

# *gunnercooke*

How do you approach confidentiality and transparency in inappropriate behaviour grievances, including sharing accusations and statements?

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# ACAS Code of Practice

Acas Code of Practice on Disciplinary and Grievance Procedures and the supporting non-statutory guide, Discipline and grievances at work

Acas Code: sets out "the standard of reasonable behaviour" for both parties when an employee has a **grievance** that cannot be resolved informally.

# Grievances General

- Grievances can be trickier to deal with than disciplinaries
- Can be lengthy, cover longer periods of time, often more potential witnesses and more issues to be covered
- Can deal with very sensitive personal matters
- Confidentiality applies to anyone involved in the process, including the person conducting the **grievance** hearing, the investigation, any witnesses, and note takers.





# Grievances - General

- In a disciplinary matter, the subject of the disciplinary that is progressing to a hearing is entitled to see the product of the investigation.
- The same is not true of grievances. There is no specific right in the Acas Code for an employee who has raised a **grievance** to see the interview notes, witness statements, or other evidence that is obtained as part of a **grievance** investigation.

# Example

A complaint is raised by email from Catherine, to Ryan, complaining about the work of another employee, Claire. That is information about both Catherine, who made the complaint, and Claire. The employer is not required to disclose the email to Claire unless:

- Catherine has consented to the disclosure of the information to Claire; or
- It is reasonable to disclose the information to Claire without the consent of Catherine.





# Witness Request for Confidentiality

A key rule for investigators to follow is: *Don't promise anyone anything.*

Conducting an investigation sometimes requires you to disclose information that directly or indirectly reveals the source.

The employer will arguably be deemed to have full knowledge of information that a witness provides to an investigator. By failing to disclose information further, you may expose the employer to liability for failing to take action in response to that information.

Subject Access Request

Tribunal Proceedings

Can you anonymise witness statements to allay concerns?



# When is it reasonable to disclose without consent?

The employer must have regard to all relevant circumstances, including:

- The type of information that would be disclosed.
- Any duty of confidentiality.
- Any steps taken by the employer with a view to seeking the consent of the other individual.
- Whether the other individual is capable of giving consent.
- Any express refusal of consent by the other individual



# When is it reasonable to disclose without consent?

- Context is key.

It is likely to be reasonable to disclose information where the other individual's role includes line management responsibility for the employee and the information relates to performance of that role.

What if a person alleged to have engaged in sexual harassment asks for information as to who made the allegation and what he or she said?

**For Disclosure Without Consent:** the serious nature of the allegation, effect on reputation, the effect on employment, the effect on future employment prospects

**Against Disclosure without Consent:**

- the duty of confidentiality owed to the person making the complaint;
- the circumstances in which the complaint was made; and
- the potential consequences if the complainant was identified.

# Practical Approach

Keep the matter as confidential as possible, limiting both the number of people who are aware of the grievance, and the information that each of those have access to.

The content of an employee's grievance should only be disclosed to the subject of the grievance, to the extent that it is **absolutely necessary** in order to conduct a thorough investigation. Consider if it is necessary to redact parts of the grievance that do not relate to him or her.

Consider how much detail employees interviewed as witnesses need to be told.

EG: Is it necessary to reveal the name of the employee who made the complaint? Or the employee being investigated? This will depend on the particular circumstances.





# Practical Approach

Warn witnesses not to discuss the investigation with other employees or third parties

Make it clear that any breach of confidentiality will be treated as a disciplinary matter

Set an example and beware of gossiping at management level. Breaches can come from management too!

Consider whether it is necessary to disclose the substance of a grievance to the employee's line manager or other managers. This may depend on whether the line managers are involved in the complaint and whether their evidence is needed in order to carry out the investigation.

A line manager may need to be informed because immediate steps need to be taken while the investigation is carried out (eg: suspension). Explain to the complainant who may need to be told, and get consent if possible.

# Get Ahead of any Issues

Ensure that the complainant fully understands the grievance process, and how the company will handle confidentiality.

One option is to suggest a list of people that you think need to be spoken to about the grievance and invite the complainant to agree/feedback on this.

Tell witnesses what their evidence might be used for and clarify to what extent they will allow their evidence to be shared.

Make it clear to the complainant that they are not entitled to know the outcome of any resulting conduct process



# Summary

It is possible to be transparent about the process you adopt to hear grievances.

Manage expectations

Consider issuing written guidance to complainants, or attaching guidance to your grievance policy

Try to agree who needs to be told about a grievance and what they need to be told.

Only tell witnesses what they need to know.

Seek consent where you can

Be prepared to justify your decision making



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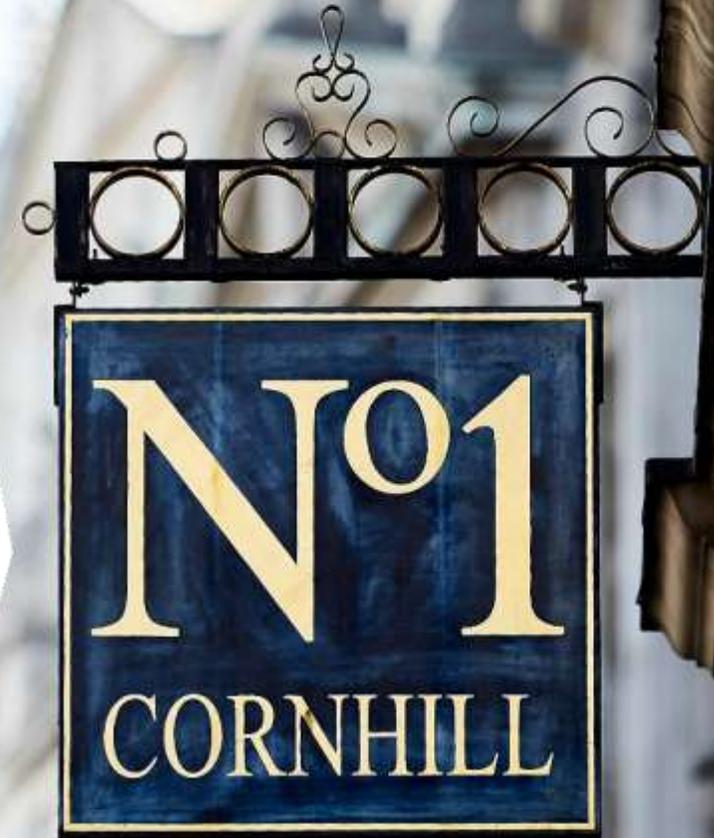
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