

Office Instruction N° 33/2017

POLICY TO PROTECT AGAINST RETALIATION FOR REPORTING MISCONDUCT AND FOR COOPERATING WITH DULY AUTHORIZED AUDITS OR INVESTIGATIONS

Introduction

1. The Organization attaches the utmost importance to securing the highest standards of integrity amongst all members of the personnel of the Organization, as provided in the Convention Establishing the World Intellectual Property Organization. In support of the Organization's established core value "Environmental, social and governance responsibility", the Organization is committed to ensuring a positive and respectful workplace free of harassment and intimidation so all members of personnel can work together with openness, dignity and respect.
2. In furtherance of these principles and objectives, the WIPO policy for the protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations (hereinafter referred to as the "Policy") is hereby established and constitutes the general framework for the protection of all personnel against retaliation for cooperation in an oversight activity, as defined in this Policy, or who make a report, in good faith, of misconduct that, if established, would be manifestly harmful to the interests, operations or governance of the Organization.
3. The Policy aims to:
 - (a) encourage prompt notification to the Organization (through the established channels set out in this Policy) of possible misconduct so that appropriate and diligent action can be taken in the best interests of the Organization, and
 - (b) enhance protection of members of personnel who cooperate with an oversight activity as defined in this Policy or who make a report of misconduct.

Definitions

4. For purposes of this Policy:

- (a) “**complaint**” shall mean an assertion by a member of personnel, as defined below, made in good faith, on the basis of submitted evidence to support a reasonable belief that misconduct has occurred, that he/she has experienced or apprehends retaliation because of cooperation with an oversight activity or because he/she reported misconduct;
- (b) “**oversight activity**” means any duly authorized investigation, audit, inspection or evaluation authorized under the Internal Oversight Charter or oversight activity undertaken in accordance with the terms of reference of the WIPO External Auditor, the WIPO Independent Advisory Oversight Committee or any other oversight activity specifically authorized by the Director General;
- (c) “**personnel**” or “**members of personnel**” shall, for purposes of this Policy, include all WIPO staff members and other members of personnel of any grade (or without grade) engaged under other types of contractual arrangements, contractors, interns and fellows, regardless of the type of engagement or its duration;
- (d) “**retaliation**” or “**retaliatory action**” for purposes of this Policy means any direct or indirect detrimental action, or failure to act, that adversely affects the employment or working conditions of an individual, where such action, or failure to act, has been recommended, threatened or taken in whole or in part because an individual has cooperated with an oversight activity or made a report of misconduct. Retaliation may include direct actions, such as by way of adverse administrative action or verbal harassment, or more indirect patterns of retaliation resulting in discriminatory treatment;
- (e) “**complainant**” is a member of personnel, as defined above, who reports retaliation or threats of retaliation, as defined in the Policy;
- (f) “**reporting misconduct**” means the reporting through established reporting mechanisms as referred to below (or subsequently established reporting mechanisms) of alleged misconduct;
- (g) “**misconduct**” shall include abuse of authority, fraud, corruption, the failure of one or more members of personnel to comply with his or her obligations to the Organization including under the Staff Regulations and Rules or other relevant administrative issuances, the Financial Regulations and Rules, or the Standards of Conduct of the International Civil Service or other terms of their engagement, and any request or instruction from any member of personnel to violate the above-mentioned regulations, rules, standards, issuances or terms, and other wrongdoing.

General Provisions

5. It is the duty of all personnel to report that misconduct may have occurred, or any reasonable belief that such misconduct may have occurred. Failure to comply with the Organization’s regulations, rules and other administrative issuances or to observe the standards of conduct expected of WIPO personnel may amount to misconduct and may lead to the initiation of an investigation into allegations of misconduct, disciplinary proceedings and the imposition of disciplinary measures¹.

¹ See Chapter X of WIPO Staff Regulations and Rules for more information on disciplinary measures.

6. It is also the duty of all personnel to cooperate with any duly authorized oversight activity. An individual who, in good faith, makes a report of misconduct or who cooperates in good faith in a duly authorized oversight activity has the right to be protected by the Organization against retaliation in accordance with the Internal Oversight Charter and this Policy.
7. Retaliation against those individuals who have cooperated with an oversight activity or who have made a report of misconduct also violates the obligation of all personnel to uphold the highest standards of efficiency, competence and integrity and to discharge their functions and regulate their conduct with the best interests of the Organization in view. When established, retaliation constitutes misconduct in itself.
8. It is the duty of the Organization to take all necessary, relevant measures to protect all personnel against retaliation in the context of an oversight activity or when they make a report of misconduct and from further acts of retaliation when retaliation has occurred in the context of such activity.
9. The Organization has a duty to address suspected wrongdoing and ensure that due diligence is exercised when reviewing and investigating reports of misconduct as well as complaints of retaliation. The review and investigation of reports of misconduct and complaints of retaliation will be thoroughly completed, even if the complainant's employment status and relationship with the Organization changes during the respective review and/or investigation. In accordance the Internal Oversight Charter and Investigation Policy and Manual, the complainant will be kept informed of the outcome of the evaluation or investigation irrespective of his/her employment status with WIPO.

