

110TH CONGRESS
1ST SESSION

S. 274

AN ACT

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 non-disclosure 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,*

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

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

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

10 (1) in subparagraph (A)—

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

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

22 (C) by striking “or” at the end;

23 (2) in subparagraph (B)—

24 (A) by striking “which the employee or ap-
 25 plicant reasonably believes evidences” and in-

serting “, without restriction to time, place,
form, motive, context, or prior disclosure made
to any person by an employee or applicant, in-
cluding a disclosure made in the ordinary
course of an employee’s duties, of information
that the employee or applicant reasonably be-
lieves is evidence of”;

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

(C) in clause (ii), by adding “or” at the
end; and

(3) by adding at the end the following:

“(C) any disclosure that—

“(i) is made by an employee or appli-
cant of information required by law or Ex-
ecutive order to be kept secret in the inter-
est of national defense or the conduct of
foreign affairs that the employee or appli-
cant reasonably believes is direct and spe-
cific evidence of—

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

“(II) gross mismanagement, a
gross waste of funds, an abuse of au-

1 thority, or a substantial and specific
2 danger to public health or safety; or

3 “(III) a false statement to Con-
4 gress on an issue of material fact; and
5 “(ii) is made to—

6 “(I) a member of a committee of
7 Congress having a primary responsi-
8 bility for oversight of a department,
9 agency, or element of the Federal
10 Government to which the disclosed in-
11 formation relates and who is author-
12 ized to receive information of the type
13 disclosed;

14 “(II) any other Member of Con-
15 gress who is authorized to receive in-
16 formation of the type disclosed; or

17 “(III) an employee of Congress
18 who has the appropriate security
19 clearance and is authorized to receive
20 information of the type disclosed.”.

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

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

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

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

4 “(D) ‘disclosure’ means a formal or informal
 5 communication or transmission, but does not include
 6 a communication concerning policy decisions that
 7 lawfully exercise discretionary authority unless the
 8 employee providing the disclosure reasonably believes
 9 that the disclosure evidences—

10 “(i) any violation of any law, rule, or regu-
 11 lation; or

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

15 (d) REBUTTABLE PRESUMPTION.—Section 2302(b)
 16 of title 5, United States Code, is amended by amending
 17 the matter following paragraph (12) to read as follows:
 18 “This subsection shall not be construed to authorize the
 19 withholding of information from Congress or the taking
 20 of any personnel action against an employee who discloses
 21 information to Congress. For purposes of paragraph (8),
 22 any presumption relating to the performance of a duty by
 23 an employee who has authority to take, direct others to
 24 take, recommend, or approve any personnel action may be
 25 rebutted by substantial evidence. For purposes of para-

1 graph (8), a determination as to whether an employee or
 2 applicant reasonably believes that they have disclosed in-
 3 formation that evidences any violation of law, rule, regula-
 4 tion, gross mismanagement, a gross waste of funds, an
 5 abuse of authority, or a substantial and specific danger
 6 to public health or safety shall be made by determining
 7 whether a disinterested observer with knowledge of the es-
 8 sential facts known to and readily ascertainable by the em-
 9 ployee could reasonably conclude that the actions of the
 10 Government evidence such violations, mismanagement,
 11 waste, abuse, or danger.”.

12 (e) NONDISCLOSURE POLICIES, FORMS, AND AGREE-
 13 MENTS; SECURITY CLEARANCES; AND RETALIATORY IN-
 14 VESTIGATIONS.—

15 (1) PERSONNEL ACTION.—Section
 16 2302(a)(2)(A) of title 5, United States Code, is
 17 amended—

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

20 (B) by redesignating clause (xi) as clause
 21 (xiv) and inserting after clause (x) the fol-
 22 lowing:

23 “(xi) the implementation or enforce-
 24 ment of any nondisclosure policy, form, or
 25 agreement;

“(xii) a suspension, revocation, or other determination relating to a security clearance or any other access determination by a covered agency;

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

(2) PROHIBITED PERSONNEL PRACTICE.—Section 2302(b) of title 5, United States Code, is amended—

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

(B) in paragraph (12), by striking the period and inserting a semicolon; and

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

“(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: ‘These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by

