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**GUIDE TO INVESTIGATING
MILITARY WHISTLEBLOWER
REPRISAL AND RESTRICTION
COMPLAINTS**

**INSPECTOR GENERAL
DEPARTMENT OF DEFENSE**

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Foreword

This guide replaces the “Green Guide” (IGDG 7050.6, cancelled). It describes best practices for conducting military reprisal and restriction intakes and investigations. Please refer to DoDD 7050.06, “Military Whistleblower Protection,” for policy and responsibilities for military whistleblower protection, to include notification requirements.

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CHAPTER 1

RESTRICTION AND WHISTLEBLOWER REPRISAL

1. Purpose

This chapter explains restriction, reprisal, and the applicable legal and regulatory terms and their application, under Title 10, United States Code, Section 1034 (10 U.S.C. 1034), “Protected communications; prohibition of retaliatory actions,” and DoD Directive (DoDD) 7050.06, “Military Whistleblower Protection,” (Appendix A).

2. Restriction

Title 10 U.S.C. 1034 prohibits anyone from restricting a member of the Armed Forces from making lawful communications to a member of Congress or an Inspector General (IG).

Proving restriction requires establishing by a preponderance of the evidence that the responsible management official (RMO) prevented or attempted to prevent a member of the Armed Forces from making or preparing to make a lawful communication to a member of Congress or an IG. While as a general matter an RMO may not limit a member’s communications to a member of Congress or an IG, in analyzing a case consider authorized limits on official communications such as those provided in DoDI 5400.04, “Provisions of Information to Congress”; DoD 5400.7-R, “DoD FOIA Program”; DoD 5400.11-R, “DoD Privacy Program.” The determination is always case-specific and must take into consideration the totality of the circumstances in that case.

Restriction can be substantiated even if the RMO’s attempt at preventing a lawful communication failed to actually deter the member of the Armed Forces from subsequently making contact with a member of Congress or an IG. When analyzing such a fact-pattern, your focus should be on whether a reasonable person could believe the RMO’s action was an attempt to deter the member from talking to a member of Congress or an IG.

3. Whistleblower Reprisal

The elements of reprisal are protected communication (PC); knowledge of the protected communication on the part of the responsible management official; a personnel action (PA) taken, threatened, or withheld; and a causal connection between the PC and the PA. If the evidence establishes that the PA would have been taken, threatened, or withheld even absent the PC, then the complaint is not substantiated. All four elements of reprisal must be established by a preponderance of the evidence in order for reprisal to be substantiated. Each element is discussed in detail below.

a. Element 1, Protected Communication (PC): Did Complainant make or prepare to make a protected communication, or was Complainant perceived as having made or prepared to make a protected communication?

The statute protects members of the Armed Forces who make or prepare to make a PC. Examples of preparing to make a PC include drafting but not sending a complaint and expressing an intention to make a PC. The statute also protects a member who is perceived as making or preparing to make a PC not actually made.

The complainant may have written a letter, sent an email, or spoken to someone who can receive a PC. Determining whether the complainant’s communication or perceived communication was protected, therefore, relies on two basic questions:

- What was communicated?
- To whom was it communicated?

Table 1.1 lists the content requirements and conditions under which communications are protected.

Table 1.1 - Protected Communications

| Type of Communication: | Conditions on Protection: | When made to: |
|---|--|---|
| Any communication | Must be a lawful communication | <ul style="list-style-type: none"> • A member of Congress or • An IG |
| Any communication in which a Service member communicates information that he or she reasonably believes evidences: <ul style="list-style-type: none"> • A violation of law or regulation, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct in violations of section 920 through 920c of Reference (c) (articles 120 through 120c of the UCMJ), sexual harassment or unlawful discrimination; • Gross mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and specific danger to public health or safety; or • A threat by another Service member or employee of the Federal Government that indicates a determination or intent to kill or cause serious bodily injury to Service members or civilians or damage to military, federal, or civilian property. • Testimony, or otherwise participating in or assisting in an investigation or proceeding related to a communication as described above; or • Filing, or causing to be filed, participating in, or otherwise assisting in a military whistleblower reprisal action. | A communication will not lose its protected status because: <ul style="list-style-type: none"> • The communication was made to a person who participated in the activity that the Service member complained of; • The communication revealed information that had been previously disclosed; • Of the Service member’s motive for making the communication; • The communication was not in writing; • The communication was made while the Service member was off duty; or • The communication was made during the normal course of the Service member’s duties. | <ul style="list-style-type: none"> • A member of Congress; • An IG; • A member of a DoD audit, inspection, investigation, or law enforcement organization; • Any person or organization in the chain of command; • A court-martial proceeding; or • Any other person or organization designated pursuant to regulations or other established administrative procedures to receive such communications |

Members of Congress and IGs. “Any lawful communication to a Member of Congress or an IG” is protected under 10 U.S.C. 1034. Communications to Congress and IGs need not disclose wrongdoing to be protected; the only requirement is that the communication be lawful. Examples include routine constituent correspondence, complaints about chain of command, or testifying before Congress. Unlawful communications include disclosures of classified, Privacy Act-protected, and medical quality assurance information to an unauthorized recipient, or threats.

Officials authorized to receive PCs include:

- a member of Congress;
- an Inspector General;
- a member of a DoD audit, inspection, investigation, or law enforcement organization;
- any person or organization in the complainant’s chain of command;
- a court martial proceeding; or
- any other person designated pursuant to regulations or other established administrative procedures to receive such communications.

Many organizations have been designated to receive communication related to their specific areas of responsibility. For example, safety officials are authorized to receive communications concerning violations of safety laws or regulations, the Sexual Assault Response Coordinator is authorized to receive communications concerning sexual violence, and Equal Opportunity advisors are authorized to receive communications regarding equal opportunity, discrimination, or harassment issues.

Communication made to an authorized recipient listed above is a PC only if the member communicates (or is perceived as communicating) information reasonably believed to constitute evidence of:

- a violation of law or regulation to include a law or regulation prohibiting rape, sexual assault, or other sexual misconduct in violation of articles 120 through 120c of the Uniform Code of Military Justice, sexual harassment, or unlawful discrimination;
- gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; or
- a threat by another member of the Armed Forces or employee of the Federal Government that indicates a determination or intent to kill or cause serious bodily injury to members of the Armed Forces or civilians, or damage to military, Federal, or civilian property.

A belief is reasonable if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the complainant could reasonably conclude that the disclosed information evidences one of the categories of wrongdoing. So long as his or her belief is reasonable, the complainant need not be right about the underlying allegation.

b. Element 2, Personnel Action (PA): Was an unfavorable personnel action taken or threatened against Complainant, or was a favorable personnel action withheld or threatened to be withheld from Complainant?

The statute prohibits persons from taking or threatening to take unfavorable PAs or withholding or threatening to withhold favorable PAs in reprisal for PC. DoDD 7050.06 defines a personnel action as “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.” PAs include promotion, a disciplinary or corrective action; a transfer or reassignment; a performance evaluation; a decision on pay, benefits, awards, or training; referral for a mental health evaluation; or any other significant change in duties or responsibilities inconsistent with the military member’s grade.

Unfavorable Personnel Actions. Unfavorable PAs may be administrative action that takes away a benefit or results in an entry or document added to the affected person’s personnel records that could be considered negative by boards or supervisors. Each Service has regulations governing PAs.

Examples of actions generally considered unfavorable PAs include:

- counseling that is punitive or that supports separation or adverse evaluation
- letter of reprimand, caution, censure
- adverse evaluation report
- relief for cause
- removal from position
- relief of command
- return to service
- separation from service
- removal from promotion, school, or command list
- entry-level separation
- administrative reduction in rank or pay
- bar to reenlistment
- military occupational specialty reclassification
- referral for mental health evaluation

Examples of favorable PAs that can be withheld or threatened to be withheld include:

- evaluation
- promotion recommendation
- award
- training
- assignment
- attendance at school
- transfer

Examples of threatened PAs taken from actual cases where a reasonable person might infer a threat include:

- a subordinate’s career would be “crushed and destroyed” for filing an IG complaint;
- the statement that a complainant would suffer a “new set of headaches” come evaluation time if he or she filed an IG complaint; and
- an RMO telling a complainant that talking to the IG was “not career enhancing.”

The list of PAs above is not exhaustive. The directive’s broad definition of PA requires investigators to consider each alleged PA on a case-by-case basis to determine whether the action had or may have an effect on the complainant’s current position or career.

Investigators should review, on a case-by-case basis, complaints that involve counseling to determine whether they affect, or have the potential to affect, a Service member’s current position or career. The same applies for other locally held letters of reprimand, admonishment, instruction, or censure.

In evaluating these complaints, the facts regarding the nature of the action should be adequately developed before deciding on whether to dismiss the complaint or proceed to investigation.

Favorable Personnel Actions. Withholding a favorable PA can affect a member’s current position or career as adversely as taking unfavorable action.

An RMO’s recommendation for a choice assignment may or may not be a PA. Careers are built on a series of assignments with follow-on assignments building on previous ones. Some programs, schools, and assignments weigh command recommendations, but others do not. Examine what influence the recommendation would have on the decision maker.

Most favorable PAs are included in the member’s Official Military Personnel Folder (OMPF). Evaluations, assignments, school attendance, and awards are generally considered PAs because of their long-lasting impact on a career. Promotion and other career boards review and consider the schools attended and awards received. However, not all schools have an impact.

Additional duties are not generally considered PAs. They do not change the inherent nature of a Service member’s current position and normally will not impact the complainant’s career. The OMPF usually does not record a Service member’s additional duties. Certain additional duties may be desirable; however, it is unlikely even in those circumstances that the additional duty would be considered a PA.

Determining whether an action is a PA may require additional fact finding. If you are uncertain of whether the action had the potential to impact the complainant’s current position or career, consult with a subject matter expert, such as contacting Human Resources Command for an expert opinion concerning an OER or NCOER to discuss what, if any, impact the RMO’s actions could have on the complainant’s current position or career.

c. Element 3, Knowledge: Did the responsible management official(s) have knowledge of Complainant's protected communication(s) or perceive Complainant as making or preparing protected communication(s)?

Independently analyze each RMO involved in the PA(s) to determine his or her knowledge of the PC. The RMO may assert that he or she was unaware of the PC. If the RMO did not know about the PC, then he or she could not have taken or threatened a PA in reprisal for a PC. However, it is very difficult to prove an absence of knowledge. Compare the RMO's testimony with other evidence, including the testimony of complainant and other witnesses, and assign it appropriate weight and credibility.

Sometimes RMOs take action based on rumor or perception. The rumors or perceptions may not be accurate, but they can still motivate reprisal.

d. Element 4, Causation: Would the same personnel action(s) have been taken, withheld, or threatened absent the protected communication(s)? To determine the answer to the "causation" question, we must analyze what bearing, if any, the protected communication had on the decision to take, threaten, or withhold the personnel action. For each personnel action, we analyze the following factors and then weigh them together to determine whether the PA would have been taken absent the PC.

Reason stated by RMO for taking, withholding, or threatening the PA. Examine the evidence supporting the RMO's stated reason for the PA. If the reason was performance related, what documentation exists regarding performance in support of the PA? Is there supporting testimonial evidence? If the RMO stated that he or she took an action based on the complainant's poor duty performance but a preponderance of evidence indicated that the complainant was a good performer, the RMO's stated reason has not been proven.

Timing between the protected communication(s) and personnel action(s). The importance of producing an accurate chronology cannot be overstated. A PA taken shortly after the complainant's PC supports the inference of reprisal. To the contrary, the RMO may have taken the PA months or even years after the complainant's PC. The complainant may have been in a different assignment or command when he or she made the PC. Consider whether the same management officials affected by the underlying investigation or PC were still in a position to take or influence the PA.

The RMO may provide evidence that he or she made the decision prior to the PC. The RMO may also provide evidence that he or she contemplated or discussed taking the action with other individuals prior to the PC. If the RMO consulted with others prior to taking the action, those individuals can provide relevant evidence and should be interviewed to determine whether they corroborate or refute the stated reason for taking the action.

Motive on the part of the RMO(s) to reprise. Did the RMO suffer embarrassment or negative consequences arising from the PC? In addition, have any of the RMOs exhibited or expressed animosity toward the complainant for making the PC, or have they expressed animosity regarding the very idea of, for example, filing an IG complaint or contacting a member

of Congress? For instance, you may find evidence that the RMO displayed anger in response to learning of the complainant's PC because he or she believed it had a negative impact on their career, or it was embarrassing to the command. Even when an RMO offers an "independent basis" for a PA (that is, asserts that the PC was not a factor and something else was the only factor), the investigation is not complete until the investigator tests the assertion against the evidence and considers the totality of the circumstances surrounding the PA.

Disparate treatment of Complainant as compared to other similarly situated individuals who did not make PCs.

If similarly situated personnel who did not make a PC exist, consider whether the RMO's actions were consistent with actions he or she has taken against those personnel. A similarly situated person would be one who engaged in the same conduct or whose performance was at a similar level to the complainant's. If the RMO treated the complainant the same as other similarly situated military members who had not made PCs, then the evidence supports that the RMO did not reprise. If the RMO disciplined the complainant more severely than others who had not made a PC, then the evidence supports reprisal. If the complainant's performance was the stated reason for the PA, how did the RMO treat other poor performers? Were they given more chances to improve before receiving a comparable PA or was poor performance generally overlooked?

4. Standard of Proof

The standard of proof in 10 U.S.C. 1034 cases is a preponderance of the evidence, meaning that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

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CHAPTER 2 COMPLAINT INTAKE

1. Expeditious Determination of Whether Sufficient Evidence Exists to Warrant Investigation

Title 10, United States Code, Section 1034, and DoD Directive 7050.06 require that Inspectors General who receive a military reprisal allegation must “expeditiously determine ... whether there is sufficient evidence to warrant an investigation of the allegation.” Investigators should use the intake form at Appendix B when conducting intakes.

