

the ART of Anonymous Activism:

Serving the Public While Surviving Public Service



POGO

The Project On Government Oversight investigates, exposes, and seeks to remedy systemic abuses of power, mismanagement, and subservience by the federal government to powerful special interests. Founded in 1981, we are a politically-independent, nonprofit watchdog that strives to promote a government that is accountable to the citizenry.

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GAP

The mission of the Government Accountability Project is to protect the public interest and promote government and corporate accountability by advancing occupational free speech, defending whistleblowers and empowering citizen activists. We also advise public agencies and legislative bodies about management policies and practices that help government deal more effectively with substantive information and concerns, while protecting the jobs and identities of those who provide this critical information.

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PEER

Public Employees for Environmental Responsibility is a private, non-profit organization that protects the government employees who protect our environment. PEER works with and on behalf of these resource professionals to effect change in the way government agencies conduct business. PEER promotes environmental ethics and government accountability.

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Forward

When Paul Revere rode to Lexington to warn Sam Adams and John Hancock that the British troops were coming to arrest them, it is said that a sentry asked him not to make so much noise. Revere responded, "Noise?! You'll have noise enough before long." After successfully warning the citizenry, Revere was himself arrested. During this famed ride, Revere lit lamps and had them hung high in a local tower. I have always preferred the term "lamp lighter" to whistle-blower. We can holler and shout but it's the lamplight that shines on corruption, injustice, ineptitude and abuse of power. We reveal villains as they try to scurry into the woodwork in hiding. We're often told: "Don't make so much noise," but we can reply, "you'll soon hear noise enough before long."

As a plainclothes cop with the NYPD, I was threatened with arrest, detained unnecessarily, and repeatedly harassed by local and federal agents in the U.S. and overseas. This was part of the price I paid as a whistleblower.

Government oversight means dealing with "the little big guys." I say little big guys, because I remember when big shots were exposed, they broke down like little babies. Without the protection power affords, they stood as naked as the fabled emperor.

Cornel West says it takes more courage to muster the exercise of critical intellect than to fight on the battlefield. At a time when Americans are coming dangerously close to losing our individual freedoms in the name of security, I shudder at the thought of living in a country without lamp lighters to ignite the torch of liberty as a beacon, welcoming the assembly of freedom loving people.

We must support and inspire each other. Whistleblowing is no small task we undertake. *The Art of Anonymous Activism* gives us the tools and guidance necessary to "make noise" in defense of our fellow citizens while protecting ourselves from harm. Read it carefully, and light those lamps.

—Frank Serpico

Frank Serpico was a former New York City police detective who revealed widespread corruption in the NYPD. Serpico's efforts to uncover bribery and kickbacks nearly cost him his life, but his testimony at hearings held by the Knapp Commission underscored their findings of institutionalized corruption throughout the police.

Two roads

diverged in a wood, and I-
I took the one less traveled by,
And that has made all the difference.

—Robert Frost, *The Road Not Taken*



Introduction

Today, more than ever, institutions that break the law, commit fraud, harm public health, or pollute the environment have good reason to fear the whistleblowing of a conscientious employee. Depending on the severity of the corruption identified and the skill with which that corruption is presented to the public, a knowledgeable individual can precipitate damaging Congressional hearings, front-page newspaper stories, and major television coverage.

Deciding to blow the whistle—either publicly or as an anonymous source—can be the single most important decision an individual ever makes. It can certainly seem glamorous in light of such publicly-aggrandized individuals like FBI agent Colleen Rowley, Enron executive Sherron Watkins, and tobacco industry insider Jeffrey Wigand. But beyond the limelight of these public icons lies a darker and more likely reality for those who choose to follow their conscience.

Retaliation against federal employees who blow the whistle is widespread and poses a significant barrier to the free flow of information about government operations to the public. According to government surveys, since 1992, one in fourteen federal employees reported being retaliated against in the previous two years for making disclosures concerning health and safety dangers, unlawful behavior, and/or fraud, waste, and abuse¹. Other surveys of government workers reflect a significant non-reporting of problems due to perceptions that such reports will not do any good or will merely trigger reprisal.

In the 1994 amendments to the Whistleblower Protection Act passed by Congress, the director of each federal agency was directed to ensure that “agency employees are informed of the rights and remedies available” under law². Today, more than eight years later, that mandate to educate federal employees about their rights and options largely remains unfulfilled. Consequently, information like that contained in this publication is made available to very few federal employees as part of any post-hiring orientation, supervisory training or in-service training.

However, a more significant problem is that whistleblower laws for federal workers have degenerated to the point that they are counterproductive. For all practical purposes, due to hostile judicial activism they have become a trap creating more victims than they help. Groups that fought for years to pass these laws now must warn whistleblowers that attempting to defend themselves with legal rights may be as dangerous as risking reprisal by blowing the whistle in the first place.

As government institutions and private companies grow larger and less accountable for their actions to the public, the very health of democracy in the U.S. and the long-term viability of its economy depend upon these truth-tellers to shine light on corruption.

The Art of Anonymous Activism is intended to help employees confronting these difficult ethical issues in their work places.

The classic confrontation that this publication addresses is the public servant being forced to choose between conscience and career. At its most stark, the public employee is confronted with a direct order or unmistakable intimation to violate the law or to overlook violations of law. This imposes unpalatable choices between the threat of discipline for insubordination, potential liability for knowingly sanctioning violations of law, or violating the Code of Ethics for Government Service by remaining a silent observer who passively acquiesces to betrayals of the public trust.

This publication provides useful guidance to public employees in order to prevent the occurrence of these irreconcilable conflicts or, in the event that these conflicts arise, to make the best choices available. Thus, *The Art of Anonymous Activism* is a survival guide for public employees. Its most important point is that it is possible to fight wrongdoing from within government agencies without sacrificing your career.

At the same time, the need for public employees to have this information has never been greater. There is a growing movement to repeal civil service protections coupled with a deteriorating appreciation for the underlying values girding the merit system among our nation's top political leaders.

Exposing and resolving problems caused by political pressure within government agencies should not be a job only for those willing to risk their careers. There is a vibrant community of concerned citizen activists who seek to aid these patriots who struggle to serve the public good. *The Art of Anonymous Activism* is an attempt to connect conscientious public servants laboring in office cubicles, field stations and laboratories across the country with their true employers, the American taxpayer.

Three organizations with many years of experience supporting whistleblowers have contributed to this manual—Government Accountability

Project (GAP), Project On Government Oversight (POGO) and Public Employees for Environmental Responsibility (PEER). The fabric of services that these organizations provide to employees has enabled the exposure of hundreds of cases of wrongdoing in the federal government and the private sector. Those services include legal advice and representation, assistance in exposing wrongdoing, the conduct of legal and media campaigns to remedy identified problems, investigative research, and emotional and moral support.

Should you ever find yourself walking the difficult path of the whistleblower, we hope this guide provides some helpful hints to light your way.

Louis Clark, *Executive Director, Government Accountability Project*

Danielle Brian, *Executive Director, Project On Government Oversight*

Jeff Ruch, *Executive Director, Public Employees for Environmental Responsibility*

November 2002

If you must sin,

sin against God and not the bureaucracy.
For God may forgive your sins but the
bureaucracy never will.

—Hyman G. Rickover³



Blowing The Whistle May Be Hazardous To Your Professional Health



Whistleblowers are in the news these days. From Sherron Watson of Enron to Coleen Rowley of the FBI, they are being held up as role models. In movies and magazines, the media glorifies those who risk everything to expose corruption, greed and illegal activity.

But for those who think that blowing the whistle is glamorous or a path to recognition, think again. The vast majority of whistleblowers suffer in obscurity, frustrated by burned career bridges, and never achieving the validation or recognition they sought. Thus, for every success story, there are a hundred stories of professional martyrdom. These prominent, lionized exceptions stand as beacons of false hope for thousands.

Downsides Are Apparent

In a free society nothing is more powerful than the truth. But few paths are more treacherous than the one that challenges abuse of power to try to make a difference. If you are thinking of publicly opposing an action by your agency or openly reporting wrongdoing at the workplace, here are three good reasons to take a long hard look before acting:

It Is Not a Fair Fight

One person against an entire agency or government is a David versus Goliath struggle. In terms of raw power, the agency holds all the cards.

People who speak out loudly and publicly against their agency face very real repercussions in their jobs. Not all of these repercussions are immediately obvious. For every outspoken critic who is immediately terminated, a number of others are simply transferred to a cubicle with no further job responsibilities.

Some people face direct harassment from their chain of command, a concept called “mobbing” where employees face so much daily persecution and negativity that they finally quit. Others are given lateral transfers to isolating or unpopular field offices. Still others face no immediate consequences, but find

over the years that they are repeatedly passed over for promotions in favor of less dedicated employees who have not been branded troublemakers.

In addition, the agency can:

- Take away job duties. This technique is called the “potted palm” gambit because the employee’s new post-whistleblowing duties are as extensive as those of an office plant.
- Blacklist the employee so that he or she cannot find gainful employment in his or her chosen field, and becomes an example to scare others off from the same fate.
- Conduct a retaliatory investigation and charge the person with an offense. Everything from sexual harassment to stealing paper clips is possible, and smears of alleged misconduct similar to what the whistleblower is challenging are most common. There is no limit to the petty depths an agency may be willing to sink (In one case, an employee was charged with gambling at work because he bought a charitable raffle ticket from a colleague). In other instances, the agency will seek a criminal prosecution for theft or misappropriation of government property. Discipline for petty offenses is an effective way to build a damaging record, where agencies must follow progressive discipline.
- Discredit or humiliate the whistleblower by questioning the person’s mental health, professional competence, reliability or honesty. Often the agency can hide behind privacy laws to hint that there is a problem with the employee that the agency is not at liberty to disclose.
- Set the person up. Usually, this means setting the person up for failure by giving impossible assignments and then firing or demoting him or her for non-performance. Sometimes, however, it means setting the person up for a criminal charge, disciplinary action or injury, i.e. ordering people with bad backs to move heavy furniture.

It Often Misses The Point

When agency employees go public with tales of malfeasance, the media spotlight often focuses on a personality to the expense of the issue.

Whistleblowers often find that they have become the focus of the story.

There are a number of problems with this scenario. First, agency heads find it easier to attack the messenger than to address the message. Rather than face the problems brought to light, managers may simply try to focus attention on the “disgruntled employee.” The conscientious employee is

then portrayed as vengeful, imbalanced, or self-serving. Women, in particular, face familiar misogynist accusations—they are “too emotional,” or the Freudian favorite, simply “hysterical.”

Second, if and when retaliatory personnel actions are taken, the battle often plays out on terrain that favors the employer, not the employee. If there is going to be a fight, the last place you want it waged is inside your own personnel jacket. This setting allows the agency to turn the tables and put the employee on trial: Is the whistleblower a good employee? In many instances, the work record of the whistleblower is utterly irrelevant to the issue at hand, but it often occupies center stage in a whistleblower case.

Third, where the employee is fighting to reverse the retaliation, the case turns on questions of labor law [see *The Law—Don't Leave Home Without It!*] such as: Was the termination lawful? Is there a legitimate reason for the transfer? Did the agency abuse its discretion? The underlying question about the employee's charges becomes a subsidiary issue.

So, even if the employee wins his or her case and is restored, it may be beyond the jurisdiction of the court to address the problem that the employee risked a career to bring to light. In other words, the victorious employee may return to an even more hostile work environment that continues to suffer from the same dysfunctional or even unlawful work conditions.

It Often Takes the Best and Brightest Out of the Agencies.

Even the most successful whistleblowers end up leaving the agency, too disheartened to pursue their chosen career. The scar tissue caused by waging the battle often exceeds the fruits of the victory.

Even if the victorious employee chooses to remain, it is almost certain that his or her career path will be forever altered. Agency managers will shy away from giving the whistleblowers controversial assignments, or assignments that carry the potential of controversy, in other words, most of the interesting work.

Thus, winning a particular battle doesn't guarantee the war, because the agency in question may be willing to give up a win early on to avoid a long-term brain drain. The conscientious employees who take career risks to address problems are precisely the people the public is best served by keeping in our public agencies. In whistleblower situations, these good professionals are invariably the first casualties.

While these are three formidable reasons to think before blowing the whistle, the human dimension behind them should not be overlooked. Being a whistleblower is stressful. It is a job stress, as a number of whistleblowers have found, that inexorably follows you home.

Employees who face retaliation most directly (as in termination or harassment) incur psychological as well as financial stress. Less obvious but no less real is the strain from a “mind-game” type of retaliation, as employees are transferred to less interesting projects or have responsibilities slowly removed.

Work pressure puts additional tension on personal relationships. Family members often have a harder time understanding or sympathizing with the less dramatic forms of retribution. It is not uncommon for marriages and other relationships to fall apart in the wake of whistleblowing.

These dynamics can lead to stress-related health problems, including ulcers and headaches, anxiety and fatigue, or alcoholism and other self-destructive addictions.

Check Your Parachutes Before You Leap – A Checklist for Whistleblowers

Notwithstanding the above, sometimes an employee is forced to blow the whistle. As explained in later chapters, oftentimes employees do not even think they are blowing the whistle, they are just doing their jobs but wake up one day to find that they invisibly made a transition from valued worker to Public (Agency) Enemy Number One. In other instances, the employee is put into a situation where he or she has nothing to lose by fighting.

