

## Department of the Interior Departmental Manual

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**Effective Date:** 06/05/13

**Series:** Personnel Management

**Part 373:** Equal Employment Opportunity

**Chapter 7:** Procedures for Processing Complaints of Discrimination Based on Sexual Orientation

**Originating Office:** Office of Civil Rights

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### 373 DM 7

**7.1 Scope and Coverage.** This chapter describes the procedures for processing complaints of sexual orientation-based workplace discrimination filed under this chapter. Individual entitlements under this chapter are derived from Departmental policy and not from the Equal Employment Opportunity Commission (EEOC) regulations (29 C.F.R. Part 1614) that govern the processing of Federal sector Equal Employment Opportunity (EEO) complaints. Complaints filed under this chapter cannot be the subject of either a hearing before an Administrative Judge of the EEOC or an appeal to the EEOC. However, it should be noted that lesbian, gay, bisexual, and heterosexual persons can also experience discrimination because of sex; a basis recognized under Title VII of the Civil Rights Act of 1964, as amended. This can take the form of sex-stereotyping, sexual harassment, or other kinds of sex discrimination. Lesbian, gay, bisexual, or heterosexual Federal employees or applicants who believe they have experienced sex discrimination may elect to file complaints under both this chapter (for sexual orientation discrimination) and the EEOC regulations that govern the processing of Federal EEO complaints of sex discrimination, as these are separate processes. Both claims shall be investigated; however, separate processing of the claims may occur thereafter.

A. When a complaint sets forth both a claim based on sexual orientation to which the procedures of this chapter apply and a claim based on race, color, religion, national origin, sex, age, genetic information, or disability to which the EEOC's regulations governing the processing for Federal sector EEO complaints apply, separate processing may occur at appropriate stages, e.g., at the investigation stage.

B. The procedures described in this chapter cover:

(1) Applicants for employment with respect to matters arising during the application and selection process.

(2) Employees.

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(3) Former employees regarding matters arising during their employment, if remedies and relief can still be granted.

C. Bargaining unit employees may elect between the negotiated grievance procedures or filing a formal complaint under this chapter unless the governing collective bargaining agreement specifies either process as the exclusive procedure for bargaining unit employees. The procedures described in this chapter apply to bargaining unit employees who are covered by a collective bargaining agreement and who have elected to use these procedures for filing a sexual orientation complaint, where the collective bargaining agreement does not require the employee to use the negotiated grievance procedures. Once an employee elects either procedure, that election is binding on the employee and the process will continue on that track and cannot be changed, once elected.

7.2 **Authority.** Executive Order 11478, as amended by Executive Order 12106, and as further amended by Executive Order 13087 (collectively, the Executive Order), prohibits discrimination and ensures equal opportunity for all persons, without regard to race, color, religion, sex, national origin, age, disability, or sexual orientation. These procedures covering complaints of discrimination based on sexual orientation are issued by the Department of the Interior (Department) pursuant to the Executive Order.

7.3 **Policy.** It is the policy of the Department to provide all employees a workplace free from unlawful discrimination, respecting the differences, different viewpoints, and the contributions each employee brings to the workplace. Further, it is the Department's policy that no employee or applicant for employment be subjected to discrimination or harassment because of his or her sexual orientation. The Department encourages the use of Alternative Dispute Resolution (ADR). See 370 DM 770, CORE PLUS Program. Covered individuals are free to use this procedure without fear of restraint, interference, coercion, discrimination, or reprisal.

#### 7.4 **Definitions.**

A. Aggrieved Person. An applicant for employment, an employee, or a former employee claiming to be discriminated against on the basis of sexual orientation who initiates a complaint in the informal phase of this complaints process.

B. Alternative Dispute Resolution (ADR). A process for seeking consensual resolution of the issues and concerns underlying a sexual orientation discrimination complaint. The ADR is generally a more flexible and cooperative approach to problem solving than other methods. It includes any assisted negotiation process which has the goal of resolving a conflict or dispute between two or more parties. CORE PLUS, administered by the Office of Collaborative Action and Dispute Resolution (CADR), is the Department's EEO and workplace ADR program.

