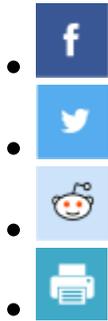


HOW HUD WILL ATTACK YOU IF YOU EXPOSE CORRUPTION AND HOW TO DEFEND

by [Nick Schwellenbach](#)



Whistleblowers do a difficult thing: They often put their career and livelihood at risk standing up against their organization and disclosing information that may embarrass their colleagues and supervisors. They may find it difficult to get another job in their field. And coworkers who once were friends often shun these employees socially. Most whistleblowers don't have movies made about them.

However, the decision to blow the whistle can be immensely patriotic. It could save lives, defend our constitutional rights against government overreach, and help preserve our democracy.

Over the last month, a number of articles have sketched out the legal protections that federal employees have if they blow the whistle and are retaliated against. But how do you blow the whistle and avoid retaliation? And if you end up facing reprisal from management, how do you maximize your chances of surviving professionally? This article aims to provide some general guidelines and practical considerations for federal employees who may ever consider making a disclosure of wrongdoing.

I recently left a government office that reviewed whistleblower disclosures and investigated complaints of retaliation, the [U.S. Office of Special Counsel \(OSC\)](#). My current organization, the [Project on Government Oversight \(POGO\)](#), was founded by Pentagon insiders concerned about the Department's procurement of ineffective and overpriced weapons. Throughout POGO's history we have served as a resource to federal whistleblowers and promoted improvements to better protect military, civilian, intelligence, and contractor whistleblowers.

Employees at many agencies are concerned about this administration. Many people are reaching out to POGO for the first time to learn about how to safely and meaningfully disclose wrongdoing. This article is an on-ramp for understanding whistleblower protections and some of the practical risks many face in trying to do what is right.

A couple issues upfront: This article is geared toward most federal civilian employees in the executive branch under the framework of [statutory whistleblower protections](#). However, the considerations discussed below generally apply to other types of employees too. And while there are similarities in legal protections and how whistleblower reprisal investigations work in the [FBI](#), [intelligence community](#), [contractor](#), and [military](#) contexts, there are significant differences as well (including the fact that intelligence contractors do not have protections). Anyone thinking about blowing the whistle should strongly consider talking to experts at [POGO](#), the [Government Accountability Project](#), or [Public Employees for Environmental Responsibility](#).

The following is not legal advice—for that, seek the services of an [attorney with relevant experience](#) who can speak to your specific circumstances. For those seeking very in-depth legal information, please see Special Counsel Carolyn Lerner and Jason Zuckerman’s paper, [“The U.S. Office of Special Counsel’s Role in Protecting Whistleblowers and Serving as a Safe Channel for Government Employees to Disclose Wrongdoing.”](#) It extensively details the prohibition on whistleblower retaliation in the federal workforce, which is the eighth [“prohibited personnel practice”](#) under the relevant federal statute. [5 U.S.C. § 2302\(b\)\(8\)](#). Let’s turn to the fundamentals and practical concerns.

Whistleblower Reprisal Investigations - 101

First—**What’s a protected whistleblower disclosure under the law?** For federal employees, you are protected for disclosures where you have a *reasonable belief* of:

- A violation of law, rule, or regulation (this includes the Constitution);
- Gross mismanagement;
- Gross waste of funds;
- Abuse of authority;
- Substantial and specific danger to public health and safety; or
- Censorship related to scientific integrity that evidences one of the above categories.

Major caution: Policy disagreements themselves are not protected disclosures under whistleblower law, unless the employee reasonably believes that an executive branch policy creates one of the problems in the bullet points above (e.g. a disclosure about an Interior Department policy that will lead to \$200

million in waste).

A whistleblower doesn't have to be correct to be protected, but they do need to have a reasonable belief in what they're disclosing. This is a relatively low legal bar. But, in practice, the more proof they can offer, the better. Documents trump verbal assertions, especially official documents. First-hand accounts made soon after an event are better than second-hand rumors long after the event occurred.

Thanks to the [Whistleblower Protection Enhancement Act \(WPEA\) of 2012](#), whistleblowers are also protected now if they make lawful disclosures to their co-workers and supervisors even if they are implicated in the wrongdoing. This is particularly significant since most employees raise concerns internally first. The WPEA also [clarified](#) that federal employees don't have to be the first to make a disclosure to receive protections, that their motive does not matter, and that the protections they receive can include disclosures made in the normal course of their job duties.

