**NAVAL INSPECTOR GENERAL**

# INVESTIGATIONS MANUAL


**JULY 1995**

# NAVINSGEN INVESTIGATIONS MANUAL (July 95)

# NAVAL INSPECTOR GENERAL
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# CHAPTER 1 - INTRODUCTION

**0101 PURPOSE:** The purpose of this manual is to set forth guidelines for the conduct of investigations by Department of the Navy (DoN) Inspector General (IG) personnel and others who perform IG investigations. It is intended for the official use of only those persons charged with the conduct and review of such investigations. Requests for release of all or part of this manual to anyone else should be referred to the Office of the Naval Inspector General (NAVINSGEN).

**0102 APPLICATION:** All Echelon II IG organizations assigned additional duty to the Naval Inspector General pursuant to SECNAVINST 5430.57F, "Mission and Functions of the Naval Inspector General," **shall use** this manual as a guide for IG investigations they conduct. This manual also **shall be used** as a guide for all investigations, at any level, conducted at the direction of NAVINSGEN. All other organizations and personnel conducting IG investigations are encouraged to adhere to its guidelines.

**0103 ADVISORY NATURE:** Although certain methods, techniques, and procedures should be followed in IG investigations, every investigation is unique. IG investigators therefore must exercise sound judgement in deciding how to proceed in each investigation. Consequently, most of the information in this manual should be viewed as advisory in nature, even in those instances where use of the manual is required pursuant to paragraph 0102. Where mandatory requirements are discussed, they are clearly identified by use of **bold underlining in conjunction with terms such as "shall" or "must**." In most cases, the mandatory requirements mentioned in the manual are imposed by law, regulation, Department of Defense (DoD) directives or Naval instructions.

**0104 STANDARD OF COMPETENCE**: Notwithstanding its advisory nature, the issuance of this manual establishes standards of competence and professionalism by which investigations may be judged. Should, for example, questions about the proper way to conduct an IG interview arise during a disciplinary proceeding, the IG investigator may observe government attorneys use the manual to support the manner in which the interview was conducted if the investigator followed its guidelines. Conversely, attorneys for the person being disciplined are likely to use the manual to attack the interview if the investigator did not adhere to its guidance. Hence, the prudent investigator should be familiar with the procedures discussed in this manual and be prepared to articulate sound reasons why they were not employed in a particular situation.

**0105 DISCLAIMER:** This manual does not create, and shall not be construed as creating, any right or benefit, substantive or procedural, enforceable at law by any person against the United States, its agencies, its officers or employees, or any other person. Thus, for example, a person who complains of fraud, waste, or abuse within a DoN organization does not have the right to insist the allegation be investigated simply because this manual discusses the investigation of such allegations. Nor does that person have the right to insist that any of the techniques, methods, or procedures discussed in this manual be applied to a particular investigation conducted by a DoN IG organization.

**0106 SUPPLEMENTS:** Supplements are permitted. Echelon II IG organizations intending to issue supplements **shall submit drafts** directly to the Naval Inspector General (attn: Director, Hotline Investigations Division) not less than 30 days in advance of the intended effective date;

approval is implied unless objections are noted. All other IG organizations **shall submit proposed supplements** through the IG chain for approval by the Naval Inspector General.

**0107 SUGGESTIONS FOR REVISIONS:** Suggestions for revisions and additions are encouraged. They should be sent to the Naval Inspector General (attn: Director, Special Inquiries Division).

**0108 DEFINITIONS:** For the purpose of this manual, the terms and phrases in this paragraph mean the following:

1. **"Admissions"** are voluntary statements acknowledging involvement in a matter under investigation.

2. **"Allegations"** are statements offered for proof through an IG investigation. They usually take the form of unsupported accusations of wrongdoing. No presumption of veracity or accuracy attaches to an allegation unless some evidence tending to support the allegation is submitted with it or developed during the investigation. The investigator's job is to obtain evidence sufficient to sustain or refute the allegation or explain why it is not possible to do either.

3. **"BCNR"** means the Board for Correction of Naval Records.

4. **"Complainants"** are people who present allegations that trigger a decision to conduct an IG investigation.

5. **"Confessions"** are voluntary statements admitting acts or omissions that violate a federal or state law, rule or regulation, including DoD or DoN regulations, directives, instructions, or other written policy. Confessions may be oral or written, and usually provide details of the acts or omissions.

6. **"Convening Authority"** is a commissioned officer who is authorized to convene a court-martial to try a person subject to the Uniform Code of Military Justice (UCMJ). Only general court-martial convening authorities are authorized to grant formal immunity from prosecution under the UCMJ.

7. **"Corrective action"** is action taken to "fix the system" to minimize the likelihood undesirable activity identified during an IG investigation will reoccur. Establishment or augmentation of procedures, checks and balances, and training are typical corrective responses.

8. **"Court-Martial"** is the exercise of military jurisdiction over criminal offenses as prescribed by law and regulation. A court-martial is a court of limited duration and jurisdiction consisting of a military judge, a panel of members, or both, or a single officer detailed as a summary court-martial. There are three types of courts-martial: general, empowered to impose any sentence prescribed by law, including death; special, empowered to impose lesser punishment, including not more than six months confinement; and summary, which may impose limited punishment, including not more than 30 days confinement. Conviction by a general or special court-martial creates a Federal criminal record. Conviction by a summary court-martial creates only an administrative record.

9. **"Custodial interrogation"** is interrogation conducted by a law enforcement officer after a person has been taken into custody or otherwise deprived of freedom of action in a significant way. For the purpose of this definition, persons conducting IG investigations are law enforcement officers.

**10. "Criminal prosecution"** is the process by which persons charged with violating criminal provisions of the United States Code (including the UCMJ) or state law are tried for their alleged offenses in a United States district court, a state court, or a general or special court-martial.

**11. "Disciplinary action"** is action, short of criminal prosecution, taken against a person found to have engaged in wrongdoing, other than training, counselling or a performance-based action. Disciplinary action runs the spectrum from letters of censure to removal or dismissal, including such actions as: admonition, reprimand and other nonjudicial punishment; suspension; demotion or reduction in rank; and summary court-marital.

**12. "DoDIG"** means the Inspector General of the Department of Defense.

**13. "DoN"** means the Department of the Navy.

**14. "EEOC"** means the Equal Employment Opportunity Commission.

**15. "DoN IG organization"** means every organization formally assigned to perform IG functions on a regular basis within the DoN. It includes NAVINSGEN, Echelon II and III IGs, and any other organization, such as a command evaluation office, that performs IG functions as part of its normal duties. A list of DoN IG organizations appears in the appendix of this manual.

**16. "FOIA"** means the Freedom of Information Act.

**17. "GCM"** means general court-martial.

**18. "Hotline caseworkers"** are people who have initial contact with hotline complainants, in-person or over the telephone. Hotline caseworkers may be IG investigators, but in most cases are not the people assigned to perform the principal investigation.

**19. "Improper (conduct)"** is conduct (acts or omissions) found to violate an identifiable directive, instruction, policy, regulation, rule, statute, or other standard applicable to the DoN, without regard to knowledge, motive, or intent. Compare to "inappropriate conduct" and "misconduct" defined below.

**20. "Inappropriate (conduct)"** refers to action a reasonable person would consider likely to erode confidence in the integrity of the DoN, but which does not violate an identifiable directive, instruction, policy, regulation, rule, statute, or other standard applicable to the DoN. Sections 5 and 6 of Chapter 12 of DoD 5700.7-R, "Department of Defense Joint Ethics Regulation," provide guidance for identifying inappropriate conduct. Note, however, that violation of the general principles set forth at 5 CFR 2635.101 (Office of Government Ethics Standards of Ethical Conduct) is improper conduct. Because inappropriate conduct involves questions of ethics about which reasonable people may differ, the **ethical considerations that underlie a finding of inappropriate conduct must be set forth and discussed in the investigative report**.

**21. "Inquiry"** is a general term used to refer to any form of examination into a matter, including inspections, investigations, area visits and surveys, but not including audits. Compare to "preliminary inquiry" defined below.

**22. "Interview"** is a controlled conversation conducted for the purpose of obtaining information from individuals who may be complainants, witnesses, subjects or suspects.

**23. "Interviewing"** is a specialized pattern of verbal communication conducted for the purpose of obtaining and furnishing information.

**24. "Interrogation"** is a demand for information, or the process of obtaining information by interview, from an unwilling or uncooperative person, usually for the purpose of obtaining admissions or confessions.

**25. "Investigation"** means any form of examination into specific allegations of wrongdoing. An investigation is one form of an IG inquiry.

**26. "IG"** means Inspector General.

**27. "IG function"** means any task or function that is customarily performed by an Inspector General, including those set forth in SECNAVINST 5430.57F, "Mission and Functions of the Naval Inspector General." However, for the purpose of this manual, an audit is not an IG function.

**28. "IG office"** is a generic term meaning any office that performs IG functions.

**29. "JAGC"** means the Judge Advocate General's Corps of the DoN.

**30. "JAGMAN investigation"** means a fact finding investigation convened and conducted pursuant to the Manual of the Judge Advocate General of the Navy (JAGMAN).

**31. "Misconduct"** is improper conduct undertaken (1) with the knowledge that the conduct violates a standard, or with wilful disregard for that possibility; (2) with the intention to harm another; or (3) for the purpose of personal profit, advantage, or gain. Gross negligence is misconduct under this definition; simple negligence is not.

**32. "MSPB"** means the Merit Systems Protection Board.

**33. "NAVINSGEN"** means the Office of the Naval Inspector General. "The NAVINSGEN" refers to the person who is the Naval Inspector General.

**34. "NCIS"** means the Naval Criminal Investigative Service.

**35. "NJP"** means non-judicial punishment.

**36. "OGC"** means the Office of the General Counsel of the DoN.

**37. "OSC"** means the Office of the Special Counsel.

**38. "Other DoN IG organization"** means every DoN IG organization except NAVINSGEN.

**39. "PA"** Means the Privacy Act.

**40. "Preliminary inquiry"** means the initial phase of an IG investigation. See Chapter 4.

**41. "Principal investigation"** means the main phase of an IG investigation. See Chapter 5.

**42. "Protected communication"** means the transmission of information that may be disclosed under a whistleblower protection statute by a person the statute allows to transmit such information, provided the information is disclosed to someone authorized by the statute to receive it. Except for some communications of military personnel to an IG or member of Congress, protected communications must also be whistleblower communications (defined below). However, not all whistleblower communications are protected communications.

**43. "Remedial action"** is action taken to restore individuals who have been harmed by the wrongdoing of others, or injured by unintended consequences of "the system," to their prior circumstances.

**44. "Responsible authorities"** are people who have authority and responsibility to take corrective, remedial, or disciplinary action based on the findings of an IG investigation.

**45. "Results of Interview"** or "Memorandum of Interview" is a written record of what was said and what occurred during an interview, derived from notes and memory of the interviewer.

**46. "SCM"** means summary court-martial.

**47. "SECNAV"** means the Secretary of the Navy.

**48. "SPCM"** means special court-martial.

**49. "Statement"** is an oral or written account of an event.

**50. "Sworn Statement"** (Affidavit or Declaration) is a written or printed declaration or statement of facts made voluntarily. An affidavit is confirmed by the oath or affirmation of the party making it, before a person having authority to administer such oath. A declaration is made pursuant to 28 USC 1746 and need not be notarized before being introduced in an administrative or judicial proceeding.

**51. "Subjects"** are people against whom allegations of wrongdoing have been made. Used loosely, the term includes people accused of either criminal or non-criminal conduct. More precisely, subjects are those accused of non-criminal wrongdoing. Compare to suspects, defined below.

**52. "Subject commands"** are those organizations in which wrongdoing is alleged to have occurred.

**53. "Suspects"** are people against whom sufficient evidence has been developed to warrant the belief that criminal prosecution would be reasonable and appropriate under the circumstances. Because most IG investigations are conducted after appropriate authority has determined not to pursue criminal sanctions, IG investigations seldom involve suspects as so defined.

**54. "Standard of Proof"** means the degree of certainty necessary to decide that an allegation should be sustained when all of the credible evidence, pro and con, developed during the investigation is weighed together. For most IG investigations, the standard of proof is "preponderance of the credible evidence," meaning that it is "more likely than not" that an event occurred. This is sometimes quantified as a 51% or greater likelihood. This is the standard most often used in civil litigation. Compare to the standard of "proof beyond a reasonable doubt" used in criminal prosecution (approaching a "moral certainty" or a percentage in the high 90's). An intermediate standard that is applied in some instances, such as civilian employee whistleblower reprisal cases, is "clear and convincing evidence."

**55. "Tasking authority"** is that person who has the authority to direct an IG organization to conduct a particular investigation.

**56. "UCMJ"** means the Uniform Code of Military Justice.

**57. "USC"** means the United States Code. The USC is a topical, rather than chronological, compilation of US law.

**58. "Whistleblowers"** are those people who disclose information they reasonably believe is evidence of a violation of any law, rule or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial or specific danger to public health or safety.

**59. "Whistleblower communications"** are disclosures of information by people who reasonably believe the information they disclose is evidence of a violation of any law, rule or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial or specific danger to public health or safety.

**60. "Witnesses"** are those people selected for interview during an IG investigation because they may have information that tends to support or refute an allegation, or information that may lead to the discovery of such information.

**61. "Wrongdoing"** is a generic term for activity that may be the subject of an IG investigation, and includes misconduct, improper conduct, and inappropriate conduct.

# CHAPTER 2 - NATURE AND PURPOSE OF IG INVESTIGATIONS

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# CHAPTER 2 - NATURE AND PURPOSE OF IG INVESTIGATIONS

**0201 DEFINITION:** SECNAVINST 5430.57F (Mission and Functions of the Naval Inspector General) defines an investigation as "any form of examination into specific allegations of wrongdoing or misconduct." An IG investigation is one form of an IG "inquiry." The difference between an IG investigation and other forms of IG inquiries is that, from the outset, an investigation focuses on allegations that the conduct of specific (known or unknown) individuals was improper.

**0202 POLICY FOR CONDUCT OF IG INVESTIGATIONS:** SECNAVINST 5430.57F sets forth the general policy for the conduct of all IG functions, including investigations. It states:

> The DoN shall strive to maintain the highest level of readiness, effectiveness, discipline, efficiency, integrity, and public confidence. Candid, objective, and uninhibited internal analysis of the management, operation, and administration of DoN is essential to achieve this objective. All inquiries into matters affecting the integrity, efficiency, discipline and readiness of the DoN shall be conducted in an independent and professional manner, without command influence, pressure, or fear of reprisal from any level within DoN. All non-frivolous allegations of misconduct shall be thoroughly and impartially investigated and reported. (emphasis added)

**0203 PURPOSE OF IG INVESTIGATIONS:** The purpose of an IG investigation is to obtain facts sufficient to enable responsible authority to (1) determine whether allegations are substantiated and (2) decide what action, if any, should be taken in response to substantiated allegations. Conceptually, responsive action may be divided into three broad categories:

1. **Corrective Action** - Corrective action includes those steps taken to "fix the system" to minimize the likelihood wrongdoing or other undesirable events will reoccur. Examples of corrective action include establishing, changing, or augmenting procedures, training, and implementing checks and balances. Inspections or audits may be used to identify effective ways to address problems identified during investigations. Responsible authorities may decide to take corrective action even when the allegations can not be substantiated.

2. **Remedial Action** - In some cases, the IG investigation reveals that wrongdoing or system deficiencies adversely affected the complainant or others. Although redress of wrongs is not, by itself, sufficient reason to initiate an IG investigation when other remedies are available, basic fairness requires that individuals harmed by improper conduct or unintended consequences of "the system" be restored to their prior circumstances whenever possible. Such action is an important element of the responsible authority's response to an IG investigation. Responsible authorities may decide to take remedial action even when allegations of wrongdoing can not be substantiated.

3. **Disciplinary Action** - In the context of an IG investigation, disciplinary action is any action short of criminal prosecution taken against a person found to have engaged in wrongdoing, except that disciplinary action does not include training, counselling, or performance based actions. Disciplinary action runs the spectrum from letters of censure to removal or dismissal, including: admonition, reprimand and other nonjudicial punishment; suspension; demotion or reduction in rank; and summary court-martial. Although outsiders may think

disciplinary action by the responsible authority is the primary purpose of an IG investigation, corrective and remedial action are actually more important to accomplishment of the IG mission. In some cases, other considerations may dictate that no (or limited) disciplinary action should be taken in response to substantiated misconduct. For example, to protect the integrity of the IG system, it may be necessary to forego disciplinary action in an unusual case to protect the identity of a complainant or other confidential source.

**0204 AUTHORITY FOR IG INVESTIGATIONS:** The authority for DoN IG organization investigations is derived from statute and regulation:

1. **Statute** - 10 USC 5020 sets forth the statutory basis for NAVINSGEN investigations. It authorizes NAVINSGEN to investigate matters affecting DoN discipline or military efficiency. There is no statutory basis for IG investigations performed by other DoN IG organizations. NAVINSGEN's statutory authority is quite limited, especially when compared to that of the DoDIG.

2. **Regulation** - SECNAV has given NAVINSGEN broad investigative authority in the US Navy Regulations, and such SECNAV Instructions as 5430.57F, 5430.92A, "Assignment of Responsibilities to Counteract Fraud, Waste, and Related Improprieties within the DoN," 5370.5A, "DoD/Navy Hotline Program," and 5800.12A, "Allegations Against Senior Officials of the DoN." SECNAVINST 5430.57F recognizes the existence of other DoN IG organizations, but does not authorize them or set forth their authority. Such organizations are created by commanders and commanding officers in order to carry out their responsibilities under the US Navy Regulations. In most cases, their authority and responsibility is set forth in command instructions, policy memos, statements of organizational responsibilities, or similar documents.

**0205 MATTERS APPROPRIATE FOR IG INVESTIGATION:** SECNAVINST 5430.57F, 5430.92A, and 5370.5A describe those matters appropriate for investigation by DoN IG organizations. In general, the following applies:

1. In broad terms, the mission of every DoN IG organization is to inquire into matters that have some relationship to readiness, effectiveness, discipline, efficiency, integrity, ethics, and public confidence. Therefore, allegations that an individual's improper conduct has adversely affected readiness, etc., are proper subjects for IG investigations. Because the DoN recognizes that improper conduct is likely to adversely affect one or more of these areas, it is DoN policy that all non-frivolous allegations of improper conduct shall be thoroughly and impartially investigated and reported. Most of these allegations are investigated by a DoN IG organization. However, as discussed below, some allegations should be referred to others for investigation. Also, allegations of inappropriate conduct sometimes are better left to command inquiry and resolution, since there is no standard by which to evaluate the alleged conduct.

2. A DoN IG organization also may be tasked or requested to perform an investigation into any matter that reasonably can be expected to be of interest to the SECNAV, CNO, or CMC, NAVINSGEN, or DODIG, even when there is no allegation of improper conduct. In most cases, the matter will be presented directly to NAVINSGEN, which will conduct the investigation. **Other DoN IG organizations that become aware of such matters shall report them to NAVINSGEN before proceeding with investigations in order to**

**ensure appropriate inquiry and management action.** For example, SECNAVINST 5800.12A establishes that some allegations against Senior Officials of the DoN are always of interest to the SECNAV. DoN IG organizations should avoid investigations of matters whose relationship to the IG mission is uncertain, even if they are arguably of Secretarial level interest, without clear direction from NAVINSGEN or their Command.

3. DoN military and civilian personnel who fear reprisal may use a DoD or DoN hotline to request IG investigations as an alternative to mechanisms available within normal chain of command channels. They also may request IG investigations when they believe the chain of command will not effectively address their concerns. They may use the hotline to lodge complaints and provide facts concerning: violations of law, rules, or regulations; fraud, waste or inefficiency; abuse of authority or other misconduct; and other matters that reasonably can be expected to be of Secretarial level interest. However, the hotline is a management tool; the hotline complainant has no right to demand the investigation of a matter. Nor is there a requirement that the DoN IG organization receiving a proper hotline complaint investigate the complaint itself; in appropriate cases, hotline complaints may be referred to others, within and without the IG chain, for inquiry and action.

**0206 MATTERS INAPPROPRIATE FOR IG INVESTIGATION:** DoN IG organizations should refer investigations of certain types of allegations to other organizations. Examples include:

**1. Major Crimes** - The Naval Criminal Investigative Command (NCIS) has authority to investigate allegations that DoN civilian or military personnel have committed major crimes. These are defined in SECNAVINST 5520.3B, "Criminal and Security Investigations," as offenses for which imprisonment for more than one year may be imposed under the UCMJ or federal, state, or local laws (such crimes often are referred to as felonies). Although DoN IG organizations are responsible for investigating standards of conduct violations, many of those standards are derived from federal felony statutes (see, for example, Office of Government Ethics regulations at 5 CFR 2635.401 through 503 for a discussion of conflicts of interest based on a criminal statute, 18 USC 208, and conflicts based on agency regulations). In those cases, NCIS should be apprised of the allegations before the IG office proceeds with the IG investigation. When NCIS has reason to believe the cognizant United States Attorney will not prosecute a case, it may decline jurisdiction and the IG investigation may go forward. When a matter appropriate for an IG investigation must be referred to NCIS for investigation pursuant to SECNAVINST 5520.3B, the DoN IG organization should log the case into its tracking system and monitor the progress of the NCIS investigation. Should the NCIS investigation fail to establish a basis for criminal prosecution, NCIS may return the case to the IG organization for such further investigation as may be necessary to permit responsible authorities to determine whether other action is appropriate.

**2. Crimes Committed By Military Personnel** - A complaint or request for an IG inquiry may include information that suggests a military member may have committed an offense punishable under the UCMJ. When the UCMJ violation would also constitute the commission of a major crime within the jurisdiction of NCIS, the matter must be referred to NCIS for investigation. In less serious cases, or after NCIS declines to investigate, the DoN IG organization should next consider whether to

refer the allegation to the alleged violator's commander for inquiry and action. A referral is appropriate when the allegation is not one that would normally be the subject of an IG investigation. When a matter appropriate for an IG investigation could constitute an offense punishable under the UCMJ, close coordination with the Staff Judge Advocate for the appropriate convening authority is necessary to ensure the investigation meets the requirements of the UCMJ. The alleged conflict of interest violation mentioned in paragraph 0206.1 is a good example, because a violation of 18 USC 208 is also a violation of the UCMJ; even if the US Attorney declines to prosecute, the cognizant convening authority may decide to refer the matter to a court martial. Unless and until the convening authority decides a court martial would not be appropriate for the offense, the investigators should coordinate their actions with the Staff Judge Advocate to ensure evidence obtained during the IG investigation may be used in the court martial proceedings. For example, as discussed in paragraph 0321, the confession of a military member suspect obtained in the absence of an Article 31(b), UCMJ warning is not admissible in a court-martial.

3. **Adverse Actions** - DoN personnel often seek IG assistance when faced with adverse action for which another, more specific remedy or means of redress is available. For example, many adverse personnel actions taken against civilians are appealable to Merit Systems Protection Board (MSPB) or subject to resolution through agency grievance procedures. Non-judicial punishments and courts-martial actions under the UCMJ are appealable to higher military authority. In such cases, the complainant should be referred to the appropriate authority to resolve the matter, unless there is an allegation of reprisal for a protected activity such as whistleblowing.

4. **Discrimination Cases** - Complaints of discrimination, whether made by civilian or military personnel, should be addressed through their respective complaint resolution processes rather than by an IG investigation. However, sexual harassment is appropriate for IG investigation, and allegations of sexual assault should be referred to NCIS. When allegations of discrimination are mixed with other allegations appropriate for IG inquiry, it is appropriate to tell the complainant which matters the IG organization will investigate, and which should be taken to the command's discrimination complaint resolution process. When the allegations are so intertwined as to make separation inefficient, consultation with discrimination investigative personnel is appropriate to decide how to proceed. See also Chapter 11.

5. **Correction Of Fitness Reports** - The Board for Correction of Naval Records (BCNR) is the appropriate authority to review allegations of improper fitness reports and other requests for correction of records. However, allegations of reprisal for whistleblowing should be investigated by the IG organization. See also Chapter 10.

6. **Chain Of Command Action** - Many complaints and requests for assistance are best handled within the chain of command and should be referred to it. For example, complaints of wrongs to individual military personnel may be handled through Article 138, UCMJ or Article 1150, US Navy Regulations proceedings, and military personnel making requests or complaints cognizable under those articles should be encouraged to use them (however, since both articles are intended to redress alleged wrongdoing, the IG organization may not refuse to accept a matter for investigation simply because it could also be addressed under one of these articles).

Allegations that, on their face, would constitute only inappropriate conduct are also examples of matters that often may be referred for command inquiry. However, IG organizations should be sensitive to complaints or requests that indicate systemic problems may exist that should be addressed through an IG investigation or inspection. When a matter is referred to a command, it is appropriate to request notification of the action, if any, that is taken.

7. **Redress Of Wrongs** - The fact that an individual believes he or she has been "wronged" by the "system" is not itself sufficient to justify an IG investigation. DoN IGs are not ombudsmen. Nor are they a substitute for DoN chain of command dispute resolution mechanisms, and they should not be used for that purpose unless there is evidence those systems are nonresponsive. Complaints from individuals seeking relief from adverse personnel or disciplinary actions, unfavorable findings in discrimination cases, or other matters for which a statute or regulation sets forth a resolution process, should be accepted for IG investigation only when coupled with a non-frivolous allegation that the chain of command is unable or unwilling to address the matter fairly and impartially for reasons related to conflicts of interest or personal impropriety, such as reprisal for whistleblowing, cooperating with an investigation, or the exercise of an appeal right.

8. **Organizations Outside the DoN** - Some violations of law or regulations must be investigated by specific organizations outside of the DoN. For example, allegations of Hatch Act violations must be referred to the Office of Special Counsel (OSC). The Department of Labor is responsible for investigation of many matters relating to wages and hours of work. Some outside organizations have special or unique powers to assist DoN personnel. For example, the OSC can seek a stay of a pending personnel action it believes is based on a prohibited personnel practice. Military personnel who present claims of reprisal for protected whistleblowing to the DoDIG have statutory rights that do not exist if they present the claim to a service IG. Complainants should be advised of these special circumstances so they may make an informed choice among the investigative organizations authorized to address their concerns. When an outside organization such as the OSC initiates an investigation into a matter that is already the subject of an IG investigation, it may be necessary or appropriate to suspend the IG investigation pending the outcome of the OSC investigation.

**0207 SOURCES OF REQUESTS FOR INVESTIGATIONS:** DoN IG organizations receive requests for investigations from many different sources. In most cases, complaints, allegations of wrongdoing, and requests for assistance require some degree of investigative effort before they can be answered, and therefore may be treated as requests for investigations. The manner in which these requests should be handled varies with the source of the request, which may include:

1. **SECNAV, CNO, CMC** - Clearly, 10 USC 5020 authorizes the SECNAV and CNO to "direct" NAVINSGEN to conduct investigations into matters that affect DoN discipline or military efficiency. The CMC's authority is not explicitly set forth in 10 USC 5020, but is implied when read in conjunction with 10 USC 5042. The CMC's authority is clarified in SECNAVINST 5430.57F. SECNAV, CNO, and CMC direction to conduct investigations should be provided in writing whenever possible, and documented with a letter to file in other cases. As in any tasking that comes directly from one authorized to act upon the results of an IG investigation, informal

discussions may precede written direction in order to ensure there is a clear understanding of the scope, focus, and intended use of the investigation. Unless expressly directed otherwise, NAVINSGEN may augment its staff with other DoN personnel, or direct the performance of the investigation by other DoN IG organizations. In such cases, however, NAVINSGEN remains directly responsible to SECNAV, CNO, or CMC for the investigative effort. In rare cases, it may not be appropriate for NAVINSGEN to conduct an investigation because of the existence or appearance of a lack of impartiality. In those instances, NAVINSGEN will apprise SECNAV of the basis for such concerns, and make recommendations for alternative methods of performing the investigation.

2. **Under and Assistant Secretaries** - Although they have no express statutory or regulatory authority to initiate IG investigations, the Under Secretary and Assistant Secretaries occasionally task NAVINSGEN to conduct investigations. As members of the Secretariat, their requests are deemed to be made on behalf of SECNAV and in most cases are handled in the same manner as requests made directly by SECNAV.

3. **Commanders, Commanding Officers** - The US Navy Regulations make Commanders and Commanding Officers responsible for the integrity and efficiency of their organizations. Many DoN organizations have assigned the performance of IG functions to specific members of their organization, whether or not they carry the title of IG. In general, DoN organizations that have personnel assigned to perform the IG function should task those people to conduct IG investigations. **Special care shall be taken to ensure there is no real or apparent lack of impartiality on the part of the investigating organization. When there is a real or apparent lack of impartiality, the investigation must be performed by the IG organization at a higher level in the chain of command. Cases that may be of interest to senior Navy leadership (SECNAV, CNO, CMC), Congress, or the public must be referred to NAVINSGEN for decision as to who should conduct the investigation.**

4. **Congress** - There is no statute or regulation that provides for Congress to task DoN IG organizations to perform IG investigations. Official requests, that is, those made on behalf of a Congressional committee, should be addressed to SECNAV. **Official committee requests for investigations made directly to a DoN IG organization must be referred to NAVINSGEN for a Secretarial decision as to whether an investigation should be conducted and who should undertake it.** The Office of Legislative Affairs (OLA) should be informed of the request, SECNAV decision, and final action. Many Congressmen write directly to DoN IG organizations with personal requests for themselves or, more often, constituents. These requests should be handled in the same manner as hotlines and requests by individuals. OLA should be advised of the request and final action.

5. **DODIG** - The DoDIG has the authority to conduct investigations into matters concerning DoN or to refer them to DoN for action. DoDIG involvement in investigations concerning Navy personnel most often results from complaints made to the DoD hotline. **NAVINSGEN is the central point of contact for coordinating DoDIG investigations, and DoDIG requests made directly to other DoN IG organizations must be coordinated with NAVINSGEN (DNIGMC for matters concerning the Marine Corps) before any action is taken.**

6. **Hotlines** - The DoD and Navy hotlines are designed to strengthen and focus efforts to combat fraud, waste and mismanagement throughout DoD and the Navy. SECNAVINST 5430.92A also requires all DoN personnel to report suspected violations of standards of conduct applicable to DoN personnel to such "proper authority" as the Navy hotline. The great majority of investigations conducted or directed by NAVINSGEN originate with a call or letter to the DoD or Navy hotline. The DoDIG refers most DoD hotline complaints that concern the Navy to NAVINSGEN for action, reserving only those that it deems particularly sensitive or those which the public could perceive were inappropriate for the Navy to investigate itself. NAVINSGEN practice is to refer DoD and Navy hotline complaints to the Commander of the cognizant Echelon II organization. From there, the complaint is usually referred for investigation to the lowest level that can accomplish the investigation without losing, or appearing to lose, impartiality or independence (however, Chapter 10 discusses new rules to ensure independence imposed by 10 USC 1034 for military whistleblower reprisal investigations). Many Navy organizations have established their own hotlines. In general, the person or office performing the IG function for that organization handles the hotline complaints. Care should be taken to refer to the next higher level those complaints that are inappropriate for investigation at the receiving level because of a real or apparent conflict of interest or other basis for a lack of impartiality. **Refer complaints that may be of interest to senior Navy leadership, Congress or the public to NAVINSGEN before proceeding with the investigation.**

7. **Individuals** - Many requests for investigations come from individuals who believe they have been wronged during the course of their exercise of a chain of command redress procedure. These requests often take the form of a hotline complaint in which it is alleged that the redress procedure produced the wrong result. Unlike a true hotline complaint, however, the allegation of "wrongdoing" does not focus on fraud, waste, mismanagement or a standards of conduct violation, although the complaint may contain some allegations of wrongdoing. Ensuring that DoN personnel are treated fairly and in accordance with applicable law and regulation does promote the efficiency of the DoN. However, the mission of DoN IG organizations does not include assistance in the correction of wrongs in individual cases absent special circumstances such as reprisal or systemic problems. Because DoN IG organizations are not advocates for individuals, complaints about actions personal to individuals should be carefully screened for referral to other DoN organizations that are a more appropriate forum. In such cases, every reasonable effort should be made to direct individuals to the proper organization to address their concerns. When an individual's complaint of wrong is a proper subject for IG investigation, it is appropriate for an IG organization to recommend the command consider remedial action that makes the complainant "whole."

## 0208 STANDARDS FOR CONDUCT OF IG INVESTIGATIONS: IG investigations shall be performed in an independent, complete, and timely manner. Where appropriate, they shall provide sufficient information to permit responsible authorities to hold subordinates accountable for their actions and to correct systemic faults.

1. **Independence** - This standard requires that the individual and organization performing an IG investigation be free, in fact and appearance, from any impairment of objectivity and impartiality.

a. On occasion, every investigator may experience difficulty in remaining objective and impartial due to official, professional, personal, or financial relationships that may affect the extent of the investigation, limit disclosure of information, or otherwise weaken the investigation. Every investigator also carries pre-conceived opinions or biases that relate directly or indirectly to particular individuals, groups or organizations. Investigators should be sensitive to inherent prejudices that may affect their work, and discuss them with their supervisors before undertaking an investigation. Investigators must also consider appearance issues. For example, if an investigator served with the subject in a recent previous assignment, or is scheduled to transfer into the subject's command, there may be the appearance of bias even though none actually exists. When there is a reasonable likelihood the integrity of the investigation may be compromised by the real or apparent bias of the investigator, the investigation should be assigned to someone else.

b. External factors may also impede the ability of an individual to conduct an independent, objective investigation. These may include interference in the assignment of cases or personnel, and restrictions on funds or other resources available for investigation may adversely affect objectivity. The authority to overrule or to influence the extent and thoroughness of the investigation and the content of the investigative report, or denial of access to sources of information also impacts directly on the independence of the investigation. **DoN IG organizations faced with such impediments shall report them to NAVINSGEN through the IG chain of command.**

c. Lack of independence also may be attributed to the position of the IG organization. **Since complete assurance of impartiality and objectivity is necessary, allegations must be examined by officials outside and independent of the operation specified in the complaint.** The preferred way to ensure this separation is to have an organization at least one level above the subject command conduct the investigation. In many cases, however, due to the size or remoteness of the organization, this is unnecessary or impractical. For example, the size of most Echelon II headquarters organizations reduces the likelihood of bias in individual cases. At isolated commands, it may be too costly or time-consuming to send an investigator from a higher level organization to investigate allegations of a less serious nature. In general, when the matter under investigation relates solely to a discrete unit within the subject command, and there is no indication that the commanding officer or other key management officials were aware of or in some manner directly responsible for the alleged impropriety, the IG office within the subject command may investigate the matter. Conversely, an allegation against a commanding officer or other senior management official within the subject command should not be investigated by that command's IG office. As noted in paragraph 0207.6, refer to Chapter 10 for special requirements imposed by 10 USC 1034 for the conduct of military whistleblower reprisal investigations.

d. Lack of independence may also result from the position, rank, or grade of the investigator. Within a command, the head of the IG organization should report directly to the commanding officer. The

investigators assigned to the IG organization should not be assigned any duties that could be the source of bias or a loss of independence. When an IG organization is conducting an investigation of alleged misconduct within the command to which it is assigned, the grade or rank of the senior person available to participate in the investigation should be equal to or higher than that of the senior subject. Inability to comply with this practice is an indication that the investigation should be performed by a different IG organization. The senior person need not personally participate in every aspect of the investigation, but should be available when needed. For example, if there is reason to believe the subject may attempt to intimidate a lower ranking investigator during a subject interview, the senior person could attend the interview.

**2. Completeness** - An investigation must be complete before it can be closed. To be complete, it must be thorough. Thoroughness is reflected by the report of investigation, and the documentation in the case file.

a. A thorough investigative report addresses all relevant aspects of the investigation. It relates the results of the investigation clearly and concisely. Facts must be presented in a logical, direct manner so as to facilitate reader comprehension. The report must be logically organized, accurate, clear and concise, and make sense. It must not raise unanswered questions nor leave matters open to question or misinterpretation. The report should be no longer than necessary to clearly and accurately communicate the relevant findings. Systemic weaknesses or management problems disclosed during the investigation must be reported.

b. Together, the investigative report and the case file must reflect the following:

- that all allegations in the basic complaint were addressed, and other allegations developed during the investigation were addressed or handed off for appropriate followup action

- that all key individuals were interviewed by the investigator

- that all relevant questions were asked by the investigator

- that pertinent documents were created, collected, reviewed, and maintained by the investigator

- that legal or technical expertise was obtained and documented when appropriate

- that the investigator used common sense in conducting the investigation

- that accountability actions have been taken

- that conclusions are logical based on facts presented

- that recommendations are feasible and appropriate

**3. Timeliness** - Investigations are to be initiated, conducted and completed in a timely manner. Command action and follow-up in response to the report must also be timely.

**4. Accountability** - Commanders, commanding officers, and supervisors have the duty to hold their subordinates accountable for their actions and to correct systemic faults. The IG

investigation must provide them with the information necessary to discharge this responsibility effectively.

5. **Checklists** - See the Appendix for forms used by NAVINSGEN and the DoDIG to ensure standards for the conduct of IG investigations are met.

# CHAPTER 3 - RIGHTS AND RESPONSIBILITIES OF PARTICIPANTS

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# CHAPTER 3 - RIGHTS AND RESPONSIBILITIES OF PARTICIPANTS

**0301 INTRODUCTION:** For analytical purposes, the participants in an IG investigation may be divided into the following categories: responsible authorities; subject command organizations; complainants; witnesses; subjects; suspects; and investigators. The participants may have different perceptions of the purpose, scope or nature of an IG investigation. Their rights and responsibilities also differ. On occasion, these rights and responsibilities impact the manner in which the investigation is conducted, its results, or the action that may be taken in response to the investigation.

**0302 OVERVIEW:** This chapter identifies the principal parties to an IG investigation and discusses various matters that concern them, including their general rights and responsibilities during an investigation. It then examines in more detail some of the specific rights, responsibilities, and expectations parties may have during the conduct of investigations that are important to the investigator's ability to effectively control the investigation.

## PART ONE - CATEGORIES OF PARTICIPANTS

**0303 RESPONSIBLE AUTHORITIES:** Responsible authorities are those people who have the authority to take or direct corrective, remedial, or disciplinary action in response to the findings of an IG investigation. Consequently, they are the people for whom the investigation is to be performed, whether or not they initiated the request for the investigation. In some cases, the commander or commanding officer of the organization that is the subject of the investigation may act as the responsible authority. However, when the commander's impartiality is subject to question, a more senior person should be identified.

1. When the responsible authority did not request the investigation, as, for example, when there is a hotline complaint, the responsible authority should be notified promptly upon commencement of an investigation, unless there is good cause to believe the investigation would be compromised by doing so. When compromise is a concern, consider whether a more senior person should act as the responsible authority.

2. Because responsible authorities are required to take appropriate corrective, remedial, or disciplinary action, the investigation should provide them sufficient information to make intelligent decisions about these matters. In longer, more complex investigations, responsible authorities may be provided periodic progress briefings. Their participation in decisions about the direction the investigation will take may be encouraged if this will help ensure they obtain information necessary to make their decisions. Such participation may also help them understand the investigation is intended to promote the efficiency of the DoN.

3. Responsible authorities have the obligation to ensure their subordinates cooperate with, and do not impede, the IG investigation. Should a subordinate with authority to carry out responsibilities described in paragraph 0304 below prove unwilling or unable to do so, the responsible authority must be prepared to direct that action so as to ensure the integrity of the investigation.

4. Responsible authorities have an obligation to ensure the investigation is complete and impartial, in appearance and in fact. It is proper for the responsible authority who tasks an investigation to set forth the initial scope of the investigation, especially when the effort is to

be divided among the available investigative resources. However, subsequent changes to the scope of the investigation must be considered in light of the appearance, as well as the fact, that the responsible authority may be attempting to divert the course of the investigation for improper reasons. Should such an issue arise during the course of an investigation, the IG organization doing the investigation should discuss the matter with the responsible authority in a straightforward manner. Under appropriate circumstances when the responsible authority appears to be insensitive to this issue, the IG organization should alert higher authority within the IG chain.

**0304 SUBJECT COMMANDS:** Subject commands are those organizations in which the matter under investigation is alleged to have occurred.

1. The subject command should be notified of the existence and general nature of the IG investigation. Premature notice that would compromise the investigation should be avoided. However, as a practical matter, the subject command should be notified before the conduct of on-site interviews in most cases.

2. Notifying the subject command at the earliest practical time is important because the command has an affirmative responsibility to cooperate with the investigation. The subject command's cooperation is essential if the investigation is to be successful. Cooperation entails more than simply providing a space for the investigators to work and making witnesses available at reasonable times. It requires the command establish the proper atmosphere for the conduct of the investigation and, at times, positive assistance. Depending on the needs and specific requests of the investigators, this may include such actions as:

a. making a general announcement regarding the existence of the investigation in order to limit speculation and inform members of the command of their duty to cooperate with investigators;

b. directing uncooperative witnesses to answer questions, and disciplining those who continue to refuse to cooperate in the absence of a proper assertion of the right to remain silent;

c. taking effective action to preclude or remedy reprisal for cooperating with the investigators; and

d. directing personnel within the command to assist the investigation by such actions as gathering documents or other evidentiary materials requested by the investigators, conducting analyses of information at the request of the investigators, and, within reason, adjusting meeting, leave and travel schedules so as to be available when needed during the conduct of the investigation.

3. Cooperation necessarily requires the subject command not take any action that could be construed as interference with the investigation. Therefore subject command personnel must refrain from any attempts to:

a. suggest what witnesses should say when interviewed or attempt to influence potential witnesses in any other manner;

b. question witnesses as to the nature of the investigator's questions or their responses;

c. take any reprisal action against complainants or witnesses; or

d. identify the complainant.

Investigators should not assume that command personnel will know it is improper to question witnesses about their statements, even in a casual manner. Therefore, these matters should be discussed when the subject command is notified of the investigation.

4. Many allegations reflect adversely on the subject command. Accordingly, in most cases, the subject command should be given an opportunity to make an official "institutional" comment on, response to, or rebuttal of the allegations before the investigation is completed. This is particularly important when the responsible authority is outside the subject command. Similarly, the subject command should be informed of the results of the IG investigation, at least in general terms. Unless there is a good reason not to do so in specific cases, i.e., a reasonable likelihood of reprisal, the subject command should be provided a copy of the final investigative report. Distribution within the command should be on an official need to know basis. When necessary to protect confidentiality, the report may be redacted.

**0305 <u>COMPLAINANTS</u>:** Complainants are those who present the initial allegations that trigger a decision to conduct an IG investigation.

1. Complainants have many different reasons for making allegations, but their motive is not directly pertinent to an investigation. The allegations of a complainant who is seeking to "get even" may lead to the discovery of substantial fraud, waste, or abuse. But see subparagraphs three and six below for the proper consideration of complainant motivation.

2. Some complainants choose to remain anonymous. Others may identify themselves to an IG office, but request confidentiality during the investigation. Other complainants have no objection to disclosure of their identities during the course of an investigation.

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3. When complainants have first hand knowledge of facts related to the allegation, they should be interviewed as witnesses. Complainants who admit their own wrongful involvement in a matter they present for investigation, or who are implicated during the course of the investigation, may also become subjects or suspects. Since bias may color the perception and recollection of any witness, investigators may find it useful to explore the complainant's motive in order to decide what weight to attach to facts asserted by the complainant, just as they would for any other witness. However, investigators must exercise caution to avoid leaving complainants with the impression they are being investigated or harassed for making the complaint.

4. Because complainants voluntarily present information concerning wrongdoing, there is a heavy burden on the DoN in general, and the IG community in particular, to ensure complainants are not subject to reprisal. Thus, complainant requests for confidentiality merit special consideration that may impact the conduct of the investigation and the potential for disciplinary action. For example, investigators may find it necessary to interview complainants more than once because not interviewing them in their office at the same time coworkers are interviewed would appear odd and suggest they were the complainant. In cases where there is a potential for disciplinary action, investigators should attempt to develop alternate sources of evidence in order to protect the identity of complainants who have requested confidentiality.

5. Complainants should be told whether the IG has decided to initiate an investigation of their complaints; doing so may reduce the

likelihood they will request duplicative investigations from other organizations. Military personnel complaining of reprisal that falls under 10 USC 1034 must be told of their right to take such allegations directly to the DoDIG (see Chapter 10). Complainants also should be told whether their allegations were sustained. They may be told, in general terms, whether corrective, remedial, or disciplinary action was taken. However, due to the subject's privacy rights, complainants do not have the right to know what specific remedial or disciplinary action occurred unless it becomes a matter of public record (for example, most MSPB decisions are available to the general public). If an allegation is not sustained, complainants should be given some explanation for that conclusion.

6. Complainants have the responsibility to present good faith allegations of wrongdoing. This means they may not make allegations they know to be untrue. Nor may they ignore or disregard information they know, or could learn upon reasonable inquiry, would tend to show the allegation is untrue. Complainants should not make frivolous allegations. That is, they should not seek an IG investigation of matters a reasonable person would know do not constitute violations of law, rule, or regulation, or other matters appropriate for IG investigation.

**0306 WITNESSES:** Witnesses are those people investigators decide to interview because they may have information that tends to support or refute an allegation, or information that may lead to the discovery of such information.

1. Most people are selected as witnesses because they have direct, first-hand knowledge of the facts surrounding an allegation. Some witnesses may be able to provide first-hand indirect, or circumstantial, evidence. However, experts who do not have first hand knowledge (and therefore must rely on factual information developed from other sources) are occasionally consulted during an IG investigation in order to obtain their expert opinions or conclusions. Examples include contract specialists or personnel classification reviewers who are familiar with procedures and regulations applicable to their field of expertise. They can review facts developed by the investigator to ascertain whether applicable procedures and regulations were followed in a particular case. They can also tell the investigator what facts should be developed in order to determine whether or not the subject adhered to applicable procedures. In general, fact and expert witnesses have the same rights and responsibilities.

2. Witnesses are sometimes divided into two categories for the purpose of selecting appropriate interviewing techniques. Cooperating witnesses are those who are willing to assist the investigator's attempts to develop pertinent facts. For example, when asked, they usually will tell a narrative story that requires minimal questioning, and therefore may be interviewed using standard interviewing techniques. Hostile witnesses are reluctant or unwilling to cooperate with the investigator. Often, the investigator must use interrogation techniques, such as asking questions that require only a yes or no answer.

3. Witnesses may become subjects or suspects during the course of an investigation. The investigators must be alert to ensure their rights (and those of the DoN to take action against them in appropriate cases) are protected should that happen.

4. Witnesses may not be subjected to reprisal for cooperating with an IG investigation.

**0307 SUBJECTS:** Used in a general sense, subjects are those people against whom any

allegation of wrongdoing has been made. More precisely, they have been accused of non-criminal conduct or of criminal conduct for which competent authority has determined criminal prosecution is not warranted.

1. As with subject commands, individual subjects should be given the opportunity to comment on, respond to, or rebut the allegations made against them. In most cases, the investigation can not be considered complete until the investigator has obtained the subject's version of the events in question. This information may aid the investigator's determination of what actually happened. In addition, information provided by the subject may assist the responsible authority in determining what action, if any, to take against the subject. For example, when the investigator concludes the subject violated an applicable standard, the investigator should attempt to determine whether the violation was due to ignorance of, inability to comply with, or deliberate disregard for, the standard.

2. Most IG investigations concern military and civilian subjects, not suspects. This is because in most cases the allegations are reviewed by NCIS, before the IG investigation starts, in order to determine whether a United States Attorney or the appropriate convening authority may be interested in criminal prosecution. If there is such an interest, NCIS will handle the investigation. If not, NCIS advises the IG organization that there is no prosecutorial interest. However, investigators must be sensitive to the possibility that additional evidence, or other forms of criminal conduct not previously considered, may be uncovered during the course of the investigation.

3. When dealing with military personnel, investigators must be familiar with the UCMJ and sensitive to the development of facts that would constitute UCMJ violations. When NCIS has terminated or declined to conduct an investigation, the investigator should determine whether NCIS has conferred with the appropriate convening authority. Until the convening authority decides criminal prosecution under the UCMJ is not warranted under the circumstances, the investigator should proceed with caution and coordinate with the local Staff Judge Advocate to ensure the rights of the subject are not violated and the convening authority's ability to take action under the UCMJ is not impeded.

4. **When conduct that may be subject to criminal prosecution is discovered during the course of an investigation, the investigator must re-evaluate the case and the manner in which it will be handled before proceeding**. In most cases, consultation with the investigator's IG superiors, NCIS, the appropriate convening authority and/or the responsible authority will be necessary to determine whether there is an interest in criminal prosecution, and, if so, what should be done to preserve the ability to take such action.

**0308 SUSPECTS:** Suspects are those people against whom sufficient evidence has been developed to warrant the belief they have engaged in criminal conduct. Under this definition, an unsupported allegation is not sufficient to render someone a suspect. Suspects have Constitutional and statutory rights, discussed below, that must be protected. In most cases, an IG investigation will be initiated against a person suspected of criminal conduct only after a decision has been made that criminal prosecution is not warranted, and the individual should be referred to as a subject.

**0309 INVESTIGATORS:** As used in this manual, investigators are those people authorized to conduct a specific IG investigation, whether or not they are working in an investigator's billet or position at the time of investigation. Investigators

have the responsibility to ensure that the rights of all other parties to an investigation discussed in the preceding paragraphs are properly addressed during the investigation. In order to obtain the facts necessary to permit the responsible authority to make appropriate decisions, the IG investigator has the right to conduct interviews, administer oaths, and collect documents. These rights interact with the specific rights of other parties, and will be discussed in more detail in the next section. If the conduct of the investigation requires access to restricted spaces or documents, the IG investigator with the appropriate level of security clearance is deemed to have the "need to know" by virtue of the investigative tasking.

## PART TWO - SPECIFIC RIGHTS AND EXPECTATIONS

**0310 ENUMERATION OF RIGHTS:** Issues concerning the perceived and actual rights of participants in an investigation arise in almost every IG investigation. They include such matters as: privacy and protection of reputation; reprisal; anonymity or confidentiality; how information disclosed during an interview or interrogation may be used by others; assistance from counsel or others prior to and during an interview or interrogation; recording interviews or reviewing investigator's notes concerning the interview; obtaining copies of one's own written or sworn statements to an investigator, or the statements of others; the opportunity to comment on allegations of wrongdoing; and the opportunity to review or receive a copy of the investigative report.

**0311 PRIVACY AND REPUTATION:** Allegations that lead to IG investigations usually involve sensitive issues, impact the subject command, are against people in positions of responsibility and trust, and are derogatory in nature. In short, the mere existence of an allegation may constitute an invasion of privacy, harm the reputation and careers of individuals, and tarnish the image of a command. The files that reflect such investigations are official records that remain in existence long after an investigation is completed, regardless of the results. They have serious implications for the privacy rights of participants.

1. Everyone who is interviewed by IG investigators should be informed that the information they provide will be maintained in files used for official purposes (including the investigation itself and any prosecution or disciplinary action that may result), and that access to the information within DoD will be on a "need to know for official use" basis. In addition, the information may be used to respond to complaints or requests for information from Congress and other government agencies, including state and local law enforcement agencies. They may also be told that their names and other identifying information will be deleted from releases of information made to the public pursuant to the Freedom of Information Act, but that a court could order release of that information in certain situations.

2. Pursuant to SECNAVINST 5211.5D, "DoN Privacy Act Program," records retrieved by personal identifiers such as names constitute Privacy Act Systems of records. Most DoN IG organization investigative records are retrieved by the name of complainants, subjects, and suspects.

3. **Individuals who are asked to provide information about themselves for DoN IG investigative records that are retrieved by their name or personal identifier must be advised of their rights under the Privacy Act.** This requirement flows from the fact that criminal law enforcement is not the primary purpose of a DoN IG investigation. Consequently, while DoN IG organizations qualify for Privacy Act exemption K status (non-criminal law enforcement), they do not qualify for Privacy Act exemption J status (criminal law enforcement), which is required

to avoid the requirement to provide Privacy Act rights advice. NCIS and the DoDIG, which have criminal investigative authority, do not require their investigators to provide Privacy Act rights to interviewees because they qualify for exemption J status.