1 Executive Order No. 12958; section 7211 of title 5,
2 United States Code (governing disclosures to Con-
3 gress); section 1034 of title 10, United States Code
4 (governing disclosure to Congress by members of the
5 military); section 2302(b)(8) of title 5, United
6 States Code (governing disclosures of illegality,
7 waste, fraud, abuse, or public health or safety
8 threats); the Intelligence Identities Protection Act of
9 1982 (50 U.S.C. 421 et seq.) (governing disclosures
10 that could expose confidential Government agents);
11 and the statutes which protect against disclosures
12 that could compromise national security, including
13 sections 641, 793, 794, 798, and 952 of title 18,
14 United States Code, and section 4(b) of the Subver-
15 sive Activities Control Act of 1950 (50 U.S.C.
16 783(b)). The definitions, requirements, obligations,
17 rights, sanctions, and liabilities created by such Ex-
18 ecutive order and such statutory provisions are in-
19 corporated into this agreement and are controlling’;
20 or

21 “(14) conduct, or cause to be conducted, an in-
22 vestigation, other than any ministerial or nondis-
23 cretionary fact finding activities necessary for the
24 agency to perform its mission, of an employee or ap-

1 plicant for employment because of any activity pro-
 2 tected under this section.”.

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

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

8 **“§ 7702a. Actions relating to security clearances**

9 “(a) In any appeal relating to the suspension, revoca-
 10 tion, or other determination relating to a security clear-
 11 ance or access determination, the Merit Systems Protec-
 12 tion Board or any reviewing court—

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

15 “(2) may not order the President or the des-
 16 ignee of the President to restore a security clearance
 17 or otherwise reverse a determination of clearance
 18 status or reverse an access determination; and

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

21 “(b)(1) If, in any final judgment, the Board or court
 22 declares that any suspension, revocation, or other deter-
 23 mination with regard to a security clearance or access de-
 24 termination was made in violation of paragraph (8) or (9)
 25 of section 2302(b), the affected agency shall conduct a re-

1 view of that suspension, revocation, access determination,
2 or other determination, giving great weight to the Board
3 or court judgment.

4 “(2) Not later than 30 days after any Board or court
5 judgment declaring that a security clearance suspension,
6 revocation, access determination, or other determination
7 was made in violation of paragraph (8) or (9) of section
8 2302(b), the affected agency shall issue an unclassified re-
9 port to the congressional committees of jurisdiction (with
10 a classified annex if necessary), detailing the cir-
11 cumstances of the agency’s security clearance suspension,
12 revocation, other determination, or access determination.
13 A report under this paragraph shall include any proposed
14 agency action with regard to the security clearance or ac-
15 cess determination.

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

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

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

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

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

9 “(ii)(I) the Federal Bureau of Investiga-
10 tion, the Central Intelligence Agency, the De-
11 fense Intelligence Agency, the National Imagery
12 and Mapping Agency, the National Security
13 Agency; and

14 “(II) as determined by the President, any
15 executive agency or unit thereof the principal
16 function of which is the conduct of foreign in-
17 telligence or counterintelligence activities, if the
18 determination (as that determination relates to
19 a personnel action) is made before that per-
20 sonnel action; or”.

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

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

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

5 “(i) disciplinary action consisting of re-
6 moval, reduction in grade, debarment from
7 Federal employment for a period not to exceed
8 5 years, suspension, or reprimand;

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

11 “(iii) any combination of disciplinary ac-
12 tions described under clause (i) and an assess-
13 ment described under clause (ii).

14 “(B) In any case in which the Board finds that
15 an employee has committed a prohibited personnel
16 practice under paragraph (8) or (9) of section
17 2302(b), the Board shall impose disciplinary action
18 if the Board finds that the activity protected under
19 paragraph (8) or (9) of section 2302(b) was a sig-
20 nificant motivating factor, even if other factors also
21 motivated the decision, for the employee’s decision to
22 take, fail to take, or threaten to take or fail to take
23 a personnel action, unless that employee dem-
24 onstrates, by preponderance of evidence, that the
25 employee would have taken, failed to take, or threat-

1 ened to take or fail to take the same personnel ac-
 2 tion, in the absence of such protected activity.”.

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

6 “(h)(1) The Special Counsel is authorized to appear
 7 as amicus curiae in any action brought in a court of the
 8 United States related to any civil action brought in con-
 9 nection with section 2302(b) (8) or (9), or subchapter III
 10 of chapter 73, or as otherwise authorized by law. In any
 11 such action, the Special Counsel is authorized to present
 12 the views of the Special Counsel with respect to compli-
 13 ance with section 2302(b) (8) or (9) or subchapter III of
 14 chapter 73 and the impact court decisions would have on
 15 the enforcement of such provisions of law.

