

An Leas-phrìomh Mhinistear agus Ath-shlànachadh
Cobhid
Deputy First Minister and Cabinet Secretary for Covid
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Kenneth Gibson MSP
Convener
Finance and Public Administration Committee
Scottish Parliament
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By email

18 November 2022

Dear Kenneth,

As you are aware, and as intimated by the First Minister at First Minister's Questions in June, officials have been working on proposals to improve transparency regarding complaints by civil servants about the behaviour of Ministers or former Ministers. This issue is complex, and requires careful balancing of considerations of transparency and public interest against privacy and confidentiality. It is essential that we ensure that there is full confidence in the process and as I outlined earlier in the year to Committee we want to encourage staff to come forward and use the revised process should they have a need to do so.

I intend to propose that the First Minister make changes to the complaints procedure, along with associated changes to the Ministerial Code, in order allow for the publication of certain information about future complaints. We have consulted with staff and other key stakeholders.

I have attached a summary of the proposed changes that we intend to make to the procedure, along with a copy of the drafting changes themselves, that I hope will be helpful to the Committee in their consideration of this issue.

I should note that the essence of the complaints procedure remains as introduced in February this year following scrutiny by your Committee including the independent investigation and independent decision making on complaints made about Ministers or former Ministers.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

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I look forward to discussing these proposals with the Committee on 22 November.

JOHN SWINNEY

Attachments:

1. Draft transparency changes to the Procedure For Making A Formal Complaint About A Minister's Or Former Minister's Behaviour: Summary
2. Procedure For Making A Formal Complaint About A Minister's Or Former Minister's Behaviour: Draft Changes Required To Procedure

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Proposed transparency changes to the Procedure For Making A Formal Complaint About A Minister's Or Former Minister's Behaviour Summary

1. The Procedure For Making A Formal Complaint About A Minister's Or Former Minister's Behaviour ('the procedure') provides for the handling of formal complaints made by civil servants about the behaviour (including bullying, harassment, discrimination, or any other unwanted conduct affecting the dignity of staff) of a Minister or former Minister, in the course of discharging their duties as civil servants in their employment by the Scottish Government ('SG'). The procedure has been in place since February 2022.
2. The First Minister told Parliament on 23 June 2022 that she intended to make changes to the procedure in order to better balance the public interest with considerations of privacy and confidentiality, to ensure we strengthen confidence in the process.
3. These changes cannot be applied retrospectively, but they will apply to all future formal complaints, regardless of when the behaviour occurred or whether the Minister is still in office or not. More detail on these changes is set out below.
4. Of paramount importance as we make these changes is our continuing commitment to protecting the protecting the privacy and confidentiality of complainants and witnesses, and ensuring their confidence in the process.

The changes

Completed complaints

5. For any future complaints, we will now publish certain information once the full process, including any appeals, has concluded.

For complaints that are upheld or partially upheld:

- a. the name of the Minister or former Minister who was the subject of the complaint; and
- b. the outcome of the complaint (i.e. 'upheld' or 'partially upheld'); and
- c. a redacted version of the decision report (redacting any information that would identify complainants).

For complaints that are not upheld:

- d. the name of the Minister/former Minister who is the subject of the complaint; and
- e. the outcome of the complaint (i.e. 'not upheld').

6. For complaints that are not upheld, publication will be for a limited period of six months. In these cases we will not publish any more information about the nature of the complaint, nor will we publish the decision report.
7. The information listed above will be published on the Scottish Government website after the full procedure of independent investigation and independent decision making, including any appeals, has been concluded and we are content that the appropriate

legal, privacy and safeguarding checks have been satisfactorily discharged. The identity of the complainer(s) and any witnesses will remain confidential and any information which could lead to identification of the complainer or witnesses will be redacted. Publication will normally be within 20 working days.

Ongoing complaints

8. After careful consideration, in the interests of increasing transparency, we will now publish the number of 'ongoing cases' – if any – that are currently being taken forward under the procedure.
9. There is a balance to be struck between transparency and confidentiality. For ongoing cases, we intend to publish the existence of a formal complaint but no further details including the Minister/former Minister's name, or any other information about a complaint, until the process has concluded.
10. Investigating and coming to a decision on a complaint should not be undertaken against a backdrop of speculation. This would risk undermining the fairness and integrity of the process, and potentially deterring future complaints.
11. We will periodically publish information on ongoing complaints on the Scottish Government website every six months.