C. Complainant. An applicant for employment, an employee, or a former employee who files a sexual orientation discrimination complaint in the formal phase of the complaints process.

D. Days. Calendar days, unless otherwise stated. Time limits expire at the normal close of business on the day specified (5:00 P.M. Eastern Time). If, however, a time limit expires on a weekend, holiday, or other non-workday, the time limit is extended to the close of business on the next workday.

E. Formal Complaint Process. A formal process whereby a complaint of sexual orientation discrimination must be filed within 15 days of receipt of Notice of Final Interview and Right to File a Discrimination Complaint.

F. Informal Complaint Process. Pre-complaint processing whereby aggrieved persons who believe they have been discriminated against on the basis of sexual orientation must consult an EEO Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action, prior to filing a complaint in order to try to informally resolve the matter.

G. Remedies and Relief. Relief to the extent permitted by existing laws and regulations. Attorney's fees and costs and compensatory (defined as monetary) damages are not recoverable in complaints of sexual orientation discrimination filed pursuant to this chapter.

H. Representative. A person selected and designated in writing by the aggrieved person or complainant to represent his/her sexual orientation complaint. The representative may accompany, represent, and advise the aggrieved person/complainant at any stage of the complaints process. In cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the agency may, after giving the representative an opportunity to respond, disqualify the representative. The complainant shall at all times be responsible for timely proceeding with the complaint whether or not he or she has designated a representative.

I. Settlement Agreement. A written document, knowingly and voluntarily entered into and signed by the aggrieved person/complainant, his/ her representative (if applicable), and the appropriate management official (with settlement authority) during the informal or formal process that serves as the final resolution of a sexual orientation complaint. Once signed and dated, the terms of the fully executed agreement are binding on both parties (the aggrieved person/complainant, and the bureau or office).

J. Sexual Orientation. Homosexuality (gay or lesbian), bisexuality, heterosexuality, whether such orientation is real or perceived.

## 7.5 **Responsibilities.**

A. Director, Office of Civil Rights (OCR). The Director, OCR, or his or her designee is responsible for overseeing the Department's sexual orientation complaint procedures and ensuring that this policy is administered properly. This includes addressing the availability of appropriate resources.

B. Director, Office of Collaborative Action and Dispute Resolution (CADR). The Director, CADR, supervises the development and implementation of the Departmental CORE PLUS program pursuant to 370 DM 770, by establishing policy, implementation guidance, and standard operating procedures for the management of the program. This includes coordinating program development and implementation efforts with the Director, OCR, to ensure ADR is available for persons filing discrimination complaints based on sexual orientation.

C. Heads of Bureaus and Offices. Heads of bureaus and offices are responsible for ensuring that their employees are aware of these procedures.

D. Bureau and Office EEO Officers. The EEO Officers, or their designees, provide advice, assistance, and guidance to employees, supervisors, and managers on the procedures described herein.

E. Managers and Supervisors. Managers and supervisors are responsible for ensuring that all personnel actions, policies, practices, and the work environment are free from discrimination and harassment on the basis of sexual orientation.

(1) No employee or applicant for employment shall be subjected to reprisal, intimidation, or coercion for raising an allegation of discrimination based on sexual orientation, or for participating in procedures addressing sexual orientation issues.

(2) Managers and supervisors will take appropriate action, including disciplinary action, when conduct and behavior occur that result in discrimination or harassment of employees because of their sexual orientation.

(3) Whenever ADR is used, the manager/supervisor participating in the ADR process must have the authority to approve and implement any settlement agreement, subject to review by the respective bureau/office EEO Officer and other relevant offices, specifically OCR, Human Resources, and the Solicitor's Office, as needed.

F. Employees. Employees are responsible for working with their supervisors and/or management officials to resolve workplace issues and concerns regarding sexual orientation discrimination and/or harassment as early as possible. However, when employees believe that they are aggrieved and decide to initiate a sexual orientation complaint, they are then responsible for complying with appropriate time limits, as established herein, and providing sufficient information to assist in the processing of their sexual orientation complaints.