4. NAVINSGEN investigative records are retrieved by the names of complainants, subjects, and suspects, but not witnesses. **Therefore, at a minimum, investigators performing investigations at the direction of NAVINSGEN must advise subjects and complainants of their Privacy Act rights.** Investigators not assigned to NAVINSGEN should determine whether the records of their organization are retrieved by additional categories, such as witness names. If so, then these people must also be advised of their Privacy Act rights. When in doubt, provide the advice.

5. The easiest way to ensure the Privacy Act requirement is met is to give the interviewee a copy of a Privacy Act Statement (PAS) to read. Examples appear in the appendix. To document that the advice was given, the investigator should ask the interviewee to sign the PAS. The interviewee may retain a copy, but the investigator should attach the signed original to the interview notes. If the interviewee declines to sign a PAS, the investigator should write "declined to sign" in the PAS signature block and place the PAS in the file with the interview notes. People asked to provide information about themselves for Privacy Act records during telephone interviews should be advised of their Privacy Act rights over the phone. Then the investigator should complete a PAS, place it in the file with the notes from the interview, and mail a copy to the individual.

6. The Privacy Act confers no right to remain silent. Thus, as indicated elsewhere in this manual, Government employees may not refuse to answer questions regarding their official duties after having been adequately informed that no criminal prosecution will be initiated because of information obtained from them during the interview, or other information developed as a result of the interview. Information may be compelled from both military and civilian witnesses if they are provided immunity by appropriate authorities.

7. On the other hand, the Privacy Act does not compel cooperation on the part of a witness. The PAS simply explains the authority to solicit information and whether disclosure is mandatory or voluntary, the principal purposes for which the information is intended to be used, the routine uses to which the information may be put, and the consequences, if any, of not providing the requested information. When disclosure is mandatory, that authority and the consequences which may result from nondisclosure are based on separate authority to compel answers, not the Privacy Act itself. The Privacy Act simply requires individuals to be informed of that authority and the consequences of their nondisclosure.

**0312 EXPECTATIONS OF CONFIDENTIALITY:** Many people who participate in IG investigations think their identity and the nature of their contact will be maintained in strict confidence. In fact, there is no absolute right to confidentiality, and the responsibilities of an IG occasionally require the disclosure of sources of information.

1. Even the Inspectors General Act of 1978 (not directly applicable to DoN IG investigations) provides only a qualified grant of confidentiality, because it permits the Inspector General to disclose the identity of complain-

ants over their objection. Section 7(b) of the Act provides that:

> The Inspector General shall not, after receipt of a complaint or information from an employee, disclose the identity of the employee without the consent of the employee, unless the Inspector General determines such disclosure is unavoidable during the course of the investigation.

2. Consequently, although it is appropriate to "grant" confidentiality in some situations, discussed below, **IG investigators must never state or imply that confidentiality is an "absolute" or "unqualified" right that will be protected under all conditions.** Such a promise is misleading because disclosure may be required to accomplish an official government purpose or compelled by law in certain cases.

3. Confidentiality creates a dilemma for any IG organization. On the one hand, an expectation of confidentiality increases the likelihood complainants will come to the IG in the first place, and makes witnesses more willing to cooperate with an IG investigation. On the other hand, as the information an IG is able to provide responsible authorities about the source of facts decreases, so does the credibility of the presentation and the likelihood that action will be taken in response to the investigation. Also, as the severity of the action taken in response to an investigation increases, so does the demand for disclosure of sources. For example, a command may decide to take corrective action - steps that will fix an actual or perceived deficiency in the way it conducts business - even when the investigative facts come from complainants and key witnesses who insist upon confidentiality. But at some point in the proceedings of the more serious forms of disciplinary action - such as a court-martial or an action appealable to MSPB - subjects or suspects will have an opportunity to review all the evidence against them and confront their accusers, whether or not the responsible authority relied on that evidence in deciding what action to take.

4. Most IG organizations have decided to strike the balance in favor of protecting confidentiality. There are two kinds of confidentiality: express and implied.

**0313 IMPLIED CONFIDENTIALITY:** A limited degree of confidentiality is accorded to all complainants by virtue of the Inspector General Act of 1978, as implemented by DoD and Navy regulations establishing the hotline program.

1. DoD Directive 7050.1, "Defense Hotline Program," provides that the DoD hotline program shall have sufficient controls "to provide maximum protection for the identity of all persons using the Defense Hotline" (paragraph E(2)(b)) and requires the DoD components to "establish the administrative and operational controls and procedures necessary to provide maximum protection for the identity of any Defense Hotline Program source who requests anonymity or confidentiality" (paragraph (3)(c)(3)).

2. Enclosure (1) to SECNAVINST 5370.5A, "DoD/Navy Hotline Program," provides, at paragraph 2(c), that:

> Informants under the DoD and Navy Hotline Programs are assured confidentiality to encourage full disclosure of information without fear of reprisal. Normally, hotline users are encouraged to identify themselves so that additional facts can be obtained if necessary. In order to protect to the maximum extent possible the identity of DoD and Navy Hotline users who have been granted confidentiality, NAVINSGEN shall be the point of contact

when such identity is required by the investigator assigned to conduct that examination. In those instances where NAVINSGEN discloses the source, the identity shall be protected to the utmost of the investigator's capabilities.

3. Implied confidentiality applies to all complainants and witnesses, whether or not they request it. Implied confidentiality simply means that the investigator is required to take reasonable steps to avoid disclosing the identity of complainants and witnesses until the investigation is completed and the responsible authority has decided whether or not disciplinary action is appropriate. At that point, the protection afforded by implied confidentiality ends if the decision is to take disciplinary action, because the identities are required for the official purpose of pursuing disciplinary action.

4. Thus, during the course of the investigation, the investigator should not reveal the names of complainants or witnesses to anyone unless it is necessary for the successful conduct of the investigation. In particular, investigators must be especially careful not to reveal the source of information they discuss with the subject or subject command until the investigation is completed and the investigative report has been issued. On rare occasions, however, it may become necessary for the investigator to confront one witness with the statements made by another witness in order to determine credibility or resolve conflicting evidence presented by them.

5. Under this standard, the investigator may provide the names of witnesses (but not complainants) to the responsible authority at the conclusion of the investigation. Indeed, the investigative report will identify all witnesses who have not been given an express grant of confidentiality. However, the investigator should not provide the underlying documentation (sworn statements, results of interviews, investigator notes, etc.) to the responsible authority unless and until such materials are specifically requested by that official.

6. Under no circumstances should the investigator provide information to the subject command or the responsible authority indicating the identity of the complainant as such without the complainant's consent. If the complainant has first hand knowledge and is interviewed as a witness, the investigative notes and the report should treat the information provided in the same manner as any other witness. If the complainant has no first hand knowledge and is not interviewed as a witness, neither the subject command nor the responsible authority has an official need to know the source of the complaint.

7. Should the responsible authority decide to take disciplinary action, subjects may have due process rights to obtain the identity of, and information provided by, witnesses who have only implied confidentiality. For example, civilian personnel against whom adverse action is proposed under 5 CFR 752 Subparts B and C are entitled to "review the material which is relied on to support the reasons for action given in the notice" (see section 752.203(b) for suspensions of 14 days or less and section 752.404(b) for more severe action). Obviously, the investigative report is such material.

8. Similarly, military personnel subject to NJP are entitled to "examine documents or physical objects against the member which the nonjudicial punishment authority has examined in connection with the case and on which the nonjudicial punishment authority intends to rely in deciding whether and how much nonjudicial punishment to impose" (see

paragraph 4c(1)(D) of Part V of the Manual for Courts-Martial). They have similar rights during court-martial proceedings (see Article 46 of the UCMJ and Rule for Court-Martial 701, Manual for Courts-Martial).

9. Since the investigative report includes the identity of witnesses, this information becomes available to subjects once disciplinary action is proposed unless the witness has been given an express grant of confidentiality that specifically precludes disclosure to the subject. Further, if the proposing authorities reviewed additional documents in the investigative file, such as witness statements, these also become available to subjects once action against them is proposed, absent express grants of confidentiality.

10. Most IG investigative files are part of a Privacy Act system of records that is retrieved by subject name. Therefore, under the Privacy Act, once a subject is deprived of a "right, privilege or benefit," as would be the case when discipline is imposed, the subject then has the right to review all of the material contained in the investigative file by making a Freedom of Information or Privacy Act request. This rule applies not only to the identity of, and information provided by, witnesses, but also to complainants, unless the complainant "furnished information to the Government under an express promise that the identity of the source would be held in confidence" (see 5 USC 552a(k)(2)). Thus, it becomes necessary to examine express grants of confidentiality.

11. The subject's exercise of due process and Privacy Act rights does not mean that a third party Freedom of Information Act requestor will subsequently be given access to the same information. Thus, the names (and identifying information) of witnesses who have only implied confidentiality may be withheld from the general public under exemption 7(C), even if they have been provided to subjects. However, this information may still be subject to release pursuant to court order.

**0314 EXPRESS GRANT OF CONFIDENTIALITY:** An express grant of confidentiality occurs when the investigator tells sources such as complainants or witnesses that their identity or the information they provide will receive more extensive protection than that described in paragraph 0313 above. Generally, this happens when the investigator says that the identity of a source will not be revealed to responsible authorities at the end of the investigation, to the subject during the course of disciplinary action, or in response to a Freedom of Information or Privacy Act request filed by the subject.

1. Since there can never be an absolute or complete grant of confidentiality, an investigator who makes a promise that exceeds the limits of implied confidentiality may find the only way to keep that promise is to delete from the investigative report all references to the identity of the source to whom the promise was made, and to information provided by that source which cannot be obtained from another source. In some cases, such as when an allegation is serious and discipline is likely to result if it is sustained, it may become necessary to refrain from making any written record of the identity of the source in order to keep the promise. Since this greatly limits the use to which information provided by the source may be used, the investigator should give an express grant of confidentiality to a witness only in very rare circumstances. It is more common to give express grants of confidentiality to complainants. However, the investigator should be especially cautious when the complainant seeks redress of a personal injury, as it may be difficult to correct the wrong without identifying the complainant at some point in the process.

2. Information provided under an express grant of confidentiality may prove helpful for taking corrective or remedial action. However, when disciplinary action is likely to result, the investigator should anticipate such information will be useful only for the purpose of developing leads. Since witnesses may be compelled to answer an investigator's questions, express confidentiality should be granted to witnesses only when the investigator has come to a dead end and believes the grant would make a witness more candid or helpful in developing useful leads the investigator could pursue with other witnesses.

3. An express grant of confidentiality may encourage a complainant to present allegations and supporting facts that otherwise would remain unknown. However, a promise of express confidentiality should be made only after a specific request by the complainant to whom implied confidentiality has been fully explained. Investigators may decline to give an express grant of confidentiality, in which case complainants must decide whether to provide information under the implied confidentiality standard.

4. Once an express grant of confidentiality is provided, the investigative file must be annotated to reflect this fact, with the exact terms of the grant, in order to facilitate compliance with the Privacy Act exemption noted above.

5. **After an express grant of confidentiality has been given, the terms of the grant shall not be violated without the express approval of NAVINSGEN or receipt of an order from a competent court or administrative tribunal.**

6. Express grants of confidentiality are subject to renegotiation. As the investigation develops, the investigator may find that the allegation cannot be sustained, or disciplinary action supported, unless sources who have been granted express confidentiality agree to be identified. Thus, for example, it is appropriate to recontact such sources in order to try to persuade them to testify in a disciplinary proceeding action. However, when doing so, the investigator must take care not to appear to be making a threat to reveal the identity of the source without consent.

7. In deciding whether to give an express grant of confidentiality, the investigator should consider the following factors:

a. the seriousness of the allegation;

b. the likelihood the interviewee may be subject to reprisal or other harm should the source of the information become known to the subject or other persons who do not want the matter investigated;

c. the ability of DoN to protect the interviewee from reprisal (consider, for example, the difference between private sector employees who are entitled to statutory "whistleblower" protection and those who are not);

d. the importance to the investigation of the information the interviewee is able to provide; and

e. the likelihood the investigator would be able to develop the information through other sources.

8. Whenever an investigator gives an express grant of confidentiality, the investigator must include a warning that the grant may be overturned by court order in appropriate circumstances and that consequently, there can be no "guarantee" of, or "absolute right" to, confidentiality.

9. Although express grants of confidentiality are discouraged, there are occasions where they may be useful to both the investigator and the source. If the source can provide leads sufficient that the investigator does not need to rely upon information that only the source can provide, the investigation may be successfully completed and the source may be able to avoid subsequent identification by the subject or others. Because information provided only by the source would not be used to take action against the subject, it should be possible to protect the identity of the source from release during disciplinary proceedings and any subsequent court action. Subsequently, the Privacy Act exemption would prevent its release to the subject against whom successful disciplinary action has been taken.

**0315 <u>THE RIGHT TO FREEDOM FROM REPRISAL</u>:** Complainants and witnesses who are concerned about confidentiality usually fear reprisal. The right to communicate with an IG free from fear of reprisal is essential to successful accomplishment of the IG mission. It should be discussed with complainants and witnesses who express concerns about confidentiality. It is very important to discuss this right with subjects and subject commands when they are notified of an IG investigation.

1. Some complainants and witnesses have a statutory right to be free from reprisal for disclosing information or otherwise cooperating with an IG investigation. For example, most federal civilian employees have been protected from reprisal for "blowing the whistle" since enactment of the Civil Service Reform Act of 1978. The Inspector General Act of 1978 contains similar provisions. Currently, military personnel, non-appropriated fund employees, and employees of defense contractors enjoy some degree of statutory whistleblower protection. See Chapter 10 for a detailed discussion of whistleblower issues.

2. Whistleblower statutes contain limitations on the type of information that may be disclosed, the persons to whom a protected disclosure may be made, and the type of conduct that constitutes reprisal. In most cases, disclosures of the type of information that would be of interest to an IG organization is covered, and IGs are included in the categories of persons to whom protected disclosures may be made. The major deficiency of most whistleblower statutes is that they do not expressly apply to disclosures made within the chain of command (however, the October 1994 amendments to the Military Whistleblower Protection Act, codified at 10 USC 1034, do expressly protect disclosures of certain types of information within the chain of command).

3. To remedy this defect, and because the Navy encourages its military and civilian personnel to report suspected misconduct to chain of command authorities, it is DoN policy that persons who make good faith disclosures of suspected misconduct to persons or organizations who are "proper authorities" under the U.S. Navy Regulations shall be protected from reprisal of any kind. Depending on the circumstances, people in the chain of command, including immediate and intermediate-level superiors, commanders or commanding officers, IGs, NCIS agents, the Naval Audit Service, the DoD and Navy Hotlines, NAVINSGEN, or the DoDIG may be proper authorities.

4. The Inspector General Act of 1978 states that whistleblower protection does not extend to employees who disclosed information "with the knowledge that it was false or with willful disregard for its truth or falsity." Under those circumstances, the disclosure is not made in good faith (note, however, an allegation may

be made in good faith even if it is not sustained, or is demonstrated to have been wrong). Also, frivolous allegations (allegations of facts that would not constitute misconduct even if true) may be made in good faith by people who misunderstand the applicable standards. However, continued persistence in asserting such allegations after the standards have been explained need not be regarded as made in good faith.

5. Reprisal, or the threat of reprisal, constitutes interference with an official investigation and is a matter of Secretarial interest. **IG investigators who become aware of threats or acts that could constitute reprisal against personnel cooperating in an investigation shall immediately document such information and advise their superiors in the IG chain.** The investigators and/or their superiors should then discuss the matter with appropriate officials in the command in which the threats or acts occurred. **If the matter is not resolved to the satisfaction of the IG at that point, the investigators shall report the matter to NAVINSGEN via the IG chain of command.** In appropriate cases, NAVINSGEN will advise senior Navy officials of the possibility of interference with an IG investigation, investigate the matter, and make recommendations for appropriate action.

**0316 INVESTIGATOR'S RIGHT OF ACCESS:** Personnel performing IG investigations have the right to reasonable access to people, spaces, and documents necessary to conduct the investigation. This right stems from 10 USC 5014 and 5020, which establish NAVINSGEN within the Secretariat, and set forth the general duties of the NAVINSGEN. The statutes are supplemented by SECNAV instruction and US Navy Regulations as discussed below. Note, however, that DoN IG investigative authority does not flow from the Inspector General Act of 1978 except when DoN personnel perform investigations at the direction of the DoDIG.

1. SECNAVINST 5430.57F states that all DoN personnel shall respond to any request or inquiry by NAVINSGEN as if made by the Secretary. It authorizes NAVINSGEN to task other DoN personnel to perform IG functions. It provides that NAVINSGEN personnel (and consequently all personnel operating under NAVINSGEN tasking) shall have unrestricted access to all persons, unclassified information, and spaces within the DoN that NAVINSGEN deems necessary to accomplish its mission.

2. SECNAVINST 5430.57F further provides that, subject to compliance with DoN requirements for handling classified material, NAVINSGEN personnel shall be provided copies, in appropriate form, of all recorded information NAVINSGEN deems necessary to accomplish its mission.

3. Regarding classified information and spaces, SECNAVINST 5430.57F provides that personnel bearing NAVINSGEN credentials are presumed to have a "need to know" for access to information and spaces classified through SECRET, and shall be granted immediate unrestricted access to all such information and spaces within the DoN. It also makes provision for access to information and spaces classified above SECRET.

4. Article 1127 of the US Navy Regulations provides that "no person, without proper authority, shall ... withhold [official records or correspondence] from those persons authorized to have access to them."

5. Persons conducting IG investigations pursuant to NAVINSGEN taskings and IG organizations assigned additional duty to NAVINSGEN are deemed to have the same authority as personnel employed directly by

NAVINSGEN. Access problems that cannot be resolved at the local level may be referred to NAVINSGEN via the IG chain of command for resolution.

**0317 RIGHT TO CARRY CREDENTIALS:** SECNAVINST 5430.57F authorizes NAVINSGEN personnel to carry credentials for identification purposes that are signed by SECNAV. Other DoN IG organizations may issue credentials to investigators as the authority which established them deems appropriate. Personnel tasked to perform IG investigations who do not carry credentials should be furnished with an authorization letter setting forth their authority.

**0318 RIGHT TO ADMINISTER OATHS:** SECNAVINST 5430.57F provides that the NAVINSGEN and credentialed personnel may administer oaths and take testimony under oath. This authority stems from 5 USC 303(b), which states that "an employee of the Department of Defense lawfully assigned to investigative duties may administer oaths to witnesses in connection with an official investigation." Consequently, non-credentialed personnel tasked to perform IG investigations may also administer oaths. Paragraph 0527 discusses when to administer oaths and provides a sample.

**0319 RIGHT TO OBTAIN IG SUBPOENAS:** The DoDIG has the authority to issue IG subpoenas pursuant to the Inspector General Act of 1978. Since the Act does not apply to the Service Inspectors General, NAVINSGEN does not have the authority to issue an IG subpoena. In appropriate cases, however, the DoDIG will assist DoN IG investigations by issuing subpoenas.

1. IG subpoenas are used to obtain documents (not testimony) from persons or organizations outside of the government, i.e., the private sector. They are not used to obtain documents from DoN or DoD personnel or organizations, or from federal agencies outside DoD (such documents should be made available through regular intergovernmental channels).

2. IG subpoenas may be used to obtain any kind of record that would tend to prove or disprove the allegations being investigated. Examples include notes, memos, books, ledgers, diaries, working papers, invoices, time cards, telephone billing and call records, financial and banking records (subject to certain restrictions), regardless of their form, i.e., hard copy or electronic storage media such as computer disks.

3. Examples of cases in which resort to an IG subpoena may be useful include frequent flyer credits abuse (airline records), falsification of SF-171 employment applications (records from former employers and schools), travel fraud (hotel, car rental, and airlines bills and other records), telephone abuse (telephone company records), conflict of interest cases (records of financial holdings, etc.), and professional competency cases (hospital and other health professional records).

4. Requests for DoDIG assistance in obtaining IG subpoenas should be made to the Director of the NAVINSGEN Hotline Investigations Division. In most cases, the request should be initiated with a telephone call, so that NAVINSGEN can determine the likelihood DoDIG would issue the subpoena before proceeding with the paperwork. The DoN IG organization seeking the subpoena should be prepared to explain the relationship between the documents sought and the allegations under investigation, and to detail the efforts, if any, already made to obtain the documents on a voluntary basis.

**0320 INTERVIEWEE'S RIGHT TO KNOW STATUS:** In the absence of a specific question from the interviewee, investigators are not required to inform interviewees of their interview

status (witness, subject, or suspect) except to preserve the government's right to obtain a criminal conviction based on information provided by suspects during the interview (in which case, Miranda or Article 31(b) rights are required, as discussed below). However, investigators may advise interviewees of their status, and usually do so in order to expedite the interview. Investigators should anticipate that people will ask whether they are accused or suspected of any wrongdoing at the outset of the interview. If asked, the investigator should reveal the interviewee's current status.

**0321 RIGHT TO RECEIVE MIRANDA OR ARTICLE 31(b) WARNINGS:** The right against self-incrimination flows from the Constitution and, for persons subject to the UCMJ, federal statute. The Miranda and Article 31(b) warnings serve essentially the same purpose - to put everyone on an even footing by minimizing the likelihood some people will waive the right due to lack of knowledge or forethought.

1. In order to preserve the government's right to use, for the purpose of criminal prosecution, any incriminating statements (or their fruits) made by civilian suspects during an interview, those suspects must first be provided a "Miranda" warning if they are interviewed in a custodial setting. For the same reason, military member suspects (and others subject to the UCMJ) are provided Article 31(b) warnings during custodial interviews, and in non-custodial interviews as well.

2. These warnings are quite similar and advise suspects of such rights as:

a. to have counsel appointed without charge under certain circumstances;

b. to consult with counsel before being interviewed;

c. to refuse to be interviewed at all;

d. to have counsel present during an interview;

e. to refuse to answer during an interview those specific questions that would tend to incriminate them, knowing that any answers they do give may be used against them in criminal proceedings;

f. to ask that an interview be suspended in order to consult with counsel; and

g. to terminate an interview at any time.

3. Despite their similarity, there are important differences, such as the Article 31(b) right to counsel without regard to ability to pay. Thus, investigators should use written forms to provide the warnings in order to minimize the chance of providing erroneous advice and to document that the warning was provided. Sample forms appear in the appendix.

4. When the proper warnings are not provided to a suspect, neither the answers obtained during the interview nor their "fruits" (other evidence obtained as a result of information provided in the interview) may be used against the interviewee in a criminal prosecution (including a general or special court-martial). Although evidence developed independently may be used in the subsequent prosecution, it is very difficult to establish such evidence is not the fruit of information provided by the suspect. However, it is possible to interview the person a second time, after a proper "cleansing warning" is given, and use subsequent statements and their "fruits" in such proceedings.

5. If, during an interview, a complainant, witness, or subject says something that gives the investigator reason to suspect the interviewee has committed a criminal offense or a UCMJ violation, the investigator must obtain

legal advice or give a Miranda or Article 31(b) warning before asking questions about the suspect conduct. However, the investigator may continue to ask questions in non-incriminating areas without providing a warning. When all non-incriminating matters have been explored, the investigator who is prepared to give the Miranda or Article 31(b) warning during the interview may then proceed into the incriminating area. In most cases, however, the investigator should conclude the interview and consult with counsel and appropriate authority, (including, for jurisdictional purposes, NCIS) in order to determine how best to proceed.

6. Courts are likely to deem an interview to have taken place in a custodial setting whenever interviewees have reason to believe their freedom of action has been deprived in any significant way. For this reason, even though IG interviews are not "custodial interrogations" in the sense that term applies to police interrogations, the better course is to give a civilian suspect Miranda warnings even when the investigator starts the interview by stating it is not custodial and may be terminated whenever the suspect desires.

7. The reader should note that although self-incrimination is often discussed from the perspective of an individual's rights, the foregoing discussion proceeds on the basis that it is the government's desire to use incriminating statements for the purpose of criminal prosecution (including general and special courts-martial) that compels the warning. Consequently, this manual does not impose a blanket rule that Miranda and Article 31(b) warnings be given in every case where criminal conduct or UCMJ violations are suspected. Rather, in keeping with the non-criminal purpose of IG investigations, the investigator, after consulting counsel and with the concurrence of the appropriate US Attorney or convening authority, may forgo the warnings in order to obtain answers to questions a suspect would be expected to refuse to answer after receiving them. As discussed in the section on de facto immunity below, a contrary view holds that Article 31(b) creates a substantive right and therefore requires the warning be given to all military members suspected of violating the UCMJ, even when the convening authority does not intend to take action under the UCMJ.

**0322 RIGHT TO CONSULT WITH COUNSEL:** The right to consult with counsel flows from the right to not incriminate oneself, and may be asserted by any category of interviewee (suspect, subject, complainant or witness) who reasonably believes a truthful answer to a question would be incriminating, or lead to the discovery of incriminating information later on.

1. It goes without saying that a suspect may assert the right to terminate or suspend the interview pending consultation with counsel after an investigator administers Miranda or Article 31(b) warnings.

2. However, any other interviewee who reasonably perceives that the investigator's questions, answered truthfully, would result in the revelation of incriminating information, also has the right to assert the privilege against self incrimination and consult with counsel before proceeding further, even if the investigator has not provided the warning (as would be the case when the investigator does not consider the interviewee a suspect at the time of the interview).

**0323 INTERVIEWEE'S RIGHT TO REFUSE TO ANSWER INCRIMINATING QUESTIONS:** From the right to not incriminate oneself it necessarily follows that an interviewee may refuse to answer questions that would reveal

incriminating information or lead to its subsequent discovery.

1. Miranda and Article 31(B) warnings advise of this right, and also the right to refuse to submit to an interview at all.

2. Since a complainant, witness, or subject may have engaged in criminal conduct not known to the investigator, the interviewee who understands the right against self-incrimination may assert it in the absence of a warning. At that point, it becomes necessary for the investigator to attempt to determine whether the interviewee has a reasonable basis to assert the right, since the general duty to cooperate with an investigation includes the duty to answer non-incriminating questions.

3. Investigators should be aware of a recent line of MSPB decisions that hold it is improper to charge a subject with making a false statement to an investigator when the lie is made for the purpose of denying the underlying wrongdoing being investigated. The theory behind these holdings is that the government should be required to prove the case without assistance from the subject. There is a similar line of cases under the UCMJ that advance the proposition that a simple denial of the charge is not actionable, but that any false elaboration of the denial (such as the advancement of an alibi) may become the basis for a separate charge of making a false statement during an investigation. Under the UCMJ, however, it is a separate offense to make a false statement under oath. At this time, it is not clear whether MSPB would draw a distinction between false statements made under oath and those that are not.

**0324 INVESTIGATOR'S RIGHT TO REQUIRE ANSWERS TO INVESTIGATIVE QUESTIONS:** DoN personnel have a duty to cooperate with an IG investigation. SECNAVINST 5430.57F states that all DoN personnel shall respond to any request or inquiry by NAVINSGEN as if made by the Secretary. Article 1115 of the US Navy Regulations requires DoN personnel to report suspected fraud and related misconduct, neglect or collusion, and SECNAVINST 5430.92A extends the obligation to fraud, waste and related improprieties, and standards of conduct violations. Article 1137 of the US Navy Regulations requires persons in the naval service to report offenses under the UCMJ (except when they themselves are criminally involved in the offense). These provisions may be used to compel DoN personnel to answer questions or face disciplinary action, especially if coupled with a formal grant of immunity from criminal prosection. When witnesses refuse to answer a question, the investigator should consider the following:

1. If the investigator has no reason to suspect criminal conduct by the witness, it is proper to remind a witness of the general duty to answer the investigator's questions unless the answers would be incriminating. The investigator should go on to state that at this point in the inquiry, the witness is not suspected of criminal conduct or UCMJ violations (or, if appropriate, of any wrongdoing), and that the investigator does not know why an answer to the question might be incriminating. The investigator may give examples of non-criminal conduct someone knowledgeable of the matter under investigation may have engaged in, and explain whether the mere observation of certain events (with or without taking action) would be considered criminal conduct or a UCMJ violation. The investigator should then state that witnesses who believe their answers may be incriminating must give that as their reason for refusing to answer a question, and ask the question again.

2. Should the witness then assert the right against self-incrimination, the investigator

must be careful not to push the witness into making an incriminating statement that the prosecuting or convening authority is unable to use (because the witness was not provided Miranda or Article 31(b) warnings). Therefore, it may be prudent to suspend the interview until the witness has an opportunity to consult with counsel.

3. In some cases, the investigator may know what the witness did that leads to the assertion of the right against self-incrimination. The investigator may also know that the conduct is not criminal, or that competent authority has decided not to initiate criminal prosecution. Although it is appropriate to explain that criminal prosecution is not contemplated, the investigator should remember that such assurances are not legally binding, and that some witnesses will think the investigator is trying to trick them into making incriminating statements. Therefore, the witness may still refuse to answer the question. At that point, the investigator will have to decide whether the witness should be ordered to answer the questions, and if a grant of immunity must accompany the order.

4. Investigators have no inherent authority to order interviewees to answer questions. Although military investigators may give such an order to military members who are subordinate in rank, it is not recommended they do so, because that is likely to impair their effectiveness. The better course of action is to request the witness' military or civilian superior in the chain of command issue the order. The superior may discuss the circumstances with the witness, and attempt to gain cooperation without obtaining a formal grant of immunity. However, unless the assertion of the right against self-incrimination is frivolous, disciplinary action taken against uncooperative witnesses who have not been provided a formal, written grant of immunity is likely to be overturned.

**0325 GRANTING IMMUNITY TO COMPEL COOPERATION:** It is appropriate to grant immunity when the government determines the need to obtain information from an individual is more important than obtaining that person's criminal conviction. Once formal immunity is granted, interviewees have no reasonable basis to fear their own incriminating statements or their fruits will be used against them in criminal proceedings. Thereafter, their continued refusal to answer questions may be used to take disciplinary action. There are two types of immunity, use immunity and transactional immunity.

1. Use immunity precludes the government from using the statements of interviewees, or information developed from those statements (their fruits), in criminal proceeding against them. However, the government may still prosecute an interviewee if it has independent sources of information sufficient to support the case. Use immunity is the more common of the two types, and IG investigators are likely to work with only this type.

2. Transactional immunity is an agreement by the government not to prosecute a person for the underlying crime, or "transaction" the individual is suspected of having committed, regardless of the source of information available for use at trial. Although transactional immunity is less desirable than use immunity from the government's perspective, the difficulty in proving that information used in prosecution of an individual was not developed from that person's statement tends to make the distinction between the two types of immunity more of a theoretical concern than a practical consideration.

3. A proper, or formal, grant of use or transactional immunity is in writing and must be

approved by the person who would be authorized to decide whether or not criminal prosecution is appropriate, as discussed in the following paragraphs. Investigators do not have the authority to give a formal grant of immunity.

**0326 GRANTING IMMUNITY TO CIVILIAN PERSONNEL:** Kalkines warnings, also known as Garrity or administrative warnings, are used to immunize civilian personnel.

1. **A Kalkines warning is a grant of immunity from criminal prosecution and must be approved by the US Attorney who has authority to decide whether to prosecute before it may be used.** IG investigators should coordinate with local NCIS agents who will be able to assist in obtaining the US Attorney's approval.

2. The Kalkines warning describes the suspected wrongdoing and advises that the suspect will be asked questions about the matter, which may be used as the basis for disciplinary action. It then explains that the suspect's answers and their fruits may not be used in any criminal proceedings. Finally, it states that the suspect is subject to removal from federal service for refusing to answer the investigator's questions or for failing to respond truthfully and fully (but see paragraph 0323(3) above, which questions the validity of the final warning).

3. Once immunity is granted through a Kalkines warning, the employee is no longer entitled to receive Miranda warnings, and may be ordered to answer questions, even if those answers will be used as the basis for adverse disciplinary action. Nor is the employee entitled to consult with counsel, or to have counsel or other type of representative present during the interview, in the absence of a contract right under a collective bargaining agreement. Should the employee continue to refuse to answer questions, adverse action may be taken on that basis. It is proper to tell immunized employees who express a desire to consult with counsel that they may do so before or after the interview. But see paragraph 0329 below.

4. IG investigators are much more likely to give Kalkines warnings than Miranda warnings. The warning may take the form of a statement that the investigator gives the employee to read and sign. A sample is provided in the appendix. A better method is to have the civilian's superior provide the warning in the form of a letter that also clearly orders the subordinate to cooperate with the investigation by answering the investigator's questions. The employee should be requested to countersign the letter and a copy should be placed in the investigative file with the interview notes. Should the employee refuse to sign the Kalkines warning document, the investigator and the employee's supervisor should annotate a copy to that effect and attach it to the interview notes.

5. A Kalkines warning is not signed by the US Attorney. However, actions taken to obtain the US Attorney's concurrence with the grant of immunity should be documented and placed in the file.

**0327 GRANTING IMMUNITY TO MILITARY PERSONNEL:** Rule for Courts-Martial 704 of the Manual for Courts-Martial provides that only General Court-Martial convening authorities have the power to provide military members formal grants of immunity from criminal prosecution. A lower level convening authority's attempt to grant formal immunity is invalid, and may be disregarded by the military member who does not want to cooperate with the investigation.

1. Absent special circumstances or action taken by higher authority, the first General Court-Martial convening authority in the chain of command over the military member involved will normally sign the grant of immunity. Samples of formal grants of use and transactional immunity appear in the appendix.

2. As in the case of civilians, military personnel who receive immunity may be ordered to answer an investigator's questions or face discipline for refusal to obey a lawful order. The answers provided by military members may be used against them in non-judicial punishment or other administrative proceedings, and they may be tried by court-martial if they refuse to answer questions after a formal grant of immunity. Immunized military members do not have the right to have counsel present during the interview, but they should be advised of their right to consult with counsel before and after the interview. See also paragraph 0329.

3. Note that the grants of immunity provided in the appendix do not contain a specific order directing the military member to answer the investigator's questions, and a separate order must be provided. Follow the same procedures for documenting the order as used for civilians. Investigators who are military officers do have the authority to order lower ranking military personnel to answer their questions, but before doing so should consider whether the interview would be easier to conduct and more productive if another officer were to issue such an order. The practice is not recommended except in unusual cases.

**0328 DE FACTO IMMUNITY:** A de facto grant of immunity takes place when, in the absence of a formal grant of immunity from appropriate authority, a suspect makes incriminating statements (or statements that may lead to the discovery of incriminating information) to an investigator in response to questions relating to the suspected conduct without benefit of Miranda or Article 31(b) warnings (and when, for civilians, the questioning takes place in a custodial setting).

1. An incriminating statement made to an investigator before the investigator suspects the interviewee has engaged in criminal conduct may be used in a subsequent criminal proceeding against the interviewee, as may any fruits of that statement. However, as soon as the investigator forms the suspicion, the investigator avoids creating de facto immunity only by changing the subject, providing the appropriate warning, or terminating the interview.

2. In some cases, the investigator may decide the most direct approach, administering the Miranda or Article 31(b) warnings and proceeding with the interview, is reasonable. NAVINSGEN experience indicates that a surprisingly large number of people do not chose to invoke their rights, and that this tendency increases as the rank or grade of the suspect goes up.

3. However, some people who are told they are suspected of criminal conduct will not consent to the interview. Since very few IG investigations lead to criminal prosecution, administering the warnings may result in the unnecessary loss of valuable testimony, including the suspect's exculpatory explanation that could lead to the refutation of the allegation of wrongdoing. Should the suspect later choose to present that explanation in response to a proposed disciplinary action, the credibility of the IG investigation will be diminished.

4. Another consideration is that some people tend to view the administration of a Miranda or Article 31(b) warning during the course of

an IG investigation as an empty threat used by the investigator to attempt to intimidate them in circumstances that obviously would not result in criminal prosecution. This will destroy whatever rapport the investigator may have with the interviewee and likely lead to an unproductive interview. Worse yet, if the suspect will play a key role in the correction of any systemic problems addressed by the investigation, the primary purpose of an IG investigation may be impaired.

5. The likelihood that an IG investigator will confront the question of Miranda warnings versus grants of immunity is quite low for civilian personnel. Cases with any real potential for criminal prosecution are normally referred to NCIS for action. However, the issue is complicated for military members because almost any form of wrongdoing may be a UCMJ violation and most UCMJ violations can be tried at a special or general court-martial. Indeed, in many circumstances, the military member has the right to refuse non-judicial punishment or a summary court-martial, and insist on a special court-martial, where conviction creates a criminal record.

6. Just as IG investigators have no authority to grant formal immunity, they also have no authority to grant de facto immunity. Investigators who do so without proper coordination leave themselves open to criticism, adverse performance evaluations, and discipline. Before interviewing suspects, therefore, investigators should determine whether appropriate authority wishes to leave open the option of criminal prosecution or is prepared to give a formal grant of immunity. In most cases, it is sufficient for investigators to consult with their assigned OGC or JAG attorney for guidance. When assigned counsel is not available, investigators should consult with the legal office that provides advice to the responsible authority.

7. Once a decision to grant de facto immunity is made and documented for the investigative file, the investigator is not required to obtain a formal grant of immunity unless it is necessary to compel the suspect to answer questions. In many cases, the interviewee will accept the assurances of the investigator that the appropriate authorities have decided criminal prosecution is not appropriate and proceed with the interview. Note, however, that a de facto grant of immunity is not sufficient to require people to answer questions they reasonably believe require incriminating answers, and they may not be disciplined for refusing to answer those questions. Thus, the investigator needs to be prepared to obtain the documents necessary to grant formal immunity from the appropriate authority.

**0329 RIGHT TO HAVE COUNSEL PRESENT:** Military suspects are entitled to have counsel present during the interview; civilian suspects have that right during custodial interviews. Complainants, witnesses and subjects do not have this right, but investigators may permit counsel to attend the interview. In some cases, this makes the interviewee more comfortable and cooperative, and therefore may be of assistance to the investigators.

**0330 RIGHT TO HAVE UNION REPRESENTATIVE PRESENT:** Civilian employees subject to a union contract have the right to have a union representative present during an interview if they reasonably believe that disciplinary action will be taken against them as a result of the interview. This right exists whether the investigator regards the employee as a complainant, witness, subject, or suspect, and is in addition to the interviewee's right to have counsel present. Accordingly, in appropriate cases, both counsel and a union representative may be present during the interview.

The right to union representation extends to all federal employees who are members of the bargaining unit, whether or not they are members of the union itself. The investigator is not required to advise employees of this right unless the specific union contract involved requires it. Investigators may consult with the cognizant personnel office in advance of conducting interviews to determine if this may be the case. To ensure the terms of a local contract are not violated, investigators may ask employees if they are members of a local bargaining unit and, if so, whether they would like a union representative present. Note, however, that it is improper for investigators to ask whether the employee is a member of the union; it does not matter and violates the employee's rights. The union has no right to have a representative present in the absence of a request from the employee.

**0331 RIGHT TO HAVE OTHERS PRESENT:** In some cases, interviewees may ask to have a friend or family member present during questioning. Although there is no right to have such people present, the investigator may permit this if it would appear to facilitate the interview. However, the investigator must be especially careful to ensure the privacy interests of third parties will not be violated.

**0332 PROPER ROLE OF COUNSEL AND UNION REPRESENTATIVES:** During the course of the interview, the interviewee may ask the counsel and/or union representative for advice before answering a specific question. These advisors do not have the right to answer questions for the interviewee or invoke the right against self-incrimination on behalf of the interviewee, but it is appropriate for counsel to advise a client to invoke the right on his or her own behalf. This may require counsel to advise a client not to answer specific questions that might be incriminating (of course, such advice is not appropriate for matters for which immunity has been granted). It is important for the investigator to take control from the outset by explaining what is, and is not, permitted. When counsel or union representatives persist in attempting to tell the story for the interviewee, the investigator should consider whether to ask them if they would like to be interviewed separately as a witness. Although they may not have first hand knowledge of a matter, in some cases they may be able to provide useful information, insights, or theories that the investigator may decide to pursue later. If they persist in disruptive conduct, the investigator may ask the interviewee to request they leave, and if the interviewee refuses to do so, the investigator should terminate or suspend the interview in order to consult with an OGC or JAG attorney, and higher IG authority, to determine the best way to bring the counsel or union representative under control.

**0333 RIGHT TO COMMENT ON ADVERSE INFORMATION:** During the course of the investigation itself, subjects and suspects have no specific right to comment or rebut adverse information about them, or even to be informed of the existence of an investigation. However, considerations of fairness and prudence often lead the investigator to give them this opportunity. It is not necessary to make all unfavorable allegations or information known to them. Generally, allegations not deemed worthy of investigation should not be revealed. Conversely, allegations that appear to be substantiated should be revealed, and the subject or suspect should be allowed the opportunity to comment on them specifically. They should also be informed of, and permitted to comment upon, any other derogatory information that will be maintained in the investigative file or other official record. Comments may take the form of:

1. oral responses made during the course of an interview;

2. sworn or unsworn written statements;

3. documents or physical evidence; and

4. a request that investigators interview others the subject or suspect asserts may have pertinent information the investigator should consider.

In most cases, subjects or suspects should be interviewed near the end of the investigation, after all adverse information has been developed. In some cases, it may be advisable to interview them at an early stage of the investigation, as when they may be the only source of certain information necessary in the preliminary stages of an investigation. In such cases, the investigator should advise them they may be interviewed more extensively at a later date.

**0334 RIGHT TO ENSURE INVESTIGATIVE ACCURACY:** The investigator's paramount duty is to ensure the accuracy of the information contained in the investigative report. A necessary corollary is the ability to convince others that information is accurate should it be challenged after the investigative report is issued. The most likely source of such challenge is the interviewee who claims the investigator did not accurately record what the interviewee said. Before, during, and after the interview, interviewees who are likely to raise such challenges may express concern over their ability to ensure the investigator accurately records the information they provide. At times, they may request to make a tape recording of the interview, to review the notes investigators take during the interview, or to read the investigator's report of investigation. Interviewees have no right to do any of these things. However, the prudent investigator can use the interviewee's concern as a tool to preclude subsequent challenge. Therefore, to ensure accuracy, investigators should consider the following:

1. At the very least, investigators should review their notes with the interviewee before completing the interview. Interviewees who perceive the investigator took accurate notes are less likely to ask to see a copy of the investigator's results of interview report.

2. Investigators have the discretion to ask interviewees to read and comment upon a draft results of interview report, and should do so in appropriate cases. This is especially important when the interviewee provides technical or complex information. The investigator may permit the interviewee to review a draft of the results of interview report at the interviewee's request when it appears likely to make an interviewee more cooperative.

3. An investigator should always consider asking the interviewee to provide a sworn or unsworn written statement. The accuracy of the information in such documents is less subject to dispute than is the investigator's report, and the documents may be used to impeach a person who later tries to change the story. Some investigators believe every witness who has information material to the proof or refutation of an allegation should be requested to provide a sworn statement. Witnesses who are concerned about the accuracy of the investigator's report should also be offered the opportunity to give a sworn or unsworn written statement.

4. When the investigator is concerned the interviewee will recant in the time between the interview and the preparation of the written document memorializing it (investigator's report or signed witness statement), the investigator should prepare the results of interview report or witness statement and obtain the interviewee's signature before completing the interview. In extreme cases, the investigator may wish to tape the interview, and play back answers to specific questions when the interviewee does not agree with the investigator's written characterization of the response.

There is no inherent reason why interviewees may not be provided copies of investigative notes, interview reports, or their own statements. However, while the investigation is pending, there is some risk the interviewee will make this information available to others as a form of preparation for their interview. Thus, absent compelling reasons, such material should not be provided interviewees until the investigation is concluded. For the same reason, interviewees should not be permitted to make their own recording of an interview. If making a tape recording is essential to obtaining the interview (as, for example in the case of a non-federal employee witness who can not be ordered to cooperate), the investigator may be able to convince the interviewee to give the investigator the tape until completion of the investigation. At the completion of the investigation, it is proper to give interviewees copies of their sworn or unsworn written statements upon request. Investigators should also keep in mind that a properly framed FOIA or Privacy Act request can also lead to the release of the factual portions of an investigator's results of interview reports. In dealing with these issues, the investigator should keep in mind that the objective, ensuring accuracy, is of equal concern to the government as to the interviewee.

**0335 RIGHT TO KNOW RESULTS OF INVESTIGATION AND TO REVIEW INVESTIGATIVE REPORT:** Except for military members who allege they have been victims of reprisal covered by 10 USC 1034, complainants, witnesses, subjects and suspects have no inherent right to know the outcome of an investigation or to review any final investigative report that may be issued pursuant to an investigation. However, it is Navy policy to apprise complainants of the general results of an investigation. Fairness dictates that subjects and suspects be afforded the same courtesy. Complainants and witnesses have no greater right to review a copy of the final investigative report than do members of the general public. If they request a copy, they should be advised to file a FOIA request. Subjects and suspects who will not be subject to adverse action also have no greater right to see the investigative report than the general public and should also be told to file a FOIA or Privacy Act request. However, if the appropriate responsible authority does decide to take action against them, then they will be entitled to obtain the report, and much of the other information maintained in the IG investigative file, during the course of, and under the rules applicable to, such proceedings. The IG should not provide these materials to subjects or suspects directly in those cases, but should work through the government counsel assigned to handle the matter. After an adverse action has been taken, a subject or suspect filing a Privacy Act request may be deemed to have been denied a right, benefit or privilege as a result of the IG investigation. In that case, the Privacy Act provides for access to all information except that which would identify a confidential source. Consequently, information that would ordinarily be withheld under FOIA, such as names of witnesses, may be subject to release pursuant to a Privacy Act request.

# CHAPTER 4 - THE PRELIMINARY INQUIRY

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# CHAPTER 4 - THE PRELIMINARY INQUIRY

**0401 INTRODUCTION:** As discussed in paragraph 0203, the purpose of an IG investigation is to obtain facts sufficient to enable responsible authorities to make intelligent decisions about corrective, remedial, or disciplinary action. Some degree of stigma attaches to the subject of every IG investigation, even when the allegations are not sustained. As noted in paragraph 0206, not all matters reported to an IG are appropriate for an IG investigation. Therefore, the purpose of the preliminary inquiry is to gather sufficient information to determine whether a full IG investigation is appropriate with the least adverse impact on the reputation of subjects and their commands.

**0402 PRELIMINARY INQUIRY VERSUS PRINCIPAL INVESTIGATION:** The preliminary inquiry is less formal than the principal investigation because it does not require the creation of a written investigative plan or the preparation of an investigative report. There is, however, no clear line dividing the preliminary inquiry from the principal investigation. Certainly, when it becomes necessary to notify the subject or the subject command that allegations have been made against them, the preliminary inquiry is over. Also, once it becomes necessary to interview witnesses who work with the subject on a regular basis, and who will learn the subject is under investigation by the nature of the interview questions, the principal investigation has started, whether or not the subject has been notified. But conversations with legal advisors, a discrete review of applicable documents or other records, and interviews of a limited nature, in person or over the phone, do not cross the line, especially when they are not conducted at the site of the subject command. For the purpose of this manual, a somewhat arbitrary dividing line is established at the point of preparation of the initial written investigative plan, which thus becomes the first step in the principal investigation. Because experience shows that complainants should be interviewed at the beginning of an investigation whenever possible, and that those interviews sometimes reveal no further investigation is necessary, this manual treats the complainant interview as part of the preliminary inquiry. Therefore it may be conducted before the written investigative plan is prepared. When a preliminary inquiry results in a decision that no further action is warranted, neither an investigative plan nor an investigative report is required. A memorandum for the record is sufficient to document the reasons for the decision to go no further. This minimizes the number of documents in the record that may be subject to disclosure, and therefore helps minimize the adverse impact on the privacy and reputations of subjects and others involved in the inquiry when there is insufficient reason to believe any wrongdoing occurred. Similarly, when the preliminary inquiry results in a referral to a non-IG organization for action, a memorandum is sufficient to close out IG action on the matter unless there is a specific reason for the IG to continue to monitor the case.

**0403 OVERVIEW:** This chapter discusses the following matters: (1) processing the initial request or complaint; (2) opening a case file; (3) issue identification and determining appropriate action, and (4) some miscellaneous considerations. Before proceeding, however, a cautionary note is in order. This chapter covers a great deal of material the investigator should consider before deciding whether to undertake a full investigation, and a casual reading may suggest the preliminary inquiry is a long and complicated process. In practice, the steps discussed in this chapter often take place very quickly.

## PART ONE - PROCESSING THE INITIAL COMPLAINT

**0404 SOURCES OF REQUESTS FOR INVESTIGATIONS:** DoN personnel who, acting in their official capacity, request a formal IG investigation of a matter are one source of requests. The second, and by far more common source, is the phone call, letter, or walk-in visit to a DoN hotline complaint office. Paragraph 0207 contains more information on sources. In some cases, DoN personnel may elect to file a hotline complaint instead of making an official request for investigation.

**0405 SCREENING OFFICIAL REQUESTS:** For the purpose of the preliminary inquiry, it is important to remember that DoN personnel who formally request IG investigations may not be aware of alternative methods for dealing with the matter in question. Therefore, those requests should be subjected to the same analysis as that used for the hotline complaint to ensure they are appropriate for an IG investigation. If a formal request from a Navy official does not appear to be appropriate for an IG investigation, alternatives should be discussed with the official before proceeding with the investigation.

**0406 THE HOTLINE COMPLAINT:** The majority of requests for investigations come through the hotline complaint system. Most hotline complaints received by NAVINSGEN are in writing. A large minority of hotline complaints are submitted by telephone. Calls placed during working hours are answered by the NAVINSGEN hotline staff. After hours, recording machines take messages. Some complaints are forwarded to NAVINSGEN by Echelon II commands or DoN staff. A small number of hotline complaints are submitted by walk-in complainants. The pattern experienced at NAVINSGEN is similar to that of DoDIG and other DoN IG organizations, except that Echelon II and lower echelon DoN IG organizations receive more walk-in complainants. Proper development of information during the initial contact with complainants, whether by telephone or in-person, is critical to the successful conduct of an IG investigation. Specifically, the more information that can be developed through the complainant upon initial contact, the greater the likelihood that a decision can be made as to how the case should be handled without doing an on-site investigation. As noted in paragraph 0402, complainants who can be identified and are willing to submit to an interview should be interviewed as part of the preliminary inquiry.

**0407 CASE PROCESSING WHEN COMPLAINANT IS NOT AVAILABLE:** In many cases, the IG office receiving the complaint has no way to contact the complainant to obtain additional information. In these cases, the office may not have enough information to determine whether the case is appropriate for IG investigation. It should not treat such cases lightly, however, because a significant number of the allegations made by anonymous complaints are substantiated. Therefore, in addition to the analysis discussed later in this chapter, it is a good practice to conduct some preliminary interviews in order to determine whether an investigation is necessary. If the case would ordinarily be assigned to a lower echelon IG office for conduct of the principal investigation, the office receiving the complaint should consider developing some preliminary information through telephone interviews before deciding whether to make the referral. If that is not practical, the case may be referred with a notation that insufficient information was available to the receiving office to determine whether a complete IG investigation is warranted. The tasking office also may ask the receiving office to conduct a preliminary inquiry and advise of its findings before proceeding to the principal investigation when it appears further investigation may not be warranted. When the tasking and receiving office disagree, the tasking office will decide what course of action to take. NAVINSGEN is available for consultation in such cases. The following paragraphs of this part

proceed on the assumption that it is possible to speak to the complainant.

**0408 HANDLING THE TELEPHONE COMPLAINT:** Chapter 6 deals with techniques for the conduct of interviews. For the purpose of the present discussion, only a few points need to be made.

1. Because the telephone is a poor method of communication when compared to the face-to-face interview, the hotline operator, who should be trained in interviewing techniques, may want to encourage the caller to arrange for an in-person interview if an IG office is located near the complainant. In order to do this, the operator should have access to a list of DoN IG organizations that are willing to make investigators available for face-to-face interviews. The IG organization need not be the one that would be tasked to perform the investigation; it is only necessary that it be located near the caller.

2. If the caller is willing give a face-to-face interview, then, as a minimum, the hotline operator should take enough information to determine whether the matter is likely to be one that should be reviewed by a DoN IG organization. If so, then, at the caller's option, the hotline operator should obtain sufficient information to enable an investigator to contact the caller and make arrangements for the interview, or provide the caller with information necessary to contact a conveniently located DoN IG organization. At the conclusion of the telephone interview, the hotline operator should prepare and forward a memo to the DoN IG organization that will conduct the complainant interview. The memo should indicate whether an investigator is to contact the complainant.