Information shared with the First Minister

12. Given the intention to make public certain information about complaints, we have also made changes to the information that will be shared with the First Minister at the appropriate points in the procedure.
13. As before, the First Minister will have no role in the procedure, and will not be invited to comment on any live investigations.
14. We are making changes so that, for a complaint about a current Minister, the First Minister would now be told at the outset the name of the Minister who was the subject of a complaint to be investigated. For a former Minister, the First Minister would now be told at the outset that a complaint about a former Minister had been received and would be investigated, but would not be told any other information including the former Minister's name.
15. At the end of the process, the First Minister would now see a copy of the decision letter concerning either a current or former Minister. The relevant special advisor would also now be informed at the end of the process, in order to provide handling advice.

Ministerial Code changes

16. We are making associated changes to the Ministerial Code to reflect these changes and make explicit the expectations on Ministers.

END

CHANGES REQUIRED TO PROCEDURE – PROPOSED [Highlighted]

PROCEDURE FOR MAKING A FORMAL COMPLAINT ABOUT A MINISTER'S OR FORMER MINISTER'S BEHAVIOUR

Procedure aims

The policy aim of this procedure, in line with our general commitment to staff to creating a workplace free from bullying, harassment and discrimination, is to ensure that formal complaints raised about current or former ministers in respect of unacceptable behaviour towards civil servants are handled sensitively, fairly and timeously and in doing so all parties are treated with respect and dignity.

The procedure provides for the handling of formal complaints made by civil servants about the behaviour (including bullying, harassment, discrimination, or any other unwanted conduct affecting the dignity of staff – for definitions see [Standards Of Behaviour](#)) of a Minister or former Minister, in the course of discharging their duties as civil servants in their employment by the Scottish Government ('SG'). This includes addressing related issues within such complaints, such as the action of the SG in preventing or addressing the alleged behaviour.

The procedure does not provide for any decision on the conduct of a Minister or former Minister. The First Minister has responsibility to judge the standards of behaviour expected of a Minister, including in their interactions with civil servants, and of the appropriate consequences of a breach of those standards.

Procedure principles

A complaint of this nature is a grievance. The procedure provides for grievances within scope to be addressed and, where possible, resolved, in line with [statutory guidance](#).

The procedure will not be used to deal with issues arising from the application of other SG policies or procedures, for example informal resolution and mediation, without the express consent of the complainer. Similarly, the procedure will not be used to deal with complaints made under the Civil Service Code which relate or refer to the behaviour of a Minister or former Minister without the express consent of the complainer.

The expectation is that a formal complaint will be raised without unreasonable delay. There is no time limit for making a complaint of harassment. There is a time limit of six months for making a complaint of bullying or other unwanted conduct. Such complaints will normally only be taken forward using this procedure if made within six months of the alleged behaviour or within six months of any informal dispute resolution processes concluding (including mediation).

If a complaint of bullying or other unwanted conduct is made outwith the time limit, there will be a consideration of available information before a decision is made on whether it would be equitable to take forward the complaint using this procedure notwithstanding that a complaint is made outwith the time limit. It may be the case

that a complaint made may not be taken forward under this procedure if it is no longer possible to investigate it fairly and effectively because of the passage of time.

All parties involved in the process are expected to be respectful and engage positively with the process to resolve the complaint, and to maintain confidentiality at all times – including when the process has concluded.

The need to maintain confidentiality does not affect the right of any member of staff to be protected from detriment because they have made a qualifying disclosure (sometimes called whistleblowing) within the meaning of the Public Interest Disclosure Act 1998 (PIDA). Details of SG's policy on raising a concern under the Civil Service Code and whistleblowing can be found [here](#).

Staff should act in good faith when raising a complaint under this procedure and should represent the facts truthfully, and in line with our [Standards of Behaviour](#).

Scope of procedure

The procedure applies to all SG staff who wish to make a formal complaint about a Minister's or former Minister's behaviour towards a civil servant (this may include bullying, harassment, or any other unwanted conduct affecting the dignity of staff).