When that moment of realization or decision arrives, take a pause to review the following checklist:

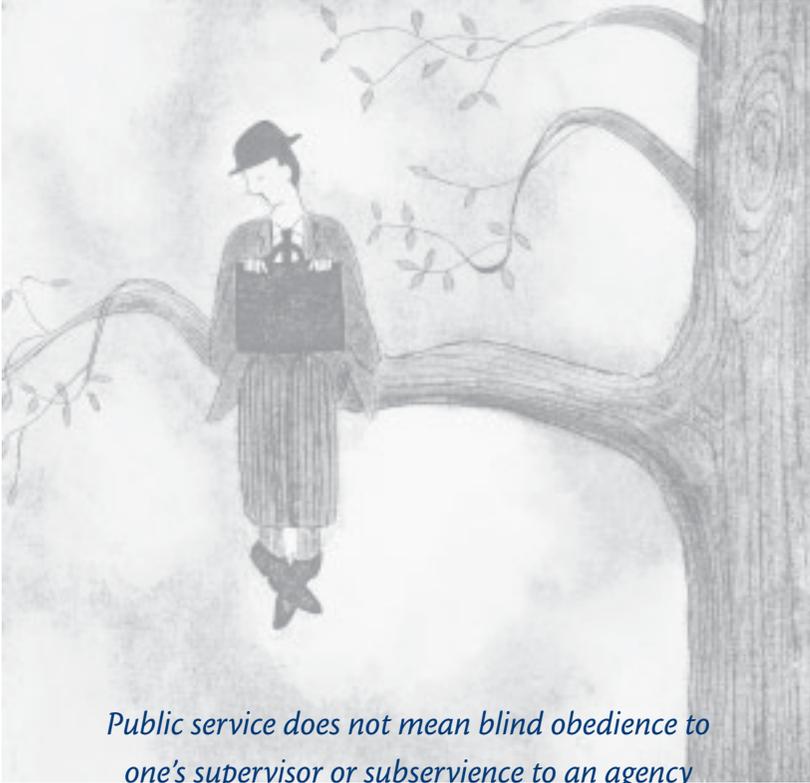
Ten Tips for Potential Whistleblowers

1 Consult Your Loved Ones

As mentioned above, blowing the whistle is a family decision. Before taking any irreversible steps talk to your spouse, your family or close friends—the support group you will need to depend upon in the coming days—about your decision to blow the whistle. If they are not with you, you may want to rethink this path.

2 Check for Skeletons in Your Closet

Any personal vulnerability or peccadillo you possess can, and most likely will, be used by the agency against you. If there is something in your past you do not want to see on the front page of the newspaper, reconsider blowing the whistle. One practical step is to make a copy of the complete contents of your personnel file as insurance that new but backdated “dirt” cannot be later slipped in.



Public service does not mean blind obedience to one's supervisor or subservience to an agency agenda that subverts the law and the public interest.

3 Document, Document, Document

Keep copious records and a daily diary of relevant information, memorialize conversations with letters to the file and maintain a separate set of documents outside of work in a safe place. Your chances of success will likely depend on how powerful a paper trail you produce. After you blow the whistle, your access to agency records may be immediately cut off.

4 Do Not Use Government Resources

Do not engage in whistleblowing activity on agency time, even to defend yourself in a retaliation case unless you have specific approval, such as through a union collective bargaining agreement. Avoid using any agency fax machine or other government resources in making your case. Know

that your workplace computer terminal belongs to the agency and any e-mail or memo on it will be in agency hands soon after you blow the whistle. Also be extremely cautious about using the office phone for “unauthorized” conversations.

5 Check to See Who, If Anyone, Will Support Your Account

Gauge the level of support among your co-workers for the concerns you might raise. Get a sense of whether key people will back up your account. If you can't count on others to later testify as supporting witnesses, you may be well advised to wait before challenging misconduct. Try to stay on good terms with administrative staff members who may be in a position to know of impending agency actions.

6 Consult an Attorney Early

Do not wait until you are in the “career emergency room” before seeking professional help. Like preventative medicine, using a little preventative legal advice can prevent the need for heroic intervention later.

7 Choose Your Battles

Pick favorable terrain for highlighting your issue. Don't sweat the small stuff. Waging a battle over an agency practice by contesting poor performance evaluations or retaliatory disciplinary actions can quickly become a trap. In any personnel action, the advantage is with the employer, not the lone employee.

8 Identify Allies

There is strength in numbers. Do not wait to be isolated by the agency. Share your knowledge with those that might have interest in your evidence. Seek out potential allies before your situation heats up, and work through intermediaries whenever possible. If possible, line up the assistance of sympathetic interest groups, elected officials or journalists. The strength of your support coalition may determine the outcome of the battle ahead.

9 Have A Well Thought Out Plan

Be clear-headed about precisely what you expect to accomplish and how. Do not premise your actions on some vague notion that the truth will prevail. Plan out a step-by-step scenario of what documents should be released when and how agency responses will be perceived. Try to prepare for agency counter-moves by anticipating agency responses to your charges

and mapping out the counter to those charges. The tenor of this first exchange may determine if the immediate battle with the agency will be quick or drawn out.

10 Get Yourself a Little Career Counseling

Map out where your actions will leave you a year from now, two years from now, five years, etc. Plan out the route you want to take and how you reasonably expect your professional path to proceed. There is no doubt that you are about to embark upon a professional journey.

A Better Way—The Path of Anonymous Activism

Throwing away your entire career, particularly if there are other ways to ventilate the problem, is imprudent and counterproductive. In addition, bureaucracies prefer to focus on the “disgruntled employee” rather than the substance of the problem. If you can keep the spotlight on the issue and not on you, there is a much greater chance that the problem will be addressed.

As discussed in the next chapter, there are many effective ways to bring agency troubles to light by focusing on the message without exposing the messenger. This approach is called anonymous activism.

This does not mean baseless accusations thrown from the bushes. The specialists within the agency are the public’s eyes and ears. They are the public’s paid experts. They are usually in the best place to expose agency deception or missteps.

Nor does it imply disloyalty. Most of the employees willing to take career risks over public interest concerns do so out of a deeper loyalty to the agency—they are committed to its mission to serve the public. Public service does not mean blind obedience to one’s supervisor or subservience to an agency agenda that subverts the law and the public interest.

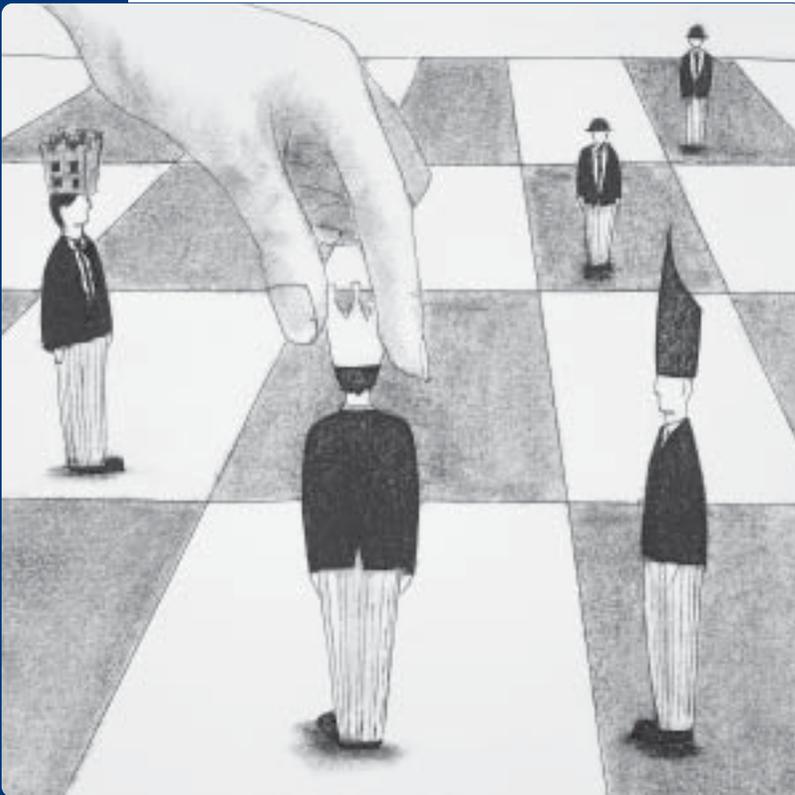
In most cases, it merely means exposing what is occurring behind closed doors in what are supposed to be *public* agencies. A fundamental precept of our system is that the people’s business should be conducted so that the people can learn what is being done in their name.

Invariably, when an agency is under heightened public scrutiny, it seeks to appear as if it is doing “the right thing.” Activists within the agency can ensure that anything happening within the agency can and will appear on the front page of the next morning’s newspaper without agency managers knowing how it got there. Once agency management comes to expect that its inner workings will be routinely exposed, that agency will be drawn towards the path to reform.

Perhaps eventually

we could realize the ideal in which
loyalty to an organization means loyalty
to ethical standards characteristic of
the organization at its finest.

Natalie Daneker, Can Whistleblowing Be Fully Legitimated?⁴



Deliver the Message, Not the Messenger



Embattled employees have several options available to break the bunker mentality that persists in many agencies. While the best offense is often a good defense, employees of conscience can utilize pro-active techniques to spur change in the way agencies conduct the public's business.

Advocacy Partners

In many instances, the evidence of agency misconduct inherently identifies the employee source. For example, a sensitive memo with an extremely small circulation or an e-mail sent to only one recipient. In these cases, public release of the “smoking gun” document would create collateral career damage for the person who is known to have released it.

Unless the document has titanic significance, ending one's career in order to expose one act of misconduct is hard to justify. Particularly when this one act of agency misconduct is part of a larger pattern that will go on uninterrupted (or only briefly suspended) after the furor of the initial exposé blows over.

The key then is to stay undercover and work with others to devise a way to pry loose the critical document in a way that leaves no fingerprints. Sometimes developing and implementing such a plan takes weeks, months or even years. Considering the alternatives, the wait and the effort in planning are well worth it.

By working on their own time with an outside advocacy group willing and able to protect the confidentiality of its sources, internal anonymous activists can maximize their impact. Strict confidentiality procedures coupled with ready legal assistance also work to maximize protection for employees.

Moreover, if the guise of anonymity remains in place, the employee source may be made privy to the agency response or damage control strategy to the very charges the employee launched. This insider role is especially likely when the employee source is the agency expert on the topic and his or her knowledge is needed to craft the agency's defense. Needless

to say, being on the inside of the agency damage control team can be especially advantageous in keeping a controversy alive by exposing deliberate agency misstatements or attempts to perpetrate a cover-up.

In any event, whether working with co-workers, citizen groups or legislative staff, employees should try to pin down specific confidentially commitments before exposing themselves to risks. Some groups that may be less sensitive to the plight of the whistleblower may choose to risk exposing their identity for the greater good. Congressional staff may not realize they are exposing you by aggressively demanding answers to charges that sound much like points you are known to have made internally.

The following techniques of “anonymous activism” have proven to be extremely effective:

Choosing an Advocacy Partner

The best way for public employees to secure their right to First Amendment Freedom of Speech is to first exercise their right to First Amendment Freedom to Assemble. In other words, form or affiliate with an outside group that can provide you with the resources, connections and assistance to address the problems internal to your agency. This outside affiliation is key to effectively utilizing your limited time outside of work.

The outside partner may be a union, non-profit organization or a professional society. Whatever you choose, it is essential that your partner share your goals and priorities, so that your concerns do not have to be subordinate to a pre-set agenda.

The advocacy partner acts as both a shield to protect the identity of employees and a conduit to the outside world so that the employee concerns can be known. This partner may also be able to help identify other allies within your agency.

Classic Example—The Leaked Document

An embarrassing document has been broadly circulated within an agency. An employee who wants to make sure that this document enters the public domain could directly try to contact a reporter with it or could entrust it to an advocacy partner. The partner can negotiate terms for its use with the reporter, organize others to comment about it on the record and publicly follow-up by pushing the agency for a response. The group can also post documents on the web, issue broader press releases and place supportive opinion pieces in local newspapers.

In other words, it helps to have friends.

CASE STUDY: Leaving No Fingerprints

As a James Watt protege with a history of right-wing advocacy, Gale Norton faced skeptical senators during her confirmation hearings to serve as Interior Secretary. She was grilled about whether she could set aside her ideology particularly on high profile issues, such as President Bush's proposal to drill for oil in the Arctic National Wildlife Refuge. To allay those concerns Norton unequivocally pledged to relay only "the best scientific evaluation of the environmental consequences" from oil development in the Refuge.

She lied.

After her confirmation, Alaska's Senator Frank Murkowski wrote Norton requesting her agency's assessment of the effects of oil drilling on the Porcupine caribou herd in the Arctic National Wildlife Refuge. Norton directed Murkowski's questions to the U.S. Fish and Wildlife Service (FWS), which oversees the refuge. FWS reported its conclusions back to Norton but the conclusions did not suit her—so she simply doctored the responses.

FWS employees contacted PEER and provided the group with the paper trail consisting of two letters: one from the FWS to Norton, and the other from Norton back to Murkowski and the Senate Energy & Natural Resources Committee. The contrast between the letters is remarkable. Secretary Norton made 17 substantive changes in what were supposed to have been scientific findings. All of Secretary Norton's changes were designed to minimize impacts of projected drilling activity.

An exposé in *The Washington Post* ran on the very day Secretary Norton was giving a keynote speech at the Society for Environmental Journalists conference in Portland, Oregon. When asked about the discrepancies, Norton got herself into even more trouble by giving misleading answers.

Norton admitted "mistakes were made" but ascribed discrepancies to typographical errors. While she admitted setting aside agency scientific findings, Norton now claimed to be relying on other "peer-reviewed" data. In fact, the data she used was from a non-peer-reviewed study by an outspoken drilling proponent who acknowledged oil giant BP Explorations for providing "encouragement, funding and useful comments" on his research.

This episode helped sink the drive to open up the Arctic Refuge. Moreover, the true sources of the documents were never revealed.

Collective Voice

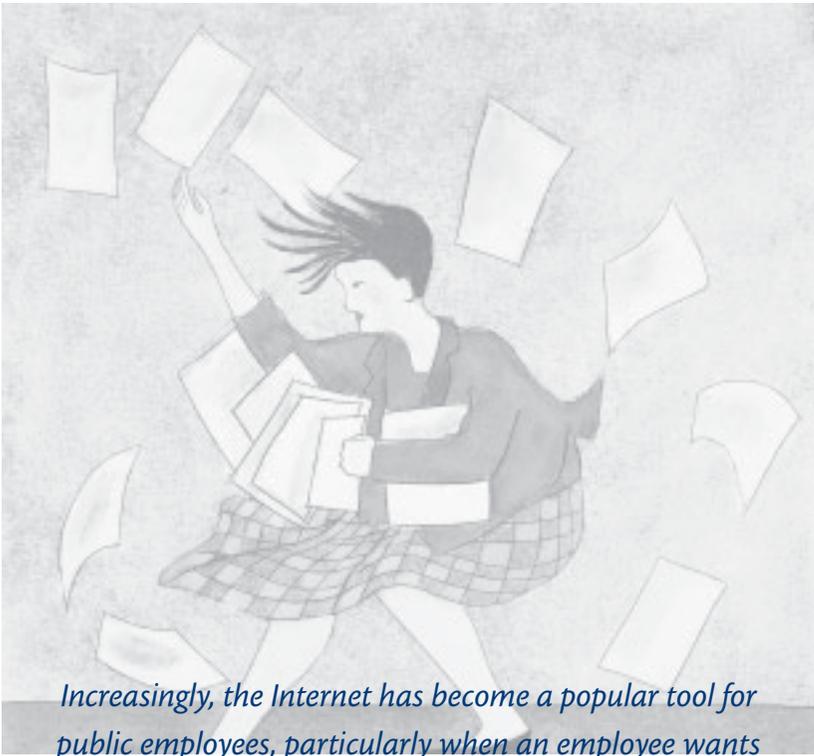
Union organizers know that collective action provides both power and anonymity for members of groups. While bad managers can punish individual employees for simply bringing up problems, both retaliation and smears are more difficult to carry out when a group of employees speak with one voice. The larger the group, the more powerless is management. For example, GAP effectively recruited the President of the Food Inspectors Union to publicly speak for a designated number of whistleblowers, providing cover for those concerned about harassment.