3. Callers who are not willing or able to visit an IG office for an in-person interview should be encouraged to write a letter after the phone call is completed, detailing as much information as possible, including the names of others who may have information about the matter and information on how to contact those people. They should be asked to provide documents that relate to the matter as enclosures to their letters.

4. The hotline operator should adhere to the techniques discussed in the following paragraphs as much as possible, keeping in mind that once the complainant hangs up, it may not be possible to re-establish contact to get more information about the allegations at a later date.

**0409 INTERVIEWING THE COMPLAINANT:** Complainants who speak to a hotline caseworker or investigator, in person or over the telephone, are submitting themselves to the interview process at that time. Under ideal circumstances, initial complainant interviews are conducted by the person who also conducts the principal investigation. As this is not always practical, persons doing initial complainant interviews should approach them as if they were going to do the principal investigation. Note that no matter how thorough the initial interview discussed in this chapter may be, the person eventually assigned to conduct the principal investigation should also interview the complainant whenever possible. When complainants insist on anonymity, consider asking them to call back at some later date to receive information that will enable them to contact the investigator assigned to the case. In both interviews, the interviewer should follow the techniques for successful interviewing outlined in Chapter 6 as much as possible given the circumstances of the interview. The following points are particularly important for investigators to keep in mind when dealing with complainants, because complainants are volunteers:

1. Set the stage for a productive interview. Meet walk-ins in a semi-private area that permits initial assessment and control of security and safety. Then move to a comfortable, private area that will encourage the complainant to be completely candid during the interview. Use the same number of interviewers and other precautionary measures as would be appropriate for a witness interview. Establish good rapport; engage in active listening; and assess demeanor, candor, bias, intelligence, motivation and understanding of subject matter and applicable rules.

2. Determine whether classified information is to be discussed, and, if so, that all present have the requisite clearance level (need to know is presumed). Encourage complainants to provide a narrative recital of their concerns with minimum interruption for questions. Be alert for the possibility that complainants may implicate themselves in wrongdoing; be prepared to steer the conversation away from incriminating statements or provide the appropriate Miranda or Article 31(b) warnings discussed in paragraph 0321 (note: most people would not consider a complainant interview to be custodial; hence Miranda warnings may not be necessary). Know how to establish contact quickly with an NCIS agent and JAGC attorney who can provide legal advice to military personnel should they be needed during the course of the interview.

3. After listening to the narrative, ask clarifying questions, then summarize the key points. Work on the summary until the complainant agrees it is accurate and that you understand the information the complainant is trying to convey. Then write the key points down. The objective is to prepare a "mini hotline report," which, as much as possible, answers the following familiar questions framed in the context of one or more allegations that would be appropriate for an IG investigation:

a. who engaged in the wrongdoing;

b. what did they do (or fail to do) that constitutes the wrongdoing;

c. what standard, rule, regulation, law, etc. was violated when this happened;

d. when did this happen;

e. where did it happen;

f. how did it happen;

g. why does the complainant think this happened, i.e., intentional, negligent, lack of training, motive of personal gain or intent to injure another, etc;

h. how the Navy is adversely affected by what happened;

i. who was harmed by what happened, and in what manner; and

j. what corrective remedial, or disciplinary action, if any, does the complainant think should be taken, and why.

4. Probe for weaknesses by asking complainants to explain what they expect the subject of their allegations or others that might not agree with the complainant would say in defense of their actions, and why such a response is not sufficient to dispose of the matter.

5. Ask complainants to identify others who may have pertinent information about the matter that would tend to support or refute the complainant's position. Ask complainants to identify documents that relate to the matter, including those that would tend to support or refute the complainant's position, and, if possible, to provide copies of them for the investigative file as soon as possible.

6. Ask complainants who else they may have contacted in an attempt to get action on their complaints, and what those others have done to date.

7. Ask complainants what they want the IG to do about their complaint. This helps to focus the complaint and permits a determination of whether the case should be referred to another organization. It also provides an opportunity to tell complainants whether their expectations of what the IG can/will do in the case are realistic.

**0410 CONSIDER OTHER AVENUES OF RELIEF:** When it appears appropriate, the interviewer and complainant should discuss whether avenues of relief other than an IG investigation are available and more appropriate. When such avenues are available, IG intervention should be reserved as an alternative to the those avenues reserved for cases in which the chain of command can not or will not address the problem, or cases the complainant fears reprisal. When the problem involves action against the complainant that may be addressed through the EEOC/EO process, the grievance process, or an adverse action appeal process (military or civilian) and the complainant has not yet pursued such recourse, encourage the complainant to do so before requesting IG action. See paragraph 0206 for a list of matters usually considered inappropriate for IG investigation. When the complainant has pursued such remedies with unfavorable results, explain that IG review is only appropriate when there is good cause to believe there was misconduct or impropriety in the application of the process to the complainant's case.

**0411 DISCUSS PRIVACY IMPLICATIONS OF AN INVESTIGATION:** At this point, the complainant may decide that another avenue of relief is more appropriate. If not, then it becomes

necessary to discuss the privacy and confidentiality implications of a decision to initiate an IG investigation. Explain that if the IG office decides to initiate an investigation, a case file that is subject to the Privacy Act will be opened and the complainant becomes entitled to receive a Privacy Act Statement. If the complainant is physically present, provide the Privacy Act Statement at that time. Tell the complainant to keep one copy for reference, and sign another for the IG file. If the complainant declines to sign, make a note of that fact on one copy and put it in the file. If the interview is conducted by telephone, read the statement to the complainant. Mail a copy to complainants who ask for one.

**0412 DISCUSS CONFIDENTIALITY:** If asked, most DoN personnel would say they assume the identities of hotline complainants are maintained in confidence. This may explain why, in a surprisingly large number of cases, complainants never ask whether their identity will be protected. As discussed in paragraph 0312, the ability to identify complainants to responsible authorities and use them as witnesses in adverse actions enhances the likelihood of a successful IG investigation. Therefore, it is important for the interviewer to discuss this matter with complainants and document their wishes. Paragraphs 0312 through 0314 discuss confidentiality issues in some detail. In summary, the interviewer should do the following at the end of the initial contact with a complainant:

1. Explain the normal practice regarding (implied) confidentiality, to include:

a. The identity of the complainant, as such, is not provided to anyone outside of the IG chain during the course of the investigation, and the complainant is not identified in the investigative report, unless the complainant consents to such use. Note that complainants who seek redress of injuries that are personal to them will probably need to be identified to the subject command at some point during the investigative process in order to correct the injury.

b. If the complainant has first hand knowledge of the matter to be investigated, the initial interview, or a subsequent interview, may be treated as an ordinary witness interview, in which case the complainant will be identified as a witness in the investigative report, and perhaps during the course of the investigation should it become necessary to reconcile conflicting witness statements. Note that the subject of the investigation may obtain a copy of the investigative report, without the names of witnesses, at any time, and with the names of witnesses included if disciplinary action is proposed against the subject.

c. The complainant's identity is usually furnished to the investigator, who may be someone assigned to the subject command. If the complainant objects to such disclosure, the complainant's name will not be released to the investigator, but this may limit the investigator's ability to conduct the investigation or substantiate the allegations.

2. Since some complainants do not mind being identified, determine and document whether the complainant is willing to be identified as the complainant: (a) to the investigator assigned to handle the case; (b) to the responsible authority; (c) to the subject command; and (d) to the subject of the investigation. Affirmative responses may assist the investigator assigned the case.

3. Determine and document whether the complainant is willing to testify in any disciplinary proceeding involving the subject or others who are determined to have engaged in mis-

conduct.

4. Finally, explain that if the subject is disciplined, or otherwise deprived of a "right, privilege or benefit" as a result of the investigation, then the subject will normally be entitled to review the entire case file, including information that may identify the complainant, after that action is taken. Determine and document whether the complainant is willing to be identified under those circumstances. If the complainant objects, then the investigator may wish to discuss conditions of express confidentiality. If the investigator and complainant agree to an express grant of confidentiality, the investigator must document the terms of the agreement for the case file and take appropriate action to ensure it is honored.

**0413 NEVER PROMISE ABSOLUTE CONFIDENTIALITY:** In some cases, complainants will ask for an explanation of the IG policy on confidentiality at the start of the conversation. Refer to paragraphs 0312 through 0314 and provide the information set forth in paragraph 0412 above. Investigators must not promise complete or absolute confidentiality because there is no way to ensure it in all circumstances. When complainants are granted some degree of express confidentiality, they may be assigned a "confidential source number" and referred to by that number in all case documents and reports.

**0414 GRANTING ANONYMITY:** Some complainants refuse to provide their names or a means of contacting them during the course of a phone or face-to-face interview. Others provide such information, then wish they had not after they understand the consequences of filing their complaint. People in the first category, along with those who write unsigned letters or leave messages on answering machines without providing their names, are truly anonymous. People in the second category are not, since their identity is known to the hotline operator. However, the hotline operator may elect to treat these people as anonymous complainants by deleting all identifying information from the case file before forwarding it for further action. Such action should not be taken lightly, but the interest of promoting confidence in the hotline system suggests this action is appropriate in some cases. It is especially important when the complainant expresses credible fears of reprisal. When hotline operators decide to grant anonymity, they should give complainants a code number and log it in the case file so complainants who later may need to prove they were the source of the complaint will have a means of doing so.

**0415 DISCUSS REPRISAL:** People who want confidentiality usually fear reprisal. Hotline operators should ask whether complainants have any specific reason to believe they may become the targets of reprisal, and should document those fears in the case file. Hotline operators should explain the Navy's policy against reprisal, as set forth in paragraph 0315, being careful to point out the DoN can not guarantee there will be no act of reprisal, but can take action to undo it and punish those who engage in reprisal.

**0416 DISCUSS THE COMPLAINANT'S ROLE AS A WITNESS:** If complainants who are concerned about confidentiality would appear to be logical witnesses in an investigation into the complaint, explain there is a possibility they may be interviewed at the same time as other witnesses. This may occur inadvertently, when the person conducting the investigation does not know the identity of the complainant. But investigators who know the complainant's identity may decide it necessary to interview them again to reduce the likelihood the complainant may be perceived as the original source of the complaint because not interviewing them along with others in the office would arouse suspicion.

**0417 OBTAINING WRITTEN STATEMENTS:** Although the hotline operator should

take notes during the interview, in some cases it may be appropriate to request the complainant provide a written statement of the allegations and supporting facts. The writing process may assist the complainant in remembering to provide additional pertinent facts. A written complaint is particularly useful if you intend to refer the investigation to another organization. The hotline operator should also consider whether to ask the complainant to provide a sworn statement. This is especially important when serious misconduct by senior officials is alleged. If the complainant agrees to give a statement, the interviewer should take it at that time, even if the complainant expresses a willingness to be interviewed later, to avoid the possibility the complainant may subsequently decline to give the statement. Later, the principal investigator assigned to the case can ask the complainant to prepare a second statement if it becomes necessary. Should the complainant decline to give a sworn statement, take an unsworn statement and make a memo to file noting the declination.

**0418 DO NOT PROMISE AN INVESTIGATION:** The hotline operator should not make any promises or commitments about the action that will be taken, other than that the allegations will be looked into, and, when appropriate, that a response will be provided to the complainant. After the interview is completed, the interviewer should record impressions of the complainant's understanding of the issues, attitude, apparent sincerity, credibility, and veracity in a separate document for the case file.

**0419 DEVELOPING WRITTEN OR ANSWERING MACHINE COMPLAINTS:** When a complaint is received in writing, or by a recorded telephone message, the IG operator should try to contact the complainant to obtain more information along the lines outlined in the previous paragraphs.

**0420 WRITING UP THE INTERVIEW:** After the interview is completed, the investigator should write a results of interview report if a case file will be opened in connection with the complaint. The following part of this chapter discusses criteria for opening a case file.

## PART TWO - OPENING A CASE FILE

**0421 EFFECT OF ESTABLISHING A CASE FILE:** During the course of a telephone or walk-in interview, the complainant and interviewer may conclude the matter does not warrant an IG investigation. Since there is no legal requirement to maintain any record of the call or visit, the investigator has the option to destroy any notes that have been made, and no official record of the visit will exist. Once a case is opened, an official government record is created, and it must be maintained in accordance with the laws and regulations applicable to federal records. It is subject to review by government officials who have a need to know its contents, and it is subject to release in accordance with the Freedom of Information and Privacy Acts. It is also subject to release in litigation. Thus, the mere decision to open a case file could adversely impact the privacy and reputation of people identified in it. Most of the time, the interviewer should open a case file, even if only to document the existence of the complaint for future reference. However, that action is not automatic, and some thought should be given to it.

**0422 WHEN NOT TO OPEN A CASE FILE:** Circumstances which may justify not opening a case file include those instances where, after discussing the case, the investigator and the complainant agree there is no basis for an investigation. This may occur when the investigator can demonstrate to the complainant that the conduct described is not improper under applicable laws or regulations, and therefore a complaint would be frivolous. It also may occur when the complainant and investigator agree that the matter should be

handled by another organization and that the complainant will take the matter there directly. In rare cases, investigators may determine complaints are not made in good faith, i.e., the complainant knows, or could determine with reasonable effort, that the statements made in support of the allegation are false. For example, complainants are not acting in good faith when they have documents that would establish some of the facts upon which the allegation is based are not true, yet fail to give them to the investigator or advise of their existence when submitting the complaint. In those cases, the investigative organization receiving the complaint may decide to ignore the complaint, open a file for record purposes only, or, in cases of extreme abuse, initiate an investigation against the complainant.

**0423 OPENING A CASE FILE TO PROTECT THE COMPLAINANT:** If the complainant agrees to take the matter to the chain of command, the investigator should consider opening a case file for record purposes in order to protect the complainant in the event of reprisal. A case file may be opened at the request of the complainant who fears reprisal, or in any other case where it would be prudent to be able to establish the date and nature of the complainant's disclosure.

**0424 OPENING A CASE OVER COMPLAINANT'S OBJECTIONS:** Once complainants have made contact with an IG organization, they have started an official government process. Consequently, complainants have no right to insist that a case file not be opened on a matter. Nor do they have the right to "withdraw" the complaint during an investigation and demand that an investigation be closed at that point. Such decisions are made by the IG organization.

**0425 REPORTING CASES OF SPECIAL INTEREST:** SECNAVINST 5430.57F requires that DoN organizations performing IG functions immediately advise NAVINSGEN, through the IG chain, prior to initiating any inquiry reasonably deemed likely to be of interest to the Secretary, the CNO, the CMC, or Congress. SECNAVINST 5800.12A requires NAVINSGEN to conduct investigations of allegations against senior DoN officials. **Therefore, upon receipt of a complaint or request for investigation, the IG organization shall analyze the allegations for such matters. All allegations against senior officials shall be forwarded directly to NAVINSGEN. This reporting requirement also applies to information that is developed during the course of an investigation.** For example, when the original allegation is made against a GS-15, but information developed during witness interviews indicates the SES employee who supervises the GS-15 is also involved in the alleged misconduct, the investigating office must advise NAVINSGEN. It may not expand the investigation to include the senior official unless and until NAVINSGEN authorizes such action.

## PART THREE - IDENTIFYING THE ISSUES

**0426 THE CONCEPT OF ISSUE SPOTTING:** In the IG context, issue spotting is the process of reviewing the facts to determine whether, alone, or together with others that may be established upon further investigation, they would provide the basis for a decision to take corrective, remedial, or disciplinary action. The issues that would justify an IG investigation relate to matters involving fraud, waste, abuse, mismanagement, standards of conduct violations, criminal acts, or other matters that relate to wrongdoing that could adversely affect readiness, effectiveness, discipline, efficiency, integrity, and public confidence. The facts presented in many hotline complaints can be tied to such matters. However, others may justify an inspection, an audit, a criminal investigation, or other action for which an IG investigation is not appropriate.

**0427 ANALYZE THE COMPLAINT FOR IG**

**ISSUES:** Careful planning is critical to a successful, credible investigation. As noted in paragraph 0408, the issue spotting analysis begins during the initial contact with the complainant, when the investigator questions the complainant to develop more information. It continues after the interview is completed, when the investigator determines whether or not to open a case file, and what referrals, if any, may be necessary. Thus, issue spotting is the first step of the planning phase of an investigation. Consider the following:

1. The ability to spot issues is directly related to the investigator's familiarity with, and understanding of, the laws, rules, regulations, directives, instructions, notices and policy statements that dictate the manner in which the government may do business.

2. The investigator needs to have access to such material, and every IG office should have easy access to a basic reference library containing the most frequently consulted references, such as the DoD Joint Ethics Regulation.

3. The OGC or JAGC attorney assigned to assist an IG organization may be consulted during issue spotting. Counsel can also assist the investigator in obtaining reference materials and in determining what additional facts would be necessary to establish a violation. When other counsel is not readily available for consultation, IG investigators may contact the NAVINSGEN legal office. Similarly, consider consulting subject matter experts such as contracts, finance, accounting, or personnel specialists as needed to assist in the issue spotting process.

**0428 DRAFT ALLEGATIONS:** Once the issues have been identified, they should be written in the form of allegations to be investigated. Consider the following:

1. Investigators should not rely on the complainant's description or characterization of the facts, but should formulate their own statement of the allegation.

2. An allegation to be investigated should be expressed in neutral, non-emotional terms. It should be formulated in such manner that substantiation (a "yes" answer) of the allegation demonstrates there has been some form of impropriety.

3. In general, the allegation should be worded along the lines of the following manner: someone (the subject) did, or failed to do, something (the act or omission), and such act or omission was improper (the wrongdoing) because it violated some standard (the law, rule, regulation, directive, instruction, notice or policy).

**0429 DECIDE WHAT SHOULD BE DONE ABOUT EACH ALLEGATION:** Having written allegations in the proper format, it is then possible to decide whether official action is warranted and, if so, what that action should be. Refer to paragraph 0205 for review of those matters appropriate for IG investigation. Also, note the following:

1. At this point, it will be clear in some cases that one or more of the allegations must be thoroughly investigated and discussed in a formal investigative report that documents the findings. The investigator is ready to start writing the investigative plan and thus embark on the principal investigation. In other cases, the investigator may want to make discrete inquiries that may develop additional information from other sources before proceeding further. Which way to proceed is a question of judgement that comes with experience.

2. On the other hand, at this point the investigator may realize that some allegations are

simply not significant enough to warrant any further form of inquiry. At best, they may warrant maintaining for record purposes (NAVINSGEN calls this "bookfiling"). If the investigator can not write a good allegation after consulting with others in the office, reviewing applicable regulations, and perhaps talking with counsel, it may be there is nothing to investigate in the first place.

3. When issues of privacy and reputation are considered, some frivolous allegations do not even warrant being recorded in an official government record. Consider, for example, whether a DoN IG organization would investigate the allegation that a government official was unfit for office due to membership in a mainstream religious organization. Then consider whether an IG organization should even maintain a file - subject to release in certain situations - that would contain such an allegation. Note that SECNAVINST 5211.5D forbids the maintenance of any record describing how an individual exercises first amendment rights unless it is pertinent to and within the scope of an authorized law enforcement activity.

4. Sometimes an allegation may be serious, but contain insufficient information or detail for the investigator to determine how to go about gathering more information. Most IGs do not have sufficient resources to engage in fishing expeditions. Complaints that fall in this category should be bookfiled.

**0430 DECIDE WHO SHOULD DO IT:** Once the appropriate type of action has been identified, determining what organization should take that action is relatively easy. For example, if the allegations include the commission of "major crimes" within the jurisdiction of NCIS, they must be referred to NCIS. If the allegations are made against a flag officer or member of the SES, they must be referred to NAVINSGEN. However, absent special circumstances, the general rule is to refer allegations for IG investigation to the lowest level IG organization able to perform an investigation that will be thorough and impartial, in fact as well as appearance. For example, allegations against a CO or XO of an organization should not be performed by the IG attached to the organization for obvious reasons. In addition, allegations made against a lower level employee who is generally known to have a close personal relationship to the CO or XO should be referred to the next higher IG organization in order to avoid any appearance of bias or command influence. Sometimes resource constraints will require an investigation be performed by a higher echelon IG. In such cases, consider the possibility of a joint investigation. Remember that NAVINSGEN has the authority to task individuals outside the IG chain to assist in the performance of IG functions. This is especially useful when expert analysis may be required during an investigation. When a witness has been transferred out of the area of the subject command, consider asking an NCIS or IG office near the witness' new location to conduct an interview as a courtesy that can save time and money. Note that it is appropriate to refer an allegation to another IG office for further preliminary inquiry.

## PART FOUR - MISCELLANEOUS MATTERS

**0431 NOTIFYING COMPLAINANTS OF INITIAL ACTION:** Once you have completed the analysis described above, contact complainants and tell them whether you have decided to open a case file, and whether you intend to conduct an investigation or simply keep it for record purposes. Furnish the case number for future correspondence, and when appropriate, tell complainants they will be apprised of the results of the investigation upon its completion.

**0432 HANDLING FREQUENT COMPLAINERS:** Some people repeatedly bring complaints to

an IG. Indexing cases by complainant names allows you to review old complaints to determine whether the matter has already been reviewed. Based on that review, you may decide it is not necessary to open a new case, or reopen the old one. However, be careful not to "type" the complainant. The fact that an earlier complaint was substantiated does not mean the new one also will be confirmed. Nor should you reject the complaints of someone whose earlier complaints have not been substantiated without a careful and objective analysis of the new matter.

**0433 HANDLING THIRD PARTY REQUESTS FOR ASSISTANCE:** Be careful of third party requests for assistance, especially those sent by a parent or family member. They may have been submitted without the knowledge of that person, and you must be careful that your correspondence with the family member does not violate any privacy rights.

**0434 HANDLING CONGRESSIONAL REQUESTS:** Refer to paragraph 0207 and be careful to distinguish "private" requests on behalf of constituents from official committee requests before proceeding. When in doubt, contact NAVINSGEN.

# CHAPTER 5 - THE PRINCIPAL INVESTIGATION

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# CHAPTER 5 - THE PRINCIPAL INVESTIGATION

**0501 INTRODUCTION:** As discussed in paragraph 0203, the purpose of an IG investigation is to obtain facts sufficient to enable responsible authorities to make intelligent decisions about corrective, remedial, or disciplinary action. The preceding chapter discussed the first, or preliminary phase of the investigation. This chapter proceeds on the assumption that a decision has been made to conduct a complete IG investigation, and a specific IG office has been identified to conduct that investigation. The principal investigation starts with the assignment of the investigator(s) who will conduct the investigation and the creation of the initial investigation plan. Note, however, that if the complainant was not interviewed during the preliminary inquiry, the investigator may do so before preparing the investigative plan.

**0502 OVERVIEW:** This chapter discusses the investigative plan, notification, evidence collection and analysis, and common problems encountered during the principal investigation. Since most IG investigations concern subjects rather than suspects, this chapter uses the term subject to refer to both categories except when it is necessary to distinguish them.

## PART ONE - THE INVESTIGATIVE PLAN

**0503 PURPOSE OF THE INVESTIGATIVE PLAN:** The investigative plan is simply the outline of how the investigator intends to carry out the investigation in order to obtain the facts necessary to enable responsible authorities to make appropriate decisions. It serves as a checklist to ensure all necessary points are covered in an efficient manner. Although a plan is created at the start of an investigation, it should be updated continually, not only to document the steps that have been completed, but also to reflect changes that become necessary as the evidence is developed. A well thought-out investigative plan that is conscientiously updated becomes the outline of the investigative report.

**0504 REQUIREMENT FOR INVESTIGATIVE PLAN:** Every investigation is conducted in accordance with some plan, whether it is deliberate or accidental, efficient or haphazard. Poor planning not only wastes resources, but diminishes the credibility of the investigator and the IG organization. Therefore, every investigator should make a conscious effort to devise an effective, efficient investigative plan. The plan need not be elaborate or formal. In simple cases, it need be no more than a statement of the allegations and a list of the witnesses to be interviewed about each allegation. However, because there is always the possibility that another investigator will be required to take over an investigation in the event of an unexpected illness or other emergency, it is essential that the investigator commit even the most simple plan to writing and place it in the case file so that another investigator may take over the case easily should the need arise.

**0505 ELEMENTS OF A GOOD PLAN:** More complicated investigations require more comprehensive and detailed investigative plans. Some of the items that may appear in a good investigative plan include: (1) a contact list; (2) a notification list; (3) background information; (4) an allegations list; (5) an outline of proof, including legal theory and evidence required for each allegation; (6) a list of witnesses and documents for each allegation; (7) an interview sequence plan; (8) a chronology of events; and (9) logistical information.

**0506 THE CONTACT LIST:** This section of the plan identifies every person the investigator intends to contact in connection with each allega-

tion to be investigated. The list should contain the name, title, rank or grade, address, phone number and other pertinent information, including their relationship to the investigation, of each person. The contact list usually grows as the investigation proceeds. In addition to complainants, subjects, and witnesses, the list should include cognizant COs, XOs, supervisors, local IG office personnel, or other points of contact within the subject command, the JAGC or OGC attorney available for legal assistance, and technical experts such as personnel specialists. The contact list facilitates day-to-day contact efforts during the investigation, and makes it easy to prepare the list of "persons interviewed" when writing the report. It can also be used as a method to keep track of who has been notified of the existence of the investigation.

**0507 NOTIFICATION LIST:** Often a part of the contact list, the notification list should include the name of everyone who has been, or should be, told an IG investigation is taking place, and the dates of notification. It may also include a list of every person the complainant has identified as having knowledge of: (1) the allegations; or (2) the complainant's intent to request an IG investigation. People who should be considered for notification include: (1) complainants; (2) responsible authorities and convening authorities; (3) commanders and/or management at the subject command; (4) subjects; and (5) witnesses. The factors that should be considered in deciding whether, and when, to notify these people are discussed later in this chapter.

**0508 BACKGROUND INFORMATION:** This part of the plan may be used to explain how the allegations were received and to highlight information about the complainant's willingness to be identified with the allegations. It should contain any information about previous investigations of similar allegations requested by the complainant, previous investigations of the allegations, the subjects, or the subject command. In simple cases, information that would appear in other sections, such as applicable laws or regulations, may be included here.

**0509 ALLEGATION LISTS:** Every allegation made by the complainant should be set forth in this section, worded in the manner suggested in paragraph 0428. Those allegations the investigator has decided not to investigate, or to refer to another organization for action, should be included, with an explanation for that decision. Other allegations the investigator believes warrant investigation based on the facts presented by the complainant, or facts developed during the course of the investigation, should also be included, with a statement as to whether they will be addressed in the instant investigation, deferred for later action, or referred to another organization. Listing all of the allegations in one place will help someone unfamiliar with the case obtain a quick overview of the nature and scope of the investigative effort required.

**0510 OUTLINE OF PROOF:** An outline of proof necessary to substantiate each allegation should be prepared in more complex cases. Each outline should start with a statement of the allegation framed by the investigator. It should include a list of applicable standards and how they apply (the legal theory); the facts necessary to prove or disprove the allegation given the applicable legal theory, the likely sources of those facts (complainant/witness/subject interviews, documents), and the standard of proof (usually preponderance of the credible evidence) required to sustain the allegation.

**0511 WITNESS AND DOCUMENT LISTS:** The sources of facts in the outline of proof will lead to the creation of a witness list and a document list for each allegation. These lists can be used to create the list of allegations and documents to be discussed with each witness. These lists also may be used when making the outline for witness interviews and document collection.

**0512 INTERVIEW SEQUENCE PLAN:** The witness and document lists can be reviewed to determine the minimum number of witnesses that will be necessary to interview, which allegations should be discussed with them, and the order in which they should be interviewed. As a general rule, start with the complainant and end with the subject. After the complainant, consider starting with collateral witnesses outside the command to minimize the embarrassment to the subject and disruption to the command should you make an early determination the allegations are unfounded. Remember to include those witnesses who may have information that may tend to disprove the allegation.

**0513 CHRONOLOGY OF EVENTS:** A timeline or chronology of what happened is useful in almost every case. It is most important to have a good understanding of the order in which events occurred before interviewing subjects. The chronology is also very useful in bringing a new investigator up to speed on the case.

**0514 LOGISTICS:** Travel arrangements, local transportation, lodging, access to secured spaces and classified documents, interview rooms, number of investigators required for interviews, office space and equipment are some of the logistical considerations that may impact the efficiency and effectiveness of an investigation. The investigative plan should demonstrate how these matters will be addressed.

**0515 UPDATING THE PLAN:** The investigative plan should be updated as the investigation proceeds. Note whether, and how, the facts necessary for each allegation have been established during the course of the investigation. Make changes to the plan that may be necessary to reflect information obtained during the interview process. Add new allegations to be investigated as they are developed, indicating whether they will be explored as part of this case, or through a separate inquiry. A good plan carefully updated throughout the investigation will facilitate writing the investigative report.

**0516 SENSITIVITY TO REPUTATION:** In creating the investigative plan, it is important to remember that the mere fact someone is being investigated by the IG tends to bring their reputation into question, even if the allegations are not substantiated. Thus, when it is possible to make initial inquiries in a roundabout way, consider taking this approach first. For example, if dealing with allegations of leave abuse, an initial step might be to contact the personnel or finance office assigned to the command in which the subject works before going to the command itself. To help protect innocent subjects in the preliminary phase of an investigation, some investigators would ask to review the leave records of several different people in order to make it appear this is just a routine audit or evaluation of an organization, rather than an investigation of a targeted subject.

## PART TWO - NOTIFICATION

**0517 GENERAL CONSIDERATIONS:** Invasion of privacy, damage to reputation, and the risk of compromising an investigation are important factors to be weighed when deciding who should be notified of an investigation, and when. On the surface, these concerns suggest investigators should delay notifying subjects and subject commands of the existence of an IG investigation until the last possible moment. Yet from the moment the investigation begins, there is a risk subjects and subject commands will learn of the investigation despite the investigator's best efforts to conceal it from them. Knowledge of an investigation that comes through unofficial sources may result in unnecessary speculation about the nature, purpose, and subjects of the inquiry. This may result in as much adverse impact on privacy, reputation, and the effectiveness of the investigative effort as premature official disclosure by the investigator.

Moreover, the investigator can use the notification process to minimize speculation and the likelihood of deliberate or inadvertent interference, concealment of evidence, or reprisal by using the notification process to set the ground rules for the conduct of the investigation. Items to consider in connection with specific players in an investigation are discussed in the following paragraphs.

**0518 COMPLAINANTS:** In most cases, complainants should be notified as soon as the decision to conduct an investigation is made. This alleviates fears that no one is looking at the matter, and reduces the likelihood of multiple investigations of the same issue. Complainants may be told they will be advised of the general results of the investigation upon its conclusion. If the notification is oral, the file should be documented to reflect notification. Complainants should also be informed if the IG office decides no investigation is appropriate. Complainants need not be provided status reports, but there is nothing wrong with advising them that an investigation is still in progress or of the expected timeframe for its completion, since they will be provided that information if they file a FOIA request before the investigation is completed.

**0519 MANAGEMENT:** Word of an investigation usually spreads rapidly throughout the organization in which the investigation takes place. Unless there is a specific need to conceal the existence of the investigation from senior management in the subject command, courtesy and professionalism dictate they be notified before the first contact with witnesses who work in the organization.

1. A solid, professional start is particularly important when the investigator will require the assistance of the command during the course of the investigation. If the initial notice is oral, the investigative file should reflect who was contacted. A personal courtesy visit early in the investigation is also helpful to establish good rapport. If there is an IG organization attached to the subject command, the investigator may choose to make the notification through that IG office.

2. During the personal visit, the investigator may choose to advise the command of the general nature of the allegations, or may state the specific allegations as framed by the investigator if that will not compromise the investigation. Note, however, that the command may not be apprised of the complainant's identity, or allowed to review or make copies of any correspondence from the complainant, unless the case file clearly shows the complainant has agreed to permit such action. Many investigators prefer not to provide this information to the command even when the complainant does not object.

3. During the courtesy visit, it is appropriate to discreetly remind command officials not to discuss the investigation with others, especially witnesses, and to be careful to avoid any action that might be construed as reprisal for initiating or cooperating with the investigation. For example, they should be advised that it is improper to ask people whether they are the complainant. It is also improper to ask witnesses what was discussed during their interviews.

4. In a very small number of cases, it may be possible to determine whether there is any substance to an allegation before contact with anyone in the subject command becomes necessary. For example, an allegation that a senior member of the command was arrested for misconduct might not need to be reported to the command if the investigator first checked with the local police department and learned that the subject was actually a witness to the misconduct and arrest of someone else.

**0520 SUBJECTS:** In most cases, subjects become aware they are being investigated during the course of an investigation, and notice may become necessary to prevent them from interfering with the investigation. **Moreover, subjects against whom credible derogatory information is developed must be provided an opportunity to comment on that information, usually during the subject interview.** Thus, subjects will have to be notified at some point in most investigations.

1. Usually, subjects are interviewed near the end of the evidence gathering stage of an investigation, after the investigator has interviewed everyone else believed to have pertinent information about the case. Thus, the investigator does have the option to defer notifying the subject until the investigation is almost complete. However, the likelihood subjects will learn details of the investigation from someone other than the investigator increases with the number of interviews. Subjects who are not officially informed of the existence and nature of an investigation involving them before they learn about it from unofficial sources may become upset, regard the investigation as unprofessional, exhibit resentment during the interview, or do other things to interfere with the investigation. Sometimes, apprising subjects of the investigation near its beginning and discretely warning them not to interfere, may avoid these problems. Therefore, the investigator needs to balance these competing considerations in deciding when to notify the subject.

2. In deciding when to notify the subject, the investigator should also consider whether it would be useful to conduct a preliminary interview with the subject shortly after the complainant is interviewed, and a more extensive interview after all of the witnesses have been interviewed. In cases where the complainant and subject are in agreement over the basic facts, this may save investigative effort. For example, when there is a question about the applicable rules to apply to a set of facts or the interpretation of those rules, getting the subject's position, especially to determine who the subject may have consulted before taking action, may help to focus subsequent interviews.

3. In rare cases, it may never become necessary to notify or interview subjects. The previous description of the witness incorrectly alleged to have been arrested is one example. However, it can be argued that people have the right to be informed a case was opened under their name even when no credible derogatory information was developed. This decision is best left to the investigating IG office in each case.

**0521 WITNESSES:** Witnesses do not need to be notified of the existence of an investigation until it is time to interview them, or make arrangements for their interview.

1. Because witnesses may desire to consult with counsel before being interviewed, the investigator may wish to notify witnesses who were directly involved in the matter under investigation far enough in advance to permit them that opportunity, or be prepared to suspend or defer the interview while they do so. Note that investigators do not have to advise witnesses that they may consult with counsel. In practice, witnesses are unlikely to seek counsel, especially when they provide only background information, such as descriptions of normal office procedures.

2. Witnesses who ask about the nature of the allegations when notified may be told in advance of the interview if the investigator believes there is some value in having the witness prepare for it. In some cases the investigator may decide to apprise witnesses of the information sought, and ask them to obtain

and review pertinent files, regulations, etc. in preparation for the interview. In other cases, the investigator may decide to request witnesses do nothing to prepare for the interview. The investigator should advise witnesses whether or not they may, or should, discuss the matter with others in preparation for the interview. In most cases, witnesses should be discouraged from talking with others, especially those who also will be witnesses. In some cases, however, witnesses should be encouraged to prepare in advance with others, as, for example, when the investigator seeks specific documents or wants certain types of analyses to be conducted before the interview.

## PART THREE - GATHERING AND EVALUATING EVIDENCE

**0522 EVIDENCE DISTINGUISHED FROM FACTS AND INFORMATION:** During the course of an investigation, the investigator may obtain a great deal of information, including expressions of opinion and statements of facts, as well as materials, such as documents or physical objects. For the purpose of an IG investigation, evidence consists of information and materials that may be used to prove facts that tend to demonstrate whether or not the allegation should be sustained.

**0523 REQUIRED STRENGTH OF THE EVIDENCE:** Almost every investigation requires the exercise of judgement to determine the amount and quality of evidence that must be gathered to prove a fact. To a large extent, this depends on the action that will be taken based on those facts, a matter committed to the discretion of the responsible authority. The strength or weight of the evidence necessary for management to decide to take corrective action may be very low. For example, the mere possibility that classified information was compromised would be sufficient to warrant a change in security procedures, even if the likelihood that the information was compromised is low. At the other extreme, the strength of the evidence necessary to support facts used to convict a person of criminal conduct in connection with the compromise of classified information is so high that we require facts to be established "beyond a reasonable doubt." Knowing when enough evidence has been gathered requires the IG office to anticipate what the responsible authority is likely to do. Periodic consultation with that official may be useful to ensure the investigative effort is sufficient to satisfy expectations without going overboard and expending time and resources unnecessarily. Consultation with the responsible authority's attorney may also be useful, especially to establish the manner in which testimony should be preserved.

**0524 PRESERVING ORAL EVIDENCE:** Many of the facts developed in IG investigations are based on oral evidence obtained during an interview that is subsequently reduced to writing in some manner. Ensuring the accuracy of the writing is not easy, but it is essential to a professional investigation. The techniques include (1) the investigator's notes; (2) a "results of interview" report (ROI) written by the investigator; (3) a written statement prepared by the investigator and/or the interviewee that is signed by the interviewee; (4) the sworn statement of the interviewee; and (5) a tape or stenographic recording of the interview that is available for subsequent transcription. The ultimate consideration is the investigator's ability to establish that the facts presented in the investigative report and supporting documents are accurate and complete when the person from whom those facts were obtained denies them. A corollary is the ability of the government trial attorney to use the investigator's work product to impeach and discredit a recanting witness. The following should be considered:

1. At the very minimum, investigators should review their notes with interviewees before concluding the interview. The investigator may write important facts in sentence form

and ask the witness to initial them to indicate agreement.

2. Witnesses who have first-hand or personal knowledge of facts that are important to prove or disprove an allegation should be asked to provide sworn statements. This is particularly important when the nature of an allegation is such that disciplinary action is likely to result if it is substantiated. In many cases, the most candid statements are obtained if they are prepared and signed before the interview is concluded.

3. At the investigator's discretion, interviewees may be asked to read the investigator's interview notes or subsequent report of the interview, to help ensure accurate reporting. This may help investigators ensure they understood the interviewee and combat later charges they did not accurately report what the interviewee said. Interviewees who pose no objections effectively adopt the investigator's statements as their own. This technique is particularly helpful with expert witnesses, or others who provide technical information in areas with which the investigator is unfamiliar.

4. Investigators should decline to provide interviewees copies of their notes or reports of interview, on the grounds that inadvertent disclosure of such documents to others could prejudice the investigation, and should point out that a witness who does not have such a document can not be pressured into providing it to others. The situation is more difficult when witnesses are asked to prepare their own statements, and the investigator may have to be more flexible in those cases.

**0525 DOCUMENTARY EVIDENCE:** Documents are important sources of evidence in most cases. Issues relating to the use of documents as evidence in litigation are discussed in Chapter 7. Interviewers should review that chapter before collecting documents to determine the kind of questions that must be asked of witnesses in order to provide attorneys information necessary to lay the proper evidentiary foundation for their introduction. In addition, the following considerations apply:

1. It is not necessary to obtain the original of a document for most purposes. However, the investigator should insist on obtaining the best possible copy, should note from whom the copy was obtained, and where the original is located. In order to preserve the document in its original state, it is a good practice to write such information on the back of the document. Should it become necessary to show this information on the face of the document later, it may be placed on a removable sticker that is fastened to the front of the document before making a second copy.

2. If there are any material differences between the original and the copy (some colors of ink do not reproduce well) be sure to note this fact in the investigative file. Use a second copy of the document to annotate the differences between the original and the first copy. If handwriting on a document is not perfectly legible, ask the writer, or someone familiar with the handwriting, to transcribe the handwriting.

3. In some cases, it is important to know who prepared and reviewed the document, as well as who signed it. Likewise, it may be necessary to identify all people who saw or received the document after its preparation. Be sure to ask witnesses who obtained a copy of the document whether they made any marks on it. Review those documents and make copies of any "non-identical duplicates" when appropriate.

**0526 CORROBORATING EVIDENCE:** One measure of the strength of evidence is the number

and type of sources for it. The number of sources necessary depends on the extent to which any particular fact is disputed. In general, the investigator should attempt to obtain two unbiased or disinterested sources to establish the existence of any fact. The statement of two witnesses who are willing to testify in a disciplinary action, or one witness and a document would satisfy this requirement. Complainants and subjects are not considered unbiased. However, when they agree that a particular event occurred, additional corroboration is unnecessary. This is one of the reasons why it is often advisable to conduct a preliminary interview of the subject early in the investigation. In many IG investigations, there is general agreement about what happened; the rationale or motivation for the action is the real issue. Conversely, when there is no clear agreement as to what happened, the investigator should interview more witnesses, although it is the credibility of the witness, not shear numbers, that should lead the investigator to decide which statements to accept as facts. In those cases where it appears that disciplinary action may be appropriate, the investigator needs to consider an interviewee's willingness to testify in determining how many witnesses are necessary to interview to establish a fact.

**0527 STANDARD INTERVIEW PROCEDURES:** There are a few things that should be done in most, if not all, interviews. They are discussed in some detail in Chapter 6. In summary, they include the following:

1. **The Opening** - This sets the tone of the investigative interview. It starts with the introduction of the investigators, the display of credentials, and the explanation of the purpose of an IG investigation. Investigators should never underestimate the effect of such ceremony during the investigation. It tends to make interviewees take the matter more seriously. They should be provided information about the Privacy Act, and how their testimony may be used.

2. **The Oath** - It is not necessary to put all interviewees under oath for the interview. However, many people expect to be put under oath, and it helps to impress upon them the gravity of the matter. On the other hand, some people become reluctant to talk freely when put under oath. It is more common to put complainants and subjects under oath than it is ordinary witnesses. Whether or not the investigator decides to administer an oath, it is appropriate to remind interviewees that knowingly making a false statement to an investigator is a violation of federal law, whether or not the interviewee is under oath. The oath itself is very simple:

Do you swear or affirm that the testimony you are about to give shall be the truth, the whole truth, and nothing but the truth?

3. **Probe for Bias or Influence** - Ask interviewees what they have heard about the investigation, whether anyone has discussed it with them, and what, if anything, they have done to prepare for the interview. In particular, ask if any of the prior testimony has been related to them, and whether anyone has asked what they will say to the investigator, or has attempted to suggest what they should say. Ask if they have any special relationship to the subject, the complainant (if the complainant's identity may be revealed), other witnesses, any victims, etc. such as relation by blood or marriage and any contact outside of the office (golf partners, members of same club, church, visit in each others homes, etc.). Ask if there is any reason why they cannot be fully objective in answering the questions during the interview. Ask if they have any reason to fear reprisal for their testimony.

**4. The Closing** - Determine the interviewee's wishes as to implied or express confidentiality. Ask if the interviewee is willing to testify in any judicial or administrative proceedings that may result from the investigation. Decide whether to grant any degree of express confidentiality. Caution interviewees not to discuss their testimony with anyone else, and to contact the investigator immediately if they believe any action has been taken against them in reprisal for their cooperation with the investigation.

**0528 GETTING STARTED - INTERVIEW THE COMPLAINANT:** If the investigators assigned to the case were not the people with whom the complainant made initial contact, they should interview the complainant as close to the start of the investigation as possible. If the complainant can be interviewed at a site away from the subject command, investigators may consider conducting that interview before meeting with management officials or the local point of contact. In general, investigators should adhere to the procedures outlined in paragraphs 0409 through 0418. If the initial contact was with another investigator, as is most likely to be the case, the investigators should go over any materials obtained from the initial contact with the complainant to ensure accuracy and to update them if necessary. The investigators should take particular care in discussing confidentiality issues with the complainant and carefully document any express grant of confidentiality (see Chapter 3).

**0529 GETTING STARTED - BRIEFING MANAGEMENT:** If the investigative plan calls for a courtesy visit with management officials, this should be arranged as soon as the investigators check in with the local point of contact. If management has already been notified of the investigation, a courtesy visit is not mandatory. Often, it is sufficient for the investigators to advise the point of contact that they are available for a courtesy call. Note that the courtesy call can be used to tell management what is expected from the command in the way of cooperation and non-interference. A discussion of reprisal couched in terms of inadvertent actions that could be misconstrued is an effective way of addressing this serious matter up front. Management will want to know as much as possible about the allegations. Investigators may brief the issues to management unless they have a reason to believe such action would compromise the investigation. Investigators should not identify complainants or show anyone copies of written complaints without the complainant's consent. However, when complainants have consented to allow management and/or subjects to know their identity or read their complaint, providing that information at the outset of the investigation puts the command "on notice" that actions taken with respect to that person will be subject to strict scrutiny and eliminates the argument that management did not know that person had "blown the whistle" when it took the action.

**0530 UPDATE THE PLAN AS INTERVIEWS PROGRESS:** As the investigators proceed with the process of examining documents and interviewing witnesses in accordance with the investigative plan, it is common to develop new issues or allegations. Investigators should update the investigative plan as this information develops in order to determine whether, when, and how these allegations or issues should be developed. Investigators need to pay particular care to the possibility that people initially thought to be witnesses should be treated as subjects or suspects due to the discovery of new evidence. Investigators must constantly evaluate the sufficiency of the evidence as it is developed in order to determine when it is appropriate to conclude the investigation.

**0531 THE INVESTIGATOR MUST DECIDE WHAT HAPPENED:** When witnesses disagree over what happened, the investigator's job is to reconcile those differences if at all possible. This

usually will require the investigator to update the plan and interview more witnesses or search for other documents. It also may require the investigator to chose between conflicting versions of events. Although the investigator's report should clearly indicate which facts are disputed, the report should also state which version is more credible, and why. In many cases, this will depend on the investigator's evaluation of witness credibility during the interview. See Chapter Six for a discussion of techniques that may assist in evaluating credibility.

**0532 CONCLUDING THE ON-SITE INVESTIGATION:** When the investigator has finished gathering evidence from the site, management should be notified, and the investigator should generally be available to attend an exit meeting if requested. The investigators should express appreciation for the support received, and indicate whether there were any significant problems that hindered the conduct of the investigation. The investigators should also advise management whether the command climate suggested a concern over reprisal for cooperating with the investigators. The investigators should not comment on the substance of their findings, noting that the investigation is not considered complete until the investigative report is completed and approved by the investigators' superiors. Management may be advised of the general timeframe in which to expect the report to be finalized, and who to contact for a status update.

## PART FOUR - COMMON PROBLEMS

**0533 UNCOOPERATIVE COMMANDS:** On rare occasions, a command may refuse to make witnesses available for interview, or engage in other activity that impedes the investigation. In such cases, investigators should immediately advise the senior member of the command of the conduct in question and ask that it be corrected. If the senior member fails to take appropriate action, investigators should state that the senior member's superiors will be apprised of the situation and report the problem back to the investigator's IG office for action. **If the problem is not corrected after a phone call to the appropriate superior, the matter shall be reported in writing to the responsible authority with a copy to the Naval Inspector General.**

**0534 REQUESTS TO HAVE OTHER PEOPLE ATTEND INTERVIEW:** In most cases, it is not appropriate to allow witnesses to have friends or relatives present during the interview, because this tends to inhibit candor and full disclosure. The investigator may permit third parties to be present if it appears this would facilitate communications during the interview. The interview record should reflect the presence of third parties. As an alternative, suggest the friend be available in a nearby room. Refer to Chapter 3 for matters relating to the right to have counsel and union representatives present during an interview. See the following paragraph for methods of dealing with interviewees who refuse to testify unless third parties are permitted to be present.

**0535 REFUSAL TO TESTIFY:** Military personnel and civilian federal employees must answer all questions relating to an investigation except those that may be self-incriminating (where immunity has not been granted) and some questions relating to privileged communications. See Chapter 3 for a discussion of immunity issues. See Chapter 7 for a discussion of privileges. In general, the only privileged communications are attorney-client, husband-wife, and certain communications with clergymen. Note that, with the exception of military attorneys assigned in accordance with service regulations to serve as counsel for individuals, there is no attorney-client privilege between government attorneys and DoN personnel. DoN personnel may also refuse to answer questions that involve classified information until they receive assurances that the investigator has the proper clearance. When DoN personnel improperly refuse to submit to an

interview or answer questions, the investigator should arrange for their superior officer or supervisor to issue them written directions to cooperate with the investigator. Civilians who are not federal employees have no legal obligation to submit to an interview. Witnesses who have "convenient" memory lapses concerning matters that may constitute a felony should be reminded that 18 USC 4, "Misprision of Felony," makes it a crime punishable by fine or imprisonment to conceal such information.

**0536 FALSE TESTIMONY:** Interviewees who knowingly make false statements may be subject to prosecution under Articles 107 or 134 of the UCMJ, and 18 USC 1001, "False Statements." Investigators who believe this may be happening should provide a warning that advises of the penalties for false statements. Interviewees should also be advised they are subject to disciplinary action, which in many cases is a more effective warning. Typical warnings statements include:

(1) For Civilian Personnel - I consider it my duty to advise you that under the provisions of Section 1001, Title 18, United States Code, whoever in any matter within the jurisdiction of any Department or Agency of the United States knowingly and willfully falsifies, conceals, or covers up by a trick, scheme or device, a material fact, or makes any false, fictitious, or fraudulent statement or representation, shall be fined not more than $10,000 or imprisoned for not more than five years, or both. Additionally, any person who wilfully and contrary to his/her oath testifies falsely while under oath may be punished for perjury in accordance with Section 1621, Title 18, United States Code. Do you understand?

(2) For Military Personnel - (including anyone subject to UCMJ) I consider it my duty to advise you that any person subject to the UCMJ who, with intent to deceive, signs any false record, return, regulation, order or other official document, knowing the same to be false, may be subject to action under the provisions of Article 107, UCMJ. Additionally, under the provisions of Article 134, UCMJ, any person subject to the UCMJ who makes a false statement, oral or written, under oath, not believing the statement to be true, may be punished as a court-martial may direct. Do you understand?

**0537 REQUESTS FOR ADVICE:** Sometimes an interviewee may request advice from the investigator. Investigators should decline to provide such advice except as it relates to their rights and duties in connection with the investigation, or the procedures relating to the interview. For example, when witnesses ask if they may consult with an attorney prior to the interview, it is appropriate to advise that they may do so. However, if a witness then asks whether consultation would be appropriate in this case, the investigator should decline to answer that question.

**0538 WITNESS INTIMIDATION:** Investigators who believe there may have been tampering or interference with a witness should immediately report the matter to the witness's commander and request action be taken to ensure this ceases immediately. **If the commander does not cooperate, or if the commander is suspected of being a party to the action, investigators shall advise their IG office and request appropriate action. Investigators shall document all incidents of suspected tampering or interference, place them in the case file, and forward a copy to NAVINSGEN.**

**0539 REPRISAL: Investigators who are told by witnesses that they have been subjected to reprisal action for cooperating with the investigation shall conduct an interview of the witness with regard to this matter and forward it to their IG office for action. The IG office shall initiate an investigation, using a different**

**investigator, if possible, and shall give it the highest possible priority. Upon developing any credible evidence to support an allegation of reprisal, the IG office shall notify NAVINSGEN immediately.**

**0540 REFUSAL TO SWEAR OR AFFIRM TESTIMONY:** DoN personnel may be directed to provide testimony under oath or affirmation. Witnesses who object should be advised that they may be disciplined for giving false testimony even if they are not under oath. They should also be advised that since other witnesses are providing testimony under oath, their testimony is likely to be deemed less credible. However, in the few cases where this is a problem, it is often sufficient to take unsworn testimony and note the refusal for the record.

**0541 LOSING IMPARTIALITY: Investigators must be especially careful to avoid situations which may make it appear they are not impartial.** For example, engaging in social activities with anyone involved in the investigation would be inappropriate. In some cases, an investigator may discover that friends, relatives, or long-time working acquaintances will be witnesses in an investigation. Investigators who believe they can remain impartial should still disqualify themselves because the appearance of impartiality will be lost. **Of course, investigators who find that they actually are biased, for whatever reason, must immediately disqualify themselves, even if there is no appearance problem.**

# CHAPTER 6 - INTERVIEWING

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# CHAPTER 6 - INTERVIEWING

**0601 INTRODUCTION:** The spoken word is usually the greatest source of investigative evidence and often is the best evidence in any judicial or administrative forum. No investigation is complete until every important witness, subject, and, when possible, complainant, has been interviewed. Proficiency in interviewing assures a high degree of accuracy in fact development, helps prove or disprove the issue at hand, prevents surprise testimony from arising later, and may help impeach witnesses who change their stories.