The following are outwith the scope of the procedure:

- informal concerns, or concerns raised before they become a formal complaint – further advice can be found [here](#). There are a range of alternative resolutions which may be more appropriate for resolving concerns, but it is up to the member of staff which route they wish to pursue.
- complaints about a Minister or former Minister relating to matters other than behaviour towards civil servants.
- complaints where a Minister or former Minister may be involved but is not the subject of complaint.
- complaints solely about other civil servants or third parties.
- complaints made by third parties.

The procedure applies to all Scottish Government staff, including senior civil servants and civil servants working in the Scottish Government's executive agencies.

For inward secondees, the conditions of their secondment apply. This means they can raise matters informally with an appropriate manager. However, if they wish to pursue a formal complaint, this must be done through their employer's grievance procedure.

Employment agency workers are not covered by this procedure. If an agency worker has a complaint, this must be raised through the agency, who may then liaise with the Scottish Government.

Procedure (summary)

The procedure will consist of five stages:

1. Initial contact and assessment. The complainer will set out their complaint in writing to [Propriety & Ethics](#). The SG will carry out initial checks, confirm whether the complaint can be taken forward under this procedure, and notify the relevant parties.

2. Investigation. Where a complaint is to be investigated, the SG will assign an external decision maker and an external investigator to the case. The decision maker will commission the investigator to undertake an impartial collection of facts and evidence from the relevant parties including the complainer and the subject of complaint, prepare a summary of the relevant facts, and submit a report for the decision maker.

3. Decision. The decision maker will ensure that a reasonable investigation has been carried out, notify the relevant parties of the report and share copies as appropriate. The decision maker will meet with the complainer and may also meet with the subject of complaint. The decision maker will decide whether to uphold the complaint or not and if appropriate make recommendations on what action, if any, should be taken. The decision maker will notify the complainer of their decision in writing and will also notify the subject of complaint. The decision maker will also notify the SG for the purposes of consideration by SG as the employer in line with Stage 4 of this procedure.

4. Employer Action. The SG will be responsible for ensuring that any recommendations are considered and implemented as appropriate. Where the complaint is about a current **or former** Minister, the SG will notify the First Minister **and the appropriate Special Adviser(s)**. Where a complaint is about the First Minister, the SG will notify the Deputy First Minister **and the appropriate Special Adviser(s)**.

5. Appeal. Where either the complainer or the subject of complaint are unsatisfied with the decision, they can appeal. Appeals will be considered by an external appeal decision maker.

Where parties involved may be the victim of a crime

There may be occasions where it is the decision maker's opinion – at any stage in the process – that a criminal offence may have been committed.

At all times the complainer is free to make a complaint directly to the police.

The decision maker will alert the SG to this opinion as soon as is practical so that SG is aware of this and may take appropriate steps in line with its duties as an employer. The SG will discuss with the complainer whether they want to report it to the police and ensure that support and access to specialist advice is provided. No pressure will be put on a complainer to make any particular decision; if they do not want to tell the police, they do not have to.

The SG will, wherever possible, respect the wishes of the complainer, however there may be circumstances where the SG may have an obligation to bring the matter directly to the attention of the police. Before taking this step, the SG will discuss with the complainer, explain the reasons, and provide appropriate support.

The SG as the employer will co-operate fully with any police investigation or criminal proceedings. The SG will pause the procedure whilst awaiting the outcome of police investigation or criminal proceedings. This is to ensure that actions under this procedure do not prejudice criminal proceedings. When the procedure is resumed, a new decision maker will be assigned by the SG nominated contact.

The SG will continue to offer support throughout to the complainer.

Record keeping

A written record will be kept at all stages of the procedure. Following conclusion, the decision maker should send copies of the documents to [Propriety & Ethics](#).

Records will be protectively marked, kept securely, and handled in line with the SG record management policy in compliance with the requirements of data protection legislation.

