

107TH CONGRESS
2D SESSION

S. 2829

To authorize appropriations for the Merit Systems Protection Board and the Office of Special Counsel, to provide for the protection of certain disclosures of information by Federal employees, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 31, 2002

Mr. AKAKA introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

To authorize appropriations for the Merit Systems Protection Board and the Office of Special Counsel, to provide for the protection of certain disclosures of information by Federal employees, 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,*

3 **SECTION 1. AUTHORIZATION OF APPROPRIATIONS.**

4 (a) MERIT SYSTEMS PROTECTION BOARD.—Section
5 8(a)(1) of the Whistleblower Protection Act of 1989 (5
6 U.S.C. 5509 note) is amended by striking “1998, 1999,
7 2000, 2001 and 2002” and inserting “2003, 2004, 2005,
8 2006, and 2007”.

1 (b) OFFICE OF SPECIAL COUNSEL.—Section 8(a)(2)
 2 of the Whistleblower Protection Act of 1989 (5 U.S.C.
 3 5509 note) is amended by striking “1993, 1994, 1995,
 4 1996, and 1997,” and inserting “2003, 2004, 2005, 2006,
 5 and 2007”.

6 (c) EFFECTIVE DATE.—This section shall take effect
 7 on October 1, 2002.

8 **SEC. 2. DISCLOSURE OF VIOLATIONS OF LAW; RETURN OF**
 9 **DOCUMENTS.**

10 Section 1213(g) of title 5, United States Code, is
 11 amended—

12 (1) in paragraph (1), by striking the last sen-
 13 tence; and

14 (2) by striking paragraph (3) and inserting the
 15 following:

16 “(3) If the Special Counsel does not transmit
 17 the information to the head of the agency under
 18 paragraph (2), the Special Counsel shall inform the
 19 individual of—

20 “(A) the reasons why the disclosure may
 21 not be further acted on under this chapter; and

22 “(B) other offices available for receiving
 23 disclosures, should the individual wish to pursue
 24 the matter further.”.

1 **SEC. 3. PROTECTION OF CERTAIN DISCLOSURES OF INFOR-**
2 **MATION BY FEDERAL EMPLOYEES.**

3 (a) CLARIFICATION OF DISCLOSURES COVERED.—
4 Section 2302(b)(8) of title 5, United States Code, is
5 amended—

6 (1) in subparagraph (A)—

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

16 (B) in clause (i) by striking “a violation”
17 and inserting “any violation”;

18 (2) in subparagraph (B)—

19 (A) by striking “which the employee or ap-
20 plicant reasonably believes evidences” and in-
21 serting “, without restriction of time, place,
22 form, motive, context, or prior disclosure made
23 to any person by an employee or applicant, in-
24 cluding a disclosure made in the ordinary
25 course of an employee’s duties to the Special
26 Counsel, or to the Inspector General of an

1 agency or another employee designated by the
2 head of the agency to receive such disclosures,
3 of information that the employee or applicant
4 reasonably believes is evidence of”; and

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

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

8 “(C) a disclosure that—

9 “(i) is made by an employee or appli-
10 cant of information required by law or Ex-
11 ecutive order to be kept secret in the inter-
12 est of national defense or the conduct of
13 foreign affairs that the employee or appli-
14 cant reasonably believes is evidence of—

15 “(I) any violation of any law,
16 rule, or regulation;

17 “(II) gross mismanagement, a
18 gross waste of funds, an abuse of au-
19 thority, or a substantial and specific
20 danger to public health or safety; or

21 “(III) a false statement to Con-
22 gress on an issue of material fact; and

23 “(ii) is made to—

24 “(I) a member of a committee of
25 Congress having a primary responsi-

1 bility for oversight of a department,
 2 agency, or element of the Federal
 3 Government to which the disclosed in-
 4 formation relates;

5 “(II) any other Member of Con-
 6 gress who is authorized to receive in-
 7 formation of the type disclosed; or

8 “(III) an employee of the execu-
 9 tive branch or Congress who has the
 10 appropriate security clearance for ac-
 11 cess to the information disclosed.”.

12 (b) COVERED DISCLOSURES.—Section 2302(b) of
 13 title 5, United States Code, is amended—

14 (1) in the matter following paragraph (12), by
 15 striking “This subsection” and inserting the fol-
 16 lowing: “This subsection”; and

17 (2) by adding at the end the following: “In this
 18 subsection, the term ‘disclosure’ means a formal or
 19 informal communication or transmission.”.

20 (c) REBUTTABLE PRESUMPTION.—Section 2308(b)
 21 of title 5, United States Code, is amended by adding after
 22 the matter following paragraph (12) (as amended by sub-
 23 section (b) of this section) the following: “For purposes
 24 of paragraph (8), any presumption relating to the per-

1 formance of a duty by an employee may be rebutted by
 2 substantial evidence.”.

