

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 reprisal 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 or prepared to make 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 being made or prepared or perceived 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.

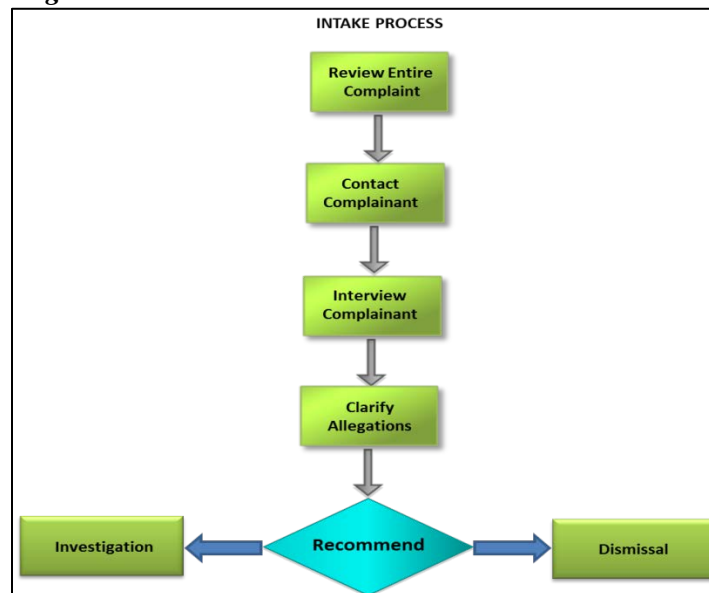
Figure 2.1 - Determining covered PC or PA

WHISTLEBLOWER PROTECTION STATUTES DESK REFERENCE (updated January 2017)			
STATUTE & REGULATION	PROTECTED COMMUNICATION	TO	PERSONNEL ACTIONS
<p>10 U.S.C. 1034 "PROTECTED COMMUNICATION; PROHIBITION OF RETALIATORY ACTIONS"</p> <p>DoD Directive 7050.06</p> <p>A member or former member of the U.S. Armed Forces</p> <p>(text in scarlet describes new statutory protections effective Dec. 23, 2016, NDAA 2017)</p> <p>1 year to file</p> <p>(a) Also prohibits any person from restricting a member of the armed forces in lawfully communicating with a Member of Congress or an IG.</p> <p>180-day letters:</p> <ul style="list-style-type: none"> • 180 days after commencement of investigation and • Every 180 days thereafter 	<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)(A) Member of Congress or Inspector General</p> <p>(b)(1)(B)</p> <ul style="list-style-type: none"> • 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 • The failure of a superior to respond to any retaliatory action or harassment (of which the superior had actual knowledge) taken by one or more subordinates against a member • The conducting¹ of a retaliatory investigation² of a member <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"> • Promotions • Disciplinary/corrective actions • Transfers or reassignments • Performance evaluations • Decisions on pay, benefits, awards, training • Relief or removals • Separations or discharges • Referrals for Mental Health Evaluation • Any other significant changes in duties or responsibilities inconsistent with the member's grade <p>¹ Affirmative defense: "Nothing in this paragraph shall be construed to limit the ability of a commander to consult with a superior in the chain of command, an inspector general, or a judge advocate general on the disposition of a complaint against a member of the armed forces for an allegation of collateral misconduct or for a matter unrelated to a protected communication."</p> <p>² "an investigation requested, directed, initiated, or conducted for the primary purpose of punishing, harassing, or ostracizing a member of the armed forces for making a protected communication"</p>

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, e-mail, 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 or withheld 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 handling.

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.