There are a variety of ways to demonstrate this principle in action. One technique is to use *employee surveys* to document or dramatize problems within public agencies without putting individual employees in the spotlight. Surveys are written by a small but representative group of employees. The questions are worded to key in on the most important problems facing the agency.

Once the survey is finalized, an advocacy partner works with employees to distribute the survey, encourage participation, and tabulate the results. The result is a targeted audit of agency leadership, addressed by the people who best know its strengths and weaknesses.

When the results are sent back to survey participants, agency leaders, and local decision makers, the results are also released to the media. As described in Chapter IV, the press amplification helps keep agency leaders accountable to the results, ensure they address the problems identified and make needed changes.

In 1999, PEER conducted a survey of the Wisconsin Department of Natural Resources. The results were astounding. Nearly half the respondents believed that the agency's scientific studies were influenced by politics, and the same number stated that they didn't trust DNR administrators to "stand up against political pressure in protecting the environment." More importantly, more than 9 in 10 respondents called for a restructuring of the agency so that the DNR secretary would not be a direct appointee of the Governor. This call for de-politicization resonated with Wisconsinites, and hundreds of citizens demonstrated outside the state capitol in Madison, calling for democratic reforms at the DNR. Even the Secretary himself, resigning two years later, echoed the survey results, and called for a restructure of the agency.



Increasingly, the Internet has become a popular tool for public employees, particularly when an employee wants to leak a “smoking gun” document that speaks for itself.

There are a number of benefits to conducting employee surveys. Aside from diagnosing problems within the agencies and holding leaders accountable, they often inspire individual employees, who no longer feel so alone in their cubicles, and solicit solutions from the rank and file. Best of all, this is accomplished without threatening the job security of any of the participants.

An Anonymous Publishing House

The problems that vex public employees frequently involve complicated bureaucratic maneuvering to accomplish or conceal misuse of funds, abuse of power, or violation of laws. Sometimes, the general public does not readily understand these stories without some previous familiarity with the issue or the internal workings of the agency.

While seemingly arcane, these problems often have profound impacts on public policy far beyond the internal culture of the agency. One tool to get these insider stories out into the public domain is through the publication of white papers, written by anonymous employees and edited by the communications staff of the advocacy partner to make sense to the public and the media.

The format of a white paper allows a lay translation of technical terms and concepts and provides context for the current details of agency malfeasance. It is an excellent vehicle for making public otherwise exclusively internal agency problems. The editing provides an “English to English” translation necessary to attract and hold the reader’s attention and to explain complex issues in a readable way. The result is a media-friendly report that could only have been written by an insider.

The employee-author(s) remain anonymous, of course, but the advocacy partner works with them to ensure that the facts are well documented. This includes citations to publicly available reference materials and photocopies of internal memos not easily available to the public. These employee-written white papers have formed the basis for litigation, been the subject of legislative hearings and helped shift the tide of environmental policy.

CASE STUDY: Tales of Sludge

Plant employees at the Missoula Wastewater Treatment Plant were told not to report numerous spills, bypasses and potential “backflows” from the plant. The problems threatened not only the Clark Fork River (one of Montana’s best fishing streams) but also risked contaminating groundwater and the plant’s own drinking water. After their pleas to the state and federal environmental agencies went unanswered, they turned to PEER.

Working with that group, the plant employees wrote a white paper, entitled *Fouling Our Nest*, documenting a pattern of questionable management practices, including manipulation of fecal coliform tests, equipment breakdowns, dangerous emissions of methane gas and mercury spills.

Fouling Our Nest explained how problems at the plant remained hidden from the public by a departmental culture of covering up issues and retaliating against those who spoke up. Plant employees described how pollution by municipalities often fell through regulatory cracks between state and federal agencies. The white paper also served as a primer on how sewage treatment

plants work and it outlined the points where checks and balances were breaking down.

Fouling Our Nest sparked a public campaign to clean up the plant and served as a blueprint for a citizen suit filed under the Clean Water Act by PEER and local citizens. PEER settled the lawsuit, with the City of Missoula agreeing to upgrade its sewage system, improve its water quality monitoring and pay \$100,000 for pollution prevention projects and PEER's attorney fees.

Increasingly, the Internet has become a popular tool for public employees, particularly when an employee wants to leak a "smoking gun" document that speaks for itself. Scanned versions of photos or internal memos can set the record straight in a powerful way. Advocacy groups' web sites double as bulletin boards for public employees to post these documents. The documents are supplemented with outreach to relevant agency staff, decision makers and media outlets, with links back to the scanned documents and a brief description of their significance. As with white papers, these web links force agency leaders to address a well-documented message, while keeping the messenger safe.

CASE STUDY: Power of the Web

The power of the web was evident in a recent case involving Berkshire Community College in Pittsfield, Massachusetts. School officials illegally damaged sensitive wetland habitat when they constructed soccer fields. The development had serious impacts on two state-listed rare species. In order to hide this from regulators, the school doctored the contour maps before submitting them to the state. When the original contour map is set beside the altered map, it is clear that all evidence of slopes *inside* the soccer fields have been erased.

PEER posted these two maps on its website, along with a short description and e-mailed the link to state regulators and the press. It has triggered an investigation of the wetlands violations and submission of falsified documents.

GAP also used this device as the hook for congressional and media oversight of attempts to deregulate inspection of domestic and imported government-approved meat and poultry. In reports titled *Fighting Filth on the Kill Floor, Free Trade in Filth and Hamburger Hell*, powerful, graphic evidence available online matched the titles. The images helped to spark public outrage that frustrated serious attempts at industry deregulation over the last two decades.

Pen Pals and Other Surrogates

The leading expert on a particular conservation or other public policy issue is often the state or federal specialist. Unfortunately, that expertise is locked away from the public because many government workers are justifiably afraid to exercise their First Amendment rights to offer public comments on the issue.

If done outside of work time, and using non-governmental equipment, such participation is completely legal (see Chapter V.) But some offices are so politicized that many employees dare not participate in the process. Thus, the public loses out, as the nation's leading experts cannot weigh in. This is doubly ironic in that the public pays the salaries of the experts who cannot speak in public.

One technique employed by advocacy partners is to place their stationery in the employee's hands to draft public comments, administrative appeals, document requests and the comments, appeals or letters under the signature of the advocacy group staff. This form of ghost writing or "pen pal privileges" is a way to free the expertise resident inside public agencies so it can reach the public domain.

Through this technique the agency is forced to openly confront the hard issues it is desperately trying to avoid. We allow these experts to draft the comments based on their expertise, unafraid of political fallout, because the comments will go out under our signature.

Similarly, the most effective Freedom of Information Act (FOIA) requests are the ones crafted by the employees who are custodians of the documents. These employees know precisely what is in the files, what is not (but should be) in the files and the significance of both.

Guided by employee activists, the public can learn of the existence of incriminating documents or other "smoking gun" evidence of malfeasance. Only through citizen awareness of questionable agency decisions will government entities be forced to focus on their mandated duties.

Anonymous whistleblowers can also play a role in tutoring the staff of congressional oversight committees. In addition to ghostwriting document requests, they can draft committee questions for oversight hearings and work with staff to expose any resulting deception.

CASE STUDY: Employees Are The Brains and We Are the Stationery

Dr. Erdem Cantekin was a researcher at University of Pittsburgh on a federally funded clinical trial evaluating the efficacy of antibiotics on children's earaches. He became alarmed when he realized that the lead researcher was personally receiving \$50,000 annually from the drug companies making antibiotics, and was misrepresenting the results of the research. While the data showed no advantage to the use of antibiotics, the research was being presented in support of the use of these drugs.

When Dr. Cantekin raised his concerns, he was ignored. When he submitted an alternative assessment of the research results for publication, he triggered a decades long series of retaliatory measures taken by the University of Pittsburgh. Dr. Cantekin had his computer taken away and his office was moved to a space above a local grocery store.

Today, Dr. Cantekin has an ongoing False Claims Act lawsuit against the researcher and the University of Pittsburgh for the misuse of federal funds. During this battle, Dr. Cantekin began working with the Project on Government Oversight (POGO) to help expose the misinformation spread by drug companies who reap billions of dollars in antibiotic sales.

POGO worked with Dr. Cantekin to draft a report that convinced the Federal Agency for Health Care Policy and Research to change their impending guidelines for pediatricians to include "watchful waiting" as a legitimate alternative to prescribing antibiotics for children's earaches.

Government surveys

confirm that some 500,000 public employees annually witness serious government misconduct but choose to do nothing.

—*Steve Bachrach et al., Who Should Own Scientific Papers?*⁵



Official Channel Swimming: Starting & Monitoring Agency Investigations



One of the most treacherous aspects of public service is navigating one's way through the bureaucracy of filing complaints. The logical place where most employees begin is to disclose the problem to their supervisors.

Even this logical first step is not without peril, however. Under current court rulings, disclosures to supervisors or other disclosures within the employee's professional responsibilities are not protected under federal whistleblower laws (see Chapter V.) So if the employee incurs retaliation for reporting problems up his chain-of-command, he or she may not be able to challenge the adverse action on whistleblower grounds. Conversely, failing to report a problem can also lead to difficulties, particularly if the problem becomes an embarrassment for the agency and the agency starts looking for a scapegoat.

For this reason, a potential whistleblower should seek legal advice before making any disclosures. Advice from legal counsel will inform potential whistleblowers of available protections, and how to best take advantage of them. It will also help them become aware of procedures and deadlines that can extremely frustrating and foreign to a non-lawyer.

If reporting the problem to a first or second line supervisor does resolve the matter, fine. If it does not resolve the matter, then the water for the conscientious employee becomes murkier. The previous chapter's guide on anonymous activism should help make these passages safer.

For those employees seeking to swim these official channels without a lifeguard, the following should be taken as cautionary advice:

Inspectors General: Trivial Pursuits

Every major federal agency has an Office of Inspector General (IG). A primary purpose of the IG is to investigate reports of internal fraud, waste or abuse. The IG staff is usually divided up between financial audits and investigations. In some cases, these two lobes of the IG work in concert, in

other cases, the scope of the IG review depends on what type of staff are assigned to the inquiry.

While the IG touts itself as independent, that is not really the case. At small agencies, the agency head appoints the IG. For larger agencies, the IG is nominated by the President and confirmed by the Senate. The IG reports to the head of the agency and serves at the pleasure of the President. In other words, if an IG is upsetting the Administration's apple cart, he or she can be instantly removed.

The IG's performance appraisal comes from the agency head, who also controls issuance of awards and financial bonuses to the IG. As a consequence, many IG offices are quite political in the selection of cases for investigation and the manner in which its findings are cast.

Many employees view the IG as a kind of knight in shining armor—an outside, objective force riding over the hill to make all right within the agency world. This reliance on the IG to instantly solve problems that employees bring to it is misplaced. The IG is a bureaucracy just like any other, with all the dysfunctions and limitations of your own workplace. In fact, there are numerous instances of whistleblower retaliation within IG offices against its own staff for raising issues.

In addition to shedding unrealistic expectations, employees should be aware that IGs:

- **Have no power.** All the IG can do is identify a problem and then make findings and recommendations. The agency in question does not have to follow (and frequently ignores) IG reports.
- **Do not guarantee confidentiality.** The Inspector General Act of 1978 provides that IGs should keep their sources confidential unless it “determines such disclosure is unavoidable during the course of the investigation.” This somewhat circular exception pretty much leaves disclosure of an employee's identity up to the discretion of the IG (an action for which the employee has no recourse.) Even if the IG does not disclose the employee's identity, per se, it often conducts its inquiry in a way to make the identity of the complainant patently obvious. Witnesses who choose to remain anonymous should negotiate signed written confidentiality agreements custom fitted to their testimony.
- **Lack Deadlines.** The IG can investigate (or ignore) employee reports of wrongdoing at its leisure. The IG controls the investigation; the employee-source does not. Thus, the IG can take a year, two year or

five years to investigate. It may choose not to complete the investigation. If it completes an investigation it can sit on the report, keeping it as a “draft” until it is moldy. Even when it completes its investigation and prints a report, it is under no compulsion to let outsiders know that the report even exists.

- **Avoid Controversy.** IGs prefer to dwell on a \$5,000 discrepancy while ignoring the \$500 million issue with policy implications. Audits involving employee misuse of credit cards or viewing porn sites on agency computers are the type of cases on which IGs appear to thrive. IGs tend to shy away from investigations that threaten to shake up the established powers.
- **Can Turn on the Complainant.** Often, the only real investigation that emanates from the IG centers not on the problem but instead on who raised the problem and why. It is not unusual for the employee who made the report of misconduct to find him or herself the subject of the real investigation.
- **Can Be Used to Retaliate Against Whistleblowers.** In certain agencies, management customarily initiates IG investigations to both discredit and harass employees deemed troublesome. The cloud of uncertainty is unsettling to the targeted employee and sends an unmistakable “don’t get too close to this guy” message to co-workers.

For these reasons, it is rare that the IG actually uncovers wrongdoing within an agency. Far more often, the IG initiates a probe in response to a scandal first raised in the media or elsewhere.

CASE STUDY: Three Inspector General Vignettes

Intensely Political—Department of Interior

Inspector General Earl Devaney slanted reports to curry favor. For instance, an investigation of federal lynx scientists found no evidence of intentional misconduct by the scientists but in the investigation summary Devaney decried the lack of stern disciplinary action for exercising poor judgment. Devaney then attacked the lack of rigor in Endangered Species Act scientific determinations. Both editorial comments had no basis in the IG investigation they purportedly summarized.