Scope of Application

10. Protection under this Policy against retaliation is extended to any member of personnel who:
 - (a) has cooperated with an oversight activity or made a report of misconduct within the meaning of this Policy; and
 - (b) asserts, on the basis of information or evidence to support a reasonable belief that he/she has experienced or apprehends retaliation as a result of participating in such activity or making a report of misconduct.

Requirements for Reporting Misconduct: Promptness and Good Faith

11. In order for a member of personnel making a report of misconduct to receive protection under this Policy, the following must apply:
 - (a) the member of personnel must make the report of misconduct as soon as possible and not later than three years after the individual becomes aware of the alleged misconduct, and
 - (b) the individual must make the report in good faith, in the overall interests of the Organization and not only for personal benefit and must submit evidence to support a reasonable belief that misconduct has occurred.

Burden of Proof

12. This Policy is without prejudice to the legitimate exercise of management functions. However, once a complaint of retaliation is made under this Policy, and if the Ethics Office has established that there is a *prima facie* case of retaliation, the burden of proof shall lie with the Organization, which must show on the basis of clear and convincing evidence that it would have taken the same action even in the absence of the activities protected under this Policy as referred to above, or that the alleged retaliatory action was not taken for the purpose of punishing, intimidating or injuring the individual who engaged in the protected activity.

Reports which are Intentionally False, Misleading or Made with Reckless Disregard for Accuracy Amount to Misconduct

13. Making a report of misconduct or complaint of retaliation or providing information for the purposes of this Policy that is intentionally false or misleading, or is made with reckless disregard as to the accuracy of the information, itself constitutes misconduct.

Reporting Alleged Misconduct

14. Reports of alleged misconduct shall be made through any of the following established channels: to a direct or hierarchical supervisor, the Office of the Director General, the Director of the Internal Oversight Division ("IOD") or the chair of the Coordination Committee, who/which shall protect the confidentiality of the identity of the reporting staff member². A report of alleged misconduct can also be made anonymously through IOD's email or telephone hotline³. It is noted that protective measures cannot be applied if anonymity is maintained. In any case, reports shall be sent to the Director, IOD, who shall register such report. It is the duty of the Administration to protect the confidentiality of the individual's identity and all communications through those channels to the maximum extent possible.

15. Protection by the Organization against retaliation or retaliation apprehended on a reasonable belief will be extended to an individual who reports alleged misconduct by a member of personnel to an entity or individual outside of the established internal mechanisms, where the criteria set out in subparagraphs (a), (b) and (c) below are satisfied:

- (a) Such reporting is necessary to avoid:
 - (i) a significant threat to public health and safety; or
 - (ii) substantive damage to the Organization's operations; or
 - (iii) violations of national or international law; and
- (b) The use of internal mechanisms is not possible because:
 - (i) At the time the report is made, the individual has grounds to believe that he/she will be subjected to retaliation by the person(s) he/she should report to pursuant to the established internal mechanism; or

² This provision may change if the WIPO Coordination Committee decides to adopt, at its upcoming session in October 2017, the amendment to Staff Regulation 1.7, as proposed by the Independent Advisory Oversight Committee (see WO/CC/74/7)

³ See Staff Regulation 1.7(b) on the ability to report wrongdoing anonymously, and paragraph 52 of the Investigation Manual IOD/IM/2017/1 detailing those channels that can be used to bring allegations to attention of the Director, IOD.

- (ii) It is likely that evidence relating to the misconduct will be concealed or destroyed if the individual reports to the person(s) he/she should report to pursuant to the established internal mechanism; or
 - (iii) The individual has previously reported the same information through the established internal mechanisms, and the Organization has failed to inform the individual in writing of the status of the matter within six months of such a report; and
- (c) The individual does not accept payment or any other benefit from any party for such report.

Preventive action

16. IOD will inform the Ethics Office of reports received of wrongdoing that IOD identifies as posing a retaliation risk to a staff member. IOD will provide this information to the Ethics Office only upon the consent of the individual making the allegation.