1. The purpose of interviewing is to gather **information**. The investigator does this through a process of asking and answering questions. The word "process" denotes a dynamic interaction, with many variables operating with, and acting upon, one another. To understand and effectively employ this process, the investigator must first examine the interview as a unique form of interpersonal communication.

2. The interviewer has but one ultimate goal, reporting the objective truth. Whether interviewers can reach that goal depends in large part on the personal attributes they bring to the interview process. But neither the ordinary experiences of growing up and living among people, nor a formal and extensive school education is of much value in learning how to obtain information from reluctant individuals. Even when interviewing cooperative witnesses, investigators may find it difficult to acquire all the pertinent facts they possess.

3. Most people learn to interview by "trial and error" practice on many persons or by watching other interviewers. Following or using techniques of untrained or inexperienced interviewers can lead to "inbred incompetence." Effective interviewing is a skill that must be learned by special training and the experience that comes from constant practice. Experience cannot be taught, but training in the basic concepts of the proper way to conduct an interview is an invaluable start. Anything that can be learned by "trial and error" can be learned more thoroughly and quickly through systematized study.

**0602 OVERVIEW:** This chapter presents techniques for interviewing and the factors and considerations that govern their application. This chapter cannot replace practical experience, but, in conjunction with the investigator's independent study and diligent application, it can substantially shorten the time required to become a successful interviewer. This chapter begins with an examination of the attributes of a good interviewer. It discusses physical and psychological factors that influence interviews, and provides guidelines for the preparation and conduct of interviews. It concludes with a discussion of telephone interviews.

**0603 QUALITIES OF GOOD INTERVIEWERS:** The qualities and personal attributes required to be a good interviewer can usually be developed with training and practice. Four of the most important qualities and the keystone for success as an interviewer are:

1. Honesty, integrity and the ability to impress upon all interviewees that you seek only the truth regarding the matter under investigation;

2. The ability to establish rapport quickly and under diverse conditions;

3. The ability to listen to interviewees and evaluate responses; and

4. The ability to maintain self-control during interviews and not become emotionally involved in the investigation.

## PART ONE - PREPARATION

**0604 CREATE INVESTIGATIVE PLAN:** The groundwork for successful interviews starts with the investigative plan. The plan establishes who is to be interviewed and in what order. It also defines the category of each interviewee (complainant, witness, subject). Order and category impact the preparation and conduct of the interview. For example, the physical setting of the interview room may be changed with the category of interviewee. Psychological factors to be employed, and the detail, manner and style of questioning also vary with the order and category of interviewees.

**0605 CREATE INTERVIEW PLAN:** Preparation is the key to successful interviewing. The investigator should obtain as much information as possible on the details of the case and the background, character and habits of the persons involved. This helps determine the most effective interview procedures applicable to each interview. In addition to an overall investigative plan, the successful investigator has a specific plan for the conduct of every interview. The plan should take into account the following:

1. The type of interview - subcategories of complainants and witnesses include victims, eye witnesses, hearsay witnesses, expert witnesses and informants. Each may require a slightly different approach. Specialized interview techniques include the use of polygraph and hypnosis conducted by subject matter experts (although rarely used in IG investigations, and then only after consultation with counsel, the investigator should be prepared to respond to the subject who offers to sit for one of these interviews). In rare cases, the investigator may have to employ the specialized techniques necessary for the interview of a minor. If so, consult with counsel.

2. The physical and psychological factors, discussed below, to be used during the conduct of the interview.

3. The questioning technique to be employed (interview or interrogation), and whether the interviewee will be asked to prepare for the interview, shown documents or confronted with information obtained from other interviewees.

4. The outline of topics to be covered, their order, and whether it is necessary to write out specific questions to ensure they are asked precisely (especially helpful when technical issues are involved). Outlines provide clear-cut goals and objectives for the interview. Outlines describe each topic to be resolved, but usually do not include written questions that must be asked. This prevents the investigator from focusing on reading the questions, forgetting to listen to the answers (to ensure they are responsive), and failing to ask appropriate followup questions.

5. Whether a second investigator will be present during the interview, and the role that investigator will play.

6. The manner of recording the information developed during the interview (investigator notes and report, interviewee's written statement, tape recording, videotaping, or a combination of methods).

7. The rights and responsibilities of the interviewee, as discussed in Chapter 3, especially as they will affect whether counsel or union representatives will be present, the requirement for Miranda or Article 31(b) warnings (see Chapter 9 when UCMJ violations may be involved), and the advance

preparation of Kalkines warnings or grants of immunity.

**0606 DETERMINE PHYSICAL INFLUENCE FACTORS TO USE:** The physical environment in which an interview is conducted can have a tremendous impact on the ability to conduct a successful interview. The physical environment includes not only the interview room itself, but what the interviewee will, and will not, be permitted to do during the course of the interview, as these physical factors definetly influence mental activity and the control of the interview.

1. The physical environment such as comfort, noise, privacy, distance between the interviewer and interviewee, seating arrangement and territoriality affects interviews. The investigator can enhance the interviewee's concentration and motivation with a well-lighted, pleasantly painted, moderately sized room that has a comfortable temperature and proper ventilation.

2. Conversely, noise, movement and interruptions, especially telephone calls, disrupt concentration, thought patterns and the mood of the interview. People have difficulty listening and thinking when they see cars on the street outside a window, persons moving about in an outer office, or other investigative personnel coming and going. The investigator must provide privacy and a good atmosphere for an effective interview to take place.

3. Generally, the person sitting behind a desk, whether the interviewer or interviewee, gains power and formality. For the majority of interviews planned by the investigator, all communications barriers such as desks, tables, personal items, etc. should be eliminated. The elimination of physical structures limits the ability of the interviewee to hide behind barriers that can provide a feeling of security as well as emotional and psychological support.

5. For friendly witnesses, the room should be casual and comfortable. For a hostile witness or subject, the room should be sparsely furnished with perhaps only chairs for the interview participants. Wall furnishings should be limited to perhaps a calendar to minimize distractions.

6. Physical factors influence mental activity. Smoking, the use of drugs, (legal and illegal), alcohol, coffee or tea with caffeine, and food may dramatically affect the interviewee. Health, age and stamina also must be considered. The investigator must decide whether to permit smoking or drinking during the interview, whether and when to take breaks, and whether food will be permitted. Offering a witness a cup of coffee at the outset of an interview, a seemingly innocuous courtesy, sends a definite message that the interview is likely to be run in an informal and friendly manner. The absence of such a cue may send a contrary message.

**0607 DETERMINE NUMBER AND ROLES OF INTERVIEWERS:** Whenever possible two investigators should conduct an interview. There are a number of reasons for following this rule, and when a second trained investigator is not available, another trustworthy person may be used as a stand-in.

1. Using two interviewers allows one to concentrate on asking questions and observing body language, while the other takes notes and reviews the outline to ensure nothing is skipped. The notetaker can also provide periodic summaries mid-interview, and a concluding summary at the end, to ensure accuracy.

2. Using two interviewers will minimize the likelihood that the investigator and the interviewee will disagree as to what happened during the interview after it is completed, and make it more likely that any disagreement that does arise will be resolved in favor of the investigator. This is especially important when the interviews take place in remote locations, and when the investigator and the interviewee are of the opposite sex. When the investigator must travel and the budget is limited, consider using personnel from another local IG, command evaluation, or legal office as stand-ins.

3. When two investigators are available, one assumes the role of the primary interviewer (generally the responsible case agent) and takes the major role in the interview. The primary interviewer makes the introductions, states the purpose, establishes rapport, and asks the first series of questions. The primary interviewer is responsible for setting the tone of the interview, setting the parameters (if any), initiating the interview and observing the interviewee via all modes of communication. The primary also ensures that secondary interviewers know exactly what is required of them.

4. It is an accepted rule that the primary and secondary interviewers **DO NOT** interrupt each other. This rule will allow each investigator to plan his or her own strategy and employ that strategy throughout the interview. The investigators may decide to switch roles as topics change, or at other logical break points. This allows the investigators to display different personalities to the interviewee, in order to develop the most information from each interviewee.

## PART TWO - CONDUCTING INTERVIEWS

**0608 PHASES OF THE INTERVIEW:** The interview may be divided into several phases or segments, each with its own purpose. The following phases are discussed below: introduction; establishing rapport; questioning for information; summarization for accuracy; and closing.

1. Phase one starts with a three part introduction. Investigators should introduce themselves and identify the office they represent. To establish credibility and introduce an air of formality, the investigators should produce their credentials. If an informal atmosphere is desired, credentials need not be shown unless requested. Second, where appropriate, identify the interviewee. Third, one investigator should explain why they want to talk to the interviewee. Almost everyone experiences apprehension when the meaning of an interview is not clear to them, so investigators should address this at the start of the interview.

2. The third part of the introduction should include a clear statement of the purpose for the interview. The statement need not, indeed usually should not, reveal detailed facts of the case developed to date. Rather, it provides interviewees an overview of what is to come. The statement of purpose should provide a reason for cooperation that leads interviewees to believe they will benefit from their cooperation. For example, if interviewees know the purpose is to learn what they know about an incident, one benefit of cooperation could be that they may be eliminated from suspicion of wrongdoing.

3. The second phase of the interview is rapport. There is little chance of a successful interview unless the interviewee can be induced to talk. Most people resist giving information to

strangers; therefore, interviewers must attempt to establish a sincere and trusting attitude with interviewees to enlist their full cooperation. Rapport is a process and the effort should continue throughout the interview. Furthermore, the effort must appear to be genuine and not affected, or it will be counterproductive.

4. Rapport offers investigators the opportunity to find out what is important to the interviewee, enabling them to determine the most effective interviewing and questioning strategies or styles. It may be nothing more than a handshake, smile, professional demeanor, or the way the purpose of the interview is explained. Establishing rapport may require a more involved discussion of some matter that is important to the interviewee. Rapport includes words, tone, inflection, gestures, facial expression, stance, etc. Rapport conditions the interviewee to talk to the investigators and establishes a secondary, non-verbal method of communication.

5. Questioning is the third phase of the interview. The ability to question effectively is central to the interview process. Questioning techniques are discussed below.

6. The fourth phase, summarization, allows the investigator to summarize the salient parts of the interview to ensure continuity and accuracy. Often the interviewee will clarify or add to information provided earlier in the interview. The summary is an important part of the interview, especially in the one-interviewer interview, because it provides both parties an opportunity to ensure the investigator has recorded all pertinent information accurately. In the two-person interview, the secondary interviewer usually summarizes from notes just taken and may ask any questions not asked by the primary interviewer.

7. The fifth and final phase of the interview is the closing. The close is the continuation of the effort to create rapport and an atmosphere that will ensure the door is left open for future contact. Investigators should thank interviewees for their cooperation or express empathy for lack of cooperation. They should reassure interviewees about any concerns they may have raised regarding the interview or information provided. In this final phase, investigators should give interviewees the opportunity to provide information concerning matters not specifically covered during the interview and ensure they know how to contact investigators should they remember or obtain any additional information. Investigators should also obtain any other identifying data required, including how and when to contact interviewees again should it become necessary.

**0609 USE ACTIVE LISTENING:** Active listening is the most important interviewing skill. It is a good technique for improving communication skills in any context, but it is critical for interviewing, because the investigator does not always have the opportunity to reinterview key witnesses. Active listening is much more than simply concentrating on what the other person is saying, because it requires investigators to constantly test the accuracy of their own perceptions.

1. Active listening begins by putting interviewees at ease and letting them know what they say is important. This is accomplished by minimizing the investigator's own talking while reacting positively to interviewee comments. Head nods, body language that suggests interest, brief statements like "yes," "I see," "go on," etc. let interviewees know the investigators understand what they are saying and consider it important. This encourages them to keep talking.

2. Questioning should be used for clarification and feedback. Paraphrasing, or putting into your own words what the other person seems to be communicating to you, is the central skill in active listening. This technique enables interviewees to know whether or not their point is getting through, or whether the investigators have misunderstood and need further explanation. It minimizes the potential for the interviewee to take exception to the investigator's subsequent report of the interview.

3. Investigators must remember that most interviewees have not developed the skill of active listening, and may misinterpret what they are being asked, even when the question is skillfully phrased. Consequently, interviewees often give an answer that does not respond to the question. Unfortunately, investigators who are not good active listeners do not realize that they never got an answer to their question until they try to write a report of the interview. Nonresponsive answers can be important and useful, because they may reveal what the interviewee is really concerned about and provide a useful basis for follow-up questions. However, the investigator must also be sure to get the answer to the question.

4. To be able to paraphrase effectively, the investigator must keep an open mind and avoid making assumptions or judgements, both of which are distracting. Active listening tests the investigator's own ability to perceive accurately, and demonstrates that the investigator must share in the responsibility for the communication.

5. The proper interpretation of an interviewee's body language is an important part of the skill of active listening and is another reason why, when possible, two people should conduct interviews. While one takes notes, the other concentrates on watching the interviewee to ensure the interviewee's body language (non-verbal communication) is consistent with what the interviewee is saying. Body language may reveal that a verbal denial is really a silent admission.

**0610 READ BODY LANGUAGE:** Most people can control their verbal communications better than their nonverbal ones. We may think before we talk, but our nonverbal communications, or body language, may say more about what we really mean. This is particularly true during an interview. For example, some interviewees will hesitate or pause before or during a response to certain questions in order to think about and formulate the answer. Such hesitation may indicate an attempt to think of a deceptive answer, but it also could be an attempt to give a controlled response to a sensitive question or area of concern. During the pause in the verbal communication, the interviewee may engage in patterns of non-verbal communications that are unconscious and therefore uncontrolled. These spontaneous reactions generally are more reliable indicators than the verbal response that accompanies or follows the body language. Thus, the good investigator reads body language to give context to verbal communication.

1. Eye gaze, eye movement, pupil constriction/dilation, touching and distance or spacing are all part of nonverbal communication. The interviewer needs to know how to use these concepts in the interview to reduce or increase tension in an interviewee, to gain rapport and enhance cooperation.

2. Likewise, interviewers need to be aware of the interviewee's nonverbal behavior to properly evaluate credibility. Is the interviewee withholding information? Lying? Unfortunately, there is no one single nonverbal indicator which magically tells whether the interviewee is being deceptive. The interviewer evaluates for stress because most

people will exhibit some signs of stress when they are omitting or falsifying information. However, the stress may be induced by a variety of unrelated issues or problems, and every individual has favored verbal and nonverbal behavior that is normal for them. The interviewee's intelligence, sense of social responsibility and degree of maturity may also affect stress.

3. There are a number of general observations about mood and veracity that may be drawn from specific body language responses. A few of them are discussed in the following paragraphs.

4. Failing to exhibit any facial expression indicates deception. The expression of fear is more likely to indicate guilt. In contrast, an expression of anger probably indicates innocence. A defiant expression, especially when coupled with crossed arms and/or legs indicates guilt, as does an expression of acceptance (sad expression, eyes dropped or hand across the mouth). Indications of pleasure (including cocky or challenging attitudes) are typical expressions of guilt (an exception may apply to juveniles).

5. Facial color changes may be revealing. Blanching, an indication of fear, also indicates guilt. Blushing is more likely to mean embarrassment than guilt.

6. Normal eye contact is maintained 30% to 60% of the time between two persons in conversation. Interviewers have greater freedom in maintaining or breaking eye contact than interviewees, and a long gaze by an interviewee may be interpreted as a challenge. Truthful persons look at their interviewers longer during the interview than do deceptive persons. Truthful eyes are direct, but not overly so; open with a good portion of the whites showing; are attentive and looking at the interviewer. Deceptive interviewees tend to avert their gaze and avoid direct eye contact. They range from evasive to a cold stare; they may appear tired or have a glassy look.

7. A body movement such as shifting the torso shows internal conflict when the movement is consistently in time with the questioning. Deceptive people unconsciously retreat from a threatening situation. In those cases, interviewees actually move their chair away from their interviewers, or toward a door or window.

8. Body posture for truthful interviewees is often:

a. Open, upright and comfortable

b. Aligned frontally to face the interviewer directly;

c. Leaning forward with interest;

d. Relaxed, casual, with some nervousness or excitement;

e. Smooth in its changes, with no pattern.

9. Body posture for deceptive interviewees is often:

a. Slouched in chair, preventing the interviewer from getting close;

b. Unnaturally rigid;

c. Lacking frontal alignment;

d. Tending to retreat behind physical barriers;

e. Erratic in its changes (can't sit still);

f. Closed (elbows close to sides, hands folded in their lap, legs and ankles crossed);

g. A "runners position" (one foot back ready to push off);

h. Exhibiting head and body slump.

10. Supportive and symbolic gestures may be used to show:

a. Sincerity, with open arms, palms up;

b. Disbelief, with hands to chest (who me?);

c. Denials, by head shaking;

d. Accusation, by pointing a finger (usually by a truthful person);

e. Threats, by pounding or slamming the fist (usually by truthful person);

f. Helplessness, with hands to the ceiling and statements like "please believe me", (usually exhibited by an untruthful person);

g. Disgust, by turning the head away and sighing (indicative of an untruthful person);

h. Agreement, by nodding the head and dropping eye contact, to indicate an admission.

i. Lack of interest, with head or chin in hand and head cocked;

j. Interest, with head or chin in hand and head straight;

k. Closed posture (deception), by crossing of arms, legs, ankles, or by hiding hands and feet, mouth or eyes.

11. Grooming gestures are exhibited because the body needs stress and tension relievers. Grooming gestures keep the hands busy and allow the interviewee a delay in answering questions. They usually occur when the interviewee is lying and are inappropriate for the situation.

12. Some general observations regarding the verbal patterns of truthful and deceptive persons include the following:

a. Deceptive persons tend to deny their wrongdoing specifically while the truthful person will deny the problem in general.

b. Deceptive persons tend to avoid realistic or harsh language while the truthful do not.

c. Truthful persons generally answer specific inquiries with direct and spontaneous answers. The answers are "on time" with no behavioral pause.

d. Deceptive persons may fail to answer or delay answers. They may ask to have the question repeated or repeat the question asked. This allows them time to think of an answer.

e. Deceptive persons may have a memory failure or have too good a memory.

f. Deceptive persons tend to qualify their answers more than truthful persons.

g. Deceptive persons may evade answering by talking off the subject.

h. Deceptive persons may support their answers with religion or oaths. The truthful rarely employ this tactic.

i. Deceptive persons tend to be overly polite and it is more difficult to arouse their

anger. The truthful will be quick to anger and any denial will grow stronger.

j. Deceptive persons may feign indignation or anger initially but will quit as the interview continues.

13. It is important that the interviewer "actively listen" to both verbal and nonverbal communication processes throughout the interview. The interviewer must read clusters of behavior and may not rely on a single observation. When analyzing behaviors, first determine what the "normal" behaviors are for the interviewee. In establishing the norm keep in mind the context of the environment and the intensity of the setting. Look for changes/variations in this norm. Be aware of cultural differences. Evaluate for timing (when the behaviors occur) and consistency (how often the behaviors occur); to be reliable indicators of truth or deception, behavioral changes should occur immediately in response to a question or simultaneously with the interviewee's response.

14. Limitations and exceptions to the use of body language are based on factors such as emotional stability, cultural variations and the age of the interviewee, outside influences such as drugs or alcohol, and the intelligence of the interviewee (the higher the level of intelligence, the more reliable are the behavioral symptoms as an indicator of truth or deceit).

15. A final caution: effective use and interpretation of body language requires training and practice. Investigators should be wary of making decisions about interviewee veracity based only on their interpretation of the interviewee's body language, without some other form of evidentiary verification.

**0611 <u>CONTROL PSYCHOLOGICAL FACTORS</u>:** There are a number of psychological factors that have a direct bearing on interviewing techniques and influence the reliability of the information obtained. It is highly desirable that the investigator ascertain the existence of such factors in the interviewee and, in some cases, reduce or heighten them. Some of the more important emotional factors are anger, fear and excitement. Such factors are readily recognizable through their physical and verbal manifestations.

1. Interviewees who become angry may resist the interviewer emotionally. In most cases, this anger must be suppressed. In some cases, however, anger may cause interviewees to make truthful admissions they would have withheld. Investigators must keep their own anger in check, but on occasion may use it to influence interviewees, especially when they appear to be withholding information because they do not think anyone cares.

2. Fear is aroused through any present or imagined danger. The fear associated with interviews is not fear of physical danger, but psychological danger which is associated with job and financial security. This emotion may be beneficial when interviewing hostile witnesses and subjects. When attempting to elicit information from friendly witnesses, investigators should attempt to minimize its influence.

3. Excitement tends to heighten perception and may leave false impressions. However, neutral excitement means the interviewee is merely prepared to meet whatever may arise. It is of some concern to the interviewer since it also may affect the perception of the witness. It could develop into fear or anger with their attendant changes in mental attitude. Usually, neutral excitement is aroused when people are aware of a potential danger not specifically directed at them, as would be the case in a witness interview. It usually may be removed by elimination of the supposed danger or by

adequate assurances to witnesses that they are not threatened by the situation. This can be accomplished by telling interviewees that they are being interviewed because they may have pertinent witness information to the matter under investigation and are not the target or subject of the inquiry.

**0612 INTERVIEW GUIDELINES:** When conducting an interviewing session, follow these guidelines during the interview:

1. Greet the person to be interviewed in an appropriate manner;

2. Define or state the purpose of the interview;

3. Establish rapport;

4. Maintain control, don't let the interviewee interview you;

5. Don't argue;

6. Try to evaluate each piece of information or allegation on its own merit; interviewees may present many allegations that are patently untrue but also make an allegation that has great significance or import; investigators who stop listening will miss the latter;

7. Refrain from trying to impress the interviewee unless such action is specifically used as an interviewing technique;

8. Maintain strict impartiality and keep an open mind, receptive to all information regardless of its nature;

9. Listen before taking action;

10. Take your time, don't hurry;

11. Be a good listener;

12. Accept the interviewee's feelings;

13. Ensure you understand what the speaker is trying to convey;

14. Use appropriate questioning techniques (see part three);

15. Make perception checks to ensure you understand what the interviewee means;

16. Use silence when it is appropriate to force a response;

17. Do not try to solve the problem during the interview, but do mention the types of subject-matter experts (personnel specialists, counsel, etc.) that may be of assistance;

18. Review your notes and information to ensure you and the interviewee agree on what was said;

19. Ask what the complainant or interviewee expects or wants to happen as a result of the information provided;

20. Make no promises;

21. Ask if there is any other issue or information the IG should know or anything else the interviewee would like to add;

22. Set up time for continuation, if necessary;

23. Extend your appreciation; and

24. Close the interview appropriately.

**0613 NOTETAKING:** Notetaking is the foundation for the actual writing of sworn statements, results of interview reports, and the investigative report itself. Notes are any recorded facts made contemporaneously with the activity being noted that might be pertinent to the investigation.

Notes encompass more than just written words. They may include materials such as notepads, letters or even matchbook covers. They may also include logs, diagrams, photographs and video recordings.

1. Notes should be made at or about the same time as the activity at issue - contemporaneously. If notes are not taken at the time, they should be made as soon as possible after the event. The accuracy should be verified with others who are (or were) present for the interview.

2. Notes must clearly state who wrote them, when and for what purpose. They should contain as much identifying data as reasonable. They should also be accurate (factual), objective, complete, concise and clear. If a quote is recorded in the notes, make it clear in the notes that it is a quote. This is easily accomplished by using quotation marks. If practical, have the person quoted initial that notation. Any other investigative personnel present at the scene should be identified in the notes and may initial the notes taken in order to enhance veracity.

3. Although the most common use of notes is as a memory resource when writing results of interviews, witness statements, or the investigative report, notes also serve an important function when the interviewer and interviewee disagree as to what was said during the interview. That is, **notes may be used to impeach either the investigator or the interviewee.** Therefore, if the interviewee makes a statement that is material to the case, the investigator must be certain to record it in the notes. **When in doubt, write it down.**

4. **It is also important to retain notes until they are no longer necessary.** Since notes may be used for impeachment purposes, this means the notes must be retained until final disposition of the case, including any judicial proceedings. This is especially important when criminal prosecution may be involved, as the rules of procedure and evidence relating to criminal trials and court martials require, pursuant to the Jencks Act (18 USC 3500), the production of investigator notes.

**0614 COMMON INTERVIEW ERRORS:** Good interviewers utilize a great variety of their personal traits, but must be able to adjust their own dispositions to harmonize with the traits and moods of the interviewee. There are many errors that an interviewer can make while doing this. Some of the most blatant are:

1. Showing personal prejudice or allowing prejudice to influence the conduct of the interview - destroys interviewer objectivity and credibility, becoming a self-fulfilling prophecy;

2. Lying - destroys the interviewer's credibility and encourages similar behavior from the interviewee;

3. Hurrying - encourages mistakes and omissions and leads to the interviewer improperly evaluating the veracity of the information provided;

4. Making assumptions, drawing unconfirmed inferences, jumping to conclusions - may result in important information not being requested or allow false or unverifiable information to be introduced into the investigation;

5. Making promises you can't keep - this destroys the investigator's credibility and reputation, and may cause the interviewee to react negatively to other investigative personnel in the future (note: the only promise investigators legitimately can make to a person involved in wrongdoing is: "I will

bring your cooperation to the attention of the appropriate officials");

6. Looking down at or degrading the interviewee, showing a contemptuous attitude - may anger interviewees and encourage unnecessary emotional barriers;

7. Placing too much value on minor inconsistencies - allows the interview and the interviewer to get "hung up" on minor or irrelevant issues;

8. Bluffing - destroys the interviewer's credibility and may allow the interviewee to take charge of the interview;

9. Anger - results in control of the session reverting to the interviewee; it serves as a relief to the interviewee and is a distraction from the information gathering process; and

10. Underestimating the mental abilities of interviewees, especially by talking down to them - antagonizes interviewees and invites them to trip up the investigator.

## PART THREE - QUESTIONING TECHNIQUES

**0615 THE FOUR STEP PROCESS:** Questions are the basic method of obtaining information in every interview. Consequently, the ability to use questions effectively is a key skill that all investigators must possess. Questioning is an art, but one that can be learned if practiced constantly in the proper manner. Questions should be asked in a conversational manner whenever possible, using terms familiar to the interviewee. Good questioning makes use of a four-step process of interpersonal communications that includes:

1. Asking the question;

2. Perceiving the answer;

3. Evaluating the answer for responsiveness, truth and consistency; and

4. Recording the response accurately.

**0616 BASIC TECHNIQUES:** Three basic questioning techniques are: the question that produces a free narrative or "memory dump" type of response; the direct examination that provides specific and detailed information; and the cross-examination that confronts and tests the witness. They may be used singly or in combination in any given interview.

**0617 FREE NARRATIVE:** The free narrative is an orderly, continuous account of an event or incident given with or without prompting. It is used to get a quick overview of what interviewees know or are willing to tell about a matter, and usually is the first questioning technique employed during an interview.

1. The free narrative may be initiated by asking interviewees to tell the investigator what they know about the issue. However, to avoid confusion, false starts, and wasted time, the investigator must be careful to specifically designate the incident, matter, or occurrence the interviewee is to discuss.

2. During the free narrative, most interviewees tend to edit the information they know by telling only what they feel is important. The investigator must be aware of this and encourage the interviewee to give the full text or "tell the whole story." Other times, the interviewee must be kept from digressing, but the interviewer must use a minimum of interruptions and not be too hasty in stopping the narration from wandering, or important points may be overlooked.

3. During free narration, interviewees sometimes provide valuable clues while talking

about things that are only partially related to the matter under investigation. The interviewer should be careful not to erroneously interpret deviations from the anticipated narrative as wandering. Remember: control does not mean dominate. The investigator should make note of these other matters and return to them after the topics in the interview outline have been explored.

**0618 DIRECT EXAMINATION:** Direct examination is a second questioning technique, often employed upon completion of the free narrative. It is systematic questioning designed to elicit new information and fill in the specific details of an event or an incident that are necessary to give a complete, connected accounting of the matter. The direct examination uses the who, what, when, where, why and how questions. To effectively accomplish direct examination the investigator:

1. Begins by asking questions that will not elicit hostility;

2. Asks questions in a manner to develop the facts in some systematic order;

3. Asks one question at a time that only requires one answer;

4. Asks straight forward and frank questions;

5. Gives interviewees ample time to answer;

6. Tries to help interviewees remember without suggesting answers;

7. Repeats or rephrases questions several times as required to get the desired facts;

8. Is sure answers are understood;

9. Gives interviewees the opportunity to clarify answers;

10. Separates facts from inferences;

11. Has interviewees give comparisons;

12. Gets all the facts;

13. Asks questions about every topic discussed; and

14. Asks interviewees to summarize.

**0619 CROSS-EXAMINATION:** Cross-examination is probing or exploratory questioning conducted for the purpose of testing the reliability of or breaking down the previous assertions of the interviewee.

1. Although often associated with the interrogation of subjects, suspects, or "hostile" witnesses (those who do not wish to cooperate), cross-examination may be used during any interview to test the accuracy of information previously provided during the free narrative or direct examination. It is especially useful for: (1) evaluating perception and judgement; (2) testing previous testimony for accuracy; (3) resolving conflicting information; (4) determining completeness; (5) filling in evaded details; and (6) undermining the confidence of those who lie.

2. Insofar as it is practical, the investigator should evaluate and check previous testimony against known or readily available information. This will give clues to portions of testimony that should be explored further during cross-examination, such as attempts to evade answers, vague or inconsistent answers, conflicting information and apparent falsehoods.

3. During cross-examination, the interviewer should generally be friendly but reserved and unemotional; effective cross-examination

must be conducted without abuse or coercion. Have the interviewee repeat testimony about a particular event or occurrence several times. Attempt to keep expanding on details at random without a definite order or sequence. This is usually best accomplished by asking about the event in a different manner from time to time. For example, ask what happened, why it happened, when it happened, who was there, why they were there, how subject happened to be there, and what preceded or followed the event.

4. The investigator should occasionally inject a different context or relationship of details. It is permissible to use suggestive questions and applications during cross-examination. Ask about known information as if it were unknown, or ask about unknown information as if it were known. Use a casual tone and demeanor. Explore vague or evaded sections of testimony. Point out conflicts and ask the interviewee to explain inconsistencies.

5. Summarize the known facts and compare them with the interviewee's statements. Ask the interviewee to explain each item of damaging evidence; then point out the illogical answers. Pay particular attention to body language during cross-examination, especially when confronting interviewees with contradictions and inconsistencies.

6 Use leading questions during cross-examination to test whether interviewees will change their testimony under pressure. Leading questions are phrased in such a way that they suggest the desired answer. In many cases (but not always) questions that can be answered with a "yes" or a "no" are leading. Leading questions may help identify inconsistencies and previous statements that were false or made without an adequate basis. They also help identify weaknesses in an interviewee's perception, and interviewees who will say whatever they think the person they are talking to wants to hear.

**0620 SEQUENCE:** To facilitate the interview, questions should be sequenced from the **general to the specific**.

1. General questions elicit a narrative response type of answer that provides the who, what, where, why, when and how. Questions starting with "tell me ..." also are likely to illicit a narrative response. Questions requiring a narrative response are open-ended questions that encourage the interviewee to talk and allow the interviewer to obtain the "big picture" of what the interviewee may know. The interviewer should refrain from interrupting the interviewee during a narrative response.

2. A specific question calls for a specific or precise answer. It tends to be direct and close-ended. The requested answer is limited to a direct item of information. The specific question should be used to extract more detailed information or to clarify information after a narrative response question is asked.

3. Questions that permit simple "yes" or "no" answers restrict the information that the interviewee may be inclined to give and generally should not be used until a number of open-ended and increasingly specific questions have been asked and answered. They should be used as a follow-up to narrative answers to ensure the investigator understands what has been said. Questions requiring "yes" or "no" answers are frequently suggestive of the answer, or leading. Leading questions are acceptable when summarizing or verifying information and even desirable during cross-examination, but should not be used when seeking new information. Leading questions may be used to enhance recall and

possibly obtain more information when the interviewee cannot remember specifics such as color, height, distance, etc. (the investigator can phrase the question in a way that is leading but makes a comparison and offers a choice).

**0621 USE TRANSITIONS:** There are other ways of asking questions that may assist the investigator when conducting an interview. Questions will progress more logically with less risk of omissions if transitions are used to connect thoughts. To do this, start with the known information and work toward areas of undisclosed information. An efficient method of achieving this sequence is to mentally reach backward over the known information and frame the next question as a logical continuation of the facts previously related. Leading questions provide an efficient technique for making transitions from one topic to another.

**0622 BUILD RAPPORT:** Another method that assists investigators in obtaining information is to express empathy or sympathy to build rapport before asking a question.

1. Although the investigator's main concern is the collection of facts, investigators have discovered that a wealth of information may be revealed when a question is asked dealing with the opinion of the interviewee after rapport is established. In many instances complainants, victims, and witnesses will have much more information about how a transgression may have happened and who may have done it than they are willing to reveal until they have had an opportunity to gauge the sincerity of the interviewer.

2. Also, in many instances when subjects are asked for an opinion regarding wrongdoing or administrative problems within their organization, they may know exactly who did or is doing things improperly, and where the organization is most vulnerable.

**0623 LANGUAGE PROBLEMS**: Language problems are often encountered during questioning portions of the interview. The two people involved may use a common language, but the meanings associated with that language are often quite different.

1. Words are imperfect vehicles for communications learned in a particular environment under particular circumstances. The interviewer must discriminate between words and meaning, as they are not always the same. There is always a physical aspect to the words, but meanings are always inside people. They are interpretations of the message. For example, investigators should always ask exactly what interviewees mean when they use slang.

2. Semantic barriers can be overcome to a great extent by the investigator's own choice of words that avoid slang and ensure communication accuracy. Varying tone of voice and using silence or pauses may also help.

**0624 TECHNIQUES TO AVOID:** There are four major ways of asking questions that should be avoided in most cases.

1. Avoid leading questions during free narrative and direct examination. They tend to cause interviewees to give the answer they think the interviewer wants to hear, rather than what they know to be the truth.

2. A common investigator error is the use of negatively phrased questions. The question that is phrased in the negative appears to be a rather serious problem, even among very experienced investigators. The negatively phrased question not only suggests that the response is to be "no," but also states that no is the right answer. For example, the question, "You wouldn't do that, would you?" clearly

implies the investigator expects a negative response. Most negatively phrased questions are also leading.

3. Compound questions are questions asked in rapid succession before the interviewee can respond to the first question. This includes rephrasing the original question and may include "either or" questions. This method of questioning should be avoided because, at best, it confuses the interviewee and, at worst, can cause information to be missed or overlooked. Compound questions tend to show a lack of experience on the investigator's part and may indicate when the investigator is excited, tense or lost.

4. In many instances, when faced with multiple questions interviewees are likely to answer only the question or questions they remember or that are the least threatening to them. The answers to the other questions are most often lost. For the suspect, compound question offer an out because they may answer only the least incriminating questions and those that create the least amount of stress. Compound questions allow the subject to conceal information while appearing to be forthcoming and cooperative.

5. Complex questions are complicated, not easily understood and cover more than one topic. Complex questions tend to confuse the interviewee and lead to an "I don't know" or an unintended false answer.

## PART FOUR - TELEPHONE INTERVIEWS

**0625 DIFFERENCES:** The first and most obvious difference between face-to-face interviews and telephone interviews is that investigators cannot see the person they are interviewing. Interviewers cannot even be sure they are talking to the person they are attempting to interview. Therefore, investigators must be careful to ask questions that would ensure a reasonable belief that the people they are talking are the people they claim to be.

1. If the investigator receives a phone call from someone whose voice is not recognized, it is a good idea to offer to call the individual back due to the length and expense of the call. This provides a telephone number that can be used to determine where the call originated from, if required. If the caller responds that they are calling from a government telephone, ask for the number "so that in the event we are cut off for some reason," the investigator can recontact them immediately.

2. Other obvious differences are: location; time (due to different time zones); lack of observation and the inability to interpret body language; feeling; and voice inflections. People talking on the telephone are just voices, which makes establishing rapport more difficult.

**0626 PROBLEMS:** In a telephone interview, we do not truly communicate. Therefore, it is imperative that the interviewer be a very careful "active listener" in order to obtain all the information that is being passed on the telephone. It must be remembered, however, that although the telephone interview allows the speakers to gather and/or exchange facts, information and ideas, they may not know to whom they are really speaking, and communication is hindered. The inability to read the nonverbal aspect of the message complicates the process and makes thorough evaluation of the interviewee and the information provided virtually impossible.

1. For the most part, telephone interviews are to be avoided, especially in the case of subjects and important witnesses. Complainant interviews done in-person are also preferred, but in the IG context, this often is not possible because many complaints come via the tele-

phone hotline and provide no means of followup.

2. It is also recognized that cost becomes a factor when in-person interviews require money for travel expenses. Effective time management may also be a factor.

3. The foregoing considerations notwithstanding, try to limit telephone interviews to witnesses who only provide background information, to use as a follow-up technique after the primary interview has been conducted in-person, and to use as a preliminary inquiry technique to determine the extent of someone's knowledge or develop leads.

**0627 GUIDELINES:** The guidelines for telephone interviews are much the same as those for face to face interviews with a few additions and a slightly different emphasis on others. In addition to the guidelines set forth in paragraph 0612, consider the following:

1. Asking a second interviewer to listen on an extension and take notes;

2. Getting call back numbers and setting up a time for continuation, if necessary, at the start of the phone conversation in case one of you has to terminate the call for an emergency or the phoneline goes down before the interview is completed;

3. Reviewing investigative notes with the interviewee more frequently during the interview to ensure that if the interview is terminated prematurely, the information obtained to that point is accurate;

4. Using televideo conferencing equipment when available in order to obtain more of the nonverbal communications that would be available in an in-person interview; although this costs more than using the telephone, it is usually much less expensive than the cost of flying or driving to a distant location.

**0628 QUESTIONING TECHNIQUES:** These are much the same as the face-to-face interview, but take on more importance due to the quality of response required or anticipated. For example, whereas open-ended questions that allow for a long narrative response are very good during an in-person interview, they are less useful in a telephone interview due to the investigator's inability to perceive the nonverbal aspect of the communication. Also, the narrative telephone response may require interruptions that may destroy continuity and could appear to be rude should the interviewee start getting way off the subject or head into irrelevancy. Probing questions are designed to get underlying reasons for previous comments. They are useful when trying to get the interviewee to focus on certain aspects of the topic(s) you want further information on. Direct questions are a good method to narrow the range of answers geared toward gathering specific information about a specific topic. Leading questions are phrased in such a way that the interviewee thinks there is an expected or appropriate response. This type of question can create a climate in which the interviewee becomes defensive and feels manipulated. It can be useful in getting the interviewee focused when they are vague or speaking in generalities. Question softening techniques are very useful during telephone interviews. Begin questions with the words "I am curious....?" or "I was wondering....?" or "Would you happen to know....?"

**0629 ENDING THE TELEPHONE INTERVIEW:** Don't be in a hurry to end the telephone interview. Much information may be relayed in small talk and casual conversation when the interviewee thinks the interview is over. Review investigative notes with the interviewee carefully to ensure agreement as to what the issues are and what was said about them. If unable to obtain all the information needed in the time available, make

an appointment and get the telephone number to talk to the person again to obtain the information. If appropriate, interviewees may volunteer or be asked to provide documents to support their complaints or to corroborate information. If they are making a complaint, it is their responsibility to provide the information and they should be told so. Avoid putting pressure on interviewees during a telephone interview because they could become hostile, lose rapport, and hang up.

# CHAPTER 7 - EVIDENCE

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# CHAPTER 7 - EVIDENCE

**0701 DEFINITION:** Evidence consists of information and objects which are used to prove or disprove facts. The IG investigator gathers evidence in order to determine the facts in the case. Although the investigative report may not directly address the evidence behind every fact stated in the report, the quality of that evidence will eventually determine the degree to which the facts will be accepted by others, especially in administrative or judicial proceedings. Rules of evidence exist to ensure evidence is reliable, and experienced investigators should be familiar with and apply the more important rules and the concepts behind them.

**0702 TYPES:** Evidence includes information obtained from people, documents, and physical objects. Information from human witnesses may be testimonial (oral descriptions of statements, acts, and events) or demonstrative. It may constitute first hand knowledge of witnesses, or recitation of what they have learned from others (hearsay). Documents may be obtained by the investigator merely to prove their existence (there was a contract), or to establish the substance of their contents (the contract was signed by a specific person, or it included a specific provision). Similarly, physical objects may be used to demonstrate their existence or identity (the serial number on the notebook computer found in a private residence establishes it is government owned property), or to demonstrate a particular characteristic or quality of the object that is subject to tampering without careful control (chain of custody) of its handling (data tending to prove a violation of the Procurement Integrity Act, stored in the computer at the time it was found in the residence, has not been altered since the computer was seized at the residence).

**0703 QUALITIES OF EVIDENCE USED IN INVESTIGATIONS:** The investigator should consider the following qualities of evidence in determining its value to the investigation:

1. **Relevance** - In obtaining and evaluating evidence, consider its relevance by asking whether it tends to make a fact that is of consequence to the inquiry more probable than it would be without that evidence. If not, then the evidence is not relevant, and its reception, consideration, or incorporation into the investigative report is not appropriate. The question of relevancy often arises in the consideration of circumstantial evidence, discussed in paragraph 0704.

2. **Materiality** - The explanation of relevancy given in the preceding paragraph is similar to the current definition of relevancy in the Federal Rules of Evidence, and encompasses the traditional concepts of both relevancy and materiality. Understanding the difference, however, is useful in analyzing a case. Evidence is relevant if it tends to make a fact more probable. A fact is material if it tends to prove or disprove an allegation. For example, the fact that contractor A's proposal was given to competing contractor B by John, a member of the source selection board, is material to proving an allegation that John violated the Procurement Integrity Act. The fact that Ann, another member of the board, also had a copy of the proposal, is not likely to be material to the allegation against John (unless it can be used to suggest Ann, not John, was the source of the leak). Evidence in the form of a statement by Mike that he saw John take the proposal out of the file cabinet and hand it to Carol, an employee of contractor B, is relevant to establishing the fact that John really did give the proposal to contractor B. Mike's observation that Carol was wearing a blue dress that day is not evidence that tends to

make more likely the fact that John gave her the proposal (unless it is used to establish the person really was Carol) and, therefore, that evidence is not relevant.

3. **Competence** - In obtaining and evaluating information, consider whether the circumstances by which it was obtained support a belief in its veracity. For example, statements by a witness with a history of lying, or impaired perception, or with a strong bias or prejudice, are likely to be of limited value in establishing facts. Similarly, a confession or statement containing information contrary to one's interest or benefit obtained by coercion will not be as reliable as one obtained fairly and freely.

4. **Authenticity** - In obtaining and evaluating information, consider its authenticity - is it what it purports to be? Is the signature on the document really that of the person whose name it conveys? Did the technician who analyzed an object alleged to be defective really look at the object at issue? Issues of authenticity are generally resolved by the quality (or lack) of chain of custody proof. The authenticity of testimony is also bolstered by being given under oath. Personnel tasked to perform IG investigations are empowered to administer oaths and take sworn testimony. See Chapter 3.

**0704 CATEGORIES OF EVIDENCE PERTINENT TO INVESTIGATIONS:** The investigator must deal with several categories of evidence and understand the distinctions between them. The most important include direct versus circumstantial evidence, and fact versus opinion evidence.

1. **Direct evidence** - Evidence, in whatever form, may tend to prove or disprove a fact either directly or indirectly (circumstantially). A fact is proved by direct evidence when the witness has actual, or direct, knowledge of the fact to be proved, and does not need to rely on facts the witness did not actually observe, but only inferred from other facts known to the witness. A witness who says, "I know that Joe shot Jim in the barracks because I was there with them, I saw Joe point and fire the gun at Jim, and I saw Jim fall right after Joe fired the shot," has presented direct evidence to prove the fact that Joe shot Jim in the barracks.

2. **Circumstantial evidence** - When direct evidence cannot be obtained to establish a fact, the existence of that fact may sometimes be established because reasonable persons are willing to draw inferences from other facts. Circumstantial evidence is direct evidence of one or more facts from which other facts may be inferred, or established indirectly, because there is a logical relationship between them. A witness who says, "I know Joe shot Jim in the barracks because while I was standing outside I heard a shot, saw Joe run out holding a gun, and when I ran into the barracks I saw Jim lying on the deck," has presented circumstantial evidence to prove the fact that Joe shot Jim in the barracks. The evidence is circumstantial because the witness did not actually observe Joe shoot Jim, but inferred that fact from other facts the witness did observe directly. In the absence of other contrary facts, it is logical to infer that the person who ran out of the barracks with a gun in his hand shot the person inside the barracks who has a gunshot wound. Of course, all of these examples assume that the witness knew what Joe and Jim look like.

3. **Importance of distinction** - It is important to appreciate the difference between direct and circumstantial evidence because circumstantial evidence leaves room for an alternate explanation of what really happened that the investigator may need to explore. In the previous example, there may have been a third

person in the barracks who shot Jim, and who ran out another door before the witness entered. Or, the witness may not have known Joe by sight, but, after describing the person running out of the barracks to a third person, had been told "that could have been Joe." Witnesses may think they know something directly, and present it in that manner, when in fact they are really drawing inferences from indirect, or circumstantial evidence. When a witness says "I know fact A occurred" it is important for the investigator to establish the actual basis for that assertion. In far too many cases, careful examination by the investigator will disclose the witness does not really know fact "A" occurred, but only that facts "B" and "C" did. Test a witness's statements by probing follow-up questions, such as, "why do you think that?" and, "how do you know that?" Don't reject evidence because it proves to be circumstantial, but be aware that such evidence should be more critically evaluated and, when possible, corroborated with additional evidence.

4. **Fact versus opinion** - Opinions are generally conclusions premised on facts and the interpretation of those facts. For example, to say that Joe was shouting at Jim, was calling him names, and was red in the face, constitutes a recitation of facts. To merely state that Joe was angry at Jim constitutes a statement of opinion that is based on the facts observed. The opinion may be accurate, but the trier of fact cannot be certain without knowing the facts underlying it. Indeed, in some cases observation of physical details may not always be sufficient to form a valid opinion. Jim may have been helping Joe practice a role in a play that required Joe to show anger.

5. **Limitation on use of opinion evidence** - In court proceedings and many administrative actions, opinion testimony by laymen (people who are not "experts") is generally not admissible. When obtaining and evaluating evidence, this distinction should be recognized. It is always necessary to ask for the facts that underlie an opinion. However, ordinary people form opinions about certain events as a result of their everyday experiences, and may be permitted to give their "opinions" as to those events. The most common example is permitting a lay witness to testify as to the speed of a moving vehicle. Remember that people become "experts" by experience as well as education and training. Many government employees can be considered experts in their line of work.

**0705 RULES OF EVIDENCE IMPORTANT TO INVESTIGATIONS:** The administrative and judicial proceedings which may result from an IG investigation are generally governed by the Federal Rules of Evidence, either directly (because their application is mandatory in a federal district court) or indirectly (because administrative boards often look to them for general guidance). Investigators should be familiar with the more important of these rules in order to evaluate whether the evidence they develop in support of the facts may be used in such proceedings. Investigators must deal with several categories of evidence to which the rules apply, as discussed in the following paragraphs.

**0706 HEARSAY EVIDENCE:** The Federal Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." They go on to explain that evidence constitutes hearsay only if three conditions are present: (1) the evidence is an assertive statement or act; (2) the statement or act was made or committed out of court; and (3) the evidence is being used to prove the truth of the assertion. Unless all three conditions are satisfied, the evidence is not hearsay.

1. Hearsay evidence is seldom admitted in a court proceeding unless it falls within one of the hearsay exceptions. This is because the declarant is not available for the type of examination, by the opposing party or the court, that would establish whether the statement may be relied upon. Hearsay evidence is generally admissible in administrative proceedings, although the trier of fact may give less weight to it than non-hearsay evidence.

2. Note that what a person says to an investigator based on personal, direct knowledge may not be "hearsay" to the investigator, who can probe the witness for problems with perception, memory, bias, etc., but the written record of the interview (or the investigator's oral recitation of it) is hearsay if someone attempts to introduce it in court or an administrative hearing to prove the truth of the statements the witness made to the investigator. An IG investigator may base findings of fact and conclusions on evidence that would be hearsay in a judicial or administrative proceeding, but the investigative notes should clearly reflect the witness' willingness to appear in such proceedings. An IG investigator also may base findings and conclusions on evidence that is hearsay to the investigator, but should be cautious in the use of this evidence, recognizing that the investigator did not have an opportunity to test its reliability by interviewing the original source.

3. An assertive statement or act is one that is offered to make a positive statement, or declaration, of the existence of some fact. For example, the statement of a witness that the traffic light was red when the defendant drove through the intersection and hit the plaintiff's car usually would be offered to prove the assertion that the light was red, an important element in plaintiff's case. In that case, the witness should make the statement in court, where the witness can be examined for error (in perception, memory, or the ability to recount the event) or bias. The attempt to introduce such evidence through the oral statement of another person present in court or a written document, even when signed and notarized by the witness, constitutes hearsay evidence.

4. Sometimes, the out of court statement (or act) of a person is not offered for its underlying truth (for example, to prove that the light was red). In that case it is not hearsay. This is often done where one is attempting to show the state of mind of the person making the statement (the person <u>thought</u> the light was red), or where the mere making of the statement, not its truth, is the fact to be established. Allen, a government employee who offers to influence the award of a contract in return for a gift, violates 18 USC 201 even if Allen does not have the power, or the intention, to make good on his promise. Joan, a supervisor who threatens adverse action if a subordinate makes a protected disclosure to Congress, violates the whistleblower protection provisions of the Civil Service Reform Act of 1978 merely by making the threat, whether or not she intends to carry it out. The in-court witness who says he heard Joan make the statement is not presenting hearsay evidence because the fact to be proved is that Joan made the statement (for whatever reason), and the witness making that assertion is in court where his perception, memory, bias, etc. may be examined.

5. Information contained in documents, as well as oral statements, can constitute hearsay if offered to prove the truth of that information.

**0707 <u>STATEMENTS AGAINST INTEREST</u>:** It is generally agreed that when people make admissions, or other statements they know are likely to be detrimental to their interests, they are

less likely to be lying than when they protest their innocence. Similarly, it is commonly believed that when innocent people are accused of wrongdoing, they will deny it. Although there is some disagreement as to whether an out of court admission is hearsay, the Federal Rules say it is not. Thus, Carrie may testify in court that Joe told her he was the one who shot Jim, and this evidence may be used to prove the fact that Joe made the statement, to show Joe's state of mind at the time, and to prove the truth of the assertion itself. Similarly, Joe's silence when Carrie accuses him of shooting Jim may also be introduced through Carrie to prove that Joe shot Jim, as could Joe's response that Carrie was right. However, where circumstances indicate a person does not have a reasonable opportunity to deny the accusation, or has the right to remain silent (for example, when under arrest), silence should not be construed as an admission. To establish the subject's acceptance of another person's accusation by silence, the investigator should attempt to obtain facts that would show the following:

1. The statement was made in the subject's presence and was in the form of an accusation against the subject;

2. The subject heard and understood the accusation;

3. The circumstances were such that an innocent person would deny the accusation; and

4. The subject remained silent, or gave an evasive or equivocal response.

**0708 <u>BUSINESS RECORDS</u>:** When a document is offered to prove the truth of the statements in it, it is hearsay. But bringing in all the witnesses necessary to prove the statements in a document can be unduly burdensome. Most business organizations, including the government, have an interest in maintaining accurate records of the normal business they conduct regularly.

1. When certain indicators of reliability are present in connection with the creation of a business record, the "business record exception" to the hearsay rule may be invoked. In those cases, courts recognize that the business record may be more accurate than the memories of the people who originally created it. To establish whether a record was created in the ordinary course of business, the investigator should attempt to determine:

a. Whether the document was prepared by a person with a business relationship with the organization (usually an employee, but other people who have business with the organization may also qualify);

b. Whether the person who provided the information recorded in the document had a duty to report the information;

c. Whether that person had personal knowledge of the facts or events recorded in the document;

d. Whether the document was prepared at a time reasonably close to the occurrence of the events;

e. Whether it is a routine practice of the organization to prepare documents of this nature;

f. Whether the information recorded in the document is the type of information the organization would ordinarily record in the regular course of its business; and

g. Whether the information is essentially factual in nature.