Some employees who would not have received protection before the WPEA now can. An OSC official recently [testified](#) before Congress that:

...a whistleblower in the Department of Treasury filed a complaint with OSC because of alleged retaliation he suffered after he reported to his supervisor that the supervisor had allowed improper expenses to be incurred by the agency. Prior to the WPEA, his disclosure would not have been deemed protected because it was made to a supervisor involved in the alleged wrongdoing. After the WPEA, however, OSC is able to pursue this case and has an active, ongoing investigation into the claim.

Most federal employees don't set out to become whistleblowers or want to be known as one, they just want their serious concerns to be resolved internally. It's important to emphasize that they're protected under the law too, even if their situation doesn't fit what we normally view as whistleblowing.

What's the relationship between disclosure and reprisal?

The disclosure is the underlying wrongdoing on which an employee blew the whistle (such as the agency wasted millions of dollars) and reprisal is the personnel actions taken against that employee for blowing the whistle (such as the employee got fired by the agency after he disclosed that millions of dollars were wasted). Some individuals make disclosures and don't face whistleblower reprisal. An employee can't face whistleblower retaliation if they didn't make a disclosure (the rare exceptions are perceived whistleblower cases when management wrongly suspects someone is a whistleblower—these non-

whistleblowers can get protections too). For context, in the last major [official study](#) on the topic in 2010, about one-third of federal employees said they faced retaliation, to one degree or another, after being identified as making a disclosure.

Many entities can receive disclosures, but the main place for federal employees to seek relief if they are retaliated against is [OSC](#). If the retaliation involves severe personnel actions such as suspensions of 14 or more days, demotions, or termination, employees can go directly to the [Merit Systems Protection Board \(MSPB\)](#), which is a quasi-court in the executive branch for handling certain employment disputes. When an employee faces lesser employment actions—such as reprimands, suspensions shorter than 14 days, or a change of job duties—they must first go to OSC before having a right to appeal to MSPB. OSC will [evaluate](#) the complaint and, if OSC finds there is a basis to the retaliation claim, OSC will [investigate](#) or [mediate](#) the case. Individuals with retaliation complaints who go to OSC first can appeal with MSPB if OSC closes their case or after OSC has it for 120 days.

My personal view is, even with severe personnel actions, it may be worth it to go to OSC first since they may be able to facilitate a favorable outcome. Retaliation cases often contain a lot of gray area where negotiated settlements are the best way to resolve a case. If OSC's process doesn't yield a good outcome for the employee, they can appeal to the MSPB for a new review. However, it does not work the other way around. OSC does not generally review complaints if MSPB has already decided on the issue, since MSPB is OSC's court of appeal.

It is worth consulting with a qualified attorney in order to file an effective retaliation complaint. In addition to OSC and MSPB, employees can also seek relief through a union's grievance process. But it's important to note that there are [election of remedies issues](#) in certain cases, meaning employees have to choose one venue—OSC, MSPB, or union process—to hear their concerns.

While MSPB and OSC are the executive branch agencies officially empowered to investigate and seek relief for federal employees, congressional offices often play a less official but powerful role in attempting to shield whistleblowers. For instance, [Franz Gayl](#), a Marine Corps civilian scientist who blew the whistle on the lack of armored vehicles in Iraq, obtained relief by working with OSC, a number of Senate offices such as that of then-Senators Joe Biden (D-DE) and Kit Bond (R-MO), as well as GAP and POGO. Senator Charles Grassley (R-IA), chairman of the Senate Judiciary Committee, has been a champion of whistleblowers for decades, and with two House Republicans he recently emphasized in a [letter](#) to President Trump the importance of whistleblowers. Congressional assistance is most powerful for whistleblowers when it is

bipartisan.

What does a reprisal investigation look for?

An investigation seeks to answer four basic questions:

- Did the person make a protected whistleblower disclosure?
- Did they suffer from or were threatened with an adverse personnel action?
- Did management know or suspect the person was the whistleblower?
- Was there a legitimate, non-retaliatory reason for the adverse personnel action?