## 7.6 **Informal Complaint Processing.**

A. Aggrieved persons who believe they have been discriminated against on the basis of sexual orientation must consult an EEO Counselor prior to filing a formal complaint in order to attempt to resolve the matter informally.

(1) An aggrieved person must contact an EEO Counselor within 45 days of the date that he/she became aware or should have been aware of the matter alleged to be

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discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action.

(2) The Director, OCR, or the bureau EEO Officer may extend the 45-day time limit in paragraph 7.6A(1) above when the aggrieved person demonstrates that he or she did not know and reasonably would not have known that the discriminatory matter or personnel action occurred; that despite reasonable efforts he or she was prevented by circumstances beyond his or her control, from contacting an EEO Counselor within the time limits; or for other reasons considered sufficient by the Director, OCR or the bureau EEO Officer. The authority to extend the time limit beyond 45 days cannot be delegated below the bureau EEO Officer.

B. The EEO Counselor shall not reveal the identity of an aggrieved person who consulted the EEO Counselor, except when authorized to do so by the aggrieved person, or after the bureau or OCR has received a formal discrimination complaint filed pursuant to paragraph 7.7, from the aggrieved person regarding the same matter.

C. At the initial counseling session, the EEO Counselor shall advise the aggrieved person in writing of his or her rights and responsibilities. The aggrieved person will be advised of other forums for raising employment issues that may address complaints of non-merit based employment actions, including the Department's Administrative Grievance Procedures, the Office of Special Counsel, the Merit Systems Protection Board (if applicable), and for those employees in a bargaining unit, the negotiated grievance procedures, as applicable. The employee will also be advised of the option to elect the ADR process and will be provided information about the CORE PLUS Program.

D. If the aggrieved person agrees to participate in ADR, he or she will be required to sign a form extending the counseling period an additional 60 days so that the informal complaint processing shall be completed within 90 days.

E. Offer of ADR during the informal complaint process:

(1) During the initial interview, if the aggrieved person indicates an interest in pursuing the ADR process, the EEO Counselor shall coordinate with the relevant bureau EEO Office that will determine if the use of ADR is appropriate in the specific situation.

(2) If the Director of CADR or the Director of OCR determines that the matter is suitable for ADR, the EEO Counselor will offer the aggrieved person, in writing, the opportunity to participate in ADR.

(3) The manager or supervisor must actively participate in the ADR process in good faith, when an employee has elected to pursue the ADR process and the determination has been made that the complaint is appropriate for ADR.

(4) The bureau EEO Official will provide pertinent information regarding the complaint to a CORE PLUS Neutral who serves as a third-party neutral during the mediation or

other ADR process, or provide the pertinent information to the third-party neutral who will conduct the mediation or other ADR process.

(5) If the conflict or dispute is resolved through the use of ADR, the resolution will be documented in the form of a written settlement agreement.

(i) Draft settlement agreements for complaints based on sexual orientation must be reviewed and concurred with by the bureau/office servicing Human Resources Office, prior to approval and execution, to ensure that the terms comply with applicable regulations, policies, and collective bargaining agreement provisions, and the provisions can be timely implemented.

(ii) Draft sexual orientation settlement agreements shall also be reviewed and concurred with by the servicing EEO Office and/or Director of OCR, prior to approval and execution, to ensure that the terms are enforceable.

(iii) Attorney's fees and costs, and compensatory (defined as monetary) damages are not recoverable in complaints of sexual orientation filed pursuant to this chapter; therefore, settlement agreements cannot provide for such.

F. When the aggrieved person does not wish to participate in ADR or the bureau EEO Officer determines that ADR is not appropriate, traditional EEO counseling will be conducted and the 30 day timeframes will apply.

G. The EEO Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person brought the matter to the EEO Counselor's attention, unless the counseling period has been extended in writing for an additional 60 days by the bureau/office EEO Officer, with the agreement of the aggrieved person, to facilitate resolution. If the matter has not been resolved at the conclusion of the counseling period, the aggrieved person shall be notified in writing by the EEO Counselor of the right to file a formal discrimination complaint, based on sexual orientation, with the appropriate bureau/office or Office of the Secretary EEO Office.