17. When informed by IOD of an individual who is at risk of retaliation, the Ethics Office will consult with that individual on appropriate retaliation prevention action. With the individual's consent, such action may include engagement by the Ethics Office with the individual's senior manager or managers to ensure monitoring of the individual's workplace situation, with a view to preventing any retaliatory action against the individual as a consequence of engaging in a protected activity.

Making a Complaint of Retaliation to the Ethics Office

18. (a) In order to benefit from the application of this Policy, individuals who have a reasonable belief that retaliatory action has been or may be taken against them because they cooperated with an oversight activity or made a report of misconduct shall make a complaint in writing and forward all information and documentation available to them to support their complaint to the Ethics Office as soon as possible and in any case no later than six (6) months after the date of the alleged act of retaliation (or the date of the last act of retaliation if a series of such acts is alleged to have occurred) has come to the attention of the individual making the complaint.
- (b) To facilitate requests for Protection against Retaliation, the dedicated form, available upon request or on the Intranet page of WIPO's Ethics Office, may be used.
- (c) A person who files a written complaint of retaliation or apprehended retaliation must substantiate the claim with factual information or documentation to show that he or she:
- (i) cooperated in an oversight activity or made a report of misconduct; and
 - (ii) suffered thereafter an unjustified, unfavorable or discriminatory action, or has submitted information or evidence to support a reasonable belief that such unjustifiable or unfavorable action may occur; and
 - (iii) has reasonable grounds to believe that the alleged retaliatory act resulted from participating in an activity protected under this Policy.

(d) A member of personnel may in addition to, but not as a replacement for, making the complaint to the Ethics Office, choose voluntarily to raise the matter with his or her immediate or hierarchic supervisor.

19. The functions of the Ethics Office with respect to protection against retaliation for cooperating in an oversight activity or making a report of misconduct are as follows:

- (a) to receive complaints of retaliation;
- (b) to record the complaint and keep a confidential record of all complaints received, which complaints shall in no event be disclosed except to the extent required to take action on the complaint and with the complainant's consent;
- (c) to conduct a preliminary review of the complaint to determine if there is a *prima facie* case of retaliation for cooperation with the oversight activity or making a report of misconduct, namely by:
 - (i) determining if the complainant cooperated in the oversight activity or made a report of misconduct;
 - (ii) establishing that the basic elements to constitute retaliation have been made out;
 - (iii) identifying any inconsistencies or outstanding questions; and
 - (iv) determining either the need for a formal internal investigation into whether the activity protected under this Policy was a contributing factor in causing the alleged retaliation or leading to the threat of retaliation or for an alternative option, such as informal resolution by line management, referral to HRMD, or the Ombudsman; or no further action.
- (d) to recommend to the Director General if and when required and relevant, in consultation with the Director IOD, adequate protection to the complainant. This could mean *inter alia*, with the consent of the complainant, and in exceptional circumstances, the temporary reassignment of the complainant, placement of the complainant on special leave with full pay during the preliminary review and/or investigation by IOD, or the temporary suspension of the implementation of the action reported as retaliatory.

20. The Ethics Office shall seek to complete its preliminary review within thirty (30) working days of receiving all information requested concerning a complaint of retaliation received. The complainant will be duly informed by the Ethics Office if its preliminary review of the complaint cannot be completed within this thirty (30) day period.

21. All offices and staff members shall cooperate with the Ethics Office and provide access to all records and documents requested by the Ethics Office, except for medical records that are not available without the express consent of the staff member concerned and IOD records that are subject to confidentiality requirements.

22. If the Ethics Office finds that there is a *prima facie* case of retaliation or threat of retaliation (including by way of intimidation), it will refer the matter in writing on a confidential basis to IOD for investigation and will promptly notify the complainant in writing that the matter has been so referred.

23. Such investigation shall be undertaken by IOD in accordance with the Internal Oversight Charter, Investigation Policy and Manual. IOD will seek to complete its investigation and submit its report within 120 days.

24. Upon receipt of the investigation report, the Ethics Office will conduct an independent review of the findings and supporting documents to determine whether the report and the supporting documents show, by clear and convincing evidence, that the Administration would have taken the alleged retaliatory action absent the complainant's protected activity or that the alleged retaliatory action was not made for the purpose of punishing, intimidating or injuring the complainant. If, in the view of the Ethics Office, this standard of proof is not met, the Ethics Office will consider that retaliation has occurred. If the standard of proof is met, the Ethics Office will consider that retaliation has not occurred. In all cases, the Ethics Office will inform the complainant in writing of its determination and make its recommendations to the head of department or office concerned and to the Director General.

25. If the Ethics Office determines that there is no *prima facie* case of retaliation or threat of retaliation (including by way of intimidation), it shall so notify the complainant in writing.