2. Prima Facie Determination

The DoD OIG has implemented a streamlined complaint intake process for investigators to determine whether complaints alleging reprisal provide sufficient evidence to warrant an investigation. For purposes of deciding whether to investigate, view the complainant’s assertions in the light most favorable to the complainant and analyze the following factors:

a. Timeliness? Did the complainant file the complaint within one year of the date on which the complainant became aware of the personnel action?

b. Protected Communication? Has the complainant alleged that he or she made or was preparing to make a protected communication, or was he or she perceived as having made a protected communication?

c. Personnel Action? Has the complainant alleged that an unfavorable personnel action was taken or threatened against him or her, or was a favorable personnel action withheld or threatened to be withheld from him or her?

d. Knowledge? Does the complaint, as supplemented by an interview of the complainant, support an inference that the RMO had knowledge of the PC or perceive the complainant as making or preparing to make a PC?

e. Causation? Does the complaint, as supplemented by an interview of the complainant, support an inference of reprisal? That is, do the facts as set forth in the complaint and clarified in an interview of the complainant suggest a causal connection between the PC and the PA? This threshold can be met where the facts suggest the existence of one or more of the following:

- The PA followed closely behind the PC
- The PC was about something that would give the RMO motive to reprise or the RMO has expressed animosity toward the PC
- The complainant received worse treatment than others who had not made PCs

The matrix in Figure 2.1 is a reference tool to help determine whether a communication is protected or a personnel action is covered under 10 U.S.C. 1034.

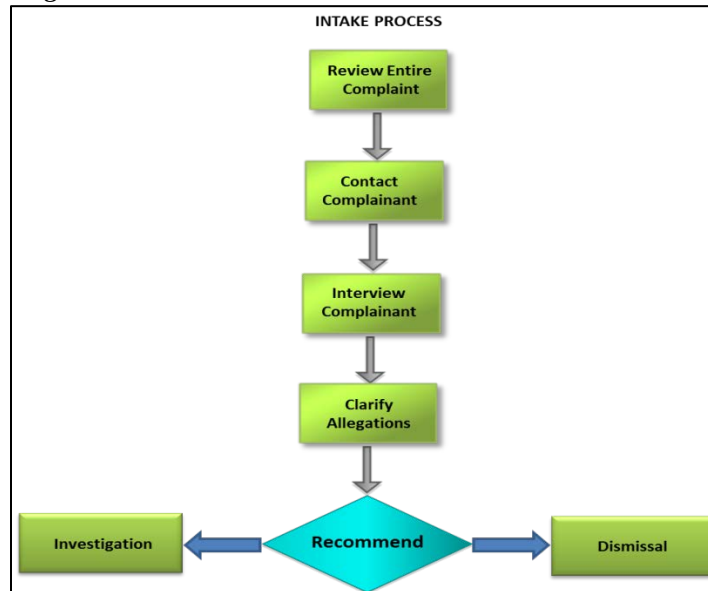
Figure 2.1 - Determining covered PC or PA

| 10 U.S.C. 1034 "PROTECTED COMMUNICATION; PROHIBITION OF RETALIATORY PERSONNEL ACTIONS" DoD Directive 7050.06, "Military Whistleblower Protection" | (a) PROHIBITION OF RESTRICTION | | |
|---|--|---|---|
| | No person may restrict a member of the armed forces in lawfully communicating with a Member of Congress or an IG. | | |
| | (b) PROHIBITION OF RETALIATORY PERSONNEL ACTIONS | | |
| | PROTECTED COMMUNICATION | TO | PERSONNEL ACTIONS |
| | <p>(b)(1) Making or preparing or being perceived as making or preparing:</p> <p>(A) Any lawful communication to a Member of Congress or an Inspector General (IG)</p> <p>(B) Information reasonably believed to evidence:</p> <ul style="list-style-type: none"> A violation of law or regulation, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct in violation of articles 120 through 120c of the UCMJ, sexual harassment or unlawful discrimination. Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. A threat that indicates a member's or federal employee's determination or intent to kill or cause serious bodily injury to members or civilians or damage to military, federal or civilian property <p>(C)</p> <ul style="list-style-type: none"> Testifying or participating in or assisting in an investigation or proceeding related to a PC Filing, causing to be filed, participating in, or otherwise assisting in an action under this section | <p>(b)(1)</p> <p>(A) Member of Congress or Inspector General</p> <p>(B)</p> <ul style="list-style-type: none"> Member of Congress Inspector General Member of a Department of Defense audit, inspection, investigation, or law enforcement organization Any person or organization in the chain of command A court-martial proceeding Any other person or organization designated pursuant to regulations or other established administrative procedures for such communications. | <ul style="list-style-type: none"> Taking an unfavorable personnel action Threatening to take an unfavorable personnel action Withholding a favorable personnel action Threatening to withhold a favorable personnel action Making or threatening to make a significant change in the duties or responsibilities of a member of the armed forces not commensurate with the member's grade <p>DoDD 7050.06: Any action that affects, or has the potential to affect, the military member's current position or career, including:</p> <ul style="list-style-type: none"> promotion disciplinary/corrective action transfer or reassignment performance evaluation decisions concerning pay, benefits, awards, or training relief or removal separation or discharge referral for mental health eval any other significant change in duties/responsibilities inconsistent with the member's grade |

3. Intake Process.

The intake process includes five steps: (1) review the entire complaint, (2) initial contact with the complainant, (3) an intake interview of the complainant, (4) clarification of the allegation with the complainant, and (5) a recommendation to dismiss¹ the case without full investigation or proceed to investigation.

Figure 2.2 - Intake Process



a. Review the Entire Complaint and its Timeline

Begin by reading the entire reprisal complaint and determine whether it is timely. No investigation is required when a member or former member of the Armed Forces submits a complaint of reprisal more than 1 year after the date that the member became aware of the personnel action that is the subject of the allegation. The year begins when the RMO's decision to take the PA has been made and communicated to the complainant; the complainant has 1 year from that time to file his or her complaint. A complaint of reprisal submitted more than 1 year after the decision was made and communicated to the complainant may, nevertheless, be considered based on compelling reasons for the delay in submission or the strength of the evidence submitted. Before making a recommendation to dismiss or investigate the case, carefully examine the reason or reasons why the complainant did not file his or her allegation timely:

- Was there something extraordinary that prevented the complainant from filing the complaint earlier? A deployment in and of itself is not an extraordinary circumstance. A deployment where the complainant had no access to phone, internet, or other

¹ We use "dismiss" to mean closing a case following intake, for failure to make a prima facie allegation, or for other threshold reasons such as timeliness.

communication devices may be extraordinary. Illness would not be extraordinary, but a serious debilitating illness or injury might be.

- Did the complainant timely file the precise claim at issue but mistakenly do so in a forum that lacks the ability to grant the requested relief? For example, did the complainant attempt to file a complaint under 10 U.S.C. 1034 with the Office of Special Counsel, which lacks authority to investigate military reprisal allegations?
- Did the complainant raise issues of particular interest to DoD OIG, including where the protected communication pertained to gross fraud, warfighter safety, detainee abuse, or sexual assault?

However, there will be times when the facts needed to evaluate timeliness are in dispute, and you will have to begin investigating in order to determine whether the complaint is timely.

Even if circumstances support extending the filing deadline, the extension is not indefinite. Once the complainant has recovered from a serious debilitating illness or injury, returned from an inaccessible deployment, or been informed of the correct forum, the complainant must promptly file the complaint or risk untimely filing.

b. Contact the Complainant. After familiarizing yourself with the entire complaint, contact the complainant promptly to conduct or schedule the intake interview.

If you are unable to interview the complainant upon contact, schedule an interview as soon as is practicable. Your first contact should accomplish at least the following:

- Inform the complainant that you have received his/her complaint and need to interview him or her to determine whether sufficient evidence exists to warrant an investigation.
- Ask the complainant to mail, email, or bring to the interview copies of any written protected communications and documents related to personnel actions.
- Briefly explain the investigative process and, if necessary, briefly explain whistleblower reprisal.
- Ensure that the complainant understands that if you proceed to full investigation, you will be asking for the names and contact information for witnesses who can testify as to what happened and that he or she may provide additional relevant evidence at any time.

c. Interview the Complainant and Clarify the Allegations. The purpose of the intake interview with the complainant is to ensure that the investigator has obtained a thorough understanding of what the complainant has alleged and clarified any questions that need to be resolved before making a prima facie determination. During an intake interview, investigators

should ordinarily discuss with the complainant every PC alleged to be a factor in the alleged PA(s), in chronological order. Additionally, the investigator should obtain as much detail as possible regarding PAs, including the names of individuals involved and the names of the organizations involved. Dates are particularly important to determine the timeliness of the allegations as well as to evaluate whether an inference of reprisal is apparent. Ask the complainant to send you any available documentation pertaining to the protected communication(s) and the personnel action(s).

The investigator should focus the interview on the PCs, PAs, and any information that suggests the possible existence of a causal connection between the PCs and the PAs. To explore the causal connection, ask questions pertaining to why the complainant believes the actions were taken in reprisal.

Ordinarily, questioning will proceed chronologically through the fact pattern. Organizing the topics of questioning around the elements of reprisal may assist in focusing the interview. Below are some sample questions that will need to be asked in almost every intake:

PCs

- To whom did you make your protected communications?
- What did you communicate to them?
- When did you make each protected communication?

PAs

- What personnel action was taken, withheld, threatened?
- Who was the RMO that took the action or made the threat?
- Were there other individuals involved in recommending, approving, or influencing the personnel action?
- What was each official's role in each action?
- Do you believe that the official(s) knew about the PC? Why?

Causation

- Why do you believe the action taken, withheld, or threatened was in reprisal?
- What motive would the RMO have to reprise against you?
- What were the reasons provided to you by the RMO for the action they took, threatened, or withheld?
- Did you do what they said you did?

Before ending the intake interview, summarize and recap what you believe the complainant has said. As soon as possible following the intake interview, investigators must memorialize the interview in writing.

d. Underlying allegation. Title 10 U.S.C. 1034 and DoD Directive 7050.06 require that the Inspector General receiving the allegation of reprisal conduct a separate investigation of the alleged wrongdoing that was the substance of the protected communication.

It is important during the intake process for investigators to obtain information from the complainant to ensure that the complainant's original alleged wrongdoing has been investigated or addressed in the proper channels. These matters should be referred to the appropriate authority for review.

4. Allegations of Restriction. Allegations of restriction are not subject to the 1 year filing deadline. They are also unique in that they are not analyzed according to the elements of reprisal. Rather, the single question at issue is whether a preponderance of the evidence established that the RMO restricted or attempted to restrict a military member from making a lawful communication to a member of Congress or an IG. Accordingly, interview questions should focus on what was done or said to restrict the member.

5. Recommend Dismissal or Proceed to Investigation. If the investigator determines that either no PC or PA occurred, the investigator should stop and draft a proposed dismissal of the complaint. The proposed dismissal must be provided to the DoD OIG for approval.

In order to be timely and efficient, the investigator should limit the intake process to a prima facie determination and not conduct a lengthy preliminary inquiry to determine if the allegations are substantiated or not. Properly executing the intake process is critical to supporting a dismissal or laying the foundation for a successful investigation.

CHAPTER 3 INVESTIGATIONS

1. Introduction

The Council of the Inspectors General on Integrity and Efficiency (CIGIE) “Quality Standards for Investigations,” dated November 2011, establishes the professional standards and principles for investigators of the Federal Offices of Inspectors General. CIGIE standards require that investigators conduct investigations in a timely, efficient, thorough, and objective manner.

a. Independence. Under the CIGIE general standards for “independence,” the investigative organization must be free, both in fact and appearance, from impairments to independence. Accordingly, under 10 U.S.C. 1034, the Inspector General conducting the investigation must be 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.

b. Due Professional Care. The CIGIE Standards require that “due professional care” be used in conducting investigations. Due professional care requires:

Thoroughness. All investigations must be conducted in a diligent and complete manner, and reasonable steps should be taken to ensure pertinent issues are sufficiently resolved.

Objectivity. Evidence must be gathered and reported in an unbiased and independent manner in an effort to determine the validity of an allegation or to resolve an issue.

Timeliness. All investigations must be conducted and reported with due diligence and in a timely manner. This is especially critical given the impact investigations have on the lives of individuals and activities of organizations.

Documentation. The investigative report’s findings must be supported by adequate documentation.

Legal. Investigations should be conducted in accordance with all applicable laws, rules and regulations, and with due respect for the rights and privacy of those involved.

This chapter guides the investigator in conducting a reprisal investigation in a manner consistent with the CIGIE professional standards.

2. Planning the Investigation

Investigators should develop an investigative plan at the initiation of the investigation (see Appendix C for the investigative plan template). The first CIGIE Qualitative Standard is planning, which provides that “case-specific priorities must be established and objectives developed to ensure that individual case tasks are performed efficiently and effectively.”

In reprisal investigations, the investigative plan should be focused on the elements of reprisal.

a. Element 1, Protected Communication (PC): Did Complainant make or prepare to make a protected communication, or was Complainant perceived as having made or prepared to make a protected communication?

Identify each PC with specific information including the date the PC was made, the individual or organization that received the PC, and the specifics of the PC.

b. Element 2, Personnel Action (PA): Was an unfavorable personnel action taken or threatened against Complainant, or was a favorable personnel action withheld or threatened to be withheld from Complainant?

