

CONGRESS' OBLIGATIONS WHEN WORKING WITH WHISTLEBLOWERS

This document addresses common questions House offices may have when working with whistleblowers on sensitive matters, including requirements and best practices for handling restricted information. The Office of the Whistleblower Ombuds is available for case-specific confidential consultations as well as private trainings on related best practices. 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.¹ Consult with the whistleblower and receive their consent before acting on information that they have shared to avoid exposing them to unintended harm.

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.

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 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 limitations and exceptions exist, and the Office of the Whistleblower Ombuds is prepared to assist House offices with compliance.



Since whistleblower laws and procedures are pretty complicated, it was great to have experts help us understand how we can provide support to the folks who call in with whistleblower problems.”



LEGAL DISCLAIMER: This document is for general informational purposes only. Its contents are not legal advice.



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.³ Whistleblowers should consult knowledgeable counsel for how to proceed lawfully. House staff should coordinate classified conversations with the Office of House Security. While all Members of Congress can receive classified information, congressional staff must have the appropriate clearance. When in doubt about what information you are authorized to receive, consult the Office of House Security or the Office of the Whistleblower Ombuds.

ACCESS TO 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

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

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. Once a House office has material that is 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.

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' library of resources for step-by-step guidance, available at <https://whistleblower.house.gov/resources/guidance-documents> and its trainings: <https://whistleblower.house.gov/training>
- 2 House of Representatives, Rule XXIII – Code of Official Conduct, available at <https://ethics.house.gov/publications/code-official-conduct>.
- 3 For background on the patchwork of laws governing classified whistleblower disclosures, see the 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.
- 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)

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