

# Investigation Manual

## CHAPTER 3 - RIGHTS AND RESPONSIBILITIES OF PARTICIPANTS

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## **CHAPTER 3 - RIGHTS AND RESPONSIBILITIES OF PARTICIPANTS**

0301 **INTRODUCTION:** For analytical purposes, the participants in an IG investigation may be divided into the following categories: responsible authorities; subject command organizations; complainants; witnesses; subjects; suspects; and investigators. The participants may have different perceptions of the purpose, scope or nature of an IG investigation. Their rights and responsibilities also differ. On occasion, these rights and responsibilities impact the manner in which the investigation is conducted, its results, or the action that may be taken in response to the investigation. Return to Chapter Table of Contents.

0302 **OVERVIEW:** This chapter identifies the principal parties to an IG investigation and discusses various matters that concern them, including their general rights and responsibilities during an investigation. It then examines in more detail some of the specific rights, responsibilities, and expectations parties may have during the conduct of investigations that are important to the investigator's ability to effectively control the investigation. Return to [Chapter Table of Contents](#).

## **PART ONE - CATEGORIES OF PARTICIPANTS**

0303 **RESPONSIBLE AUTHORITIES:** Responsible authorities are those people who have the authority to take or direct corrective, remedial, or disciplinary action in response to the findings of an IG investigation. Consequently, they are the people for whom the investigation is to be performed, whether or not they initiated the request for the investigation. In some cases, the commander or commanding officer of the organization that is the subject of the investigation may act as the responsible authority. However, when the commander's impartiality is subject to question, a more senior person should be identified.

When the responsible authority did not request the investigation, as, for example, when there is a hotline complaint, the responsible authority should be notified promptly upon commencement of an investigation, unless there is good cause to believe the investigation would be compromised by doing so. When compromise is a concern, consider whether a more senior person should act as the responsible authority.

Because responsible authorities are required to take appropriate corrective, remedial, or disciplinary action, the investigation should provide them sufficient information to make intelligent decisions about these matters. In longer, more complex investigations, responsible authorities may be provided periodic progress briefings. Their participation in decisions about the direction the investigation will take may be encouraged if this will help ensure they obtain information necessary to make their decisions. Such participation may also help them understand the investigation is intended to promote the efficiency of the DoN.

Responsible authorities have the obligation to ensure their subordinates cooperate with, and do not impede, the IG investigation. Should a subordinate with authority to carry out responsibilities described in paragraph 0304 below prove unwilling or unable to do so, the responsible authority must be prepared to direct that action so as to ensure the integrity of the investigation.

Responsible authorities have an obligation to ensure the investigation is complete and impartial, in appearance and in fact. It is proper for the responsible authority who tasks an investigation to set forth the initial scope of the investigation, especially when the effort is to be divided among the available investigative resources. However, subsequent changes to the scope of the investigation must be considered in light of the appearance, as well as the fact, that the responsible authority may be attempting to divert the course of

the investigation for improper reasons. Should such an issue arise during the course of an investigation, the IG organization doing the investigation should discuss the matter with the responsible authority in a straightforward manner. Under appropriate circumstances when the responsible authority appears to be insensitive to this issue, the IG organization should alert higher authority within the IG chain.

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0304 **SUBJECT COMMANDS:** Subject commands are those organizations in which the matter under investigation is alleged to have occurred.

The subject command should be notified of the existence and general nature of the IG investigation. Premature notice that would compromise the investigation should be avoided. However, as a practical matter, the subject command should be notified before the conduct of on-site interviews in most cases.

1. Notifying the subject command at the earliest practical time is important because the command has an affirmative responsibility to cooperate with the investigation. The subject command's cooperation is essential if the investigation is to be successful. Cooperation entails more than simply providing a space for the investigators to work and making witnesses available at reasonable times. It requires the command establish the proper atmosphere for the conduct of the investigation and, at times, positive assistance. Depending on the needs and specific requests of the investigators, this may include such actions as: making a general announcement regarding the existence of the investigation in order to limit speculation and inform members of the command of their duty to cooperate with investigators;
2. directing uncooperative witnesses to answer questions, and disciplining those who continue to refuse to cooperate in the absence of a proper assertion of the right to remain silent;
3. taking effective action to preclude or remedy reprisal for cooperating with the investigators; and
4. directing personnel within the command to assist the investigation by such actions as gathering documents or other evidentiary materials requested by the investigators, conducting analyses of information at the request of the investigators, and, within reason, adjusting meeting, leave and travel schedules so as to be available when needed during the conduct of the investigation.

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1. Cooperation necessarily requires the subject command not take any action that could be construed as interference with the investigation. Therefore subject command personnel must refrain from any attempts to suggest what witnesses should say when interviewed or attempt to influence potential witnesses in any other manner;
2. question witnesses as to the nature of the investigator's questions or their responses;
3. take any reprisal action against complainants or witnesses; or
4. identify the complainant.

*Investigators should not assume that command personnel will know it is improper to question witnesses about their statements, even in a casual manner. Therefore, these matters should be discussed when the subject command is notified of the investigation.*

Many allegations reflect adversely on the subject command. Accordingly, in most cases, the subject command should be given an opportunity to make an official "institutional" comment on, response to, or rebuttal of the allegations before the investigation is completed. This is particularly important when the responsible authority is outside the subject command. Similarly, the subject command should be informed of the results of the IG investigation, at least in general terms. Unless there is a good reason not to do so in specific cases, i.e., a reasonable likelihood of reprisal, the subject command should be provided a copy of the final investigative report. Distribution within the command should be on an official need to know basis. When necessary to protect confidentiality, the report may be redacted.

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**0305 COMPLAINANTS:** Complainants are those who present the initial allegations that trigger a decision to conduct an IG investigation.

Complainants have many different reasons for making allegations, but their motive is not directly pertinent to an investigation. The allegations of a complainant who is seeking to "get even" may lead to the discovery of substantial fraud, waste, or abuse. But see subparagraphs three and six below for the proper consideration of complainant motivation.

Some complainants choose to remain anonymous. Others may identify themselves to an IG office, but request confidentiality during the investigation. Other complainants have no objection to disclosure of their identities during the course of an investigation..

When complainants have first hand knowledge of facts related to the allegation, they should be interviewed as witnesses. Complainants who admit their own wrongful involvement in a matter they present for investigation, or who are implicated during the course of the investigation, may also become subjects or suspects. Since bias may color the perception and recollection of any witness, investigators may find it useful to explore the complainant's motive in order to decide what weight to attach to facts asserted by the complainant, just as they would for any other witness. However, investigators must exercise caution to avoid leaving complainants with the impression they are being investigated or harassed for making the complaint.

Because complainants voluntarily present information concerning wrongdoing, there is a heavy burden on the DoN in general, and the IG community in particular, to ensure complainants are not subject to reprisal. Thus, complainant requests for confidentiality merit special consideration that may impact the conduct of the investigation and the potential for disciplinary action. For example, investigators may find it necessary to interview complainants more than once because not interviewing them in their office at the same time coworkers are interviewed would appear odd and suggest they were the complainant. In cases where there is a potential for disciplinary action, investigators should attempt to develop alternate sources of evidence in order to protect the identity of complainants who have requested confidentiality. Complainants should be told whether the IG has decided to initiate an investigation of their complaints; doing so may reduce the likelihood they will request duplicative investigations from other organizations. Military personnel complaining of reprisal that falls under 10 USC 1034 must be told of their right to take such allegations directly to the DoDIG (see Chapter 10). Complainants also should be told whether their allegations were sustained. They may be told, in general terms, whether corrective, remedial, or disciplinary action was taken. However, due to the subject's privacy rights, complainants do not have the right to know what specific remedial or disciplinary action occurred unless it becomes a matter of public record (for example, most MSPB decisions are available to the general public). If an allegation is not sustained, complainants should be given some explanation for that conclusion.

