

Protecting Whistleblower Information

ENIGMA 2023

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OFFICE OF THE WHISTLEBLOWER OMBUDS

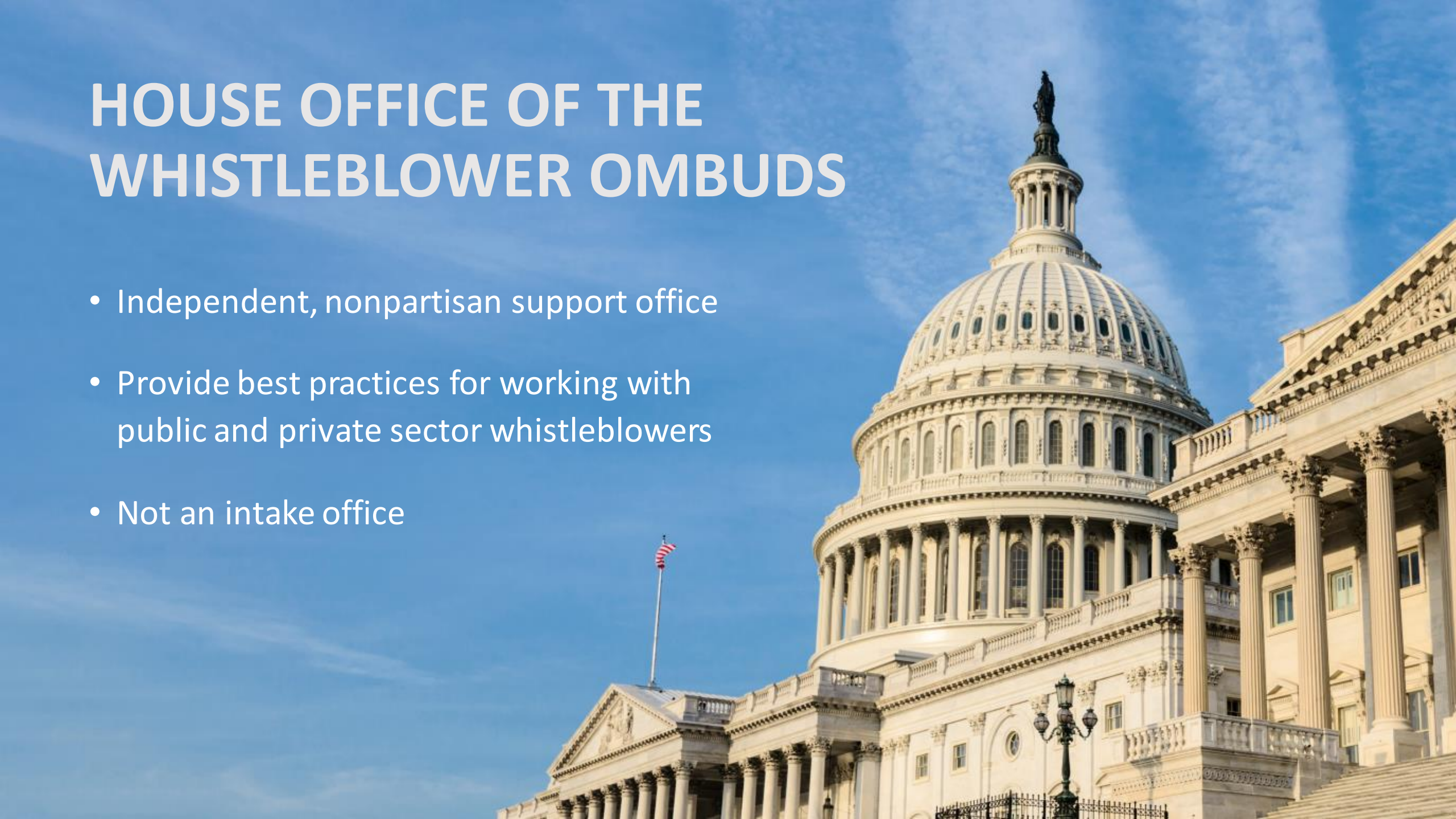
Twitter Whistleblowing

"I'm here today because Twitter's leadership is misleading the public, lawmakers, regulations, and even its own board of directors. What I discovered when I joined Twitter was that this enormously influential company was over a decade behind industry security standards. The company's cybersecurity failures make it vulnerable to exploitation, causing real harm to real people." – Peter "Mudge" Zatko



