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To amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 11, 2007

Mr. AKAKA (for himself, Ms. COLLINS, Mr. GRASSLEY, Mr. LEVIN, Mr. LIEBERMAN, Mr. LEAHY, Mr. VOINOVICH, Mr. CARPER, Mr. DURBIN, Mr. PRYOR, and Mr. LAUTENBERG) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

To amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. PROTECTION OF CERTAIN DISCLOSURES OF IN-**
2 **FORMATION BY FEDERAL EMPLOYEES.**

3 (a) **SHORT TITLE.**—This Act may be cited as the
4 “Federal Employee Protection of Disclosures Act”.

5 (b) **CLARIFICATION OF DISCLOSURES COVERED.**—
6 Section 2302(b)(8) of title 5, United States Code, is
7 amended—

8 (1) in subparagraph (A)—

9 (A) by striking “which the employee or ap-
10 plicant reasonably believes evidences” and in-
11 sserting “, without restriction to time, place,
12 form, motive, context, or prior disclosure made
13 to any person by an employee or applicant, in-
14 cluding a disclosure made in the ordinary
15 course of an employee’s duties, that the em-
16 ployee or applicant reasonably believes is evi-
17 dence of”; and

18 (B) in clause (i), by striking “a violation”
19 and inserting “any violation”; and

20 (2) in subparagraph (B)—

21 (A) by striking “which the employee or ap-
22 plicant reasonably believes evidences” and in-
23 sserting “, without restriction to time, place,
24 form, motive, context, or prior disclosure made
25 to any person by an employee or applicant, in-
26 cluding a disclosure made in the ordinary

1 course of an employee’s duties, of information
2 that the employee or applicant reasonably be-
3 lieves is evidence of”; and

4 (B) in clause (i), by striking “a violation”
5 and inserting “any violation (other than a viola-
6 tion of this section)”.

7 (c) COVERED DISCLOSURES.—Section 2302(a)(2) of
8 title 5, United States Code, is amended—

9 (1) in subparagraph (B)(ii), by striking “and”
10 at the end;

11 (2) in subparagraph (C)(iii), by striking the pe-
12 riod at the end and inserting “; and”; and

13 (3) by adding at the end the following:

14 “(D) ‘disclosure’ means a formal or informal
15 communication or transmission, but does not include
16 a communication concerning policy decisions that
17 lawfully exercise discretionary authority unless the
18 employee providing the disclosure reasonably believes
19 that the disclosure evidences—

20 “(i) any violation of any law, rule, or regu-
21 lation; or

22 “(ii) gross mismanagement, a gross waste
23 of funds, an abuse of authority, or a substantial
24 and specific danger to public health or safety.”.

1 (d) REBUTTABLE PRESUMPTION.—Section 2302(b)
2 of title 5, United States Code, is amended by amending
3 the matter following paragraph (12) to read as follows:
4 “This subsection shall not be construed to authorize the
5 withholding of information from Congress or the taking
6 of any personnel action against an employee who discloses
7 information to Congress, except that an employee or appli-
8 cant may be disciplined for the disclosure of information
9 described in paragraph (8)(C)(i) to a Member or employee
10 of Congress who is not authorized to receive such informa-
11 tion. For purposes of paragraph (8), a determination as
12 to whether an employee or applicant reasonably believes
13 that they have disclosed information that evidences any
14 violation of law, rule, regulation, gross mismanagement,
15 a gross waste of funds, an abuse of authority, or a sub-
16 stantial and specific danger to public health or safety shall
17 be made by determining whether a disinterested observer
18 with knowledge of the essential facts known to and readily
19 ascertainable by the employee could reasonably conclude
20 that the actions of the Government evidence such viola-
21 tions, mismanagement, waste, abuse, or danger.”.