Complainants have the responsibility to present good faith allegations of wrongdoing. This means they may not make allegations they know to be untrue. Nor may they ignore or disregard information they know, or could learn upon reasonable inquiry, would tend to show the allegation is untrue.

Complainants should not make frivolous allegations. That is, they should not seek an IG investigation of matters a reasonable person would know do not constitute violations of law, rule, or regulation, or other matters appropriate for IG investigation.

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**0306 WITNESSES:** Witnesses are those people investigators decide to interview because they may have information that tends to support or refute an allegation, or information that may lead to the discovery of such information.

Most people are selected as witnesses because they have direct, first-hand knowledge of the facts surrounding an allegation. Some witnesses may be able to provide firsthand indirect, or circumstantial, evidence. However, experts who do not have firsthand knowledge (and therefore must rely on factual information developed from other sources) are occasionally consulted during an IG investigation in order to obtain their expert opinions or conclusions. Examples include contract specialists or personnel classification reviewers who are familiar with procedures and regulations applicable to their field of expertise. They can review facts developed by the investigator to ascertain whether applicable procedures and regulations were followed in a particular case. They can also tell the investigator what facts should be developed in order to determine whether or not the subject adhered to applicable procedures. In general, fact and expert witnesses have the same rights and responsibilities. Witnesses are sometimes divided into two categories for the purpose of selecting appropriate interviewing techniques. Cooperating witnesses are those who are willing to assist the investigator's attempts to develop pertinent facts. For example, when asked, they usually will tell a narrative story that requires minimal questioning, and therefore may be interviewed using standard interviewing techniques. Hostile witnesses are reluctant or unwilling to cooperate with the investigator. Often, the investigator must use interrogation techniques, such as asking questions that require only a yes or no answer. Witnesses may become subjects or suspects during the course of an investigation. The investigators must be alert to ensure their rights (and those of the DoN to take action against them in appropriate cases) are protected should that happen.

Witnesses may not be subjected to reprisal for cooperating with an IG investigation.

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**0307 SUBJECTS:** Used in a general sense, subjects are those people against whom any allegation of wrongdoing has been made. More precisely, they have been accused of non-criminal conduct or of criminal conduct for which competent authority has determined criminal prosecution is not warranted.

As with subject commands, individual subjects should be given the opportunity to comment on, respond to, or rebut the allegations made against them. In most cases, the investigation can not be considered complete until the investigator has obtained the subject's version of the events in question. This information may aid the investigator's determination of what actually happened. In addition, information provided by the subject may assist the responsible authority in determining what action, if any, to take against the subject. For example, when the investigator concludes the subject violated an applicable standard, the investigator should attempt to determine whether the violation was due to ignorance of, inability to comply with, or deliberate disregard for, the standard.

Most IG investigations concern military and civilian subjects, not suspects. This is because in most cases the allegations are reviewed by NCIS, before the IG investigation starts, in order to determine whether a United States Attorney or the appropriate convening authority may be interested in criminal prosecution. If there is such an interest, NCIS will handle the investigation. If not, NCIS advises the IG organization that there is no prosecutorial interest. However, investigators must be sensitive to the possibility that additional evidence, or other forms of criminal conduct not previously considered, may be uncovered during the course of the investigation.

When dealing with military personnel, investigators must be familiar with the UCMJ and sensitive to the development of facts that would constitute UCMJ violations. When NCIS has terminated or declined to conduct an investigation, the investigator should determine whether NCIS has conferred with the appropriate convening authority. Until the convening authority decides criminal prosecution under the UCMJ is not warranted under the circumstances, the investigator should proceed with caution and coordinate with the local Staff Judge Advocate to ensure the rights of the subject are not violated and the convening authority's ability to take action under the UCMJ is not impeded. When conduct that may be subject to criminal prosecution is discovered during the course of an investigation, the investigator must re-evaluate the case and the manner in which it will be handled before proceeding. In most cases, consultation with the investigator's IG superiors, NCIS, the appropriate convening authority and/or the responsible authority will be necessary to determine whether there is an interest in criminal prosecution, and, if so, what should be done to preserve the ability to take such action.

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0308 **SUSPECTS:** Suspects are those people against whom sufficient evidence has been developed to warrant the belief they have engaged in criminal conduct. Under this definition, an unsupported allegation is not sufficient to render someone a suspect. Suspects have Constitutional and statutory rights, discussed below, that must be protected. In most cases, an IG investigation will be initiated against a person suspected of criminal conduct only after a decision has been

made that criminal prosecution is not warranted, and the individual should be referred to as a subject. Return to [Chapter Table of Contents](#).

**0309 INVESTIGATORS:** As used in this manual, investigators are those people authorized to conduct a specific IG investigation, whether or not they are working in an investigator's billet or position at the time of investigation. Investigators have the responsibility to ensure that the rights of all other parties to an investigation discussed in the preceding paragraphs are properly addressed during the investigation. In order to obtain the facts necessary to permit the responsible authority to make appropriate decisions, the IG investigator has the right to conduct interviews, administer oaths, and collect documents. These rights interact with the specific rights of other parties, and will be discussed in more detail in the next section. If the conduct of the investigation requires access to restricted spaces or documents, the IG investigator with the appropriate level of security clearance is deemed to have the "need to know" by virtue of the investigative tasking. Return to [Chapter Table of Contents](#).

## **PART TWO - SPECIFIC RIGHTS AND EXPECTATIONS**

**0310 ENUMERATION OF RIGHTS:** Issues concerning the perceived and actual rights of participants in an investigation arise in almost every IG investigation. They include such matters as: privacy and protection of reputation; reprisal; anonymity or confidentiality; how information disclosed during an interview or interrogation may be used by others; assistance from counsel or others prior to and during an interview or interrogation; recording interviews or reviewing investigator's notes concerning the interview; obtaining copies of one's own written or sworn statements to an investigator, or the statements of others; the opportunity to comment on allegations of wrongdoing; and the opportunity to review or receive a copy of the investigative report. Return to [Chapter Table of Contents](#).

**0311 PRIVACY AND REPUTATION:** Allegations that lead to IG investigations usually involve sensitive issues, impact the subject command, are against people in positions of responsibility and trust, and are derogatory in nature. In short, the mere existence of an allegation may constitute an invasion of privacy, harm the reputation and careers of individuals, and tarnish the image of a command. The files that reflect such investigations are official records that remain in existence long after an investigation is completed, regardless of the results. They have serious implications for the privacy rights of participants.

Everyone who is interviewed by IG investigators should be informed that the information they provide will be maintained in files used for official purposes (including the investigation itself and any prosecution or disciplinary action that may result), and that access to the information within DoD will be on a "need to know for official use" basis. In addition, the information may be used to respond to complaints or requests for information from Congress and other government

agencies, including state and local law enforcement agencies. They may also be told that their names and other identifying information will be deleted from releases of information made to the public pursuant to the Freedom of Information Act, but that a court could order release of that information in certain situations.

Pursuant to SECNAVINST 5211.5D, "DoN Privacy Act Program," records retrieved by personal identifiers such as names constitute Privacy Act Systems of records. Most DoN IG organization investigative records are retrieved by the name of complainants, subjects, and suspects.

Individuals who are asked to provide information about themselves for DoN IG investigative records that are retrieved by their name or personal identifier must be advised of their rights under the Privacy Act. This requirement flows from the fact that criminal law enforcement is not the primary purpose of a DoN IG investigation. Consequently, while DoN IG organizations qualify for Privacy Act exemption K status (non-criminal law enforcement), they do not qualify for Privacy Act exemption J status (criminal law enforcement), which is required to avoid the requirement to provide Privacy Act rights advice. NCIS and the DoDIG, which have criminal investigative authority, do not require their investigators to provide Privacy Act rights to interviewees because they qualify for exemption J status.