HOUSE OFFICE OF THE WHISTLEBLOWER OMBUDS

- Independent, nonpartisan support office
- Provide best practices for working with public and private sector whistleblowers
- Not an intake office



SERVICES

- Trainings on best practices for working with whistleblowers
- Developing guidelines and procedures for whistleblower intake
- Confidential consultations to assist staff in responding to whistleblowers
- Technical expertise for whistleblower legislation



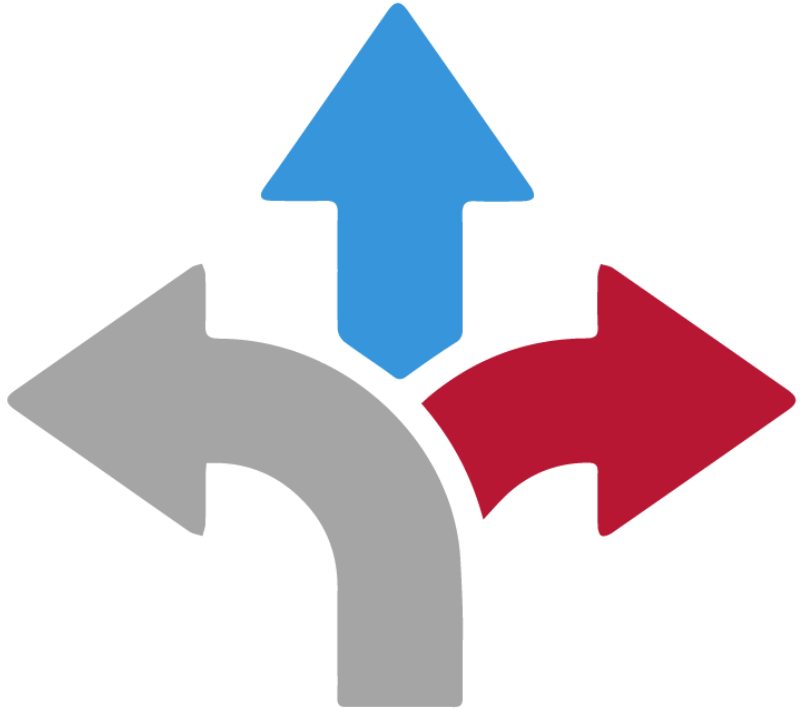
Who Are Whistleblowers?

- Expose abuses of power that betray public trust
- Protections vary across sectors
- Distinct from traditional casework/witnesses



Why Come Forward?

- Believe they are doing their jobs
- “Employees shall disclose waste, fraud, abuse, and corruption”
- At professional crossroads





Profiles in Courage

Why Don’t Come Forward?

- Fear of **futility**
- Fear of **retaliation**



Principles For Working With Whistleblowers

- Do no harm
- Establish ground rules
- Manage expectations



Principles For Working With Whistleblowers

- Honor commitments
- Partner on oversight
- Stand by your sources



CONGRESS' OBLIGATIONS WHEN WORKING WITH WHISTLEBLOWERS

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

APPROACHES TO MITIGATE RISK

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

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

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

COMPLIANCE WITH THE HOUSE CODE OF CONDUCT

The House Code of Official Conduct includes requirements for working with whistleblowers from the public and private sectors.[2] Clause 20 prohibits the House from engaging in retaliation against individuals because of truthful disclosures made to certain congressional offices or to law enforcement. Clause 21 prohibits the House from publicly disclosing the identity of, or personally identifiable information about, an individual who has engaged in protected whistleblowing with Congress, without their prior voluntary written consent. Some limitations and exceptions exist, and the Office of the Whistleblower Ombuds is prepared to assist House offices with compliance.