Identify each PA alleged to be reprisal by the complainant including the date of the PA and the Responsible Management Official (RMO) who took, threatened, or withheld the PA.

c. Element 3, Knowledge: Did the responsible management official(s) have knowledge of Complainant's protected communication(s) or perceive Complainant as making or preparing protected communication(s)?

Identify all RMOs including their rank, title, and organization. Identify whether those who were involved in the PA(s) were likely to have known about the PCs or have perceived Complainant to have made the PCs.

d. Element 4, Causation: Would the same personnel action(s) have been taken, withheld, or threatened absent the protected communication(s)?

Plan the investigation to determine the following information in order to reach a conclusion whether reprisal occurred:

Reason stated by each RMO for taking, withholding, or threatening action.

Timing between the PC(s) and PA(s) – Was the PA taken after the PC?

Motive on the part of the RMO(s) for deciding, taking, or withholding the PA. What bearing, if any, did the PC have on the decision to take or withhold the PA? Did the Complainant's PC allege any wrongdoing by any of the RMOs or otherwise implicate or criticize their performance, integrity, competence, or leadership? In addition, have any of the RMOs exhibited or expressed animosity toward the complainant for making the PC, or have they expressed animosity regarding the very idea of, for example, filing an IG complaint or contacting a member of Congress?

Disparate treatment of Complainant as compared to other similarly situated individuals who did not make PCs: how did the RMO(s) respond in the past to similarly situated personnel who did not make PCs? Are their actions in the case of the Complainant consistent with past actions, or did they handle the matter differently? If the RMO(s)

deviated from the way they normally acted in the past, you must explain the difference and determine whether the reasons are credible under the circumstances.

The investigator should assess what evidence is needed in order to resolve each element of reprisal.

- witnesses to be interviewed;
- documentary and other relevant evidence to be collected;
- investigation milestones; and
- steps necessary to execute a timely, efficient, thorough, and objective investigation

e. Develop a List of Documents. During the planning phase of your investigation identify documentary evidence that you believe will help resolve the allegation(s). Organize the documents needed by each PC and PA.

Examples of documents in reprisal investigations include copies of the PC to an IG, member of Congress, or Equal Opportunity office; copies of the PA, which may be found in official personnel files, as well as performance evaluations, counselings, awards; copies of disciplinary actions including letters of reprimand; and copies of separation, re-enlistment, and reduction actions. Emails, memorandums, other correspondence, and staffing packages are also often useful as evidence.

f. Develop a Witness List. The Investigative Plan should include a list of witnesses to be interviewed. It may be helpful to use an investigative planning tool like the Evidence Matrix at figure 3.1 below to accomplish this task. A list of witnesses can be developed based on the intake interview with the complainant, a review of documents obtained at the intake stage, and by performing research about the people and organizations involved in the investigation. Whenever possible, review documents that show the organizational structure and the chain of command.

The investigative plan should also address: Whom are you going to interview? In what sequence are you going to conduct the interviews? How many witnesses will need to be interviewed to ascertain the facts in the case? In order to conduct an objective investigation, investigators should interview the complainant, the RMOs, and relevant witnesses.

g. Develop a Chronology. Investigators will develop a chronology during the planning process. The chronology should contain details on who, what, when, where, how, and why things happened the way they did. The chronology will be updated and maintained throughout the investigation and will be critical in performing the timing analysis required to reach conclusions on whether reprisal occurred.

h. Planning Tools. There are planning tools that can help you organize your investigation. Lists of the documents to be obtained and witnesses to be interviewed are a good place to start. The evidence matrix below in Figure 3.1 is another tool that can help plan and organize the evidence. List the elements of reprisal along the horizontal axis. The vertical axis contains a list of witnesses, documents, and RMOs. Initially, where you expect a witness, document, or RMO

to provide evidence will be marked with an “X.” After you gather evidence, then the investigator can replace the “X” with the relevant credible evidence gathered. Additionally, you can place a “-” if you believe they may be knowledgeable about the allegation. A marking, “~” means do not discuss this part of the allegation with this witness.

Figure 3.1 - Evidence Matrix

| Evidence Matrix | | | | |
|------------------------------|----|----|-----------|-----------|
| Witness or Document | PC | PA | Knowledge | Causation |
| CDR Teller (Complainant) | X | X | - | |
| Col Abel (Chief of Staff) | X | ~ | - | |
| RADM Thomas (Commander) | X | ~ | - | |
| Mr. Dawn (Co-worker) | ~ | ~ | - | |
| Performance Evaluation | ~ | ~ | - | |
| Col Kenny (Subject) | X | X | X | X |
| Ms. Fawn (Subject) | X | X | X | X |

X = Primary Witness - = Discuss if knowledgeable ~ = Do not discuss

3. The Investigation Process. The following steps of the investigative process are mandatory for all investigations.

a. Interview the Complainant. The complainant must always be interviewed. Frequently, follow-up interviews may be needed to go over new evidence or information developed during the investigation, and to clarify conflicts in testimony or ambiguities.

b. Obtain Relevant Documentation. Make sure to obtain relevant documentation whenever such documentation exists and is available to you.

c. Interview Knowledgeable Witnesses. Witnesses with knowledge of the events under investigation should be interviewed. It is important to interview relevant witnesses identified by the complainant and those identified by the RMO in order to be objective.

d. Interview the RMO. It is important to interview the RMO. This affords the RMO the opportunity to respond to the allegations made against them, to identify witnesses and evidence that may be material to the elements of reprisal. However, if initial fieldwork reveals that there was, in fact, no PC, interviewing the RMO will not be necessary.

e. Obtain a Legal Review. All final reports of investigation must undergo a legal review by an attorney with the servicing Staff Judge Advocate or General Counsel.

4. Interrogatories. Preparation is the key to timely, efficient, thorough, and objective interviews. Prepare an interrogatory before every interview. A well thought-out interrogatory is critical to a successful interview because it can help keep you properly focus on the issues under investigation. Referring to your well-developed interrogatory can also help you get back on track with your interview when unexpected issues or allegations arise. Always prepare your interrogatory before the interview, give thought to the order of your questions, and prepare open-ended questions whenever possible.

Building an interrogatory begins with the elements of reprisal and your assessment of the evidence you believe the witness possesses. The interrogatory provides a road map for the interview and helps ensure that the interview is thorough, accurate, and complete. If you plan to have the witness comment on documentary evidence, ensure that you have the documents ready and organized for introduction during the course of the interview. Build topics of questioning around the elements of reprisal, anticipate possible answers the witness might provide, and be prepared to ask appropriate follow-up questions. Interviewers who adequately prepare are rarely surprised and usually get better information from interviews.

In general, the questions below will form the foundation of your interrogatories, adapted to the type of witness being interviewed.

Element 1, Protected Communication (PC): Did Complainant make or prepare to make a protected communication, or was Complainant perceived as having made or prepared to make a protected communication?

- What was the PC? Describe the details of the communication. Provide a copy.
- Who was the PC made to?
- When was the PC made? Give the specific dates.
- If complainant prepared a PC or expressed intent to make a PC, ask:
 - Who knew about your preparation of the PC, or who knew you intended to make the PC?
 - How did they know?
 - Were there other witnesses?

Element 2, Personnel Action (PA): Was an unfavorable personnel action taken or threatened against Complainant, or was a favorable personnel action withheld or threatened to be withheld from Complainant?

- What personnel action(s) were taken or were withheld or were threatened?
- Who was the RMO who took, withheld, or threatened the action?

- Did other officials or members of the chain of command recommend or approve the action?
- On what date(s) did the action occur?
- Why would the action taken affect Complainant's position or career?
- Provide copies of all documents and related correspondence and emails.

Element 3, Knowledge: Did the responsible management official(s) have knowledge of Complainant's protected communication(s) or perceive Complainant as making or preparing protected communication(s)?

- Ask complainant:
 - Why do you believe that RMO knew about the PC?
 - Who did you tell about making or preparing a PC?
 - Who can testify that RMO knew about the PC?
 - Do you have any documents that show RMO knew about the PC?
- Ask witnesses:
 - Did you know that Complainant made a PC?
 - How did you find out?
 - When did you find out?
 - Did you tell anyone else?
 - Who else may know that the Complainant made a PC?
 - Do you have information that shows that the RMO knew that the Complainant made a PC?
 - Do you have any documents that show the Complainant made a PC?

- Ask the RMO:
 - Were you aware that the Complainant made or prepared a PC?
 - When did you become aware?
 - How did you become aware?
 - Did you suspect that the Complainant made a PC?
 - Did you hear rumors that the Complainant made a PC?

Element 4, Causation: Would the same personnel action(s) have been taken, withheld, or threatened absent the protected communication(s)?

- Ask the complainant:
 - What reasons did the RMO give you for taking or withholding the PA?
 - Did you do those things?
 - Why do you believe the PA was taken in reprisal and not for the reasons given?
 - Did anyone tell you they believed the PA was reprisal?
 - Who else can corroborate the information that you have provided?
 - Do you believe that you were treated differently than others were treated in similar situations?
 - What examples can you give?
 - Do you have any documents that relate to the PA?
- Ask witnesses:
 - Have you ever talked to the RMO about the PA being taken against the Complainant? When?
 - If so, what did the RMO say regarding the reasons for taking the PA?
 - Did the RMO mention the Complainant's PC? When? To whom?
 - Did you ever discuss the Complainant's PC with the RMO? When?

- What did the RMO say about the PC?
- Did the RMO say anything that indicated that there was any bias or animosity toward the Complainant for making the PC? Describe.
- Do you believe that the RMO took the PA in reprisal for the Complainant making the PC? Why.
- Do you believe the Complainant making the PC was a factor in the RMO taking the PA? Why?
- Do you have any documents that relate to the PA? Provide.
- Ask individuals who recommended or influenced the PA:
 - What action did you recommend?
 - Why did you recommend the action?
 - Was the action you recommended the same as you have recommended in similar situations?
 - If no, why was it different?
 - Do you have any documents that relate to the PA? Provide.
- Ask the RMO:
 - Explain the circumstances that led you to take the PA involving the Complainant.
 - Why did you take the PA?
 - Who did you consult with in taking the PA?
 - Did anyone recommend or influence the PA?
 - If so, who, and what were the reasons they provided for recommending the PA?
 - Have you taken the same action against others who did the same thing as the complainant?
 - What was your reaction when you learned that the Complainant made the PC?

- Did the Complainant's PC influence your decision to take the PA?

5. Conducting Interviews. Ask open-ended questions. Avoid putting words in witnesses' mouths by asking questions like, "You really didn't reprimand against CDR Smith, did you?" While leading a witness is inappropriate, summarizing a witness' testimony as you understand it is acceptable. An interviewer might ask, "Was it your testimony that MAJ Smith's change of assignment was initiated by HRC?" This question clarifies previous testimony and is not a solicitation of new information.

a. Beginning the Interview. Investigators should use a standard read-in to begin an interview. Use a read-in provided by Service regulation or see sample read-in at Appendix D.

b. Closing the Interview. Investigators should use a standard read-out to conclude the interview. Either use a read-out provided under Service regulations, or see sample read-out at Appendix D.

6. Quality Assurance Review of Investigation. Upon completion of the fieldwork, investigators should perform a quality assurance review of their investigation using the checklist at Appendix E. The checklist is modeled after the oversight review worksheet used by the DoD OIG to review investigations. This affords the investigator an opportunity to perform a self-assessment of their investigation prior to submitting to the DoD OIG for approval. The investigator should also go through the checklist after writing the report of investigation to double-check their work and to ensure that the quality standards for reports and supporting documentation are met.

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CHAPTER 4 REPORTING REQUIREMENTS

1. Report of Investigation (ROI) - Format

The WRI ROI format includes an executive summary followed by sections on background, scope, statutory authority, findings of fact, analysis, discussion, conclusions, and recommendations, in that order (see Appendices F and G for WRI's 10 U.S.C. 1034 templates for reprisal and restriction, respectively).

a. Executive Summary. The Executive Summary should be a one-page section of the report designed to give the reader the most important information contained in the report in the most concise manner. The main elements of the Executive Summary are:

- **Introductory Paragraph.** The introductory paragraph should state that the investigation was conducted in response to allegations that the complainant suffered reprisal for making a protected communication. Start with: "We initiated this investigation in response to an allegation that [RMO name]¹ took withheld or threatened to take or withhold action [replace "took withheld or threatened to take or withhold action" with the specific personnel action, such as, "did not recommend assignment extension," "denied an end-of-tour award"] to [complainant name] in reprisal for making a protected communication."
- **Findings Paragraph.** This paragraph should concisely summarize the factual findings related to the elements of reprisal.
- **Substantiation.** This paragraph should state whether or not the allegation was substantiated. It should include a clear description of the allegation that the RMO(s) did or did not take, withhold, or threaten to take the PA in question in reprisal for Complainant's protected communication(s), in violation of Title 10, United States Code, Section 1034 (10 U.S.C. 1034), "Protected communications; prohibition of retaliatory personnel actions," which is implemented by DoD Directive 7050.06, "Military Whistleblower Protection."

If there are multiple RMOs having different findings, summarize them separately as in the paragraph above; however, if they collectively took the actions, summarize them together.

¹ Brackets are used throughout the examples to indicate the writer should insert information. Do not use the brackets in the ROI unless needed within a quote.