NAVINSGEN investigative records are retrieved by the names of complainants, subjects, and suspects, but not witnesses. Therefore, at a minimum, investigators performing investigations at the direction of NAVINSGEN must advise subjects and complainants of their Privacy Act rights. Investigators not assigned to NAVINSGEN should determine whether the records of their organization are retrieved by additional categories, such as witness names. If so, then these people must also be advised of their Privacy Act rights. When in doubt, provide the advice.

The easiest way to ensure the Privacy Act requirement is met is to give the interviewee a copy of a Privacy Act Statement (PAS) to read. Examples appear in the appendix. To document that the advice was given, the investigator should ask the interviewee to sign the PAS. The interviewee may retain a copy, but the investigator should attach the signed original to the interview notes. If the interviewee declines to sign a PAS, the investigator should write "declined to sign" in the PAS signature block and place the PAS in the file with the interview notes. People asked to provide information about themselves for Privacy Act records during telephone interviews should be advised of their Privacy Act rights over the phone. Then the investigator should complete a PAS, place it in the file with the notes from the interview, and mail a copy to the individual.

The Privacy Act confers no right to remain silent. Thus, as indicated elsewhere in this manual, Government employees may not refuse to answer questions regarding their official duties after having been adequately informed that no criminal prosecution will be initiated because of information obtained from them during the interview, or other information developed as a result of the interview. Information may be compelled from both military and civilian witnesses if they

are provided immunity by appropriate authorities.

On the other hand, the Privacy Act does not compel cooperation on the part of a witness. The PAS simply explains the authority to solicit information and whether disclosure is mandatory or voluntary, the principal purposes for which the information is intended to be used, the routine uses to which the information may be put, and the consequences, if any, of not providing the requested information. When disclosure is mandatory, that authority and the consequences which may result from nondisclosure are based on separate authority to compel answers, not the Privacy Act itself. The Privacy Act simply requires individuals to be informed of that authority and the consequences of their nondisclosure.

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**0312 EXPECTATIONS OF CONFIDENTIALITY:** Many people who participate in IG investigations think their identity and the nature of their contact will be maintained in strict confidence. In fact, there is no absolute right to confidentiality, and the responsibilities of an IG occasionally require the disclosure of sources of information.

Even the Inspectors General Act of 1978 (not directly applicable to DoN IG investigations) provides only a qualified grant of confidentiality, because it permits the Inspector General to disclose the identity of complainants over their objection. Section 7(b) of the Act provides that:

The Inspector General shall not, after receipt of a complaint or information from an employee, disclose the identity of the employee without the consent of the employee, unless the Inspector General determines such disclosure is unavoidable during the course of the investigation.

Consequently, although it is appropriate to "grant" confidentiality in some situations, discussed below, IG investigators must never state or imply that confidentiality is an "absolute" or "unqualified" right that will be protected under all conditions. Such a promise is misleading because disclosure may be required to accomplish an official government purpose or compelled by law in certain cases.

Confidentiality creates a dilemma for any IG organization. On the one hand, an expectation of confidentiality increases the likelihood complainants will come to the IG in the first place, and makes witnesses more willing to cooperate with an IG investigation. On the other hand, as the information an IG is able to provide responsible authorities about the source of facts decreases, so does the credibility of the presentation and the likelihood that action will be taken in response to the investigation. Also, as the severity of the action taken in response to an investigation increases, so does the demand for disclosure of sources. For example, a command may decide to take corrective action - steps that will fix an actual or perceived deficiency in the way it conducts business - even when the investigative facts come from complainants and key witnesses who insist upon confidentiality. But at some point in the proceedings of the

more serious forms of disciplinary action - such as a court-martial or an action appealable to MSPB - subjects or suspects will have an opportunity to review all the evidence against them and confront their accusers, whether or not the responsible authority relied on that evidence in deciding what action to take. Most IG organizations have decided to strike the balance in favor of protecting confidentiality. There are two kinds of confidentiality: express and implied.

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0313 **IMPLIED CONFIDENTIALITY:** A limited degree of confidentiality is accorded to all complainants by virtue of the Inspector General Act of 1978, as implemented by DoD and Navy regulations establishing the hotline program.

DoD Directive 7050.1, "Defense Hotline Program," provides that the DoD hotline program shall have sufficient controls "to provide maximum protection for the identity of all persons using the Defense Hotline" (paragraph E(2)(b)) and requires the DoD components to "establish the administrative and operational controls and procedures necessary to provide maximum protection for the identity of any Defense Hotline Program source who requests anonymity or confidentiality" (paragraph (3)(c)(3)).

Enclosure (1) to SECNAVINST 5370.5A, "DoD/Navy Hotline Program," provides, at paragraph 2(c), that:

Informants under the DoD and Navy Hotline Programs are assured confidentiality to encourage full disclosure of information without fear of reprisal. Normally, hotline users are encouraged to identify themselves so that additional facts can be obtained if necessary. In order to protect to the maximum extent possible the identity of DoD and Navy Hotline users who have been granted confidentiality, NAVINSGEN shall be the point of contact when such identity is required by the investigator assigned to conduct that examination. In those instances where NAVINSGEN discloses the source, the identity shall be protected to the utmost of the investigator's capabilities.

Implied confidentiality applies to all complainants and witnesses, whether or not they request it. Implied confidentiality simply means that the investigator is required to take reasonable steps to avoid disclosing the identity of complainants and witnesses until the investigation is completed and the responsible authority has decided whether or not disciplinary action is appropriate. At that point, the protection afforded by implied confidentiality ends if the decision is to take disciplinary action, because the identities are required for the official purpose of pursuing disciplinary action.

Thus, during the course of the investigation, the investigator should not reveal the names of complainants or witnesses to anyone unless it is necessary for the successful conduct of the investigation. In particular, investigators must be especially careful not to reveal the source of information they discuss with the subject or subject command until the investigation is completed and the investigative report has been issued. On rare occasions, however, it may become necessary for the investigator to confront one witness with the

statements made by another witness in order to determine credibility or resolve conflicting evidence presented by them.

Under this standard, the investigator may provide the names of witnesses (but not complainants) to the responsible authority at the conclusion of the investigation. Indeed, the investigative report will identify all witnesses who have not been given an express grant of confidentiality. However, the investigator should not provide the underlying documentation (sworn statements, results of interviews, investigator notes, etc.) to the responsible authority unless and until such materials are specifically requested by that official.

Under no circumstances should the investigator provide information to the subject command or the responsible authority indicating the identity of the complainant as such without the complainant's consent. If the complainant has first hand knowledge and is interviewed as a witness, the investigative notes and the report should treat the information provided in the same manner as any other witness. If the complainant has no first hand knowledge and is not interviewed as a witness, neither the subject command nor the responsible authority has an official need to know the source of the complaint.

Should the responsible authority decide to take disciplinary action, subjects may have due process rights to obtain the identity of, and information provided by, witnesses who have only implied confidentiality. For example, civilian personnel against whom adverse action is proposed under 5 CFR 752 Subparts B and C are entitled to "review the material which is relied on to support the reasons for action given in the notice" (see section 752.203(b) for suspensions of 14 days or less and section 752.404(b) for more severe action). Obviously, the investigative report is such material.

Similarly, military personnel subject to NJP are entitled to "examine documents or physical objects against the member which the nonjudicial punishment authority has examined in connection with the case and on which the nonjudicial punishment authority intends to rely in deciding whether and how much nonjudicial punishment to impose" (see paragraph 4c(1)(D) of Part V of the Manual for Courts-Martial). They have similar rights during court-martial proceedings (see Article 46 of the UCMJ and Rule for Court-Martial 701, Manual for Courts Martial).

