



Reply to the attention of:

JUL 15 2016

MEMORANDUM TO: REGIONAL ADMINISTRATORS  
WHISTLEBLOWER PROGRAM MANAGERS

THROUGH:

  
DOROTHY DOUGHERTY  
Deputy Assistant Secretary

  
JORDAN BARAB  
Deputy Assistant Secretary

FROM:

  
MARYANN GARRAHAN  
Director, Directorate of Whistleblower Protection Programs

SUBJECT: Clarification of the Express Promise of Confidentiality Prior to  
Confidential Witness Interviews

I. PURPOSE:

This document serves to clarify what Whistleblower Investigators should tell interview subjects who request confidentiality. In all such cases, Whistleblower Investigators must use the phrase, "Your interview will be protected to the fullest extent of the law."

II. STATUTE AND REGULATION:

This guidance deals with 5 U.S.C. 522(b)(7)(D) which provides protection from disclosure under the Freedom of Information Act for:

Records or information compiled for law enforcement purposes [which] could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority of any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source.

The importance of making an expressed promise of confidentiality to witnesses (other than officials representing the respondent) is emphasized in the Whistleblower Investigations Manual, Chapter 3, Section VI., Paragraph H, 4. as follows:

When interviewing potential witnesses (other than officials representing the respondent), the Investigator should specifically ask if they request confidentiality. In each case a notation should be made on the interview form as to whether confidentiality is desired. Where confidentiality is requested, the Investigator should explain to potential witnesses that their identity will be kept in confidence to the extent allowed by law, but that if they are going to testify in a proceeding, the statement may need to be disclosed. Furthermore, they should be advised that their identity may be disclosed to another Federal agency, under a pledge of confidentiality from that agency. In addition, all interview statements obtained from non-managers (including former employees or employees of employers not named in the complaint) must be clearly marked in such a way to prevent the unintentional disclosure of the confidential statement.

### III. BACKGROUND:

An express promise of confidentiality is vital to assuring confidential witnesses that OSHA will take all legal steps necessary to prevent the disclosure of their interview or statement from a FOIA request.

In reviewing the case files under OSHA's Section 11(c) Request for Review program, DWPP observed that Whistleblower Investigators use a wide variety of ways to preface confidentiality interviews.

In addition, during the processing of a FOIA request, it was noted that witness recordings did not provide an express promise of confidentiality. As a result, there is a risk that the interviews could be inadvertently disclosed to the public.

In the interest of safeguarding confidential interviews from disclosure under FOIA, and to improve the consistency of all confidential interviews, DWPP has requested a recommendation from the Office of the Solicitor to help improve clarity and consistency.

### IV. INSTRUCTION

For confidential witness interviews, Whistleblower Investigators are reminded to say (including in audio recordings), "*Your interview will be protected to the fullest extent of the law.*" However, the investigator shall answer questions posed about confidentiality with only the information noted above, as referenced in the Whistleblower Investigations Manual.