

**OFFICE OF ATTORNEY RECRUITMENT AND MANAGEMENT
PROCEDURES FOR FBI WHISTLEBLOWER REPRISAL CLAIMS
BROUGHT PURSUANT TO 28 C.F.R. PART 27**

1. **PURPOSE:** This directive establishes Office of Attorney Recruitment and Management (OARM) policies and procedures for processing whistleblower reprisal cases brought under 28 C.F.R. part 27 by former or current employees of, or applicants for employment with, the Federal Bureau of Investigation (FBI). This directive is OARM policy and shall be applied accordingly. Exceptions and/or modifications to this policy may be made at the discretion of the Director or Assistant Director of OARM.

2. **SCOPE:** This directive applies to:
 - A. OARM in its delegated authority to adjudicate whistleblower reprisal cases brought under 28 C.F.R. part 27, by current and former employees of, or applicants for employment with, the FBI; and
 - B. The parties to a whistleblower reprisal case before OARM (Complainant or Complainant's designated representative, if any, and the FBI).

3. **AUTHORITIES:**
 - A. 5 U.S.C. § 2303
 - B. 28 C.F.R. part 27

4. **DEFINITIONS:**
 - A. Appeal: When a party (Complainant or the FBI) files a request for review by the Deputy Attorney General of the Director of OARM's Final Determination or Corrective Action Order, pursuant to 28 C.F.R. § 27.5.
 - B. Classified Information: Official information or material that requires protection in the interest of national security and is classified for such purpose by an appropriate classification authority in accordance with the provisions of Executive Order 12958, Classified National Security Information.
 - C. Clear and Convincing Evidence: The measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established; it is a higher standard than preponderant evidence.
 - D. Complainant: A former or current employee of, or applicant for employment with, the FBI who has filed a request for corrective action with OARM.

- E. Conducting Office: The office that conducts the investigation into a complainant's reprisal allegations, either the Department of Justice's Office of the Inspector General (OIG) or Office of Professional Responsibility (OPR).
- F. Corrective Action: Generally, the placement of a complainant, as nearly as possible, in the position the complainant would have been in had the whistleblower reprisal not occurred. Corrective action may include: reimbursement for attorneys fees, reasonable costs, medical costs incurred and travel expenses; back pay and related benefits; and any other reasonable and foreseeable consequential damages. Compensatory damages for emotional distress, *i.e.*, pain and suffering, are not included.
- G. Investigating Office: The office that receives the report of an alleged reprisal, either OIG or OPR. Once received, the office that received the report of reprisal consults with the other Investigating Office to determine which office is more suited, under the circumstances, to conduct an investigation into the allegation (*i.e.*, to serve as the Conducting Office).
- H. Mediation: Mediation is an informal process in which a neutral third party, the mediator, assists the opposing parties in reaching a voluntary, negotiated resolution of a complaint. Mediation is different from other forms of dispute resolution in that the parties participate voluntarily, and the mediator has no authority to make a decision.
- I. Nonfrivolous Allegation: An allegation of fact which, if proven, could establish a prima facie case that OARM has jurisdiction over the matter at issue.
- J. Personnel Action: A personnel action means an appointment, a promotion; an adverse action or other disciplinary action; a detail, transfer, or reassignment; a reinstatement; a restoration; a reemployment; a performance evaluation; 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, performance evaluation, or other action described within 5 U.S.C. § 2302(a)(2); a decision to order psychiatric testing or examination; and any other significant change in duties, responsibilities, or working conditions.
- K. Preponderant Evidence: The degree of relevant evidence that a reasonable person, considering the record as a whole, would need to find that a contested fact is more likely true than untrue.
- L. Protected Disclosure: A disclosure of information to specified individuals or offices listed under 28 C.F.R. § 27.1(a) which Complainant reasonably believes

evidences a violation of any law rule or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.

- M. Request for Corrective Action (RCA): A request by Complainant that the Director of OARM order the FBI to remedy or “correct” the consequences of the FBI’s alleged unlawful reprisal.