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

5 (1) PERSONNEL ACTION.—Section
 6 2302(a)(2)(A) of title 5, United States Code, is
 7 amended—

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

10 (B) by redesignating clause (xi) as clause
 11 (xii) and inserting after clause (x) the following:

12 “(xi) the implementation or enforce-
 13 ment of any nondisclosure policy, form, or
 14 agreement; and”.

15 (e) AUTHORITY OF SPECIAL COUNSEL RELATING TO
 16 CIVIL ACTIONS.—

17 (1) REPRESENTATION OF SPECIAL COUNSEL.—
 18 Section 1212 of title 5, United States Code, is
 19 amended by adding at the end the following:

20 “(h) Except as provided in section 518 of title 28,
 21 relating to litigation before the Supreme Court, attorneys
 22 designated by the Special Counsel may appear for the Spe-
 23 cial Counsel and represent the Special Counsel in any civil
 24 action brought in connection with section 2302(b)(8) or

1 subchapter III of chapter 73, or as otherwise authorized
2 by law.”.

3 (2) JUDICIAL REVIEW OF MERIT SYSTEMS PRO-
4 TECTION BOARD DECISIONS.—Section 7703 of title
5 5, United States Code, is amended by adding at the
6 end the following:

7 “(e) The Special Counsel may obtain review of any
8 final order or decision of the Board by filing a petition
9 for judicial review in the United States Courts of Appeals
10 for the Federal Circuit if the Special Counsel determines,
11 in the discretion of the Special Counsel, that the Board
12 erred in deciding a case arising under section 2302(b)(8)
13 or subchapter III of chapter 73 and that the Board’s deci-
14 sion will have a substantial impact on the enforcement of
15 section 2302(b)(8) or subchapter III of chapter 73. If the
16 Special Counsel was not a party or did not intervene in
17 a matter before the Board, the Special Counsel may not
18 petition for review of a Board decision under this section
19 unless the Special Counsel first petitions the Board for
20 reconsideration of its decision, and such petition is denied.
21 In addition to the named respondent, the Board and all
22 other parties to the proceedings before the Board shall
23 have the right to appear in the proceedings before the
24 Court of Appeals. The granting of the petition for judicial
25 review shall be at the discretion of the Court of Appeals.”.

1 **SEC. 4. NONDISCLOSURE POLICIES, FORMS, AND AGREE-**
2 **MENTS.**

3 (a) IN GENERAL.—Each agreement in Standard
4 Forms 312 and 4414 of the Government and any other
5 nondisclosure policy, form, or agreement shall contain the
6 following statement: “These restrictions are consistent
7 with and do not supersede, conflict with, or otherwise alter
8 the employee obligations, rights, or liabilities created by
9 Executive Order No. 12958; section 7211 of title 5,
10 United States Code (governing disclosures to Congress);
11 section 1034 of title 10, United States Code (governing
12 disclosure to Congress by members of the military); sec-
13 tion 2302(b)(8) of title 5, United States Code (governing
14 disclosures of illegality, waste, fraud, abuse or public
15 health or safety threats); the Intelligence Identities Pro-
16 tection Act of 1982 (50 U.S.C. 421 et seq.) (governing
17 disclosures that could expose confidential Government
18 agents); and the statutes which protect against disclosure
19 that may compromise the national security, including sec-
20 tions 641, 793, 794, 798, and 952 of title 18, United
21 States Code, and section 4(b) of the Subversive Activities
22 Act of 1950 (50 U.S.C. 783(b)). The definitions, require-
23 ments, obligations, rights, sanctions, and liabilities created
24 by such Executive order and such statutory provisions are
25 incorporated into this agreement and are controlling.”
26 Any nondisclosure policy, form, or agreement that does

1 not contain the above statement may not be implemented
2 or enforced to the extent that it conflicts with language
3 in the above statement.

4 (b) PERSONS OTHER THAN FEDERAL EMPLOY-
5 EES.—Notwithstanding subsection (a), a nondisclosure
6 policy, form, or agreement that is to be executed by a per-
7 son connected with the conduct of an intelligence or intel-
8 ligence-related activity, other than an employee or officer
9 of the United States Government, may contain provisions
10 appropriate to the particular activity for which such docu-
11 ment is to be used. Such form or agreement shall, at a
12 minimum, require that the person will not disclose any
13 classified information received in the course of such activ-
14 ity unless specifically authorized to do so by the United
15 States Government. Such nondisclosure forms shall also
16 make it clear that such forms do not bar disclosures to
17 Congress or to an authorized official of an executive agen-
18 cy or the Department of Justice that are essential to re-
19 porting a substantial violation of law.

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