22 (e) NONDISCLOSURE POLICIES, FORMS, AND AGREE-
23 MENTS; SECURITY CLEARANCES; AND RETALIATORY IN-
24 VESTIGATIONS.—

1 (1) PERSONNEL ACTION.—Section
2 2302(a)(2)(A) of title 5, United States Code, is
3 amended—

4 (A) in clause (x), by striking “and” after
5 the semicolon; and

6 (B) by redesignating clause (xi) as clause
7 (xiv) and inserting after clause (x) the fol-
8 lowing:

9 “(xi) the implementation or enforce-
10 ment of any nondisclosure policy, form, or
11 agreement;

12 “(xii) a suspension, revocation, or
13 other determination relating to a security
14 clearance or any other access determina-
15 tion by a covered agency;

16 “(xiii) an investigation, other than
17 any ministerial or nondiscretionary fact
18 finding activities necessary for the agency
19 to perform its mission, of an employee or
20 applicant for employment because of any
21 activity protected under this section; and”

22 (2) PROHIBITED PERSONNEL PRACTICE.—Sec-
23 tion 2302(b) of title 5, United States Code, is
24 amended—

1 (A) in paragraph (11), by striking “or” at
2 the end;

3 (B) in paragraph (12), by striking the pe-
4 riod and inserting a semicolon; and

5 (C) by inserting after paragraph (12) the
6 following:

7 “(13) implement or enforce any nondisclosure
8 policy, form, or agreement, if such policy, form, or
9 agreement does not contain the following statement:
10 ‘These provisions are consistent with and do not su-
11 perse, conflict with, or otherwise alter the em-
12 ployee obligations, rights, or liabilities created by
13 Executive Order No. 12958; section 7211 of title 5,
14 United States Code (governing disclosures to Con-
15 gress); section 1034 of title 10, United States Code
16 (governing disclosure to Congress by members of the
17 military); section 2302(b)(8) of title 5, United
18 States Code (governing disclosures of illegality,
19 waste, fraud, abuse, or public health or safety
20 threats); the Intelligence Identities Protection Act of
21 1982 (50 U.S.C. 421 et seq.) (governing disclosures
22 that could expose confidential Government agents);
23 and the statutes which protect against disclosures
24 that could compromise national security, including
25 sections 641, 793, 794, 798, and 952 of title 18,

1 United States Code, and section 4(b) of the Subver-
 2 sive Activities Control Act of 1950 (50 U.S.C.
 3 783(b)). The definitions, requirements, obligations,
 4 rights, sanctions, and liabilities created by such Ex-
 5 ecutive order and such statutory provisions are in-
 6 corporated into this agreement and are controlling’;
 7 or

8 “(14) conduct, or cause to be conducted, an in-
 9 vestigation, other than any ministerial or nondis-
 10 cretionary fact finding activities necessary for the
 11 agency to perform its mission, of an employee or ap-
 12 plicant for employment because of any activity pro-
 13 tected under this section.”.

14 (3) BOARD AND COURT REVIEW OF ACTIONS
 15 RELATING TO SECURITY CLEARANCES.—

16 (A) IN GENERAL.—Chapter 77 of title 5,
 17 United States Code, is amended by inserting
 18 after section 7702 the following:

19 **“§ 7702a. Actions relating to security clearances**

20 “(a) In any appeal relating to the suspension, revoca-
 21 tion, or other determination relating to a security clear-
 22 ance or access determination, the Merit Systems Protec-
 23 tion Board or any reviewing court—

24 “(1) shall determine whether paragraph (8) or
 25 (9) of section 2302(b) was violated;

1 “(2) may not order the President or the des-
2 ignee of the President to restore a security clearance
3 or otherwise reverse a determination of clearance
4 status or reverse an access determination; and

5 “(3) subject to paragraph (2), may issue declar-
6 atory relief and any other appropriate relief.

7 “(b)(1) If, in any final judgment, the Board or court
8 declares that any suspension, revocation, or other deter-
9 mination with regard to a security clearance or access de-
10 termination was made in violation of paragraph (8) or (9)
11 of section 2302(b), the affected agency shall conduct a re-
12 view of that suspension, revocation, access determination,
13 or other determination, giving great weight to the Board
14 or court judgment.