On the flip side of the same dynamic, in an investigation of Interior Secretary Gale Norton’s handling of Native American trust fund accounts, Devaney found no misconduct by his boss, concluding:

“We are convinced that in a department whose components are blinded by clouded judgment and crippled by distrust, a singular sinister or conspiratorial plan is impossible to construct.”

Devaney thus absolved Secretary Norton from misconduct charges on the somewhat curious grounds of extreme disorganization. Two months later, a Reagan-appointed federal judge presiding over another trust fund lawsuit brought by tribes to examine the same conduct, held Secretary Norton in contempt for filing false reports, lying about the security of trust fund computer records and concealing her actions.

Using the IG to Hide Conflicts of Interest — EPA

The EPA National Ombudsman investigated complaints about decisions in handling of Superfund sites and frequently exposed agency foibles. As a result, the Ombudsman often faced hostility from EPA management and ultimately became a whistleblower represented by GAP.

In one case, management used the IG’s office to retaliate against the Ombudsman. EPA Administrator Christine Todd Whitman removed the Ombudsman from an investigation and replaced him with IG staff in order to hide agency conflicts of interest concerning the cleanup of a battery recycling operation. Administrator Whitman’s action was prevented after congressional protests revealed that the IG investigator assigned to the case also had conflicts of interest. The Department of Labor later concluded that Whitman’s action was indeed illegal retaliation.

Burned By the Hotline — Department of Defense

Randy Taylor, DOD’s chief petty officer who also served as the chief of police at the Bermuda Naval Air Station, had had enough. He had seen the cover-up of a civilian rape, officers falsifying records and a “party base” out of control. He made an anonymous call to the DOD-IG “hotline.” The next morning he was called into his security officer’s conference room and told that the officer had gotten a call from the mainland — someone had tried to call in the IG. The officer told Chief Taylor to find the caller and plug the leak.

Chief Taylor decided he had to go to the media to expose the problems. Working with the GAP, Taylor persuaded ABC News to film a devastating exposé. Shortly after the program aired Congress acted to shut the base.

Shaking of Jowls: Congress & GAO

Some public employees believe that problems within their agencies would be solved if only they could be brought to the attention of Congress. In reality, only rarely is this the case, and more often the opposite is true.

The U.S. Congress is not an investigative or fact-finding agency. It sometimes conducts what it calls investigative hearings but in almost all cases the investigation has already been completed elsewhere and the purpose of the hearing is to publicly “pile on” to the alleged perpetrators or to dramatize a situation. A quintessential use of this power was the now famous House of Representatives hearing in which all of the tobacco company CEO’s were subpoenaed to testify under oath about their knowledge of the dangers of smoking. This hearing was not so much a fact-finding exercise but an effective display of political theater to put the tobacco industry on the record.

While not an investigative body, Congress—by design—is an unquestionably political entity. It is made of 535 offices loosely organized by party, each headed by an elected official with his or her own agenda. “The Hill” is awash with activity and intrigue: it is a true “short attention span theater” with emphasis on quick turnarounds and one page summaries. The lone public employee seeking to wade into the swirling eddies of Congress faces unknown risks, usually unmatched by reward.

However, whistleblowers can appeal to legislators who want to earn a public spotlight by acting against bureaucratic breakdowns. Legislators have great access to the media, and can bring a national spotlight to the issue. It is also harder to retaliate against a whistleblower whose disclosures are sponsored by a member of Congress. A legislative partnership can be invaluable for the whistleblower, but it is a relationship that must be crafted carefully.

The first point of contact for most public employees and members of Congress is often a letter laying out a problem or issue. What usually happens to letters from public employees is that a copy of the letter is sent over by the correspondence staff of the congressional office to the agency for a response. As a result, the perpetrators of the misconduct may be the ones who prepare the agency answer. This may also confirm for them the identity of the troublemaker within their midst. Before sending sensitive material to a congressional office, a public employee should consider:

- Does the member have a political stake in the matter? Check the member’s relevant voting record and whether the member receives campaign contributions from affected interests.

- Is the member a chairperson or ranking member of a committee or subcommittee with jurisdiction over the issue? If so, the member may have staff that may be knowledgeable and helpful.
- Are you a constituent of the member; or is someone else involved a constituent? Members tend to be more attentive to potential voters.

Once you have decided to approach a member of Congress:

- Be concise but very clear on precisely what action you want taken;
- Provide his staff suggested text they can use (i.e., staff the staff); and
- Be courteous and, if the member helps, profusely grateful.

If a member of Congress, or even better, a committee chairperson takes up your cause it is potentially a huge asset. The caution, however, is that no individual member has any direct authority over the Executive Branch. Thus, even in the teeth of Congressional opposition, an executive agency can still proceed to do the “wrong thing.” Congress does have a few powerful tools, i.e. the power of the purse, but these tools are usually too blunt, awkward or otherwise ill suited to directly address operational issues inside the bowels of the agencies.

General Accounting Office

The General Accounting Office (GAO) is the investigative arm of Congress. Only members of Congress can initiate GAO probes. GAO investigations usually take months to occur, from initial authorization to the release of a final report. Its reports are generally considered authoritative (if not stodgy) and do influence policy. GAO protects the identity of employees who speak with investigators.

Official Disclosures

As discussed in greater detail in Chapter V, the Office of Special Counsel (OSC) is a place whistleblowers can lodge complaints of retaliation. Less known is that OSC is a place where a federal employee can go to blow the whistle. This disclosure function lays out a process for a federal employee to report waste, fraud or abuse.

The procedure is as follows: First, the employee files a disclosure with OSC detailing the wrongdoing. OSC then has fifteen days to review the

information and determine whether further investigation is necessary. If the OSC finds that there is a “substantial likelihood that the information discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety” (5 USC § 1213), OSC immediately informs the head of the appropriate agency of the matter. That agency head is required to conduct the proper investigation into the disclosed matter. The agency head has sixty days (unless the OSC grants an extension) to submit a written report outlining their findings.

This report must include:

- a summary of the disclosure leading to the investigation
- a description of how the investigation was conducted
- a summary of all evidence found during the investigation
- a list of any real or apparent violation
- a description of any action either taken or planned to be taken in response to the violation.

Upon receiving the agency report, the OSC is required to review it and determine if the required information is included and whether the findings are reasonable. The OSC must transmit a copy of the agency report to the employee whistleblower. The whistleblower then has fifteen days from the time they received a copy of the agency report to submit any additional comments to the OSC.

OSC transmits the agency report, any comments added by the whistleblower, along with any OSC comments or recommendations to the President, congressional leadership and the congressional committee(s) holding jurisdiction over the agency. It is also made available to the public in a file at OSC headquarters. If the OSC does not receive the agency report within the allotted time including extensions, they are required to submit all available information to the President and proper congressional committee along with a statement noting the agency failure to file their investigative report.

It is extremely important that the disclosure does not raise issues of personal retaliation if a legal remedy exists in civil service law. Otherwise, raising an issue of retaliation may cause OSC to treat all or part of the disclosure as a complaint and refer it to an entirely different (and even slower moving) staff. In addition, it is usually much more effective if the

disclosure is “pure” and not laced with any notion of self-interest by the whistleblower. For more information about this, please consult an attorney.

There are several strengths as well as limitations to this disclosure procedure.

Strengths

- **It allows agency investigations to be monitored.** As opposed to the “black box” nature of IG or other internal agency investigations, the OSC disclosure process allows the employee a window into the investigation of his or her own allegations. The whistleblower gets a chance to respond to the agency investigative findings, and OSC makes an independent determination as to whether the resolution was responsible.
- **It gives both validation and protection to the employee.** If OSC makes the finding of “substantial likelihood of validity” it certifies that the whistleblower allegations are credible. This is the equivalent of a bureaucratic Good Housekeeping Seal of Approval. Moreover, since OSC is the whistleblower protection agency, any retaliation the employee incurs following the disclosure is presumptively prohibited.
- **There is a confidentiality option.** OSC may not disclose the whistleblower’s identity unless the individual consents or the OSC feels disclosure of identity is necessary due to imminent danger to the public or the imminent violation of criminal law.
- **It’s newsworthy.** An OSC “substantial likelihood” finding provides a media hook for the press to tell a story that might have been otherwise bypassed. One person’s tale becomes less of an editorial risk to print once it has been validated to a certain extent by a government agency.

CASE STUDY: Now It's News

After September 11, 2001, Federal Aviation Administration staff member and GAP client Bogdan Djakovich reported a cover-up of persistent airline security failures in mock raids prior to that date. When the OSC ordered an investigation into Djakovich’s allegations, USA Today issued a front-page story on the finding, which was also reported on the nightly news programs off all four major television networks.

Limitations

- **OSC does not follow its own deadlines.** The small OSC disclosure unit is hopelessly backlogged. That means that scores of employee disclosures languish for months and even years without action. Even when those disclosures are forwarded to the agency, OSC allows the agency to obtain extension after extension so that the 60-day agency response period routinely results in much longer delays.
- **The process has no teeth.** While the disclosure process may be an excellent way to highlight an issue, OSC has no corrective power to force the agency to desist from waste, fraud or abuse.
- **Confidentiality can be illusory.** An agency may very well figure out the identity of an employee-discloser who has requested confidentiality. The agency can then retaliate against the employee while maintaining with a straight face that it did not know the employee was a whistleblower. The only alternative is for the employee to go public. See *One Person Can Make a Difference* on the following page.

CASE STUDY: One Person Can Make a Difference

Dr. Donald Sweeney, a senior economist with the Army Corps of Engineers, single-handedly blew an enormous hole in the Corps' credibility while unleashing a national movement to reform this powerful but little publicized agency. Many had long suspected that the Corps cooked their books but few expected to be given the recipes and a seat in the kitchen to watch the chefs at work.

In a disclosure filed with OSC, Dr. Sweeney, the well-respected creator of a leading econometric model, revealed a secret plan by top officers to illegally manipulate cost/benefit studies in order to justify building a multi-billion dollar expanded lock system on the Upper Mississippi River. His vividly detailed disclosures, accompanied by a sheaf of internal e-mails and memos, generated extensive press coverage, congressional inquiries and a growing debate about the role of the Corps.

Dr. Sweeney's revelations revolved around Corps plans to double the size of the barge lock system on the Mississippi River above St. Louis, as well as locks on the Illinois River. This plan would have far-reaching environmental effects on one of the nation's most important and fragile ecosystems. The putative justification for the project was the need to accommodate increased barge traffic on the rivers — a need Corps brass inflated well beyond any reasonable interpretation of data.

The implications of these uncovered documents go well beyond the Upper Mississippi. They reveal an entire Corps planning process that is, according to its

own economists, “corrupt” and so driven by political expediency that its own economic studies are called “first half irrelevancies” in a game determined not by facts but the dynamics of political pork.

Dr. Sweeney revealed memos from Corps’ top officers that told how “concern was expressed that if we don’t provide for the [barge] industry, navigation program might be moved to the Department of Transportation.” Another memo advised that if one study failed to “capture the need for navigation improvements, then we have to find some other way to do it.”

PEER filed Dr. Sweeney’s affidavit with the OSC that found that allegations of violations of law and gross waste of public funds had “a substantial likelihood of validity” and ordered then-Secretary of Defense William Cohen to immediately investigate and report findings.

Secretary Cohen’s investigation confirmed that top Corps officers illegally manipulated the Upper Mississippi study and recommended that MG Fuhrman, the Deputy Chief of Engineers, and MG Phillip Anderson, the Commander of the Mississippi Valley Division, be disciplined (all have left the service). In addition, a number of independent economic reviews have since confirmed Dr. Sweeney’s criticisms of the cost/benefit studies that were “fixed” by the Corps.

The Freedom of Information Act (FOIA)

The Freedom of Information Act (FOIA) is used to obtain records from federal agencies. Virtually all states also have some form of public records law.

For the employee inside of an agency, FOIA can be a tremendous tool for putting the agency on the record by keeping the “paper trail” behind internal actions alive. If the employee is generating the creation of documents, try to make sure that they stay out of confidential files or that purely factual portions of longer memos are put into smaller memos that are not exempt from the FOIA process.

Employees who receive key records should circulate them far and wide throughout the agency and, where its can be justified, to colleagues in sister agencies. This wide circulation helps keep records in a FOIA-able state. It also makes it much harder for agencies to later deny the existence of documents that have a high likelihood of turning up.

E-mail is another asset in the war for making the public’s business public. Many managers will write candid thoughts in an e-mail that he or she would never put into formal correspondence, yet the e-mail is just as much of a

public record as is an old-fashioned letter. The ease with which e-mails can be forwarded makes it a powerful dissemination tool.

Many employees will e-mail all pertinent documents to a private, home e-mail account, ostensibly to be able to work at home but simultaneously to preserve from later erasure a set of the “smoking gun” documents telling the real story behind agency actions.

On the flip side, anonymous whistleblowers can act as watchdogs for FOIA cover-ups. During investigations of unsafe nuclear facilities, GAP worked with public employees to draft precisely targeted FOIA requests. These employees made copies of the records, and were prepared to alert officials if documents were concealed or destroyed.

Now You Know That We Know

Many times a strategically timed and worded records request is all that is required to nip a bad project in the bud. For example, a public employee in the Dakotas called to inform an advocacy group that a national park had recently negotiated a closed-door deal, allowing an influential farmer to crop-dust a large area adjacent to the park without going through the standard permit approval process. The employee strongly, and rightly, recommended that the proposed pesticide application be prevented.

A Freedom of Information Act (FOIA) request, drafted by the employee, was immediately filed from Washington, D.C. office of the advocacy group asking for a copy of minutes from the secret, closed-door meeting where the deal was struck. Upon receipt of the FOIA request, park officials put an immediate end to any consideration of allowing the crop-dusting to occur because it could no longer be done without fear of discovery. The cost of this operation was the price of one stamp.

“The medium
is the message.”

—Marshall McLuhan⁶



The Medium Is The Message



One of the most effective tools for influencing decision makers is the media. The fourth estate can bring transparency to government agencies and shape public opinion. For these reasons, it is alternately respected, exploited and feared by politicians. Since politicians head public agencies, they are both senders and recipients of messages via the media.