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



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

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WHISTLEBLOWER CASE MANAGEMENT INTAKE WORKFLOW

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INTAKE

Web-based form | Email | In-person | Hotline/Phone

AUTO REPLY OR FRONT LINE INTAKE/CASEWORKER

Acknowledge receipt and provide timeline for expected follow up

ENSURE YOU HAVE KEY FACTS

1. Name
2. Contact information
3. Issue being disclosed
4. Type of assistance sought
5. Confidentiality desired
6. Employment status & employer
7. Represented by a lawyer?
8. Goals in working with Congress

UPDATE SECURE TRACKING SYSTEM

Restrict access to those with need-to-know

INITIAL SCREENING

Within office jurisdiction?
Could this matter be an office priority?

NO

1. Refer whistleblower to other entities

POTENTIALLY

INVESTIGATE FURTHER

How was evidence obtained?
Limitations on further use?

DETAILS TO KEEP IN MIND

DISCLAIMERS

- Right to communicate with Congress
- Risk of retaliation, consult experienced counsel
- Blow the whistle on own time with own resources
- Your office's jurisdiction
- No classified information over unsecured channels
- Office confidentiality practices, and right to confidentiality

DISCUSS

- Do not provide legal advice
- Desired confidentiality?
- Boundaries around further use of information
- Obtain consent prior to any sharing
- Share Survival Tips and menu of government and non-government referral options, advise them to obtain experienced counsel
- Refrain from accepting documentary evidence until you feel sure that you can accept it safely

VET THE ALLEGATIONS

- Homework assignments for potential whistleblower – timelines and detailed summaries of key evidence
- Consider alternate ways to safely get evidence
- Are there corroborating witnesses?
- Disclosures to other entities? (e.g. congressional offices, watchdogs)
- Any investigative reports for review?

October 2022

OFFICE OF THE
WHISTLEBLOWER OMBUDS

Sample Whistleblower Confidentiality Policy[i]

Purpose: The purpose of this document is to ensure sufficient protections for the confidentiality of sensitive whistleblower information as the [**Member office or Committee**] (hereinafter, "Office") engages with whistleblowers from the public and private sectors to support the Office's oversight work [**and constituent support functions**].

Requirements: The House Code of Official Conduct mandates confidentiality protections for whistleblower information, and House Information Security Policy requires heightened security protections for information provided in confidence or with restrictions on its use.[ii]

Information provided to the Office by a constituent, source, or whistleblower (hereinafter, "whistleblower") may fall within the ambit of this policy. As a best practice, the Office will assume that whistleblower information is sensitive and should be handled and used with caution.

Note: This Information Security Policy relates solely to information that is **not** classified. Policy and procedures for matters relating to classified material or communications are **not** contained in this document. Consult the Office of House Security for specific guidance concerning the lawful handling of classified information. Consult the Office of the Whistleblower Ombuds for guidance on the laws and processes that protect classified whistleblowing disclosures.

1. **Decision maker(s).**
   The [**Member/Chair/Ranking Member**] has responsibility for making the key decisions affecting the Office's collection, retention, and use of all information related to whistleblower matters.
2. **Principal contact.**
   The principal contact for overseeing and implementing this policy is the Office's [**insert title**].
3. **Office staff cybersecurity training requirements.**
   Personnel handling sensitive information are responsible for meeting all minimum cybersecurity training requirements in accordance with House Information Security policies.

Notice and Consent aka “Ground Rules”

- Right to confidentiality
- Right to have their information protected
- Right to review
- Right to object to use/sharing



WHISTLEBLOWER SURVIVAL TIPS

The Office of the Whistleblower Ombuds is an independent, nonpartisan support office that advises the House on best practices for working with whistleblowers from the public and private sectors. It treats all inquiries confidentially. The Office cannot accept disclosures from whistleblowers.

Whistleblowers can take key steps to protect themselves while having an impact. The following tips were informed by whistleblower attorneys and experts who have worked with thousands of whistleblowers to provide valuable lessons learned.

Seek legal and other expert advice early:

Before you make a disclosure (or early in your process before taking risks), consider consulting an attorney experienced in representing whistleblowers. This can help to protect your communications through the attorney-client privilege and help to shield you from legal liability. Also consider contacting an organization that specializes in working with whistleblowers, to help guide you through the process and provide solidarity and support. Many such organizations offer legal representation, and they can potentially serve as a bridge between you those who should be benefiting from your knowledge.