- **Recommendation Paragraph.** In not substantiated cases, state, “We make no recommendations in this matter.” In substantiated cases, state, “We recommend that the Secretary of the Military Department concerned:
 - Take appropriate corrective action regarding the [RMO name]; and
 - Specify here the relief to make the complainant whole; that is, to return the whistleblower, as nearly as practicable and reasonable, to the position the whistleblower would have held had the reprisal not occurred.

b. Background. This section should provide the reader information about the organizations, command relationships, and Complainant and management officials involved in the matter under investigation. Give a brief overview of events that led to the protected communication and personnel action. It may also be used to provide a very brief chronology or synopsis of key events leading up to the matters under investigation but generally not the matters directly under investigation. Do not include detailed narratives of the facts of the case that are presented in the Findings of Fact section of the report.

c. Scope. This section should describe the scope of the investigation in summary terms, leading with a statement of the timeframe addressed by the investigation, followed by key witnesses interviewed and crucial documents reviewed. Do not list every witness and every type of document. Include subject matter experts if their testimony was crucial to the outcome of the investigation.

d. Statutory Authority. The following statutory language should be cited:

“The [name the investigating organization] conducted this whistleblower reprisal investigation pursuant to Title 10, United States Code, Section 1034 (10 U.S.C. 1034), “Protected communications; prohibition of retaliatory personnel actions,” which is implemented by DoD Directive 7050.06, “Military Whistleblower Protection.”

e. Findings of Fact. This section is a chronological telling of only the facts relevant to the case. State who, what, when, and where—without the use of terms such as protected communications, personnel actions, RMO knowledge, stated reason, RMO motive, animus, or disparate treatment. These terms are for analyzing what happened in relation to the elements of reprisal and should be reserved for the analysis section. Do not, for example, find that a visit to the IG is a protected communication or an unfavorable OER is a personnel action, or that an email to an RMO gave them knowledge of a protected communication etc.

Tell what happened, not the testimony about what happened. For facts not in dispute, state, for example, “Complainant told RMO during a meeting on September 11 that she had been sexually harassed by his XO,” instead of “Complainant testified.... RMO testified..., etc.”

Refer specifically to testimony or other evidence only where there are factual disputes in the testimony and resolve those discrepancies in this section. When this requires a credibility assessment, it should be done in this section as well.

f. Analysis. The analysis section begins with a standard paragraph describing the way reprisal is proven. This is to facilitate the understanding of the reader of the report. The paragraph states:

The elements of reprisal are protected communication, knowledge of the protected communication on the part of the responsible management official; a personnel action taken, threatened, or withheld; and a causal connection between the protected communication and the personnel action. The causal connection is resolved by answering the question in paragraph D, below. If the evidence does not establish that the personnel action would have been taken, threatened, or withheld even absent the protected communication, then the complaint is substantiated. Conversely, if the evidence establishes that it would have been taken, threatened, or withheld absent the protected communication, then the complaint is not substantiated. Below, we analyze each of the elements.

This paragraph is followed by a subsection for each of the 4 elements to be analyzed—the headings are in the form of questions. The four-part analysis is a conjunctive standard; therefore, if one of the elements cannot be met (for example, if investigation reveals there was in fact no PC made or no RMO knowledge of the PC), it will ordinarily be unnecessary to address the subsequent elements. In those circumstances, following the last question analyzed, simply write, for example, “Because the RMO lacked knowledge of the PCs, reprisal could not have occurred.”

The four questions to be addressed are as follows:

A. Did Complainant make or prepare to make a protected communication, or was Complainant perceived as having made or prepared to make a protected communication?

Summarize the findings in the first sentence: “We determined that the Complainant made X protected communications and Y communications were not protected....”

Use a short paragraph for each alleged protected communication that synthesizes information already in the Findings of Fact section. Do not introduce new facts. This is merely listing each alleged protected communication and showing your determination that it either is or is not in fact a protected communication and why. These should not begin with “We found,” or “So-and-so stated.” They should end with a statement saying that an alleged protected communication is or is not protected under 10 U.S.C. 1034 and why.

When the investigation covers more than one protected communication, the first paragraph should summarize the different protected communications (not the facts for each protected communication) and serve as a topic paragraph for the section. Then use

descriptive sub-headings to introduce a paragraph or more for each protected communication.

Conclude the entire section by stating, “As described above, a preponderance of the evidence established that Complainant”

B. Was an unfavorable personnel action taken or threatened against Complainant, or was a favorable personnel action withheld or threatened to be withheld from Complainant?

Summarize the findings in the first sentence: “We determined that Complainant was/was not the subject of [a personnel action].”

When the investigation covers only one personnel action, this paragraph should synthesize the facts related to the personnel action and determine whether or not it is a personnel action under the statute.

When the investigation covers more than one personnel action, the very first paragraph should summarize the different personnel actions (not the facts for each personnel action) and serve as a topic paragraph for the section. Then use descriptive sub-headings to introduce a paragraph for each personnel action.

Conclude the entire section by stating, “As described above, a preponderance of the evidence established that....”

C. Did the responsible management official(s) have knowledge of Complainant’s protected communication(s) or perceive Complainant as making or preparing protected communication(s)?

Summarize the findings in the first sentence: “We determined that [RMO name] knew and [second RMO’s name] perceived that Complainant had communicated with ..., and [third RMO’s name] had no knowledge of any protected communications.” Analyze in a separate paragraph or more the findings regarding each RMO.

The follow-on sentences/paragraphs should present the findings of fact—when each RMO first perceived or became aware of the protected communications(s). If knowledge by any RMO is undisputed, simply state the fact and cite the evidence establishing that fact (i.e., witness testimony, documentary evidence). If knowledge by any RMO is disputed, describe the evidence for and against knowledge and explain which is more compelling than the other—for example, the RMO may have stated that she had no knowledge, but a contemporaneous email discussing the protected communication establishes knowledge. Alternatively, you may need to make a credibility assessment of witnesses when you have competing testimony or weigh the authenticity of documentary evidence.

When the investigation covers more than one RMO or more than one PC, it may be appropriate to use descriptive sub-headings to organize this section to clearly present the relevant facts; you may choose to organize by RMO or by PC or some other approach, depending on the specifics of the case. In rare instances where the RMO was not interviewed, explain why.

Conclude the entire section by stating, “As described above, a preponderance of the evidence established that [RMO’s name] knew and [second RMO’s name] perceived that Complainant had communicated with [Third RMO’s name] had no knowledge of the protected communications.”

D. Would the same personnel action(s) have been taken, withheld, or threatened absent the protected communication(s)? [Include D only if questions A-C are all answered in the affirmative.]

Summarize the findings in the first sentence: “We determined that [RMO’s name] would/would not have taken the personnel actions against Complainant absent his/her protected communications.”

To determine the answer to this “causation” question, we must analyze what bearing, if any, the protected communication had on the decision to take, threaten, or withhold the personnel action. For each personnel action, we analyze the following factors:

- the strength of the evidence in support of the stated reason for the personnel action;
- the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and
- any evidence that the similar actions have been taken against employees who are not whistleblowers, but who are otherwise similarly situated.

Do not retell the story already detailed in the findings of fact. Instead, refer to the events by the descriptive name given as the heading for each event, such as “September 1, 2013, Complaint to DoD Hotline” or “January 2013 email from DoD Hotline to [RMO’s Name].”

For each personnel action, analyze the following factors and then weigh them together to determine whether the PA would have been taken absent the PC.

- **Each RMO's stated reason(s) for the personnel action(s)**

Remember, the fact that an action was within management's prerogative does not establish that the action would have been taken absent the PCs. Even if you find that the RMO(s) offered reasonable justification for the personnel action the investigation is not complete. The RMO(s) may offer that the action was taken based on the complainant's performance or conduct. The investigator must explore the possibility that others who did not make a PC but who have engaged in the same misconduct as the complainant were treated less harshly or not disciplined at all.

- **Timing between the protected communication(s) and personnel action(s)**

Dates of key events are usually of critical importance in the analysis of reprisal. This section should identify and analyze how much time elapsed between the PC(s) and PA(s). The closer the temporal proximity between the PC(s) and PA(s), the stronger the inference becomes of a possible causal connection between the events. Note that while an inference of causation is stronger when a PA is taken only a few days after a PC, a timing connection may still be present for lengthier gaps in time. For example, it is possible that the member's next performance evaluation was not due for nearly a year following the PC.

- **Motive on the part of the RMO(s) to reprise**

In this section, analyze the RMO's motive to reprise, including any animosity expressed by the RMO(s) regarding the protected communications. Did the complainant's protected communication allege any wrongdoing by any of the RMOs or otherwise implicate or criticize their performance, integrity, competence, or leadership? Have any of the RMOs exhibited or expressed animosity toward the very idea of, for example, filing an IG complaint or contacting a member of Congress?

- **Disparate treatment of Complainant as compared to other similarly situated individuals who did not make PCs**

How did the RMO(s) respond in the past to similarly situated personnel who did not make PCs? Are their actions in the case of the complainant consistent with past actions? If there is no evidence supporting a reason for handling the situation differently than in the past, it raises the inference of reprisal. If there is no evidence of similarly situated individuals, say so here.

Conclude the entire section by stating that, as described above, a preponderance of the evidence established [RMO's name] would or would not have taken, withheld, or threatened the specific personnel action in question absent the protected communication.

g. Discussion. Synthesize the analysis above in one or two paragraphs, explaining how we arrived at our conclusions. For example: “Based on a preponderance of the evidence, we conclude that [RMO name] issued an adverse OPR in reprisal for Complainant’s protected communication to the IG. The evidence shows that Complainant’s protected communication resulted in an investigation that substantiated misconduct by the RMO, who knew Complainant made the protected communication. [RMO name] told his XO and others that he was upset that Complainant went outside of the chain of command. Finally, the evidence shows that Complainant had received glowing OPR’s prior to his protected communication, etc.”

h. Conclusions. This section should provide a conclusion for each alleged PA addressed under the findings and analysis section of the report. The conclusion statement for each allegation should briefly identify the misconduct and the statute violated. For example:

We conclude that General Morrow demoted Complainant in reprisal for contacting her congressional representative in violation of Title 10, United States Code, Section 1034.

i. Recommendations. If the complaint was substantiated, this section will recommend specific remedial actions to return the whistleblower, as nearly as practicable and reasonable, to the position the whistleblower would have held had the reprisal not occurred. Additionally, this section should include the general recommendation that appropriate action be taken against the RMO. For example:

We recommend that the Secretary of (the Service) direct [Service/Agency] officials to:

- A. Remove Complainant’s FITREP for (date) from his permanent record, and
- B. Take appropriate corrective action against the RMO.

In cases where no corrective action is required, state that we make no recommendations.

2. Restriction Cases

Investigations into allegations of restriction require an answer to the question: “Did the RMO restrict the complainant from communicating with a member of Congress or an Inspector General?” Investigators must consider and analyze all of the evidence relating to the RMO’s restriction (preventing or attempting to prevent a member of the Armed Forces from making or preparing to make a lawful communication to a member of Congress and/or an IG) of the complainant’s access to a member of Congress or an Inspector General. It is not necessary for the RMO’s attempt at restriction to be successful for such an allegation to be substantiated. ROIs on restriction cases follow a different template than that used for reprisal reports. See Appendix G for a restriction ROI template.

3. Reporting When the Case Cannot be Completed within 180 Days

If, in the course of an investigation, it becomes clear that the report cannot be issued within 180 days of the filing of the complaint, the responsible Inspector General shall notify the complainant, in writing, of the reasons for the delay and when the report will be issued. The

same information must be sent to the Deputy Under Secretary of Defense for Personnel and Readiness; IG DoD, Whistleblower Reprisal Investigations Directorate; the Secretary of the military department concerned; and the member or former member; this can be accomplished by courtesy-copying them the letter to the Complainant (See Appendix H for a sample letter).

4. Reporting Closed Cases

Within 30 days after Whistleblower Reprisal Investigations Directorate approves the ROI or the determination that an investigation is not warranted, the Service IG must send a letter to the complainant informing him or her (1) of the investigative findings, (2) that a copy of the report on the results of the investigation is enclosed, and (3) of the right to appeal to the appropriate BCMR (see Appendix I for a sample letter). The report must contain the maximum disclosure of information that is possible, except for information that may be withheld under the Freedom of Information and Privacy Acts. The letter must be courtesy-copied to the:

- Deputy Under Secretary of Defense for Personnel and Readiness,
- DoD IG Directorate for Whistleblower Reprisal Investigations,
- relevant Board for Corrections of Military Records, and
- Secretary of the military department concerned.

APPENDIX LIST

- A.** Title 10, United States Code, Section 1034, “Protected communications; prohibition of retaliatory actions,” and DoD Directive 7050.06, “Military Whistleblower Protection.”
- B.** Complaint Intake Form.
- C.** Military Reprisal Investigative Plan.
- D.** Interview Read In/Read Out.
- E.** IO Checklist.
- F.** WRI 1034 Reprisal ROI Template.
- G.** WRI Restriction ROI Template.
- H.** 180-day letter to the complainant.
- I.** Closure letter to the complainant.

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10 U.S.C.

ARMED FORCES Subtitle A - General

Military Law PART II - PERSONNEL

CHAPTER 53 - MISCELLANEOUS RIGHTS AND BENEFITS

Sec. 1034 - Protected communications; prohibition of retaliatory personnel actions

§1034. Protected communications; prohibition of retaliatory personnel actions

(a) Restricting Communications With Members of Congress and Inspector General Prohibited.—

- (1) No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General.
- (2) Paragraph (1) does not apply to a communication that is unlawful.

(b) Prohibition of Retaliatory Personnel Actions.—

(1) No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing or being perceived as making or preparing—

- (A) a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted;
- (B) a communication that is described in subsection (c)(2) and that is made (or prepared to be made) to—
 - (i) a Member of Congress;
 - (ii) an Inspector General (as defined in subsection (i)) or any other Inspector General appointed under the Inspector General Act of 1978;
 - (iii) a member of a Department of Defense audit, inspection, investigation, or law enforcement organization;
 - (iv) any person or organization in the chain of command;
 - (v) a court-martial proceeding; or
 - (vi) any other person or organization designated pursuant to regulations or other established administrative procedures for such communications; or
- (C) testimony, or otherwise participating in or assisting in an investigation or proceeding related to a communication under subparagraph (A) or (B), or filing, causing to be filed, participating in, or otherwise assisting in an action brought under this section.