Since the investigative report includes the identity of witnesses, this information becomes available to subjects once disciplinary action is proposed unless the witness has been given an express grant of confidentiality that specifically precludes disclosure to the subject. Further, if the proposing authorities reviewed additional documents in the investigative file, such as witness statements, these also become available to subjects once action against them is proposed, absent express grants of confidentiality.

Most IG investigative files are part of a Privacy Act system of records that is retrieved by subject name. Therefore, under the Privacy Act, once a subject is deprived of a "right, privilege or benefit," as would be the case when discipline is imposed, the subject then has the right to review all of the material contained in the investigative file by making a Freedom of Information or Privacy Act

request. This rule applies not only to the identity of, and information provided by, witnesses, but also to complainants, unless the complainant "furnished information to the Government under an express promise that the identity of the source would be held in confidence" (see 5 USC 552a(k)(2)). Thus, it becomes necessary to examine express grants of confidentiality.

The subject's exercise of due process and Privacy Act rights does not mean that a third party Freedom of Information Act requestor will subsequently be given access to the same information. Thus, the names (and identifying information) of witnesses who have only implied confidentiality may be withheld from the general public under exemption 7(C), even if they have been provided to subjects. However, this information may still be subject to release pursuant to court order.

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**0314 EXPRESS GRANT OF CONFIDENTIALITY:** An express grant of confidentiality occurs when the investigator tells sources such as complainants or witnesses that their identity or the information they provide will receive more extensive protection than that described in paragraph [0313](#) above. Generally, this happens when the investigator says that the identity of a source will not be revealed to responsible authorities at the end of the investigation, to the subject during the course of disciplinary action, or in response to a Freedom of Information or Privacy Act request filed by the subject.

Since there can never be an absolute or complete grant of confidentiality, an investigator who makes a promise that exceeds the limits of implied confidentiality may find the only way to keep that promise is to delete from the investigative report all references to the identity of the source to whom the promise was made, and to information provided by that source which cannot be obtained from another source. In some cases, such as when an allegation is serious and discipline is likely to result if it is sustained, it may become necessary to refrain from making any written record of the identity of the source in order to keep the promise. Since this greatly limits the use to which information provided by the source may be used, the investigator should give an express grant of confidentiality to a witness only in very rare circumstances. It is more common to give express grants of confidentiality to complainants. However, the investigator should be especially cautious when the complainant seeks redress of a personal injury, as it may be difficult to correct the wrong without identifying the complainant at some point in the process.

Information provided under an express grant of confidentiality may prove helpful for taking corrective or remedial action. However, when disciplinary action is likely to result, the investigator should anticipate such information will be useful only for the purpose of developing leads. Since witnesses may be compelled to answer an investigator's questions, express confidentiality should be granted to witnesses only

when the investigator has come to a dead end and believes the grant would make a witness more candid or helpful in developing useful leads the investigator could pursue with other witnesses.

An express grant of confidentiality may encourage a complainant to present allegations and supporting facts that otherwise would remain unknown. However, a promise of express confidentiality should be made only after a specific request by the complainant to whom implied confidentiality has been fully explained. Investigators may decline to give an express grant of confidentiality, in which case complainants must decide whether to provide information under the implied confidentiality standard.

Once an express grant of confidentiality is provided, the investigative file must be annotated to reflect this fact, with the exact terms of the grant, in order to facilitate compliance with the Privacy Act exemption noted above.

After an express grant of confidentiality has been given, the terms of the grant shall not be violated without the express approval of NAVINSGEN or receipt of an order from a competent court or administrative tribunal.

Express grants of confidentiality are subject to renegotiation. As the investigation develops, the investigator may find that the allegation cannot be sustained, or disciplinary action supported, unless sources who have been granted express confidentiality agree to be identified. Thus, for example, it is appropriate to recontact such sources in order to try to persuade them to testify in a disciplinary proceeding action. However, when doing so, the investigator must take care not to appear to be making a threat to reveal the identity of the source without consent.

1. In deciding whether to give an express grant of confidentiality, the investigator should consider the following factors:the seriousness of the allegation;
2. the likelihood the interviewee may be subject to reprisal or other harm should the source of the information become known to the subject or other persons who do not want the matter investigated;
3. the ability of DoN to protect the interviewee from reprisal (consider, for example, the difference between private sector employees who are entitled to statutory "whistleblower" protection and those who are not);
4. the importance to the investigation of the information the interviewee is able to provide; and
5. the likelihood the investigator would be able to develop the information through other sources.
- 6.

Whenever an investigator gives an express grant of confidentiality, the investigator must include a warning that the grant may be overturned by court order in appropriate circumstances and that consequently, there can be no

"guarantee" of, or "absolute right" to, confidentiality. Although express grants of confidentiality are discouraged, there are occasions where they may be useful to both the investigator and the source. If the source can provide leads sufficient that the investigator does not need to rely upon information that only the source can provide, the investigation may be successfully completed and the source may be able to avoid subsequent identification by the subject or others. Because information provided only by the source would not be used to take action against the subject, it should be possible to protect the identity of the source from release during disciplinary proceedings and any subsequent court action. Subsequently, the Privacy Act exemption would prevent its release to the subject against whom successful disciplinary action has been taken.

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**0315 THE RIGHT TO FREEDOM FROM REPRISAL:** Complainants and witnesses who are concerned about confidentiality usually fear reprisal. The right to communicate with an IG free from fear of reprisal is essential to successful accomplishment of the IG mission. It should be discussed with complainants and witnesses who express concerns about confidentiality. It is very important to discuss this right with subjects and subject commands when they are notified of an IG investigation.

Some complainants and witnesses have a statutory right to be free from reprisal for disclosing information or otherwise cooperating with an IG investigation. For example, most federal civilian employees have been protected from reprisal for "blowing the whistle" since enactment of the Civil Service Reform Act of 1978. The Inspector General Act of 1978 contains similar provisions. Currently, military personnel, nonappropriated fund employees, and employees of defense contractors enjoy some degree of statutory whistleblower protection. See [Chapter 10](#) for a detailed discussion of whistleblower issues.

Whistleblower statutes contain limitations on the type of information that may be disclosed, the persons to whom a protected disclosure may be made, and the type of conduct that constitutes reprisal. In most cases, disclosures of the type of information that would be of interest to an IG organization is covered, and IGs are included in the categories of persons to whom protected disclosures may be made. The major deficiency of most whistleblower statutes is that they do not expressly apply to disclosures made within the chain of command (however, the October 1994 amendments to the Military Whistleblower Protection Act, codified at 10 USC 1034, do expressly protect disclosures of certain types of information within the chain of command). To remedy this defect, and because the Navy encourages its military and civilian personnel to report suspected misconduct to chain of command

authorities, it is DoN policy that persons who make good faith disclosures of suspected misconduct to persons or organizations who are "proper authorities" under the U.S. Navy Regulations shall be protected from reprisal of any kind. Depending on the circumstances, people in the chain of command, including immediate and intermediate-level superiors, commanders or commanding officers, IGs, NCIS agents, the Naval Audit Service, the DoD and Navy Hotlines, NAVINSGEN, or the DoDIG may be proper authorities. The Inspector General Act of 1978 states that whistleblower protection does not extend to employees who disclosed information "with the knowledge that it was false or with willful disregard for its truth or falsity." Under those circumstances, the disclosure is not made in good faith (note, however, an allegation may be made in good faith even if it is not sustained, or is demonstrated to have been wrong). Also, frivolous allegations (allegations of facts that would not constitute misconduct even if true) may be made in good faith by people who misunderstand the applicable standards. However, continued persistence in asserting such allegations after the standards have been explained need not be regarded as made in good faith. Reprisal, or the threat of reprisal, constitutes interference with an official investigation and is a matter of Secretarial interest. **IG investigators who become aware of threats or acts that could constitute reprisal against personnel cooperating in an investigation shall immediately document such information and advise their superiors in the IG chain.** The investigators and/or their superiors should then discuss the matter with appropriate officials in the command in which the threats or acts occurred. **If the matter is not resolved to the satisfaction of the IG at that point, the investigators shall report the matter to NAVINSGEN via the IG chain of command.** In appropriate cases, NAVINSGEN will advise senior Navy officials of the possibility of interference with an IG investigation, investigate the matter, and make recommendations for appropriate action.