Consult your loved ones:

Blowing the whistle may be one of your most difficult professional decisions, and it can have long-lasting personal impacts for you and your loved ones. You could be forced out of your chosen career field, subjected to public smear campaigns, and undergo severe psychological trauma. It is important to have a personal support network in place. To the extent possible, discuss the decision with your loved ones in advance, including the risks and benefits of reporting the misconduct and options for how to safely proceed. They also must live with the consequences. Putting aside the professional and public stakes, it is an intensely personal decision.



Make a plan:

Develop a well-thought-out strategy for your whistleblowing process that incorporates these survival tips, so that you remain at least one step ahead of those engaging in the misconduct. Include exactly what you plan to accomplish (your goals) and how. Consider how your employer will respond before they do, and plan accordingly (e.g., securing evidence before it is destroyed). Identify the applicable law(s) in advance to ensure you are engaging in protected whistleblowing. The plan will likely need to be adjusted throughout your journey, but it will provide a roadmap to guide you.

Carefully weigh the options of being anonymous/confidential versus public:

There are risks and benefits to being anonymous, confidential or public during your whistleblowing. For instance, if you remain anonymous, the recipient of your disclosure cannot follow up to discuss how to use the information. If you remain confidential, it may be more difficult to demonstrate that your employer knew about your whistleblowing, which can help to prove retaliation. Yet, going public may expose you to professional isolation, public scrutiny, expensive defamation suits, and even threats to your safety. This is a personal decision that you should discuss in advance with your attorney and support network. With some exceptions, the House of Representatives' Code of Conduct prohibits the House from publicly identifying a protected whistleblower without their advance written consent. However, it is not possible for recipients of your disclosures to guarantee confidentiality – due to factors such as legal limitations, unsecured communications, and the reality that your facts may be your signature and could identify you through context. Always be prepared for the possibility of becoming public.

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Work within your workplace for as long as possible without incurring suspicions:

Working within your workplace for as long as possible without incurring suspicions will help you to maintain access to key evidence to confirm suspicions and further build your case. Moreover, it may provide an opportunity for the matter to be resolved internally before it escalates further or requires outside intervention. A few exceptions exist to this approach, such as if you have reason to believe doing so could put you or others in harm's way or result in the destruction of evidence.

Stick to the facts and don't embellish:

Your credibility is your greatest asset and key to building solidarity. When making a disclosure, stick to information that you know to be sound and reliable, whether you obtained it firsthand or from a credible source. If in doubt, understate rather than risk exaggerating. Embellishing or straying from the facts will likely backfire for you later down the road and undermine your credibility – severing trust with key allies such as congressional offices, advocacy groups, or journalists relying on your information.

Create a contemporaneous paper trail or journal:

Document key facts and developments surrounding your whistleblowing through a paper trail and/or journal, to maintain an accurate record and timeline of events as they unfold. This will help you to share a consistent narrative with those who should be benefiting from your disclosures. At the top of the notes, provide a disclaimer that "I have made these notes to refresh my recollection later," which can help prevent them from being used during the discovery process in a related legal proceeding.

Carefully secure and protect evidence before drawing suspicion:

Secure and protect evidence before drawing suspicion to your whistleblowing, since your employer may take action to destroy it or block your access. However, proceed cautiously when gathering supporting evidence. Keep it in a secure location, such as with your attorney, and avoid removing original documents when possible (e.g., for unclassified documents, take a photo from your personal phone instead). Employers regularly conduct retaliatory investigations to identify whistleblowers, tracing metadata or other identifying information back to the original source. Even when you are engaging in lawful whistleblowing, retaliators have found methods to bypass workplace rights. They may threaten criminal prosecution for "theft" of workplace documents, or file SLAPP suits – defamation or breach of contract lawsuits for significant damages.