## 7.7 Formal Complaints.

A. Formal complaints filed under this Section must be in writing and must be filed within 15 days of receipt of the Notice of Right to File a Complaint of Discrimination required by paragraph 7.6G.

B. Formal complaints may be filed with the Director, OCR, or the bureau/office EEO Officer. To ensure prompt processing, the complaint should be filed with the EEO Officer of the bureau/office that services the organization where the alleged discrimination arose.

C. A Formal Complaint of Discrimination Based on Sexual Orientation (Form DI-1892B), must contain a signed statement from the person claiming to be discriminated against (complainant), or that person's attorney. This statement must be sufficiently precise to identify

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the complainant, where he or she is employed, the bureau or office where the complaint arose, and the alleged discriminatory action(s) or practice(s), including the dates on which the alleged discriminatory actions(s) or practice(s) occurred. The complaint must also contain a telephone number and address where the complainant and his/her representative (if applicable) can be contacted. Failure to provide this information may result in dismissal of the complaint.

#### 7.8 **Acceptance or Dismissal of Complaints.**

A. If the complaint is accepted for investigation, the complainant will be advised in writing of the specific alleged claim(s) that were accepted for processing and investigation. Such notice shall also advise the complainant that the bureau or Office of the Secretary is required to conduct an investigation of the complaint within 180 days of the filing date of the complaint. This time limit applies unless the EEO Officer and the complainant agree, in writing, to an extension of not more than an additional 90 days to ensure the complete development of the investigative record.

B. Once a formal complaint has been accepted, ADR may be offered to the parties in an attempt to resolve the matter prior to conducting the investigation. If the complainant accepts the offer of ADR, he or she will be required to sign a statement agreeing to extend the investigation period an additional 60 days for the purpose of mediation. If the dispute is resolved through the use of ADR, the resolution will be processed pursuant to procedures described in paragraph 7.6. If the complaint is not resolved, the investigation will proceed.

C. The OCR, Chief of Employment Complaints and Adjudication Division, shall dismiss a complaint or a portion of a complaint:

(1) That fails to state a claim covered under this chapter or states a claim by the same complainant that is pending before or has been decided by the Department, except for those allegations being processed under 29 C.F.R Part 1614;

(2) That fails to comply with the applicable time limits contained in paragraphs 7.6(A)(1) and 7.7(A), unless the Director, OCR, or bureau EEO Officer extends the time limits pursuant to paragraph 7.6A(2);

(3) Where the complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination;

(4) That is moot, where there is no reasonable expectation that the alleged violation will recur and interim relief or events have completely eradicated the effects of the alleged violation;

(5) Where the complainant is a former employee, and remedies and relief can no longer be granted;

(6) That alleges that a proposal to take a personnel action or other preliminary step to taking a personnel action is based on sexual orientation;

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(7) Where the complainant cannot be located, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days to a notice of proposed dismissal sent to his or her last known address; or

(8) Where the Director, OCR or bureau EEO Officer, has provided the complainant a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to respond to the request within 15 days of receipt, or the complainant's response does not address the Agency's request, provided that the request included a notice of the proposed dismissal under this chapter.

#### **7.9 Investigation of Sexual Orientation Complaints.**

A. The investigation of sexual orientation complaints shall be managed by the bureau EEO Officer and/or Director, OCR, consistent with the procedures for investigating EEO complaints of discrimination. The bureau or office from which the sexual orientation claim(s) originated will fund the cost of the investigation.

B. Any investigation under this chapter will be conducted by a contract investigator or Government investigator with an appropriate security clearance. The Director, OCR, or bureau EEO Officer may authorize the assigned investigator to use an exchange of letters or memoranda, interrogatories, fact-finding conferences, or any other fact-finding methods that efficiently and thoroughly address the specific issues raised in the sexual orientation complaint.