26. The Ethics Office shall maintain the confidentiality of all communications exchanged between it and complainants who request protection against retaliation, and of all communications exchanged with relevant third parties. The Ethics Office may be required to cooperate with requests for information under compulsion of law from judicial bodies.

Protective Measures

27. The Director General may exercise discretion under this Policy to take such interim protective measures as may be appropriate to safeguard the interests of individuals who cooperate with an oversight activity or make a report of misconduct. Such measures may be taken at any time before all related internal formal proceedings are complete, and may be based on the recommendation of the Ethics Office or at the request of the individual concerned. They may include, but are not limited to, temporary suspension of the implementation of the action reported as retaliatory and, with the consent of the complainant, temporary reassignment of the complainant within or outside his or her office or placement of the complainant on special leave with full pay.

28. If retaliation is established, the Director General may, based on the recommendation of the Ethics Office, or on his own accord, take appropriate measures aimed at correcting negative consequences suffered as a result of the retaliatory action.

Conflict of Interest

29. Where the Ethics Office determines that a significant and material conflict of interest (potential, perceived or real) would prevent IOD from conducting an investigation into retaliation under this Policy, it shall report such conflict to the Independent Advisory Oversight Committee which shall recommend such actions that may be needed to mitigate and reduce the undesirable effects of any potential, perceived or real conflict of interest.

30. In case the Chief Ethics Officer has a potential, perceived or real conflict of interest preventing the exercise of his or her functions under this Policy in a particular matter, he or she shall recuse him/herself therefrom, and designate an alternative, acceptable to the complainant, to act in his or her stead.

31. In case the Director General has a potential, perceived or real conflict of interest preventing the exercise of his or her functions under this Policy in a particular matter, he or she shall recuse him/herself therefrom, and designate another appropriate WIPO staff member to act in his or her stead and notify the Chair of the Coordination Committee of such designation.

Review of a Determination by the Ethics Office

32. If, following a determination by the Ethics Office pursuant to paragraph 19(c)(iv) of the Policy, the complainant wishes to have the determination reviewed further, he or she may, within thirty (30) days of notification of the determination, refer the matter in writing to the Ethics Office of the United Nations Office for Project Services (UNOPS). The outcome of the review by the Ethics Office of UNOPS shall be final and binding.

Recourse to Services of Ombudsman

33. If the Ethics Office finds that there is no *prima facie* case of retaliation but considers that there is an interpersonal problem within a particular office, it may encourage the complainant to consider using the services of the Office of the Ombudsman and any other informal means of conflict resolution in the Organization. The complainant may use the services of the Office of the Ombudsman at any time before, during or after the conduct of any preliminary review and without prejudice to the use of legal proceedings as provided in Chapter XI of the WIPO Staff Regulations and Rules.

Managerial Problem

34. If the Ethics Office considers that there is a problem related to the management of personnel (short of retaliation or other misconduct), based on the preliminary review of the complaint or the record of complaints relating to a particular department or office, it will advise the Director General, HRMD and the head of department, sector or office concerned.

Recourse through Internal Mechanisms and Related Timelines not Affected

35. The procedures set out in the present Policy are without prejudice to the rights of an individual who has suffered retaliation to seek redress through the internal recourse mechanisms in accordance with Chapter XI of the Staff Regulations and Rules, entitled "Conflict Resolution". An individual may raise a violation of the present Policy by the Administration in any such internal recourse proceeding.

36. This Policy does not have the effect of waiving or suspending the time limits for filing any process under Chapter XI of the WIPO Staff Regulations and Rules, including a request for review, a workplace-related grievance, a rebuttal of a performance appraisal, an appeal to the WIPO Appeal Board, or a complaint to the International Labour Organization Administrative Tribunal.

Action against the Individual Who Engaged in Retaliation

37. A finding of retaliation by a member of personnel against an individual because that individual has cooperated with an oversight activity or made a report of misconduct constitutes misconduct that will lead to appropriate administrative action, including the possibility of disciplinary proceedings.

Retaliation against Outside Parties

38. Any retaliatory measures by a member of personnel against a WIPO contractor or its employees, agents or representatives or any other individual engaged in any dealings with WIPO because such individual has cooperated with an oversight activity or made a report of misconduct as defined in this Policy may be considered misconduct that, if established, will lead to appropriate administrative action, including the possibility of disciplinary proceedings.

Review of the Policy

39. The Policy shall be reviewed on a periodical basis, as needed.

40. This Office Instruction shall enter into force on the date of its publication. It shall replace and supersede Office Instruction N° 58/2012.

[signed by Francis Gurry
Director General]