5. **BURDENS OF PROOF:**

- A. Jurisdiction: In order to establish OARM’s jurisdiction over his RCA, Complainant must:
1. Show that he exhausted his administrative remedies with the Conducting Office (by first filing a complaint of reprisal with either OIG or OPR); and
 2. Make a nonfrivolous allegation that he made a protected disclosure that was a contributing factor in the FBI’s decision to take or fail to take, or threaten to take or fail to take, a personnel action against him.
- B. Timeliness: Complainant must show that his RCA was timely filed with OARM. Complainant’s RCA must be received by OARM either:
1. Within 60 calendar days of receipt of notification of termination of an investigation by the Conducting Office; or
 2. At any time after 120 calendar days from the date Complainant first notified an Investigating Office of an alleged reprisal if Complainant has not been notified by the Conducting Office that it will seek corrective action.
- C. Merits: If Complainant shows that OARM has jurisdiction over his RCA, Complainant must then prove the merits of his case by preponderant evidence. If Complainant meets this burden, then the Director of OARM will order corrective relief that is deemed appropriate and authorized by 28 C.F.R. § 27.4(f), unless the FBI proves by clear and convincing evidence that it would have taken the same personnel action(s) against Complainant in the absence of his protected disclosure(s).

The case law of the U.S. Merit Systems Protection Board and the U.S. Court of Appeals for the Federal Circuit, although not binding on OARM, is instructive and looked to for guidance.

6. **PROCEDURES:** The procedures set forth herein apply to FBI whistleblower reprisal cases brought under 28 C.F.R. part 27:

A. Filing of Pleadings: All pleadings filed with OARM must meet the following requirements:

1. Page Limit: Pleadings must not exceed 25 pages (not to include any attachments). OARM may grant a motion for leave to exceed the 25-page limit for good cause shown.
2. Paper Size: Pleadings and attachments must be filed on 8½ inch by 11-inch paper, except for good cause shown. All electronic submissions must be formatted so that they will print on 8½ by 11-inch paper.
3. Date of Filing: All pleadings must be filed by the date set by the applicable regulations, 28 C.F.R. part 27, or OARM. The date of filing is the date on which the submission is postmarked, faxed, or emailed (if submitted electronically). Extensions of filing dates will be granted only if requested in writing and if good cause is shown.
4. Service: All pleadings filed with OARM must be served upon the opposing party and/or designated representative, if any.
5. Certificate of Service: All pleadings filed with OARM must be accompanied by a certificate of service stating the:
 - a. Method of service (*e.g.*, by mail, facsimile, or email);
 - b. Date of service; and
 - c. Name and address of the individual(s) served.

OARM may reject a submission that does not have a certificate of service.

6. Organization:

- a. Hardcopy: When a pleading submitted by postal mail or facsimile includes three or more documentary attachments, the attachments should be “tabbed.” A “tab” is a dividing page, a portion of which extends beyond the normal 8½ inch width of paper, and which contains a description or label. Pages in a pleading should be sequentially numbered or Bates stamped, and the attachments

should be preceded by a table of contents describing each attachment and indicating the page on which it starts.

b. Electronic: Electronic tables of contents take the place of physical “Tabs” in pleadings filed by traditional/hardcopy means. When an electronic pleading contains three or more electronic supporting documents, each attachment must be identified in the accompanying table of contents and designated with a brief descriptive label (*e.g.*, “Exh. 4b, Decision Notice”). Each pleading should be assembled into a single PDF document, to include all electronic attachments, and will contain sequential page numbers. Pleadings are subject to a 10 megabyte size limit. If what would otherwise be a single pleading must be broken into multiple pleadings because of size limit, each should contain the same descriptive title, together with a “Part” designation in parentheses (*e.g.*, Brief on the Merits of Complainant’s RCA (Part A), Brief on the Merits of Complainant’s RCA (Part B), etc.).

7. Classified Information: The parties shall not file any classified information with OARM. In the event such information becomes relevant to proceedings before OARM, appropriate arrangements for the protection, transmission, and handling of such materials must be in compliance with FBI and other applicable requirements regarding classified materials.

