

Confidentiality

during investigations

Confidentiality of Information and Sources

- Confidentiality is essential to creating an environment in which the agency can effectively obtain sensitive information needed to evaluate the challenged conduct.
- Balancing test:
 - need to protect the confidential information (commercial interests);
 - need to provide the parties the evidence forming the basis of the case to allow them fairly to defend themselves;
 - public interest in transparent enforcement

Confidentiality of Information and Sources

Confidentiality questions during an investigation:

- Treatment of information provided by the parties and third parties is treated as confidential (agency policy and statutory restrictions)
 - criteria, process to designate and evaluate
- Sharing the *nature of concern* and *general understanding of the facts*, but not specific confidential information
- Identity of complainant or witnesses
- Public disclosure of existence of non-public investigations

Confidentiality of Information and Sources

- **Information obtained by compulsory process:** generally no public access to such information without the prior permission of the submitter
- **Information obtained voluntarily:** treated as confidential when so marked by the submitter
- **Disclosure of non-public information:** must provide submitter advance notice to object or protect
- **Unauthorized release of non-public information:** a criminal offense and subjects the offending employee to disciplinary action

Limiting Exposure of Confidential Information

- **Redaction:** Remove or redact confidential information before providing third party information to parties under investigation
- **Summaries:** Provide non-confidential summaries of confidential information
- **Confidentiality Rings:** allow full disclosure of the information to a limited set of persons (e.g., legal and economic advisers)
- **Data Rooms:** allow disclosure of a specific set of documents or information but with prescribed, supervised access