15 “(2) Not later than 30 days after any Board or court
16 judgment declaring that a security clearance suspension,
17 revocation, access determination, or other determination
18 was made in violation of paragraph (8) or (9) of section
19 2302(b), the affected agency shall issue an unclassified re-
20 port to the congressional committees of jurisdiction (with
21 a classified annex if necessary), detailing the cir-
22 cumstances of the agency’s security clearance suspension,
23 revocation, other determination, or access determination.
24 A report under this paragraph shall include any proposed

1 agency action with regard to the security clearance or ac-
 2 cess determination.

3 “(c) An allegation that a security clearance or access
 4 determination was revoked or suspended in retaliation for
 5 a protected disclosure shall receive expedited review by the
 6 Office of Special Counsel, the Merit Systems Protection
 7 Board, and any reviewing court.

8 “(d) For purposes of this section, corrective action
 9 may not be ordered if the agency demonstrates by a pre-
 10 ponderance of the evidence that it would have taken the
 11 same personnel action in the absence of such disclosure.”.

12 (B) TECHNICAL AND CONFORMING AMEND-
 13 MENT.—The table of sections for chapter 77 of
 14 title 5, United States Code, is amended by in-
 15 serting after the item relating to section 7702
 16 the following:

“7702a. Actions relating to security clearances.”.

17 (f) EXCLUSION OF AGENCIES BY THE PRESIDENT.—
 18 Section 2302(a)(2)(C) of title 5, United States Code, is
 19 amended by striking clause (ii) and inserting the following:

20 “(ii)(I) the Federal Bureau of Investiga-
 21 tion, the Central Intelligence Agency, the De-
 22 fense Intelligence Agency, the National Imagery
 23 and Mapping Agency, the National Security
 24 Agency; and

1 “(II) as determined by the President, any
 2 executive agency or unit thereof the principal
 3 function of which is the conduct of foreign in-
 4 telligence or counterintelligence activities, if the
 5 determination (as that determination relates to
 6 a personnel action) is made before that per-
 7 sonnel action; or”.

8 (g) ATTORNEY FEES.—Section 1204(m)(1) of title 5,
 9 United States Code, is amended by striking “agency in-
 10 volved” and inserting “agency where the prevailing party
 11 is employed or has applied for employment”.

12 (h) DISCIPLINARY ACTION.—Section 1215(a)(3) of
 13 title 5, United States Code, is amended to read as follows:

14 “(3)(A) A final order of the Board may im-
 15 pose—

16 “(i) disciplinary action consisting of re-
 17 moval, reduction in grade, debarment from
 18 Federal employment for a period not to exceed
 19 5 years, suspension, or reprimand;

20 “(ii) an assessment of a civil penalty not to
 21 exceed \$1,000; or

22 “(iii) any combination of disciplinary ac-
 23 tions described under clause (i) and an assess-
 24 ment described under clause (ii).

1 “(B) In any case in which the Board finds that
2 an employee has committed a prohibited personnel
3 practice under paragraph (8) or (9) of section
4 2302(b), the Board shall impose disciplinary action
5 if the Board finds that the activity protected under
6 paragraph (8) or (9) of section 2302(b) was a sig-
7 nificant motivating factor, even if other factors also
8 motivated the decision, for the employee’s decision to
9 take, fail to take, or threaten to take or fail to take
10 a personnel action, unless that employee dem-
11 onstrates, by preponderance of evidence, that the
12 employee would have taken, failed to take, or threat-
13 ened to take or fail to take the same personnel ac-
14 tion, in the absence of such protected activity.”.

15 (i) SPECIAL COUNSEL AMICUS CURIAE APPEAR-
16 ANCE.—Section 1212 of title 5, United States Code, is
17 amended by adding at the end the following:

18 “(h)(1) The Special Counsel is authorized to appear
19 as amicus curiae in any action brought in a court of the
20 United States related to any civil action brought in con-
21 nection with section 2302(b) (8) or (9), or subchapter III
22 of chapter 73, or as otherwise authorized by law. In any
23 such action, the Special Counsel is authorized to present
24 the views of the Special Counsel with respect to compli-
25 ance with section 2302(b) (8) or (9) or subchapter III of

1 chapter 73 and the impact court decisions would have on
2 the enforcement of such provisions of law.