Procedure (full)

For the purposes of this procedure and associated guidance, the following terms will be used to describe the parties involved:

- **Complainer:** the person(s) making a complaint. The complaint might come from the person who experienced the behaviour, someone who witnessed it or a trade union representative supporting a member of staff.
- **Subject of complaint:** the subject(s) of the complaint. This will be the Minister or former Minister who is alleged to have behaved inappropriately during their term of office, but may include others, for example civil servants.
- **Witness:** Anyone who witnessed the alleged inappropriate behaviour, who can provide corroborating evidence to support either the complainer's or subjects of complaint's account of events or who has other information relevant to the complaint.
- **Decision maker:** the external person(s) appointed by the Scottish Government to consider the complaint and decide on appropriate action.
- **Investigator:** The external person(s) appointed by the Scottish Government to undertake an impartial collection of facts and evidence and produce a report.
- **SG nominated contact:** The person(s) in Scottish Government responsible for appointing the external decision maker and investigator, retaining a record of the complaint, and taking forward any further actions as appropriate.
- **Support contact:** The person(s) in Scottish Government responsible for provision of relevant pastoral support.
- **Trade Union representative:** If parties are a member of a trade union, they may wish to discuss with their representative who can offer appropriate advice and support.
- **Appeal decision maker:** the external person(s) appointed by the Scottish Government to consider an appeal.

Stage 1 Initial contact and assessment

The complainer will set out their complaint in writing to [Propriety & Ethics](#), providing:

- details of the complaint, giving specific instances and details of witnesses if appropriate;
- what has been done to informally resolve the issue if appropriate, and if nothing has been done, explaining why this could not address the concerns;
- how they would like to see matters resolved.

The SG nominated contact, who will have had no prior involvement with any aspect of the matter being raised, and no close association with the complainer or the subject of complaint, will acknowledge receipt of the complaint.

The SG nominated contact will carry out initial checks in relation to whether the complaint is in scope of this procedure. Where a complaint of bullying or other unwanted conduct is made outwith the time limit this stage will include an

assessment of any relevant information and whether it would be equitable to take forward the complaint using this procedure notwithstanding that a complaint is made outwith the time limit.

Where the complaint is in scope of the procedure and is capable of being investigated, the decision will be to investigate further. Once the SG nominated contact has confirmed this decision, they will inform the complainer of this.

Where the decision at stage 1 is not to investigate and not to proceed under this procedure, the SG nominated contact will arrange for a meeting with the complainer to inform them. The meeting will be arranged without unreasonable delay, giving at least five working days' notice to the complainer and informing them that they may be accompanied by a trade union representative or work colleague. The SG nominated contact will arrange for a note taker to be present at the meeting to keep a factual record of the discussions that take place.

After the meeting, the SG nominated contact will notify the complainer by letter that the complaint will not be considered further under this procedure, and include the written notes of the meeting.

A support contact will be offered to the complainer who may offer support to consider alternative resolution to their issues.

Where an investigation is to be carried out, the SG nominated contact will notify the subject of complaint that a complaint has been received which will be investigated (letting the complainer know when the subject of complaint has been notified). The SG nominated contact will notify the Permanent Secretary or a delegate by providing a summary of the complaint, the initial checks carried out, and any other information relevant to the decision that the complaint will be investigated.

The SG nominated contact will establish a support contact for all parties involved in the process.

Where a complaint that will be investigated is about a current Minister, the Permanent Secretary or delegate will inform the First Minister **of the name of the subject of the complaint and** that a complaint has been received, providing a summary of the issues considered in the decision taken to investigate further.

Where a complaint that will be investigated is about a former Minister, the Permanent Secretary or delegate will inform the First Minister that a complaint has been received, but the name of the subject of the complaint will not be disclosed.

Where a complaint that will be investigated is about the current First Minister, the Permanent Secretary or a delegate will inform the Deputy First Minister.

Stage 2 Investigation

The SG nominated contact will assign the complaint to an external decision maker and share the complaint, the initial checks carried out and any other information relevant to the decision that the complaint will be investigated.

The decision maker will have had no prior involvement with any aspect of the matter being raised, and no close association with the complainer or the subject of complaint.

The decision maker will commission an external investigator, appointed by the SG nominated contact, who will have had no prior involvement with any aspect of the matter being raised, and no close association with the complainer or the subject of complaint.

The decision maker will set the terms of reference for the investigation, for example the alleged incident(s), potential witnesses, and the format of the final report. This may include establishing if there are other staff within the SG who may have a legitimate interest in the outcome of the complaint, for example where the complainer is someone who witnessed the alleged behaviour and the investigation and decision may be relevant to staff who directly experienced the alleged behaviour.