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**0316 INVESTIGATOR'S RIGHT OF ACCESS:** Personnel performing IG investigations have the right to reasonable access to people, spaces, and documents necessary to conduct the investigation. This right stems from 10 USC 5014 and 5020, which establish NAVINSGEN within the Secretariat, and set forth the general duties of the NAVINSGEN. The statutes are supplemented by SECNAV instruction and US Navy Regulations as discussed below. Note, however, that DoN IG investigative authority does not flow from the Inspector General Act of 1978 except when DoN personnel perform investigations at the direction of the DoDIG.

SECNAVINST 5430.57F states that all DoN personnel shall respond to any request or inquiry by NAVINSGEN as if made by the Secretary. It authorizes NAVINSGEN to task other DoN personnel to perform IG functions. It provides that NAVINSGEN personnel (and consequently all personnel operating under

NAVINGEN tasking) shall have unrestricted access to all persons, unclassified information, and spaces within the DoN that NAVINGEN deems necessary to accomplish its mission.

SECNAVINST 5430.57F further provides that, subject to compliance with DoN requirements for handling classified material, NAVINGEN personnel shall be provided copies, in appropriate form, of all recorded information NAVINGEN deems necessary to accomplish its mission.

Regarding classified information and spaces, SECNAVINST 5430.57F provides that personnel bearing NAVINGEN credentials are presumed to have a "need to know" for access to information and spaces classified through SECRET, and shall be granted immediate unrestricted access to all such information and spaces within the DoN. It also makes provision for access to information and spaces classified above SECRET.

Article 1127 of the US Navy Regulations provides that "no person, without proper authority, shall ... withhold [official records or correspondence] from those persons authorized to have access to them."

Persons conducting IG investigations pursuant to NAVINGEN taskings and IG organizations assigned additional duty to NAVINGEN are deemed to have the same authority as personnel employed directly by NAVINGEN. Access problems that cannot be resolved at the local level may be referred to NAVINGEN via the IG chain of command for resolution.

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**0317 RIGHT TO CARRY CREDENTIALS:** SECNAVINST 5430.57F authorizes NAVINGEN personnel to carry credentials for identification purposes that are signed by SECNAV. Other DoN IG organizations may issue credentials to investigators as the authority which established them deems appropriate. Personnel tasked to perform IG investigations who do not carry credentials should be furnished with an authorization letter setting forth their authority. Return to [Chapter Table of Contents](#).

**0318 RIGHT TO ADMINISTER OATHS:** SECNAVINST 5430.57F provides that the NAVINGEN and credentialed personnel may administer oaths and take testimony under oath. This authority stems from 5 USC 303(b), which states that "an employee of the Department of Defense lawfully assigned to investigative duties may administer oaths to witnesses in connection with an official investigation." Consequently, non-credentialed personnel tasked to perform IG investigations may also administer oaths. Paragraph 0527 discusses when to administer oaths and provides a sample. Return to [Chapter Table of Contents](#).

**0319 RIGHT TO OBTAIN IG SUBPOENAS:** The DoDIG has the authority to issue IG subpoenas pursuant to the Inspector General Act of 1978. Since the Act does not apply to the Service Inspectors General, NAVINGEN does not have the authority to issue an IG subpoena. In appropriate cases, however, the DoDIG will assist DoN IG investigations by issuing subpoenas.

IG subpoenas are used to obtain documents (not testimony) from persons or organizations outside of the government, i.e., the private sector. They are not used to obtain documents from DoN or DoD personnel or organizations, or from federal agencies outside DoD (such documents should be made available through regular intergovernmental channels).

IG subpoenas may be used to obtain any kind of record that would tend to prove or disprove the allegations being investigated. Examples include notes, memos, books, ledgers, diaries, working papers, invoices, time cards, telephone billing and call records, financial and banking records (subject to certain restrictions), regardless of their form, i.e., hard copy or electronic storage media such as computer disks.

Examples of cases in which resort to an IG subpoena may be useful include frequent flyer credits abuse (airline records), falsification of SF-171 employment applications (records from former employers and schools), travel fraud (hotel, car rental, and airlines bills and other records), telephone abuse (telephone company records), conflict of interest cases (records of financial holdings, etc.), and professional competency cases (hospital and other health professional records).

Requests for DoDIG assistance in obtaining IG subpoenas should be made to the Director of the NAVINSGEN Hotline Investigations Division. In most cases, the request should be initiated with a telephone call, so that NAVINSGEN can determine the likelihood DoDIG would issue the subpoena before proceeding with the paperwork. The DoN IG organization seeking the subpoena should be prepared to explain the relationship between the documents sought and the allegations under investigation, and to detail the efforts, if any, already made to obtain the documents on a voluntary basis.

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**0320 INTERVIEWEE'S RIGHT TO KNOW STATUS:** In the absence of a specific question from the interviewee, investigators are not required to inform interviewees of their interview status (witness, subject, or suspect) except to preserve the government's right to obtain a criminal conviction based on information provided by suspects during the interview (in which case, Miranda or Article 31(b) rights are required, as discussed below). However, investigators may advise interviewees of their status, and usually do so in order to expedite the interview. Investigators should anticipate that people will ask whether they are accused or suspected of any wrongdoing at the outset of the interview. If asked, the investigator should reveal the interviewee's current status. Return to [Chapter Table of Contents](#).

**0321 RIGHT TO RECEIVE MIRANDA OR ARTICLE 31(b) WARNINGS:** The right against self-incrimination flows from the Constitution and, for persons subject to the UCMJ, federal statute. The Miranda and Article 31(b) warnings serve essentially the same purpose - to put everyone on an even footing by

minimizing the likelihood some people will waive the right due to lack of knowledge or forethought.

In order to preserve the government's right to use, for the purpose of criminal prosecution, any incriminating statements (or their fruits) made by civilian suspects during an interview, those suspects must first be provided a "Miranda" warning if they are interviewed in a custodial setting. For the same reason, military member suspects (and others subject to the UCMJ) are provided Article 31(b) warnings during custodial interviews, and in non-custodial interviews as well.

1. These warnings are quite similar and advise suspects of such rights as: to have counsel appointed without charge under certain circumstances;
2. to consult with counsel before being interviewed;
3. to refuse to be interviewed at all;
4. to have counsel present during an interview;
5. to refuse to answer during an interview those specific questions that would tend to incriminate them, knowing that any answers they do give may be used against them in criminal proceedings;
6. to ask that an interview be suspended in order to consult with counsel; and
7. to terminate an interview at any time.
- 8.

Despite their similarity, there are important differences, such as the Article 31(b) right to counsel without regard to ability to pay. Thus, investigators should use written forms to provide the warnings in order to minimize the chance of providing erroneous advice and to document that the warning was provided. Sample forms appear in the appendix.

When the proper warnings are not provided to a suspect, neither the answers obtained during the interview nor their "fruits" (other evidence obtained as a result of information provided in the interview) may be used against the interviewee in a criminal prosecution (including a general or special court-martial).

Although evidence developed independently may be used in the subsequent prosecution, it is very difficult to establish such evidence is not the fruit of information provided by the suspect. However, it is possible to interview the person a second time, after a proper "cleansing warning" is given, and use subsequent statements and their "fruits" in such proceedings.