Many retaliation investigations hinge on that last question. Some factors that may have to be examined are: Did management care about performance or conduct issues only after disclosures were made? If so, that may indicate retaliatory motive. How were other employees with the same performance or misconduct issues treated? If our whistleblower is facing harsher punishment than others with similar job performance problems, that could indicate retaliation. It is helpful for the whistleblower to be aware of these comparisons in documenting and building their case.

Considerations

With the above established, what should an ethical federal employee consider when deciding whether to blow the whistle?

Talk to Your Partner

Would-be whistleblowers should discuss with their spouse or anyone else that might be drastically impacted by the professional consequences of whistleblowing. Move forward with eyes wide open, together.

Anonymity

The classic and often best method for protecting oneself is to stay anonymous as the source of a disclosure that may anger one's management. This can be easier said than done.

The traceability of digital communications have created liabilities for employees wishing to stay anonymous. In response, a number of tools have been created that make it harder to establish the digital fingerprints on information communicated electronically. Right now, there are questions being raised about whether government employees communicating with these tools on official time or involving official business might violate federal records laws. The safest course for any employee *may* be to communicate on private time with a private device using one of these secure tools.

Low-tech means of making disclosures should also be considered and often are preferable. In-person meetings, mailing documents, slipping envelopes under doors. Sometimes the old ways are still the best. They may seem time-consuming, but they could prevent larger (and even more time-consuming!) problems.

Then there's the issue of who knew the information that was disclosed. If the information is widely known within an agency, it might be virtually impossible for management to identify the source. If very few had access, those seeking out the source are more likely to be successful. There are some ways around this challenge. Providing a congressional office or a reporter with enough information to ask the right questions or make document requests might be possibilities to strongly consider. This is often the safest route for insiders since it does not involve actually passing along any documents, including potentially sensitive information.

The anonymous route can make follow-up difficult with whoever receives the disclosure. Reporters, IG investigators, and congressional offices may want to know who the source is to assess the disclosure's credibility and to ask questions. While there are situations where one-time anonymous disclosures lead to changes, they typically do not. Figuring out how to communicate while preserving your anonymity can be key to making an impact.

Another potential downside is that if a whistleblower is later retaliated against and they can't show that the person who retaliated against them knew they blew the whistle it poses a challenge to their retaliation complaint.

For more, please review "[The Art of Anonymous Activism](#)," by PEER, GAP, and POGO. The book's discussion of the federal whistleblower laws is now out of date, but the rest of the book generally is on point.

When Being Public Might Make Sense

Sometimes the negative publicity that can stem from retaliating against a whistleblower can give an agency pause. The choice to go public can make sense when management knows who the whistleblower is even if they attempted to stay anonymous. But managers have long memories and when the story fades from the headlines, the press might not be paying attention when management decides to finally take action.

Pros and Cons of the Press

The press often pays more attention when there's a person at the center of their story since it helps create a narrative. At times this can lead to better coverage and, in certain circumstances, help protect a whistleblower. But sometimes the

story becomes more about a person rather than the issue that they raised. This can also backfire if an agency leaks information that impugns a whistleblower's motive. It's possible that skeletons in your closet could come out. It may be that individuals with motive to retaliate may make what you might have done in the past appear worse than it was. And going public may raise the ire of managers even more.

Deciding on whether to get involved in a public relations battle is a major decision. I've been involved in a number of cases where it has been critical to a whistleblower's professional survival, including their legal strategy, but it isn't without risk.

It's important that whistleblowers understand most journalists are not advocates. Some consider actively protecting their source to be beyond their role as objective journalists (you may want to find out which do and which don't). Many simply move on to the next story and are no longer interested or available when the hammer falls.

Whom to Disclose To

With some important exceptions (please read below for more), the federal whistleblower protection laws allow employees to make protected disclosures to a wide variety of entities, including the press and the public. Inspectors General (IGs), Congress, the Office of Special Counsel, agency leadership, supervisors, and coworkers can receive disclosures. When deciding on where to go, it's worth considering the substance of the disclosure and what entity is best suited to take appropriate action. Look for offices or reporters that may have conducted previous quality investigations on similar issues. Research their reputation for working with whistleblowers.

Before making a formal disclosure, consider summarizing the essence of the problem in writing in plain English—on one page. Better yet, one paragraph. While there may be a whole story behind the wrongdoing being exposed, get to the point as early as possible. This exercise will help anyone blowing the whistle communicate their concerns succinctly.