The decision maker will share a copy of the terms of reference with the complainer, the subject of complaint, and the SG nominated contact. The decision maker will keep the SG nominated contact informed of expected time scales, and provide updates on progress against those timescales. The decision maker will actively monitor the case to ensure that the investigation is concluded as quickly as possible and to minimise any delays.

The investigator will, in accordance with the terms of reference, undertake an impartial and objective collection of facts and evidence from the complainer, the subject of complaint and other relevant witnesses.

The investigator will establish the facts of the matter as far as is reasonably possible and appropriate. The decision maker will inform the complainer of any delays.

If the investigation is not completed after 30 working days, the case should be reviewed by the SG nominated contact. The purpose of the review is to ensure that everything possible is being done to progress the investigation, that the correct process is being followed and that all reasonable steps are being taken to avoid delays. Following review, the SG nominated contact may direct the decision maker or investigator to complete the investigation as far as is reasonably practicable.

The support contact will signpost or arrange support services to all parties involved in the investigation, including any witnesses.

The investigator will prepare a report presenting the facts and evidence ingathered, whether there are any mitigating factors to consider, and any other relevant information, and submit this to the decision maker.

Stage 3 Decision

The decision maker will ensure that a reasonable investigation has been carried out in accordance with the terms of reference. The decision maker may require the

investigator to clarify points and update the report. Once satisfied, the decision maker will notify the complainer of the report and provide a copy. The SG nominated contact and the subject of complaint should also receive a copy of the report. This will usually also include any witness statements to ensure openness and transparency in the investigation process.

The decision maker will invite the complainer to a meeting without unreasonable delay, giving at least five working days' notice and informing them that they may be accompanied by a trade union representative or work colleague.

The SG nominated contact will arrange for a note taker to be present at the meeting to keep a factual record of the discussions that take place.

At the meeting, the decision maker will allow the complainer to explain their complaint and how they think it should be resolved and clarify any points which are not clear. The decision maker will also offer a meeting to the subject of complaint to allow them to set out their position.

The decision maker should consider adjourning the meeting(s) if it is necessary to investigate any statements made or new facts which arise.

After the meeting(s), the decision maker will assess the evidence put forward, make findings where possible on any contested facts and decide whether to uphold the complaint or not. This may include partially upholding the complaint (for example, if some allegations are found to be justified, and others are not).

The decision maker will have access to appropriate advice through the SG nominated contact, where they may need further guidance or support.

The decision maker will notify the complainer of their decision by letter, including the written notes of the meeting and any recommendations for action. They will also notify the outcome to the subject of complaint.

The decision maker will consider whether it would be appropriate to share the outcome with other staff within the SG who have a legitimate interest in the outcomes. This will be limited to sharing the outcome only where strictly necessary, and all parties will be expected to maintain confidentiality at all times. The decision maker will inform the complainer and the subject of complaint of who else **within the SG** will be told about the decision and the information they will be given.

The decision maker will share any other recommendations with the SG nominated contact, for the SG to consider with the letter and the investigation report at stage 4.

Stage 4 Employer Action

The SG nominated contact will share the final report, the decision letter and any other recommendations with the Permanent Secretary or delegate, **provided that no appeal has been lodged by either of the parties within ten working days. The process for appeal is set out in Stage 5.**

The SG nominated contact will consider the report and ensure that any recommendations are considered and implemented as appropriate. This may include arrangements to engage with the complainer on further action. Further action could include: steps to support and protect staff wellbeing, to ensure a positive working environment, and to ensure lessons are learnt for the future. For complaints which are not upheld, this could include actions to resolve remaining issues informally or other management actions.

Where there is evidence that staff have not acted in good faith when raising a complaint or not represented the facts truthfully and in line with SG's Standards of Behaviour, this may be regarded as a disciplinary issue and taken forward using the SG disciplinary procedure.

Where the complaint is about a current Minister, the Permanent Secretary or delegate will inform the First Minister **and the appropriate Special Adviser(s)** and provide a copy of the decision letter. The First Minister will be informed where a current Minister has declined to co-operate with the procedure. Where the complaint is about the current First Minister, the Permanent Secretary or delegate will inform the Deputy First Minister **and the appropriate Special Adviser(s)** and provide a copy of the decision letter. The Deputy First Minister will be informed where a current First Minister has declined to co-operate with the procedure.