2. Note that the person who provides the document to the investigator (or who introduces it in court) need not have personal knowledge of

the information recorded in the document, and, in fact, usually does not have such information.

3. Having established the reliability of a business record by asking the questions presented in the preceding paragraph, the investigator still needs to determine the authenticity of the particular document being provided. To do this, it is usually sufficient to establish proper custody of the document between the time it was created and the time it is presented to the investigator. The investigator would want to know:

a. Whether the person providing the document has personal knowledge of the organization's filing system;

b. The name (or description) of the file from which the person removed the document;

c. Whether the witness recognizes the document as one that should be contained in the file where it was located; and

d. In some cases, the investigator may want to know who has access to the files, whether there is any reasonable possibility of tampering with the files, and the process through which a document goes from initial receipt to storage in the file.

4. Note that the business records discussion outlined in the preceding paragraphs also applies to official government documents. In addition, some documents are required to be maintained pursuant to laws or regulations, such as the Federal Acquisition Regulations. Also, the Federal Records Act makes almost every record regularly maintained by the DoN an official document. In those cases, the investigator may ask for a "certified copy" of the document from an official custodian. This practice is especially useful when the document is obtained from a government organization outside of the DoD. The certification should include a signature and/or seal, along with a statement to the effect that:

I, [name], certify that I am the [title], and that the attached document is a true and accurate copy of an original, official record in my custody.

**0709 USING DOCUMENTS TO REFRESH MEMORY:** Documents are an effective tool for prompting the memory of witnesses, especially reluctant ones. There are two evidentiary theories relating to this practice that the investigator should understand.

**1. Refreshing Present Recollection** - The first theory assumes that the witness, after reviewing the document, has an independent recollection of the events recorded in it, such as a meeting the witness attended. Reviewing the document merely served to "refresh" the witness' present recollection of what happened at the meeting. Under this theory, the real evidence is the witness' statements to the investigator (or testimony in court), not the contents of the document. Since the document is not the evidence, there is no hearsay problem with using the document this way. Indeed, any object or sound that would help the witness recall what happened at the meeting may be used for this purpose. When using a document to refresh the witness' present recollection of a meeting, the investigator would establish the following during the interview:

a. The witness indicates an inability to recall what happened at the meeting;

b. The witness recalls (or is shown) a document that may state what happened during the meeting;

c. The witness reviews the document;

d. The witness states she now can recall what happened at the meeting; and

e. The witness tells the investigator what happened at the meeting (to test whether the witness really has an independent recollection, the investigator may want to take the document away from the witness while the witness relates what occurred during the meeting).

**2. Note** - in this situation, the document does not have to be an accurate accounting of what occurred during the meeting, since the witness is telling the investigator what happened. However, it is still a good practice to get the witness to state whether the document is accurate, and, if not, to indicate what information is erroneous.

**3. Past Recollection Recorded** - Assume that, during the course of an interview, the investigator shows the witness minutes of a meeting the witness attended, yet the witness still claims to be unable to remember what happened during the meeting. By asking the witness a series of questions, the investigator may still be able to force the witness to concede the document accurately reflects what took place. This evidentiary theory is called "past recollection recorded." In this case, the document is the real evidence, and the witness is being used to establish the reliability of the document in order to get around the problem that the document is hearsay if used to assert what happened at the meeting. To employ this technique, the investigator would establish that:

a. At one time in the past, the witness had personal knowledge of what happened during the meeting (usually by participating in it);

b. The witness prepared a document recording what happened during the meeting (or reviewed a document prepared by someone else) within a reasonable period of time after the meeting (close enough to the date of the meeting that the witness could accurately recall what happened);

c. The witness is willing to state that at the time the document was prepared (or reviewed) it accurately reflected what took place during the meeting; and

d. After reviewing the document during the interview, the witness is still unable to independently recall what happened during the meeting.

**4. Note** - Since in this case, the document, not the witness, is asserting what happened during the meeting, it is clearly hearsay, both as to the investigator and as to a court. Its use is permitted because the witness is vouching that at one time he or she knew the document was accurate. The investigator can force reluctant witnesses to concede the accuracy of a document they prepared by asking why they prepared the document, whether they considered it important to be accurate at that time, whether they generally try to prepare accurate documents, why they would prepare a document that was not accurate, etc., so that the witness must choose between conceding the accuracy of the document or admitting to negligence, if not outright falsification of what may be an official government document. Similarly, if the witness reviewed the document, he or she can be led to admit that any inaccuracy they may have noted would have been corrected when it was reviewed.

**0710 BEST EVIDENCE RULE:** This old rule once required the production of the original of a document in order to prove its contents. Modern

day mechanical reproduction devices (photocopiers such as the "Xerox machine") have largely done away with its application in the courtroom. Nonetheless, photocopy equipment may not produce a true copy of a document if the writing on the original is too light, or of a certain color that does not reproduce well. In general, therefore, a photographic copy is accepted in legal proceedings unless the opposing party can articulate a specific reason why it may not be accurate. In such cases, it may become necessary to produce the original, or a certified copy from the custodian of the document. Thus investigators should document their files to indicate where the originals of important documents may be obtained. Investigators should also note that the best evidence rule applies only to "writings" such as printed or typed documents, tape recordings, computer tapes, photographs, video tapes, and the like. It does not apply to testimonial evidence. Although the subject's admission that he accepted a gift from a contractor may be more persuasive than the same testimony from a witness (and in that sense may constitute the best evidence to prove the fact) the best evidence rule applies only to writings, and may not be used to preclude use of the witness to prove the fact. Note also that simply because a writing may record what happened at a particular event such as a meeting, it does not preclude a participant in the meeting from testifying as to what took place during the meeting based on the witness' present recollection, with or without reference to the document.

**0711 CHAIN OF CUSTODY:** Chain of custody issues relate to proving the authenticity of objects. Lets assume that when Joe ran out of the barracks after a shot was fired, he stumbled and dropped the pistol in his hand. The witness then walked over and picked it up. When the police officer arrived, the witness gave her the pistol. After Jim arrived at the hospital, the doctor removed a bullet from his shoulder. Establishing that the pistol Joe dropped fired the bullet removed from Jim's shoulder will go a long way toward proving Joe shot Jim. There are two issues involved.

1. The first issue, relating to the pistol, is relatively simple, because it has certain unique, readily identifiable characteristics. It is sufficient for the police officer to note the serial number (if any) and place a unique mark on the pistol (preferably in the presence of the witness). Later, the witness can testify that he knows it is the pistol Joe dropped because of its unique mark he saw the police officer place on it (the police officer could testify that the witness gave her the pistol, but it would still be necessary to call the witness to establish Joe dropped it). Investigators who must account for objects of this nature should be prepared to establish the following points:

a. The object has a unique characteristic;

b. the witness observed the characteristic on a previous occasion;

c. the witness looks at the object and identifies it as the one seen earlier; and

d. the witness points out the unique characteristic that leads him to conclude the object is the one seen earlier.

2. The second issue, proving that the bullet taken from Jim's shoulder was fired from the pistol Joe dropped, is more complex. The movement of the bullet taken from Jim's shoulder must be tracked from the time it is removed until the point at which it is compared to another bullet fired from the pistol Joe dropped. The chain of custody is broken if, at any point along the way, there is the possibility that another bullet could have been substituted for it, or the characteristics of the bullet altered (the classic example of this type of problem arises in the case of drug arrests). To establish the bullet was not substituted or

altered, each step in the movement of the two bullets to be compared must be traced in such manner as to establish that:

a. The witness originally received the object at a certain time and place;

b. The witness safeguarded the object while in his or her possession in order to prevent substitution or tampering;

c. The witness eventually disposed of the object in some manner (usually by turning it over to the next person in the chain, or by performing the test that establishes the characteristic to be proven (that the bullet was fired from the pistol in question, that the substance is an illegal drug, etc.);

d. As best the witness can tell, the object he or she is now looking at (assuming it was not destroyed during testing) is the object the witness previously handled; and

e. As best the witness can tell, the object is in the same condition as when the witness originally received it (unless testing the object would alter its condition).

**0712 PHOTOGRAPHIC EVIDENCE:** When photography was a relatively new technique for the presentation of evidence, it was common for courts to require the person who took the photo to testify. The photographer had to be prepared to describe the photographic equipment, the film used, the type of lens, and the settings on the camera. Cross examination frequently centered on establishing the photograph presented a distorted depiction of the scene. The modern view of photographic evidence is that anyone familiar with the scene or object depicted in the photograph may be used to introduce and verify the accuracy of the photo. Nevertheless, considering the remarkable capability to "doctor" photographs and video film that exists today, the investigator should always be alert for the possibility of tampering. Usually it is sufficient for the investigator to establish that:

a. The witness is familiar with the object or scene depicted in the photo;

b. The witness can explain the basis for his or her familiarity with the object or scene (where the object or scene has changed over time, as, for example, during construction of a building, the witness should indicate the basis for familiarity at the time the photo was taken);

c. The witness recognizes the object or scene in the photograph; and

d. The witness says that the photograph is an accurate (fair, true, good, etc.) depiction of the object or scene at the pertinent time.

**0713 PRIVILEGES:** Certain types and sources of information have restrictions imposed by law on their solicitation and use.

**1. Self-incrimination** - Solicitation of information can raise a witness' Constitutional right against compulsory self-incrimination. The Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself." Its application extends to investigations that may furnish leads on which a criminal prosecution could be based. Thus, questions asked in the context of an IG investigation must be considered in light of the right against self-incrimination.

a. The law generally requires that suspects in custody be advised of their right to remain silent or refuse to respond to questions that may require incriminating answers. Article 31 of the UCMJ (10 USC 831) also requires that suspects be advised of their rights even when they are not in custody. See Paragraphs 0320 through

0328 for a discussion of the interplay between the use of warnings and grants of immunity to protect rights and further the purposes of the investigation.

b. Investigators must remember that courts interpret "custody" as any set of circumstances which deprive people of their freedom in any significant way. IG investigators do not place witnesses in custody in the same way police do, but, depending on the circumstances, a court could find an interviewee's freedom had been deprived by orders to report to be interviewed, orders to cooperate, and so forth. Therefore, investigators who seek to use a civilian suspect's statements (or their fruits) for criminal prosecution, should not rely on their belief that the interview will be non-custodial, and should provide the Miranda warning. See paragraph 0321.

**2. Attorney-client** - Communications made by a person to his attorney for the purpose of obtaining legal advice or representation are privileged. The privilege belongs to the client: he can stop the attorney from divulging the information conveyed by the client. An exception exists where the communication was made in connection with the future commission of a crime. The client may not always be an individual. Information provided by members of an organization, such as employees of a corporation, to the organization's attorney may come within the privilege: the organization in such cases is the client, and it may legitimately seek to bar disclosure of information conveyed by its members. In the government context, consultation with a military defense counsel or legal assistance attorney, done for the purpose of obtaining legal advice, and with an expectation of confidentiality, will come within the privilege. However, an organization's JAGC or OGC attorney cannot provide personal legal counsel for an individual member of that organization. Thus, information provided under such circumstances does not come within the attorney-client privilege. While the privilege belongs to the client, an attorney, if asked questions regarding statements made by his client, will refuse to answer, claiming that the statements were made in reliance on the confidentiality afforded by the privilege. If your investigative plan envisions interviewing an attorney, consult beforehand with a JAGC or OGC attorney to determine if your proposed inquiries are likely to trigger an invocation of the privilege, to get guidance on what areas of inquiry are not within the privilege, and to consider whether alternative means exist to obtain the desired information.

**3. Spousal** - There are two spousal privileges. The first allows one spouse, during the existence of the marriage, to refuse to testify against the other spouse. The second applies to confidential communications made during the marriage. It applies even after the marriage is ended, and is asserted by the spouse who made the confidential communication. These privileges should not bar solicitation of information in an IG inquiry or investigation. However, subsequent use of such information in a more formal proceeding may be barred.

**4. Doctor-Patient** - There is no generally recognized or common law doctor-patient privilege, but some jurisdictions have created the privilege by statute. Neither the Federal Rules of Evidence nor the Military Rules of Evidence recognize this privilege.

**5. Communications to Clergy** - To be recognized as confidential, communications to a clergyman must be made as a formal act of religion or as a matter of conscience. The communicant owns the privilege.

**0714 Sources:** Certain potential sources of evidence require special mention.

**1. Tax returns** - Inquiries stemming from allegations of financial irregularities may conclude that tax return information would add to the store of useful knowledge. But Section 6103 of the Internal Revenue Code greatly restricts the disclosure of tax returns and return information. A disclosure can be predicated on a need for investigation of a non-tax federal crime. It requires a showing that: a specific federal crime has been committed; that the return or other information may be relevant to a matter relating to the commission of the crime; that the return or other information is sought exclusively for use in a federal criminal investigation or proceeding concerning the crime; and the information sought cannot reasonably be obtained from another source (26 U.S.C. § 6103(i)(1)(A) and (B)). Given these predicates, this provision is of little use in an IG inquiry or investigation; generally, if the facts suggest the commission of a crime, the matter will be handled by means other than an IG inquiry.

2. Financial institutions - IG inquiries or investigations may also raise a need for information maintained by financial institutions. Access to such information (e.g. bank account records) is restricted by the Right to Financial Privacy Act (RFPA), 12 USC 3401 et. seq. Basically, such information can only be disclosed by the financial institution to the government if the customer has consented to disclosure, or in response to an administrative summons or subpoena (including a DoD IG subpoena, discussed in paragraph 0319); a judicial subpoena; a search warrant; or other formal written request. SECNAVINST 5500.13 establishes procedures for compliance with RFPA.

**0715 DECLARATIONS VERSUS AFFIDAVITS:** When taking sworn statements, investigators should consider putting them in the form of a declaration rather than an affidavit. Technically, an affidavit must be notarized, and although investigators have the authority to administer oaths, not all of them are authorized to act as a notary. A declaration executed pursuant to 28 USC 1746 is acceptable in court without being notarized.

1. 28 USC 1746 states:

**Unsworn declarations under penalty of perjury:** Wherever, under any law of the United States, or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form ...

2. For the purposes of an IG investigation, the following is suggested as the form to follow at the start of the declaration:

Pursuant to 28 USC 1746, I [name], declare as follows:

3. The following language is suggested for the form of the closing of the declaration:

I declare under penalty of perjury that the foregoing is true and correct. Executed on [date].
[Signature]

4. Federal court decisions interpreting 28 USC 1746 routinely hold that those who make false statements in a declaration that contains the language "under penalty of perjury" may be charged with perjury under 18 USC 1621, just as if the statement were made under oath, and that declarations may be used in lieu of sworn statements or affidavits to support or oppose motions for summary judgment.

# CHAPTER 8 - REPORT WRITING

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# CHAPTER 8 - REPORT WRITING

**0801 INTRODUCTION:** The purpose of the IG investigative report (IR) is to demonstrate why the allegations investigated were (or were not) sustained, in order to provide the responsible authority a basis to determine whether any corrective, remedial, or disciplinary action should be taken. The well-written IR "tells a story" to the reader as it discusses the nature of the allegations, explains the applicable standards, and marshals the pertinent facts in order to persuade the reader that the investigator's conclusions are correct. Objectivity and basic fairness also require the IR provide a balanced accounting of evidence that would tend to support a contrary conclusion, and explain why such evidence was not accorded greater weight. The ability to balance these competing considerations is the hallmark of a professional IR.

**0802 OVERVIEW:** This chapter presents an overview of the characteristics of a good IR. It discusses the different sections that comprise the typical IR, and notes the types of investigations that require specific formats. It also discusses specific problems that may occur in writing reports.

**0803 CHARACTERISTICS OF A GOOD INVESTIGATIVE REPORT:** Clarity, completeness, and accuracy are the three principle characteristics of a good IR. The IR must be clear enough so that others may understand what the writer means. But more than that, it must be written so clearly that others cannot possibly misunderstand the writer's meaning. Clarity results from a IR that contains a concise, systematic arrangement of facts and analysis stated in precise, neutral terms. Completeness dictates that all information a prudent manager reasonably would want to consider before reaching a decision should appear in the report. Accuracy requires there be no errors in reporting facts or identifying people, places, events, dates, documents, and other tangible matters. A good rule of thumb requires asking whether a person who knows nothing about the case could read the report, fully understand what happened, and feel confident in making a decision based on its contents.

**0804 STYLE AND TONE:** Whether the allegations are sustained or refuted, most IRs convey bad news to someone. Proper style and tone makes the news easier to accept; an inappropriate style or tone impedes acceptance and appropriate resolution. Style varies from one person to another, but a simple, direct approach, void of colorful language, is the most effective way to convey facts. The tone also should be neutral, not judgmental, convincing in its modesty of language, not provocative in its descriptions. Style, tone and clarity must complement one another; each handled well tends to achieve the others.

**0805 ANALYSIS:** In most investigations, more information is collected than is necessary to reach a conclusion. Some information is redundant; other information is not pertinent to a decision. Sometimes the information is conflicting. Deciding what information to treat as evidence and how to deal with it in the IR is important because in cases where remedial or disciplinary action is a possibility, the decision to accept the conclusions in the IR is likely to be made only after an examination of all the evidentiary material in the file. If the report does not appear to fairly address pertinent evidence, its conclusions may be rejected. Some common issues include:

1. Evidence considered, but not relied upon, should be discussed in the IR if it is likely that others would want to consider it, or question the completeness of the report were it not mentioned. This is critical when there is conflicting evidence. The failure to discuss

and explain why one version of events is relied upon in lieu of competing evidence will cause readers who are aware of the conflicts to question the objectivity of the writer.

2. Evidence that is redundant or repetitive can be summarized when it comes from various sources that present no unique information. For example, stating that five people saw the subject in the office on a particular day is adequate in most cases.

3. Testimony may prove difficult to analyze in some cases. Often, only a few witnesses have the entire story. The investigator must piece together fragments of the story to present the entire picture. Summarizing the testimony of witnesses providing these fragments is one acceptable technique to make the sequence of events clear. In complex cases, or cases with many witnesses, it is helpful to use some system for identifying what each witness said about each allegation, such as an evidence matrix, an outline, or file cards.

4. The evidentiary analysis must bring together all documentary, physical, and testimonial facts relating to the allegations to reach a conclusion. The facts relied upon to reach each conclusion should be apparent to the reader. When the applicable standards are themselves vague, or the testimony conflicts, the reasoning that leads to a conclusion is not always apparent. In that case, the analysis in the IR must explain to the reader how the investigator reached the conclusion.

**0806 ORGANIZATION:** Details of the format of the IR vary with the source of the tasking. Generally, all follow an outline that includes: (1) an executive summary (optional); (2) an introduction (optional); (3) background information; (4) a discussion of each allegation (consisting of a statement of the allegation, findings, discussions (optional), and conclusions); (5) other matters (optional); and (5) recommendations (optional).

**0807 EXECUTIVE SUMMARY:** An IR should be structured as a stand-alone document that can be read and understood without referral to other material. Unlike a JAGMAN investigative report, the IR seldom has attachments or enclosures that must be read in conjunction with it. In complex cases, this means that discussions of findings in the IR will be quite lengthy. An executive summary is useful in those cases where the responsible authority is unlikely to read the entire IR due to its length. Sometimes an executive summary is used as a response to Congressional requests for information about an investigation. At a minimum, the executive summary should identify subjects or suspects, note the source of the tasking, list the allegations and conclusions, and provide a brief discussion of the findings for each allegation. The executive summary should be set forth on a separate page or pages that may be separated from the main body of the report.

**0808 INTRODUCTION:** The introduction explains how the investigation was initiated (command request, hotline, DoDIG, etc.) and tasked to the investigation office. It should include information of an explanatory nature that will assist the reader in understanding the remainder of the report. In cases with many allegations, the introduction may include a summary list of all the allegations in order for the reader to get an overview of the issues. In those cases where the investigator developed additional allegations during the course of the investigation that should be resolved at the same time as the original allegations, they should be identified here. Use of an introduction is optional, and it may be combined with the section containing background information.

**0809 BACKGROUND:** This optional section may be used to describe information about the case, or similar events, that would help the reader

understand what led to the tasking. Background information on the subject command and personnel involved in the case may be included here. A brief recitation of prior complaints on the same or similar matter, earlier investigations, other proceedings, etc., may be included here. If several allegations share common facts, it is sometimes useful to set them out in the background. A chronology or timeline is an effective way to familiarize readers with such matters.

**0810 DISCUSSION OF ALLEGATIONS:** This section is the heart of the IR. In most cases, each allegation should be discussed separately. The order of presentation of the allegations should facilitate an overall understanding of the case. Sometimes this requires the allegations be discussed in chronological order of the facts pertinent to each allegation. In other cases, allegations that are conceptually linked, or share common facts, should be placed close together. When the order of presentation is not critical to an overall understanding of the case, then it is common to list the most important in terms of seriousness or sensitivity first. Among those, normal practice is to discuss first those allegations that were sustained, then those that were not sustained. Allegations that were neither sustained nor refuted should appear last. Allegations should be worded in the same manner as they were during issue spotting (paragraph 0426) and set forth in the investigative plan. The complainant's language may be used if it facilitates an understanding of the issues.

**0811 FINDINGS:** The findings present and analyze the evidence the investigator has developed and decided to address in the report with respect to each allegation. Organization and content of the findings are critical to a good report.

1. Organization should facilitate understanding by one unfamiliar with the case who is reading the IR for the first time. A chronological statement of facts is most likely to achieve this objective. One approach is to set forth the standard, followed by a chronology, or vice versa. When chronology is not important, setting forth information that tends to support the allegation, then information that tends to refute the allegation, promotes understanding. Where there is substantial disagreement over the facts, it may be helpful to first set forth the complainant's story, followed by the subject's version. Facts provided by neutral parties should follow, ending with a discussion that reconciles or selects between conflicting facts. When it is necessary to present the investigator's opinions (usually reserved for the discussion), they should be carefully separated from statements of fact.

2. Content determines whether the report will be perceived as objective, complete, and persuasive. To promote objectivity, the subject's response to the allegations should be set forth, to include the subject's interpretation of the rule or standard alleged to have been violated and the subject's motivation when those issues are pertinent. When it is necessary to present the investigator's opinions, they must be clearly identified as such. Completeness requires that all significant evidence, pro or con, be discussed. The pertinent standard must also be set out and, where necessary, explained. Persuasiveness requires that the logical chain between the statement of facts and the conclusions be clearly set forth in the IR.

**0812 DISCUSSION:** The discussion explains the weight the investigator assigns to the facts set forth in the findings and how they fit together to substantiate or refute the allegations. Consequently, when the issues surrounding an allegation are simple and facts are not in dispute, this section may not be necessary. The discussion gives the reader a clear understanding of the investigator's opinion of the case that has been developed. It should never include new facts, nor should it

restate facts already set forth in the findings. Rather, the investigator should sift through the facts in conflict and reconcile them, if possible. If conflicting facts can not be reconciled, the investigator must explain why one version of the facts is found to be more credible than another. In some cases, this may simply consist of comparing the number of witnesses who say an event happened to the number who say it did not and going with the majority vote. In most cases, however, questions of perception, bias, self-interest, competence, and veracity must be addressed, because it is the quality of the evidence, not the quantity, that determines how disputed issues should be resolved.

**0813 CONCLUSIONS:** Each allegation must have one or more conclusions, which must be consistent with, and flow logically from, the findings and discussion. Where facts are in dispute, the discussion should make reasons for the conclusions obvious. Therefore, no further discussion in the conclusions section should be necessary if the allegation is substantiated or not substantiated. When an allegation is partially substantiated, the conclusion must clearly distinguish those portions that were substantiated from those that were not. When an allegation is substantiated, but extenuating or mitigating circumstances are present, they should be discussed, i.e. "... however, the facts indicate subject was motivated by concern for subordinates and not self-interest". The conclusions may also reflect that an allegation, as framed in the IR, was not substantiated, but that a related allegation would be. An example is the case where the allegation of an actual conflict of interest is not substantiated, but the appearance of a conflict does exist.

**0814 OTHER MATTERS:** During the course of an investigation, an investigator sometimes develops information about another matter that is outside the scope of the present investigation. The "other matters" section of the IR is useful for identifying such information and making recommendations for a separate IG investigation or other form of examination of the matter.

**0815 RECOMMENDATIONS:** The recommendations section should contain constructive suggestions for action by the responsible authority. Every IR should contain a recommendation as to the status of the investigation, i.e., that it be closed as completed based on the report, or that further action along specific lines such as that raised in the other matters section be taken. Where the IR has identified systemic problems or program weaknesses, a recommendation to consider corrective action to "fix the system" is appropriate. A general recommendation for remedial action may also be included, but specific recommendations for punitive, adverse administrative, or disciplinary action should not appear in the IR. In such cases, the recommendation should merely indicate that "appropriate action" should be taken with regard to the subject or suspect.

**0816 INTERIM REPORTS:** When investigations will require more than 90 days to complete, interim reports are usually required. The purpose of an interim report is to report the status of the investigation and point out any problems that have been encountered, particularly those that may delay the investigation or need to be addressed at a higher level. The interim report should not be used to indicate the likely outcome of the investigation. Similarly, complainants and subjects/suspects should not be provided information indicating the anticipated outcome of the investigation.

**0817 PROTECTIVE MARKINGS:** At a minimum, every IR should be marked in accordance with the Navy FOIA instruction, SECNAVINST 5720.42E. This requires that the words "FOR OFFICIAL USE ONLY" appear at the bottom center of each page of the report. The purpose of this marking is to alert DoN personnel that material so marked may contain information not appropriate for release to the general public. The

marking, in itself, creates no protection. In addition, IRs that contain classified information should be marked in accordance with DoD/DoN information security requirements. At a minimum, the outside front and back of the report must be marked with the highest classification of information contained in the report. In most reports, classified information can be confined to a few specific paragraphs. The report should clearly identify those paragraphs, to facilitate discussion and dissemination of unclassified information contained in the report. Since the first page of most IRs will contain derogatory information, a cover sheet or neutrally worded cover letter should be used with every IR.

**0818 SPECIFIC FORMATS:** There are three specific report formats that DoN IG organizations may be required to use in preparing IRs. They are the DoD/Navy Hotline Completion Report, the Senior Official Investigative Report, and the Military Whistleblower Reprisal Report. The latter report requires that specific questions be answered in a specific order, as set forth in IGDG 7050.6, the DoDIG Guide to Military Reprisal Investigations. Note that the Hotline Completion Report format does require a separate discussion of each allegation, including the elements discussed in paragraphs 0810 through 0815, even though that requirement is not clearly set forth in the sample that appears in the Hotline instruction, SECNAVINST 5370.5A.

**0819 SPECIFIC PROBLEMS:** Problems in IRs often occur because investigators know the case so well that they fail to include information in the IR that readers who are not familiar with the case need to know. Other problems occur because of sloppy writing habits or the failure to organize and place information in the appropriate sections of the report. Some common examples include the following:

1. **Mixing up facts, opinions, and conclusions** - There are separate sections of the IR for recording facts, opinions, and conclusions. All too often, writers give their opinions in the middle of a recitation of facts. This is confusing and may cause readers to question whether the investigator understands the difference. Opinions may creep in through the use of adjectives and adverbs in a sentence setting forth facts. This may occur because the investigator fails to reserve the discussion of the implications that may be drawn from the facts for a later section of the report. Another common problem is the inclusion of facts, for the first time in the report, in the sections of the report reserved for conclusions and recommendations. This often happens when the investigator realizes that a fact necessary to support the conclusion does not appear in the findings section. These problems can be avoided by carefully following the outline of the IR described earlier. Another good technique is to take a highliter and mark everything in the IR that is not a statement of fact. This technique, used in reviewing an IR for release pursuant to a FOIA request, is an effective way to determine whether facts and opinions are in the wrong places.

2. **Unsupported conclusions** - Sometimes it is not apparent how the investigator arrived at the conclusions based on the evidence presented in the IR. This usually occurs for one of three reasons. First, because investigators are so familiar with the case, they may think they included a fact when they did not, or they may assume something will be apparent to the reader that is not obvious to one unfamiliar with the investigation. In most cases, the evidence was gathered, it simply was not reported. A second cause is the inclusion of conflicting statements of fact that are not resolved in the discussion of the findings. When the reader looks at some of the reported facts the conclusions appear logical, but when others are added, a contrary result would also appear reasonable. This

requires the reader to attempt to resolve the conflicts, often without any information in the report that would provide a logical basis for doing so. A third cause is the failure to cite and, where necessary, discuss the standard that should be applied to the facts in order to reach a conclusion. The most effective way to avoid these problems is to adhere to the outline of proof in the investigative plan when writing, then to ask someone in the office who is unfamiliar with the case to read a draft of the IR.

3. **Insupportable conclusions -** Misinterpreting testimony, misreading documents, and not wording allegations properly may result in erroneous conclusions for which there is simply no support in the investigative record. This discredits recommendations and brings the integrity of the IG system into question. This problem may not be obvious from a reading of the IR itself; it is most likely to be discovered when command counsel is reviewing the investigative file to determine whether or not it will support disciplinary action. To avoid this situation, the investigator first must be able to document the source of every fact in the report. The most effective way to do so is to create an endnote for each statement of fact when writing the draft of the IR. The endnoted draft should be maintained in the file; the endnotes should not appear in the final or smooth version of the IR. Using endnotes permits another person in the office to quickly review the document, sworn statements, interview notes, or other sources of evidence relied on to support the facts in order to determine if there is sufficient support in the record. Early coordination of the investigation with the appropriate legal office will help ensure that evidence necessary to support disciplinary action will be developed during the course of the investigation.

4. **Recommendations not consistent with conclusions -** Occasionally, conclusions are presented that merit a recommendation, but none appears in the IR. In other cases, the conclusion does not support the recommendation. These errors are likely to be picked up when drafts are reviewed by fellow investigators not familiar with the case.

# CHAPTER 9 - INVESTIGATING UCMJ VIOLATIONS

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# CHAPTER 9 - INVESTIGATING UCMJ VIOLATIONS

**0901 INTRODUCTION:** IG investigators must understand the type of conduct that may constitute a violation of the UCMJ. When the IG investigator encounters conduct that may be a "major crime" under the UCMJ (punishable by imprisonment for more than one year), the IG investigator must consult with NCIS. See paragraph 0206(1). If the allegation is not one that normally would be the subject of an IG investigation, the investigator should also consider turning the matter over to the chain of command. IG investigators must have some knowledge of the punitive provisions of the UCMJ in order to know when Article 31(b) warnings may be required. See paragraphs 0320 through 0328.

**0902 PUNITIVE ARTICLES OF UCMJ - ARTICLES 77 - 134:** Many criminal prohibitions to which civilians are subject appear in the UCMJ. Offenses such as murder, manslaughter, rape and other sex offenses, assaults, robbery, larceny, and frauds are crimes under the UCMJ. See Articles 118 - 132. But many of the offenses set forth in the UCMJ are unique to the military, and define conduct that in the civilian world would only be grounds for disciplinary or at most civil action. Examples include fraudulent enlistment, desertion and unauthorized absence, disrespect to superiors, failure to obey orders, misconduct before the enemy, malingering, and fraternization with subordinates. See Articles 83 - 117 and 133 - 134. The investigator should also consider the following examples of UCMJ violations that may trigger the requirement to provide Article 31(b) warnings.

1. An allegation of unlawful command influence in military justice matters may be made during the conduct of an IG investigation. Article 37 of the UCMJ prohibits convening authorities (the officers authorized to convene, or establish, a court-martial and empower it to try persons subject to the Code) and other commanding officers from censuring, reprimanding, or admonishing a military judge, counsel, or court-martial member for any action in connection with the court-martial, including adversely commenting on such conduct in a fitness report or other evaluation.

2. Article 98 of the UCMJ criminalizes noncompliance with procedural rules; violations of Article 37 are punishable under Article 98. See Manual for Courts-Martial, United States, 1984, R.C.M. 104.

3. An allegation that a convening authority or other officer has acted improperly in commenting on or otherwise trying to influence the proceedings of a court may constitute a UCMJ violation.

4. Other examples of conduct that may constitute violations of the UCMJ include using government property for personal purposes (for example, charging personal expenses to a government-issued credit card, or using government personnel or equipment for a personal purpose, such as a side occupation); lying to an investigator regarding the subject of an investigation, and obstructing justice by encouraging another to provide a false story to NCIS.

5. Perhaps of greatest import for IG investigations is the fact that provisions of the DoD Joint Ethics Regulation appearing in bold italics are "lawful general orders" that apply to all military members without further implementation (see DoD Directive 5500.7 at paragraph B(2)(a)). Violations of lawful general orders are punishable under Article 92, UCMJ. The maximum punishment that may be imposed includes dishonorable discharge,

forfeiture of all pay and allowances, and confinement for two years.

**0903 DETERMINE WHETHER A UCMJ VIOLATION MAY EXIST:** Investigators should review each allegation against military members to determine whether, if the allegation is substantiated, the military member could be charged under one of the punitive articles of the UCMJ. The prudent investigator will seek legal advice as to the existence and severity of possible UCMJ violations at the outset of the case. The investigator also needs to be sensitive to the possibility that seemingly innocuous questions may elicit responses that constitute admissions to UCMJ violations during the course of an interview. Therefore, the investigator should ask counsel to discuss whether variations on the facts alleged or developed to date could constitute UCMJ violations. The investigator also should ask counsel to explain what additional facts, if any, would create a UCMJ violation.

**0904 DETERMINE WHETHER TO GIVE ARTICLE 31(b) WARNINGS:** This investigations manual does not require that Article 31(b) warnings be given in every instance where the violation of a punitive article of the UCMJ is suspected, because NAVINSGEN views the right as procedural, not substantive. Consequently, the investigator who suspects the subject has violated the UCMJ should balance the adverse effect on the subject interview that giving Article 31(b) warnings would have against the likelihood the convening authority would want to take punitive action against the subject were the UCMJ violations substantiated by the investigation. The investigator should consider the following:

1. The warnings should be given if the investigator does not believe it would impede the interview process.

2. The warning should be given if the investigator believes the likelihood the convening authority would want to take punitive action is very high, even if the warning would impede the interview process.

3. When the investigator believes the warning would impede the interview process, and thinks the likelihood of prosecution under the UCMJ is not high, the investigator should seek approval to give formal or de facto immunity for information provided during the subject interview.

4. The investigator should begin by consulting with the investigator's assigned JAGC attorney. If none is available, the investigator should consult with a JAG attorney within the convening authority's chain of command. If the JAG attorney advises that it is not necessary to provide Article 31(b) warnings under the circumstances, the investigator should document the advice and proceed with the interview without providing the warning. By doing so, the investigator is granting de facto immunity for the interview. Note that in this situation the subject may ask why the warning is not given, and may insist on a formal grant of immunity before consenting to the interview or agreeing to answer specific questions in the interview.

5. Investigators should anticipate that in many cases where a UCMJ violation is suspected, the advice from the JAG attorney will be to give the warning. Should the investigator still believe it advisable to forego the warning, the investigator may discuss the matter with the subject's commanding officer. Should this officer decide that the UCMJ violation, if sustained, would not lead to punitive action under the UCMJ, and that therefore it is not necessary to give the warning, the investigator should document the decision and proceed with the interview as discussed in the foregoing paragraph, noting again that the subject may still refuse to answer specific

questions or consent to an interview without a formal grant of immunity.

6. The investigator's final recourse lies with the general court-martial convening authority who is authorized to issue a formal grant of immunity to the subject. At this point, even if the convening authority is willing to proceed on the basis of de facto immunity, the investigator should consider asking the convening authority to execute a document providing a formal grant of immunity. Then, should the subject still refuse to answer questions or consent to the interview, the immunity document may be presented to the subject, who can then be ordered to cooperate with the investigation.

# CHAPTER 10 - WHISTLEBLOWER PROTECTION

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# CHAPTER 10 - WHISTLEBLOWER PROTECTION

**1001 INTRODUCTION:** For centuries, the common law has recognized that an employee's duty of obedience and loyalty to an employer stops at the point where the employer directs the employee take action that violates a law or constitutes a threat to public health and safety. Similarly, the proposition that a military member has no obligation to obey an unlawful order is now beyond question. Indeed, it may be more appropriate to state that federal employees and military members, whose ultimate loyalty runs to the Constitution, have an affirmative duty to refuse to carry out unlawful orders.

1. The concept that employees or military members have a civic responsibility to disclose corporate or government wrongdoing that comes to their attention is more troubling. The ancient common law theory of misprision (concealment) of felony has received much lipservice, but little enforcement in the United States. Indeed, many statutes that implement the concept, such as 18 USC 4, include an affirmative act of concealment as an element of the crime. Mere silence is not punishable. Moreover, the ideal of loyalty to one's co-workers, comrades, office or military unit is so fundamental that it is not uncommon to see personnel admit their own wrongdoing while steadfastly refusing to identify others who have engaged in the same misconduct.

2. Gradually, the law has recognized that society benefits from the disclosure of wrongdoing, which should be encouraged by government; sometimes through the provision of monetary incentives, more often by offering protection from reprisal. "Blowing the whistle" on suspected impropriety is one of the principal means by which IGs become aware of situations that warrant investigation or inquiry. It is the concept behind any hotline system. For years, US Navy Regulations and SECNAV instructions have given DoN personnel an affirmative duty to report suspected wrongdoing to DoN investigative organizations or to designated officials within the chain of command. Although logic would dictate that no one should suffer retaliation for doing their duty, Congress has found it necessary to enact laws that encourage disclosure of certain types of wrongdoing by prohibiting retaliatory personnel actions. Over time, these laws have been extended to cover most civilian, military, and government contractor personnel.

**1002 OVERVIEW:** This chapter begins by establishing working definitions for the terms whistleblowing, protected communications, reprisal and retaliation. It then reviews the laws and regulations intended to protect whistleblowers, with emphasis on the kinds of communications that are protected, and the types of responses that constitute reprisal, under each statute. In particular, this chapter discusses whistleblower protection for civilian government employees, military personnel, non-appropriated fund employees, and contractor employees. It then discusses IG action in response to whistleblowing complaints and allegations of reprisal and investigative issues peculiar to reprisal investigations.

**1003 WHISTLEBLOWING DEFINED:** The mere use of the word "whistleblower" ignites intense feelings. To their supporters, whistleblowers are heroes who have the courage to place the interest of the public ahead of personal reputation and gain. To their detractors, whistleblowers are misfits who cannot work within a traditional organizational structure or, worse yet, misuse the concept to shield their own incompetence or misconduct. It is a measure of the ambivalence with which our society regards

whistleblowers that not one of the statutes of interest to DoN IG organizations discussed below uses the term whistleblower, and the only implementing regulation that defines the word never uses it in the operative portion of that regulation.

1. Any discussion of whistleblower protection should include a working definition of the term. For our purposes, we adopt a slight variation of the definition used in DoD Directive 1401.3, which implements the statutory whistleblower protection afforded to non-appropriated fund employees. Thus, a whistleblower is any person who discloses information he or she reasonably believes is evidence of a violation of any law, rule or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial or specific danger to public health or safety. Note that some statutes imply a slightly different definition, for example, "gross" rather than "simple" mismanagement.

2. Similarly, we say a whistleblower communication is the disclosure of information by a person who reasonably believes the information is evidence of a violation of any law, rule or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial or specific danger to public health or safety.

3. It is critical for investigators to remember two points that follow from these definitions. First, people who make reasonable mistakes are still whistleblowers. That is, they remain whistleblowers even if their allegations are refuted by the investigator during the course of the investigation. They lose whistleblower status only if the investigator concludes that they did not hold a reasonable belief the information they provided was evidence of a violation, etc., when they made the allegation. Under the statutes, this is a subjective test based on the knowledge and status of the individual making the disclosure, not an "objective person" test. Examples of situations in which a "belief" would be "unreasonable" include cases in which people making allegations know they are untrue, or know of information reasonably available to them that would tend to indicate the allegations are not true, but make a deliberate decision not to obtain that information before presenting the allegation. Further, for any given set of facts (those concerning a procurement action, for example), the reasonable belief of one group of people (government contracts attorneys) may differ from that of another (contract specialists).

4. The second critical point to keep in mind is that the motive for "blowing the whistle" does not play a role in determining whether or not someone is a whistleblower. Thus, an employee who remains silent about a superior's abuse of time and attendance rules until the superior does something to make the employee hostile to the superior, and only then reports the misconduct to the IG, is still a whistleblower. In short, "bad actors" may be "good whistleblowers" nonetheless. The legislative history of the False Claims Act of 1863, generally considered the first federal law intended to encourage whistleblowing by offering a monetary incentive to sue contractors defrauding the government, is illustrative:

> The effect of the [qui tam provision of the act] is simply to hold out to a confederate a strong temptation to betray his coconspirator, and bring him to justice. The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator ... based ... upon the old-fashioned idea of holding out a temptation, and "setting a rogue to catch a rogue ..."

**1004 PROTECTED COMMUNICATIONS:** Not every whistleblower communication is protected under the whistleblower protection statutes. For each statute, it is necessary to determine the type of information that may be disclosed, and to whom it may be given, in order for the whistleblower to be entitled to statutory protection. A "protected communication" occurs when a person covered by the statute discloses information of the type permitted by the statute to a person the statute authorizes to receive it. For the most part, the statutes protect only whistleblower communications. The statute applicable to military members, 10 USC 1034, is an exception.

1. Under 10 USC 1034, both ordinary and whistleblower communications to Congress and the IG are protected. However, there is no express statutory provision or judicial interpretation that affords protection for military members who make "lawful" (discussed below) whistleblower, or even ordinary, communications to a member of the media. Since DoN Public Affairs Office (PAO) instructions at all levels routinely require coordination of press communications, a military member who provides information concerning the DoN to the press without following the procedures in the applicable PAO instruction may be subject to discipline for failing to comply with the instruction, especially if the member were to represent the information provided constitutes the official DoN position on a matter rather than a personal opinion.

2. Conversely, the Civil Service Reform Act of 1978 (CSRA), the whistleblower statute applicable to civilian federal employees, does not expressly state to whom a lawful whistleblower communication may be made. Based on the legislative history, the statute is usually construed to afford protection from reprisal for lawful whistleblower communications made to members of the press.

3. All of the whistleblower protection statutes applicable to DoN personnel draw a distinction between "lawful" and "unlawful" communications. Unlawful communications, hereafter referred to as "confidential communications," include the transmission of classified information and information that a law specifically prohibits from being disclosed. See paragraph 1016 for a discussion of statutes that prohibit the release of certain types of information. The whistleblower statutes, in their current form, protect confidential whistleblower communications (but not confidential ordinary communications) that are made to a restricted category of persons (generally, Congress, the Office of the Special Counsel (OSC), and an agency audit or investigative organization). Thus, although a civilian employee who makes a confidential whistleblower communication to the press is a whistleblower, the disclosure is not a "protected communication" because the CSRA does not designate members of the press to receive confidential whistleblower communications, i.e. the statutes contemplate that "unlawful" whistleblower communications will be made in a "confidential" manner to a limited group of government officials. Consequently, it would be proper to take disciplinary action against a civilian employee who gives classified information to a member of the press while making a whistleblower communication. The same information provided to a member of Congress or an IG, however, would be a protected communication under the CSRA, and reprisal for its disclosure would be improper.

4. Sometimes it is difficult to determine whether or not the disclosure of specific information is prohibited by law or executive order, especially when the information is not marked

properly. Unmarked proprietary or procurement sensitive information is an example of such information. Likewise, occasionally it may be unclear whether a particular person is one to whom an unlawful whistleblower communication properly may be made. For example, until October 1994, the whistleblower protection statute applicable to military members expressly provided protection for lawful whistleblower communications made to an IG. However, because of the nature of the statutory language, there was some question as to whether the same communication made to NCIS or NAVAUDSVC personnel was protected. Consequently, Congress amended the statute to make it clear that those communications also were protected under the statute. During an IG investigation, if there is any question in these areas, the investigator should ask whether a reasonable person with the same status of the whistleblower would have believed the communication was lawful, or that the person to whom the disclosure was made was a proper person to receive a confidential whistleblower communication. When there is reasonable doubt, the investigator should find in favor of the whistleblower.

**1005 REPRISAL AND RETALIATION:** Curiously, the whistleblower protection statutes DoN IGs work with do not prohibit all forms of adverse or disparate treatment that may occur to one who makes a protected communication. Generally, they prohibit specific personnel actions, such as discharges, demotions, performance appraisals, or reassignments. Although most also prohibit "any other significant change" in working conditions, duties or responsibilities that is "inconsistent with" the whistleblower's rank, grade level, or salary, there are many ways to "get even" that can not be called a "prohibited personnel practice" (the phrase used in the CSRA). For IG purposes, we call action taken for the purpose of getting even that is prohibited by the whistleblower protection statutes "reprisal," and all other action taken for that purpose "retaliation." NAVINSGEN takes the position that retaliation for protected communications is improper, and warrants remedial action, even if the retaliation does not constitute reprisal under an applicable statute. Consequently, IG investigators who find retaliation that does not constitute statutory reprisal should discuss the distinction in the investigative report, but go on to recommend remedial action to undo the adverse effect of the retaliation.

**1006 WHISTLEBLOWER STATUTES AND IMMUNITY:** Whistleblower statutes are intended to protect the disclosure of improper conduct, not the underlying conduct itself. Consequently, none of the whistleblower statutes IGs are concerned with provide whistleblowers immunity from discipline or prosecution for their participation in the misconduct they disclose. Conversely, the statutes do not prohibit a grant of immunity from prosecution or discipline, and the False Claims Act even permits a participant to recover money for reporting the fraud, albeit at a reduced rate. IG investigators may be confronted by people who offer to make whistleblower communications in return for both immunity and protection from reprisal. Investigators must be careful not to promise whistleblowers immunity, and to ensure that any decision to grant immunity from prosecution or disciplinary action based on the underlying misconduct is made by proper authority. IG investigators also must remember that they can never guarantee whistleblowers freedom from retaliation or reprisal. They can promise a thorough investigation and an IG recommendation for remedial action if an allegation of reprisal or retaliation is substantiated.

**1007 STATUTORY AND INHERENT AUTHORITY:** Before examining the specific whistleblower statutes, it is important to distinguish between an IG's statutory authority to

investigate allegations of reprisal, and an IG's inherent, or general, authority to undertake such investigations. The US Navy Regulations and various SECNAV instructions state that DoN personnel have a duty to report suspected wrongdoing to various officials, including DoN IG organizations. Consequently, DoN IG organizations have a duty, independent of the whistleblower statutes, to investigate both the underlying allegation and any subsequent complaint of reprisal. In general, the whistleblower statutes indicate that the primary responsibility for investigation of allegations of reprisal rests with an organization outside DoN, such as the DoDIG or the OSC. However, DoN personnel who elect not to proceed under the applicable whistleblower statute, but have a DoN IG organization conduct the investigation, should not be penalized for their decision to keep the matter "in-house," and should be afforded the same rights as provided by the statute to the maximum extent possible. Nonetheless, the investigator must understand, and be prepared to explain, that some of the whistleblower statutes provide for remedies that are not within the power of the DoN to grant.

**1008 CIVILIAN GOVERNMENT EMPLOYEES:** Protection for the whistleblowing activities of civilian employees was established in the CSRA and is codified in 5 USC 1212-1215, and 2302. Congress made major revisions to the CSRA whistleblower protection provisions in 1989. Reprisal for protected whistleblowing is called a prohibited personnel practice, and civilians who commit a prohibited personnel practice may be disciplined.

1. Allegations that whistleblowing has resulted to the commission of a prohibited personnel action may be presented to the OSC, which can initiate legal proceedings at the MSPB in order to obtain remedial action for the injured whistleblower and to discipline civilians who committed prohibited personnel actions. OSC regulations describing how to file complaints of reprisal appear at 5 CFR 1800. A copy of the complaint form used by the OSC is in Appendix E.

2. Under the CSRA, a whistleblower communication is one that discloses information a person reasonably believes constitutes evidence of: (1) a violation of law or regulation; (2) gross mismanagement; (3) gross waste of funds; (4) abuse of authority; or (5) a specific danger to public health or safety.

3. Under the CSRA, a lawful whistleblower communication consists of disclosures "not specifically prohibited by law" and "information [that] is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs," i.e., classified information. Disclosures of this type may be made to virtually anyone - Congress, the public, the press, an IG, etc. - in order to invoke the protection of the law. Since the 1989 amendments to the CSRA, most commentators agree that disclosures made within the chain of command, i.e., to a supervisor, or as part of the performance of one's regular duties, are protected under the statute.

4. Under the CSRA, confidential whistleblower communications may be made to the OSC, "the Inspector General of an agency," or to "another employee designated by the head of the agency to receive such disclosures of information." Within the DoN, the last category includes any person or organization authorized to receive or investigate, hotline complaints. Usually, the OSC will refer the whistleblower allegation to the agency concerned for investigation.

5. The CSRA also authorizes the OSC to investigate allegations of reprisal for making, or preparing to make, protected communications. The CSRA also authorizes the OSC to seek a

stay of a prohibited personnel practice in appropriate cases.

6. The CSRA at 5 USC 2302, defines a personnel action as:

- an appointment;
- a promotion;
- a disciplinary or corrective action;
- a detail, transfer, or reassignment;
- a reinstatement, restoration, or reemployment;
- a performance evaluation;
- a decision regarding pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation or other action described above;
- a decision to order psychiatric testing or examination (see Oct 94 amendments); and
- any other significant change in duties, responsibilities or working conditions (see Oct 94 amendments and note that OSC personnel suggest this language gives OSC authority in sexual harassment cases).

7. Under the CSRA, it is a prohibited personnel practice to "take or fail to take" any personnel action described in the previous paragraph in reprisal for making a protected communication. Directing, recommending or approving a prohibited personnel practice is also prohibited.

8. If the OSC substantiates the allegation of reprisal, it can recommend that the offending agency personnel be removed, reduced, suspended, reprimanded or fined. The offenders have the right to a hearing before the MSPB, and may appeal an adverse MSPB decision to United States Court of Appeals for the Federal Circuit.

9. Most executive branch (including DOD) personnel are protected. But there are exceptions: policymaking or confidential positions, such as non-career SES and Schedule C employees. Additionally, employees of certain intelligence agencies, including the FBI and CIA, are not protected by this law. Personnel hired other than under Title 5 of the US Code, such as employees of non-appropriated fund instrumentalities (exchanges, etc.) are also not covered under the CSRA provision; they are protected under another statute (see paragraph 1005).

10. In 1989, Congress made major revisions to the CSRA that affect the standard and burden of proof. See paragraph 1015 below.

**1009 MILITARY PERSONNEL:** The Military Whistleblower Protection Act, 10 USC 1034, as amended (most recently) by the FY95 Defense Authorization Act, prohibits interference with a military member's right to make protected communications to members of Congress, Inspectors General, members of DoD audit, inspection, investigation or law enforcement organizations, and other persons or organizations (including the chain of command) designated by regulation or administrative procedures.

1. Before 1988, 10 USC 1034 was entitled "Communicating with a Member of Congress" and simply stated "[n]o person may restrict any member of an armed force in communicating with a Member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States."

2. In 1988, Congress changed the title of 10 USC 1034 to "Communicating with a Member of Congress or Inspector General; prohibition of retaliatory personnel actions." In addition to classifying communications as "lawful"

(protected) and "unlawful" (not protected), it also divided lawful communications into two subtypes - ordinary communications and whistleblower communications. The latter have the same definition as in the CSRA except that the adjective "gross" does not appear before "mismanagement."

3. Under the 1988 statute, any statutory Inspector General (such as the DoDIG) and the service Inspectors General could receive and investigate lawful whistleblower communications from military members. However, only the DoDIG was authorized to investigate a military member's complaint of reprisal (or the threat of reprisal) for making (or preparing to make) a lawful whistleblower communication - and then only if the member "submits" the allegation to the DoDIG.

4. Experience with the 1988 statute suggested that the class of people or organizations a protected whistleblower communication could be made to needed expansion. For example, disclosures made during the course of interviews conducted by NCIS or NAVAUDSVC personnel were not protected under the literal language of the statute. In late 1991, the coverage was expanded by Section 843 of Public Law 102-190 to include communications to any DOD employee or member of the Armed Forces who is assigned to or belongs to an organization which has as its primary responsibility audit, inspection, investigation, or enforcement of any law or regulation. This expansion also required SECDEF to issue regulations - violation of which would be punishable under Article 92, UCMJ - prohibiting any military member from taking an unfavorable personnel action (or failing to take a favorable personnel action) in reprisal for whistleblowing. See DoDDIR 7050.6 and SECNAVINST 5370.7A

5. Still, as amended, the Military Whistleblower Protection statute provided no mechanism by which a military member could make a confidential whistleblower communication without being subject to discipline for the "unlawful" aspect of the disclosure. This gap in protection was closed by the 1994 amendments to 10 USC 1034, which appear in Section 531 of the FY95 Defense Authorization Act.