Engage in whistleblowing on your own time, with your own resources:

Unless you have advance permission (e.g., via a collective bargaining agreement) or are prohibited from using your own resources (e.g., sharing classified information), engage in whistleblowing on your own time, and from your own resources (e.g., phone, computer, email, Wi-Fi). Remember that your work email and anything done through your work devices can be monitored by your employer. Due to advanced surveillance techniques, however, communication through your personal devices may also not be secure. When possible, meet in person or use secure communication tools (e.g., Signal, Wickr) to engage in confidential whistleblowing. Contact an organization experienced in secure whistleblower communications for further guidance.

Test the waters with trusted colleagues:

Test the waters with trusted colleagues in order to confirm your concerns for quality control and to identify potential sources of solidarity. However, avoid exposing yourself by engaging in strategic but casual questioning. Take note of potential allies and witnesses; their support could help to further advance your disclosures and provide a barrier to subsequent retaliation.

Engage in self-care:

Practice self-care and stress-reducing activities throughout your whistleblowing process. It is common to experience toxic forms of retaliation – from professional isolation to gaslighting (manipulating someone by psychological means into questioning their own sanity) – which can lead to post-traumatic stress disorder, depression, or even thoughts of harm. Engage in mindfulness activities, and develop a community of support through trusted peers, loved ones, and therapists. The National Suicide Prevention Lifeline offers free and confidential support for people in distress by dialing 988.

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Publicly Accessible Resources

Organized for

- Congressional Audience
- Whistleblower Audience

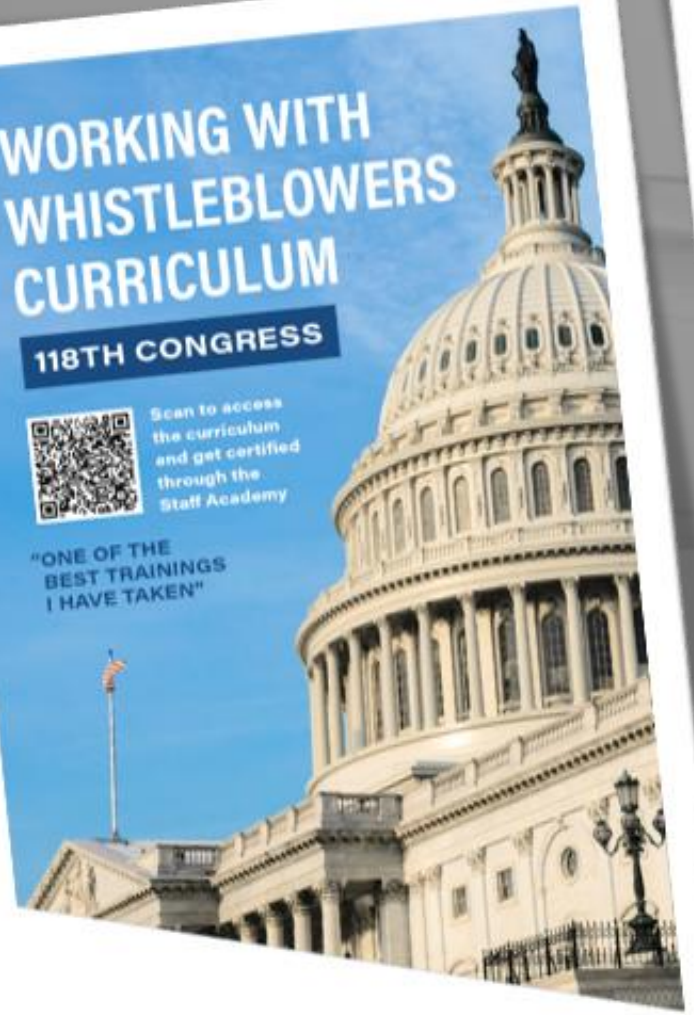


WORKING WITH WHISTLEBLOWERS CURRICULUM

118TH CONGRESS

Scan to access the curriculum and get certified through the Staff Academy

"ONE OF THE BEST TRAININGS I HAVE TAKEN"



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WORKING WITH WHISTLEBLOWERS LEARNING PATH

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OFFICE OF THE WHISTLEBLOWER OMBUDS

Vision

To be a valuable, nonpartisan resource for every House office, by institutionalizing safe, effective, and consistent practices for working with whistleblowers.



Thank You USENIX!

Questions?



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