B. Motions:

1. Form: All motions, except those made during a prehearing conference or a hearing, must be in writing. All motions must include a statement of the reasons supporting them. Written motions must be filed with OARM and served upon the other party. A party filing a motion for extension of time, a motion for postponement of a hearing, or any other procedural motion must first contact the other party to determine whether there is any objection to the motion, and must state in the motion whether the other party has an objection.
2. Objection: Unless OARM provides otherwise, any objection to a written motion must be filed within 10 days of the date of service of the motion.
3. Motions for Extension of Time: Motions for extension of time will be granted only on a showing of good cause. **OARM, in its discretion, may grant or deny motions for extensions of time to file pleadings without providing any opportunity to respond to the motions.**

C. Discovery:

1. Scope: Discovery covers any non-privileged matter that is relevant to the issues involved in the request for corrective action, including the existence, description, nature, custody, condition, and location of documents or other tangible things, and the identity and location of persons with knowledge of relevant facts. Relevant information includes information that appears reasonably calculated to lead to the discovery of admissible evidence.
2. Methods: Parties may use one or more of the methods provided under the Federal Rules of Civil Procedure. These methods include written interrogatories to parties, depositions, requests for production of documents or things for inspection or copying, and requests for admission. The Federal Rules of Civil Procedure may be used as a general guide for discovery practice in proceedings before OARM. Those rules, however, are instructive rather than controlling.
3. Initial Disclosures: Without awaiting a discovery request, and within 10 days of the date of OARM's jurisdictional Opinion and Order, each party must provide the following information to the other:
 - a. The FBI must provide:
 - (i) A copy of, or a description by category or location of all documents in the possession, custody, or control of the FBI that the FBI may use in support of its claims or defenses; and
 - (ii) The name and position title and, if known, the contact information of each individual likely to have discoverable information that the FBI may use in support of its claims or defenses, identifying the subjects of such information.
 - b. Complainant must provide:
 - (i) A copy of, or a description by category or location of all documents in the possession, custody, or control of Complainant that Complainant may use in support of his claims or defenses, and
 - (ii) The name and position title and, if known, the contact information of each individual likely to have discoverable

information that Complainant may use in support of his claims or defenses, identifying the subjects of such information.

These disclosures must be based on the information reasonably available to the parties at the time they are made. A party is not excused from making its disclosures because it challenges the sufficiency of the other party's disclosures, or because the other party has not made its disclosures. **They must be served on the other party, but not on OARM.** If they are served on OARM, they will be rejected and returned to the party.

4. Initial Requests for Discovery: An initial request for discovery must be served on the other party within 25 calendar days of OARM's jurisdictional Opinion and Order.
5. Responses to Initial Discovery Requests: Responses to initial discovery requests must be served no later than 20 calendar days after the date of service of the other party's discovery request or OARM order. Any discovery requests following the initial request must be served within 10 calendar days of the date of service of the prior response, unless the parties are otherwise directed. Unless the parties file a motion to compel, **no discovery requests or responses are to be served on OARM.** If they are, they will be rejected and returned to the parties. OARM expects the parties to assist in the expeditious processing of the case by honoring requests for relevant documents and producing material witnesses without additional OARM intervention.
6. Motions to Compel Discovery: If a party fails or refuses to respond in full to a discovery request, the requesting party may file a motion to compel discovery. The requesting party must file the motion with OARM, and must serve a copy of the motion on the other party from whom the discovery was sought. The parties must attempt to resolve a discovery dispute before filing a motion to compel with OARM. Thus, the moving party shall discuss the anticipated motion with the opposing party either in person or by telephone and the parties must make a good faith effort to resolve the dispute and narrow the areas of disagreement. The motion to compel shall include:
 - a. A copy of the original request for discovery, showing that the information sought is relevant and material; and
 - b. A copy of the response to the request (including the objections to discovery), or, where appropriate, a statement that no response has

been received, along with an affidavit or sworn statement supporting the statement; and

- c. A statement that the parties have discussed the anticipated motion and have made a good faith effort to resolve the discovery dispute and narrow the areas of disagreement.

Any motion for an order to compel discovery must be filed with OARM within 10 calendar days of the date of service of objections, or, if no response is received, within 10 calendar days after the time limit for response has expired. Any pleading in opposition to a motion to compel discovery must be filed with OARM within 10 calendar days of the date of service of the motion.