If, during an interview, a complainant, witness, or subject says something that gives the investigator reason to suspect the interviewee has committed a criminal offense or a UCMJ violation, the investigator must obtain legal advice or give a Miranda or Article 31(b) warning before asking questions about the suspect

conduct. However, the investigator may continue to ask questions in non-incriminating areas without providing a warning. When all non-incriminating matters have been explored, the investigator who is prepared to give the Miranda or Article 31(b) warning during the interview may then proceed into the incriminating area. In most cases, however, the investigator should conclude the interview and consult with counsel and appropriate authority, (including, for jurisdictional purposes, NCIS) in order to determine how best to proceed.

Courts are likely to deem an interview to have taken place in a custodial setting whenever interviewees have reason to believe their freedom of action has been deprived in any significant way. For this reason, even though IG interviews are not "custodial interrogations" in the sense that term applies to police interrogations, the better course is to give a civilian suspect Miranda warnings even when the investigator starts the interview by stating it is not custodial and may be terminated whenever the suspect desires.

The reader should note that although self-incrimination is often discussed from the perspective of an individual's rights, the foregoing discussion proceeds on the basis that it is the government's desire to use incriminating statements for the purpose of criminal prosecution (including general and special courts-martial) that compels the warning. Consequently, this manual does not impose a blanket rule that Miranda and Article 31(b) warnings be given in every case where criminal conduct or UCMJ violations are suspected. Rather, in keeping with the non-criminal purpose of IG investigations, the investigator, after consulting counsel and **with the concurrence of the appropriate US Attorney or convening authority**, may forgo the warnings in order to obtain answers to questions a suspect would be expected to refuse to answer after receiving them. As discussed in the section on de facto immunity below, a contrary view holds that Article 31(b) creates a substantive right and therefore requires the warning be given to all military members suspected of violating the UCMJ, even when the convening authority does not intend to take action under the UCMJ.

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**0322 RIGHT TO CONSULT WITH COUNSEL:** The right to consult with counsel flows from the right to not incriminate oneself, and may be asserted by any category of interviewee (suspect, subject, complainant or witness) who reasonably believes a truthful answer to a question would be incriminating, or lead to the discovery of incriminating information later on.

It goes without saying that a suspect may assert the right to terminate or suspend the interview pending consultation with counsel after an investigator administers Miranda or Article 31(b) warnings.

However, any other interviewee who reasonably perceives that the investigator's questions, answered truthfully, would result in the revelation of incriminating information, also has the right to assert the privilege against self incrimination and consult with counsel before proceeding further, even if the investigator has not provided the warning (as would be the case when the investigator does not consider the interviewee a suspect at the time of the interview).

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**0323 INTERVIEWEE'S RIGHT TO REFUSE TO ANSWER INCRIMINATING QUESTIONS:** From the right to not incriminate oneself it necessarily follows that an interviewee may refuse to answer questions that would reveal incriminating information or lead to its subsequent discovery.

Miranda and Article 31(B) warnings advise of this right, and also the right to refuse to submit to an interview at all.

Since a complainant, witness, or subject may have engaged in criminal conduct not known to the investigator, the interviewee who understands the right against self-incrimination may assert it in the absence of a warning. At that point, it becomes necessary for the investigator to attempt to determine whether the interviewee has a reasonable basis to assert the right, since the general duty to cooperate with an investigation includes the duty to answer non-incriminating questions.

Investigators should be aware of a recent line of MSPB decisions that hold it is improper to charge a subject with making a false statement to an investigator when the lie is made for the purpose of denying the underlying wrongdoing being investigated. The theory behind these holdings is that the government should be required to prove the case without assistance from the subject.

There is a similar line of cases under the UCMJ that advance the proposition that a simple denial of the charge is not actionable, but that any false elaboration of the denial (such as the advancement of an alibi) may become the basis for a separate charge of making a false statement during an investigation. Under the UCMJ, however, it is a separate offense to make a false statement under oath. At this time, it is not clear whether MSPB would draw a distinction between false statements made under oath and those that are not.

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**0324 INVESTIGATOR'S RIGHT TO REQUIRE ANSWERS TO INVESTIGATIVE QUESTIONS:** DoN personnel have a duty to cooperate with an IG investigation. SECNAVINST 5430.57F states that all DoN personnel shall respond to any

request or inquiry by NAVINSGEN as if made by the Secretary. Article 1115 of the US Navy Regulations requires DoN personnel to report suspected fraud and related misconduct, neglect or collusion, and SECNAVINST 5430.92A extends the obligation to fraud, waste and related improprieties, and standards of conduct violations. Article 1137 of the US Navy Regulations requires persons in the naval service to report offenses under the UCMJ (except when they themselves are criminally involved in the offense). These provisions may be used to compel DoN personnel to answer questions or face disciplinary action, especially if coupled with a formal grant of immunity from criminal prosecution. When witnesses refuse to answer a question, the investigator should consider the following:

If the investigator has no reason to suspect criminal conduct by the witness, it is proper to remind a witness of the general duty to answer the investigator's questions unless the answers would be incriminating. The investigator should go on to state that at this point in the inquiry, the witness is not suspected of criminal conduct or UCMJ violations (or, if appropriate, of any wrongdoing), and that the investigator does not know why an answer to the question might be incriminating. The investigator may give examples of non-criminal conduct someone knowledgeable of the matter under investigation may have engaged in, and explain whether the mere observation of certain events (with or without taking action) would be considered criminal conduct or a UCMJ violation. The investigator should then state that witnesses who believe their answers may be incriminating must give that as their reason for refusing to answer a question, and ask the question again.

Should the witness then assert the right against self-incrimination, the investigator must be careful not to push the witness into making an incriminating statement that the prosecuting or convening authority is unable to use (because the witness was not provided Miranda or Article 31(b) warnings). Therefore, it may be prudent to suspend the interview until the witness has an opportunity to consult with counsel.

In some cases, the investigator may know what the witness did that leads to the assertion of the right against self-incrimination. The investigator may also know that the conduct is not criminal, or that competent authority has decided not to initiate criminal prosecution. Although it is appropriate to explain that criminal prosecution is not contemplated, the investigator should remember that such assurances are not legally binding, and that some witnesses will think the investigator is trying to trick them into making incriminating statements.

Therefore, the witness may still refuse to answer the question. At that point, the investigator will have to decide whether the witness should be ordered to answer the questions, and if a grant of immunity must accompany the order. Investigators have no inherent authority to order interviewees to answer questions. Although military investigators may give such an order to military members who are subordinate in rank, it is not recommended they do so, because that is likely to impair their effectiveness. The better course of action is to request the witness' military or civilian superior in the chain of command issue the order. The superior may discuss the circumstances with the witness,

and attempt to gain cooperation without obtaining a formal grant of immunity. However, unless the assertion of the right against self-incrimination is frivolous, disciplinary action taken against uncooperative witnesses who have not been provided a formal, written grant of immunity is likely to be overturned.

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**0325 GRANTING IMMUNITY TO COMPEL COOPERATION:** It is appropriate to grant immunity when the government determines the need to obtain information from an individual is more important than obtaining that person's criminal conviction. Once formal immunity is granted, interviewees have no reasonable basis to fear their own incriminating statements or their fruits will be used against them in criminal proceedings. Thereafter, their continued refusal to answer questions may be used to take disciplinary action. There are two types of immunity, use immunity and transactional immunity.

Use immunity precludes the government from using the statements of interviewees, or information developed from those statements (their fruits), in criminal proceeding against them. However, the government may still prosecute an interviewee if it has independent sources of information sufficient to support the case. Use immunity is the more common of the two types, and IG investigators are likely to work with only this type.

Transactional immunity is an agreement by the government not to prosecute a person for the underlying crime, or "transaction" the individual is suspected of having committed, regardless of the source of information available for use at trial. Although transactional immunity is less desirable than use immunity from the government's perspective, the difficulty in proving that information used in prosecution of an individual was not developed from that person's statement tends to make the distinction between the two types of immunity more of a theoretical concern than a practical consideration.

