

**Calendar No. 114**109<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION**S. 494****[Report No. 109-72]**

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.

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**IN THE SENATE OF THE UNITED STATES**

MARCH 2, 2005

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

MAY 25, 2005

Reported by Ms. COLLINS, without amendment

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**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 disclo-

sure 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”; and

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

22           (2) in subparagraph (B)—

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

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

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

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

12                   “(C) any disclosure that—

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

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

22                                   “(II) gross mismanagement, a  
23                                   gross waste of funds, an abuse of au-  
24                                   thority, or a substantial and specific  
25                                   danger to public health or safety; or

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

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

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

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

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

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

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

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

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

7                   “(i) any violation of any law, rule, or regu-  
8                   lation; or

9                   “(ii) gross management, a gross waste of  
10                  funds, an abuse of authority, or a substantial  
11                  and specific danger to public health or safety.”.

12           (d) REBUTTABLE PRESUMPTION.—Section 2302(b)  
13           of title 5, United States Code, is amended by amending  
14           the matter following paragraph (12) to read as follows:  
15           “‘This subsection shall not be construed to authorize the  
16           withholding of information from Congress or the taking  
17           of any personnel action against an employee who discloses  
18           information to Congress, except that an employee or appli-  
19           cant may be disciplined for the disclosure of information  
20           described in paragraph (8)(C)(i) to a Member or employee  
21           of Congress who is not authorized to receive such informa-  
22           tion. For purposes of paragraph (8), any presumption re-  
23           lating to the performance of a duty by an employee who  
24           has authority to take, direct others to take, recommend,  
25           or approve any personnel action may be rebutted by sub-

1 substantial evidence. For purposes of paragraph (8), a deter-  
 2 mination as to whether an employee or applicant reason-  
 3 ably believes that they have disclosed information that evi-  
 4 dences any violation of law, rule, regulation, gross mis-  
 5 management, a gross waste of funds, an abuse of author-  
 6 ity, or a substantial and specific danger to public health  
 7 or safety shall be made by determining whether a disin-  
 8 terested observer with knowledge of the essential facts  
 9 known to and readily ascertainable by the employee would  
 10 reasonably conclude that the actions of the Government  
 11 evidence such violations, mismanagement, waste, abuse, or  
 12 danger.”.

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

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

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

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

1           “(xi) the implementation or enforce-  
2           ment of any nondisclosure policy, form, or  
3           agreement;

4           “(xii) a suspension, revocation, or  
5           other determination relating to a security  
6           clearance or any other access determina-  
7           tion by a covered agency;

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

14          (2) PROHIBITED PERSONNEL PRACTICE.—Sec-  
15          tion 2302(b) of title 5, United States Code, is  
16          amended—

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

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

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

23                 “(13) implement or enforce any nondisclosure  
24                 policy, form, or agreement, if such policy, form, or  
25                 agreement does not contain the following statement:

1       ‘These provisions are consistent with and do not su-  
2       persede, conflict with, or otherwise alter the em-  
3       ployee obligations, rights, or liabilities created by  
4       Executive Order No. 12958; section 7211 of title 5,  
5       United States Code (governing disclosures to Con-  
6       gress); section 1034 of title 10, United States Code  
7       (governing disclosure to Congress by members of the  
8       military); section 2302(b)(8) of title 5, United  
9       States Code (governing disclosures of illegality,  
10      waste, fraud, abuse, or public health or safety  
11      threats); the Intelligence Identities Protection Act of  
12      1982 (50 U.S.C. 421 et seq.) (governing disclosures  
13      that could expose confidential Government agents);  
14      and the statutes which protect against disclosures  
15      that could compromise national security, including  
16      sections 641, 793, 794, 798, and 952 of title 18,  
17      United States Code, and section 4(b) of the Subver-  
18      sive Activities Control Act of 1950 (50 U.S.C.  
19      783(b)). The definitions, requirements, obligations,  
20      rights, sanctions, and liabilities created by such Ex-  
21      ecutive order and such statutory provisions are in-  
22      corporated into this agreement and are controlling’;  
23      or

24               “(14) conduct, or cause to be conducted, an in-  
25      vestigation, other than any ministerial or nondis-

1       cretionary fact finding activities necessary for the  
 2       agency to perform its mission, of an employee or ap-  
 3       plicant for employment because of any activity pro-  
 4       tected under this section.”.

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

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

10   **“§ 7702a. Actions relating to security clearances**

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

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

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

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

23       “(b)(1) If, in any final judgment, the Board or court  
 24       declares that any suspension, revocation, or other deter-  
 25       mination with regards to a security clearance or access

1 determination was made in violation of paragraph (8) or  
2 (9) of section 2302(b), the affected agency shall conduct  
3 a review of that suspension, revocation, access determina-  
4 tion, or other determination, giving great weight to the  
5 Board or court judgment.

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

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

23       “(d) For purposes of this section, corrective action  
24 may not be ordered if the agency demonstrates by a pre-

1 ponderance of the evidence that it would have taken the  
2 same personnel action in the absence of such disclosure.”.

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

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

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

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

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

23 (g) ATTORNEY FEES.—Section 1204(m)(1) of title 5,  
24 United States Code, is amended by striking “agency in-

1 volved” and inserting “agency where the prevailing party  
2 is employed or has applied for employment”.