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

19 (j) JUDICIAL REVIEW.—

20 (1) IN GENERAL.—Section 7703(b)(1) of title
 21 5, United States Code, is amended to read as fol-
 22 lows:

23 “(b)(1)(A) Except as provided in subparagraph (B)
 24 and paragraph (2), a petition to review a final order or
 25 final decision of the Board shall be filed in the United

1 States Court of Appeals for the Federal Circuit. Notwith-
2 standing any other provision of law, any petition for re-
3 view must be filed within 60 days after the date the peti-
4 tioner received notice of the final order or decision of the
5 Board.

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

14 (2) REVIEW OBTAINED BY OFFICE OF PER-
15 SONNEL MANAGEMENT.—Section 7703(d) of title 5,
16 United States Code, is amended to read as follows:

17 “(d)(1) Except as provided under paragraph (2), this
18 paragraph shall apply to any review obtained by the Direc-
19 tor of the Office of Personnel Management. The Director
20 of the Office of Personnel Management may obtain review
21 of any final order or decision of the Board by filing, within
22 60 days after the date the Director received notice of the
23 final order or decision of the Board, a petition for judicial
24 review in the United States Court of Appeals for the Fed-
25 eral Circuit if the Director determines, in his discretion,

1 that the Board erred in interpreting a civil service law,
2 rule, or regulation affecting personnel management and
3 that the Board's decision will have a substantial impact
4 on a civil service law, rule, regulation, or policy directive.
5 If the Director did not intervene in a matter before the
6 Board, the Director may not petition for review of a Board
7 decision under this section unless the Director first peti-
8 tions the Board for a reconsideration of its decision, and
9 such petition is denied. In addition to the named respond-
10 ent, the Board and all other parties to the proceedings
11 before the Board shall have the right to appear in the pro-
12 ceeding before the Court of Appeals. The granting of the
13 petition for judicial review shall be at the discretion of the
14 Court of Appeals.

15 “(2) During the 5-year period beginning on the effec-
16 tive date of the Federal Employee Protection of Disclo-
17 sures Act, this paragraph shall apply to any review relat-
18 ing to paragraph (8) or (9) of section 2302(b) obtained
19 by the Director of the Office of Personnel Management.
20 The Director of the Office of Personnel Management may
21 obtain review of any final order or decision of the Board
22 by filing, within 60 days after the date the Director re-
23 ceived notice of the final order or decision of the Board,
24 a petition for judicial review in the United States Court
25 of Appeals for the Federal Circuit or any court of appeals

1 of competent jurisdiction as provided under subsection
 2 (b)(2) if the Director determines, in his discretion, that
 3 the Board erred in interpreting paragraph (8) or (9) of
 4 section 2302(b). If the Director did not intervene in a
 5 matter before the Board, the Director may not petition
 6 for review of a Board decision under this section unless
 7 the Director first petitions the Board for a reconsideration
 8 of its decision, and such petition is denied. In addition
 9 to the named respondent, the Board and all other parties
 10 to the proceedings before the Board shall have the right
 11 to appear in the proceeding before the court of appeals.
 12 The granting of the petition for judicial review shall be
 13 at the discretion of the Court of Appeals.”.

14 (k) NONDISCLOSURE POLICIES, FORMS, AND AGREE-
 15 MENTS.—

16 (1) IN GENERAL.—

17 (A) REQUIREMENT.—Each agreement in
 18 Standard Forms 312 and 4414 of the Govern-
 19 ment and any other nondisclosure policy, form,
 20 or agreement of the Government shall contain
 21 the following statement: “These restrictions are
 22 consistent with and do not supersede, conflict
 23 with, or otherwise alter the employee obliga-
 24 tions, rights, or liabilities created by Executive
 25 Order No. 12958; section 7211 of title 5,

1 United States Code (governing disclosures to
2 Congress); section 1034 of title 10, United
3 States Code (governing disclosure to Congress
4 by members of the military); section 2302(b)(8)
5 of title 5, United States Code (governing disclo-
6 sures of illegality, waste, fraud, abuse or public
7 health or safety threats); the Intelligence Iden-
8 tities Protection Act of 1982 (50 U.S.C. 421 et
9 seq.) (governing disclosures that could expose
10 confidential Government agents); and the stat-
11 utes which protect against disclosure that may
12 compromise the national security, including sec-
13 tions 641, 793, 794, 798, and 952 of title 18,
14 United States Code, and section 4(b) of the
15 Subversive Activities Act of 1950 (50 U.S.C.
16 783(b)). The definitions, requirements, obliga-
17 tions, rights, sanctions, and liabilities created
18 by such Executive order and such statutory
19 provisions are incorporated into this agreement
20 and are controlling.”.