6. In addition to extending protection to confidential whistleblower communications, the 1994 amendments again expanded the group of people and organizations a protected whistleblower communication may be made to by adding "any other person or organization (including any person or organization in the chain of command) designated pursuant to regulations or other established administrative procedures for such communications."

7. The 1994 amendments also included a provision expressly stating that disclosures concerning the violation of laws or regulations prohibiting sexual harassment or unlawful discrimination were covered by the statute. This language should be construed as a Congressional exclamation point, not as an indication that such disclosures were not protected whistleblower communications prior to October 1994.

8. Unlike the statute applicable to civilians, 10 USC 1034 has never defined the types of "personnel actions" to which it applies. However, the House Report accompanying the 1988 amendments indicates a broad definition is applicable, stating that it includes:

> ... any unfavorable personnel action, or the withholding of a favorable personnel action, as a reprisal ... the prohibition against an unfavorable personnel action is intended to include any action that has the

effect or intended effect of harassment or discrimination against a member of the military ...

9. The regulatory definition appearing in DoD Directive 7050.6 is similar to the statutory definition used for civilians and includes:

any action taken on a member of the Armed Forces that affects or has the potential to affect that military member's current position or career. Such actions include:

- a promotion;
- a disciplinary or other corrective action;
- a transfer or reassignment;
- a performance evaluation;
- a decision on pay, benefits, awards or training; and
- any other significant change in duties or responsibilities inconsistent with the military member's rank

10. As now amended, 10 USC 1034 itself requires the DoDIG to investigate all allegations of reprisal (or threatened reprisal) for making (or preparing to make) protected communications. It requires the boards for correction of military records to consider such investigations, and hold hearings when appropriate, in connection with any application to correct the record of a member who alleges an improper personnel action. Disciplinary action can be recommended against a person who is determined to have committed the improper personnel action. The statute still requires the issuance of implementing regulations, and a new DoD regulation should be issued in the near future.

11. The amended statute permits the DoDIG to delegate the conduct of an investigation under the statute to a Service Inspector General, but in that case requires the DoDIG to ensure "that the inspector general conducting the investigation is outside the immediate chain of command of both the member submitting the allegation and the individual or individuals alleged to have taken the retaliatory action." The draft of the new DoD regulation would permit DoD component regulations to establish the meaning of "the immediate chain of command." See paragraph 1013.2e for further discussion.

12. The draft of the new DoD regulation includes a provision requiring that a Service IG who receives allegations of reprisal from a military member advise the member in writing that only written complaints of reprisal made to the DoDIG, or forwarded to the DoDIG, will receive consideration under the directive. The draft would require the Service IG to forward the complaint to the DoDIG upon the service member's written request.

**1010 NON-APPROPRIATED FUND EMPLOYEES:** 10 USC 1587 provides whistleblower protection to civilian employees, paid from non-appropriated funds, of the Army and Air Force Exchange Service, the Navy Exchange system, and Marine Corps exchanges, or "any other instrumentality of the United States under the jurisdiction of the armed forces which is conducted for the comfort, pleasure, contentment, or physical or mental improvement of members of the armed forces." Thus, Morale, Welfare and Recreation (MWR) employees are protected under this statute.

1. The statute prohibits civilian employees and military members who have authority to take, recommend, or approve personnel actions, or direct others to take personnel actions, from taking or failing to take a personnel action in reprisal for the employee's disclosure of information that he or she reasonably believes is evidence of a violation of law or regulation, or of mismanagement, gross waste of funds,

abuse of authority, or danger to public health or safety.

2. Personnel actions under the statute include:

- an appointment;
- a promotion;
- a disciplinary or corrective action;
- a transfer, detail, or reassignment;
- a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion or other action listed above; and
- any other significant change in duties or responsibilities that is inconsistent with the employee's salary or grade level.

3. Like the CSRA, the statute permits unlimited disclosure of "lawful" whistleblower information, and provides that a "confidential" whistleblower communication may be made to "any civilian employee or member of the armed forces designated by law or by the Secretary of Defense to receive such disclosures." However, the statute assigns the Secretary of Defense the responsibility for preventing acts of reprisal and for correction of any such acts. The statute expressly prohibits the Secretary from delegating the responsibility to correct acts of reprisal to the service secretaries.

4. The statute is implemented by DoD Directive 1401.3, "Employment Protection for Certain Non-appropriated Fund Instrumentality Employees/Applicants," dated 19 July 1985 (with changes 1 and 2). The directive assigns the DoDIG responsibility for the investigation of allegations of reprisal. It assigns the Director of Administration and Management, OSD (DA&M) responsibility for adjudicating complaints of reprisal and determining, based on the DoDIG report, whether or not reprisal action was taken as a result of a protected disclosure. It also authorizes the DA&M to order a stay of a personnel action pending such determinations. Finally, the directive requires the DoD Components to implement the corrective action directed by the DA&M.

**1011 <u>CONTRACTOR EMPLOYEES</u>:** Two statutes, 10 USC 2409, and 10 USC 2409a, have provided a measure of protection to contractor personnel who report suspected violations of laws or regulations relating to defense contracts. DoN IG organizations (and many other DoN offices, such as contracts offices) are authorized to receive such disclosures, and contractor personnel who make disclosures to DoN IG (and other) organizations are entitled to the protection of the statutes. However, DoN IG organizations are not authorized to receive or investigate contractor employee allegations of reprisal for making disclosures protected by the statutes.

1. Enacted in 1986, 10 USC 2409 prohibited defense contractors from discharging, demoting, or discriminating against their employees for making disclosures to Congress or authorized DoD or Department of Justice officials that related to "a substantial violation of law related to a defense contract (including the competition for or negotiation of a defense contract)." The statute required people who believed they were victims of contractor reprisal to submit their complaints to the DoDIG, which would investigate and submit a report of the findings to the complainant, the contractor, and SECDEF. The statute did not provide any specific remedy for substantiated allegations of reprisal. The statute imposed no time limit for making the complaint of reprisal, nor did it establish a minimum threshold for the value of the defense contracts to which it applied, or limit its application based on the type of product to be purchased under the contract.

2. In 1990, Congress enacted 10 USC 2409a. This statute required SECDEF to issue regulations applicable to each defense contract "entered into by a contractor and the [DoD] for an amount greater than $500,000" except where the contract price was based "solely on established catalog or market prices of commercial items sold in substantial quantities to the general public." The statute went on to outline the contents of the regulations, which were placed in the DoD supplement to the Federal Acquisition Regulation (FAR) at DFARS Subpart 203.71, entitled "Contractor Employee Communications with Government Officials."

a. The regulations prohibited a defense contractor from discharging or otherwise discriminating "against any employee with respect to such employee's compensation or terms and conditions of employment because the employee (or any person acting pursuant to a request of the employee) discloses to an appropriate Government official information concerning a defense contract which the employee reasonably believes evidences a violation of any Federal law or regulation relating to defense procurement or the subject matter of the contract."

b. The regulations provided that contractor employee complaints of discharge or discrimination be certified, signed, and submitted to the Director, Defense Logistics Agency (DLA), not more than 180 days after the date on which the violation was alleged to have occurred, or the date on which the violation was discovered, whichever was later. DLA would refer the complaint to the DoDIG for investigation. Upon receipt of the completed report of investigation, DLA was to provide a copy of the report to the complainant, any person acting on the complainant's behalf, and the defense contractor alleged to have committed the violation. DLA was then required to issue an order providing relief; issue an order denying the complaint; or terminate the proceedings on the basis of a settlement agreement.

c. Under the regulations, DLA could order the contractor to abate the violation. DLA could also order the contractor to reinstate the complainant, with back pay and other appropriate remedies (including reimbursement for costs of pursuing the complaint such as attorney fees). The orders of DLA could be appealed by any person aggrieved by the orders (both the contractor and the complainant) to the Federal Circuit Court of Appeals for the circuit in which the violation alleged in the order occurred. DLA was also authorized to seek enforcement of its orders in the federal district court for the district in which the alleged violation occurred.

3. In 1991, Congress amended 10 USC 2409a to state that it would expire on 5 November 1994, and amended 10 USC 2409 to state that it would not be in effect during the period that 10 USC 2409(a) was in effect. In 1992, Congress again amended 10 USC 2409 to make it available to contractor employees who did not seek timely redress under 10 USC 2409a.

4. In September 1994, Congress enacted the Federal Acquisition Streamlining Act of 1994, PL 103-355. Sections 6005 and 6006 of the act repealed 10 USC 2409a and substantially rewrote 10 USC 2409, extending its coverage to federal civilian agency contractors. The new law represents a consolidation of the two pre-existing laws applicable to defense contracts in that it extends coverage to any contract, without regard to dollar value or type

of item procured, as was the case with 10 USC 2409, and also provides contractor employee whistleblowers the procedural and enforcement protection that had been included in 10 USC 2409a. With the passage of the new law and the repeal of 10 USC 2409a, the DFARS regulations ceased to have effect.

5. On 21 July 1995, the FAR Council published in the Federal Register (60 FR 37774) a new FAR Subpart 3.9, entitled "Whistleblower Protection for Contractor Employees." The most significant change in the new regulation is that DLA will no longer have the responsibility for deciding, on behalf of DoD, what action should be taken upon receipt of the DoDIG report of investigation. Instead, pursuant to the terms of the statute (and when read in conjunction with the DFARS 202.101 definition of "head of the agency"), the regulation vests this authority in the heads of each of the military departments and, for the DoD agencies, the Secretary of Defense.

**1012 IG ACTION ON RECEIPT OF WHISTLEBLOWING ALLEGATIONS:** DoN IGs are authorized to receive and investigate complaints that include whistleblowing allegations. In some cases, especially where the complainant expresses a concern about the independence of the DoN IG organization, it is appropriate to suggest the complainant may wish to make the complaint to another organization, such as DoN IG organization at a higher echelon, the DoDIG, or the OSC. Of course, in those cases where the DoN IG organization itself recognizes that it would not satisfy the IG requirement for independence, it must refer the complaint to higher authority for investigation. Those cases aside, it is incumbent upon the DoN IG organization receiving the investigation to conduct an appropriate inquiry into the whistleblowing allegations. This is the primary purpose for the establishment of the DoD and DoN hotline systems, at whatever level they may be implemented.

**1013 IG ACTION ON RECEIPT OF ALLEGATIONS OF REPRISAL:** As indicated in the foregoing paragraphs, DoN IG organizations do not have the primary jurisdiction in the investigation of allegations of reprisal for making protected whistleblower disclosures and, in one case, have no authority to undertake an investigation at all. Therefore, upon receipt of a complaint of reprisal, determine the category in which the alleged victim of reprisal falls and take appropriate action as follows:

**1. Civilian Appropriated Fund Employ-ees** - Advise complainants that DoN IG organizations have general authority to investigate the complaint and recommend appropriate corrective and remedial action within the DoN. In addition:

a. Advise that the OSC has special authority under 5 USC 1211-1215 to investigate such allegations and ensure that the DoN takes appropriate action. For example, the OSC may seek a stay of a proposed personnel action. Also, should the OSC and the DoN be unable to agree on the corrective action, if any, that should be taken, the OSC has the authority to bring the matter before the Merit Systems Protection Board for resolution. Finally, should the OSC and the DoN disagree on the disciplinary action, if any, that should be taken against a civilian employee the OSC believes has taken (or threatened to take) a retaliatory personnel action, the OSC may initiate disciplinary proceedings against the employee before the Merit Systems Protection Board.

b. Advise that the OSC does not object to the conduct of a reprisal investigation by a DoN IG organization and will review information obtained in that investigation before taking any action in response to a

complaint filed with it. Thus, the employee may elect to allow the DoN IG organization to initiate and proceed with an investigation without prejudice to the employee's right to subsequently ask the OSC to intervene. Note, however, that once the OSC does intervene, the DoN investigative effort ordinarily would be terminated in order to avoid duplication of effort.

c. Provide a copy of the form in Appendix E that OSC provides to complainants in order to comply with its requirement that complaints of reprisal be made in writing (note that this form is an excellent checklist to use when conducting an interview of a complainant).

d. Provide OSC phone numbers that may be used to obtain information regarding complaints of reprisal: (800) 872-9855 and (202) 653-7188.

**2. Military Members** - Advise complainants that DoN IG organizations have general authority to investigate the complaint and recommend appropriate corrective and remedial action within the DoN. Also advise, however, that DoN IG organizations do not have the authority to undertake an investigation under 10 USC 1034, the Military Whistleblower Protection Act, except at the direction of the DoDIG. In addition:

a. Advise that to receive all of the protection afforded by 10 USC 1034, the military member must file the complaint of reprisal with the DoDIG.

b. Explain that under the statute the reprisal investigation must be conducted by or under the direction of the DoDIG if the complaint of reprisal is submitted to the DoDIG within 60 days after the military member becomes aware of the personnel action (but DoDIG may waive the 60 day deadline); that the member is entitled to receive a copy of the investigative report automatically (without the need to make a FOIA request), which may be submitted to the Board for Correction of Naval Records (BCNR) in support of the member's request for correction; that the member is entitled to OSD review of the BCNR and Secretary of the Navy action on the petition for correction; and that the DoDIG is required to interview the military member after the final action on the complaint, in order obtain the member's views on the disposition of the matter.

c. Ask if the member wants to submit the complaint to the DoDIG, and if the response is affirmative, offer to assist the member in doing so. When possible, and especially if the 60 day filing window is about to expire, place a call to the DoDIG Hotline office in the presence of the complainant. Where this is not practical, assist the member in writing out the complaint and offer to mail or fax it to the DoDIG (in preparing the complaint, refer to the DoD Guide on Military Reprisal Investigations discussed in paragraph 1014 below and try to obtain as much pertinent information as possible).

d. Inform the member that the DoDIG will accept phone-in complaints of reprisal via its regular hotline numbers, (800) 424-9098 or (703) 604-8546, and that the address for filing written complaints is Department of Defense Inspector General; Attn: Hotline Division; The Pentagon; Washington, D.C. 20301-1900.

e. Pending the issuance of new DoD and SECNAV regulations to implement the

1994 amendments to 10 USC 1034, NAVINSGEN will review investigative taskings to ensure that the person in command of the office investigating an allegation of reprisal against a military member and the subject of the investigation do not report to the same person.

**3. Non-Appropriated Fund Employees** - Advise complainants that DoN IG organizations have general authority to investigate the complaint and recommend appropriate corrective and remedial action within the DoN, but that DoN IG organizations do not have the authority to undertake an investigation under 10 USC 1587, the Whistleblower Protection Act applicable to non-appropriated fund employees. In addition:

a. Advise that regulations implementing the statute provide for investigation by the DoDIG, and review of the results by the DA&M. The regulations also authorize the DA&M to order a stay of a personnel action pending review of the report and require the DoN to implement the corrective action directed by the DA&M.

b. Offer to assist in filing the complaint with DoDIG as outlined in paragraph 1013(2)(c) above and provide the phone numbers and address for the DoDIG Hotline Division set forth in paragraph 1013(2)(d) above.

**4. Defense Contractor Employees** - Advise complainants that DoN IG organizations have no authority to investigate the complaint without the consent of the contractor in question, and consequently DoN IG organizations do not undertake such investigations. Advise that pursuant to 10 USC 2409 and implementing regulations, such investigations are undertaken by the DoDIG. Provide the DoDIG hotline phone numbers and address that are set forth in paragraph 1013(2)(d). If asked, advise that the 180 day time limit for filing complaints appearing in the DFARS was deleted from the new FAR Subpart 3.9, but that timeliness is still important to the success of the investigation.

**1014 DOD INVESTIGATIVE GUIDANCE:** The DoDIG has published a manual or guide that details the procedure to follow when investigating allegations of reprisal against military personnel. Its use is mandatory for investigations of allegations received by the DoDIG and referred to a DoN IG organization for investigation The manual is IGDG 7050.6DI, "Guide to Military Reprisal Investigations," dated September 30, 1992. The DoDIG intends to revise and reissue this guide after DoD Directive 7050.6 is revised in order to reflect the recent amendments to 10 USC 1034.

1. NAVINSGEN recommends use of the guide in all other investigations of reprisal against military personnel. The guide contains information that should prove useful for all other reprisal investigations.

2. The DoDIG routinely refers all whistleblower reprisal cases to its office of counsel for legal review. That office has requested that the services provide the name and phone number of the legal officer who reviewed the case before it was forwarded to the DoDIG. DoN IG investigators should consult with local counsel as appropriate, and, when feasible, obtain local legal review before forwarding the case. The name and phone number of the attorney who reviewed the case should accompany the report. NAVINSGEN legal staff personnel are available for consultation at (202) 433-2222, FAX (202) 433-3277.

**1015 EVIDENTIARY ISSUES:** In American jurisprudence, the plaintiff has the burden of proof. Plaintiffs who do not carry their burden lose their

case. Courts and administrative tribunals such as the MSPB charged with hearing whistleblower reprisal cases have adopted the evidentiary standards used in Title VII discrimination cases, since whistleblower reprisal is regarded as a form of discrimination. In these cases, the plaintiff's burden of proof is complicated by the fact that the retaliatory personnel action, standing alone, is seldom illegal, and the plaintiff must prove the defendant had an improper state of mind or reason for taking the action.

1. To reduce the plaintiff's difficulty, the typical Title VII case uses the concepts of the prima facia case and the shifting burden of "going forward" with the production of evidence. Thus, in a typical employment discrimination case, the minority race plaintiff initially need prove only that he or she was qualified for the job or promotion, that the employer had reason to know the race of the applicants, and that members of a favored race who were less qualified were selected or promoted while the plaintiff was not. At that point, the plaintiff has made out a prima facia case for discrimination. Consequently, if the defendant puts on no evidence in rebuttal, the tribunal will adopt the presumption that the defendant's motive for the selections was based on race, and will find in favor of the plaintiff.

2. Once the plaintiff has made out a prima facia case of discrimination, then the burden of going forward with the production of evidence (but not the overall burden of proof) shifts to the defense, which must articulate (not prove) a legitimate non-discriminatory reason for not having selected the plaintiff. At that point the burden of going forward shifts back to the plaintiff, who must prove that the reason articulated by the defendant was just a pretext to cover the real, discriminatory reason for non-selection.

3. Between 1979 and 1989, MSPB and courts hearing whistleblower cases adopted these standards for trial of whistleblower reprisal cases. In addition, following the reasoning of first amendment free speech cases, they adopted the "but for" test to decide whether an action was reprisal when the employer had several legitimate reasons for taking action in addition to a retaliatory reason. Under that standard, the plaintiff had to prove that the protected whistleblowing was a significant, or major factor in the decision. In a case of failure to promote, for example, the plaintiff had to show he or she would have been promoted "but for" the protected whistleblowing. It was not enough to show that the protected communication was considered by management and contributed to its decision.

4. In 1989, Congress decided that MSPB and court decisions placed too great a burden on the civilian whistleblower. Consequently, Congress made several significant changes to the CSRA in order to reverse existing whistleblower caselaw. In particular, Congress amended the CSRA to require management to prove by clear and convincing evidence that it had a legitimate, non-retaliatory reason for taking the personnel action in question. Thus, Congress changed the traditional rule that the plaintiff has the burden of proof for every element of the case, and substantially raised the evidentiary standard that the defense had to meet. Also, Congress did away with the "but for" test and substituted a "contributing factor test." Thus, a personnel action would be reprisal if the whistleblowing activity was a reason for it, even if it was not a significant or major reason for the action.

5. Congress passed the Military Whistleblower Protection Act in 1989, the same year it amended the CSRA. Congress did not

explicitly address the foregoing evidentiary issues in the military act. The DoDIG, however, takes the position that management has the burden to prove it had legitimate, non-retaliatory reasons for personnel actions involving military members, and that if protected conduct was a contributing factor, the personnel action is reprisal under the act. DoDIG personnel advise they have not come across a case in which it appears the degree of proof management must present - preponderance or clear and convincing - would have made a difference.

6. Because it is the motive of management that must be examined in whistleblower cases, it is not sufficient for the investigator to close the case upon determining that the personnel action in question was one that management had the authority to take, or that it was within the range of discretion permitted management. As noted earlier, most retaliatory personnel actions are not per se illegal, and would be within management prerogative but for the improper motive.

**1016 STATUTES THAT PROHIBIT DISCLOSURES:** As noted in the preceding paragraphs, Congress has drawn a distinction between lawful and unlawful communications by making a general reference to laws and executive orders that prohibit disclosure of certain types of information. The whistleblower statutes do not provide a list of such laws and statutes. However, the Freedom of Information Act includes two exemptions based on the application of laws prohibiting disclosures of information, and one based on the non-disclosure of classified information. Enclosure (2) to the SECNAV FOIA Instruction 5720.42E, identifies the following as examples of statutes that specifically prohibit the disclosure of certain types of information:

National Security Agency Information, PL 86-36, Section 6

Patent Secrecy, 35 USC 181-188 (any records containing information relating to inventions that are the subject of patent applications on which Patent Secrecy Orders have been issued)

Restricted Data and Formerly Restricted Data, 42 USC 2162

Communication Intelligence, 18 USC 798

Authority to Withhold From Public Disclosure Certain Technical Data, 10 USC 130

Confidentiality of Medical Quality Records: Qualified Immunity Participants, 10 USC 1102

Physical Protection of Special Nuclear Material: Limitation on Dissemination of Unclassified Information, 10 USC 128 (prohibits unauthorized dissemination of unclassified information pertaining to security measures, including security plans, procedures, and equipment for the physical protection of special nuclear material)

Protection of Intelligence Sources and Methods, 50 USC 403(d)(3)

Alcohol Abuse Prevention/Rehabilitation, 42 USC 4582 (protects records of identity, diagnosis, prognosis, or treatment of any patient maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly assisted by any department or agency of the US, unless expressly authorized)

Procurement Integrity Act Protected Information, 41 USC 423 (protects procurement sensitive information, and related proprietary and source selection information during the course of the procurement process)

The Trade Secrets Act, 18 USC 1905 (protects documents containing trade secrets or commercial or financial information received from a person or organization outside the government with the understanding that the information will be maintained on a privileged or confidential basis)

The Copyright Act of 1976, 17 USC 106 (which includes protection for computer software)

See Appendix E for an OSD memo that contains a more comprehensive list.

**1017 DISCLOSURES UNDER THE CIVIL FALSE CLAIMS ACT:** This chapter started by pointing out that statutes encouraging whistleblowers can be traced to the qui tam provisions of the False Claims Act of 1863. In 1986, Congress revitalized this law by making it easier to bring, and win, qui tam actions. Since then, the government and qui tam whistleblowers have recovered millions of dollars in settlements and judgements. DoN IG organizations usually do not get involved in investigations leading to qui tam actions, and it is not clear that federal employees may bring qui tam actions based on information they learned during the course of performing their official duties. However, it is worth noting that the 1986 revisions to the act contain, at 31 USC 3730, the following comprehensive provision for the protection of qui tam whistleblowers:

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

**1018 SUGGESTED READING MATERIALS:** See the appendix for a list of whistleblower reading materials.

# CHAPTER 11 - DISCRIMINATION/SEXUAL HARASSMENT

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# CHAPTER 11 - DISCRIMINATION/SEXUAL HARASSMENT

**1101 INTRODUCTION:** Employment discrimination in the private sector based on race, color, religion, sex or national origin was made unlawful by Title VII of the Civil Rights Act of 1964 (see 42 USC 2000e-2(a)). Coverage was extended to civilian employees of federal agencies in 1972. Although Congress has never made Title VII applicable to military members, the DoD prohibits such discrimination and generally follows the development of Title VII as interpreted by the Equal Employment Opportunity Commission (EEOC) and courts charged with deciding cases alleging discrimination against private and public sector civilian personnel.

**1102 SEXUAL HARASSMENT:** Although Title VII does not refer to sexual harassment, the EEOC issued guidelines in 1980 that defined sexual harassment and declared it a form of sex discrimination that violates Title VII (see 29 CFR 1604.11). The EEOC position was affirmed by the Supreme Court in Merritor Savings Bank v. Vinson (106 S.Ct. 2399 (1986)). Over the years, a number of federal agencies, including the DoD, have expanded upon the basic guidelines set forth by the EEOC. For example, the DoD and DoN have expanded the EEOC definition of sexual harassment by including supervisors and those in command positions who use or condone implicit or explicit sexual behavior to affect another's career, pay, or job. Nonetheless, the EEOC definition and guidelines remain central to the investigation of sexual harassment in the government and private sector. Thus cases that construe those guidelines are important to an understanding of sexual harassment in the DoD and the DoN. For example, the Supreme Court's 1993 decision in Harris v. Forklift Systems, Inc. (114 S.Ct. 367) resulted in the issuance of a 22 August 1994 SECDEF memo stating that "abusive work environment" harassment need not result in concrete psychological harm to the victim in order to be actionable within the DoD. The memo reiterates that DoD policy is the same for both military members and civilian personnel.

**1103 THE COMMANDER'S HANDBOOK FOR PREVENTION OF SEXUAL HARASSMENT:** In recent years, the DoN has taken many steps to eliminate sexual harassment, including the issuance of SECNAVINST 5300.26B, "DoN Policy on Sexual Harassment," updated 6 January 1993, a complete overhaul and substantial expansion of the previous instruction. For the purpose of this IG investigations manual, the most important subsequent action was the issuance of "The Commander's Handbook for Prevention of Sexual Harassment" (The Commander's Handbook) in March 1994. Chapter 2 of the Commander's Handbook sets forth the definition of sexual harassment within the DoN and related terms. The Commander's Handbook also discusses DoN policy regarding sexual harassment, prevention, training, and grievance procedures (also known as the "Informal Resolution System"). Most important, Chapter 4 and Appendix M of the Commander's Handbook contain a detailed guide for the investigation of sexual harassment complaints at the unit level. This material applies to both civilian and military complainants and subjects.

**1104 DISCRIMINATION INVESTIGATIONS:** The standards for the conduct of military discrimination investigations are contained in the Navy Equal Opportunity Manual, OPNAVINST 5354.1C. Similar to the Commander's Handbook, this reference is essential for the conduct and review of racial and other discrimination investigations, but applies only to military complainants and subjects. For DoN civilian employees, see paragraph 1109. See the following paragraph for reporting requirements for discrimination cases.

**1105 COMMAND RESPONSIBILITY FOR INITIAL SEXUAL HARASSMENT INVESTIGATION:** Under current DoN policy, a local command bears the primary responsibility for investigating and resolving allegations of sexual harassment, and must act as quickly as possible. Investigations should be started within one calendar day of the receipt of a complaint, and must be started within three calendar days. An OPREP-3 Navy Blue is required if the sexual harassment complaint is not resolved within 14 days, with status reports by UNIT SITREP every 14 days thereafter (60 and 30 days, respectively for reservists not on active duty). Thus, DoN IG organizations that receive complaints of sexual harassment should quickly determine whether the complainant has sought relief through the foregoing process. Complainants who have not yet done so should be encouraged to give the chain of command an opportunity to investigate and resolve the matter. Note that although the policy of mandatory reporting by message when time standards are not met in sexual harassment cases received more publicity than the reporting requirements for other discrimination cases, the "Navy Equal Opportunity/Sexual Harassment Complaint Form," used for all discrimination cases for military members (unless resolved under the Informal Resolution System), imposes the same reporting requirements for all discrimination cases, including those not alleging sexual harassment.

**1106 IG RESPONSIBILITY FOR SEXUAL HARASSMENT INITIAL INVESTIGATION:** DoN policy also provides that complainants who do not feel comfortable with their chain of command may make their complaints directly to DoN IG organizations. Consequently, although it is appropriate initially to encourage a complainant to use the chain of command, a **DoN IG organization must accept the complaint for action should the complainant insist upon IG investigative action**. In that case, the reporting requirement mentioned in the foregoing paragraph rests with the IG organization that is tasked with the investigation. Note also that, even when the complainant initially takes the complaint to the local command, the commander has the authority to request that someone outside the command conduct the command inquiry, e.g., IG staff, command evaluator, EEO counselor, Equal Opportunity Program Specialist, etc.

**1107 CONDUCT OF IG SEXUAL HARASSMENT INVESTIGATION:** When a DoN IG organization conducts an investigation into a complaint of sexual harassment, it should follow the guidance in this investigations manual as well as the guidance in Appendix M of the Commander's Handbook, which is reproduced in Appendix F of this investigations manual for convenience. Additional guidance for the conduct of more complex investigations, especially those alleging quid pro quo harassment (exchange of job benefits for sexual favors), may be found in the reading materials listed in the appendix to this investigations manual.

**1108 MILITARY MEMBER FORMAL COMPLAINT FORM:** The DoN has created a four part "Navy Equal Opportunity (EO) / Sexual Harassment (SH) Formal Complaint Form" to record information concerning the filing, investigation, and resolution of equal opportunity and sexual harassment complaints. The form also provides advice to the complainant and command, and may be used to document allegations of reprisal for making complaints and subsequent command action. This form is also reproduced in Appendix F. Although it is intended for use when the military member elects to have the chain of command investigate the complaint, it is also useful during IG investigations. IG investigators may review it with complainants and use it as a document in the IG investigation. For example, if a command inquiry was conducted prior to an IG investigation, the form is an essential document to review for actions taken prior to IG involvement.

**1109 CIVILIAN DISCRIMINATION/SEXUAL HARASSMENT COMPLAINT POLICY:** For guidance regarding the handling of civilian complaints at the local command level, see Chapters 4 and 7 of the Commander's Handbook, OCPMINST 12713.2, "Department of the Navy Discrimination Complaints," and OCPMINST 12720.1, "Equal Employment Opportunity and Affirmative Employment Programs." If the complaint of discrimination is not resolved during the informal stage, the formal complaint is now investigated by the DoD Office of Complaint Investigations. Consequently, there are few, if any, circumstances in which an IG investigation of civilian complaints of discrimination would be appropriate. One such instance would be when there is an allegation that appropriate local command procedures had not been followed.

**1110 PROCESSING COMPLAINTS OF REPRISAL:** The October 1994 amendments to the Military Whistleblower Protection Act, discussed in paragraph 1009, expressly prohibit reprisal against military members who file complaints of discrimination or sexual harassment. Thus, command and IG personnel who receive complaints of reprisal from a military member should provide the complainant the advice set forth at paragraph 1013.2 and, if the complainant indicates a desire to file the complaint of reprisal with the DoDIG, offer assistance in doing so. Reprisal against civilian personnel is a prohibited personnel practice under the CSRA. See paragraph 1013.1 for processing civilian cases of reprisal.

**1111 SUGGESTED READING MATERIALS:** Essential references for DoN sexual harassment and equal opportunity policies for military and civilian DoN personnel are contained in Appendix J of the Commander's Handbook. See the appendix of this investigations manual for a list of other books concerning investigation of sexual harassment complaints.

# CHAPTER 12 - FILE MANAGEMENT, RETENTION AND RELEASE

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# CHAPTER 12 - FILE MANAGEMENT, RETENTION AND RELEASE

**1201 INTRODUCTION:** Proper management, retention, and release of IG investigative files is an integral part of the IG function. Good file management and retention practices help ensure the completeness and accuracy of an investigation during its performance, and permit the documentation of completeness and accuracy upon review after the investigation is completed. Good release practices help ensure appropriate access for official purposes. They also permit individual and public access sufficient to ensure accuracy and inform the public while preventing undue embarrassment to complainants, subjects, and others who participated in the investigation.

**1202 OVERVIEW:** This chapter provides general information on file management, retention, and release. It provides advice as to the materials that should be retained in case files during, and after completion of, the investigation. It discusses DoD and DoN retention requirements. It reviews DoN and NAVINSGEN policy and practice on the release of information from IG investigative files for official purposes and in response to Freedom of Information Act (FOIA) and Privacy Act (PA) requests. It should be read in conjunction with complementary materials in Chapters 3, 4, and 5.

**1203 CASE FILE MANAGEMENT DURING THE INVESTIGATION:** Since the purpose of an IG investigation is to gather facts sufficient to enable responsible authorities to take appropriate action, the investigator usually collects or creates many documents during the course of an investigation. These include, but are not limited to: complaints; tasking letters; legal opinions; investigative and interview plans; contact and witness lists; investigator notes; documents indicating supervisory and chop chain reviews; routing slips; notes of phone conversations; investigator time, travel and expense reports; results of interview reports (ROIs); complainant, witness and subject statements; memos; letters; contracts; laws, regulations, directives, instructions and policy statements; organization manuals; the investigative report; and, of course, drafts of many of the foregoing documents.

1. Some of the documents collected during an investigation eventually prove to have limited value. Extraneous documents only clutter up the file, and may prove harmful if their release outside the IG chain would cause unnecessary embarrassment. The key to good file management then, is to eliminate extraneous material while ensuring that all documents necessary to conduct and document a complete and thorough investigation are maintained in such a manner as to be readily accessible on short notice.

2. Documents must be organized in a manner that enables investigators to locate key documents quickly and easily, and facilitates supervisory review. Beyond that, these materials should be organized so that another investigator called upon to take over the case in an emergency can quickly determine what has been done to date, and what still remains to be done to complete the investigation. No single method of organization is best in all circumstances. However, organization of similar materials into logical groupings, which are then bound together in properly indexed folders or ring binders, with the location of the investigative plan and contact list clearly identified, usually is the minimum necessary to permit supervisory review and case reassignment.

3. Drafts, whether kept with the corresponding final document or in a separate file area reserved for drafts, should be clearly labeled and dated. Hard copies of documents and

drafts created by the investigator on a computer should include the computer file name. Floppy disk backups of such documents should be maintained in the case file, or the case file should state where the floppy is kept in the investigator's work area. Of course, investigators must adhere to good computer file backup procedures in order to ensure their work is preserved in the event of a computer failure.

4. As an investigation progresses, it occasionally becomes evident to the investigator that some documents that have been collected or created are no longer pertinent. However, until the investigation is completed and accepted by the tasking and responsible authorities, it is impossible to be certain about the need for other documents. Therefore, as a rule of thumb, if there is any doubt as to the continuing need for a document, it should be retained. Drafts of documents created by the investigator, however, should be retained only if useful to document their contents, as, for example, to establish that a certain line of reasoning was considered, then discarded. Similarly, drafts of interviewee statements need be retained only if it is important to document the changes made by the interviewee. Of course, when the interviewee and the investigator disagree as to what was said during the interview, it is imperative that the investigator keep all documents that reflect both positions.

5. The investigator's original notes taken during interviews must be retained until the investigation is accepted by the tasking and responsible authorities, and it is certain that no criminal prosecution will be undertaken as a result of the investigation. When in doubt, retain the notes.

**1204 CASE FILE MANAGEMENT UPON COMPLETION OF THE INVESTIGATION:**

When the investigation has been completed and accepted by the tasking and responsible authorities, the file should be reviewed to eliminate unnecessary documents in preparation for storage. Unless criminal prosecution or disciplinary action is to result, only those documents necessary to establish the scope and completeness of the investigation need be retained in the file. All extraneous materials, including most drafts, should be removed from the file. At this point, when in doubt, throw it out.

1. Documents that should be retained include: the complaint and tasking or forwarding letters; the completed investigation report and all endorsements or other documents indicating acceptance of the report and action taken as a result (including disciplinary action, if any); the investigative plan and any contact, witness or notification lists; documents collected during the investigation that are pertinent to the facts or findings in the investigative report, especially those that are referred to in the investigative report (but don't retain readily available published instructions); sworn and unsworn statements of all persons interviewed; legal opinions; the investigator's interview notes and ROIs for those interviewees that did not provide written statements; and documents that establish whether the complainant and subject were notified of the results and/or provided a copy of the investigative report.

2. Drafts of documents should be destroyed in most cases. They should be retained only if necessary to document their contents, as, for example, to establish that a certain line of reasoning was considered, then discarded. Investigator notes and ROIs created for those interviewees who provided sworn or unsworn written statements may be destroyed when there will be no criminal prosecution, the interviewee statement contains all pertinent information relied upon to write the investigative report, and there is no additional or

inconsistent information in the notes or results of interview reports that the investigator relied upon when writing the investigative report. Conversely, when the investigator's notes and ROIs contain information that contradicts the interviewee's statement, or information not included in that statement, they should be retained if the investigative report makes use of that contradictory or additional information.

3. In most cases, the investigator collects many documents from the subject command, such as command instructions, policy statements, telephone logs and organizational manuals, that are useful during the investigation but have no value thereafter (unless retained as part of a separate "library" of similar documents for reference in future cases). Other documents the investigator may collect or generate include travel and expense records, maps, directions, notes of phone calls not pertinent to the investigative report, time logs, and the like. These extraneous documents should be removed from the file.

4. Once the investigator has reviewed the file and removed unnecessary materials, the file must then be maintained within the files of a DoN IG organization within the tasking chain. Investigators who do not work within such offices should forward the file up the tasking chain and should not retain a copy. The lowest echelon DoN IG organization may retain the file, but some IG organizations may wish to retain files at a higher level, such as the Echelon III IG office.

**1205 DODIG RECORD RETENTION REQUIREMENTS:** When the DoDIG tasks a hotline investigation, it requires the investigative organization to keep the file for two years after the investigation is completed. Thereafter, the investigative organization is free to dispose of all material in the file in accordance with its own record retention requirements.

**1206 DON RECORD RETENTION REQUIREMENTS:** Within the DoN, records must be maintained in accordance with SECNAVINST 5212.5C, "Navy and Marine Corps Records Disposition Manual." As currently written, this instruction requires that NAVINSGEN investigations be maintained permanently, although they may be sent to archives for storage. Investigations tasked by NAVINSGEN are subject to the same retention requirement. SECNAVINST 5212.5C is also applicable to DoDIG tasked investigations, even though the DoDIG would permit the destruction of files pertaining to them after two years. NAVINSGEN practice is to retain files in its offices for three years after completion of an investigation, then send them to a federal records center. NAVINSGEN recommends other DoN IG organizations follow the same practice. Where space constraints require it, files may be sent to storage two years after the investigation is completed and accepted.

**1207 RELEASE OF CASE FILES FOR OFFICIAL PURPOSES:** An IG investigation is done for an official purpose, and the documents obtained and created during the investigation are available to those who need them for that reason. The following matters should be considered in deciding when, and to whom, to release information in case files for official purposes.

1. During the course of an investigation, information contained in the case file should not be made available to personnel outside of the DoN IG chain except for the purpose of providing status reports and briefings to tasking and responsible authorities. ln particular, information concerning the identity of complainants and witnesses should not be provided without their express permission.

2. Once the investigation is completed, however, certain information in the case file may be provided to those who have an official need to

see and use it, except for information obtained subject to an express grant of confidentiality. Persons who have a need to know at that point include endorsing, tasking and responsible authorities, and their legal advisors. They may have access to all information in the file, except for that subject to an express grant of confidentiality. Subjects and subject commands may be provided a copy of the investigative report, with the names of interviewees redacted, at the discretion of the investigating organization or the responsible authority. In most cases, subjects and subject commands do not have a need to review underlying documentation, such as witness statements, unless additional action is to be taken, and they should not be given access to them.

3. Should the responsible authority decide to undertake disciplinary action, the subject usually has due process rights that permit access to most, if not all, of the information in the investigative file, including the identity of witnesses, as part of the disciplinary process. **However, the identity of the complainant (as the complainant, not as a witness) and anyone provided an express grant of confidentiality should not be provided without their consent, absent advice from counsel and the consent of NAVINSGEN.**

**1208 RELEASE OF CASE FILES PURSUANT TO FOIA AND PA REQUESTS:** The PA permits people to have access to government records that contain information about them in order to know what the records contain, and to seek the correction of erroneous information. The information must be "personal" in nature, must be maintained in a "system of records," and must be routinely retrieved by use of personal identifiers, such as names or social security numbers, before a person may invoke the PA (instead of the FOIA) to obtain access to the information. The FOIA is a general release statute that may be invoked by virtually anyone, whether or not the information they seek is about them. Both the PA and the FOIA exempt certain information from release. Current DoD and DoN policy states that persons requesting information about themselves are entitled to have their request reviewed under both the PA and the FOIA, and that the information be released under whichever standard would result in the greater release of information.

1. Case files maintained in an IG organization constitute a "system of records," and much of the information in IG files is considered "personal" in nature. NAVINSGEN logs case files under the names of complainants and subjects, but not witnesses. Thus, for cases investigated or tasked by NAVINSGEN, complainants and subjects may invoke the PA, but witnesses (and of course, members of the public in general) may not. Complainants and subjects are entitled to have their requests reviewed under PA standards, even if they do not specifically refer to it, or if they cite the FOIA in their request. The rights of people making requests to other DoN IG organizations will depend on the extent to which they comply with DoN Federal Register Notice N04385-1, discussed below.

2. DoN IG organizations that maintain their records consistent with DoN Federal Register Notice N04385-1, which covers IG reports, may invoke PA exemption k2. By virtue of that notice, until such time as subjects or complainants have been denied a "right, privilege or benefit," their rights to obtain information under the PA are, in practice, no greater than the rights of a member of the public who makes a FOIA request. However, once a subject has been denied a "right, privilege or benefit" (the likely result of disciplinary action), then the subject becomes entitled to review everything in the investigative file relied upon to take the action except for information provided by, or revealing the

identity of, someone who was given an express grant of confidentiality. Note that subjects usually may obtain the same information (and perhaps also the identity of a confidential source) before disciplinary action is effected by invoking the due process rights associated with the disciplinary action. Notice N04385-1 is reproduced in the appendix. **CAUTION:** If a DoN IG organization is not in compliance with Notice N04385-1 and does not have a similar notice applicable to it, a subject who has been denied a "right, privilege or benefit" may obtain the identity of, and information provided by, sources who were provided an express grant of confidentiality. Therefore, **all DoN IG organizations shall ensure they are in compliance with Notice N04385-1 or a similar notice specifically applicable to them.**

3. Under the FOIA, the rights of a subject and complainant are no greater than third parties. The FOIA enables a person to obtain information in government records unless there is an exemption that may be involved in order to withhold the information and the government decides to exercise the exemption. Under previous administrations, information was usually withheld if an exemption applied. Thus, NAVINSGEN routinely redacted (deleted) opinions, conclusions, recommendations, identities, chop chains and routing slips, invoking FOIA exemptions b(2), b(5), and b(7). However, the current administration has adopted a more release-oriented policy that dictates the invocation of exemptions only in those cases where the agency reasonably foresees that disclosure would be harmful to a governmental interest. To implement this policy, NAVINSGEN now routinely releases all information in investigation reports except for the names and other identifying information of people mentioned in the reports. When other information in the files is requested, chop chains and routing slips are routinely released.

4. Note, however, NAVINSGEN takes the position that it is not appropriate to release any information under the FOIA until an investigation has been completed. NAVINSGEN believes that the release of information from the case file while the investigation is still pending would impede the investigation and therefore be harmful to the DoN. Absent unusual circumstances where the public interest would be served by an earlier release, the investigation is not considered complete for FOIA purposes until final administrative action (including, when appropriate, disciplinary action) has been taken.

5. NAVINSGEN serves as the release and initial denial authority for all investigations it has performed itself or tasked to other DoN IG organizations. This includes DoDIG and Navy hotline cases tasked through NAVINSGEN. All cases originating with a complaint to the hotline of another DoN organization are that organization's responsibility. Thus, for example, the FOIA release of a NAVSEA hotline complaint investigated by the NAVSEA IG or someone tasked by the NAVSEA IG will be processed by the release/initial denial authorities for NAVSEA. However, since a complaint to the NAVSEA hotline that concerns a NAVSEA SES employee must be referred to NAVINSGEN for investigation, NAVINSGEN will act as the release/initial denial authority for FOIA requests concerning that complaint.

**1209 RELEASE OF CASE FILES PURSUANT TO JUDICIAL ORDER:** Federal courts and federal quasi-judicial or administrative tribunals such as the MSPB have the authority to issue orders requiring the production of documents. NAVINSGEN and other DoN IG organizations

must honor those orders in most cases. This is a principal reason why it is impossible to promise complete confidentiality to complainants and witnesses. Moreover, most judicial and administrative records and proceedings are open to the public, so that a document provided to a court becomes available to anyone. An OGC or JAGC attorney should be consulted before the release of information to a court or administrative tribunal. In many cases it is possible to obtain a protective order that will limit the use of IG documents to that necessary for the proceeding in order to preclude their release to the general public.

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Department of Navy
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#2 Navy Annex
Washington, DC 20370
(703) 614-1100/1263

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TELEFAX # 703-693-1746

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Ballston Center Tower One
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800 North Quincy Street
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U. S. Naval Academy
181 Wainwright Road
Annapolis, Maryland 21402-5008

DSN 281-1630/3227
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Office of Information (Code 09C)
1200 Navy Pentagon; Room 2E340
Washington, DC 20350-1200

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DSN 227
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686 Cushing Road
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200 Stovall Street
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DSN - 224-7420
FAX - 703-697-4610

**COMNAVCENTCOM**

Commander
U. S. Naval Forces Central
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011-973-72-4052
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** DEPUTY - (813) 828-6772 X 345
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DSN 968
TELEFAX # (813) 828-6632
(AIG) - 011-973-72-4837
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Deputy
U. S. Naval Forces Central
2707 Zemke Avenue - Building 532
MacDill Air Force Base
Tampa, Florida 33621-5105

## DIRECTORY OF ECHELON III INSPECTORS GENERAL

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Chief of Naval Air Training (Code 019)
250 Lexington Boulevard Suite 102
Corpus Christi, TX 78419-5041

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DSN 861-2645
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TELEFAX # (512) 939-2930

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DSN 577
TELEFAX # (619) 437-2050

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Arlington, VA 22203-1991

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HOTLINE (800) 448-6185
TELEFAX # (703) 696-0879

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Virginia Beach, VA 23452-5724

Office of Audit & Evaluation
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TELEFAX # (804) 631-3799

## DEPUTY NAVAL INSPECTOR GENERAL for MARINE CORPS MATTERS (INSPECTOR GENERAL OF THE MARINE CORPS)

Headquarters
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## MARINE CORPS COMMAND INSPECTORS

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FAX - (910) 451-2415/DSN 484

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PSC Box 8003
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Albany, GA 31704-50000
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DSN - 567
FAX - (912) 439-5666/DSN 567

Commanding General
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Fleet Marine Force, Pacific
Camp H. M. Smith, Hawaii 96861-5000
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COM - (808) 477-6897
DSN - 477
FAX (808) 477-5045/DSN 477

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Camp Smedley D. Butler, Okinawa
FPO AP 93373-5001
(old: 98773-5000)
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COM OVERSEAS - 7611/3788
DSN - 645
FAX OVERSEAS - 3762/DSN - 645

Commanding General
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Fleet Marine Force, Pacific
Camp Pendleton, CA 92055-5500
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DSN - 365
FAX - (619) 725-6319/ DSN - 365

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Fleet Marine Force, Pacific
MCB Camp Pendleton, CA 92055-5500
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COM - (619) 725-5472/6382
DSN - 365
FAX - (619) 725-0987/DSN - 365

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3D Marine Aircraft Wing, FMFPAC
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DSN - 997
FAX - (714) 726-3902/DSN - 997

Commanding General
Marine Corps Base - Camp Pendleton
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DSN - 365
FAX - (619) - 725-5776/DSN - 365

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Box 63002 (Base Inspector)
Kaneohe Bay, Hawaii 96836-3002
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COM - (808) 257-3250/3290
DSN - 457
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Commanding General
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Marine Corps Air Station, El Toro
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DSN - 997
FAX (714) 726-2336/DSN - 997

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Fleet Marine Force, Pacific
FPO AP 96602-8600
(ATTN: INSPECTOR)

COM OVERSEAS - 9538/9452
DSN - 622
FAX OVERSEAS - 9558/DSN - 622

Commanding General
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Fleet Marine Force, Pacific
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COM OVERSEAS - 2118-3217-1020
DSN - 637
FAX OVERSEAS - 2719/DSN - 637

Commanding General
1st Marine Air Wing
Fleet Marine Force, Pacific
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(ATTN: INSPECTOR)

COM OVERSEAS - 3010/3270
DSN - 645
FAX OVERSEAS - 7201/DSN - 645

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Barstow
Barstow, CA 92311-5010
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DSN - 282
FAX - (619) 577-6058/DSN - 282

Commanding General
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Twentynine Palms, CA 92278-5000
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COM - (619) 830-6641
DSN - 957
FAX - (619) 830-6155/DSN-957

Commanding General
Marine Corps Combat Development
Command
Quantico, VA 22134-5001
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COM - (703) - 640-2277/3661
DSN - 278
FAX - (703) 640-3750/DSN - 278

Commanding General
Marine Corps Systems Command
MCCDC
Quantico, VA 22134-5080
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COM - (703) 640-4319
DSN - 278
FAX - (703) 640-4939/DSN - 278

Commanding General
Marine Corps Recruit Depot/
Eastern Recruiting Region
Parris Island, SC 29905-5001
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COM - (803) 525-2732
DSN - 832
FAX - (803) 525-3980/DSN - 832

Commanding General
Marine Corps Recruit Depot/
Western Recruiting Region
San Diego, CA 92140-5001
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COM - (619) 524-1268 (Ext 1319)
DSN - 524
FAX - (619) 524-1803/DSN - 524

Commanding General
1 Marine Expeditionary Force
Marine Corps Base
Camp Pendleton, CA 92055-5401
(ATTN: INSPECTOR)

COM - (619) 725-4210/9165/9045
DSN - 365
FAX - (619) 725-9168/DSN - 365

Commanding General
III Marine Expeditionary Force
Fleet Marine Force, Pacific
FPO AP 96602-8600
(ATTN: INSPECTOR)

COM OVERSEAS - 7741
DSN - 622
FAX OVERSEAS - 7769/DSN - 622

Commanding Officer
Marine Corps Air Station
Iwakuni, Japan
FPO AP 98764-5001
(ATTN: INSPECTOR)

COM OVERSEAS - 3428
DSN - 253
FAX OVERSEAS - 4357/DSN - 253

Commanding Officer
Marine Corps Air Station
Yuma, AZ 85369-5001
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COM - (602) 341-2529/3534
DSN - 951
FAX - (602) 341-2812/DSN - 951

Commanding General
Marine Reserve Force, FMF USMCR
4400 Dauphine Street
New Orleans, LA 70146-5400
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DSN - 363
FAX - (504) 942-6635/DSN - 363

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DSN - 292
FAX - (202) 282-2912/DSN - 292

# ABBREVIATIONS AND REFERENCES

## Abbreviations

BCNR - Board for Correction of Naval Records

CMC - Commandant of the Marine Corps
CNO - Chief of Naval Operations
CO - Commanding officer
CSRA - Civil Service Reform Act

DA&M - Director of Administration and Management, OSD
DFARS - Defense Federal Acquisition Regulations
DLA - Defense Logistics Agency
DoD - Department of Defense
DoDIG - Inspector General of the Department of Defense
DoN - Department of the Navy

EEO - Equal Employment Opportunity
EO - Equal Opportunity
EEOC - Equal Employment Opportunities Commission

FAR - Federal Acquisition Regulation
FASA - Federal Acquisition Streamlining Act
FOIA - Freedom of Information Act

GCM - general court martial

IG - Inspector General
IR - Investigative report

JAGC - the Judge Advocate General's Corps
JAGMAN - the Manual of the Judge Advocate General of the Navy

MCM - Manual for Courts-Martial
MSPB - Merit Systems Protection Board
MWR - Morale, welfare & recreation

NAVAUDSVC - Naval Audit Service
NAVINSGEN - Office of the Naval Inspector General
the NAVINSGEN - the Naval Inspector General
NCIS - Naval Criminal Investigative Command
NJP - Non-judicial punishment

OCI - Office of Complaint Investigations

OGC - Office of the General Counsel
OLA - Office of Legislative Affairs
OPREP - Operation Report
OSC - Office of the Special Counsel
OSD - Office of the Secretary of Defense

PA - Privacy Act
PAS - Privacy Act Statement

RCM - Rule for Courts-Martial
RFPA - Right to Financial Privacy Act
ROI - Results of Interview (report)

SCM - Summary court martial
SECDEF - Secretary of Defense
SECNAV - Secretary of the Navy
SES - Senior executive service
SH - Sexual Harassment
SITREP - Situation Report
SPCM - Special court-martial

