictions. Most modern private sector whistleblower laws include similar requirements. These rights are not universal, however.[3]

CONTROLLED UNCLASSIFIED INFORMATION

House offices may receive evidence from whistleblowers that includes Controlled Unclassified Information (CUI) markings.[4] The use of CUI, which replaced labels such as For Official Use Only and Law Enforcement Sensitive, standardizes the way agencies handle unclassified information that requires safeguarding or dissemination controls. It is only controlling for the executive branch, and there are not limitations around Congress' use of CUI.[5] The Whistleblower Protection Act established the right for executive branch whistleblowers to disclose CUI, among other evidence of misconduct, to Congress.[6]

CLASSIFIED INFORMATION

Whistleblower disclosures to Congress that involve information marked classified are protected only if made through lawful channels. There exists a patchwork of whistleblower laws that govern classified disclosures to designated audiences.[7] While all Members of Congress can receive classified information, congressional staff must have the appropriate clearance. House staff can coordinate classified conversations with the Office of House Security.

OTHER SENSITIVE INFORMATION (E.G., PRIVACY ACT, HIPAA, TRADE SECRETS)

There may be restrictions for the whistleblower around their disclosure of other sensitive information, such as that covered by the Privacy Act (protected personal identifiers), HIPAA (protected health information), or proprietary information such as trade secrets. However, there is no restriction on Congress' ability to receive, possess, and use that material.

MATTERS INVOLVING ALLEGED CRIMINAL VIOLATIONS

There is no legal obligation for Congress to report criminal allegations made by whistleblowers or to act on such disclosures. An office may exercise its own discretion when deciding whether it wants to pursue the matter directly and/or share the information with a third-party for review. Likewise, a House office can choose to conduct a parallel investigation into a whistleblower's allegation (for the purpose of informing remedial legislation, for instance) even if it is already being acted on by the executive branch or another third party.

MATTERS INVOLVING LITIGATION

Questions about involvement in whistleblower matters involving litigation should be discussed on a case-by-case basis with the Office of the Whistleblower Ombuds, the Office of General Counsel, or the Ethics Committee.

ENDNOTES

1 See the Office of the Whistleblower Ombuds' Resources Library for further case management guidance, available at https://whistleblower.house.gov/resources/resource-library.

2 House of Representatives, Rule XXIII – Code of Official Conduct, available at https://ethics.house.gov/code-of-official-conduct/.

3 5 U.S.C. § 2302(b)(13); Pub. L. No. 118-47, div. B, tit. VII, § 743; Pub. L. No. 118-47, div. B, tit. VII, § 742

4 National Archives, CUI Categories, available at https://www.archives.gov/cui/registry/category-list.

5 Exec. Order No. 13,556, 75 Fed. Reg. 68,675 (Nov. 9, 2010), https://www.govinfo.gov/app/details/FR-2010-11-09/2010-28360, the authority note applicable to 32 C.F.R. Subtit. B, Ch. XX, Pt. 2002 (2018), https://www.govinfo.gov/content/pkg/CFR-2018-title32-vol6/pdf/CFR-2018-title32-vol6-part2002.pdf.

6 5 U.S.C. § 2302(b)(8)(C)

7 Office of the Whistleblower Ombuds, Intelligence Community Whistleblowing Fact Sheet, available at https://whistleblower.house.gov/sites/whistleblower.house.gov/files/Intelligence_Community_Whistleblowing_Fact_Sheet.pdf.

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