3 “(2) A court of the United States shall grant the ap-
4 plication of the Special Counsel to appear in any such ac-
5 tion for the purposes described in subsection (a).”.

6 (j) JUDICIAL REVIEW.—

7 (1) IN GENERAL.—Section 7703(b)(1) of title
8 5, United States Code, is amended to read as fol-
9 lows:

10 “(b)(1)(A) Except as provided in subparagraph (B)
11 and paragraph (2), a petition to review a final order or
12 final decision of the Board shall be filed in the United
13 States Court of Appeals for the Federal Circuit. Notwith-
14 standing any other provision of law, any petition for re-
15 view must be filed within 60 days after the date the peti-
16 tioner received notice of the final order or decision of the
17 Board.

18 “(B) During the 5-year period beginning on the effec-
19 tive date of the Federal Employee Protection of Disclo-
20 sures Act, a petition to review a final order or final deci-
21 sion of the Board in a case alleging a violation of para-
22 graph (8) or (9) of section 2302(b) shall be filed in the
23 United States Court of Appeals for the Federal Circuit
24 or any court of appeals of competent jurisdiction as pro-
25 vided under subsection (b)(2).”.

1 (2) REVIEW OBTAINED BY OFFICE OF PER-
2 SONNEL MANAGEMENT.—Section 7703(d) of title 5,
3 United States Code, is amended to read as follows:
4 “(d)(1) Except as provided under paragraph (2), this
5 paragraph shall apply to any review obtained by the Direc-
6 tor of the Office of Personnel Management. The Director
7 of the Office of Personnel Management may obtain review
8 of any final order or decision of the Board by filing, within
9 60 days after the date the Director received notice of the
10 final order or decision of the Board, a petition for judicial
11 review in the United States Court of Appeals for the Fed-
12 eral Circuit if the Director determines, in his discretion,
13 that the Board erred in interpreting a civil service law,
14 rule, or regulation affecting personnel management and
15 that the Board’s decision will have a substantial impact
16 on a civil service law, rule, regulation, or policy directive.
17 If the Director did not intervene in a matter before the
18 Board, the Director may not petition for review of a Board
19 decision under this section unless the Director first peti-
20 tions the Board for a reconsideration of its decision, and
21 such petition is denied. In addition to the named respond-
22 ent, the Board and all other parties to the proceedings
23 before the Board shall have the right to appear in the pro-
24 ceeding before the Court of Appeals. The granting of the

1 petition for judicial review shall be at the discretion of the
2 Court of Appeals.

3 “(2) During the 5-year period beginning on the effec-
4 tive date of the Federal Employee Protection of Disclo-
5 sures Act, this paragraph shall apply to any review relat-
6 ing to paragraph (8) or (9) of section 2302(b) obtained
7 by the Director of the Office of Personnel Management.
8 The Director of the Office of Personnel Management may
9 obtain review of any final order or decision of the Board
10 by filing, within 60 days after the date the Director re-
11 ceived notice of the final order or decision of the Board,
12 a petition for judicial review in the United States Court
13 of Appeals for the Federal Circuit or any court of appeals
14 of competent jurisdiction as provided under subsection
15 (b)(2) if the Director determines, in his discretion, that
16 the Board erred in interpreting paragraph (8) or (9) of
17 section 2302(b). If the Director did not intervene in a
18 matter before the Board, the Director may not petition
19 for review of a Board decision under this section unless
20 the Director first petitions the Board for a reconsideration
21 of its decision, and such petition is denied. In addition
22 to the named respondent, the Board and all other parties
23 to the proceedings before the Board shall have the right
24 to appear in the proceeding before the court of appeals.