21 (B) ENFORCEABILITY.—Any nondisclosure
22 policy, form, or agreement described under sub-
23 paragraph (A) that does not contain the state-
24 ment required under subparagraph (A) may not
25 be implemented or enforced to the extent such

1 policy, form, or agreement is inconsistent with
2 that statement.

3 (2) PERSONS OTHER THAN GOVERNMENT EM-
4 PLOYEES.—Notwithstanding paragraph (1), a non-
5 disclosure policy, form, or agreement that is to be
6 executed by a person connected with the conduct of
7 an intelligence or intelligence-related activity, other
8 than an employee or officer of the United States
9 Government, may contain provisions appropriate to
10 the particular activity for which such document is to
11 be used. Such form or agreement shall, at a min-
12 imum, require that the person will not disclose any
13 classified information received in the course of such
14 activity unless specifically authorized to do so by the
15 United States Government. Such nondisclosure
16 forms shall also make it clear that such forms do
17 not bar disclosures to Congress or to an authorized
18 official of an executive agency or the Department of
19 Justice that are essential to reporting a substantial
20 violation of law.

21 (1) CLARIFICATION OF WHISTLEBLOWER RIGHTS
22 FOR CRITICAL INFRASTRUCTURE INFORMATION.—Section
23 214(c) of the Homeland Security Act of 2002 (6 U.S.C.
24 133(c)) is amended by adding at the end the following:
25 “For purposes of this section a permissible use of inde-

pendently obtained information includes the disclosure of such information under section 2302(b)(8) of title 5, United States Code.”.

(m) ADVISING EMPLOYEES OF RIGHTS.—Section 2302(c) of title 5, United States Code, is amended by inserting “, including how to make a lawful disclosure of information that is specifically required by law or Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs to the Special Counsel, the Inspector General of an agency, Congress, or other agency employee designated to receive such disclosures” after “chapter 12 of this title”.

(n) SCOPE OF DUE PROCESS.—

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

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

(o) REPORTING REQUIREMENTS.—

(1) GOVERNMENT ACCOUNTABILITY OFFICE.—

1 (A) IN GENERAL.—Not later than 40
2 months after the date of enactment of this Act,
3 the Government Accountability Office shall sub-
4 mit a report to the Committee on Homeland
5 Security and Governmental Affairs of the Sen-
6 ate and the Committee on Oversight and Gov-
7 ernment Reform of the House of Representa-
8 tives on the implementation of this Act.

9 (B) CONTENTS.—The report under this
10 paragraph shall include—

11 (i) an analysis of any changes in the
12 number of cases filed with the United
13 States Merit Systems Protection Board al-
14 leging violations of section 2302(b)(8) or
15 (9) of title 5, United States Code, since
16 the effective date of the Act;

17 (ii) the outcome of the cases described
18 under clause (i), including whether or not
19 the United States Merit Systems Protec-
20 tion Board, the Federal Circuit Court of
21 Appeals, or any other court determined the
22 allegations to be frivolous or malicious; and

23 (iii) any other matter as determined
24 by the Government Accountability Office.

25 (2) MERIT SYSTEMS PROTECTION BOARD.—

1 (A) IN GENERAL.—Each report submitted
2 annually by the Merit Systems Protection
3 Board under section 1116 of title 31, United
4 States Code, shall, with respect to the period
5 covered by such report, include as an addendum
6 the following:

7 (i) Information relating to the out-
8 come of cases decided during the applicable
9 year of the report in which violations of
10 section 2302(b)(8) or (9) of title 5, United
11 States Code, were alleged.

12 (ii) The number of such cases filed in
13 the regional and field offices, the number
14 of petitions for review filed in such cases,
15 and the outcomes of such cases.

16 (B) FIRST REPORT.—The first report de-
17 scribed under subparagraph (A) submitted after
18 the date of enactment of this Act shall include
19 an addendum required under that subparagraph
20 that covers the period beginning on January 1,
21 2008 through the end of the fiscal year 2008.

- 1 (p) EFFECTIVE DATE.—This Act shall take effect 30
- 2 days after the date of enactment of this Act.

Passed the Senate December 17, 2007.

Attest:

Secretary.

110TH CONGRESS
1ST SESSION

S. 274

AN ACT

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.