UCMJ - Uniform Code of Military Justice

XO - Executive Officer

## Directives and Instructions

5 CFR 2635.101 - Office of Government Ethics Standards of Ethical Conduct

The Commander's Handbook for the Prevention of Sexual Harassment

DFARS 203.71 - Contractor Employee Communications with Government Officials

DoD Directive 1401.3 - Employment Protection for Certain Non-appropriated Fund Instrumentality Employees/Applicants dated 19 July 1985 (with changes 1 and 2)

DoD Directive 5500.19 - Cooperation with the Office of Special Counsel

DoD Directive 5505.5 - Implementation of the Program Fraud Civil Remedies Act

DoD Directive 5505.6 - Investigations of Allegations Against Senior Officials of the DoD

DoD Directive 5700.7-R - Department of Defense Joint Ethics Regulation

DoD Directive 7050.1 - Defense Hotline Program

DoD Directive 7050.3 - Access to Records and Information by the DoDIG

DoD Directive 7050.4 - Awards for Cost Savings Resulting from the Disclosure of Fraud, Waste, and Mismanagement

DoD Directive 7050.5 - Coordination of Remedies for Fraud and Corruption Related to Procurement Activities

DoD Directive 7050.6 - Military Whistleblower Protection

IGDG 7050.6DI - Guide to Military Reprisal Investigations dated September 30, 1992

OCPMINST 12713.2 - DoN Discrimination Complaints

OCPMINST 12720.1 - Equal Employment Opportunity and Affirmative Employment Programs

OPNAVINST 5354.1C - Navy Equal Opportunity (Manual)

SECNAVINST 5211.5D - DoN Privacy Act (PA) Program

SECNAVINST 5212.5C - Navy and Marine Corps Records Disposition Manual

SECNAVINST 5300.26B - DoN Policy on Sexual Harassment

SECNAVINST 5350.10B - Equal Opportunity within the DoN

SECNAVINST 5370.5A - DoD/Navy Hotline Program

SECNAVINST 5370.7A - Military Whistleblower Protection

SECNAVINST 5430.57F - Mission and Functions of the Naval Inspector General

SECNAVINST 5430.92A - Assignment of Responsibilities to Counteract Fraud, Waste, and Related Improprieties within the DoN

SECNAVINST 5430.102 - Implementation of the Program Fraud Civil Remedies Act

SECNAVINST 5500.33 - Obtaining Information from Financial Institutions

SECNAVINST 5520.3B - Criminal and Security Investigations and Related Activities within the DoN

SECNAVINST 5720.42E - DoN Freedom of Information Act ( FOIA) Program

SECNAVINST 5740.25B - Relations with the Office of the Assistant IG for Auditing (AIG(A)), DoD

SECNAVINST 5740.26 - Relations with the General Accounting Office

SECNAVINST 5740.27 - Release of Information to the DoDIG

SECNAVINST 5800.12A - Investigations of Allegations Against Senior Officials of the DoN

## References For Sexual Harassment Investigations

Publications Available through BUPERS:

Commanders Handbook for Prevention of Sexual Harassment
PERS 61
available on the BUPERS BBS

Sexual Harassment - Drawing the Line
Your Rights and Responsibilities in the Sea Services
A Navy Times Publication
Army Times Publishing Company, 1993
6883 Commercial Drive
Springfield VA 22159

Sexual Harassment - Drawing the Line
Your Rights and Responsibilities in the Federal Workplace
A Federal Times Publication
Army Times Publishing Company, 1993
6883 Commercial Drive
Springfield VA 22159

Resolving Conflict ... Following the Light of Personal Behavior
NAVPERS 15620
Commands may contact:
Navy Aviation Supply Office (ASO 1013)
5801 Tabor Avenue
Philadelphia PA 19120-5099
also for sale by GPO at:
Superintendent of Documents
U.S. Government Printing Office
Mail Stop SSOP
Washington, D.C. 20402-9328
ISBN 0-16-041846-1

Private Sector Publications:
(Listing does not constitute endorsement)

Sexual Harassment
Know Your Rights
Martin Eskenazi and David Gallen
Carroll & Graf Publishers, Inc., 1992
260 Fifth Avenue
New York, NY 100011992
ISBN 0-88184-816-6

DD# 346.013 E 1992

Sexual Harassment in the Workplace
How to Prevent, Investigate and Resolve
Problems in Your Organization
Ellen J. Wagner
AMACOM (American Management Association), 1992
135 West 50th Street
New York, NY 10020

ISBN 0-8144-7787-9
DD# HD6060.3.W34 1992
658.3' 145--dc20

Sexual Harassment
The Complete Handbook
Joel Friedman, Marcia Mobilia Boumil, Barbara Ewert Taylor
Health Communications, Inc., 1992
3201 S.W. 15th Street
Deerfield Beach, Florida 33442-8190
ISBN 1-55874-244-1
Library of Congress Cataloging in Publication Data Number: 92-054505

Sexual Harassment - Women Speak Out
Edited by Amber Coverdale Sumrall & Dena Taylor
The Crossing Press, 1992
P.O. Box 1048
Freedom, CA 95019
ISBN 0-89594-544-4
ISBN 0-89594-545-2

## References For Whistleblowing Investigations

MSPB PUBLICATIONS:

Whistleblowing and the Federal Employee
Blowing the Whistle on fraud, waste, and
mismanagement - who does it and what happens
A Report of the U.S. Merit Systems Protection Board
Office of Merit Systems Review and Studies
October 1981
for sale by the Superintendent of Documents
U.S. Government Printing Office
Washington, D.C. 20402
DD# JK468.W54 U54 1981
#7810605

Whistleblowing in the Federal Government: An Update
A report to the President and the Congress of the United
States by the U.S. Merit Systems Protection Board
October 1993
JK468.W54 W437 1993
for sale by U.S. Government Printing Office
Superintendent of Documents, Mail Stop: SSOP
Washington, D.C. 20402-9328
ISBN 0-16-042059-8

Questions & Answers About Whistleblower Appeals
United States Merit Systems Protection Board, May 1992
1120 Vermont Avenue, N.W.
Washington, D.C. 20419
JK468.W54 Q63 1992

GAO Publications:

Whistleblower Complainants Rarely Qualify for Office of the Special Counsel Protection
(GAO/GGD-85-53, May 10, 1985)

Whistleblower Protection: Impediments to the Protection of Military Members
(GAO Code 391140)(GAO/NSIAD-92-125 Whistleblower Protection)
B-247485, May 27, 1992

Whistleblower Protection: Survey of Federal Employees on Misconduct and Protection from Reprisal
(GAO/GGD-92-120FS, July 14, 1992)

Whistleblower Protection: Determining Whether Reprisal Occurred Remains Difficult

(GAO/GGD-93-3, Oct. 27, 1992)

Whistleblower Protection: Agencies' Implementation of the Whistleblower Statutes Has Been Mixed
(GAO/GGD-93-66, Mar. 5, 1993)

Whistleblower Protection: Employees' Awareness and Impact of the Whistleblower Protection Act of 1989
(GAO/T-GGD-93-10, Mar. 31, 1993)

GAO Mail Orders: U.S. General Accounting Office, P.O. Box 6015, Gaithersburg, MD 20884-6015
GAO walk in services: GAO Building, , Room 1000, 700 4th St. N.W., Washington D.C.
GAO phone orders (202) 512-6000; GAO fax orders (301) 258-4066

Private Sector Publications:
(Listing does not constitute endorsement)

Courage Without Martyrdom - A Survival Guide for Whistleblowers
Julie Stewart, Thomas Devine, Dina Rasor
October 1989
Government Accountability Project (in conjunction with Project on Military Procurement)
810 1st Street, N.E. Suite 630
Washington, D.C. 20002
(202) 408-0034
DD# JK468.W54.578 1989
(GAP advises a new edition will be published in August or September 1995)

Whistleblowing - The Law of Retaliatory Discharge
Daniel P. Westman
Bureau of National Affairs, 1991
1231 25th St., N.W.
Washington, D.C. 20037
ISBN 0-87179-661-9
DD# KF3471.W47 1991
344.73'012596-dc20[347.30412596]

Whistleblowing - Managing Dissent in the Workplace
Frederick Elliston, John Keenan, Paula Lockhart, Jane van Schaick
Praeger Publishers, 1985
CBS Educational & Professional Publishing
521 Fifth Avenue
New York NY 10175
ISBN 0-03-070774-9
ISBN 0-030070776-5
DD# HD60.5.U5W473 1985

Whistleblowing Research - Methodological and Moral Issues
Frederick Elliston, John Keenan, Paula Lockhart, Jane van Schaick
Praeger Publishers, 1985
CBS Educational & Professional Publishing
521 Fifth Avenue
New York NY 10175
DD# HD60.5U5W4735 1985

Whistleblowing - Loyalty and Dissent in the Corporation
Edited by Alan F. Westin
McGraw-Hill Book Company, 1981
New York, NY
ISBN 0-07-069483-4
DD# HD60.5.U5W47

The Whistleblowers - Exposing Corruption in Government and Industry
Myron Peretz Glazer, Penina Migdal Glazer
Basic Books, Inc., 1989
New York, NY
ISBN 0-465-09173-3
DD# JK468.W54G55 1989

The Pentagonists - An Insider's View of Waste, Mismanagement, and Fraud in Defense Spending
A. Ernest Fitzgerald
Houghton Mifflin Company, 1989
2 Park Street
Boston MA 02108
ISBN 0-395-36245-8
DD# UC263.F57 1989

# PRIVACY ACT SYSTEM OF RECORDS NOTICE
# NAVAL INSPECTOR GENERAL
# NUMBER N04385-1

**System name:** Inspector General Records

**System location:** Office of the Naval Inspector General, Washington Navy Yard, Washington D.C. 20374; Inspector General offices at major commands and activities throughout the Department of the Navy and at other Naval activities which perform IG functions. Addresses are published in the Navy's compilation of record systems notices.

**Categories of individuals covered by the system:** Any person who has been the subject of, witness for, or referenced in an Inspector General investigation as well as any individual who submits a request for assistance or complaint to an Inspector General.

**Categories of records in the system:** Letters/transcriptions of complaints, allegations and queries; tasking orders from DODIG, SECNAV, CNO and CMC; requests for assistance from other Navy/Marine Corps commands and activities; appointing letters; reports of investigations, inquiries and reviews with supporting attachments, exhibits and photographs; records of interviews and synopses of interviews; witness statements; legal review of case files; congressional inquiries and responses; administrative memoranda; letters and reports of action taken; referrals to other commands; letters to complainants and subjects of investigations; court records and results of NJP; letters and reports of adverse personnel actions; financial and technical reports.

**Authority for maintenance of the system:** 10 U.S.C. 5014, Office of the Secretary of the Navy; 10 U.S.C. 5020, Naval Inspector General: details; duties; SECNAVINST 5430. 57F, Mission and Functions of the Naval Inspector General, 15 January 1993.

**Purpose(s):** To determine the facts and circumstances surrounding allegations or complaints against Naval personnel and or Navy/Marine Corps activities. To present findings, conclusions and recommendations developed from investigations and other inquiries to the Secretary of the Navy, CNO, CMC or other appropriate Commanders.

**Routine uses of records maintained in the system, including categories of users and the purposes of such uses:** The "Blanket Routine Uses" published at the beginning of the Navy's compilation of record system notices apply to this system. To law enforcement or investigatory authorities for law enforcement purposes and DON officials responsible for administrative and disciplinary action.

**Policies and practices for storing, retrieving, accessing, retaining, and disposing of records in the system:**

**Storage:** File folders, magnetic tape/discs.

**Retrievability:** By subject's or complainant's name; by case name; by case number; and other case fields.
**Safeguards:** Access is limited to officials/employees of the command who have a need to know. Files are

stored in locked cabinets and rooms. Computer files are protected by software systems.

**Retention and disposal:** Files are maintained at the command for two years after final action is taken. Thereafter, files are stored with the nearest Federal Records Center. Electronic data is transferred to a history file two years after the case is closed.

**System manager(s) and address:** The Office of the Naval Inspector General, Code 01, Washington Navy Yard, Washington, D.C. 20374; Inspector General's offices at major commands and other Naval offices performing IG functions. See compilation of Navy's records system notices for addresses of commands.

**Notification procedure:** Individuals seeking to determine whether this system of records contains information on them should address inquiries to or visit the Naval Inspector General, Code 01, Washington Navy Yard, Washington, D.C. 20374 or the relevant command Inspector General. Positive identification will be required.

**Record access procedures:** The Agency's rules for access to records may be obtained from the System Manager.

**Contesting record procedures**: The Navy's rules for contesting contents and appealing initial determinations by the individual concerned are contained in Secretary of the Navy Instruction 5211.5C

**Record source categories:** Complainants, witnesses, Members of Congress, the media, other commands or government agencies.

**Exemptions claimed for the system:** Parts of this system may be exempt under 5 U.S.C. 552a (k)(1) and (2). The exemption rule for this system is contained in SECNAVINST 5211.5 series.

## D-1 - Standard Opening Response to Complainant

9XXXX
Ser 01/

**DKSN John Q. Doe, USN**
**USS NEVERSAIL (DE 999)**
**FPO AA 95433-2243**

Dear **Seaman Doe**:

I have received your letter of **(Month, Day, Year)** , regarding alleged **(what, who, and where)**, and have directed an inquiry into the matter. When our investigation is completed, you will receive notification concerning the outcome.

You have been assigned case number **XXXXXX** in this matter. Please utilize that number in all future correspondence with our office. Thank you for bringing your concern to my attention.

Sincerely,

## D-2 - Standard Opening Referral For DoD Hotline Complaint

**9XXXX**
Ser 01/

From: Naval Inspector General
To: **(ECHELON II COMMAND)**

Subj: DoD HOTLINE COMPLAINT **9X-LXXXXX(9XX)**; ALLEGED **(WHAT, WHO, WHERE)**

Ref: (a) SECNAVINST 5370.5A
(b) NAVINSGEN Investigations Manual (July 95)

Encl: (1) Subject Hotline Complaint

1. Please inquire into the allegations contained in enclosure (1) and provide a response by **(Day, Month, Year)**. Reference the hotline complaint number in all correspondence.

2. Ensure that the requirements of reference (a) are observed and due consideration is given to independence, completeness, timeliness, and accountability. Refer to reference (b) for the conduct of the investigation.

3. We appreciate your support in this matter.

## D-3 - Standard Opening Referral For Navy Hotline Complaint

**9XXXX**
Ser 01/

From: Naval Inspector General
To: **(ECHELON II COMMAND)**

Subj: NAVY HOTLINE COMPLAINT **9XXXX;** ALLEGED **(WHAT, WHO, WHERE)**

Ref: (a) SECNAVINST 5370.5A
(b) NAVINSGEN Investigations Manual (July 95)

Encl: (1) Subject Hotline Complaint

1. Please inquire into the allegations contained in enclosure (1) and provide a response by **(Day, Month, Year)**. Reference the hotline complaint number in all correspondence.

2. Ensure that the requirements of reference (a) are observed and due consideration is given to independence, completeness, timeliness, and accountability. Refer to reference (b) for the conduct of the investigation.

3. We appreciate your support in this matter.

## D-4 - Standard Opening Referral for DoD/Navy Hotline Reprisal Complaint

**9XXXX**
Ser 01/

From: Naval Inspector General
To: **(ECHELON II COMMAND)**

Subj: **( DOD or NAVY HOTLINE COMPLAINT (CASE NUMBER OR NUMBERS)); ALLEGED (WHAT, WHO, WHERE)**

Ref: (a) SECNAVINST 5370.5A
(b) DODIG IGDG 7050.6 of 30 Sep 92; Guide to Military Reprisal Investigations
(c) NAVINSGEN Investigations Manual (July 95)

Encl: (1) Subject Hotline Complaint

1. Please inquire into the allegations contained in enclosure (1) and provide a response by **(Day, Month, Year)**. Reference the subject hotline complaint number in all correspondence.

2. Ensure that the requirements of references(a) and (b) are observed and due consideration is given to independence, completeness, timeliness, and accountability. Refer to reference (c) for the conduct of the investigation.

3. We appreciate your support in this matter.

## D-5 Progress Report for DoD Hotline Complaint

**9XXXX**
Ser 01/

From: Naval Inspector General
To: Inspector General, Department of Defense, Assistant Inspector General for Departmental Inquiries (Hotlines)

Subj: DOD HOTLINE COMPLAINT **9X-TXXXXX (9XXXXX)**; PROGRESS REPORT

Ref: (a) DOD Directive 7050.1

Encl: (1) **(REFERENCE PR FROM ECHELON II)**

1. Enclosure (1) is forwarded in accordance with reference (a) as a progress report concerning the subject DOD Hotline Complaint.

2. Please extend the due date to **(Day, Month, Year)**. By copy of this letter, **(ECHELON II)** is requested to provide a progress or completion report not later than **(Day, Month, Year)**.

Copy to: (w/o encl)
**(ECHELON II)**

## D-6 - Referral to DNIGMC [or other organization]

**9XXXX**
Ser 01/

MEMORANDUM FOR THE DEPUTY NAVAL INSPECTOR GENERAL FOR MARINE

Subj: NAVY HOTLINE COMPLAINT **9XXXX;** ALLEGED **(WHAT, WHO, WHERE)**
Encl: (1) Subject Hotline Complaint

1. Enclosure (1) is forwarded to you as a matter under your cognizance.

## D-7 - Referral for Information and Appropriate Action

**9XXXX**
Ser 01/

From: Naval Inspector General
To: **[ECHELON II COMMAND]**

Subj: DOD HOTLINE COMPLAINT **9X-TXXXXX (9XXXX);** ALLEGED **(WHAT, WHO, WHERE)**

Encl: (1) Subject Hotline Complaint

1. Enclosure (1) contains insufficient information to determine whether an IG investigation is warranted. It is forwarded to you for information and action deemed appropriate.

2. If any formal action is taken with regard to this matter, please inform us of the outcome.

## D-8 - Referral for Action When Investigation Substantiates Allegations

**9XXXXX**
Ser 01/

From: Naval Inspector General
To: **(ECHELON II COMMAND)**

Subj: NAVY HOTLINE COMPLAINT **9XXXXX;** ALLEGED **(WHAT, WHO, WHERE)**

Ref: (a) SECNAVINST 5370.5A

Encl: (1) **NCIS ROI CCN: (NCIS CASE NUMBER) [or other organization report]**

1. Enclosure (1) reports the results of a Naval Criminal Investigative Service **[or other organization]** investigation which substantiated the subject allegation. In accordance with reference (a), please provide a report of disciplinary or administrative actions taken, if any, against (subject of ROI).

2. We appreciate your support in this matter.

## D-9 - Opening Response to Congressional (Senate)

**9XXXXX**
Ser 05/

The Honorable
United States Senate
Attn: **[staffer]**
**[address]**
Washington, D.C. **[zipcode]**

Dear Senator **XXXXXXXX**:

This is in response to your letter of **[date]** which forwarded the concerns of your constituent, **[name]**, who alleges that **[state nature of allegation]**.

I have opened an inquiry into the allegations and should be able to provide a final response to you in approximately ninety days.

Sincerely,

## D-10 - Opening Response to Congressional (House)

**9XXXXX**
Ser 05/

The Honorable **[name]**
Member, U.S. House of Representatives
**[address]**
Washington, D.C. **[zipcode]**

Dear Mr. **[name]**:

This is in response to your letter of **[date]** which forwarded the concerns of your constituent, **[name]**, who alleges that **[state nature of allegation]**.

I have opened an inquiry into the allegations and should be able to provide a final response to you in approximately ninety days.

Sincerely,

## D-11 - Opening Response to Complainant Referred by SECNAV

**9XXXXX**
Ser 01/

Mr. **[name]**
**[address]**
**[address]**

Dear Mr. **[name]**:

The Secretary of the Navy has asked me to respond to your letter of **[date]**, in which you allege that **[state nature of allegations]** at the **[location]**. I have directed an inquiry into the matter. When the investigation is completed, you will receive notification concerning the outcome.

You have been assigned case number **[9XXXXX]** in this matter. Please utilize that number in all future correspondence with my office. Thank you for bringing your concern to the attention of the Department of the Navy.

Sincerely,

## D-12 - Standard Paragraphs or Sentences

**1. Senior Official involvement possibility:**

If, during the course of your inquiry, you develop facts which indicate possible misconduct by a senior official, as defined by reference **( )**, immediately notify this office prior to further investigative effort.

Ref: SECNAVINST 5800.12A dtd 11 Jan 93

**2. NCIS interest possibility:**

The Naval Criminal Investigative Service (NCIS) has declined to initiate a criminal investigation at this time based upon the information presented in the complaint. Should your inquiry develop additional information which supports an allegation of criminal wrongdoing, the matter should be referred to the appropriate NCIS office for reevaluation.

## D-13 - Response to Office of Special Counsel Requests

**[Name]**
**[Title]**
**U.S. Office of Special Counsel**
**[Address]**
**[Address]**

Re: Naval Inspector General Report **[Specific Report Info]**

Dear _____:

This is in response to your letter of **--[date]--** requesting a copy of the enclosed report of the Naval Inspector General concerning subject matter.

The Naval Inspector General is the confidential agent of the Secretary of the Navy and the Chief of Naval Operations. He provides uninhibited self-analysis and self-criticism of the management, operation, and administration of the Department of the Navy. Reports such as the one you have requested are considered to be internal decision memoranda not normally releasable outside the Department of the Navy.

Since this report **--[and its attachments]--** may assist your review of matters within your agency's jurisdiction, it is provided to you in your official capacity. However, it is released with the understanding that appropriate restrictions, including limitations on copying and distribution, will be imposed to ensure confidentiality of its contents. Particular care should be taken with regard to release of the report to subjects, witnesses, or complainants during the course of your review of the matter. In the event you receive any requests for this report or its attachments under the Freedom of Information Act, please refer them to the Naval Inspector General. Your point of contact in such case is Lawrence J. Lippolis, Counsel to the Naval Inspector General, who may be reached at (202) 433-2222.

Your cooperation in this matter is appreciated.

Sincerely,

## D-14 -Sample Closing Sheet

CLOSING SHEET CASE#

_____

CLOSED ON COMPUTER? YES _ NO _ RECOVERY? _ LOSS? _ AMOUNT $

_____

DATE: _____ REVIEWED: 122 RECOMMENDATION: CLOSE _ OTHER _
COMMENTS: SUBSTANTIATED? YES _ NO _ PARTIAL _

**********

ENCLOSED LTR: CR _ PR _ COMPLAINANT _ OTHER _

**********

DATE: _____ REVIEWED: _____ CONCUR? YES __ NO __
COMMENTS:

_____

DATE: _____ REVIEWED: _____ CONCUR? YES __ NO __
COMMENTS:

_____

DATE: _____ REVIEWED: _____ CONCUR? YES __ NO __
COMMENTS:

_____

DATE: _____ REVIEWED: _____ CONCUR? YES __ NO __
COMMENTS:

_____

DATE:_____ REVIEWED:_____
FINAL ACTION:

13 Jun 88 (Rev 10/08/92)

# D-15 - Data Sheet

RPT25 Date

DATA FOR CASE NUMBER XXXXXX

ORIGINATOR: N NAVY HOTLINE DESKCODE: 35 NIG-011
DUE DATE: 94/02/09
STATUS : 0
UIC: CNAVBASE DOLLAR AMOUNT:
SIGNIFICANT : NO CLOSED:
REMEDY PLAN: DOD CLOSED:

DUE TO (S) / 1) 2)
DATE (S) 3) 4)

---
---

| CATEGORY (S) | FAC (S) | FAC DESCRIPTION | FDG |
|---|---|---|---|
| N NAVY HOTLINE | FAG | PAYROLL/BENEFITS | |

==========

| SUBJECT (S) | RANKS | DISPOSITION |
|---|---|---|
| FEMALE EMPLOYEE OF CLUBS IN CHS UN | | |

==========

| ACT RESP | SERIAL | TSK DATE | EV | REJ | ST | TCK-DATE | RCV-DATE | DOC-NBR |
|---|---|---|---|---|---|---|---|---|
| T | | 01 | | | 0 | | 94/05/09 | |

==========

| CROSS REFERENCE (S) | TYPE | CROSS REFERENCE | TYPE |
|---|---|---|---|

==========

CASE SUMMARY

ANONYMOUS COMPLAINANT ALLEGED THAT MS. , AN EMPLOYEE AT THE CAFE, NAVBASE BOQ (ASST MANAGER), FALSIFIES HER TIMECARDS, LEAVING EARLY REGULARLY TO GO TO HER SECOND JOB AS A CONTRACT CATERER AT THE CLUB, NWS . CALLER NAMED TWO SPECIFIC DATES, 12/30/93 AND 1/14/94, WHEN MS. IS

ALLEGED TO HAVE DEPARTED HER BOQ JOB AT 1:30 P.M. (TWO HOURS EARLY)
AND CLAIMED SHE WORKED A FULL DAY .
==========

REMARKS

TASK TO FLT.

## D-16 - Record of Contacts

RECORD OF CONTACTS

NIG FILE NUMBER: _____ NIG CASE OFFICER:
SUBJECT:

CROSS REFERENCES

NIS CASE NUMBER (S): _____ DOD:
DCIS CASE NUMBER(S): _____ NAVY: _____
CONGRESSIONAL(S): _____ DCN(S):
TRACKER-A: _____ B: _____

| DATE & TIME | NIG CODE# | CONTACT & PHONE NUMBER | DETAILS OF CONTACT |
|---|---|---|---|
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# D-17 - Hotline Telephone Call Data Sheet

HOTLINE TELEPHONE INTERVIEW TICKLER

1. LISTEN.

2. GET AS MUCH INFORMATION FROM CALLER AS YOU CAN, INCLUDING NAME, ADDRESS, AND TELEPHONE NUMBER.

3. EXPLAIN CALLER'S RIGHT TO ANONYMITY OR CONFIDENTIALITY IF THEY DESIRE IT OR EXPRESS APPREHENSION.

4. IF A SUBJECT MATTER EXPERT IS AVAILABLE AND CALLER WILLING, GET THEM TOGETHER ON THE PHONE.

5. ENCOURAGE THE CALLER TO USE THE CHAIN OF COMMAND. BE ALERT FOR MORE EFFECTIVE AVENUES TO ADDRESS CALLER'S CONCERNS.

6. QUESTIONS TO BE ANSWERED:

WHO - ENGAGED IN THE VIOLATION, MISCONDUCT, ETC.?

WHAT - DID THEY DO (OR FAIL TO DO) THAT CONSTITUTES VIOLATION, MISCONDUCT, ETC.?

WHAT - WAS THE STANDARD, RULE, REG, LAW, ETC. VIOLATED?

WHEN - DID THIS HAPPEN?

WHERE - DID IT HAPPEN? I.E. LOCATION, COMMAND, UIC.

HOW - DID IT HAPPEN?

WHY - DID IT HAPPEN? MOTIVE?

OTHER - IS COMPLAINANT WILLING TO BE INTERVIEWED? WHO ELSE COULD CORROBORATE?
- HOW IS THE NAVY ADVERSELY AFFECTED?
- WHAT CORRECTIVE, DISCIPLINARY, OR REMEDIAL ACTION WOULD BE APPROPRIATE?
- HAS COMPLAINT BEEN MADE PREVIOUSLY TO NAVINSGEN OR TO OTHER AGENCIES SUCH AS CONGRESSMAN, DOD, BUPERS, LEGAL SYSTEM, BCNR, ETC.?
- WHY HAS COMPLAINANT NOT USED OR HAS FAILED IN USING CHAIN OF COMMAND?

7. ENCOURAGE FOLLOW-UP LETTER WITH SUPPORTING DOCUMENTS.

8. DO NOT PROMISE AN INVESTIGATION.

9. PROMISE TO EVALUATE INFORMATION PROVIDED.

10. END THE INTERVIEW POLITELY AND FIRMLY WHEN IT IS TIME.

11. OPEN A CASE FILE IF WARRANTED.

# D-18 - Privacy Act Statement

PRIVACY ACT STATEMENT

DATA REQUIRED BY THE PRIVACY ACT OF 1974

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**PRIVACY ACT STATEMENT**
For Personal Information Taken During
Inspector General interviews

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**AUTHORITY**: Title 10, US Code, Sections 5014 and 5020.

**PURPOSE**: To determine the facts and circumstances surrounding allegations or complaints against Naval personnel and/or Navy/Marine Corps activities. To present findings, conclusions and recommendations developed from investigations and other inquiries to the Secretary of the Navy, CNO, CMC, or other appropriate Commanders. Disclosure of Social Security Account Number is voluntary, and if requested, is used to further identify the individual providing the information.

**ROUTINE USES**: The information is used for the purpose set forth above and may be:

a. forwarded to federal, state, or local law enforcement agencies for their use;

b. used as a basis for summaries, briefings or responses to Members of Congress or other agencies in the Executive Branch of the Federal Government;

c. provided to Congress or other federal, state and local agencies, when determined necessary.

**MANDATORY OR VOLUNTARY DISCLOSURE AND EFFECT ON INDIVIDUAL NOT PROVIDING INFORMATION**:

**For Military Personnel:** Disclosure of personal information is mandatory and failure to do so may subject the individual to disciplinary action.

**For Department of the Navy Civilians**: Failure to disclose personal information in relation to individual's position responsibilities may subject the individual to adverse personnel action.

**For All Other Personnel**: Disclosure of personal information is voluntary and no adverse action can be taken against individuals for refusing to provide information about themselves.

**ACKNOWLEDGEMENT**

I understand the provisions of the Privacy Act of 1974 as related to me through the foregoing statement.

Signature: _____

Date: _____

## D-19 - Miranda Warning (Civilian Acknowledgement/Waiver of Rights)

CIVILIAN SUSPECT'S ACKNOWLEDGEMENT AND WAIVER OF RIGHTS

Place: _____
_____

I, _____,

have been advised by _____

that I am suspected of _____

_____.

I have also been advised that:

(1) I have the right to remain silent and make no statement at all;
(2) Any statement I do make can be used against me in a court of law or other judicial or administrative proceeding:
(3) I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at no cost to the United States, or, if I cannot afford a lawyer, one will be appointed to represent me at no cost to me.
(4) I have the right to have my retained or appointed lawyer present during this interview; and
(5) I may terminate this interview at any time, for any reason.

I understand my rights as related to me and as set forth above. With that understanding, I have decided that I do not desire to remain silent, consult with a retained or appointed lawyer, or have a lawyer present at this time. I make this decision freely and voluntarily. No threats or promises have been made to me.

Signature: _____

Date & Time: _____

Witnessed: _____

_____

Date & Time: _____

At this time, I,_____,
desire to make the following voluntary statement. This statement is made with an understanding of my rights as set forth above. It is made with no threats or promises having been extended to me.

## D-20 - Article 31(b) Warning (Military Acknowledgement/Waiver of Rights)

SUSPECT'S RIGHTS ACKNOWLEDGEMENT/STATEMENT (See JAGMAN 0170)

| | | | |
|---|---|---|---|
| Full Name (Accused/ Suspect) | SSN | Rate/Rank | Service (Branch) |
| Activity/Unit | | | Date of Birth |
| Name (Interviewer) | SSN | Rate/Rank | Service (Branch) |
| Organization | | Billett | |
| Location of Interview | | Time | Date |

RIGHTS

I certify and acknowledge by my signature and initials set forth below that, before the interviewer requested a statement from me, he warned me that:

(1) I am suspected of having committed the following offense(s); _____
_____
_____ (initial) _____

(2) I have the right to remain silent;----------(initial) _____

(3) Any statement I do make may be used as evidence against me in trial by court-martial; ----------(initial ) _____

(4) I have the right to consult with lawyer counsel prior to any questioning. This lawyer counsel may be a civilian lawyer retained by me at my own expense, a military lawyer appointed to act as my counsel without cost to me, or both; and ----------(initial) _____

(5) I have the right to have such retained civilian lawyer and/or appointed military lawyer present during this interview. ----------(initial) _____

WAIVER OF RIGHTS

I further certify and acknowledge that I have read the above statement of my rights and fully understand them, and that ----------(initial) _____

(1) I expressly desire to waive my right to remain silent; ----------(initial) _____

(2) I expressly desire to make a statement; ----------(initial) _____

(3) I expressly do not desire to consult with either a civilian lawyer retained by me or a military lawyer appointed as my counsel without cost to me prior to any questioning; ----------(initial) _____

(4) I expressly do not desire to have such a lawyer present with me during this interview; and ----------(initial) _____

(5) This acknowledgement and waiver of rights is made freely and voluntarily by me, and without any promises or threats having been made to me or pressure or coercion of any kind having been used against me. ----------(initial) _____

| | | |
|---|---|---|
| Signature (Accused/Suspect) | Time | Date |
| Signature (Interviewer) | Time | Date |
| Signature (Witness) | Time | Date |

## D-21 - Civilian Grant of Use Immunity (Kalkines Warning)

CIVILIAN EMPLOYEE ADMINISTRATIVE WARNING

Place: _____
_____

I, _____,

have been advised by _____

that I am suspected of _____

I have also been advised that:

(1) I am going to be asked a number of specific questions concerning the performance of my official duties;

(2) I have the duty to reply to these questions. Although Department of the Navy disciplinary proceedings may be initiated as a result of my answers, neither my answers nor any information or evidence which is gained by reason of such statements can be used against me in any criminal proceedings; and

(3) I am subject to removal from federal service if I refuse to answer or fail to respond truthfully and fully to any questions.

I understand the warning as related to me and as set forth above.

Signature: _____

Date & Time: _____

Witnessed: _____

_____

Date & Time: _____

## D-22 - Military Grant of Use Immunity (JAGMAN)

GRANT OF IMMUNITY

IN THE MATTER OF _____)

_____) GRANT OF IMMUNITY

_____)

_____)

_____

_____

_____

To: (Witness to whom immunity is to be granted)

1. It appears that you are a material witness for the Government in the matter of {if charges have been preferred, set forth a full identification of the accused and the substance of all specification preferred.}

2. In consideration of your testimony as a witness for the Government in the foregoing matter, you are hereby granted immunity from the use of your testimony of other information given by you (or any other information directly or indirectly derived from such testimony or other information) against you in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with an order to testify in this matter.

3. It is understood that this great of immunity from the use of your testimony or other information given by you (or other information directly or indirectly derived from such testimony or other information) against you in any criminal case is effective only upon the condition that you testify under oath as a witness for the Government.

_____
Signature

_____
Grade, title

## D-23 - Military Grant of Transactional Immunity (JAGMAN)

ORDER TO TESTIFY (See JAGMAN 0129e)

GRANT OF IMMUNITY
IN THE MATTER OF _____
_____ GRANT OF IMMUNITY
_____
_____

_____

_____

_____

To: (Witness to whom immunity is to be granted)

1. It appears that you are a material witness for the Government in the.matter of {if charges have been preferred, set forth a full identification of the accused and the substance of all specifications preferred.}

2. In consideration of your testimony as a witness for the Government in the foregoing matter, you are hereby granted immunity from prosecution for any offense arising out of the matters therein involved which you may be required to testify under oath.

3. It is understood that this grant of immunity from prosecution is effective only upon the condition that you actually testify as a witness for the Government. It is further understood that this grant of immunity from prosecution extends only to the offense or offenses which you were implicated in the matter herein set forth and concerning which you testify under oath.

_____
Signature

_____
Grade, title

## D-24 - Voluntary Statement Form (NAVAIR)

### STATEMENT

PLACE : _____
_____
DATE: _____

I, _____ make the following free and voluntary statement to _____ whom I know to be a _____, Naval Air Systems Command. I make this statement of my own free will and without any threats made to me or promises extended. I fully understand that, in the event of an adverse action, this statement may be used as supporting documentation for an action. This statement is given concerning my knowledge of

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I have read the above statement, initialed errors and corrected mistakes; and, to the best of my knowledge and belief, it is true and correct.

_____Permission is granted to use this statement by HRO-CC or other competent personnel office as supporting documentation in an adverse action, if necessary, or by any law enforcement agency for official purposes.

_____This statement may not be released outside the Office of the NAVAIR Inspector General without my permission. (NOTE: Circumstances may require release to HRO-CC, other competent personnel office, or law enforcement agency. I understand that I will be notified prior to any release).

_____
(Signature)

Subscribed and sworn before me at _____
(Location)

on _____, 19 _____.

_____
(Signature)

Auth: Title 5, U.S.C.
Section 303 et.seq.

_____
(Title)

Page _____ of _____

## D-25 - Voluntary One Page Statement Form (NAVFAC)

AFFIDAVIT

Place: _____
Date/Time: _____

I, _____
do hereby make the following statement to _____ who has identified himself as an investigator with Navy Facilities Engineering Command Inspector General's Office, Alexandria, VA. I make this statement freely and voluntarily without having any threats made against me or any promises of reward having been made to me in return for it.

_____
_____
_____
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_____
_____
_____

I have read the foregoing statement consisting of this page only. I fully understand this statement and it is true and accurate and complete to the best of my knowledge and belief. I made the corrections shown and placed my initials opposite each .

_____
(Signature of affiant)

Subscribed and sworn before me

this _____ day of _____, 19

## D-26 - Voluntary Multiple Page Statement Form (NAVFAC)

AFFIDAVIT

Place: _____
Date/Time: _____

I,
_____do
hereby make the following statement to _____ who has identified himself as an investigator with Naval Facilities Engineering Command Inspector General's Office, Alexandria, VA. I make this statement freely and voluntarily without having any threats made against me or any promises of reward having been made to me in return for it.

Page _____ of _____ pages  Affiant _____

I have read the foregoing statement consisting of _____ pages. I fully understand this statement and it is true and accurate and complete to the best of my knowledge and belief. I made the corrections shown and placed my initiate opposite each.

_____
(Signature of affiant)

Subscribed and sworn before me
this _____ day of ____, 19 .
_____

## D-27 - Document Receipt

NAVAL FACILITIES ENGINEERING COMMAND

**Document Receipt**

Documents submitted regarding: _____

Date and place of submission: _____

Submitted by: _____
I acknowledge receipt of the following documents submitted in an official Navy investigation as listed on this page.

Received by: _____

Address of recipient: _____

Phone number of recipient: _____

Acknowledgement of return of documents _____
(Signature and date-to whom returned)

## D-28 - Search Consent Form (JAGMAN)

CONSENT TO SEARCH (See JAGMAN 0170)

CONSENT TO SEARCH

I, _____. have been advised that inquiry is being made in connection with _____ _____. I have been advised of my right not to consent to a search of {my person} the premises mentioned below}. I hereby authorize _____and_____, who {has} {have been} identified to me as _____
Position(s)

to conduct a complete search of my {person}{residence}{automobile}{wall locker} { } { } located at_____ _____.

I authorize the above listed personnel to take from area searched any letters, papers, materials, or other property which they may desire. This search may conducted on

_____.
Date

This written permission is being given by me to the above named personnel voluntarily and without threats or promises of any kind.

_____
Signature

_____
WITNESSES
_____

_____

## D-29 - Record of Authorization for Search Form (JAGMAN)

RECORD OF AUTHORIZATION FOR SEARCH (see JAGMAN 0170)

RECORD OF AUTHORIZATION FOR SEARCH

1. At _____ on _____ I was approached by _____
Time Date Name

in his capacity as _____ who having been first duly sworn,

advised me that he suspected _____ of _____
Name Offense

and requested permission to search his _____ for _____
Object or Place Items

2. The reasons given to me for suspecting the above named person were:
_____
_____
_____
_____
_____
_____
_____

3. After carefully weighing the foregoing information, I was of the belief that the crime of _____ {had been} (was being} {was about to be} committed that _____ was the likely perpetrator thereof, that a search of the object or area stated above would probably produce the items stated and that such items were {the fruits of crime} {the instrumentalities of a crime} (contraband} {evidence}.

4. I have therefore authorized _____ to search the place named for the property specified, and if the property be found there, to seize it.

_____
Grade Signature Title

_____
Date and Time

## INSTRUCTIONS

1. Although the person bringing the information to the attention of the individual empowered to authorize the search will normally be one in the execution of investigative or police duties, such need not be the case. The information may come from one as a private individual.

2. Other than his own prior knowledge of facts relevant thereto, all information considered by the individual empowered to authorize a search on the issue of probable cause must be provided under oath or affirmation. Accordingly, prior to receiving the information which purports to establish the requisite probable cause, the individual empowered to authorize the search will administer an oath to the person(s) providing the information. An example of an oath is as follows: Do you solemnly swear {or affirm} that the information you are about to provide is true to the best of your knowledge and belief, so help you God? (This requirement does not apply when all information considered by the individual empowered to authorize the search, other than his prior personal knowledge, consists of affidavits or other statements previously duly sworn to before another official empowered to administer oaths.)

3. The area or place to be searched must be specific, such as wall locker, wall locker and locker box, residence, or automobile.

4. A search may be authorized only for the seizure of certain classes of items: (1) fruits of a crime (the results of a crime such as a stolen objects); (2) instrumentalities of a crime (example: search of an automobile for a crowbar used to force entrance into a building which was burglarized); (3) contraband (items, the mere possession of which is against the law-marijuana, etc); or (4) evidence of crime (example: bloodstained clothing of an assault suspect).

5. Before authorizing a search, probable cause must exist. This means reliable information that would lead a reasonably prudent and cautious man to a natural belief that:

a. An offense probably is about to be, or has been committed;

b. Specific fruits or instrumentalities of the crime, contraband or evidence of the crime exist; and

c. Such fruits, instrumentalities, contraband, or evidence are probably in a certain place.

In arriving at the above determination it is generally permissible to rely on hearsay information particularly if it is reasonably corroborated or has been verified in some substantial part by other facts or circumstances. However, unreliable hearsay cannot alone constitute probable cause, such as where the hearsay is several times removed from its source or the information is received from an anonymous telephone call. Hearsay information from an informant may be considered if the information is reasonably corroborated or has been verified in some substantial part by other facts, circumstances, or events. The mere opinion of another that probable cause exists is not sufficient, however, along with the pertinent facts, it may be considered in reaching the conclusion as to whether or not probable cause exists. If the information available does not satisfy the foregoing, additional investigation to produce the necessary information may be ordered.

## D-30 - Rights Warning Procedure

RIGHTS WARNING PROCEDURE

---

**GIVE THE WARNING**

1. Inform the suspect of:

   a. Your official position

   b. Nature of offense(s).

   c. The fact that he/she is a suspect.

2. Advise the suspect of his/her rights by stating:

   "before I ask you any questions, you must understand your rights."

   a. "You do not have to answer my questions or say anything."

   b. "Anything you say or do can be used as evidence against you in a criminal trial."

   c. (For personnel subject to the UCMJ) "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer can be one you arrange for at your own expense, or if you cannot afford a lawyer and want one, a lawyer will be appointed for you before any questioning begins."

   **- or -**

   (For civilians not subject to the UCMJ) "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer can be one you arrange for at your own expense, or if you cannot afford a lawyer and want one, a lawyer will be appointed for you before any questioning begins."

   d. "If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if you sign a waiver certificate."

3. Make certain the suspect fully understands his/her rights by asking: "Do you understand your rights?" (if the suspect say "no", determine what is not understood, and repeat the appropriate rights advice as necessary. If the suspect say "yes", go to the following section.

---

**OBTAIN THE WAIVER**

1. Minimize risk of violating the right to counsel by asking:

"Have you ever requested a lawyer after being read your rights?"

(If the suspect/accused says "yes," find out when and where. If the request was recent (i.e., fewer than 30 days ago), obtain legal advice on whether to continue the interrogation. If the suspects/accused says "no," or if the prior request was not recent, ask the following question.)

2. Determine desire for a lawyer at this time by asking:

a. "Do you want a lawyer at this time?"

(If the suspect/accused says "yes," stop the questioning until he/she has a lawyer. If the suspect/accused says "no," ask him/her the following question.)

b. "At this time, are you willing to discuss the offensive(s) under investigation and make a statement without talking to a lawyer and without having a lawyer present with you?"

(If the suspect/accused says "no," stop the interview. If the suspect/accused says "yes" have him/her read and sign the rights waiver.)

---

**SPECIAL INSTRUCTIONS**

**WHEN SUSPECT/ACCUSED REFUSES TO SIGN WAIVER CERTIFICATE**: If the suspect/accused orally waives his/her rights but refuses to sign the waiver certificate, you may proceed with the questioning. Make notations on the waiver certificate to the effect that he/she has stated that he/she understands his/her rights, does not want a lawyer, wants to discuss the offense(s) under investigation, and refuses sign the waiver certificate.

**IF WAIVER CERTIFICATE CANNOT BE COMPLETED IMMEDIATELY:** In all cases the waiver certificate must be completed as soon as possible. Every effort should be made to complete the waiver certificate before any questioning begins. If the waiver certificate cannot be completed at once, as in the case of street interrogation, completion may be temporarily postponed. Notes should be kept on the circumstances.

**PRIOR INCRIMINATING STATEMENTS:**

1. If the suspect/accused has made spontaneous incriminating statement before being properly advised of his/her rights he/she should be told that such statements do not obligate him/her to answer further questions.
2. If the suspect/accused was questioned as such either without being advised of his/her rights or some question exists as to the propriety of the first statement, the accused must be so advised. Contact Counsel or the Staff Judge Advocate for assistance in drafting the proper rights advice.

**NOTE**: If 1 or 2 applies, the fact that the suspect accused was advised accordingly should be noted in the comment section on the waiver certificate and initialed by the suspect/accused,

**WHEN SUSPECT/ACCUSED DISPLAYS INDECISION ON EXERCISING HIS OR HER RIGHTS DURING THE INTERROGATION PROCESS:** If during the interrogation the suspect displays indecision about requesting counsel (for example, "Maybe I should get a lawyer,"), further questioning must cease immediately. At that point, you may question the suspect/accused only concerning whether he or she desires to waive counsel. The questioning may not be utilized to discourage a suspect/accused from exercising his/her rights. (For example, do not make such comments as "If you didn't do anything wrong, you shouldn't need an attorney.")

## D-31 - Investigative Plan Outline (DoDIG)

INVESTIGATIVE PLAN OUTLINE

**A.** ALLEGATION(S)

1. SOURCE OF ALLEGATIONS(S)

2. SPECIFIC ALLEGATION (S)

3. FACTS BEARING ON ALLEGATION (S)

B. BACKGROUND

1. RELEVANT STATUTES/DIRECTIVES/REGULATIONS/POLICIES

2. PREVIOUS INVESTIGATIONS

3. ORGANIZATION INVOLVED

C. EVIDENCE

1. DOCUMENTS NEEDED

*Note: Obtain copies of all pertinent documents and records.

2. TESTIMONY/STATEMENTS NEEDED FROM:

*Note: All witnesses will be sworn or affirmed if possible and may be tape recorded. Military personnel suspected of a violation of the Uniform Code of Military Justice must be advised of their rights.

3. PHYSICAL EVIDENCE

D. ADMINISTRATIVE MATTERS

1. NOTIFICATIONS

2. ITINERARY

*Note: Use government lodging to the maximum extent possible. Include a telephone point of contact at your TDY location. When out for more than one day check in with the office periodically.

3. ADDITIONAL RESOURCES REQUIRED

4. INTERIM RESPONSES REQUIRED

5. EXPECTED COMPLETION DATE/SUSPENSE DATE

INVESTIGATOR _____

DIVISION CHIEF _____
(Initials)

## D-32 - Hotline Progress Report Outline (SECNAV)

SECNAVINST 5370.5A
26 FEB 1988

DEFENSE/NAVY HOTLINE PROGRESS REPORT
AS OF: (_____)

1. Applicable DOD Component: Department of the Navy

2. Hotline Control Number:

3. Date Referral Initially Received:

4. Status

   a. Name of organization conducting investigation.

   b. Type of investigation being conducted.

   c. Results of investigation to date (summary).

   d. Reason for delay in completing investigation.

5. Expected Date of Completion

6. Action Agency Point of Contact (POC)

   a. Name of POC:

   b. Duty telephone number:

Enclosure (3)

## D-33 - Hotline Completion Report Outline (SECNAV)

SECNAVINST 5370.5A
26 FEB 1988

DEFENSE/NAVY HOTLINE COMPLETION REPORT
AS OF (_____)

1. Name of Official(s) Conducting the Audit, Inspection, or Investigation:

2. Rank and/or Grade of Official(s):

3. Duty Position and Contact Telephone Number of Official(s):

4. Organization of Official (s):

5. Hotline Control Number:

6. Scope of Examination, Conclusions, and Recommendations:

a. Identify the allegations, applicable organization and location, person or persons against whom the allegation was made, dollar significance of actual or estimated loss or waste of resources.

b. Indicate the scope, nature, and manner of the investigation conducted (documents reviewed, witnesses interviewed, evidence collected, and persons interrogated). The report shall reflect whether inquiries or interviews were conducted by telephone or in person. The identity of the interviewee need not be reflected in the report; however. this information shall be documented in the official field file of the examining agency. If individuals cited in the allegation are interviewed, the fact shall be reflected in the report. The specific identity and location of pertinent documents reviewed during the course of the investigation shall be recorded and reflected in the report. Procurement history data shall be reflected in those complaints of spare parts excessive price increases.

c. Report findings and conclusions of the investigating official. This paragraph may include program reviews made, comments as to the adequacy of existing policy or regulation, system weaknesses noted, and similar comments.

7. Criminal or Regulatory Violation(s) Substantiated:

Enclosure (2)

SECNAVINST 5370.SA
16 FEB 1988

8. Disposition: For investigations involving economies and efficiencies, report management actions taken in the final report. For investigations involving criminal or other unlawful acts, provide the results of criminal prosecutions including details of all charges and sentences imposed. Include the results of administrative sanctions, reprimands, value of property or money recovered, or other such actions taken to preclude recurrence.

9. Security Classification of Information. Each investigating organization must determine and state, when applicable, the security classification of information included in the report that might jeopardize national defense or otherwise compromise security if the contents were disclosed to unauthorized sources.

10. Location of Field Working Papers and Files:

## D-34 - Sample Hotline Completion Report (DoDIG)

**DOD HOTLINE COMPLETION REPORT**
**AS OF**
**MARCH 17, 1989**

1. Name of Official Conducting the Investigation:

2. Grade of Official: GM-13

3. Duty Position and Contact Telephone Number of Official:
Special Inquiries investigator, (202)

4. Organization of Official: Personnel and management Inquiries Division, Office of the Assistant Inspector General for
Special Programs, Office of the Inspector General, Department of
Defense.

5. Hotline Control Number:

6. Scope of Examination, Conclusions, and Recommendations:

a. An anonymous complainant made three allegations against
three senior officers assigned to units at
Florida, involving misuse of government vehicles and the inappropriate expenditure of
Government funds.

b. The complainant alleged that Commander,
improperly drives his assigned Government vehicle to play golf on weekends, and that he often took his wife with him.

1. testified he drove his assigned Government vehicle to the golf course. Records at Headquarters,
and Headquarters
indicate that the Commander, authorized the Commander,
the use of a vehicle specially fitted with communication (command and control) equipment under Regulation 102-1, " Command
and Control Vehicles." The purpose of the vehicle is to support commanders who require an immediate means to communicate with their organization 24-hours-a-day, and the commander is expected to use the vehicle wherever he/she goes, so long as command authority has not been delegated. However, the vehicle was assigned did not have command and control

capability. Without that capability, regulation did not authorize to take his assigned Government vehicle to the golf course.

2. testified he transported his wife to official functions to the vehicle, and to functions not for official purposes, on or two other occasions. Paragraph 7-2, Manual 77-310, "Acquisition Management, and Use of Motor Vehicles, "Volume I, authorized to transport his wife in the vehicle to official functions, but not for unofficial purposes.

3. We concluded that improperly used assigned Government vehicle by driving it to the golf course and taking his wife on trips that the Commander may not need a command and control equipped vehicle to perform his/her duties, since apparently performed those duties effectively without that capability.

c. The complainant alleged that Vice Commander, and Vice Commander, drove staff cars to their domiciles every night, in violation of regulation, and that was told that the officers were violating was-told that the officers were violating regulation, but took no action.

1. Senior officials are authorized the use a Government vehicle under . However, paragraph 7-4 provides that only the Secretary of the may approve the use of a vehicle for domicile-to-work transportation, and that the authority is limited to certain individuals under specific circumstances. The positions and filled did not meet the criterion, and the Secretary of the not authorized the officers to use their vehicles for domicile-to-work transportation.