Media can play the role of a leveler. News reports can take disputes out of the stifling air of agency cubicles and into the glare of the public domain. Media coverage can transform a workplace “troublemaker” into a public hero, or reduce a powerful agency head to an embattled figure whose resignation is clamored for. But media exposure can also cause an agency to change its stance on negotiation with you from favorable to unwilling, as it finds itself on the defensive in an embarrassing public forum.

While media can be powerful, the effects of its coverage can be evanescent. The attention span of the public and our leaders can be distressingly short. Try not to let the excitement or ego boost from media coverage undercut the point of your publicity. New distractions compete daily for our attention. The news media is also a competitive business, driven by economic as well as informational dynamics.

If It Bleeds, It Leads

Viewing any local TV news program, reports about violent criminal acts interspersed with traffic accidents seem to dominate. The saying that “if it bleeds, it leads” reflects the value that TV news places on gore. Stories about sexual scandals run a close second, unless they are so salacious as to trump violence.

By contrast, stories about government bureaucracies or complex scientific or technical issues do not usually elicit the same widespread interest or keep viewer attention. As a consequence, coverage of such complex or “wonky” issues are usually confined to less sensational print

media. Only occasionally do these internal agency stories cross over from specialized journals into mainstream TV coverage.

This means that the outlets for any internal agency scandal story may be limited to a handful of journalists. In order to identify that limited pool and effectively work with them to educate readership, consider the following tips:

- **Know the outlet.** Try to figure out whether national or local outlets are the best fit for what you are trying to accomplish. The newspaper or other outlet may have economic ties (such as substantial advertising buys) to the interest you are trying to expose. Research what kind of coverage the issue has garnered, if any, in the past. Also, look at the outlet's relevant editorial policy on the issue.
- **Know the reporter.** Read several articles by a reporter written over time about this or a related issue. Compare the reporter's work on a story with his or her competition. Find out whether the reporter has a reputation for being a hard charger or someone who avoids making waves. Consider the writer's tone—it can be very telling. While the facts may all appear in the story, the tone can lead the reader towards one side of the story or the other.
- **Have the story prepared.** Start by visualizing the headline and lead paragraph of the news story you are trying to produce. Work backward from your bottom line. Write a short, to-the-point summary and back it up with definitive documentation. Respect that the reporter has limited time, so make his research as easy as possible. The key to publicizing problems within an agency is to make the story interesting and clear, so present reporters with a compelling description of the actions and their ramifications for the media audience. Remember to keep the emphasis not on yourself, but on the story.
- **Decide beforehand what your role will be.** Do not contact a reporter until you know whether you want to be quoted in the story or whether you want to stay off the record. It is vital that you know what ground rules you want governing the interaction. For example, "off the record" means that your name can't be used, but identifying information that can be traced back to you is fair game for publications. On the other hand, speaking on "background" protects you from being traced. Pin down your agreement before you have shared information that may reveal you as the source.
- **Set a deadline.** If the information is time sensitive (i.e., you are trying to affect an upcoming agency action or decision), the timetable for its use by the reporter must be part of the initial interaction. Most reporters

have no shortage of items competing for their time and if you leave timing completely up to the reporter, you may find yourself frustrated.

Employees with access to trustworthy journalists may choose to make these contacts on their own, but it is usually much easier and more effective for an employee to use an advocacy partner to make those contacts on the employee's behalf. Advocacy groups have experience working with the press and often keep tabs on journalists who cover specific topics or "beats." The groups can also help package the information and put the story into a larger policy context than an individual employee may be able to do. Lastly, the advocacy groups interact with a number of reporters working the same beat so that the implicit message for one reporter is that the groups can easily go to his or her competition.

Following these steps does not guarantee a news story. Not every internal agency dispute or problem will merit extensive media coverage. Moreover, even if the issue is covered you may not like the result.

Limits of "Bullet Proofing"

An employee who is in the media spotlight enjoys a certain protection from agency retaliation. This phenomenon is called "bullet proofing," meaning that the media scrutiny deters the agency from attacking the employee due to the prospect of even more negative publicity. "Bullet proofing" does provide the employee with some measure of protection — while the media spotlight is still on.

When the spotlights do go dim, the formerly prominent employee may find him or herself subjected to "the death of 1,000 paper cuts" — a series of humiliating but low level harassments, none individually harsh enough to cause a large complaint but cumulatively insufferable.

Reporters Are Not Your Friends

Most reporters are acute observers of their beat. The best add value and context to stories based on disclosures by individual public employees. In some instances, by refusing to take no for an answer (or a non-answer for an answer), a reporter can take a story far deeper with much greater impact than the employee source ever thought possible.

That said, the reporter is not your friend, your advocate or supporter. It is not the reporter's job to find you a lawyer, to get your job back or even to right a wrong. The reporter is just supposed to report the news, accurately and fairly.

Reporters working for news organizations are not free agents. They work in a business with a chain-of-command and idiosyncrasies, perhaps just like your agency. Consequently:

- **An editor may veto or cut a story.** A reporter committed to writing a story cannot guarantee that it is printed at all or that it is printed in its entirety. Often, stories are cut back to fit allotted space and the edits will leave out key facts or analysis. Further, reporters do not write the headlines; a hard-hitting story may be introduced with a painfully lame headline.
- **The agency may get equal time.** In almost all cases, the reporter will want to include the agency reaction or explanation as part of any story. The result may come out appearing as a "He said/She said" standoff, leaving it to the reader to guess who is right. (This is where familiarity with the tone of the outlet is particularly valuable.)
- **The agency may be able to preempt your story.** As the government, the agency has the advantage of being able to, on occasion, make news through a pronouncement or other action. Astute agencies have been known to release an announcement or other breaking news out the front door of its public affairs office to drown out the bad news coming out the back door from employees.

In addition, reporters like to add drama to their stories. In an agency setting, the tortured whistleblower angle can provide the desired human dimension. In some instances, a reporter will demand a live conflict as a condition of writing the story ("Let me know when you are fired and then I'll write," stated one reporter to an embattled employee). In this case, the "hook" or precipitating event for the story is the retaliation against workers. While this approach is sometimes justified, do not allow yourself to be lured into a profile at the expense of the issue. If the story needs a hook, try to avoid having it buried in your back.

Finally, there are times in which an employees' identity is "outed." In rare cases, an overzealous or sloppy journalist has mistakenly named an off-the-record employee source. Or, the identity of the employee becomes known through a revealing description of the unnamed source. More commonly, reporters have quoted employees who thought they were speaking candidly off the record. However such mishaps occur, once that media bell is rung, it

CASE STUDY: Combating a Media Hoax

Reporters work on deadlines, and from time to time they will misquote an important source, refuse to check a faulty assertion of fact or draw an erroneous conclusion. It is well known that newspaper retractions rarely get the same prominence as the original allegation. So, while it is possible to reverse the effects of published disinformation through an information campaign, to do it right takes time, hard work and a whole lot of patience.

One example is the case of lynx biologists in the Pacific Northwest. What started out as a series of inaccurate articles in the *Washington Times*, a right-leaning newspaper owned by the Unification Church, became a national scandal after the stories were circulated without correction by the Associated Press. The *Times* story implied that biologists from the Forest Service, US Fish & Wildlife Service and the Washington Department of Fish & Wildlife had conspired to defraud the public by planting lynx hairs into a wide ranging habitat survey to back some sort of secret environmental agenda.

Before agency scientists had a chance to respond, a number of politicians jumped into the fray, demanding hearings, investigations and even firing the scientists involved. Newspapers throughout the West joined the chorus, calling for removal of the scientists before the facts had been investigated. By the time PEER got involved (two weeks later) the story was dominating talk radio and Capitol Hill.

It turns out that the scientists had actually simply submitted “blind tests” to test the accuracy of a lab—a procedure long accepted as a crucial part of the scientific process. There was no attempt to plant lynx hair or change land use management. PEER quickly developed information sheets for media outlets correcting the many errors with the story and worked one-on-one with an array of investigative reporters, federal agents and media watchdog groups.

Nine months after the allegations were made, four separate federal investigations and an ethics review by a professional organization had all cleared the biologists of wrongdoing. By this time, the media coverage was starting to catch up. Articles with titles like “Lynx, Lies and Media Hype” and “Debunking Lynxgate” began to appear in national magazines. Editorial boards wrote about the biologists as victims, and some radio shows actually apologized for their role in spreading the misinformation. Over time the truth can come out but, without a concerted education effort, a number of careers can be destroyed in the interim.

cannot be undone. For that reason, a public employee should be cautious when interacting with the media.

The Morning After—Yesterday's News

Rarely is media coverage an end unto itself. Rather, it is just one component of a larger effort.

Often, the moment of greatest leverage with an agency is just before a news story runs because the agency may be willing to take steps it would otherwise not take in order to avoid the exposure. Conversely, the day after the story runs, the agency may be set in a defensive posture, unwilling to take any steps that imply an admission of guilt.

If the employee's goal is to correct a problem, he or she should attempt to clearly visualize how that will be accomplished and precisely what role media coverage will play. In other words, it is important to think of the process in terms of a campaign. Very few problems within agencies evaporate simply because they have been the subject of one article in the newspaper. Most agencies can shrug off one story, or even one week's worth of stories. It usually takes sustained media exposure to effect change.

If sustained coverage is necessary, the employee activist must plan for an entire campaign and not just the first step or a single story. In order to generate a series of stories, a lot of raw material must be assembled and then refined down to individual news bites. Once an arsenal of "ammunition" has been stockpiled, it should be released over time so that each explosion reinforces the effects of the one before it. Spacing the intervals between "hits" gives the agency ample opportunity to do something counterproductive, such as putting forth a demonstrably untrue fact in its defense, instituting a gag order forbidding employee contact with the media or otherwise overreacting in a way that defers attention from the underlying problem.

If done successfully, the deepest wounds on the agency will be self-inflicted. After a few weeks or months of unrelenting bad news, media accounts may start to refer to the agency head as "embattled" or "beleaguered." At that point, support for the agency may erode as political patrons shrink from away from the prospects of guilt by association.

Sustained media attention also tends to spawn official investigations (see Official Channel Swimming) that add even more pressure onto agency leadership. Each investigation not only becomes a new, separate story but each may provide a new forum to air new allegations.

Driving each development is more media coverage. Each new story will recount the previous developments, like an arrest rap sheet, so that the allegations continue to build toward a climax.

For the employee(s) who seek to direct such a campaign from inside the agency, extreme caution is in order because the agency leadership will correctly see its professional survival at stake.

CASE STUDY: "Ed" and the Superconducting Super Collider

Working with the POGO, an anonymous whistleblower provided documents that ultimately generated major media attention leading to the cancellation of the Department of Energy's (DOE) wasteful multi-billion dollar Superconducting Super Collider project.

POGO only knew the whistleblower as "Ed," although that wasn't his real name. "Ed" would call POGO every other day at a certain time, and would mail documents in plain envelopes. It was very important to have that phone contact with him, not only so that he could let POGO know what was happening, but also so that he could answer any questions the organization had about the documents he sent.

The Supercollider scandal reached a crescendo when "Ed" mailed POGO a draft DOE Inspector General report concluding that 40% of federal money spent on the project to date had been either wasted or misspent. Expenses paid with taxpayer money had included \$35,000 for a holiday party and \$56,000 for decorative potted plants. POGO received the report on a Monday and was able to place several national media stories resulting in a House of Representatives vote to kill the project by Friday. Many members of Congress cited the Washington Post story as their reason for voting to kill the project.

But no good deed goes unpunished. Then-Secretary of Energy Hazel O'Leary launched an investigation to determine the source of the document, sending Inspector General officers with badges to POGO's doors demanding to know the identity of the whistleblower. POGO refused to comply, and "Ed" remained anonymous, even to the POGO staff.

Ironically, "Ed's" efforts exposing the multi-billion dollar waste ultimately led to him losing his job, as the program was cancelled. He later called POGO to let them know that he was all right, had found a good new job, and was proud that he was behind the cancellation of the biggest – and most wasteful – government contract in history.

“The law
is an ass”

—*Charles Dickens, Oliver Twist*



The Law—Don't Leave Home Without It



Legal Disclaimer: The material in this guide is provided for informational purposes only. Nothing in this publication should be construed as legal advice on any employment-related matter. Before acting on any of the material in this guide, the authors *strongly* urge you to seek legal counsel.

In one sense, government employees in the United States are among the most legally protected workers on earth. Because they work for government they are protected by the First Amendment on the job in a way in which their private sector counterparts are not. Most civil servants are also covered by laws that accord procedural due process, seniority rights and “merit system” protections. In addition, whistleblower protection laws prohibit retaliation for employee reports of wrongdoing.

Notwithstanding this array of legal guarantees, the climate inside many public agency workplaces—particularly on controversial matters with heavy political implications—is one of rigid information control, an oppressively authoritarian atmosphere and pervasive insecurity.

How This Chapter Is Organized

This chapter presents a brief overview of the legal terrain on which public employees operate, with a particular emphasis on laws affecting federal workers.

Depending on the situation, the law can be a tool or an impediment, a sword or a shield:

- The first section, Rights & Options, discusses employee rights to speak both inside and outside the workplace. This section provides a brief, non-technical “how-to” guide of how to invoke these laws, and includes a discussion of their strengths and limitations.
- The second section, Danger Zones, outlines some high-risk areas for conscientious employees. It highlights approaches agencies often use to

eliminate “troublemakers” and lists some things the prudent employee should avoid.

- The third and final section, Legal Lane Changes, focuses on the effect that citizen suits and other litigation against an agency can have on unwary employees.

Rights & Options

A subcompact car enters an intersection under a green light. A careening semi-truck runs a red light and smashes into the small car. The subcompact clearly had the right-of-way but is nonetheless squashed.

In the same way an employee may be in “the right” in speaking out, but an individual employee is often no match for an out-of-control public agency careening over a career. The law can be a powerful tool an individual can use to subdue a rogue agency but if all that the individual has on his or her side is the law, it is often not a fair fight.

This guide is meant to give tips in how to level the playing field.

When Simply Doing Your Job Requires a Profile in Courage

When one thinks of a “whistleblower,” images from movies like *The Insider* or *Erin Brockovich* come to mind—determined individuals risking all to report explosive disclosures before Congress or on *60 Minutes*.

The vast majority of civil servants labeled as whistleblowers never thought of themselves in that role. In their minds they were simply doing their jobs.