1 The granting of the petition for judicial review shall be
2 at the discretion of the Court of Appeals.”.

3 (k) NONDISCLOSURE POLICIES, FORMS, AND AGREE-
4 MENTS.—

5 (1) IN GENERAL.—

6 (A) REQUIREMENT.—Each agreement in
7 Standard Forms 312 and 4414 of the Govern-
8 ment and any other nondisclosure policy, form,
9 or agreement of the Government shall contain
10 the following statement: “These restrictions are
11 consistent with and do not supersede, conflict
12 with, or otherwise alter the employee obliga-
13 tions, rights, or liabilities created by Executive
14 Order No. 12958; section 7211 of title 5,
15 United States Code (governing disclosures to
16 Congress); section 1034 of title 10, United
17 States Code (governing disclosure to Congress
18 by members of the military); section 2302(b)(8)
19 of title 5, United States Code (governing disclo-
20 sures of illegality, waste, fraud, abuse or public
21 health or safety threats); the Intelligence Iden-
22 tities Protection Act of 1982 (50 U.S.C. 421 et
23 seq.) (governing disclosures that could expose
24 confidential Government agents); and the stat-
25 utes which protect against disclosure that may

1 compromise the national security, including sec-
2 tions 641, 793, 794, 798, and 952 of title 18,
3 United States Code, and section 4(b) of the
4 Subversive Activities Act of 1950 (50 U.S.C.
5 783(b)). The definitions, requirements, obliga-
6 tions, rights, sanctions, and liabilities created
7 by such Executive order and such statutory
8 provisions are incorporated into this agreement
9 and are controlling.”.

10 (B) ENFORCEABILITY.—Any nondisclosure
11 policy, form, or agreement described under sub-
12 paragraph (A) that does not contain the state-
13 ment required under subparagraph (A) may not
14 be implemented or enforced to the extent such
15 policy, form, or agreement is inconsistent with
16 that statement.

17 (2) PERSONS OTHER THAN GOVERNMENT EM-
18 PLOYEES.—Notwithstanding paragraph (1), a non-
19 disclosure policy, form, or agreement that is to be
20 executed by a person connected with the conduct of
21 an intelligence or intelligence-related activity, other
22 than an employee or officer of the United States
23 Government, may contain provisions appropriate to
24 the particular activity for which such document is to
25 be used. Such form or agreement shall, at a min-

1 imum, require that the person will not disclose any
2 classified information received in the course of such
3 activity unless specifically authorized to do so by the
4 United States Government. Such nondisclosure
5 forms shall also make it clear that such forms do
6 not bar disclosures to Congress or to an authorized
7 official of an executive agency or the Department of
8 Justice that are essential to reporting a substantial
9 violation of law.

10 (l) CLARIFICATION OF WHISTLEBLOWER RIGHTS
11 FOR CRITICAL INFRASTRUCTURE INFORMATION.—Section
12 214(c) of the Homeland Security Act of 2002 (6 U.S.C.
13 133(c)) is amended by adding at the end the following:
14 “For purposes of this section a permissible use of inde-
15 pendently obtained information includes the disclosure of
16 such information under section 2302(b)(8) of title 5,
17 United States Code.”.

18 (m) ADVISING EMPLOYEES OF RIGHTS.—Section
19 2302(c) of title 5, United States Code, is amended by in-
20 serting “, including how to make a lawful disclosure of
21 information that is specifically required by law or Execu-
22 tive order to be kept secret in the interest of national de-
23 fense or the conduct of foreign affairs to the Special Coun-
24 sel, the Inspector General of an agency, Congress, or other

1 agency employee designated to receive such disclosures”
2 after “chapter 12 of this title”.

3 (n) SCOPE OF DUE PROCESS.—

4 (1) SPECIAL COUNSEL.—Section
5 1214(b)(4)(B)(ii) of title 5, United States Code, is
6 amended by inserting “, after a finding that a pro-
7 tected disclosure was a contributing factor,” after
8 “ordered if”.

9 (2) INDIVIDUAL ACTION.—Section 1221(e)(2)
10 of title 5, United States Code, is amended by insert-
11 ing “, after a finding that a protected disclosure was
12 a contributing factor,” after “ordered if”.

13 (o) EFFECTIVE DATE.—This Act shall take effect 30
14 days after the date of enactment of this Act.

○