C. The following procedures apply to the investigation of complaints:

(1) After coordination with the bureau EEO Officer, the investigator may require that the complainant, bureau officials, and any employee of the Department produce the documentary and testimonial evidence that has been deemed necessary for development of the investigative record.

(2) Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.

(3) Managers who are the subject of an investigation are entitled to request legal representation from the Office of the Solicitor during the investigatory interview.

(4) Managers who are the subject of an EEO investigation shall be provided with a copy of the allegations being made against them.

(5) When a complainant, or the bureau against which a complaint is filed, or its employees, fails without good cause shown, to respond fully and in a timely fashion to requests for documents, records, affidavits, or the attendance of witness(es), the investigator shall note that fact in the investigative record.



(6) At the conclusion of the fact-finding process, the investigator will develop and complete the report of investigation.

D. The bureau EEO Officer, through the investigation process, shall ensure that there is a complete and impartial factual record sufficient to make findings on the matters raised in the formal complaint.

E. The bureau EEO Officer is responsible for ensuring the completion of the investigation within 180 days of the date of filing of the formal complaint. This time limit applies unless the bureau EEO Officer and the complainant agree, in writing, to an extension of not more than an additional 90 days to ensure the complete development of the investigative record.

F. Within 180 days from the filing of the complaint or within the period of extension provided in paragraph 7.9E above, the bureau EEO Officer shall notify the complainant, in writing, that the investigation has been completed and provide the complainant a copy of the investigative file.

(1) The notice shall advise the complainant of the right to elect, within 30 days of receipt of the notice, a Final Agency Decision (FAD) by the Director, OCR, or to withdraw the complaint, as appropriate.

(2) The written notice shall also advise the complainant that, if the complainant fails to respond to the written notice within 30 days of receipt, a FAD, based on the record, will be issued.

**7.10 Final Agency Decisions.** Within 60 days of receiving notification that a complainant has requested a FAD from OCR, the Director, OCR, shall issue the FAD. When a complainant, or the bureau against which a complaint is filed, or its employees, fails without good cause shown, to respond fully and in a timely fashion to requests for documents, records, affidavits, or the attendance of witness(es), when developing a FAD, the Director, OCR, may use this information to:

A. Draw an adverse inference that the requested information, or the testimony of the requested witness(es), would have reflected unfavorably on the party failing to provide the requested information;

B. Consider the matters to which the requested information or testimony pertains established in favor of the opposing party; or

C. Exclude other evidence offered by the party failing to produce the requested information or witness(es). When sexual orientation discrimination is found, appropriate remedies and relief shall be ordered pursuant to paragraph 7.11 below.

**7.11 Remedies and Relief.** When the Director, OCR, finds that an applicant for employment, an employee, or a former employee was discriminated against on the basis of sexual orientation,

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the Director, OCR, shall order remedies and relief to the extent permitted by existing laws and regulations. Attorney's fees and costs and compensatory (defined as monetary) damages are not recoverable in complaints filed under this chapter.

**7.12 Request for Reconsideration (RFR).** If the complainant is dissatisfied with the FAD, a RFR may be filed with the Director, OCR. The RFR must be in writing and must contain arguments or evidence which establish that the FAD was erroneous because:

A. New and material evidence is available that was not readily available when the FAD was issued; or

B. The FAD involved an erroneous interpretation of material facts, or misapplication of established policy or procedures contained within this chapter, and the FAD will have a substantial impact on the policies, practices, or operations of the Department.

(1) The RFR, with supporting statements or evidence, must be filed on or before the 30th day after receipt of the FAD. For purposes of calculating receipt of the FAD, if not otherwise evident, receipt will be presumed to have occurred within 5 days of the mailing of the FAD to the complainant.

(2) A complete copy of the RFR must be provided to the Director, OCR, and to all persons listed in the FAD.

(3) The RFRs must be submitted to the Director, OCR, 1849 C Street, N.W., Washington, DC 20240. The Director, OCR, will issue the decision on the RFR no later than 60 days from receipt of the RFR and the supporting documents. The RFR decision of the Director, OCR, will be final and with no further right(s) of appeal. A copy of the RFR final decision will be provided to the relevant offices.