A proper, or formal, grant of use or transactional immunity is in writing and must be approved by the person who would be authorized to decide whether or not criminal prosecution is appropriate, as discussed in the following paragraphs. Investigators do not have the authority to give a formal grant of immunity.

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**0326 GRANTING IMMUNITY TO CIVILIAN PERSONNEL:** Kalkines warnings, also known as Garrity or administrative warnings, are used to immunize civilian personnel.

A Kalkines warning is a grant of immunity from criminal prosecution and must be approved by the US Attorney who has authority to decide whether to prosecute before it may be used. IG investigators should coordinate with local NCIS agents who will be able to assist in obtaining the US Attorney's approval. The Kalkines warning describes the suspected wrongdoing and advises that

the suspect will be asked questions about the matter, which may be used as the basis for disciplinary action. It then explains that the suspect's answers and their fruits may not be used in any criminal proceedings. Finally, it states that the suspect is subject to removal from federal service for refusing to answer the investigator's questions or for failing to respond truthfully and fully (but see paragraph 0323(3) above, which questions the validity of the final warning). Once immunity is granted through a Kalkines warning, the employee is no longer entitled to receive Miranda warnings, and may be ordered to answer questions, even if those answers will be used as the basis for adverse disciplinary action. Nor is the employee entitled to consult with counsel, or to have counsel or other type of representative present during the interview, in the absence of a contract right under a collective bargaining agreement. Should the employee continue to refuse to answer questions, adverse action may be taken on that basis. It is proper to tell immunized employees who express a desire to consult with counsel that they may do so before or after the interview. But see paragraph 0329 below.

IG investigators are much more likely to give Kalkines warnings than Miranda warnings. The warning may take the form of a statement that the investigator gives the employee to read and sign. A sample is provided in the appendix. A better method is to have the civilian's superior provide the warning in the form of a letter that also clearly orders the subordinate to cooperate with the investigation by answering the investigator's questions. The employee should be requested to countersign the letter and a copy should be placed in the investigative file with the interview notes. Should the employee refuse to sign the Kalkines warning document, the investigator and the employee's supervisor should annotate a copy to that effect and attach it to the interview notes. A Kalkines warning is not signed by the US Attorney. However, actions taken to obtain the US Attorney's concurrence with the grant of immunity should be documented and placed in the file.

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**0327 GRANTING IMMUNITY TO MILITARY PERSONNEL:** Rule for Courts-Martial 704 of the Manual for Courts-Martial provides that only General Court-Martial convening authorities have the power to provide military members formal grants of immunity from criminal prosecution. A lower level convening authority's attempt to grant formal immunity is invalid, and may be disregarded by the military member who does not want to cooperate with the investigation.

Absent special circumstances or action taken by higher authority, the first General Court-Martial convening authority in the chain of command over the military member involved will normally sign the grant of immunity. Samples of formal grants of use and transactional immunity appear in the appendix. As in the case of civilians, military personnel who receive immunity may be ordered to answer an investigator's questions or face discipline for refusal to obey a lawful order. The answers provided by military members may be used

against them in nonjudicial punishment or other administrative proceedings, and they may be tried by court martial if they refuse to answer questions after a formal grant of immunity. Immunized military members do not have the right to have counsel present during the interview, but they should be advised of their right to consult with counsel before and after the interview. See also paragraph [0329](#).

Note that the grants of immunity provided in the appendix do not contain a specific order directing the military member to answer the investigator's questions, and a separate order must be provided. Follow the same procedures for documenting the order as used for civilians. Investigators who are military officers do have the authority to order lower ranking military personnel to answer their questions, but before doing so should consider whether the interview would be easier to conduct and more productive if another officer were to issue such an order. The practice is not recommended except in unusual cases.

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**0328 DE FACTO IMMUNITY:** A de facto grant of immunity takes place when, in the absence of a formal grant of immunity from appropriate authority, a suspect makes incriminating statements (or statements that may lead to the discovery of incriminating information) to an investigator in response to questions relating to the suspected conduct without benefit of Miranda or Article 31(b) warnings (and when, for civilians, the questioning takes place in a custodial setting).

An incriminating statement made to an investigator before the investigator suspects the interviewee has engaged in criminal conduct may be used in a subsequent criminal proceeding against the interviewee, as may any fruits of that statement. However, as soon as the investigator forms the suspicion, the investigator avoids creating de facto immunity only by changing the subject, providing the appropriate warning, or terminating the interview.

In some cases, the investigator may decide the most direct approach, administering the Miranda or Article 31(b) warnings and proceeding with the interview, is reasonable. NAVINSGEN experience indicates that a surprisingly large number of people do not chose to invoke their rights, and that this tendency increases as the rank or grade of the suspect goes up.

However, some people who are told they are suspected of criminal conduct will not consent to the interview. Since very few IG investigations lead to criminal prosecution, administering the warnings may result in the unnecessary loss of valuable testimony, including the suspect's exculpatory explanation that could lead to the refutation of the allegation of wrongdoing. Should the suspect later choose to present that explanation in response to a proposed disciplinary action, the credibility of the IG investigation will be diminished.

Another consideration is that some people tend to view the administration of a Miranda or Article 31(b) warning during the course of an IG investigation as an empty threat used by the investigator to attempt to intimidate them in

circumstances that obviously would not result in criminal prosecution. This will destroy whatever rapport the investigator may have with the interviewee and likely lead to an unproductive interview. Worse yet, if the suspect will play a key role in the correction of any systemic problems addressed by the investigation, the primary purpose of an IG investigation may be impaired.

The likelihood that an IG investigator will confront the question of Miranda warnings versus grants of immunity is quite low for civilian personnel. Cases with any real potential for criminal prosecution are normally referred to NCIS for action. However, the issue is complicated for military members because almost any form of wrongdoing may be a UCMJ violation and most UCMJ violations can be tried at a special or general court-martial. Indeed, in many circumstances, the military member has the right to refuse non-judicial punishment or a summary court-martial, and insist on a special court-martial, where conviction creates a criminal record.

Just as IG investigators have no authority to grant formal immunity, they also have no authority to grant de facto immunity. Investigators who do so without proper coordination leave themselves open to criticism, adverse performance evaluations, and discipline. Before interviewing suspects, therefore, investigators should determine whether appropriate authority wishes to leave open the option of criminal prosecution or is prepared to give a formal grant of immunity. In most cases, it is sufficient for investigators to consult with their assigned OGC or JAG attorney for guidance. When assigned counsel is not available, investigators should consult with the legal office that provides advice to the responsible authority.

Once a decision to grant de facto immunity is made and documented for the investigative file, the investigator is not required to obtain a formal grant of immunity unless it is necessary to compel the suspect to answer questions. In many cases, the interviewee will accept the assurances of the investigator that the appropriate authorities have decided criminal prosecution is not appropriate and proceed with the interview. Note, however, that a de facto grant of immunity is not sufficient to require people to answer questions they reasonably believe require incriminating answers, and they may not be disciplined for refusing to answer those questions. Thus, the investigator needs to be prepared to obtain the documents necessary to grant formal immunity from the appropriate authority.

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**0329 RIGHT TO HAVE COUNSEL PRESENT:** Military suspects are entitled to have counsel present during the interview; civilian suspects have that right during custodial interviews. Complainants, witnesses and subjects do not have this right, but investigators may permit counsel to attend the interview. In some cases, this makes the interviewee more comfortable and cooperative, and therefore may be of assistance to the investigators. Return to [Chapter Table of Contents](#).