Congress and the press can be important allies even when a whistleblower also discloses to an IG or within their agency. With numerous [Department of Veterans Affairs whistleblowers](#), in the [Jason Amerine case](#), and with many other employees, congressional pressure and media coverage were key to protecting whistleblowers and prompting improved investigations of their disclosures.

Be Careful What Information You Disclose to the Press and the Public

Generally, federal employees are protected for making the types of disclosures described above. But the law carves out exceptions for classified information or information “specifically prohibited by law” from public disclosure. For example, this latter provision covers sensitive medical information protected under the Health Insurance Portability and Accountability Act (HIPAA) and tax return information protected under the Internal Revenue Service’s statute. Whistleblowers who disclose these types of information are not protected. Indeed, one can easily be fired for disclosing information prohibited by statute from public disclosure. There are some categories of information created by agency rules and regulations that can still be legally disclosed to the press or the public. In January 2015, the Supreme Court [ruled](#) in favor of an air marshal who disclosed “Sensitive Security Information,” a category of data created by a Transportation Security Administration regulation. The Supreme Court ruled that Congress did not intend to give agencies a unilateral means of defanging whistleblower protections. But there is enough nuance in the Court’s decision to warrant serious caution since some information categories created by agency regulations may have sufficient basis in statute and thus are excluded from whistleblower protection.

However, Offices of Inspectors General, Congress, and the Office of Special Counsel all can receive sensitive information that cannot legally be disclosed to the press. The whistleblowers who disclose to these channels simply cannot be punished for those disclosures.

Whistleblowing Is Not a Blank Check for Misconduct or Poor Performance

For those identified or even suspected as being a whistleblower, they will come under scrutiny from management and co-workers. It’s a human reaction and many well-meaning people become upset when concerns are taken outside of the chain of command, especially when they’re made public.

While overzealous management with animus can likely find a problem with almost any employee, we advise whistleblowers not to hand them ammo. If you blow the whistle, try to do your job the best you can.

That can be hard to do if management and co-workers socially isolate you and make it hard to do your job. But it’s important to try to be as professional as possible despite the hostility that you might confront. In fact, the pressure that may lead to losing your cool and/or not doing your job effectively could be used as justification for discipline. Hostile work environment claims are difficult to establish, especially if there are no official personnel actions that accompany the hostility. But if it can be shown that the hostility was bad enough to interfere with your ability to do your job despite your best efforts, it may be possible to make a viable claim.

Get An Attorney That Works for You

Agency attorneys ultimately work for their client, which they see as their agency and their leadership. Don't count on them if you think you're going to be at odds with management. Indeed, be wary. **They don't have an attorney-client relationship with you** and they are conflicted if such a situation develops. At the end of the day, they know who the boss is.

When looking for a private attorney, find one that has previous experience working on federal employment law. POGO provides a [list of attorneys](#).

Don't Lie—Ever

When dealing with investigators, congressional staffers, reporters, your own attorney, your management, don't lie to any of them, especially if you work in a national security context. If you lie to management or to investigators, it's easily a basis for losing your security clearance—if the government can't trust you, why should you be allowed to see secrets? For many positions, the loss of a clearance is the kiss of professional death. Neither the Office of Special Counsel nor the Merit Systems Protection Board can investigate security clearance determinations due to a Supreme Court decision, *Navy v. Egan* (484 U.S. 518 (1988)). That said, there are administrative ways to have security clearance decisions reviewed separate from the context of a whistleblower reprisal investigation.

Lying to investigators can result in criminal charges too.

If you lie to reporters or congressional staffers, your credibility will dry up quickly with these potential allies. If you lie to your own attorney, you may cripple their ability to defend you.

Taking Care of What's Important

The stress of blowing the whistle can be overwhelming and can take a toll on a whistleblower's personal life outside the office. Many whistleblowers become, understandably so, engrossed by their retaliation case. Prioritize the important people—family and friends—in your life and protect your physical and emotional health. Exercising, hobbies, socializing—these are some ways to renew your psychological well-being.

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All federal employees swear an oath to the Constitution and serve the nation, not any one person or political party. Our system of government and its institutions were designed to provide checks and balances. But institutions are only as strong as the people that give them life—and whistleblowers are the

conscience of those institutions. Hang in there.