Increasingly, the line between simply doing what is right and being a whistleblower is becoming blurred, particularly as society changes its expectations about how government workers should serve the people.

When Doing Your Job IS Blowing the Whistle

When an agency is under political pressure to do the wrong thing, its scientists, land managers and law enforcement officers are caught in the middle.

A typical setting for political pressure that we see involves a multi-million dollar project hinging on the evaluation of a single field biologist. The field biologist, in essence, holds the future of the project in his or her hands. In this way, even lower level field specialists can be found at the apex of intense political pressure.

In a growing number of cases, unfortunately, that staff member cannot count on support from his or her chain-of-command in making a profes-

sional assessment. Thus, agency professionals are increasingly at career risk simply for doing their jobs.

Three examples from the U.S. Forest Service illustrate:

- The agency's leading goshawk scientist in Arizona had an up and coming career until his research on the amount of undisturbed land area required for a successful mating pair of the birds was used by local environmental groups as evidence in a lawsuit against proposed timber cuts. In order to defeat the suit, the Forest Service set about not only discrediting its science but its own scientist. The researcher was forced to move to Alaska to save his job. Through no action of his own, except what he had been doing for years, this scientist went from "Golden Boy" to "Public Enemy Number One" in a twinkling solely because his work had become institutionally inconvenient.
- Similarly, a botanist on a North Carolina national forest ended her career by discovering rare plants in an area slated for a timber sale. After she refused to renounce her find, she was confined to doing all future plant surveys in the dead of winter until she finally quit in disgust.
- Forest Service special agents who uncovered massive commercial timber theft in Oregon and California all lost their positions in a curious re-organization. Today, the Forest Service has no single unit dedicated to investigating corporate timber theft on our national forest system. The agency explained that such a unit, of any size, is not cost-effective and deprives the agency of maximum flexibility in its use of investigative staff. Not surprisingly, the agency has stopped bringing multi-million dollar timber theft cases for prosecution.

None of these people considered themselves "whistleblowers." They were simply doing their jobs and got caught sideways in agency politics.

Although the difference between whistleblowing and doing your job is often only slight, it is a distinction that will be a recurring theme throughout this chapter.

One Size Does Not Fit All

Each case is different. Applying the law to the facts of any one case is often an unnatural exercise of trying to fit a messy melange of real life circumstances into a neat and narrow legal box. In many instances, the situation an employee faces may be a mix of retaliation for sticking to principle mixed with discrimination on the basis of gender, age or disability.

The 1st Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Going to work for a public agency does not require one to surrender the rights of citizenship. Despite appearances to the contrary, civil servants are protected by the Bill of Rights just like everyone else. In fact, because they work for government, in some ways, civil servants enjoy greater constitutional protection on the job than do their private sector counterparts.

One area of greater protection is the 1st Amendment. Since Congress may “make no law” prohibiting free speech, that prohibition includes laws affecting those working in the federal agencies that Congress charters, funds and oversees.

Like most rights, free speech as guaranteed by the 1st Amendment is not absolute. As Justice Oliver Wendell Holmes famously opined, free speech does not allow one to shout “Fire” in a crowded theatre. There must be a balancing of interests in deciding when speech can be limited.

In a governmental setting, drawing that balance can be complicated and case-specific. For a public employee to invoke protection under the 1st Amendment, a court must find that the public benefits from their exercise of free speech (i.e., political and social importance of the speech) is more important than the government’s interest in maintaining efficient operations without disruption.

This distinction can be problematic. For example, most agencies have designated media spokespeople as well as rules that all press interviews with employees must be coordinated with a public affairs office. So, an employee who speaks to the press as an agency representative without permission or in violation of agency protocol will likely be deemed to be disruptive, no matter how much of what he or she says is of public concern. Further, ensuing personality conflicts from dissent qualify as disruption, and hard feelings are almost inevitable among the targets of a whistleblower’s disclosure.

For that reason, the employee who is speaking outside of the workplace as an individual is more likely to enjoy constitutional protection. Generally speaking, public employees may not be disciplined for engaging in public discourse that has nothing to do with their jobs.

The First Amendment

The First Amendment is not without limits and those limits are murkily defined. In a public agency context, employee speech is protected so long as it does not impair the efficient functioning of the public agency.

The seminal case in this area is *Pickering v. Board of Education of Township High School District*.⁷ In *Pickering*, a public school teacher wrote a letter to the editor in local paper that opposed a proposed tax increase and was highly critical of the school board's management of funds. The teacher, *Pickering*, was fired for writing the letter.

Lower courts ruled that *Pickering's* speech was not protected by the 1st Amendment because his voluntary acceptance of the teaching position obliged him to refrain from making critical statements concerning the school's operation. The Supreme Court reversed the lower courts' rulings, finding in favor of the teacher. The Court said his comments were indeed of legitimate public concern and that this outweighed any disruption in normal operations his comments may have caused.

In an important aside, the Court noted that since *Pickering's* statements were in no way directed towards any person he was normally in contact with in the course of his employment, issues of efficient operation were absent.

While remaining the leading case in this area, *Pickering* does not create any bright-line rule to resolve similar disputes.⁸

It is the off-duty disclosures about the internal operations of the agency that is most often at issue. For example, off-duty speech that discloses classified information, compromises an ongoing investigation or violates confidentiality will fall outside of constitutional protection because they clearly disrupt the efficient operation of the agency.

In the context of whistleblowing, however, there is an inherent tension between an employee's open disclosure of a matter of compelling public concern and the resultant embarrassment to the agency. By disclosing misconduct or inefficiency, the employee often hopes to disrupt agency operations in order to change them for the better.

Limited Utility

In a government context, the First Amendment has greater utility in addressing a general restriction on free speech than it does as a remedy for the actions of an individual employee. Courts place a heavier burden upon a government agency to justify a prior restraint on speech, such as a gag order (see next section).

First Amendment claims are not available to federal employees in court, because the Supreme Court has held that the civil service administrative law system replaced fact finding by a judge or jury⁹. Since many of those remedies are slow acting, this roadblock will place application of the First Amendment outside of the realm of practical usefulness.

CASE STUDY: The Case of Matt Chew

In the spring of 2000, Arizona States Parks officials fired an employee because he authored an essay in the *Boston Globe* about a very popular new park, Kartchner Caverns. State Parks Director Kenneth Travous ordered the termination claiming the piece brought “discredit and embarrassment to the State.”

The employee, Matt Chew, has worked for State Parks for the past 7 years as a coordinator for land purchases and preservation of natural areas. His essay, which the *Globe* entitled “A Theme Park Grows Beneath the Ground”, discussed the trade-offs inherent with high human visitation in natural places.

Matt Chew’s essay was a thoughtful discussion of an important matter of public policy. “I have a constitutional right to express my opinion and I did not intend, nor do I believe my essay does, bring any discredit on the state or the people who work for it,” commented Chew.

Little more than two weeks after Chew’s essay appeared in the *Globe*, Director Travous proposed that in lieu of dismissal Chew could first resign and then “enter into an Independent Consultation Agreement” for \$10,000 if Chew would promise to “refrain from any further communication with [the media] regarding the past, present or future activities of Parks or its employees...” The document also provided that the terms of the agreement must remain secret. Matt Chew refused the offer of hush money and was fired. He called PEER.

Within 36 hours we assembled a legal team in Arizona, anchored by one of the best law firms in Phoenix. Our challenge to the termination was based on free speech guarantees in both the state and federal constitutions. Exhaustion of remedy requirements meant that the dismissal had to be reviewed by the State Personnel Board before any court challenge could be filed.

On the eve of the appeal hearing in early May, state officials caved—Arizona State Parks reinstated Matt Chew with full back pay.

For employees undergoing daily, low level harassment due to the circumstances of their jobs, First Amendment litigation may not be a practical avenue. Even if litigation is an option, application of the “balancing” test by individual judges can be highly subjective. Therefore, the outcome to litigation is never predictable. It is always best for an employee to first consult an attorney before acting under the assumption that the First Amendment will block any possible agency retaliation.

Anti-Gag Statutes

Every year since 1988 Congress has reenacted a prohibition developed and championed by GAP against the use of federal funds to implement or enforce gag orders that would cancel or supersede statutory free speech rights. Since this “anti-gag” provision is part of an appropriations bill, it only has effect for that fiscal year (which is why it has to be reenacted each year).

Congress started enacting this language to counterattack efforts by the Reagan Administration to force Executive Branch employees to sign wide-ranging “nondisclosure agreements.” Unless legislatively counteracted, courts have generally allowed agencies to refer to these agreements through disciplinary action or, in some cases, civil lawsuits for breach of contract.

So, if you are asked to sign any kind of nondisclosure agreement or “gag order,” proceed cautiously, take it seriously and consult an attorney to learn the statutory and constitutional limits on its enforcement before signing.

Civil Service Laws & Collective Bargaining Agreements

Knowing one’s overall legal terrain is a good first step in deciding how to approach potentially contentious employment situations. For example, civil service laws, at all levels of government, extend basic guarantees of procedural fairness or due process.

This means:

- the right to notice before an action may be taken against you
- an opportunity to respond
- usually, a right to appeal any action up the chain-of-command of the agency.

Virtually, every jurisdiction also has an administrative civil service board to hear appeals from agency final decisions (more details below.)

In addition, civil servants have the right to notice concerning internal investigations in which they are the target and, generally speaking, have the right to bring a witness, lay representative or counsel (or to tape record) investigative interviews.

Collective bargaining agreements and union representation can supply additional dimensions of protection and support. Collective bargaining agreements permit independent arbitrations to challenge any violation of merit system rights in civil service law, with decision makers selected through a mutual strike consensus process. Because the arbitrators are not Executive branch employees, their increased independence has made arbitration hearings by far the most favorable chance for federal whistleblowers to have a fair day in administrative court. Unfortunately, the party in collective bargaining arbitration is the union, not the individual employee. That means the individual whistleblower has no control of his or her rights, and the litigation can be arbitrarily abandoned if the union and management decide to scuttle it behind the employee's back. Enforcing the terms of a collective bargaining agreement can also invoke various "fair dealing" provisions of federal and state labor law.

The Whistleblower Protection Act

The passage of the Whistleblower Protection Act (WPA) of 1989 marked a concerted attempt by Congress to shield federal civil servants from retaliation for reporting misconduct. Congress passed the WPA unanimously in 1988, only to have it pocket vetoed by outgoing President Reagan. The next year Congress again unanimously put a stronger version of the bill back on President Bush's desk and he signed it into law.

What Is Covered (and What Is NOT)

The WPA defines "whistleblowing" as any disclosure evidencing a violation of any law, rule or regulation, gross mismanagement, gross waste of funds, abuse of authority or substantial and specific danger to public health or safety. The law states that an employee must make a disclosure that he or she reasonably believe evidences such actions have taken place to gain protection under the WPA. The Act also bans retaliation against an employee for refusing to obey an order to violate the law.

The WPA applies to present employees, former employees and applicants for employment with federal agencies. Like most civil service statutes, it limits protection only to defined instances where agencies take or fail to take personnel actions because of that disclosure including termination, demotion, suspensions or other disciplinary actions, transfer, decrease in job duties or responsibilities, treatment inconsistent with salary or position within the agency, adverse decisions regarding promotion, reviews, benefits, awards or raises and psychiatric referrals.



Within a collective bargaining agreement the individual whistleblower has no control of his or her rights, and the litigation can be arbitrarily abandoned if the union and management decide to scuttle it behind the employee's back.

WPA does **not** protect employees for:

- Doing your job by administering the law (versus disclosing violations);
- Expressing reasonable scientific conclusions; or
- Adhering to professional ethical standards.

Protection would also be denied if laws, such as those that forbid the public release of classified information, otherwise prohibited the disclosure.

New Restrictions—Going Beyond the Call of Duty

For an employee to receive protection under the WPA, the employee's disclosure must address an issue that goes beyond the realm of assigned job responsibilities—placing one's job at risk.

The employer must have knowledge of the disclosure and the disclosure must be a clear contributing factor to the subsequent personnel actions taken. Once the employee has established these requirements, the burden shifts to the government to show by clear and convincing evidence that the personnel actions would have been taken regardless of the whistleblower's disclosure.

The WPA contains serious loopholes. For example, government contractors are not covered. Nor are FBI employees who instead must rely on an in-house "separate but equal" system.

In addition, although Congress wrote the law to protect “any” disclosure which the employee reasonably believes is evidence of listed government misconduct the Federal Circuit Court of Appeals has ruled that “any” does not include disclosures to co-workers, suspected wrongdoers, supervisors within the chain of command, information in connection with job duties, policy misconduct, or any misconduct if the employee is not the first to raise the subject.

Election of Remedies

The first choice an employee seeking whistleblower protection must make is where to file a disclosure. For a civil servant who is covered by a collective bargaining agreement, the WPA provides that the employee may seek binding arbitration pursuant to that agreement.

Binding arbitration is relatively quick, is usually paid for by the union and is a good means to equalize a one-sided situation. On the other hand, binding arbitration is binding—there is no appeal and both sides have to live with the result.

If the employee first files a disclosure with the Office of Special Counsel (OSC), he or she gives up the binding arbitration option. Conversely, if the employee seeks binding arbitration, he or she is precluded from going the OSC route. Like the proverbial fork in the road, this initial choice, or election of remedies, often dictates subsequent events.

The OSC and MSPB Route

If the employee is not in a bargaining unit or chooses not to arbitrate, resolution of the whistleblower complaint will come through an administrative civil service court system. The two principal components of this system are the Merit Systems Protection Board (MSPB) and OSC.

If the personnel action the employee is challenging is a termination, demotion or suspension of longer than two weeks, the employee can file directly with the MSPB for a contested evidentiary hearing with the agency before an administrative judge. The judge’s recommended decision must be approved by the three-member, presidentially-appointed MSPB in Washington. The Board’s decision can then be appealed to the Federal Circuit Court of Appeals, a panel whose recent decisions have been consistently anti-employee.

At an MSPB hearing, the employee may be represented by counsel, though lay representation or self-representation is allowed. Both sides have discovery rights—the right to depose witnesses under oath and

require the production of documents. At the hearing, the administrative judge acts as judge and jury, ruling on questions of law and making findings of fact.

If an MSPB hearing is contested by an agency all the way to the Federal Circuit, the entire experience can last between two and five years. Not surprisingly, most matters before MSPB are settled, often before the first hearing.