(2) Any action prohibited by paragraph (1) (including the threat to take any unfavorable action, or making or threatening to make a significant change in the duties or responsibilities of a member of the armed forces not commensurate with the member's grade, and the withholding or threat to withhold any favorable action) shall be considered for the purposes of this section to be a personnel action prohibited by this subsection.

(c) Inspector General Investigation of Allegations of Prohibited Personnel Actions.—

(1) If a member of the armed forces submits to an Inspector General an allegation that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in paragraph (2), the Inspector General shall take the action required under paragraph (4).

(2) A communication described in this paragraph is a communication in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following:

- (A) A violation of law or regulation, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct in violation of sections 920 through 920c of this title (articles 120 through 120c of the Uniformed Code of Military Justice), sexual harassment or unlawful discrimination.
- (B) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.
- (C) A threat by another member of the armed forces or employee of the Federal Government that indicates a determination or intent to kill or cause serious bodily injury to members of the armed forces or civilians or damage to military, Federal, or civilian property.

(3) A communication described in paragraph (2) shall not be excluded from the protections provided in this section because—

- (A) the communication was made to a person who participated in an activity that the member

- reasonably believed to be covered by paragraph (2);
- (B) the communication revealed information that had been previously disclosed;
- (C) of the member's motive for making the communication;
- (D) the communication was not made in writing;
- (E) the communication was made while the member was off duty; and
- (F) the communication was made during the normal course of duties of the member.

- (4)(A) An Inspector General receiving an allegation as described in paragraph (1) shall expeditiously determine, in accordance with regulations prescribed under subsection (h), whether there is sufficient evidence to warrant an investigation of the allegation.
 - (B) If the Inspector General receiving such an allegation is an Inspector General within a military department, that Inspector General shall promptly notify the Inspector General of the Department of Defense of the allegation. Such notification shall be made in accordance with regulations prescribed under subsection (h).
 - (C) If an allegation under paragraph (1) is submitted to an Inspector General within a military department and if the determination of that Inspector General under subparagraph (A) is that there is not sufficient evidence to warrant an investigation of the allegation, that Inspector General shall forward the matter to the Inspector General of the Department of Defense for review.
 - (D) Upon determining that an investigation of an allegation under paragraph (1) is warranted, the Inspector General making the determination shall expeditiously investigate the allegation. In the case of a determination made by the Inspector General of the Department of Defense, that Inspector General may delegate responsibility for the investigation to an appropriate Inspector General within a military department.
 - (E) In the case of an investigation under subparagraph (D) within the Department of Defense, the results of the investigation shall be determined by, or approved by, the Inspector General of the Department of Defense (regardless of whether the investigation itself is conducted by the Inspector General of the Department of Defense or by an Inspector General within a military department).
- (5) Neither an initial determination under paragraph (3)(A) nor an investigation under paragraph (3)(D) is required in the case of an allegation made more than one year after the date on which the member becomes aware of the personnel action that is the subject of the allegation.
- (6) The Inspector General of the Department of Defense, or the Inspector General of the Department of Homeland Security (in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy), shall ensure that the Inspector General conducting the investigation of an allegation under this subsection is one or both of the following:
- (A) 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.
 - (B) At least one organization higher in the chain of command than the organization of the member submitting the allegation and the individual or individuals alleged to have taken the retaliatory action.
- (d) Inspector General Investigation of Underlying Allegations.—Upon receiving an allegation under subsection (c), the Inspector General receiving the allegation shall conduct a separate investigation of the information that the member making the allegation believes constitutes evidence of wrongdoing (as described in subparagraph (A), (B), or (C) of subsection (c)(2)) if there previously has not been such an investigation or if the Inspector General determines that the original investigation was biased or otherwise inadequate. In the case of an allegation received by the Inspector General of the Department of Defense, the Inspector General may delegate that responsibility to the Inspector General of the armed force concerned.
- (e) Reports on Investigations.—
- (1) After completion of an investigation under subsection (c) or (d) or, in the case of an investigation under subsection (c) by an Inspector General within a military department, after approval of the report of that investigation under subsection (c)(4)(E), the Inspector General conducting the investigation shall submit a report on the results of the investigation to the Secretary of Defense and the Secretary of the military department concerned (or to the Secretary of Homeland Security in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) and shall transmit a copy of the report on the results of the investigation to the member of the armed forces who made the allegation investigated. The report shall be transmitted to such Secretaries, and the copy of the report shall be

transmitted to the member, not later than 30 days after the completion of the investigation or, in the case of an investigation under subsection (c) by an Inspector General within a military department, after approval of the report of that investigation under subsection (c)(4)(E).

- (2) In the copy of the report transmitted to the member, the Inspector General shall ensure the maximum disclosure of information possible, with the exception of information that is not required to be disclosed under section 552 of title 5. However, the copy need not include summaries of interviews conducted, nor any document acquired, during the course of the investigation. Such items shall be transmitted to the member, if the member requests the items, with the copy of the report or after the transmittal to the member of the copy of the report, regardless of whether the request for those items is made before or after the copy of the report is transmitted to the member.
 - (3) If, in the course of an investigation of an allegation under this section, the Inspector General determines that it is not possible to submit the report required by paragraph (1) within 180 days after the date of receipt of the allegation being investigated, the Inspector General shall provide to the Secretary of Defense and the Secretary of the military department concerned (or to the Secretary of Homeland Security in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) and to the member making the allegation a notice—
 - (A) of that determination (including the reasons why the report may not be submitted within that time); and
 - (B) of the time when the report will be submitted.
 - (4) The report on the results of the investigation shall contain a thorough review of the facts and circumstances relevant to the allegation and the complaint or disclosure and shall include documents acquired during the course of the investigation, including summaries of interviews conducted. The report may include a recommendation as to the disposition of the complaint.
- (f) Action in case of violations—
- (1) Not later than 30 days after receiving a report from the Inspector General under subsection (e), the Secretary of Homeland Security or the Secretary of the military department concerned, as applicable, shall determine whether there is sufficient basis to conclude whether a personnel action prohibited by subsection (b) has occurred.
 - (2) If the Secretary concerned determines under paragraph (1) that a personnel action prohibited by section (b) has occurred, the Secretary shall—
 - (A) order such action as is necessary to correct the record of a personnel action prohibited by subsection (b); and
 - (B) take any appropriate disciplinary action against the individual who committed such prohibited personnel action.
 - (3) If the Secretary concerned determines under paragraph (1) that an order for corrective or disciplinary action is not appropriate, not later than 30 days after making the determination, such Secretary shall—
 - (A) provide to the Secretary of Defense and the member or former member a notice of the determination and the reasons for not taking action; and
 - (B) when appropriate, refer the report to the appropriate board for the correction of military records for further review under subsection (g).
- (g) Correction of Records When Prohibited Action Taken.—
- (1) A board for the correction of military records acting under section 1552 of this title, in resolving an application for the correction of records made by a member or former member of the armed forces who has alleged a personnel action prohibited by subsection (b), on the request of the member or former member or otherwise, may review the matter.
 - (2) In resolving an application described in paragraph (1), a correction board—
 - (A) shall review the report of the Inspector General submitted under subsection (e)(1);
 - (B) may request the Inspector General to gather further evidence; and
 - (C) may receive oral argument, examine and cross-examine witnesses, take depositions, and, if appropriate, conduct an evidentiary hearing.

- (3) If the board holds an administrative hearing, the member or former member who filed the application described in paragraph (1)—
- (A) may be provided with representation by a judge advocate if—
 - (i) the Inspector General, in the report under subsection (e)(1), finds that there is probable cause to believe that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in subsection (c)(2);
 - (ii) the Judge Advocate General concerned determines that the member or former member would benefit from judge advocate assistance to ensure proper presentation of the legal issues in the case; and
 - (iii) the member is not represented by outside counsel chosen by the member; and
 - (B) may examine witnesses through deposition, serve interrogatories, and request the production of evidence, including evidence contained in the investigatory record of the Inspector General but not included in the report submitted under subsection (e)(1).
- (4) The Secretary concerned shall issue a final decision with respect to an application described in paragraph (1) within 180 days after the application is filed. If the Secretary fails to issue such a final decision within that time, the member or former member shall be deemed to have exhausted the member's or former member's administrative remedies under section 1552 of this title.
- (5) The Secretary concerned shall order such action, consistent with the limitations contained in sections 1552 and 1553 of this title, as is necessary to correct the record of a personnel action prohibited by subsection (b).
- (6) If the Board determines that a personnel action prohibited by subsection (b) has occurred, the Board may recommend to the Secretary concerned that the Secretary take appropriate disciplinary action against the individual who committed such personnel action.
- (h) Review by Secretary of Defense.—Upon the completion of all administrative review under subsection (f), the member or former member of the armed forces (except for a member or former member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) who made the allegation referred to in subsection (c)(1), if not satisfied with the disposition of the matter, may submit the matter to the Secretary of Defense. The Secretary shall make a decision to reverse or uphold the decision of the Secretary of the military department concerned in the matter within 90 days after receipt of such a submittal.
- (i) Regulations.—The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, shall prescribe regulations to carry out this section.
- (j) Definitions.—In this section:
- (1) The term “Member of Congress” includes any Delegate or Resident Commissioner to Congress.
 - (2) The term “Inspector General” means any of the following:
 - (A) The Inspector General of the Department of Defense.
 - (B) The Inspector General of the Department of Homeland Security, in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy.
 - (C) Any officer of the armed forces or employee of the Department of Defense who is assigned or detailed to serve as an Inspector General at any level in the Department of Defense.
 - (3) The term “unlawful discrimination” means discrimination on the basis of race, color, religion, sex, or national origin.



Department of Defense **DIRECTIVE**

NUMBER 7050.06
April 17, 2015

IG DoD

SUBJECT: Military Whistleblower Protection

References: See Enclosure 1

1. **PURPOSE.** This directive reissues DoD Directive (DoDD) 7050.06 (Reference (a)) to update established policies and assigned responsibilities for military whistleblower protection pursuant to section 1034 of Title 10, United States Code (U.S.C.) (Reference (b)).

2. **APPLICABILITY.** This directive applies to OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this directive as the “DoD Components”) and the Office of the Inspector General of the Department of Defense (IG DoD).

3. **POLICY.** It is DoD policy that:

a. Members of the Military Services (referred to in this directive as “Service members”) are free to make protected communications.

b. No person will restrict a Service member from making lawful communications to a member of Congress or an inspector general (IG).

c. Service members will be free from reprisal for making or preparing to make or being perceived as making or preparing to make a protected communication.

d. No person may take or threaten to take an unfavorable personnel action or withhold or threaten to withhold a favorable personnel action in reprisal against any Service member for making or preparing to make, or being perceived as making or preparing to make a protected communication.

e. No investigation is required when a Service member (hereinafter, use of “Service member” includes both current and former Service members) submits a reprisal complaint more than 1 year after the date that the member became aware of the personnel action that is the

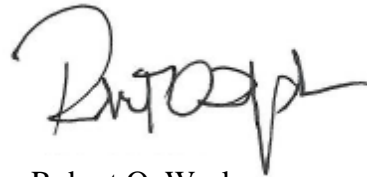
subject of the allegation. However, an IG receiving a reprisal complaint more than 1 year later may consider the complaint based on compelling reasons or circumstances. These circumstances may include situations in which the Service member:

- (1) Was actively misled regarding his or her rights;
- (2) Was prevented in some extraordinary way from exercising his or her rights; or
- (3) Filed the same allegation within the 1 year period with the wrong office or agency.

4. RESPONSIBILITIES. See Enclosure 2.

5. RELEASABILITY. **Cleared for public release.** This directive is available on the Internet from the DoD Issuances Website at <http://www.dtic.mil/whs/directives>.

6. EFFECTIVE DATE. This directive is effective on April 17, 2015.



Robert O. Work
Deputy Secretary of Defense

Enclosures

1. References
2. Responsibilities

Glossary

ENCLOSURE 1

REFERENCES

- (a) DoD Directive 7050.06, "Military Whistleblower Protection," July 23, 2007 (hereby cancelled)
- (b) Title 10, United States Code
- (c) Title 5, United States Code
- (d) DoD Directive 5505.06, "Investigations of Allegations Against Senior DoD Officials," June 6, 2013
- (e) DoD Directive 5106.04, "Defense Inspectors General," May 22, 2014
- (f) DoD Instruction 6490.04, "Mental Health Evaluations of Members of the Military Services," March 4, 2013

ENCLOSURE 2
RESPONSIBILITIES

Unless otherwise expressly provided below, the responsibilities in this enclosure may be delegated in writing.

1. IG DoD. The IG DoD investigates or oversees DoD Component IG investigations of allegations that the prohibitions of restriction or reprisal of this directive have been violated. To ensure compliance with this directive and section 1034 of Reference (b), the IG DoD:

a. Determines if there is sufficient evidence to warrant an investigation of an allegation submitted to the IG DoD by a Service member that the prohibitions of restriction or reprisal have been violated. Within 30 days after the date of receipt of a complaint with sufficient evidence to warrant further investigation, IG DoD initiates an investigation or requests the DoD Component IG to initiate an investigation.

b. Reviews determinations by DoD Component IGs that investigation of an allegation is not warranted. Notifies the DoD Component IG of approval or concerns.

c. Ensures the investigating DoD Component IG:

(1) Is outside the immediate chain of command (as established under DoD Component regulations) of both the Service member submitting the allegation and the individual or individuals alleged to have taken the retaliatory action; or

(2) Is at least one organization higher in the chain of command than the organization of the Service member submitting the allegation and the individual or individuals alleged to have taken the retaliatory action.

d. Reviews the results of investigations into violations of restrictions and reprisals conducted by DoD Component IGs. Approves the results or ensures the DoD Component IG corrects inadequacies or initiates a follow-up investigation. Notifies DoD Component IG of approval.

e. Reports the results of the IG DoD investigation within 180 days after the date of receipt of an allegation of reprisal or restriction. The report will include:

(1) A thorough review of the facts and circumstances relevant to the allegation(s), relevant documents acquired during the course of investigation, and summaries or transcripts of interviews conducted.