2. In a telephone interview, stated that he drove his vehicle home at night until mid-1988, when an article in the base newspaper about the misuse of vehicles caused him to check his authority to use his assigned Government vehicle in this manner. He stated that he immediately stopped driving the car to his domicile at night unless he was acting in the absent of his commander. in his testimony, verified account or events, and he testified that he was satisfied that stopped using his Government vehicle to drive his domicile.

3. In a telephone interview, stated that he did not drive his Government-assigned vehicle to his domicile unless he was acting as commander. He stated that Commander, personally authorized him to take the vehicle to his domicile three times over the last 13 months whether it was in the best interest of the to do so. confirmed account of events in a telephone interview.

4. , testified that he and discussed the article in the base newspaper about the misuse of Government vehicles, and they agreed that should driving his Government vehicle to his domicile. had no command authority over and he testified he could not speak to use of his

assigned Government vehicle.

5. We concluded that used his assigned Government vehicle to travel to and from his domicile in violation of regulation , but he ceased such travel in 1988 when he became aware of the restriction. the allegation that took no action to have stop driving his assigned Government vehicle to his domicile was unsubstantiated. The allegation that drove his Government-assigned vehicle to his domicile in violation of regulation was not substantiated.

d. The complainant alleged that requested that golf balls with two stars imprinted on them be purchased with Government funds.

1. Paragraph 7-3.e., "Basic Responsibilities, Policies and Practices," authorizes the purchase and presentation of mementos to U.S. citizens as part of an official function so long as the cost does not exceed $75.

2. testified that the golf balls were purchased with Special Morale an Welfare funds for presentation to visitors and mementos. He testified he did not have them made for his personal use, and that he personally did not use the golf balls.
Chief of Staff, confirmed, a telephone interview, that the purchase price of the gold balls was well below the authorized ceiling, that they were being used as mementos long before became commander, and that careful records were kept or purchases and presentations, according to regulation.

3. The allegation that authorized the purchase of golf balls with two stars imprinted on them was substantiated. However, the golf balls were presented during official functions as mementos to guests and visiting dignitaries. Such purchases and presentations are authorized by regulation, and were not improper in this instance.

7. Criminal or Regulatory Violations Substantiated: We concluded that improperly used his assigned Government vehicle by driving it to the golf course and taking his wife on trips that were not authorized. We also concluded that the Commander, may not need a command and control equipped vehicle to perform his/her duties, since apparently performed those duties effectively without that capability. The allegation that drove his Government-assigned vehicle to his domicile, in violation of regulation, was not substantiated.

8. Disposition: It was recommended that the reconsider the need for the Commander, to be authorized a vehicle equipped with command and control capability. It was also recommended that the adequacy of procedures to apprise senior officials of the restrictions for using Government vehicles that are assigned to them for their exclusive use, and that be briefed on the restrictions.

9. Security classification: Unclassified.

10. Location of Field Working Papers and Files: Office of the Assistant Inspector General for Special Programs, Director, Special Inquiries, 400 Army Navy Drive, Room 1027, Arlington, Virginia 22202-2884.

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W. Suite 300
Washington, D.C. 20036-4505

# REPORT OF PROHIBITED PERSONNEL PRACTICE OR OTHER PROHIBITED ACTIVITY

(Please print or type and complete all items. Enter "N/A" (not applicable) or "Unknown" where appropriate.)

NAME OF COMPLAINANT: _____

POSITION TITLE, SERIES AND GRADE:

AGENCY:

AGENCY ADDRESS:

HOME OR MAILING ADDRESS

TELEPHONE NUMBER: (Home) ( )
(Office) ( )

IF SUBMITTED BY OTHER THAN COMPLAINANT, PLEASE COMPLETE THE FOLLOWING:

Name & Title of Submitter:

Address:

Telephone Number: ( )

1. WHAT IS THE EMPLOYMENT STATUS OF THE COMPLAINANT: (Check all applicable items. More than one item may apply.)

a. ( ) Applicant for federal employment

b. ( ) Competitive Service
( ) Temporary appointment
( ) Term appointment
( ) Career or Career Conditional appointment
( ) Probationary period

c. ( ) Excepted Service
( ) Schedule A ( ) VRA
( ) Schedule B ( ) National Guard Technician
( ) Schedule C ( ) Nonappropriated Fund
( ) VADMS ( ) TVA
( ) Postal Service ( ) Other (specify):

d. ( ) Senior Executive Service, Supergrade or Executive Level
( ) Career SES
( ) Noncareer SES
( ) Career GS-16, 17, or 18
( ) Noncareer GS-16, 17 or 18
( ) Executive Level V or above (Career)
( ) Executive Level V or above (Noncareer)
( ) Presidential Appointee Confirmed by the Senate

e. ( )Other
( ) Civil Service Annuitant
( ) Former Civil Service employee
( ) Competitive Service
( ) Excepted Service
( ) SES
( ) Other (specify):
( ) Military officer or enlisted person
( ) Not known

2. IF THE PERSON AFFECTED BY A PROHIBITED PERSONNEL PRACTICE IS OTHER THAN THE COMPLAINANT, WHAT IS THE EMPLOYMENT STATUS OF THE PERSON AFFECTED? (See Items 1.a - 1.e. above for appropriate employment status descriptors.)

3. WHO TOOK OR IS TAKING THE ILLEGAL ACTION AND WHAT IS HIS OR HER EMPLOYMENT STATUS? (See Items 1.a - 1.e above for appropriate employment status descriptors)

a. Name & Title:

b. Employment Status:

4. WHAT SPECIFICALLY IS THE PROHIBITED PERSONNEL PRACTICE OR OTHER PROHIBITED ACTIVITY BEING REPORTED? (If known, please state law, rule or regulation that you believe applies.)

5. IF A PROHIBITED PERSONNEL PRACTICE UNDER 5 U.S.C. ξ 2302 IS BEING REPORTED, WHAT IS THE PERSONNEL ACTION TAKEN ORDERED TO BE TAKEN, RECOMMENDED OR APPROVED (OR NOT TAKEN IN VIOLATION OF THE LAW?

6. WHAT FACTS EVIDENCE THE COMMISSION OR OCCURRENCE OF THE ILLEGAL ACTION OR ACTIVITY DESCRIBED IN ITEM 4. ABOVE? (Be as specific as possible regarding dates, locations and the identities and positions of all persons named. In particular, identify witnesses and potential witnesses giving work locations and telephone numbers were possible. Continue on a separate sheet if you need more writing space. Also, attach any documentary evidence you may have.)

7. HAS THIS MATTER BEEN APPEALED, GRIEVED OR REPORTED UNDER ANY OTHER PROCEDURE? IF SO, PLEASE INDICATE WHAT ACTION OR ACTIONS HAVE BEEN TAKEN.

( ) No or not applicable
( ) Appealed to MSPB on _____
( ) Request for reconsideration of MSPB initial decision filed on _____
Decision No. _____
( ) Grievance filed under agency grievance procedure on _____
( ) Grievance filed under negotiated grievance procedure on _____
( ) Matter heard by Arbitrator under grievance procedure on _____
( ) Matter is pending arbitration.
( ) Discrimination complaint filed with agency on _____
( ) Agency decision on discrimination complaint appealed to EEOC on _____
( ) Appealed to OPM on _____
( ) Unfair Labor Practice (ULP) complaint filed with FLRA General Counsel on _____
_____
( ) Suit filed in U.S. Court on _____
( ) Court Name: _____
( ) Reported to agency Inspector General on _____
( ) Matter reported to Member of Congress on _____
Name of Congressman or Senator: _____
( ) Other (specify):

Remarks:

8. DO YOU CONSENT TO THE DISCLOSURE OF YOUR NAME TO OTHERS OUTSIDE THE OFFICE OF THE SPECIAL COUNSEL SHOULD IT BE NECESSARY IN TAKING FURTHER ACTION ON THIS MATTER?

I, the complainant, consent to the disclosure of my name.

_____

Signature

I, the complainant, do not consent to the disclosure of my name.

_____

Signature

I certify that the foregoing statement is true and complete, the best of my knowledge and belief. I understand that a false statement or concealment of a material fact is a criminal offense punishable by a fine of up to $10,000 imprisonment for up to five years, or both 18 U.S.C. ξ 1001.

Signature _____ Date: _____

Place: _____

_____

PRIVACY ACT STATEMENT

The collection of personal information requested on this Form OSC-11 is necessary to reach a decision on the course of action to be taken on allegations presented to the Special Counsel.

Allegations made to the Special Counsel are voluntary so you are not required to provide any personal information. Failure to supply the Special Counsel with all the information essential to determine the extent of investigation or other action required, however, may result in a decision to take no further action.

Your identity and other personal data will not be disclosed without your permission unless it is determined that disclosure is necessary in order to carry out the statutory functions of the Special Counsel Information collected will be used in the investigation of your allegation. Some information may be disclosed if required by the Freedom of Information Act (5 U.S.C. 552) or for certain routine uses published by the Special Counsel (44 FR 7253). The Special Counsel has also published a Disclosure Policy as Appendix 1 to 5 CFR 1261 (See 44 FR 75922)

OFFICE OF THE ASSISTANT TO THE SECRETARY OF DEFENSE
1400 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1400

PUBLIC AFFAIRS

20 OCT 1994
Ref: 94-CORR-154

MEMORANDUM FOR: SEE DISTRIBUTION
SUBJECT: FOIA Exemption Three Statutes

Attached is a revised list of statutes commonly used as FOIA exemption three statutes within DoD. Changes are indicated in bold type. Statutes known to have been determined valid exemption three statutes as a result of litigation are identified by an asterisk.

Memorandum of January 25, 1993 (93-CORR-005), subject as above is hereby superseded.

A. H. Passarella
Acting Director
Freedom of Information
and Security Review

Attachment:
As stated

| Statute | Type of Information Covered |
|---|---|
| 1.5 USC App. 4, Sec 207(a)(1)(2) | Ethics in Governments Act of 1978 - Protecting Financial Disclosure Reports of Special Government Employees |
| 2.5 USC 7114(b)(4) | Civil Service Reform Act - Representation Rights and Duties, Labor Unions |
| 3.10 USC 128 | Authority to Withhold Unclassified Special Nuclear Weapons Information |
| 4.* 10 USC 130 | Authority to Withhold Unclassified Technical Data With Military or Space Application |
| 5.10 USC 618(f) | Action on Reports of Selection Boards |
| 6.10 USC 1102 | Confidentiality of Medical Records |
| 7.10 USC 2796 | Maps, Charts, and Geodetic Data; Public Availability |
| 8. 12 USC 3403 | Confidentiality of Financial Records |
| 9. 15 USC 3705 (e) (E) | Centers for Industrial Technology - Reports of Technology Innovations |
| 10.18 USC 798 | Communications Intelligence |
| 11. 18 USC 1917 | Interference with Civil Service Examinations |
| 12.*18 USC 2510-2520 | Protection of Wiretap Information (specific applicable section(s) must be involved) |
| 13.21 USC 1175 | Drug Abuse Prevention/Rehabilitation |
| 14.*26 USC 6103 | Confidentiality and Disclosure of Returns and Return Information |
| 15.31 USC 3729 | False Claims Act |
| 16.*35 USC 122 | Confidential Status of Patent Applications |

| | |
|---|---|
| 17.35 USC 181-188 | Secrecy of Certain Inventions and Withholding of Patents (specific applicable section(s) must be involved) |
| 18.35 USC 205 | Confidentiality of Inventions Information |
| 19.41 USC 423 | Procurement Integrity |
| 20.42 USC 290ee-3 | Confidentiality of Patient Records |
| 21.42 USC 290dd-3 | Confidentiality of Patient Records |
| 22.42 USC 2161-2168 (P.L. 703) | Information Regarding Atomic Energy; Restricted and Formerly Restricted Data (A.E. Act of 1954) (specific applicable sections must be invoked. |
| 23.50 USC 401 Note Sec 1082, P.L. 102-190 | Disclosure of Information Concerning US Personnel Classified as POW/MIA During Vietnam Conflict (McCain "Truth Bill") |
| 24.50 USC 402 Note Sec 6, P.L. 86-36 | NSA Functions and Information (NSA Use) |
| 25.50 USC 421 | Protection of Identities of US Undercover Intelligence Officers, Agents, Informants and Sources |
| 26.50 USC 2407 | Foreign Boycotts |
| 27.*National Security Act of 1947, Subsection 102(d)(3), as amended (50 USC 403(d)(3)) | Intelligence Sources and Methods (CIA Use) |
| 28.*Section 6 of the CIA Act of 1949 (50 USC 403(g)) | CIA Functions and Information (CIA Use) |
| 29.Sec 38(e) of the Arms Export Control Act (22 USC 2778(e)) | Control of Arms Exports |

| | |
|---|---|
| 30.*Sec 12(c)(1) of the Export Administration Act of 1979 (50 App 2411(c)(1)) | Confidentiality of Information Obtained Under the Export Administration Act of 1979 |
| 31.*Rule 6(e), Federal Rules of Criminal Procedure | Grand Jury Information but only to the extent that the documents reveal the internal workings or deliberations of the grand jury. Documents extrinsic to the jury's internal working process do not qualify. See Astley v. Lawson, C.A. No. 89-2806 D.D.C. Jan. 11, 1991 |
| 32.*Rule 32 | Federal Rules Disclosure of Presentence Reports of Criminal Procedures |
| 33.IG Act of 1978, Sec 7(b), P.L. 95-452 | Confidentiality of Employee Complaints to the IG |
| 34.P.L. 100-180, Sec 276(a) | Protection of Sematech Information |
| 35.Intelligence Authorization Act, FY93, Sec 406 (a), 10 USC 425 | Protection of names, titles, salaries, and number of personnel assigned to the National Reconnaissance Office |
| 36.National Security Act of 1947 (50 USC 401 et seq.), as amended, See 403-3(c) (5) | Protection of Intelligence Sources and Methods by the Director of Central Intelligence |
| 37.Freedom of Informa-tion Exemption for Certain Open Skies Treaty Data, P.L. 103-236, Sec 533, codified at 5 USC 552 note | Protection of Certain Open Skies Treaty Information |

* Valid by litigation

# COMMANDER'S HANDBOOK FOR PREVENTION OF SEXUAL HARASSMENT
## Appendix M
## GUIDELINES FOR THE COMMAND INVESTIGATING OFFICER (IO)
## of
## SEXUAL HARASSMENT COMPLAINTS

Attachments: (1) Summary of Key Concepts Relating to Sexual Harassment
(2) OCPM Schedule of Offenses and Recommended Remedies
(3) Charging Sexual Harassment Under the UCMJ

1. **Purposes of investigation**. Develop a written record; lay out the facts; draw a clear picture; memorialize witness statements; obtain and preserve other pertinent evidence; serve as decision-making tool; provide a reference point for justifying actions taken; foster trust in the resolution process by demonstrating command commitment and allowing affected personnel an opportunity to be heard; establish credibility and objectivity; provide a foundation for subsequent decisions by the CO/OIC/activity head; and protect morale and productivity.

2. **Nature of investigation**. Always neutral and impartial; primarily, a fact-finding quest to determine exactly what happened; secondarily, a search for solutions; generate opinions only after completion of fact-finding (communicate opinions only to appropriate command authority, never to witnesses or parties).

3. **Before starting, thoroughly familiarize yourself with**--

a. Guidance, instructions, and/or supplemental material provided by your command.

b. SECNAVINST 5300.26B (especially paragraph 8 and enclosures (1) and (2)).

c. The attachments to these guidelines (summarizing key concepts relating to sexual harassment and other inappropriate conduct which might surface during the investigation of a sexual harassment complaint).

d. You may also find it helpful to review the Informal Resolution System (IRS) skills booklet ("Resolving Conflict . . . Following the Light of Personal Behavior," NAVPERS 15620).

4. **Know what your objectives are**.

a. Review the specific allegations to identify the issues subject to investigation. Develop a plan to specifically address all apparent issues (and consider developing a list of questions to pursue.) (Be prepared to adjust your plan as warranted by developments during the course of the investigation.) Be sure to comply with any specific command requirements. If you have any questions about how to proceed (whether before, during, or after the investigation), obtain clarification from the command.

b. Understanding the material in paragraph 0 above will help you formulate the necessary frame of reference to pursue your primary objective of collecting all evidence relevant to establishing the factual basis for determining whether inappropriate conduct did or did not occur and related information pertinent to

making a proper disposition of the case. Items of interest include: the parties' currently assigned duties; evaluation of performance; attitudes and ability to get along with others; and particular personal difficulties or hardships which they are willing to discuss.

5. **Maintain confidentiality to the extent practicable**. Avoid identifying the persons involved except as may be necessary to obtain all necessary evidence. Do not discuss the nature or progress of your inquiry with anyone without a "need to know."

6. **Gather and preserve all relevant evidence**.

a. **Interview all persons who might possess relevant information**.

(1) Interview the person initiating the allegations first, then any known witnesses, then any other witnesses identified during these interviews.

(2) Next interview the offending person. Then interview any witnesses suggested by the offending person.

(3) Finally, re-interview as necessary.

(4) See paragraph 0 for guidelines for conducting interviews.

b. **Gather and preserve any documentary evidence**. Documentary evidence, such as letters, notes, counseling sheets, written or printed material, instructions, or watchbills, should be obtained and attached to the report. If unable to provide originals, explain why (and if possible attach copies).

c. **Gather and preserve any real evidence**. Real evidence is a physical object, such as a picture, greeting card, or token of affection. The IO may receive any such items voluntarily given by the witnesses and safeguard them until final disposition of the case. If the IO seeks to obtain any such evidence from an unwilling person, he/she should seek advice from the judge advocate or other legal counsel advising the command.

7. **General principles for conducting interviews**

a. Treat everyone with dignity and respect.

b. Tell each interviewee who you are, what you are doing, and why you are talking to them.

c. Maintain a reasonable tone of voice. Be careful not to use threatening mannerisms or body language.

d. Listen. Keep an open mind. Do not filter. Try to understand each person's point of view.
- Let each witness tell his/her story.
- List points to ensure that you elicit all necessary information to specifically address each allegation.
- Interrupt for clarification.
- Interrupt or return later for details.
- Use written questions or phone interviews for absent witnesses.

e. Avoid re-victimizing recipients (or witnesses). Investigate the complaint, not the complainant. Apprise the command immediately if it appears that counseling support and/or referral services might be warranted.

f. Accord any person suspected of having engaged in sexual harassment (or other illegal or inappropriate behavior) all applicable rights. Applicable rights for military personnel are summarized in paragraph 0 below. Applicable rights for civilian employees are summarized in paragraph 0 below.

g. Take verbatim notes (as closely as possible). Alternatively, consider taping each interview. (Inform the interviewee of the taping prior to the interview--**do NOT tape in secret**.) Start the interview by stating on tape the date, time, and location, and have the interviewee acknowledge on tape that he/she understands the interview is being taped.

h. Translate your notes (or the tape) into a typed statement. (DON Voluntary Statement Form (OPNAV 5527/2, SN 0107-LF-055-2710) may be used if available.) The IO may assist in helping the interviewee express him/herself accurately and effectively in a written form that is thorough, relevant, orderly, and clear, but the substance of the statement must always be the actual thoughts, knowledge, or beliefs of the interviewee. Have the interviewee read, correct (pen and ink is preferable), initial any corrections, sign the statement (and initial all pages other than the signature page). The interviewee should sign in the presence of a witness (which can be you); the witness should also sign the statement (also legibly print or type the witness' name). (If the interviewee has additional information to provide, it may be provided in a supplementary statement.)

i. Oral statements, even though not reduced to writing, are also evidence. If an interviewee does not wish to reduce an oral statement to writing, the IO should note this in the report and attach a summary of the interview. Where the interviewee has made an incomplete written statement, the IO must add a summary of the matters made orally that were omitted from the written statement.

j. All statements should be sworn. Pursuant to JAGMAN 0902b(2)(d), military personnel detailed to conduct an investigation are authorized to administer oaths in connection therewith. This may be accomplished by asking the interviewee to raise his/her hand and asking, "Do you swear that the information provided in the statement is the truth to the best of your knowledge, so help you God?" (See JAGMAN 0908d.) This should be done both at the end of oral statements (on tape, if applicable)and when executing any subsequent written statements. For written statements, administer the oath verbally, then ensure the statement is completed as follows:

I swear (or affirm) that the information in the statement above (and on the ___ attached pages, each bearing my initials) is the truth to the best of my knowledge.

Interviewee's signature and date

Subscribed and sworn to before me at (location) on (date)

Investigating officer's signature

k. Before closing any interview--

(1) Summarize key information.

(2) Solicit any additional information the interviewee wishes to provide.

(3) Ask the interviewee to identify other witnesses.

(4) Ask the interviewee to identify and/or provide any pertinent documents or other evidence.

(5) Schedule a follow-up meeting, if required (e.g., to obtain additional information, signature on written statement, etc.).

(6) Discuss how the interviewee should advise of supplementary information he/she might obtain (or think of) later.

(7) Discuss the concept of reprisal (improper action against a person for providing information in the investigation) and ensure the interviewee knows how and to whom to report any suspected instances of reprisal.

(8) Ensure the interviewee has a number to contact you.

8. **Rights advisement**

a. **Military personnel**

(1) All forms of sexual harassment constitute violations of the UCMJ. When a military member is suspected of having committed sexual harassment (or any other offense), the offending person may only be questioned after a) having been properly informed of all applicable rights **and** b) knowingly and intelligently waiving them. (Military suspects must be advised of their rights even if they are not in "custody.") The Suspect's Rights and Acknowledgment/Statement form (contained in JAGMAN A-1-m), when properly completed, may be used for this purpose. Other than advising the offending person of the rights as listed on the form, the IO should never give any other form of legal advice or promises to the offending person.

(2) If the offending person desires a lawyer, the IO should immediately terminate the interview and seek advice from the judge advocate or other legal counsel advising the command.

(3) After the offending person has properly waived all rights, the IO may begin questioning. After the offending person has made a statement, the IO may probe with pointed questions and ask the offending person about inconsistencies in the story or contradictions with other evidence. The IO should, with respect to his/her own conduct, keep in mind that the statement must be "voluntary." A confession or admission which was obtained through the use of coercion, unlawful influence, deception, or unlawful inducement is not voluntary. The advantage of having an impartial witness present will have to be balanced on a case-by-case basis against the likelihood that more people might inhibit the interviewee's willingness to be interviewed.

(4) If the offending person initially waives all rights, but during the interview indicates a desire to consult with counsel or to stop the interview, scrupulously adhere to such request and terminate the interview.

The interview may not resume unless the offending person voluntarily approaches the IO and indicates a desire to once again waive all rights and submit to questioning.

b. **Civilian employees**

(1) The right to be informed of charges does not apply to an investigatory proceeding.

(2) There is no right to government-provided counsel (per "Miranda" rights) in an investigatory proceeding (except for custodial interrogations where the employee is not free to leave and has no resources to provide his/her own counsel--such custodial interrogations should only be conducted by appropriate law enforcement personnel).

(3) There is a right to remain silent in an investigation only when there is a reasonable belief that statements taken will be used in criminal proceeding. An employee may be disciplined for not replying to questions raised in an agency investigation if the employee is adequately informed both that he/she is subject to discipline for not answering and that the replies will not be used against him/her in a criminal proceeding. In this regard, however, many forms of sexual harassment are also criminal violations. For example, the use of foul language may constitute "disorderly conduct" under local law. Unauthorized touching is a common law battery which can be prosecuted in criminal courts. New laws dealing with "stalking" may also apply to some sexual harassment cases. Where there is potential for criminal prosecution, simply telling the employee not to leave the room or escorting him/her to a confined area can result in a "custodial" interrogation triggering Miranda rights (see paragraph 0 above). Accordingly, even though a criminal offense may seem relatively minor, the employee may still be justified in refusing to answer questions.

(4) Aggrieved employees have no statutory right to legal counsel, but only a right to representation. It is the employee's responsibility to secure legal counsel. The appellant/aggrieved is responsible for the actions of his/her representative.

(5) An employee who is a member of a bargaining unit represented by a union has a right to be represented by that union if the employee reasonably believes that the interview may result in disciplinary action against him/her and the employee requests such representation. This right does not apply to a supervisor (as defined by 5 U.S.C. § 7103(a)(10)), nor to a non-supervisor who is not a member of the bargaining unit.

(6) Prior coordination with the command's legal and/or labor relations advisors is essential.

9. **When gathering the facts, as to each allegation find out**--

a. What exactly happened?

b. What were the circumstances under which the behavior occurred?

c. What was the stated intent behind the behavior? Apparent intent? What evidence supports this?
d. Where did the behavior occur?

e. Who was involved?

f. Were there any witnesses?

g. What was the impact on the recipient? How did the behavior affect the recipient or make the recipient feel?

h. Did the conflict disrupt the work environment? How? Did it affect the recipient's work performance, or relationship with coworkers?

i. Did the recipient discuss the situation with anyone at the time?

j. Has objectionable conduct (either to this recipient or another) happened before? When? How many times?

k. Was the offending person told to stop? If so, when? How? What was the reaction? Any witnesses?

l. Was any of the foregoing documented? How? Is the documentation available? If not, why not? If so, attach documentation (or true copy) to report.

m. What type of example was set by supervisors?

n. Were supervisors aware of the offending behavior? Of the conflict? Should they have been? Why? Did they take action to resolve the conflict? What action? Were the persons involved satisfied with any such action? Did the action have any effect? What effect? Did the supervisor follow-up and provide feedback?

o. Did all persons involved receive accession training in sexual harassment prevention? Yearly training? When? Was training documented? How? (Attach documentation (or true copies thereof) to report.)

p. If reprisal appears to be an issue, are there also legitimate reasons which would justify the treatment of the person(s) who made the report of sexual harassment? What evidence supports these reasons? Were these reasons apparent and/or substantiated prior to the report of sexual harassment? Is there evidence that legitimate reasons were, or were not, the controlling factors for the treatment?

q. Are the persons involved prepared to try to listen, understand, and resolve the conflict? To apologize? To accept an apology?

r. What relief does the recipient desire? Will the recipient be completely satisfied with resolving the matter under the Informal Resolution System (IRS)? Does the recipient desire any further action? What are the recipient's feelings about the loss of confidentiality which may result in the event the command takes disciplinary action against the offender?

10. **When reviewing the facts and formulating your opinions, evaluate**--

a. What exactly happened? It is your role to evaluate agendas and credibility, sort fact from fiction, and draw a clear picture of what happened. (Have you completed all reasonable lines of inquiry or can you think of others which should also be pursued?)

b. How was the recipient treated compared with others? If the recipient has been treated differently, why? Does any independent evidence provide a legitimate basis for any different treatment. Even if there is such a basis, does an evidence suggest that the different treatment was in fact based upon an improper basis?

c. Would the behavior have offended a reasonable person with the victim's perspective? Would a reasonable person perceive the behavior in the same manner, given the circumstances that occurred?

d. Was the behavior zone Red, Yellow, or Green? What zone does the behavior fall into when considering whether it is unacceptable or acceptable?

e. What were the responsibilities of the persons involved? Were these responsibilities met? (You may find it helpful to review the Informal Resolution System (IRS) skills booklet.)

f. Even if a supervisor did not condone or ignore sexual harassment and did not know or have reason to know of the specific conduct in question, was the supervisor nonetheless derelict in failing to take reasonable measures to establish and maintain a policy against sexual harassment and to adequately educate and train subordinates? (Did all subordinates receive the mandatory accession training? Annual training? If not, was it the supervisor's fault? Why or why not?)

g. If the behavior does <u>not</u> constitute sexual harassment as defined in SECNAVINST 5300.26B, is it nonetheless inappropriate for some other reason? For example--

(1) Even if sexual conduct was not sexual harassment because the recipient welcomed it, was it--
- an ethics violation for use of public office for private gain, or making unauthorized "gifts" to superiors?
- bribery, graft?
- fraternization?
- adultery?
- sexual harassment <u>of non-participating subordinates</u>?

(2) Even if the conduct was not sexual harassment because it was not sexual, was it--

- maltreatment of subordinate?
- an ethics violation for use of public office for private gain, or making unauthorized "gifts" to superiors?
- fraternization?
- disrespect?

h. If it appears the allegation of sexual harassment was false, was it made honestly and in good faith, or did the person who made it know it was false when made? What's the evidence on this issue?

i. What are the possible resolution options? Are there any that would be acceptable to all? What option(s) do you recommend? Why? How will the recommended option(s) resolve the conflict?

11. **Complete your report**.

a. Comply with any specific requirements of your command.

b. In general, your report should usually contain the following--

(1) List of persons interviewed (if all desired interviews were not completed indicate who, why).

(2) Signed written statements of persons interviewed (preferably sworn). Also include your written summaries of any oral statements (see paragraph 0). Unless otherwise directed by your command, do not include your notes or tapes, but do retain them until the matter is resolved and your command advises you that retention is no longer necessary.)

(3) Completed suspect's rights acknowledgment forms (if applicable).

(4) Any other evidence.

(5) Your discussion including background, identification of all allegations, findings, opinions, recommendations, signature, and date. (Clearly address all allegations; identify opinions and recommendations as such.) (Where the offending person is a military member, a properly completed NAVPERS 1626/7, Report and Disposition of Offense(s), will usually be acceptable for this purpose.)

(6) Identify any related policies, practices, deficiencies, or other issues that may constitute or foster sexual harassment (or appear to) noted in the course of the investigation even though not specifically raised by the complaint.

# NAVY EQUAL OPPORTUNITY (EO)/SEXUAL HARASSMENT (SH) FORMAL COMPLAINT FORM

This form is for EO/SH complaints of military personnel. For EEO complaints of civilian employees, see Chapters 4 and 7, Commander's Handbook for Prevention of Sexual Harassment; OCPMINST 12713.2.)

**AUTHORITY** 10 U.S.C. § 5013 (g).

**PRINCIPAL PURPOSE:** Formal filing of allegations of reprisal, or of discrimination based on race, color, religion, gender, or national origin.

**ROUTINE USES:** Information provided on this form may be used: *(a)* as a data source for complaint information, statistics, reports, and analysis, *(b)* to respond to requests from appropriate outside individuals or agencies *(e.g. Members of Congress; the White House)* regarding the status of a complaint; *(c)* to adjudicate the complaint or appeal; **(d)** any other properly established routine use.

**DISCLOSURE:** Disclosure is voluntary; however, failure to fully complete all portions of this form may result in rejection of the complaint on the basis of inadequate data to assess complaint.

## PART I - COMPLAINT

| 1a. COMPLAINANT'S NAME | | 1b. RANK/GRADE | 1c. SSN |
|---|---|---|---|
| 1d. UNIT | 1e. RACE/ETHNIC GROUP | 1f. GENDER | 1g. DATE |

1h. **NATURE OF COMPLAINT**. *(State, in as much detail as possible, the basis for your complaint; describe the complained of conduct, date(s) of occurrence, names of involved parties, witnesses, or others to whom previous reports may have been made, other evidence that might be available, and any additional information which may be helpful in resolving your complaint. Attach additional sheets, as needed.)*

1i. **FILING DEADLINE**. **I UNDERSTAND THAT I HAVE 45 CALENDAR DAYS FROM THE DATE OF THE ALLEGED INCIDENT TO FILE A FORMAL EO COMPLAINT.** *This EO filing deadline does not affect alternative remedies which might apply.* (Investigation of EO complaints received after 45 calendar days is discretionary with the cognizant commanding officer/activity head. *If you are filing this complaint after 45 days, state the reasons for the delay.)*

1j. **REQUESTED REMEDY**. *(What, specifically, do you think the final outcome should be?)*

1k. **AFFIDAVIT**. I,_____ have read the above statement which begins on this page *(page 1)* and continues on ____ attached page(s), and I have initialed any changes. Having been duly sworn upon my oath I swear, or affirm, that the statement is true and correct to the best of my knowledge and belief, and that it is made freely without coercion, threat, or promise.

_____

*(Signature of Complainant)*

Subscribed and sworn to before me, a person authorized to administer oaths (per JAGMAN chapter IX), this

_____ day of _____, 19____ at _____

_____ _____

*(Signature of Person Administering Oath)* *(Typed Name of Person Administering Oath*

---

2a. **ACKNOWLEDGEMENT OF RECEIPT OF COMPLAINT**. I acknowledge receipt of this complaint from

_____ *(name/rank)* of _____ *(command)* on _____ *(date)*

**I UNDERSTAND I HAVE 1 CALENDAR DAY TO REFER THE COMPLAINT TO THE APPROPRIATE AUTHORITY AND TO INFORM THAT AUTHORITY OF ANY INTERIM ACTION THAT IS TAKEN.**

| 2b. NAME | 2c. RANK/GRADE | 2d. DATE |
|---|---|---|
| 2e. UNIT/COMMAND | 2f. SIGNATURE | |

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## PART II - COMPLAINANT SUPPORT/COUNSELLING

3a. **REFERRAL TO COUNSELING AND SUPPORT SERVICES. THE COMPLAINANT SHOULD BE INFORMED OF/REFERRED TO AVAILABLE COUNSELLING AND SUPPORT SERVICES WITHIN 24 HOURS WITH FOLLOW-UP AS REQUIRED.** *(This part should be completed by an appropriate command representative. The complainant should be provided a copy and acknowledge receipt on the command copy.)*

3b. **THE FOLLOWING ARE AVAILABLE LOCALLY** *(complete the following as appropriate)*--

(1) DON Sexual Harassment Advice Line. For confidential counseling/advice for identifying and dealing with sexual harassment and similar inappropriate behavior. (Business hours Monday - Friday EST, toll free 1-800-253-0931, DSN 224-2735, commercial 703-614-2735, call collect from overseas.)

(2) Informal Resolution System (IRS). (Ref: IRS Skills Booklet, NAVPERS 15620.) Both military and civilian personnel are encouraged to utilize the IRS as a means of direct resolution of sexual harassment complaints (not clearly criminal in nature). The IRS can be employed either before pursuing other statutory and regulatory procedures or as a supplemental dispute resolution tool during formal discrimination complaints processing. For further information on the IRS contact (name, unit, phone number): _____

(3) Authorized command forums. The following command-sponsored councils and committees, ombudsman, command master chief, etc, are available (insert name, unit, phone number for each):

_____

(4) Assistance of personal advocate (at shore commands). Per OPNAVINST 5354.1C, shore commanders are responsible for assigning a personal advocate to assist members needing help in processing complaints. Personal advocate assigned (name, phone): _____

(5) Request mast with the CO/OIC. Your right to communicate with the CO in a proper manner, time, and place may not be denied. Such requests shall be acted upon promptly and forwarded without delay. Local procedures are: _____

(6) Other local resources. (Insert local name, organization, phone number):
Family Service Center (FSC) _____
Equal Opportunity (EO) advisor _____
Medical Treatment Facilities (MTF) _____
Chaplain _____
Legal _____

(7) Communications with Inspectors-General. As an alternative to the normal chain of command, any person who doesn't feel comfortable filing complaints locally or in person can lodge complaints (anonymously if desired) via one or more of the available hotlines:
Naval Inspector General, toll free 1-800-522-3451, DSN 288-6743, commercial (202) 433-6743.
Marine Corps Inspector General, DSN 224-1349, commercial (703) 614-1349.
Atlantic Fleet Inspector General, toll free 1-800-533-2397, DSN 565-5940, comm. (804) 445-5940.
Pacific Fleet Inspector General, commercial (808) 471-0735.
Naval Forces Europe Inspector General, DSN 235-4188.
Naval Reserve Inspector General, DSN 363-1324, commercial (504) 948-1324.
(Insert local TYCOM, ISIC, local commanders' hotlines:) _____

(8) A servicemember may always communicate individually with members of Congress.

(9) **Article 138/NAVREGS 1150 complaint**. A servicemember who believes him/herself wronged by his/her CO or other superior officer may file a complaint as provided in JAGMAN chapter III. Assistance in filing such complaints may be available from the local Naval Legal Services Office.

(10) Other. (*Attach additional pages as necessary)*: _____

3c. **IF YOU SUSPECT THAT YOU (COMPLAINANT) ARE BEING SUBJECTED TO IMPROPER PERSONNEL ACTION (REPRISAL) AS A RESULT OF FILING THIS COMPLAINT, PLEASE CONTACT THE FOLLOWING IMMEDIATELY** *(insert name, phone):* _____

3d. **COMPLAINANT WAS ADVISED OF COUNSELING/SUPPORT SERVICES, REPRISAL ASSISTANCE, PROVIDED A COPY OF THIS FORM, AND OFFERED ASSISTANCE IN MAKING APPOINTMENTS.**

| 3e. NAME OF COMMAND REPRESENTATIVE | 3f. RANK/GRADE | 3g. DATE |
|---|---|---|
| 3h. UNIT/COMMAND | 3i. SIGNATURE | |

3j. COMPLAINANT'S ACKNOWLEDGEMENT _____ _____
*(Signature)* *(Date)*

DISCARD THIS PAGE

## PART III - COMPLAINT PROCESSING

4a. **ACKNOWLEDGEMENT OF RECEIPT BY COMMANDING OFFICER/ACTIVITY HEAD**. I acknowledge receipt

of this complaint by _____ *(name/rank)* of _____ *(date)*

**I UNDERSTAND I MUST INITIATE AN APPROPRIATE INVESTIGATION (OR ENSURE THAT ONE IS BEING CONDUCTED (E.G., BY NCIS) WITHIN 3 CALENDAR DAYS.**

| 4b. NAME OF COGNIZANT CO/ACTIVITY HEAD | 4c. RANK/GRADE | 4d. DATE |
|---|---|---|
| 4e. UNIT/COMMAND | 4f. SIGNATURE | |

5. **REFERRAL TO COUNSELING AND SUPPORT SERVICES (MANDATORY).** If not already done, ensure compliance with Part II of this form. **(COMPLAINANT MUST BE INFORMED OF/REFERRED TO AVAILABLE COUNSELLING/SERVICES WITHIN 24 HOURS, WITH FOLLOW-UP AS REQUIRED.)**

6. **OBTAIN LEGAL ADVICE (HIGHLY ADVISABLE)**. Consult the command legal advisor at the outset and maintain close coordination through final resolution and follow-up.

7. **OTHER PRELIMINARY CONSIDERATIONS** *(for details, see chapter 4 of the Commander's Handbook)*

a. Special Incident Reporting? (e.g., OPREP-3, Navy Blue, Unit SITREP per OPNAVINST 3100.6/TYCOM )

b. Major criminal offense?

(1) Referral to NCIS is mandatory (SECNAVINST 5520.3B).

(2) In interim preserve evidence, ensure members' safety, avoid compromising later investigation.

c. Special considerations for crime victims and witnesses (SECNAVINST 5800.11, OPNAVINST 1752.1).

d. Review other options under the UCMJ: e.g., conditions on liberty? pre-trial restraint? search?

e. Recommend informal resolution (IRS)? Unless the conduct is clearly criminal in nature, it is within the CO/OIC/activity head's discretion to forego taking further formal action when a complaint has been resolved under the IRS and the complainant does not desire further action.

f. **Protect privacy**. Protect individual privacy (both complainant's and alleged offending person) through all stages of the process. (SECNAVINST 5211.5D)

g. Important caution: DODDIR 6490.1 (14 Sep 93), Mental Health Evaluations of Members of the Armed Forces, (SECNAVINST 6320.xx) prohibits the use of referrals by commands for mental health evaluations in reprisal, establishes rights for members referred by their commands for such evaluations, and imposes specific procedures which commands must follow in order to refer a member for a mental health evaluation.

8. **INVESTIGATION OF THE COMPLAINT**. **MUST BE INITIATED WITHIN 3 CALENDAR DAYS--NOTIFY COMPLAINANT OF COMMENCEMENT SAME DAY (See part IV, item 13).** Unless another activity (e.g., NCIS) has cognizance, the complainant's command must promptly and appropriately investigate the complaint. The nature of the investigation will depend upon the CO's/activity head's assessment of what more is required under the particular facts and circumstances (and chain-of-command directives) to sufficiently resolve/document factual issues. (For a command investigator's guide, see Appendix M of the Navy Commander's Handbook for Prevention of Sexual Harassment.) Completed investigation must be sufficient to permit any subsequent reviewers to clearly ascertain nature/source/analysis of evidence considered (including who was interviewed) and all pertinent facts developed. (Indicate type of investigation, investigating officer, date convened:)

_____

9. **INTERIM FEEDBACK/ASSISTANCE TO COMPLAINANT**. **TAKE PARTICULAR CARE TO AVOID RE-VICTIMIZING COMPLAINANTS (AND WITNESSES).** Keep the complainant apprised of the status of the investigation (including any deadline extensions). Provide supplemental counselling/support assistance/referral as warranted. Ensure that all involved know that reprisal against the complainant will not be tolerated. *(Recommend keeping a record of such feedback/assistance):*

_____

_____

10. **POSSIBLE COMMAND ACTIONS AFTER INVESTIGATION**

a. If warranted, initiate a formal, more in-depth investigation or refer/re-refer the case to NCIS.

b. Forward the report to another authority for disposition.

c. Dispose of the allegations at the command. Each commander/activity head generally has the discretion to dispose of offenses by members of that command. Options for disposition span the spectrum from taking no action on groundless complaints (after appropriate investigation) through counseling, exhortation, criticism, EMI, administrative withholding of

privileges, entries in FITREPS/ EVALS/performance ratings, revocation of security clearance, detachment for cause, civilian termination, separation processing, NJP, or court-martial. (See chapters 7 and 8 of the Navy Commander's Handbook for Prevention of Sexual Harassment for a more detailed listing of options for correcting offenders.)

d. Consider/implement command improvements based on lessons learned.

11. **RESOLUTION TIME STANDARDS/REPORTING.** RESOLUTION OF CASE SHOULD BE COMPLETED NOT LATER THAN 14 DAYS (60 DAYS FOR RESERVE UNITS) FROM INVESTIGATION COMMENCEMENT. Resolution includes: completion of investigation; determination of validity of complaint; holding NJP or preferring of charges (if courts-martial contemplated); initiation of other appropriate action; notification to accused; and notification to complainant. IF TIME STANDARDS CANNOT BE MET, OPREP (SITREP IF OPREP PREVIOUSLY SUBMITTED) IS MANDATORY: explain reasons case is taking more time and request any assistance required (or state no assistance required). Submit follow-up SITREP's every 14 days until case resolved.

12. **DOCUMENT COMMAND ACTION**. Command records should permit reviewers to clearly ascertain/assess decisions reached. (Retain this form at least 3 years.) Also make appropriate entries in individual personnel records, if applicable. Finally, make any statistical reports required by the chain of command.

## PART IV - NOTIFICATION, REVIEW, AND FOLLOW-UP (attach additional pages as required)

13a. **NOTIFICATION OF INVESTIGATION COMMENCEMENT**. **(NOTIFY COMPLAINANT SAME DAY.)**

13b. COMPLAINANT'S ACKNOWLEDGEMENT _____ _____
*(Signature)* *(Date)*

14a. **NOTIFICATION OF ACTION TAKEN TO RESOLVE COMPLAINT**. **(TO OCCUR WITHIN 14 CALENDAR DAYS (60 DAYS FOR RESERVE UNITS) OF INVESTIGATION COMMENCEMENT. REPORT DELAYS VIA OPREP/SITREP.)**

This complaint was investigated by_____ *(name and rank)*

of _____ *(unit/command)* and completed on _____ *(date).*

The complaint was found to be *(mark one)*: ☐ Substantiated

☐ Unsubstantiated [Insufficient Corroboration]; ☐ Unsubstantiated [No Corroboration]

based on the following findings:

The following action has been taken/initiated by the command ((**CAUTION: SECNAVINST 5211.5D generally precludes providing specific details on adverse actions against offenders. Consult servicing Judge Advocate for further guidance.):**

14b. COMPLAINANT'S ACKNOWLEDGEMENT _____ _____
*(Signature)* *(Date)*

14c. ACCUSED'S ACKNOWLEDGEMENT _____ _____
*(Signature)* *(Date)*

15a. **COMPLAINANT'S RIGHT TO REVIEW BY HIGHER AUTHORITY**. I acknowledge notice of my right to submit a statement concerning the investigative findings and command action taken, and to request review of those findings and actions by the next higher authority who is:

_____

15b. **I REALIZE ANY STATEMENT AND REQUEST FOR REVIEW MUST BE SUBMITTED WITHIN 7 CALENDAR DAYS OF TODAY'S DATE.**

15c. I: _____ **DO NOT REQUEST REVIEW** _____ **REQUEST REVIEW**
*(Initials)* (Initials)

*If review requested, indicate reason:*

15d. COMPLAINANT'S ACKNOWLEDGEMENT _____ _____
*(Signature)* *(Date)*

16a. **ACTION TAKEN BY REVIEWING AUTHORITY**. The following action has been taken:

| 16b. NAME OF REVIEWING AUTHORITY | 16c. RANK/GRADE | 16d. DATE |
|---|---|---|
| 16e. UNIT/COMMAND | 16f. SIGNATURE | |

16g. COMPLAINANT'S ACKNOWLEDGEMENT _____ _____
*(Signature)* *(Date)*

*(RETAIN FORM IN COMMAND EO FILES FOR AT LEAST 3 YEARS*

17a. **COMPLAINANT'S FOLLOW-UP COMMENTS** *(The complainant should be debriefed 30-45 days after final action to assess complainant's views as to effectiveness of corrective action, present command climate, ensure the complainant has not suffered any reprisal, etc.)* The complainant was debriefed on _____ *(date)* and had the following comments:

17b. COMPLAINANT'S ACKNOWLEDGEMENT _____ _____

*(Signature)* *(Date)*

---

18. **COMMANDING OFFICER'S FOLLOW-UP NOTES.** (Indicate dates/nature of any actions prompted by complainant's debrief.)

# CASE REVIEW CHECKLISTS

Example 1: As Used By DoDIG to Inspect Service IG Organizations

**Case No.** _____ **Brief Description:** _____
_____

**Source:** *Local:* _____ _____ _____
*call in* *walk-in* *letter*

*Higher Authority:* _____
*DoD Hotline, NAVINSGEN, DNIGMC, Echelon II/III, etc.*

A. Findings:

Date Closed _____ Were extensions granted?_____

Date Opened _____ Was age of case justified by type of complaint?_____

Case Age _____ Case is timely _____ or untimely_____

Were allegations substantiated? _____ Remarks:_____
_____
_____

B. Independence:

*Criteria: DoD Directive 7050.1* (F.4) *addresses requirement for independence.*

Findings:

- Was the Investigating officer (IO) independent of unit/base where allegations took place? (Yes or No--explain No)

_____
_____
_____

- Was IO subordinate to individual whom allegations are against? (Yes or No)

_____
_____

Case is considered independent _____ Not independent _____

C. Documentation:

*Criteria:* *DoD Directive 7050.1 (E.3.c.ll) requires:*
"*Documentation contained in the official examination file fully support the findings and conclusions reflected in the DoD Hotline completion report. As a minimum, the file shall contain a copy of the DoD Hotline completion report and a memorandum that reflects the actions taken by the examining official to determine the findings, complete identity of all witnesses, notes from transcripts of interviews and specific details and locations of all documents reviewed. Subparagraph 12 further requires the retention of all working papers and files for a period of two years from the date the matter was closed by the DoD Hotline.*"

Findings:

- Is there evidence of an investigative plan in(field) file (Yes or No)?

_____
_____
_____

- are there copious notes (made from statements taken) (Yes or No)?

_____
_____
_____
_____

- Documentation is sufficient _____ Insufficient _____

D. Adequacy

Criteria:Specific criteria defining the element to close a report is not covered in DoD Directive 7050.1. However, the QAR team previously developed criteria (listed below) that, while not all inclusive, has proven successful during previous QAR's.

Findings:

- Were all the allegations in the basic complaint addressed (Yes or No)?

_____
_____
_____

- Were all key individuals (complainant, witnesses, subjects) interviewed (Yes or No)?

_____
_____
_____

- Were all relevant questions asked (Yes or No)?

_____
_____
_____

- Did the Investigating officer collect and review all pertinent documentation in support of his conclusions?

_____
_____
_____

- Were legal opinions or technical expertise solicited when appropriate? How is it documented in the case file?

_____
_____
_____

- Did the examining official demonstrate a "common sense" approach while conducting this inquiry (Yes or No)?

_____
_____
_____

- Case is considered adequate? _____ not adequate _____

E. Processing:

1. "Bounceback" information. Is there any indication in the case file that the ROI was rejected or returned by higher authority for additional work? (Yes/No/Comment)

_____
_____

2. Was follow-up action by the IG sufficient in cases where corrective action was recommended? (Did the IG verify that corrective action was taken?) (Yes/No/Comment)

_____
_____

## III. OTHER COMMENTS

_____
_____
_____
_____
_____
_____
_____

FOR FOLLOW-UP & CRITIQUE PURPOSES:

Name of Complainant: _____

Telephone Number: _____

Address or Military Unit: _____

_____

Name of subject: _____

Telephone Number: _____

Address or military Unit: _____

Example 2: As Used by DoDIG in Military Whistleblower Reprisal Cases

MILITARY WHISTLEBLOWER INVESTIGATIONS
REVIEW CRITERIA WORK SHEET

1. Complainant name/case number;

2. Date complaint received:

3. Allegations were: substantiated not substantiated

4. Investigator's name:
Organization:
DSN:

5. Was the investigator independent of the allegations and free from command influence?

6. Were all protected disclosures accurately identified as such?

7. (a) What was the protected disclosure(s)?

(b) When did the disclosure(s) occur? (Date?)

8. (a) To whom was the disclosure made? (Name, title, & position)

(b) Was the protected disclosure properly addressed? If not,what action was taken by the investigator?

9. What were the specific personnel actions taken, withheld or threatened?

10. Were all personnel actions alleged to be reprisal investigated or otherwise addressed?

11. Who were the management officials responsible for the personnel action(s) and when did they know of the disclosure(s)?

12. Were all responsible management officials interviewed for each personnel action?

13. Was the complainant interviewed?

14. Were witnesses listed by the complainant interviewed?

15. Were any key witnesses not interviewed? (If not, why?)

16. Does the report clearly and objectively present the facts of the case?

17.Does the evidence establish the personnel action would have been taken, withheld or threatened if the protected disclosure had not been made?

18. Is there any indication of bias by the investigator?

19. Is the report balanced, i.e. does it present both sides of issues?

20. Are the conclusions and recommendations reasonable based on the facts?

21.Were there deficiencies, discrepancies, incongruities in the findings, conclusions or recommendations?

22.Is there any relevant information the complainant submitted which the investigator did not include or address?

23. (a) Is there documentation of witnesses' testimony?

(b) Are the summaries adequate? (Do they support the findings of the report?)

24. Are all pertinent documents/records provided as enclosures to the report?

Example 3: As Used by NAVINSGEN in Military Whistleblower Reprisal Cases

U.S. NAVY
MILITARY REPRISAL INVESTIGATION
QUALITY CONTROL REVIEW

NAME OF CASE:

CASE NUMBER:

DATES

- reprisal allegation received:
- investigation completed:
- IG, DoD informed of results:

APPLIES TO:

- NAVY ARMY MARINE CORPS AIR FORCE
- REGULAR RESERVE NATIONAL GUARD
- ENLISTED COMMISSIONED OFFICER WARRANT OFFICER

PROTECTED DISCLOSURE:

To: Inspector General Member of Congress
Other:

Date of initial disclosure:

PERSONNEL ACTIONS:

| **DATE** | **PERSONNEL ACTION** | **REPRISAL** (Y or N) |
|---|---|---|

RESPONSIBLE MANAGEMENT OFFICIALS:

| NAME | GUILTY OF REPRISAL? (Y OR N) |
|---|---|

Did the Investigating Officer:
- Work for any of the responsible management officials? Y or N

- Apply the "acid test"?

  * Were all protected disclosures accurately identified as such? Y or N

  * Were all personnel actions alleged to be reprisal investigated? Y or N

  * Were all responsible officials accurately identified for each personnel action? Y or N

  * Did the investigation appropriately address the fourth question of the acid test: Does the evidence establish the personnel action would have been taken, withheld or threatened if the protected disclosure had not been made? Y or N

- Interview:

  the complainant? Y or N

  all responsible officials? Y or N

  other critical witnesses, if any? Y or N

OVERALL EVALUATION OF THE REPRISAL INVESTIGATION:

Summary Evaluation: Adequate? Y or N

LOCATION OF INVESTIGATIVE FILES: Naval Inspector General

For Additional Information Contact:

Name:

Organization:

Telephone Number:

DSN: _____ Commercial:

# INDEX OF PARAGRAPH HEADINGS