### **7.13 Settlement Agreements.**

A. Bureaus and offices shall make reasonable efforts to resolve sexual orientation complaints voluntarily and as early as possible in and throughout the administrative processing of the complaint, including the informal and formal stages. Bureau/office EEO Officers are strongly encouraged to use ADR procedures to facilitate early resolution.

B. Any settlement agreement reached at any time in the process shall be in writing, signed by both parties, and the complainant's representative (if applicable), and shall identify the allegations resolved, complaint docket number (if any), and the terms of the agreement. A copy of the final executed settlement agreement shall be given to the complainant, the respective bureau/office EEO Officer who is responsible for ensuring compliance with the terms of the agreement, and the Director, OCR.

C. As appropriate or necessary for implementation of the settlement agreement, the terms of the settlement agreement may also be discussed with the Human Resources Office and respective managers and/or supervisors, as well as the Office of the Solicitor. All terms of the

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settlement agreement must be consistent with current directives and regulations, and must otherwise comply with all Departmental policies, requirements, and legal authorities.

#### **7.14 Compliance with Settlement Agreements and Final Agency Decisions.**

A. Settlement Agreements. Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, as described in paragraph 7.13, shall be binding on all parties. The bureau/office EEO Officer shall maintain all documentation and records supporting compliance with the settlement agreement.

(1) If the complainant believes that the bureau/office has failed to comply with the terms of a settlement agreement, the complainant shall notify the Director, OCR, in writing, of the alleged noncompliance with the settlement agreement, within 30 days of the date when the complainant knew or should have known of the alleged noncompliance. The complainant must also submit a copy of the settlement agreement.

(2) The complainant may request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point where processing ceased. The Director, OCR, will issue a FAD on the breach of settlement claim within 60 days of receipt of the claim and copy of the settlement agreement.

(3) If the Director, OCR, determines that the settlement agreement has not been complied with and the non-compliance is not attributable to acts or conduct of the complainant, the Director, OCR, may order such compliance or order that the complaint be reinstated for further processing from the point processing ceased. Should the Director, OCR, order that the complaint be reinstated, the complainant must return any benefit conferred by the settlement agreement to the Department. There are no further appeals from a FAD on a breach of settlement claim.

B. Final Agency Decision. As noted in paragraph 7.14A above, a FAD shall be binding on both the bureau/office and the complainant. The bureau/office EEO Officer shall report on the compliance efforts to the Director, OCR, and submit documentation supporting compliance with the FAD. If the complainant believes that the bureau/office has failed to comply with the FAD, the complainant shall notify the Director, OCR, in writing, of the alleged non-compliance. A copy of the FAD must be submitted with the notice. The Director, OCR, shall issue a decision on the complainant's claim of non-compliance within 60 days of the receipt of the claim and copy of the settlement agreement.

#### **7.15 Relationship to Other Procedures.**

A. With the exception of hearings before the EEOC Administrative Judges and appeals to the EEOC, to the extent possible and consistent with existing authorities, relevant Departmental policies and practices generally used in processing complaints of discrimination under 29 C.F.R. Part 1614 and the EEOC's Management Directive, MD-110, will be utilized in

processing complaints of discrimination based on sexual orientation. This may include, but is not limited to:

- (1) granting complainants a reasonable amount of official time to present the complaint and to respond to Departmental requests for information, if otherwise on duty;
- (2) computation and calculation of dates for resolving timeliness issues;
- (3) confidentiality of records; and
- (4) the methodology for analyzing allegations of discrimination.

B. Nothing in this chapter affects the right of any employee to file a complaint of discrimination against the Department within the purview of the Federal sector EEO complaint procedures set forth in 29 C.F.R. Part 1614, or in U.S. District Court, as appropriate.

**7.16 Management's Rights.** Managers and alleged responsible management officials shall have the same rights and opportunities as the complainant to review relevant documents on a need to know basis, be made aware of relevant allegations, and provide responses and evidence as are available to managers under 29 C.F.R. Part 1614 and the implementing EEOC Management Directive 110.