(2) Recommendations for an appropriate remedy for the whistleblower in a substantiated case.

f. If a report of the IG DoD investigation cannot be issued within 180 days, notifies the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), the Secretary of the Military Department concerned, and the Service member of the reasons for the delay and of the time when the report will be issued.

g. Conducts or requests a DoD Component IG to conduct a separate investigation of the underlying allegations contained in the protected communication when:

(1) An investigation has not been initiated; or

(2) An investigation of the allegation(s) contained in the protected communication has been conducted, and the IG DoD determines that the investigation was biased or inadequate.

h. Maintains reports on the results of the IG DoD investigation of restriction, reprisal, or underlying allegations and is responsible for transmitting the reports to the USD(P&R), the Secretary of the Military Department concerned, and the Service member not later than 30 days after the completion of the investigation; and when requested, transmits a copy of the documents acquired during the investigation and summaries or transcripts of testimony to the Service member. Ensures the copy of the report and supporting documents released to the Service member includes the maximum disclosure of information possible, with the exception of information that is not required to be disclosed in accordance with section 552 of Title 5, U.S.C. (Reference (c)).

i. Advises the Service member concerned that he or she may request review of the matter by a Board for Correction of Military Records (BCMR).

j. At the request of a BCMR, submits a copy of the report on the results of the investigation and gathers further evidence.

2. USD(P&R). On behalf of the Secretary of Defense, the USD(P&R):

a. Reviews reports on the results of investigations conducted pursuant to this directive and section 1034 of Reference (b).

b. Within 90 days of receipt of an appeal of a decision pursuant to this directive:

(1) Reviews the final decision of the Secretary of the Military Department concerned on applications for correction of military records decided in accordance with this directive and section 1034 of Reference (b).

(2) Decides whether to uphold or reverse the decision of the Secretary of the Military Department concerned. The decision of the USD(P&R) is final within the Department of Defense.

c. If necessary, requests the Secretary of the Military Department concerned comment on evidence considered by a BCMR when the Secretary of Defense is requested to reconsider the final decision of the Secretary of the Military Department concerned.

d. Notifies the IG DoD and Military Department IG concerned of decisions made on appeals pursuant to this directive to the Secretary of Defense.

3. DoD COMPONENT HEADS. The DoD Component heads:

a. Will maintain regulations governing civilian employees that makes any violation of the prohibitions of restriction and reprisal the basis for appropriate disciplinary action.

b. Direct that all allegations submitted in accordance with section 1034 of Reference (b) are thoroughly, objectively, and timely considered, and appropriate corrective actions are taken.

c. Direct that their respective IGs:

(1) Establish internal procedures for receiving, reporting, and investigating pursuant to this directive and section 1034 of Reference (b) allegations that the prohibitions of restriction and reprisal have been violated.

(2) Notify the IG DoD within 10 working days after receiving any allegation that the prohibitions of restriction or reprisal of this directive have been violated. Provide a copy of the written complaint to the IG DoD.

(3) Determine if there is sufficient evidence to warrant an investigation within 30 days of receipt of a restriction or reprisal allegation.

(4) Forward to the IG DoD any determination that there is not sufficient evidence to warrant investigation. If the IG DoD agrees with the determination, the DoD Component IG will notify the Service member making the allegation.

(5) Initiate an investigation when it has been determined investigation is warranted or upon the request of IG DoD. Forward reports on the results of investigation to the IG DoD for approval.

(6) Apply the provisions of DoDD 5505.06 (Reference (d)) when a reprisal or restriction allegation is made against a senior official of the DoD.

d. Ensure the investigating IG:

(1) Is outside the immediate chain of command (as established under DoD Component regulations) of both the Service member submitting the allegation(s) and the individual(s) alleged to have taken the retaliatory action; or

(2) Is at least one organization higher in the chain of command than the organization of the Service member submitting the allegation and the individual or individuals alleged to have taken the retaliatory action.

e. Provide the IG DoD with the report of investigation within 150 days after the date of receipt of the allegation from the Service member by the DoD Component IG or IG DoD. Include in the report:

(1) A thorough review of the facts and circumstances relevant to the allegation(s), relevant documents acquired during the investigation, and summaries or transcripts of interviews conducted.

(2) Recommendations for an appropriate remedy for the whistleblower in a substantiated case.

f. If the report cannot be issued within 180 days after receipt of the allegation, notify the USD(P&R), IG DoD, the Secretary of the Military Department concerned, and the Service member of the reasons for the delay and an estimate of when the report will be issued.

g. Conduct a separate investigation of the underlying allegations contained in the protected communication when an investigation has not been initiated or an investigation of the allegation(s) contained in the protected communication has been conducted, and the DoD Component IG or IG DoD determines that the investigation was biased or inadequate.

h. Transmit a report on the results of the investigation of restriction, reprisal, or underlying allegations to the USD(P&R), the Secretary of the Military Department concerned, and the Service member not later than 30 days after IG DoD approval of the results of the investigation. If requested, transmit a copy of the documents acquired during the investigation and summaries or transcripts of testimony to the Service member. Ensure the copy of the report and supporting documents released to the Service member includes the maximum disclosure of information possible, with the exception of information not required to be disclosed pursuant to section 552 of Reference (c).

i. Advise the Service member that he or she may request review of the matter by a BCMR.

j. At the request of a BCMR, ensures the investigating IG submits a copy of the investigation report or gathers further evidence.

k. Ensure that the subject(s) of the investigation of an allegation of restriction or reprisal conducted in accordance with this directive are afforded procedural protections, including the opportunity to present matters on their behalf, incident to administrative or disciplinary action, under DoD Component regulations or other established administrative procedures governing such action.

l. Publicize the content of this directive to ensure that members of the Military Services and other DoD personnel fully understand its scope and application.

4. SECRETARIES OF THE MILITARY DEPARTMENTS. In addition to the responsibilities in section 3 of this enclosure, the Secretaries of the Military Departments:

a. Will maintain regulations that make punishable, under Article 92 of chapter 47 of Reference (b) (also known and referred to in this directive as “the Uniform Code of Military Justice (UCMJ)”), any violation of the prohibitions of restriction and reprisal by persons subject to the UCMJ.

b. Not later than 30 days after receiving a report from or approved by IG DoD of a substantiated allegation, determine if there is sufficient basis to conclude the prohibition of restriction or reprisal of this directive has been violated.

c. When a prohibition has been violated:

(1) Order the record of the Service member corrected.

(2) Take any appropriate disciplinary or corrective action against the individual who committed the restriction or reprisal.

d. If an order for remedial, disciplinary, or corrective action is not appropriate, not later than 30 days after making the determination:

(1) Provide the Secretary of Defense and the Service member a notice of the determination and the reasons for not taking action.

(2) When appropriate, refer the report to the appropriate BCMR for further review.

e. Based on the IG report, take remedial action including assisting members in preparing an application to BCMR when implementation of the recommendations of the report requires action by a BCMR. Notify IG DoD of remedial action taken within 10 working days of taking action.

f. Ensure their respective BCMRs:

(1) Considers applications for the correction of military records at the request of a Service member who alleged restriction or reprisal.

(2) Establishes procedures to resolve such an application that as a minimum include:

(a) Reviewing the IG report submitted to the Secretary of the Military Department concerned.

(b) Requesting the IG DoD or the Military Department IG concerned to gather further evidence if needed.

(c) As appropriate, taking depositions, conducting an evidentiary hearing, examining and cross-examining witnesses, and receiving oral arguments.

(d) As appropriate, recommending to the Secretary of the Military Department concerned that disciplinary action be taken against the individual responsible for violations of the prohibitions.

(e) If the BCMR holds a hearing, the Service member who filed the application:

1. May be provided with representation by a judge advocate if:

a. The IG investigation finds the prohibition of reprisal has been violated.

b. The Judge Advocate General concerned determines that the Service member would benefit from judge advocate assistance to ensure proper presentation of the legal issues in the case.

c. The Service member is not represented by outside counsel.

2. The Service member may examine witnesses through depositions, serve interrogatories, and request the production of evidence, including evidence in an IG investigative record not included in the report released to the Service member.

g. Issue a final decision on an application submitted to the BCMR in accordance with this directive within 180 days after the application is filed. If the Secretary of the Military Department fails to issue a final decision within that time, the Service member will be deemed to have exhausted the administrative remedies afforded by section 1552 of Reference (b).

h. Advise the Service member that he or she may request review of the matter by the USD(P&R) on behalf of the Secretary of Defense. The request must be made within 90 days after receipt of the Secretary of the Military Department's decision.

i. Order such action, consistent with the limitations in section 1552 and 1553 of Reference (b), to correct the record of a personnel action prohibited by section 1034 of Reference (b).

j. Notify the IG DoD, the USD(P&R), and the Military Department IG concerned of a decision on an application for the correction of military records received from a Service member pursuant to this directive.

GLOSSARY

PART I. ABBREVIATIONS AND ACRONYMS

| | |
|----------|--|
| BCMR | Board for Correction of Military Records |
| DoDD | DoD Directive |
| IG | inspector general |
| IG DoD | Inspector General of the Department of Defense |
| UCMJ | Uniform Code of Military Justice |
| U.S.C. | United States Code |
| USD(P&R) | Under Secretary of Defense for Personnel and Readiness |

PART II. DEFINITIONS

Unless otherwise noted, these definitions are for the purposes of this directive.

abuse of authority. An arbitrary or capricious exercise of power by a military member or a federal official or employee that adversely affects the rights of any person or results in personal gain or advantage to himself or herself or to preferred other persons.

audit, inspection, investigation, or law enforcement organizations. The IG DoD, the U.S. Army Audit Agency, the Naval Audit Service, the Air Force Audit Agency, and the Defense Contract Audit Agency. The law enforcement organizations at any command level in any of the DoD Components, the Defense Criminal Investigative Service, the U.S. Army Criminal Investigation Command, the Naval Criminal Investigative Service, and the Air Force Office of Special Investigations.

BCMR. Any board empowered pursuant to section 1552 of Reference (b) to recommend correction of military records to the Secretary of the Military Department concerned.

chain of command. The succession of commanding officers from a superior to a subordinate through which command is exercised; also the succession of officers, enlisted members, or civilian personnel through whom administrative control is exercised, including supervision and rating of performance. For members of the National Guard this also includes the Adjutant General and the Governor of the State.

gross mismanagement. A management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission. The matter must be

significant and more than *de minimis* wrongdoing or simple negligence. It does not include management decisions that are merely debatable among reasonable people.

gross waste of funds. An expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government.

IGs. The IG DoD; the Military Department IGs (these include the Military Department IGs and IGs assigned or detailed under regulations of the Secretary of the Military Department concerned to serve at any command level in one of the Military Services); Defense IGs (as defined in DoDD 5106.04 (Reference (e))); an IG appointed under Appendix of Reference (c).

member of Congress. A U.S. Senator or Representative, delegate or resident Commissioner to the U.S. Congress, or a staff member of a Senator, Representative, or congressional committee, delegate, or resident Commissioner.

personnel action. Any action taken on a Service member that affects, or has the potential to affect, that member's current position or career. Such actions include promotion; disciplinary or other corrective action; transfer or reassignment; a performance evaluation; decisions concerning pay, benefits, awards, or training, relief and removal; separation; discharge; referral for mental health evaluations in accordance with DoD Instruction 6490.04 (Reference (f)); and any other significant change in duties or responsibilities inconsistent with the Service member's grade.

protected communication. The Table describes when a communication is protected.

remedial action. Appropriate relief to make the complainant whole, to include such action as is necessary to correct the record of a retaliatory personnel action.

reprisal. Taking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, for making, preparing to make, or being perceived as making or preparing to make a protected communication.

restriction. Preventing or attempting to prevent a current Service member from making or preparing to make a lawful communication to a member of Congress or an IG.

Service member. A Regular or Reserve Component officer (commissioned and warrant) or enlisted member of the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard (when it is operating as a Service in the Navy) on active duty. A Reserve Component officer (commissioned and warrant) or enlisted member in any duty or training status, including officers and enlisted members of the National Guard.

unlawful discrimination. Discrimination on the basis of race, color, religion, sex, or national origin.

whistleblower. A Service member who makes, prepares to make, or is perceived as making or preparing to make a protected communication.