Where a complaint about a current Minister is upheld **or partially upheld**, it will be for the First Minister to consider whether a relevant provision of the Ministerial Code has been breached by the Minister and to decide on the appropriate response.

Where the complaint is about a former Minister, *[Deleted: a complaint about a former Minister is upheld]*, the Permanent Secretary or delegate will inform the First Minister **and the appropriate Special Adviser(s)** and provide a copy of the decision letter. The Permanent Secretary or delegate will consider steps to review practice within the Scottish Government to ensure the working environment is free from unacceptable behaviour. This may include sharing structural lessons with the First Minister in a format that ensures that confidentiality **of the complainer and any witnesses is maintained.** *[Deleted: within the procedure is maintained (including that no information is shared that would reveal the identity of the complainer or the subject of the complaint).]* The First Minister may wish to consider any lessons relevant to ensuring awareness and adherence to the Ministerial Code.

Stage 5 – Appeal

Where either the complainer or the subject of complaint are unsatisfied with the decision, they can appeal within 10 working days of being notified of the decision.

The complainer or subject of complaint should make their written appeal to [Propriety & Ethics](#). The written appeal should clearly set out the grounds for appeal, the outcome sought, and provide any supporting information and evidence.

Grounds for appeal could include (but are not limited to):

- where new evidence has come to light that may change the outcome of the decision;
- procedural errors where there is evidence the process was incorrectly followed.

The SG nominated contact will assign the appeal to an external appeal decision maker who has had no prior involvement with any aspect of the matter being raised, and no close association with the complainer or the subject of complaint. The SG nominated contact will notify the complainer and the subject of complaint when this has been done.

The complainer or the subject of complaint bringing the appeal will be offered a meeting with the appeal decision maker to present their case. This will be offered without unreasonable delay, giving at least five working days' notice of the meeting. Where the appeal is brought by the complainer, they will be informed that they may be accompanied at the meeting by a trade union representative or work colleague. The SG nominated contact will arrange for a note taker to be present at the meeting to keep a factual record of the discussions that take place.

The appeal decision maker will offer the other party not appealing the opportunity to comment on the grounds for appeal.

Appeals should be dealt with without unreasonable delay. The complainer and subject of complaint will be informed of any delays.

Following the appeal meeting, the appeal decision maker will take into account all the information and evidence provided at the appeal stage and review the original decision. They will consider whether the procedure was applied correctly and fairly, whether there were reasonable grounds for the decision, and whether the decision was fair and appropriate.

There may be circumstances where it would be appropriate for the appeal to be conducted as a re-hearing.

If an appeal is to be conducted as a re-hearing, the appeal decision maker will inform the SG nominated contact, the complainer and the subject of the complaint.

If an appeal is to be conducted as a re-hearing, the appeal stage may be paused for further investigation and reconvene when the investigation has been carried out with any resulting evidence provided to all appropriate parties. The further investigation will be carried out following the process described at stage 2.

Following the review or re-hearing, the appeal decision maker will notify the complainer and the subject of complaint of their decision by letter. They will also notify the outcome to the SG nominated contact.

Should any action need to be taken following the appeal, the SG nominated contact will ensure appropriate steps are taken. This may include revisiting the actions as set out at stage 4 and steps to evaluate the application of this procedure.

Reporting the outcome of concluded complaints

The Ministerial Code provides that the Scottish Government will publish information about concluded formal complaints about a Minister's or Former Minister's behaviour, other than where for legal reasons it is not possible to do so without prejudicing the rights of confidentiality owed to a complainer or others involved.

For complaints which are upheld or partially upheld, the following information will be published within 20 working days:

- The name of the Minister
- The outcome of the complaint (upheld or partially upheld)
- A redacted version of the decision report

For complaints which are not upheld, the following information will be published within 20 working days:

- The name of the Minister
- The outcome of the complaint (not upheld)

In the case of complaints not upheld, the information will be published for a fixed period of six months.

The identity of the complainer(s) and any witnesses will remain confidential and any information which could lead to identification of the complainer or witnesses will be redacted.

END