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

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

7 “(i) disciplinary action consisting of re-  
8 moval, reduction in grade, debarment from  
9 Federal employment for a period not to exceed  
10 5 years, suspension, or reprimand;

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

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

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

1       onstrates, by preponderance of evidence, that the  
2       employee would have taken, failed to take, or threat-  
3       ened to take or fail to take the same personnel ac-  
4       tion, in the absence of such protected activity.”.

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

8       “(h)(1) The Special Counsel is authorized to appear  
9 as amicus curiae in any action brought in a court of the  
10 United States related to any civil action brought in con-  
11 nection with section 2302(b) (8) or (9), or subchapter III  
12 of chapter 73, or as otherwise authorized by law. In any  
13 such action, the Special Counsel is authorized to present  
14 the views of the Special Counsel with respect to compli-  
15 ance with section 2302(b) (8) or (9) or subchapter III of  
16 chapter 77 and the impact court decisions would have on  
17 the enforcement of such provisions of law.

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

21       (j) JUDICIAL REVIEW.—

22       (1) IN GENERAL.—Section 7703(b)(1) of title  
23       5, United States Code, is amended to read as fol-  
24       lows:

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

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

17 (2) REVIEW OBTAINED BY OFFICE OF PER-  
18 SONNEL MANAGEMENT.—Section 7703(d) of title 5,

19 United States Code, is amended to read as follows:

20 “(d)(1) Except as provided under paragraph (2), this  
21 paragraph shall apply to any review obtained by the Direc-  
22 tor of the Office of Personnel Management. The Director  
23 of the Office of Personnel Management may obtain review  
24 of any final order or decision of the Board by filing, within  
25 60 days after the date the Director received notice of the

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

18       “(2) During the 5-year period beginning on the effec-  
19 tive date of the Federal Employee Protection of Disclo-  
20 sures Act, this paragraph shall apply to any review relat-  
21 ing to paragraph (8) or (9) of section 2302(b) obtained  
22 by the Director of the Office of Personnel Management.  
23 The Director of the Office of Personnel Management may  
24 obtain review of any final order or decision of the Board  
25 by filing, within 60 days after the date the Director re-

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

17 (k) NONDISCLOSURE POLICIES, FORMS, AND AGREE-  
18 MENTS.—

19 (1) IN GENERAL.—

20 (A) REQUIREMENT.—Each agreement in  
21 Standard Forms 312 and 4414 of the Govern-  
22 ment and any other nondisclosure policy, form,  
23 or agreement of the Government shall contain  
24 the following statement: “These restrictions are  
25 consistent with and do not supersede, conflict

1 with, or otherwise alter the employee obliga-  
2 tions, rights, or liabilities created by Executive  
3 Order No. 12958; section 7211 of title 5,  
4 United States Code (governing disclosures to  
5 Congress); section 1034 of title 10, United  
6 States Code (governing disclosure to Congress  
7 by members of the military); section 2302(b)(8)  
8 of title 5, United States Code (governing disclo-  
9 sures of illegality, waste, fraud, abuse or public  
10 health or safety threats); the Intelligence Iden-  
11 tities Protection Act of 1982 (50 U.S.C. 421 et  
12 seq.) (governing disclosures that could expose  
13 confidential Government agents); and the stat-  
14 utes which protect against disclosure that may  
15 compromise the national security, including sec-  
16 tions 641, 793, 794, 798, and 952 of title 18,  
17 United States Code, and section 4(b) of the  
18 Subversive Activities Act of 1950 (50 U.S.C.  
19 783(b)). The definitions, requirements, obliga-  
20 tions, rights, sanctions, and liabilities created  
21 by such Executive order and such statutory  
22 provisions are incorporated into this agreement  
23 and are controlling.”.

24 (B) ENFORCEABILITY.—Any nondisclosure  
25 policy, form, or agreement described under sub-

1 paragraph (A) that does not contain the state-  
2 ment required under subparagraph (A) may not  
3 be implemented or enforced to the extent such  
4 policy, form, or agreement is inconsistent with  
5 that statement.

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

24 (1) CLARIFICATION OF WHISTLEBLOWER RIGHTS  
25 FOR CRITICAL INFRASTRUCTURE INFORMATION.—Section

1 214(c) of the Homeland Security Act of 2002 (6 U.S.C.  
2 133(c)) is amended by adding at the end the following:  
3 “For purposes of this section a permissible use of inde-  
4 pendently obtained information includes the disclosure of  
5 such information under section 2302(b)(8) of title 5,  
6 United States Code.”.

7 (m) ADVISING EMPLOYEES OF RIGHTS.—Section  
8 2302(c) of title 5, United States Code, is amended by in-  
9 serting “, including how to make a lawful disclosure of  
10 information that is specifically required by law or Execu-  
11 tive order to be kept secret in the interest of national de-  
12 fense or the conduct of foreign affairs to the Special Coun-  
13 sel, the Inspector General of an agency, Congress, or other  
14 agency employee designated to receive such disclosures”  
15 after “chapter 12 of this title”.

16 (n) SCOPE OF DUE PROCESS.—

17 (1) SPECIAL COUNSEL.—Section  
18 1214(b)(4)(B)(ii) of title 5, United States Code, is  
19 amended by inserting “, after a finding that a pro-  
20 tected disclosure was a contributing factor,” after  
21 “ordered if”.

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

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



**Calendar No. 114**

109<sup>TH</sup> CONGRESS  
1<sup>ST</sup> Session

**S. 494**

[Report No. 109-72]

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**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.

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MAY 25, 2005

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