Limits on Relief

The notion that a federal employee can win a multi-million dollar lawsuit against the government is a fantasy. By law recoveries in whistleblower and related employment cases by public employees is limited to “consequential damages,” which includes items like lost pay and attorney fees, but does not include matters like pain and suffering that routinely are included in “make whole” remedies as compensatory damages. Ironically, sometimes what an employee wins in settling a case may sometimes exceed what he or she could have won if the case went to final judgment.

If the personnel action is less severe than termination, demotion or suspension of greater than two weeks, the employee must file first with OSC. OSC itself has no direct power. If it decides a complaint has merit, it files on the employee’s behalf with the MSPB, much the same as a District Attorney would prosecute a case before a Superior Court.

Unreliability of a different sort compromises efforts to seek informal relief through the OSC. Despite its broad mandate to be an advocate for whistleblowers, it is unrealistic for an individual employee to make any plans based on getting championed by the OSC. It is swamped by more pleas than the staff can keep up with, and often takes weeks if not months to decide whether to even begin investigating a case. Once OSC decides to investigate a case, it then takes months and often years before it is ready to litigate for a whistleblower.

The same resource limitations also restrict the OSC from litigating more than a small number of test cases that can set major precedents or have broad impact on the merit system. In short, the odds of getting “saved” by this agency are remote.

Because of these chronic delays and anemic performance, Congress amended the WPA in 1994 to allow a whistleblower to file directly with the MSPB once OSC has had the case for 120 days.

At that point, the MSPB process described above would commence.

Environmental Statutes

Seven of the major federal environmental statutes are part of a group of two dozen federal public health or safety statutes containing whistleblower or witness protection clauses. Unlike civil service whistleblower statutes that require some disclosure of some form of misconduct, the environmental statutes protect any disclosure furthering the enforcement or administration of the particular statute. Thus, for public employees working in environmental agencies on Clean Air Act issues or in water pollution programs, much of what they do on a day-to-day basis is covered by one of these “Big Seven” environmental statutes.

These statutes apply to both public (see caution for state workers) and private sector employees. The statutes broadly prohibit any form of retaliatory discrimination. While these laws are broad there are drawbacks:

- **Patchwork Protections.** Protected speech is limited only to those disclosures furthering the particular statute. Thus, a disclosure relating to the Endangered Species Act or the National Environmental Policy Act (both of which lack a whistleblower provision) would be outside the scope of protection.
- **Very Short Statute of Limitations.** Claims must be made within a very short period, ranging from 30 days to 6 months, depending on the statute, following the act of discrimination or retaliation from which the employee seeks relief (see box).
- **State Employees May No Longer Be Protected.** Due to a string of U.S. Supreme Court cases, an expanded doctrine of state sovereignty rooted in the 11th Amendment may preclude state employees from citing state agencies under federal law. PEER is litigating the lead case in this area on behalf of Rhode Island’s top state hazardous waste scientist. That case is now pending. Also, the Energy Reorganization Act is limited to employees of the nuclear power and weapons industries. Outside the environmental statutes, coverage also is hit or miss. Consult a lawyer or contact our groups to make sure of your rights.

State Whistleblower Laws

The WPA covers federal civil servants. In addition, 38 states have passed whistleblower protection laws for government employees. This guide focuses on federal whistleblower laws. State employees should conduct further investigation to find out what if any statutory protections exist in your state.

Most states have some form of whistleblower protection legislation. However, some states are far more progressive than others in this area, and the degree of protection provided varies greatly.

Many state civil service statutes limit employees to an administrative forum with circumscribed remedies. Laws drafted and championed by PEER and GAP for California and the District of Columbia, respectively, are notable exceptions as state employees (or contractors in D.C.) may bring civil actions for jury trials and monetary damages.

In addition to statutes on the state law books, the common law (i.e., judicially created rules developed through case law) in 42 states allows a suit for punitive damages if the motivating factor for employee discharge violates a clear public policy evidenced by an unambiguous constitutional, statutory, or regulatory provision. In reviewing public policy violations, the courts will analyze whether some aspect important to public policy and embodied in the law, such as crime control or preventing corruption, was advanced by the whistleblower.

How the “Big Seven” Work

The seven major federal environmental laws have similar provisions; all are enforced by the U.S. Department of Labor (DOL.) An employee must file a complaint with the Occupational Health and Safety Division of the DOL (see insert on statute of limitations). The person against whom the complaint is filed will be notified of the proceedings. DOL must complete an investigation of the violation within thirty days from the time the complaint is filed.

Upon completion of the investigation, DOL must notify the complainant and the alleged violator of his or her findings. Either side can appeal that finding. The appeal triggers a full blown evidentiary hearing before a

DOL administrative law judge with full pre-hearing discovery rights. As with MSPB, the judge's recommended decision can be appealed to an Administrative Review Board. The Secretary of Labor must confirm any final order or decision. Even then, an aggrieved party may appeal the Secretary's decision to the Federal Circuit Court with jurisdiction in the state in which the action occurred. Cases may eventually reach the U.S. Supreme Court.

Thus, the DOL process brings some preliminary rapid results, such as the 30-day investigative finding, but appeal rights can cause contested cases to drag on for years in some instances. In a public agency setting, filing a complaint that triggers immediate intervention by the DOL may produce a quick impact but the long-term consequences and risks should be thought out (within the statute of limitations) prior to choosing this option.

Short Statutes of Limitations

Of the following seven environmental statutes, six have a statute of limitations of only thirty days. This means that a complaint must be filed with the Secretary of Labor within thirty days from the time that the act of retaliatory discrimination occurred.

- 1) Clean Air Act (42 USC § 7622)
- 2) Comprehensive Environmental Response, Compensation & Liability Act (42 USC § 9610)
- 3) Federal Water Pollution Control Act (33 USC § 1367) (29 CFR 24).
- 4) Safe Drinking Water Act (42 USC § 300j-8(l))
- 5) Solid Waste Disposal Act (42 USC § 6971)
- 6) Toxic Substance Control Act (15 USC § 2622)
- 7) Energy Reorganization Act of 1974 (42 USC § 5851 as amended by § 2902, P.L. 102-486 (106 Stat. 2776))

The Energy Reorganization Act of 1974 allows a lengthy 180 days to file a complaint. This has the longest statute of limitations of any of the "Big Seven" environmental laws.

The False Claims Act (31 USCS § 3729)

The False Claims Act is a powerful tool against government contract fraud. It makes persons civilly liable for three times the amount of damages the government incurs as a result of the fraud, plus penalties and costs.

It's sometimes called the "Lincoln Law" because President Lincoln first proposed the law as a way to counteract widespread fraud by suppliers who were selling the Union army spoiled rations and faulty muskets. It has since been modernized, most recently with a bipartisan update in 1986.

This effectiveness of this anti-fraud measure is greatly enhanced by its special whistleblower provisions. Any person can file a claim on behalf of the U.S. Treasury, an action called a qui tam suit. The claimant, called a "relator," can recover a portion of the treble damages, ranging from 15-30%. This feature is why the False Claims Act is also sometimes called the Whistleblower Bounty Statute. The amount that the relator can recover varies according to whether the Department of Justice (DOJ) decides to enter and take over the claim, as well as to the degree the relator helped to uncover the fraud.

In a false claims suit, the individual is suing on behalf of the U.S. Treasury. The suit is filed under seal, in order to allow the DOJ to make a decision about whether it will take over the suit against the contractor. Be advised that while the DOJ is considering whether to join the suit, you are gagged from discussing its existence. This can extend for many months, or even over a year.

In addition to its bounty provision, the False Claims Act also has very strong whistleblower protection providing a district court remedy with double back pay and compensatory damages for those employees who suffer retaliation for filing or preparing to file claims covered by the Act.

While government employees are technically able to use both provisions of the False Claims Act, a growing body of case law bars employees from filing claims for fraud uncovered within the scope of their employment. These rulings are premised on the theory that a government worker should not be able to reap profits from merely doing his or her job. The anti-retaliation provisions are not available for federal workers.

As a practical matter, however, government workers who resort to filing a qui tam suit do so in frustration with their agency's unwillingness or inability to address the matter itself. Thus, while the subject matter of the fraud is technically within the employee's job description to report, many of these public servants must go well above and beyond the call of duty to achieve any measure of justice.

Other potential limitations include a series of legal challenges that a state or any of its subdivisions is outside the scope of the Act and its

whistleblower provisions. Consequently, fraud committed by state agencies to obtain a federal grant or in spending that grant may go unpunished unless federal oversight agencies decide to take action directly.

Once you've launched a False Claims Act suit, future decisions about how to proceed are limited. Depending on what your ultimate goal is, a False Claims suit may be the most desirable route, but to avoid making a regrettable decision, consult with your attorney about various paths before starting out on this one.

False Claims Act

The False Claims Act is the nation's most effective law for whistleblowers to go on the attack against misconduct. To illustrate, before the law was modernized, Department of Justice civil fraud recoveries ranged from \$5-26 million annually. In the first ten years after it was reborn, the totals averaged \$200 million per year, a ten-fold increase. In 2002 one case alone recovered over \$800 million, and the statute recovered over \$1.5 billion.

Other Laws

There are also a number of other limited or statute-specific whistleblower protections scattered throughout the federal code. Workplace safety reports are covered by a whistleblower provision in the Occupational Safety & Health Act. The Military Whistleblower Protection Act covers uniformed personnel. There is a trio of banking whistleblower laws. A congressional right to know law, the Lloyd Lafollette Act of 1912, bans harassment for communicating with Congress. Unfortunately, the courts have dismissed 53 of 54 cases since passage of the Lloyd Lafollette Act on jurisdictional grounds.

Employee speech protections can also be found outside of traditional "whistleblower" statutes. This guide is not meant to provide a comprehensive review of public employment law but suffice it to say that there are potential legal remedies for public employees in:

- Equal Employment Opportunity laws barring discrimination on the basis of age, race, gender, disability, etc.
- Civil Rights Statutes barring deprivation of constitutional liberties under the color of law;

- Defamation and other personal injury torts for bringing civil actions against individual agency managers for deliberately wrongful and harmful acts.

In addition, criminal statutes preventing witness intimidation or tampering can apply to public employee situations. As, in some cases that are currently in litigation, can civil or criminal contempt powers of the trial court.

In short, the legal tools available to you depend on the situation, so please consult competent counsel before taking the law into your own hands.

Danger Zones

In the world of occupational dissent within a public agency, there are some commonly experienced danger zones. These are pitfalls conscientious employees should try to avoid.

Don't Use Government Time or Facilities

Avoid using agency equipment, materials or supplies on the government's time while gathering information at all costs. Most agencies have explicit rules barring any unofficial or personal use of government equipment. Thus, a whistleblower caught with private correspondence to an environmental group or faxing documents to a reporter will often be disciplined for misuse of the equipment, misappropriation of government resources, or, in some cases, arrested and charged with theft.

Employee whistleblowers should also be cautious about telephone conversations conducted over workplace telephone lines. Certain agencies have regulations that allow them to monitor conversations or tape all telephone calls (i.e., certain law enforcement agencies.) It is suspected that others have listened to employees' telephone conversations even without regulatory authority. Furthermore, most government agencies keep a computer log of all incoming and outgoing telephone numbers dialed to or from agency telephones. These logs are frequently reviewed to ascertain with whom agency employees are associating.

Agency facsimile machines keep logs of all sending and receiving documents. These logs may be used to prove that an employee improperly used government equipment. Similarly, use of a government mailroom in some cases has been deemed to be a violation of laws governing personal use of government facilities.

Agency managers have also been known to go through employee e-mail and word processing files. Employees should assume that any information

on their workplace computer terminal is open to management review. The more prudent course of action is to e-mail key computer records to your personal computer, so that one may “work on them at home.” This tactic is rarely criticized, since a manager is unlikely to complain about an employee putting in additional hours at home. It also gives the employee a safe and complete record in case his or her access to the agency is interrupted.

The “Appearance” of Conflict or Impropriety

In some cases, resource agency employees are counseled that they cannot be involved in environmental issues or organizations in their off duty time because it would create the appearance of a conflict.

Since the employee has no personal financial stake in these matters, in a strict sense there can be no “conflict of interest.” Instead, the agency contends that the employee who is an off duty activist is guilty of the appearance of impropriety or partiality. At the federal level, the statutory bulwark of this prohibition can be found in 18 U.S.C. § 205 that bars a federal employee from acting as “an agent or attorney” in any case or claim against the United States.

CASE STUDY: The Saga of Jeffrey van Ee

Jeffrey van Ee, an electrical engineer with the Environmental Protection Agency based in Las Vegas, had to wage a ten-year legal battle to win the right to speak out on environmental issues. The fight began when van Ee, on his own time, spoke on behalf of the Sierra Club at a Bureau of Land Management (BLM) forum concerning the desert tortoise.

In an attempt to silence van Ee, BLM managers complained to EPA who, in turn, ginned up criminal charges against him under 18 U.S.C. Section 205, a part of the criminal code that forbids federal employees from serving as “an agent or attorney” in any case or claim against the U.S. After the U.S. Attorney declined to prosecute, EPA reprimanded van Ee for creating the “appearance of a conflict of interest.”

While van Ee successfully challenged the reprimand under the Whistleblower Protection Act, the underlying constitutional issues remained unaddressed until the U.S. Court of Appeals in Washington, D.C. ruled that federal employees are free to speak on behalf of non-profit citizens groups when addressing federal agencies. The Court said this law could not be interpreted “to act as a general gag order on employees.” The decision reversed previous rulings by both a lower court and the federal Office of Government Ethics that this type of speech by federal workers was a crime.



Current law does not allow independent due process hearings to defend against security clearance reprisals.

After the ruling, van Ee, a GAP client and later a PEER activist, reflected, “I never believed it would be considered a crime to try to make a difference in my community. While I am pleased the D.C. Circuit came to the same conclusion, I hope no other federal employee has go to through what I’ve been through in the past ten years.”

These statutes present particular dangers to agency employees who are privately aiding lawyers preparing to sue or presently in litigation against the agency. If the agency suspects its employee's involvement with "the other side" it may be able to compel the private counsel to disclose the employee contacts in discovery. The agency's discovery of the employee's role in aiding litigation against the agency may then result in discipline or removal of the employee.

One function our organizations serves is as a safe and legal conduit between concerned employees and environmental lawyers so that these situations do not occur.