**0330 RIGHT TO HAVE UNION REPRESENTATIVE PRESENT:** Civilian employees subject to a union contract have the right to have a union representative present during an interview if they reasonably believe that disciplinary action will be taken against them as a result of the interview. This right exists whether the investigator regards the employee as a complainant, witness, subject, or suspect, and is in addition to the interviewee's right to have counsel present. Accordingly, in appropriate cases, both counsel and a union representative may be present during the interview. The right to union representation extends to all federal employees who are members of the bargaining unit, whether or not they are members of the union itself. The investigator is not required to advise employees of this right unless the specific union contract involved requires it. Investigators may consult with the cognizant personnel office in advance of conducting interviews to determine if this may be the case. To ensure the terms of a local contract are not violated, investigators may ask employees if they are members of a local bargaining unit and, if so, whether they would like a union representative present. Note, however, that it is improper for investigators to ask whether the employee is a member of the union; it does not matter and violates the employee's rights. The union has no right to have a representative present in the absence of a request from the employee. Return to [Chapter Table of Contents](#).

**0331 RIGHT TO HAVE OTHERS PRESENT:** In some cases, interviewees may ask to have a friend or family member present during questioning. Although there is no right to have such people present, the investigator may permit this if it would appear to facilitate the interview. However, the investigator must be especially careful to ensure the privacy interests of third parties will not be violated. Return to [Chapter Table of Contents](#).

**0332 PROPER ROLE OF COUNSEL AND UNION REPRESENTATIVES:** During the course of the interview, the interviewee may ask the counsel and/or union representative for advice before answering a specific question. These advisors do not have the right to answer questions for the interviewee or invoke the right against self-incrimination on behalf of the interviewee, but it is appropriate for counsel to advise a client to invoke the right on his or her own behalf. This may require counsel to advise a client not to answer specific questions that might be incriminating (of course, such advice is not appropriate for matters for which immunity has been granted). It is important for the investigator to take control from the outset by explaining what is, and is not, permitted. When counsel or union representatives persist in attempting to tell the story for the interviewee, the investigator should consider whether to ask them if they would like to be interviewed separately as a witness. Although they may not have first hand knowledge of a matter, in some cases they may be able to provide useful information, insights, or theories that the investigator may decide to pursue later. If they persist in disruptive conduct, the investigator may ask the interviewee to request they leave, and if the interviewee refuses to do so, the investigator should terminate or suspend the interview in order to consult with an

OGC or JAG attorney, and higher IG authority, to determine the best way to bring the counsel or union representative under control. Return to [Chapter Table of Contents](#).

**0333 RIGHT TO COMMENT ON ADVERSE INFORMATION:** During the course of the investigation itself, subjects and suspects have no specific right to comment or rebut adverse information about them, or even to be informed of the existence of an investigation. However, considerations of fairness and prudence often lead the investigator to give them this opportunity. It is not necessary to make all unfavorable allegations or information known to them. Generally, allegations not deemed worthy of investigation should not be revealed. Conversely, allegations that appear to be substantiated should be revealed, and the subject or suspect should be allowed the opportunity to comment on them specifically. They should also be informed of, and permitted to comment upon, any other derogatory information that will be maintained in the investigative file or other official record. Comments may take the form of:

- oral responses made during the course of an interview;
- sworn or unsworn written statements;
- documents or physical evidence; and
- a request that investigators interview others the subject or suspect asserts may have pertinent information the investigator should consider.

In most cases, subjects or suspects should be interviewed near the end of the investigation, after all adverse information has been developed. In some cases, it may be advisable to interview them at an early stage of the investigation, as when they may be the only source of certain information necessary in the preliminary stages of an investigation. In such cases, the investigator should advise them they may be interviewed more extensively at a later date. Return to [Chapter Table of Contents](#).

**0334 RIGHT TO ENSURE INVESTIGATIVE ACCURACY:** The investigator's paramount duty is to ensure the accuracy of the information contained in the investigative report. A necessary corollary is the ability to convince others that information is accurate should it be challenged after the investigative report is issued. The most likely source of such challenge is the interviewee who claims the investigator did not accurately record what the interviewee said. Before, during, and after the interview, interviewees who are likely to raise such challenges may express concern over their ability to ensure the investigator accurately records the information they provide. At times, they may request to make a tape recording of the interview, to review the notes investigators take during the interview, or to read the investigator's report of investigation. Interviewees have no right to do any of these things. However, the prudent investigator can use the interviewee's concern as a tool to preclude subsequent challenge. Therefore, to ensure accuracy, investigators should consider the following:

At the very least, investigators should review their notes with the interviewee before completing the interview. Interviewees who perceive the investigator took accurate notes are less likely to ask to see a copy of the investigator's results of interview report.

Investigators have the discretion to ask interviewees to read and comment upon a draft results of interview report, and should do so in appropriate cases. This is especially important when the interviewee provides technical or complex information. The investigator may permit the interviewee to review a draft of the results of interview report at the interviewee's request when it appears likely to make an interviewee more cooperative.

An investigator should always consider asking the interviewee to provide a sworn or unsworn written statement. The accuracy of the information in such documents is less subject to dispute than is the investigator's report, and the documents may be used to impeach a person who later tries to change the story. Some investigators believe every witness who has information material to the proof or refutation of an allegation should be requested to provide a sworn statement. Witnesses who are concerned about the accuracy of the investigator's report should also be offered the opportunity to give a sworn or unsworn written statement.

When the investigator is concerned the interviewee will recant in the time between the interview and the preparation of the written document memorializing it (investigator's report or signed witness statement), the investigator should prepare the results of interview report or witness statement and obtain the interviewee's signature before completing the interview. In extreme cases, the investigator may wish to tape the interview, and play back answers to specific questions when the interviewee does not agree with the investigator's written characterization of the response.

There is no inherent reason why interviewees may not be provided copies of investigative notes, interview reports, or their own statements. However, while the investigation is pending, there is some risk the interviewee will make this information available to others as a form of preparation for their interview. Thus, absent compelling reasons, such material should not be provided interviewees until the investigation is concluded. For the same reason, interviewees should not be permitted to make their own recording of an interview. If making a tape recording is essential to obtaining the interview (as, for example in the case of a non-federal employee witness who can not be ordered to cooperate), the investigator may be able to convince the interviewee to give the investigator the tape until completion of the investigation. At the completion of the investigation, it is proper to give interviewees copies of their sworn or unsworn written statements upon request. Investigators should also keep in mind that a properly framed FOIA or Privacy Act request can also lead to the release of the factual portions of an investigator's results of interview reports. In dealing with these issues, the investigator should keep in mind that the objective, ensuring accuracy, is of equal concern to the government as to the interviewee. Return to [Chapter Table of Contents](#).

**0335 RIGHT TO KNOW RESULTS OF INVESTIGATION AND TO REVIEW INVESTIGATIVE REPORT:**

Except for military members who allege they have been victims of reprisal covered by 10 USC 1034, complainants, witnesses, subjects and suspects have no inherent right to know the outcome of an investigation or to review any final investigative report that may be issued pursuant to an investigation. However, it is Navy policy to apprise complainants of the general results of an investigation. Fairness dictates that subjects and suspects be afforded the same courtesy. Complainants and witnesses have no greater right to review a copy of the final investigative report than do members of the general public. If they request a copy, they should be advised to file a FOIA request. Subjects and suspects who will not be subject to adverse action also have no greater right to see the investigative report than the general public and should also be told to file a FOIA or Privacy Act request. However, if the appropriate responsible authority does decide to take action against them, then they will be entitled to obtain the report, and much of the other information maintained in the IG investigative file, during the course of, and under the rules applicable to, such proceedings. The IG should not provide these materials to subjects or suspects directly in those cases, but should work through the government counsel assigned to handle the matter. After an adverse action has been taken, a subject or suspect filing a Privacy Act request may be deemed to have been denied a right, benefit or privilege as a result of the IG investigation. In that case, the Privacy Act provides for access to all information except that which would identify a confidential source. Consequently, information that would ordinarily be withheld under FOIA, such as names of witnesses, may be subject to release pursuant to a Privacy Act request. Return to [Chapter Table of Contents](#).