Table. Protected Communication

| Type of Communication: | Conditions on Protection: | When made to: |
|--|---|--|
| Any communication | Must be a lawful communication | <ul style="list-style-type: none"> • A member of Congress or • An IG |
| <p>Any communication in which a Service member communicates information that he or she reasonably believes evidences:</p> <ul style="list-style-type: none"> • A violation of law or regulation, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct in violations of section 920 through 920c of Reference (c) (articles 120 through 120c of the UCMJ), sexual harassment or unlawful discrimination; • Gross mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and specific danger to public health or safety; or • A threat by another Service member or employee of the Federal Government that indicates a determination or intent to kill or cause serious bodily injury to Service members or civilians or damage to military, federal, or civilian property. | <p>A communication will not lose its protected status because:</p> <ul style="list-style-type: none"> • The communication was made to a person who participated in the activity that the Service member complained of; • The communication revealed information that had been previously disclosed; • Of the Service member's motive for making the communication; • The communication was not in writing; • The communication was made while the Service member was off duty; or • The communication was made during the normal course of the Service member's duties. | <ul style="list-style-type: none"> • A member of Congress; • An IG; • A member of a DoD audit, inspection, investigation, or law enforcement organization; • Any person or organization in the chain of command; • A court-martial proceeding; or • Any other person or organization designated pursuant to regulations or other established administrative procedures to receive such communications. |
| <ul style="list-style-type: none"> • Testimony, or otherwise participating in or assisting in an investigation or proceeding related to a communication as described above; or • Filing, or causing to be filed, participating in, or otherwise assisting in a military whistleblower reprisal action. | | |

Military Reprisal Complaint Intake Worksheet

APPENDIX B

Case Number:

Investigator:

Complainant:

Date Complaint Filed:

Filed within 1 year of most recent PA? Yes/No

Statutory Authority: Title 10, United States Code, Section 1034 (10 U.S.C. 1034), “Protected communications; prohibition of retaliatory personnel actions,” as implemented by DoD Directive 7050.06, “Military Whistleblower Protection.”

Case Summary:

Element 1: Did Complainant make or prepare to make a protected communication (PC), or was Complainant perceived as making or preparing a protected communication?

| 10 U.S.C. 1034 “PROTECTED COMMUNICATION; PROHIBITION OF RETALIATORY PERSONNEL ACTIONS” DoD Directive 7050.06, “Military Whistleblower Protection” | (a) PROHIBITION OF RESTRICTION | | |
|---|--|--|--|
| | No person may restrict a member of the armed forces in lawfully communicating with a Member of Congress or an IG. | | |
| | (b) PROHIBITION OF RETALIATORY PERSONNEL ACTIONS | | |
| PROTECTED COMMUNICATION | TO | PERSONNEL ACTIONS | |
| (b)(1) Making or preparing or being perceived as making or preparing: (A) Any lawful communication to a Member of Congress or an Inspector General (IG) (B) Information reasonably believed to evidence: • A violation of law or regulation, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct in violation of articles 120 through 120c of the UCMJ, sexual harassment or unlawful discrimination. • Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. • A threat that indicates a member’s or federal employee’s determination or intent to kill or cause serious bodily injury to members or civilians or damage to military, federal or civilian property (C) • Testifying or participating in or assisting in an investigation or proceeding related to a PC • Filing, causing to be filed, participating in, or otherwise assisting in an action under this section | (b)(1) (A) Member of Congress or Inspector General (B) • Member of a Department of Defense audit, inspection, investigation, or law enforcement organization • Any person or organization in the chain of command • A court-martial proceeding • Any other person or organization designated pursuant to regulations or other established administrative procedures for such communications. | <ul style="list-style-type: none"> • Taking an unfavorable personnel action • Threatening to take an unfavorable personnel action • Withholding a favorable personnel action • Threatening to withhold a favorable personnel action • Making or threatening to make a significant change in the duties or responsibilities of a member of the armed forces not commensurate with the member’s grade DoDD 7050.06: Any action that affects, or has the potential to affect, the military member’s current position or career, including: <ul style="list-style-type: none"> • Promotions • Disciplinary/corrective actions • Performance evaluations • Decisions on pay, benefits, awards, training • Referrals for Mental Health Evaluation | |

Military Reprisal Complaint Intake Worksheet

Alleged PC #1: *(add more as needed)*

Description:

To whom:

Date:

Determination: Protected/Not Protected

Element 2: Was an unfavorable personnel action (PA) taken or threatened against Complainant, or was a favorable personnel action withheld or threatened to be withheld from Complainant?

Alleged PA #1: *(add more as needed)*

Action:

By whom? (Responsible Management Official (RMO)):

Were there other individuals involved in recommending, approving, or influencing the PA?

Date:

Determination: PA/Not PA

Possible Inference of Knowledge? Yes/No

Explain:

Knowledge Questions to ask Complainant:

- Did the RMO have knowledge of the PC or suspect you?
- What, if anything, was done in response to your PC(s)?
- How much time passed between your PC(s) and the PA(s) taken against you?

Possible Inference of Causation: Yes/No

Explain:

Causation Questions to ask Complainant:

- Why do you believe the action taken, withheld, or threatened was in reprisal?
- What motive would the RMO have to reprise against you?
- What were the reasons provided to you by the RMO for the action they took?

Prima Facie Allegation? Yes/No

Recommendation: Dismiss/Investigate

Inference of Causation: Does the complaint, as supplemented by an interview of the complainant support an inference of reprisal—that is, a causal connection between the PC and the PA? This can be met where the facts suggest the existence of one or more of the following:

- The PA followed closely behind the PC
- The PC was about something that would give the RMO motive to reprise
- The RMO expressed animosity toward the Complainant and/or the PC
- The Complainant received worse treatment than others in similar situations who have not made PCs

Military Reprisal Investigative Plan as of [Date]

| | |
|----------------------------------|--|
| Case Number: | |
| Investigator: | |
| Supervisory Investigator: | |
| Case Summary: | |

| Complainant(s): | | | |
|------------------------|--------|-----------|---------|
| [Rank] | [Name] | [Service] | [Title] |

| Subject(s): | | | |
|--------------------|--------|-----------|---------|
| [Rank] | [Name] | [Service] | [Title] |

| Allegations: | | |
|---------------------|---|--------|
| Alleged Subject | Allegation | Result |
| [Name] | REPRISAL/MILITARY | TBD |
| | Description: [Example: Complainant alleged that RMO gave him an adverse fitness report on March 11, 2013, in reprisal for telling his chain of command that RMO was a toxic leader in 2010.] | |

| Protected Communication(s): | | | | |
|------------------------------------|--|----|------------|-------------|
| Date | PC | To | Protected? | If No, Why? |
| 7/24/2012 | [Type of PC, e.g., (b)(1)(B) A substantial and specific danger to public health or safety] | | | |
| | Description: | | | |

| Personnel Action(s): | | | | |
|-----------------------------|---------------------|----------|----------|-------------|
| Date | PA | By Whom? | Covered? | If No, Why? |
| | | | | |
| | Description: | | | |

| Documentary Evidence: | | | |
|------------------------------|--------|----------------|---------------|
| Document Description | Source | Date Requested | Date Received |
| | | | |
| | | | |
| | | | |

INTERVIEW READ-IN

APPENDIX D

PRE-RECORDING DISCUSSION

We are investigators with the [insert office name] (display credentials and provide business card).

We are conducting an investigation into (summarize the general nature of the allegation(s)).

This is an administrative investigation (not a criminal investigation); we are impartial fact finders and the information you provide may be included in our report of investigation.

Please take a moment to look over this Privacy Act notice (or if you sent the Privacy Notice ahead of time) – do you have any questions?

This interview will be sworn and recorded.

We ask that you not discuss any classified information during the interview -- if there is a need to discuss classified information we can make suitable arrangements to do so at another time.

We caution you that everything you tell us is for the record (we are never off the record – even when the recorder is turned off).

Do you have any questions before we start?

RECORDER IS TURNED ON

Today is DATE. The time is

I am (name of investigator) with the [insert office name]. With me is (name of second investigator).

We are located at (physical location of the interview).

We are conducting this interview as part of our investigation into allegations (summarize the general nature of the allegation(s)).

At this time, I ask you to acknowledge that this interview is being recorded?

Also, acknowledge that I have provided you a copy of the [insert office name] Privacy Act notice.

I will now administer you the oath – please raise your right hand

Do you solemnly swear (affirm) that the testimony you are about to give shall be the truth, the whole truth, and nothing but the truth (so help you God)?

Please state your name, rank/grade and position/duty assignment.

[CONDUCT INTERROGATORY]

INTERVIEW READ-OUT

READ OUT

Is there any additional information that you would like to provide?

Are there other individuals whom we should talk to?

Do you have any questions?

If you remember anything else that you believe may be relevant to the investigation, please contact me.

Finally, in order to protect the integrity of the investigation, we ask that you not discuss the matters under investigation or the questions we have asked you during this interview with anyone other than your attorney. This does not apply to or restrict your right to contact an IG or member of Congress.

If anyone asks you about your testimony or the investigation, please inform them that the [insert office name] has asked you not to discuss the matter.

If anyone persists in asking you about your testimony or the investigation, or if you feel threatened in any manner because you provided testimony, please contact me.

OIG Investigating Officer Checklist

4. Causation: Did you analyze all factors in determining whether the same personnel action(s) would have been taken, withheld, or threatened absent the protected communication(s):
- a. Reason stated by the RMO for taking, withholding or threatening the action
 - b. Timing between the protected communications and the personnel actions
 - c. RMO's motive for taking, withholding, or threatening the personnel actions, including animosity toward the protected communication
 - d. Disparate treatment of the complainant as compared to other similarly situated individuals

Analyzing Restriction Allegations

N/A YES NO

5. Did you gather and analyze evidence relevant to the question of whether the responsible management official restricted or attempted to restrict a military member or members from making or preparing to make a lawful communication to a member of Congress or an Inspector General?

Adherence to Council of the Inspectors General on Integrity and Efficiency Quality Standards

YES NO

6. Did you accurately summarize the complaint in the report?
7. Did you accurately cite and apply the statute or standard that *applied at the time*
8. Did you identify each underlying allegation or other issues, and were they addressed or referred for handling?
9. Did you prepare an investigative plan?
10. Did you gather all relevant evidence by:
- a. Interviewing the complainant?
 - b. Interviewing the responsible management official(s)?
 - c. Interviewing relevant witnesses?
11. For any key witnesses not interviewed, does the report explain why interviews were not conducted?
12. Did you apply the facts to each element of reprisal or to the standard for restriction?
13. Did you apply the appropriate standard of proof
14. Does the evidence support the investigative findings?
15. Did you retain all evidence relied upon in the report and include it with the report for review?

OIG Investigating Officer Checklist

| | N/A | YES | NO |
|--|--------------------------|--------------------------|--------------------------|
| 16. If the case has been open over 180 days after receipt of the allegation, have all required notifications been made? USD(P&R), DoD IG, the Secretary of the Military Department concerned, and the complainant? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 17. Did the report reach a conclusion for each allegation? | | <input type="checkbox"/> | <input type="checkbox"/> |
| 18. If substantiated, did the report recommend appropriate remedy for the complainant? | | <input type="checkbox"/> | <input type="checkbox"/> |
| 19. If substantiated, did the report recommend corrective action for the subject(s)? | | <input type="checkbox"/> | <input type="checkbox"/> |
| 20. Did the report receive legal sufficiency review? | | <input type="checkbox"/> | <input type="checkbox"/> |
| 21. Did the legal review find the report legally sufficient? | | <input type="checkbox"/> | <input type="checkbox"/> |
| 22. Does the report include the WRI case number as well as the Service case number? | | <input type="checkbox"/> | <input type="checkbox"/> |
| 23. Is the investigative information organized in a logical and easily retrievable manner? | | <input type="checkbox"/> | <input type="checkbox"/> |

WHISTLEBLOWER REPRISAL INVESTIGATION
TITLE/RANK COMPLAINANT'S NAME
AGENCY/SERVICE
LOCATION

I. EXECUTIVE SUMMARY

We conducted this investigation in response to allegations that list RMO information here – name(s) with title/rank, Service/agency, and location did something describe the personnel action(s) here to Complainant's name in reprisal for communicating to whom

Comment [Template1]: This first paragraph must include RMO name(s), personnel actions, Complainant's name, and protected communication.

[list RMO information here – name(s) with title and rank, agency/service, and location] [did something]

We found that concisely summarize the factual findings related to the elements of reprisal.

[describe the personnel action(s) here – did not recommend assignment extension...denied an end-of-tour award...gave an unfavorable noncommissioned officer evaluation report...] to [complainant's name] in reprisal for communicating to his command's information systems security manager...to his command IG...).

We substantiated the allegation that RMO name did describe the personnel action in reprisal for Complainant's protected communication(s), in violation of Title 10, United States Code, Section 1034 (10 U.S.C. 1034), "Protected communications; prohibition of retaliatory personnel actions," which is implemented by DoD Directive 7050.06, "Military Whistleblower Protection."

Comment [Template2]: For substantiated allegations state ...

We did not substantiate the allegation that RMO name did not describe the personnel action in reprisal for Complainant's protected communication(s).

Comment [Template3]: For allegations not substantiated, state ...

We

Comment [Template4]: If there are multiple RMOs having different findings, summarize them separately as in the paragraph above; however, if they collectively took the actions, summarize them together.

Comment [Template5]: State what you recommended and to whom; in cases where you do not make any recommendations, state: We did not make any recommendations in this matter.

II. **BACKGROUND**

Complainant ...

III. **SCOPE**

This investigation covered the period from

IV. **STATUTORY AUTHORITY**

The Department of Defense Inspector General (DoD) IG conducted this whistleblower reprisal investigation pursuant to Title 10, United States Code, Section 1034 (10 U.S.C. 1034), "Protected communications; prohibition of retaliatory personnel actions," which is implemented by DoD Directive 7050.06, "Military Whistleblower Protection."

V. **FINDINGS OF FACT**

Heading

Set subheadings in at .5. DO NOT UNDERLINE!

Heading

Heading

VI. **ANALYSIS**

The elements of reprisal are protected communication, knowledge of the protected communication on the part of the responsible management official; a personnel action taken, threatened, or withheld; and a causal connection between the protected communication and the personnel action. The causal connection is resolved by answering the question in paragraph D, below. If the evidence does not establish that the personnel action would have been taken, threatened, or withheld even absent the protected communication, then the complaint is substantiated. Conversely, if the evidence establishes that it would have been taken, threatened, or withheld absent the protected communication, then the complaint is not substantiated. Below, we analyze each of the elements.