Security Clearances & Classified Information

Public employees working with classified information or doing work that requires a security clearance must also operate under a wholly different set of rules from those of normal civil service. Classified material can be disclosed under very limited circumstances. Security clearances can be suspended or removed for a range of behaviors, including personal habits or off-duty associations, which would not justify a disciplinary action against an ordinary civil servant.

The agency is accorded so much discretion in the area of security clearances that ordinary notions of due process have little application. It is for this reason that GAP calls security clearances "the Achilles Heel for freedom of speech."

Current law does not allow independent due process hearings to defend against security clearance reprisals. Those are governed by flexible in-house systems to enforce identical anti-retaliation paper rights. The results? GAO reported that employees regularly are not informed of their alleged misconduct for three years. An illustrative event recently involved national security whistleblower Linda Lewis, a USDA employee protesting the lack of planning for biochemical terrorist attacks on the food supply. She was assigned to work at her home for 2 1/2 years without duties while awaiting the hearing, which lasted 90 minutes. After the hearing, she still had not been told the specific charges against her. She was not allowed to confront her accusers, or call witnesses of her own.

Special Note for Government Lawyers

While government employees are protected from on-the-job retaliation for reporting wrongdoing under whistleblower laws, these laws do not shield government attorneys from discipline and potential loss of license for violating client confidentiality in order to protect the public from harm.

Who does a government lawyer represent—the department or the public? If a government lawyer knows that the agency has violated the law or endangered the public, does he or she violate attorney client confidentiality by reporting the matter to the proper authorities? In most state bar codes, the government lawyer is treated exactly as private counsel. He or she owes a duty of confidentiality to the agency-client.

Public attorneys struggle with this dilemma every day. Consider some cases:

- A federal lawyer working for US EPA felt a need to disclose EPA's cover-up of conditions at a Superfund site that could have profound public health implications for neighboring communities. This attorney sought advice from his state bar and was told that he could ethically make no disclosure about the problem. The only ethical course of conduct he could pursue, he was officially advised, was to resign from federal service but forever remain silent.
- Ann Rapkin, the Chief Counsel for the Connecticut Department of Environmental Protection has filed legal claims against her agency leadership concerning matters affecting public health and environmental enforcement. Connecticut, like many states, has a very restrictive standard for matters that attorneys may disclose. Consequently, Ms. Rapkin's complaint is under seal.

To address this gap in the law, PEER launched the "Public Attorney Project" to reform state bar rules so that government attorneys could serve the public interest in a manner consistent with the ethical bounds of the practice of law. At the same time, a case arose in California that which put this dilemma on the front page of newspapers across the state.

CASE STUDY: The Case of Cindy Ossias

California's elected Insurance Commissioner Charles Quackenbush had been settling earthquake insurance claims filed by ratepayers behind closed doors for ridiculously small amounts. In return, the big insurers donated to a non-profit controlled by Quackenbush. Cindy Ossias, a staff lawyer in the Insurance Department blew the whistle before the Legislature on the entire scheme. In the subsequent furor Quackenbush resigned and left the state, his top aides pled guilty and Quackenbush remains the target of an expanding criminal investigation.

Cindy Ossias was protected from any adverse employment action by virtue of a recently enacted PEER-drafted whistleblower law. But someone filed a complaint against Cindy with the State Bar alleging that she had violated client confidentiality. Ultimately, the State Bar dismissed the charge, declaring that Cindy Ossias acted in the public interest and in the spirit of the new whistleblower law. The Bar, however, stipulated that its ruling could not be used as a precedent in any other case — leaving all other government lawyers in limbo.

PEER stepped into the breach and drafted legislation allowing government lawyers in California to report improper activity free from the specter of Bar discipline. The bill passed the Legislature but was vetoed by Governor Gray Davis on September 30, 2002. As of today, only Hawaii allows government lawyers to report official misconduct.

Legal Lane Changes

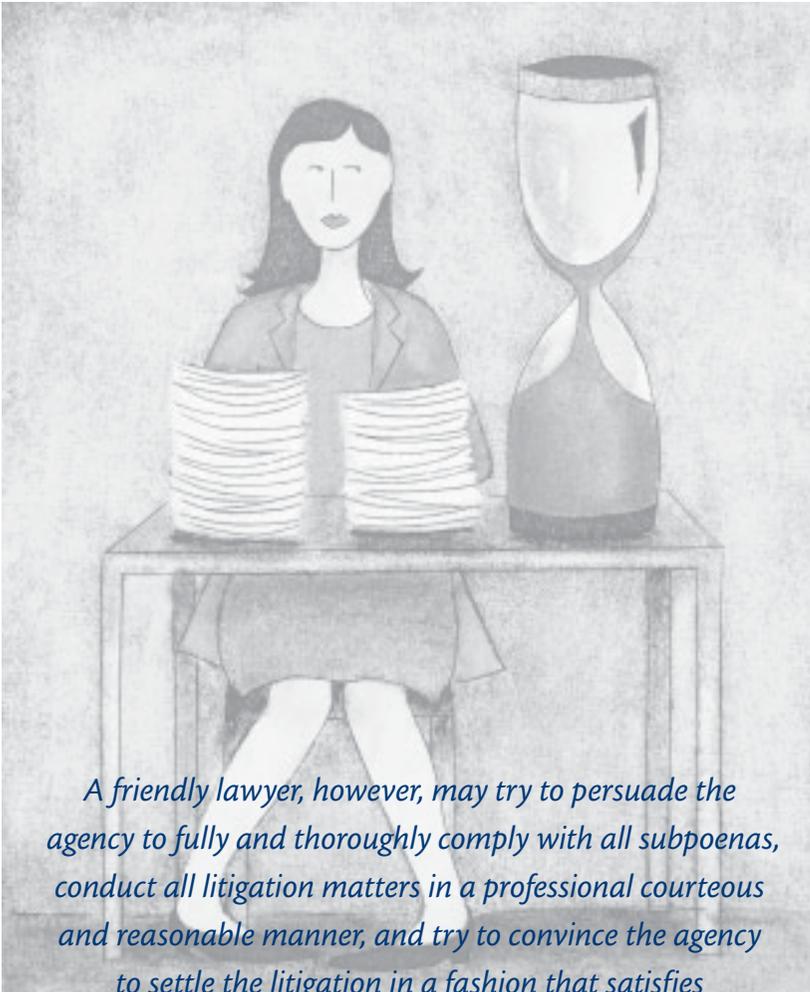
It is not uncommon, particularly in some environmental agencies, for citizen groups to sue an agency on the very issue over which some of the agency's own internal specialists are blowing the whistle.

These situations can be extremely delicate for the internal specialists, particularly if the citizen group suing the agency is doing so largely based upon that employee's internal dissent. As discussed above, it is extremely important for the employee not to be in direct contact with the counsel who is suing the agency.

What Happens When Your Agency Gets Sued?

If an agency employee is needed as a witness in litigation to testify about an employee's area of expertise, work product or knowledge of agency-related matters, the employee must either be subpoenaed or given permission to testify by agency supervisors. Unless disclosing information protected by whistleblower statutes, an employee can be fired for testifying about internal matters without the agency's permission or pursuant to a subpoena. Once an agency employee becomes a witness, a whistleblower will not be allowed to talk to them about agency business without the consent or presence of the agency's lawyers.

Lawyers employed within an agency are among the first to be involved in a disputed matter. They enter the scene while the issue is still at the agency level and has not yet gone into litigation. Usually, they also know the agency's weak points and internal analysis of the problem. They have



A friendly lawyer, however, may try to persuade the agency to fully and thoroughly comply with all subpoenas, conduct all litigation matters in a professional courteous and reasonable manner, and try to convince the agency to settle the litigation in a fashion that satisfies the whistleblower's needs.

immediate access to most types of agency information. **The agency lawyer does not represent you** and anything you tell him or her can be relayed up the chain-of-command. One must remember that the agency's managers closely direct the lawyers' work and greatly influence how agency lawyers handle the matter. Ultimately, agency management has control over a government lawyer's continued employment. This can be a difficult situation for an agency lawyer who favors the whistleblower's position.

Once a lawsuit is filed, however, the agency is usually compelled to turn the matter over to lawyers in the U.S. Department of Justice (DOJ) or the State Attorney General's Office (AG). The DOJ and AG lawyers do not report to the agency management. They have their own separate chain of command and handle many separate agency matters. They do not have loyalty to a particular agency's political agendas, governing regulations, financial concerns or mission. Their continued employment with the government usually is not dependent on pleasing a specific agency's managers. These DOJ and AG lawyers usually want to win the litigation or settle it quietly. Further, they want to conduct the process in such a fashion that they do not embarrass themselves in Court or anger the judge. This is especially true in a court where the lawyer appears often. They do not want their names associated with scandal, big losses or publicly disclosed government misconduct.

Even though the lawyer may be friendly to your cause, there are ethical rules that control any interaction between the whistleblower and the government lawyer. If the friendly lawyer has been directly involved in representing the agency on the matter, you cannot expect the lawyer to meet with you privately, give you confidential agency documents, breach attorney-client privilege or sabotage the agency's lawsuit in any overt fashion. Their ethical duty requires them to vigorously represent their client's position and place it above their personal feelings.

Any government lawyer who violates the ethics rules governing their representation of the agency is subject to being fired and disbarred from the practice of law. If a whistleblower finds a friendly government lawyer, they must be especially careful not to put them into a conflict position or take advantage of their private position towards a case.

A friendly lawyer, however, may try to persuade the agency to fully and thoroughly comply with all subpoenas, conduct all litigation matters in a professional courteous and reasonable manner, and try to convince the agency to settle the litigation in a fashion that satisfies the whistleblower's needs.

Not every government lawyer involved in the litigation process is equal. While the lawyers involved in the litigation all work for the government, they often have different roles, perspectives and goals in litigation. In addition to DOJ, AG and agency lawyers who have specific duties related to the issue, other agency lawyers who are friendly to the whistleblower's cause, may be helpful in aiding a whistleblower. These lawyers can provide other types of help in the dispute process. For instance, they can meet with you and talk to you about certain agency information, policies and atti-

tudes, but do not expect them to breach attorney-client privilege or do anything that violates the ethical rules governing their conduct.

What If You Are Called to Testify?

If the agency is not a party in the proceedings, but an agency expert is needed to testify, a subpoena is issued to compel testimony at trial. State court rules allow the government to refuse to send their personnel to depositions if the proceedings would be too inconvenient (i.e. occur far away from the agency). This is usually only possible when the employee is a fact or expert witness and the agency is not a party to the litigation. A trial subpoena from a federal court, however, cannot be ignored by the agency.

Subpoenaing witnesses to testify at trial or to give depositions serves multiple purposes. Without a subpoena, the agency is not compelled to present a particular witness. The subpoena allows one to be certain that the person needed to testify will be present at the proceeding. Even if the agency has agreed to make a particular person available, without the subpoena, the agency can change its mind (often at the last minute) and refuse to send a witness or send a less desirable witness in their place.

If the employee-witness is friendly to the side calling him or her, the subpoena protects his or her relationship with the agency employer. The witness is compelled by law to testify. Thus the agency does not have a legal option to discipline the employee for volunteering information unfavorable to the agency. Additionally, if the friendly witness has been providing information in confidence, the subpoena, along with the appropriate questions posed under oath, will help to protect the employee from agency suspicion that the employee has given unfavorable information to the opponent in advance of the proceeding.

If compelled to testify, either at trial or a deposition, the scope of the questions posed to the agency employee will be outside of his or her control. The witness must tell the truth under oath.-

Truth engenders

hatred of truth. As soon
as it appears, it is the enemy.

—Tertullian (c. 150-230)
Roman church father. Apologeticus, VI.3.



Conclusion

While this manual issues many dire warnings about the dangers of blowing the whistle, it should in no way dissuade you from following your conscience and your desire to make the world a better place. Rather, this manual is offered as a road map to help you address the problem you are facing with maximum effectiveness, while minimizing potential damage and harm to your career and to your life.

If you decide to become a whistleblower, you will be joining an elite group of people distinguished by their exceptional moral character and their commitment to public justice. The viability of our democracy depends in large part upon this small group of people who are willing to challenge corruption by speaking out about government deception.

Knowing the risks involved in whistleblowing and managing those risks effectively can be a liberating and empowering personal growth experience. POGO, GAP, and PEER are available to help you manage that process and win your battle for justice.

Over the years, working with public employees who “commit truth” has been a great honor for the three organizations authoring this manual. We dedicate this manual to the whistleblowers we have known throughout the years — to their sacrifice, their incredible accomplishments, and their legacy of ethical government stewardship.

Notes

¹ Merit Systems Protection Board, 2001.

² (5 U.S.C. § 2302 (c)).

³ Quoted by William A Clinkscales Jr after Senate committee delayed confirming him as director of the Selective Service System, NY Times 3 Nov 86

⁴ 10 BUSINESS & PROFESSIONAL ETHICS JOURNAL, (89-108).

⁵ SCIENCE (1998) 1459.

⁶ Assessing the impact of television, Understanding Media McGraw-Hill 64

⁷ (391 U.S. 563 (1968)).

⁸ See also United States v. National Treasury Employees Union, 513 U.S. 454 (1995) and Sanjour v. EPA 56 F. 3d 85 (1995).

⁹ Bush v. Lucas, 462 U.S. 367 (1983)

Resources for Whistleblowers: An Internet Index

The following is a brief list of web sites that may be of assistance or interest to whistleblowers:

American Civil Liberties Union
www.aclu.org

Association of Forest Service Employees for Environmental Ethics
www.afseee.org

Jim D'Elia's Whistleblower Home Page
<http://members.aol.com/jdelia2667/whistle.htm>

Department of Energy Hearing and Appeals - Whistleblower Decisions
www.oha.doe.gov

Department of Labor—Whistleblower Decisions
www.oalj.dol.gov/libwhist.htm

Good Government Groups
www.fas.org/pub/gen/ggg/

Jobs with Justice
www.jwj.org

LawMall: Legal Self-help
www.lawmall.com/lm_pamph.html

Merit Systems Protection Board
www.mspb.gov

National Whistleblower Center
www.whistleblowers.org

Office of Special Counsel
www.osc.gov

Qui Tam Information Center
www.quitam.com

Taxpayers Against Fraud: The False Claims Act Legal Center
www.taf.org

The Whistleblower Society of America
www.whistleblowersocietyofamerica.com



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