7. Limits on the Number of Discovery Requests:

- a. Absent prior approval by OARM, interrogatories served by parties upon another party may not exceed 25 in number, including all discrete subparts.
- b. Absent prior approval by OARM, each party may not take more than 10 depositions.
- c. Requests to exceed the aforementioned limitations may be granted at the discretion of OARM.
- d. OARM may also limit the frequency or extent of use of the discovery methods in the event OARM finds that:
 - (i) The discovery sought is cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
 - (ii) The party seeking discovery has had sufficient opportunity by discovery in the action to obtain the information sought; or
 - (iii) The burden or expense of the proposed discovery outweighs its likely benefit.

8. Time for Discovery: Discovery must be completed within the time OARM designates.

- D. Case Suspension Procedures: In some situations, the parties may conclude that they need more time than is routinely provided for discovery or settlement discussions. If so, the parties may request that OARM suspend the case for 30 days, as follows:
1. *Joint requests*: The parties may submit a joint request for additional time to pursue discovery or settlement. Upon receipt of such request, an order suspending processing of the case for a period up to 30 days may be issued at the discretion of OARM.
 2. *Unilateral requests*: In lieu of participating in a joint request, either party may submit a unilateral request for additional time to pursue discovery. Unilateral requests for additional time of up to 30 days may be granted for good cause shown at the discretion of OARM.

No case may be suspended for more than a total of 30 days under these procedures. Should the parties contact OARM during the period of suspension for assistance relative to discovery, and if OARM's involvement is likely to be extensive, OARM will notify the parties that it will be necessary to take the case off suspension and return it to standard processing.

- E. Dismissal Without Prejudice to Refiling: A case may not be suspended for more than 30 days. However, the case may be dismissed without prejudice to refiling for good cause shown (*e.g.*, where the parties agree that additional time for settlement discussions or discovery is necessary, Complainant needs time to retain counsel, etc.). Dismissal without prejudice is a procedural option that is committed to the sound discretion of OARM. Generally, the parties will be given 90 days to refile a case dismissed without prejudice. In the event the parties need additional time, the parties shall provide OARM with a written case status update and establish good cause for the time requested.
- F. Hearings: Complainant does not have an automatic right to a hearing. A hearing may be held at the discretion of OARM where Complainant has presented a cognizable legal claim supported by sufficient evidence of a triable issue of fact. Hearings before OARM shall be closed to the public. Generally, the parties, the witnesses, and the Director/Assistant Director of OARM shall attend hearings in person. However, OARM, in its discretion, may hold the hearing in whole or in part by telephone, video-conference, or in-person at OARM's hearing/conference room (or designated alternate hearing site). Among the factors OARM will consider in deciding whether to hold a hearing in whole or in part by video-conference or telephone are:

1. The distance that Complainant and/or Complainant's representative must travel to access video conferencing equipment;
2. A comparison of the total costs of holding an in-person, video, or telephonic hearing;
3. The distance the parties and their witnesses would have to travel to appear in person; and
4. Whether appearance by video-conference or telephone of Complainant and his or her witnesses would unduly prejudice Complainant.

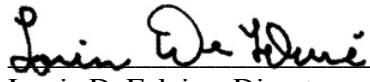
Either party may file a motion for postponement of the hearing. The motion must be made in writing and must either be accompanied by an affidavit or sworn statement. The affidavit or sworn statement must describe the reasons for the request. OARM will grant the request for a continuance of the hearing only upon a showing of good cause.

G. Closing the Record:

1. When a Hearing is Held: When there is a hearing, the record ordinarily will close at the conclusion of the hearing. When OARM allows the parties to submit argument, briefs, or documents previously identified for introduction into evidence, however, the record will remain open for as much time as OARM grants for that purpose.
2. Decision Based on the Written Record: If no hearing is held, the record will close on the date OARM sets as the final date for the receipt or filing of submissions of the parties.
3. When the Record Closes: Once the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed. OARM will include in the record, however, any supplemental citations received from the parties or approved corrections of the transcript, if one has been prepared.

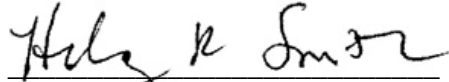
7. **EFFECTIVE DATE AND IMPLEMENTATION:** This policy is effective immediately

upon signature of the Director and Assistant Director of OARM.



Louis DeFalaise, Director
Office of Attorney Recruitment and Management

10 / 14 / 11
Date



Hilary Smith, Assistant Director
Office of Attorney Recruitment and Management

10 / 14 / 11
Date