A. Did Complainant make or prepare to make a protected communication , or was Complainant perceived as having made or prepared to make a protected communication?

We determined that Complainant made number protected communications under 10 U.S.C. 1034 and number communications were not protected.

Comment [Template6]: This section can be as short as one paragraph. *The detailed chronological telling of the facts involved in the investigation should be in the "FINDINGS OF FACT" section. **Other key individuals involved in the investigation should be identified in the "FINDINGS OF FACT" section as they come into the story chronologically.

Comment [Template7]: This section should provide the reader information about the organizations, command relationships, and Complainant and management officials involved in the matter under investigation. Give a brief overview of events that led to the protected communication and personnel action. It may also be used to provide a very brief chronology or synopsis of key events *leading up to* the matters under investigation but generally not the matters *directly* under investigation. Do not include detailed narratives of the facts of the case that are presented in the Findings of Fact section of the report.

Comment [Template8]: This section should describe the scope of the investigation in summary terms, leading with a statement of the *timeframe* addressed by the investigation, followed by *key* witnesses interviewed and *crucial* documents reviewed. Do not list every witness and every type of document. Include subject matter experts if their testimony was crucial to the outcome of the investigation.

Comment [Template9]: THIS BOILERPLATE LANGUAGE SHOULD NOT CHANGE.

Comment [Template10]: This section is a chronological telling of ONLY the RELEVANT facts involved in the story we've found in the investigation. Don't discuss the facts in terms of protected communications, personnel actions, RMO knowledge, stated reason, RMO motive, animus, and disparate treatment. Do not, for example, find that a visit to the IG is a protected communication or an unfavorable OER is a personnel action, or that an email to an RMO gave them knowledge of a protected communication etc. In the "ANALYSIS" section, we will answer the questions related to the elements of reprisal using the facts established in this section.

Comment [Template11]: Many paragraphs in the section will start with something like "On DATE, Complainant..." Use transition words and phrases for readability (ex: Following that, ... After that, ... Concurrently,)

Comment [Template12]: Tell what happened, not what the testimony was about what happened. For facts not in dispute, state, for example, "Complainant told RMO during a meeting on September 11 that she inventoried the stock and found a significant discrepancy between the invoices and stock on hand," instead of "Complainant testified.... RMO testified..., etc." Refer specifically to testimony or other evidence only where there are factual disputes in the testimony and resolve those discrepancies here in the factual ...

Comment [Template13]: Set subheadings in at .5 DO NOT UNDERLINE

[Redacted]

Thus, a preponderance of the evidence established that Complainant

B. Was an unfavorable personnel action taken or threatened against Complainant, or was a favorable personnel action withheld or threatened to be withheld from Complainant?

We determined that Complainant was or was not the subject of a personnel action as defined by 10 U.S.C. 1034.

[Redacted]

Alleged personnel action #1

Alleged personnel action #2

Thus, a preponderance of the evidence established that Complainant

C. Did the responsible management official(s) have knowledge of Complainant’s protected communication(s) or perceive Complainant as making or preparing protected communication(s)?

We determined that RMO name knew and second RMO name knew that Complainant had communicated with who and third RMO’s name had no knowledge of any protected communications.

[Redacted]

Thus, a preponderance of the evidence established that RMO name

D. Would the same personnel action(s) have been taken, withheld, or threatened absent the protected communication(s)? [Include D only if questions A-C are all answered in the affirmative.]

[Redacted]

We determined that RMO name would/would not have taken the personnel actions against the Complainant absent his/her protected communications.

Comment [Template14]: Use a short paragraph for each alleged protected communication that synthesizes information already in the “FINDINGS OF FACT.” Do not introduce new facts. This is merely listing each alleged protected communication and showing your determination that it either is or is not in fact a protected communication and why. **These should not begin** with “We found,” or “So-and-so stated.” They should end with a statement saying that an alleged protected communication is or is not protected under 10 U.S.C. 1034 and why.

Comment [Template15]: When the investigation covers **only one** protected communication, the first paragraph should synthesize the facts related to the protected communication and determine whether or not it is protected.

When the investigation covers **more than one** protected communication, the first paragraph should summarize the different protected communications (not the facts for each protected communication) and serve as a topic paragraph for the section. Then u ...

Comment [Template16]: Close the section with a sentence or paragraph that begins “Thus, a preponderance of the evidence established that Complainant . . .”

Comment [Template17]: State personnel action here if there is only one.

Comment [Template18]: The follow-on sentences/paragraphs should present the analysis of whether the facts as stated above constitute a personnel action. **These should not begin** with “We found,” or “So and so stated.” Do not introduce new facts. End with a statement saying that the action ...

Comment [Template19]: When the investigation covers only one personnel action, this paragraph should synthesize the facts related to the personnel action and determine whether or not it is a personnel action under the statute. ...

Comment [Template20]: Close the section with a sentence or paragraph that begins, “Thus, a preponderance of the evidence established that Complainant . . .”

Comment [Template21]: The follow-on sentences/paragraphs should synthesize the facts related to knowledge and determine whether or not the evidence established that the RMOs had knowledge. **These should not begin with** “We found,” or “So and so stated.”

Comment [Template22]: When the investigation covers only one RMO and one protected communication, the paragraph should summarize the relevant facts. When the investigation covers more than one RMO or more than one protected communication, the very first ...

Comment [Template23]: To make this determination, for each action taken, we analyze the following factors:
the strength of the evidence in support of the stated reason for the personnel action; ...

RMO's name stated reasons for personnel action

Comment [Template24]: Consider and analyze all of the following factors that are applicable to the facts and evidence. The follow-on sentences/paragraphs should present the synthesized findings of fact—what happened, based on the evidence. **These should not begin** with “We found,” or “So and so stated.”

Timing between protected communication and personnel action

Comment [Template25]: •
•Each RMO's stated reason(s) for the personnel action(s)
•Timing between the protected communication(s) and personnel action(s)
•Motive on the part of the RMO(s) to reprise, including any animosity expressed by the RMO(s) regarding the protected communications
•Disparate treatment of Complainant as compared to other similarly situated individuals who did not make protected communications

RMO's name motive to reprise

Disparate treatment of Complainant

Thus, a preponderance of the evidence established that RMO name would/would not ...

Comment [Template26]: Close the section with a sentence or paragraph that begins, “Thus, a preponderance of the evidence established that [RMO's name] would/would not...”

VI. DISCUSSION

Comment [Template27]: Synthesize the analysis above in **one or two paragraphs**, explaining how we arrived at our conclusions. For example: “Based on a preponderance of the evidence, we conclude that [RMO name] issued an adverse OPR in reprisal for Complainant's protected communication to the IG. The evidence shows that Complainant's protected communication resulted in an investigation that substantiated misconduct by the RMO, who knew Complainant made the protected communication. [RMO name] told his XO and others that he was upset that Complainant went outside of the chain of command. Finally, the evidence shows that Complainant had received glowing OPR's prior to his protected communication, etc.”

VII. CONCLUSION(S)

We conclude, by a preponderance of the evidence, that:

RMO name did/did not (personnel action) Complainant in reprisal for protected communication.

Second RMO name did/did not (personnel action) Complainant in reprisal for protected communication.

Third RMO name did/did not (personnel action) Complainant in reprisal for protected communication.

VIII. RECOMMENDATION(S)

We make no recommendations in this matter.

Comment [Template28]: When not substantiated.

We recommend that the Secretary of the Military Service/Agency direct Military Service/Agency officials to:

Comment [Template29]: When substantiated, use the following . . .

Insert appropriate relief to make Complainant whole.

Take appropriate corrective action against RMO name

WHISTLEBLOWER RESTRICTION INVESTIGATION
TITLE/RANK COMPLAINANT'S NAME
AGENCY/SERVICE
LOCATION

APPENDIX G

I. EXECUTIVE SUMMARY

We conducted this investigation in response to allegations that [list RMO information here – name(s) with title and rank, agency/service, and location] restricted [or attempted to restrict] [complainant's name] from making or preparing to make a lawful communication to communicating with a member of Congress or an Inspector General. This first paragraph must include RMO name(s) and Complainant's name.

We found that...[concisely summarize the factual findings related to the alleged restriction. For example: We found that [RMO's name] told complainant via email on [Date] that if she contacted the IG again there would be dire consequences.].

For substantiated allegations, state: We conclude that [RMO's name] did [describe the restriction] in violation of Title 10, United States Code, Section 1034 (10 U.S.C. 1034), "Protected communications; prohibition of retaliatory personnel actions," which is implemented by DoD Directive 7050.06, "Military Whistleblower Protection." For allegations we did not substantiate, state: We conclude that [RMO's name] did not [describe the restriction] in violation of Title 10, United States Code, Section 1034 (10 U.S.C. 1034), "Protected communications; prohibition of retaliatory personnel actions," which is implemented by DoD Directive 7050.06, "Military Whistleblower Protection."

If there are multiple RMOs having different findings, summarize them separately as in the paragraph above; however, if they collectively took the actions, summarize them together.

State what you recommended and to whom; in cases where you do not make any recommendations, state: We did not make any recommendations in this matter.

Insert case number here

II. BACKGROUND

This section should provide the reader information about the organizations, command relationships, and key individuals involved in the investigation. Give a brief overview of events that led to the protected communication and personnel action. It may also be used to provide a very brief chronology or synopsis of key events *leading up to* the matters under investigation but generally not the matters *directly* under investigation. Do not include detailed narratives of the facts of the case that are presented in the Findings of Fact section of the report.

III. SCOPE

This section should describe the scope of the investigation in summary terms, leading with a statement of the *timeframe* addressed by the investigation, followed by *key* witnesses interviewed and *crucial* documents reviewed. Do not list every witness and every type of document. Include subject matter experts if their testimony was crucial to the outcome of the investigation.

IV. STATUTORY AUTHORITY

This boilerplate statutory language should not change:

The [name of office conducting investigation] conducted this whistleblower restriction investigation pursuant to Title 10, United States Code, Section 1034 (10 U.S.C. 1034), “Protected communications; prohibition of retaliatory personnel actions,” which is implemented by DoD Directive 7050.06, “Military Whistleblower Protection.”

V. FINDINGS OF FACT

We found that

VI. ANALYSIS

Did the responsible management official (RMO) restrict or attempt to restrict Complainant from making or preparing to make a lawful communication to a member of Congress or an Inspector General?

We determined that the responsible management official restricted/did not restrict Complainant....

[Consider and analyze all of the evidence relating to the RMO’s restriction or attempt to restrict the Complainant’s communication with a member of Congress or an Inspector General.]

VII. DISCUSSION

Insert case number here

VI. CONCLUSION(S)

We conclude:

[RMO's name] [did/did not restrict] Complainant in violation of 10 U.S.C. 1034.

VII. RECOMMENDATION(S)

When not substantiated:

We make no recommendations in this matter.

OR, when substantiated:

We recommend that the [Secretary of the Military Service/Agency] direct [Military Service/Agency] officials to:

[Take appropriate corrective action against RMO(s).]

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Service/Agency letterhead

APPENDIX H

[Rank Abbreviation Full Name, Service abbreviation]
[Street Address]
[City, State Zip]
[Email address]

[Case Number]

Dear [Rank last name]:

This letter is to update you on our investigation into the complaint you filed under Title 10, United States Code, Section 1034, "Protected communications; prohibition of retaliatory personnel actions," as implemented by DoD Directive 7050.06, "Military Whistleblower Protection."

Section 1034(e)(3) requires that we notify you and the Secretary of Defense if we are unable to complete the report of investigation within the 180-day statutory timeframe and that we tell you when we expect to complete the investigation. Further, under paragraph 5.1.6 of the DoD Directive, we are also required to notify you of the reason for the delay.

Over 180 days have passed since you filed this complaint on [enter date]. [Enter brief explanation of the reason for the delay.] We anticipate that the investigation will be completed within the next 90 days.

Please contact [Mr./Ms. Investigator or Supervisory Investigator name], [investigator title], at [phone number] or DSN [number] or by email at [enter Investigator or Supervisory Investigator email] if you have any questions.

Sincerely,

[SI Full Name]
Supervisory Investigator
Whistleblower Reprisal Investigations

cc:

Director, Enterprise Services
Office of the Under Secretary of Defense for Personnel and Readiness
[Service Secretary of the military department concerned]
DoD IG, Whistleblower Reprisal Investigations

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Service/Agency letterhead
D R A F T

APPENDIX I

[Rank Abbreviation Full Name, Service abbreviation]
[Street Address]
[City, State Zip]
[Email address]

[Case Number]

Dear [Rank last name]:

We have completed an investigation into your complaint of reprisal under Title 10, United States Code, Section 1034 (10 U.S.C. 1034), "Protected communications; prohibition of retaliatory personnel actions," implemented by DoD Directive 7050.06, "Military Whistleblower Protection."

Your complaint (was or was not) substantiated. Enclosed is a copy of the report of investigation, redacted to exclude information exempt from release under the Freedom of Information and Privacy Acts.

Under 10 U.S.C. 1034, you may request review of the matter by the [enter appropriate Board name] (board abbreviation). Should you wish to do so, complete and mail the enclosed application (DD 149) to the [Service] address listed on the reverse of the form.

Should you have any questions, please contact [Mr./Ms. Investigator or Supervisory Investigator name], [investigator title], at [phone number] , DSN [number], or email at [email address].

Sincerely,

Enclosures:
As stated

cc:
OUSD P&R Chief of Staff
DoD OIG WRI
[Board abbreviation]