

108TH CONGRESS
1ST SESSION

H. R. 3281

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

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 8, 2003

Mr. PLATTS (for himself, Mr. WOLF, Mr. WAXMAN, Mr. MCHUGH, Mr. SHAYS, Mr. RUPPERSBERGER, Ms. SCHAKOWSKY, and Mr. TIERNEY) introduced the following bill; which was referred to the Committee on Government Reform

A BILL

To amend title 5, United States Code, to clarify which disclosures of information are protected from prohibited personnel practices; to require a statement in nondisclosure policies, forms, and agreements to the effect that such policies, forms, and agreements are consistent with certain disclosure protections; to provide certain authority to 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. SHORT TITLE; TABLE OF CONTENTS.**

2 (a) SHORT TITLE.—This Act may be cited as the
3 “Whistleblower Protection Enhancement Act”.

4 (b) TABLE OF CONTENTS.—The table of contents of
5 this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Clarification of disclosures covered.
- Sec. 3. Covered disclosures.
- Sec. 4. Rebuttable presumption.
- Sec. 5. Nondisclosure policies, forms, and agreements; security clearances; and
retaliatory investigations.
- Sec. 6. Exclusion of agencies by the President.
- Sec. 7. Attorney fees.
- Sec. 8. Compensatory damages.
- Sec. 9. Disciplinary action.
- Sec. 10. Disclosures to Congress.
- Sec. 11. Authority of Special Counsel relating to civil actions.
- Sec. 12. Judicial review.
- Sec. 13. Nondisclosure policies, forms, and agreements.
- Sec. 14. Clarification of whistleblower rights for critical infrastructure informa-
tion.
- Sec. 15. Effective date.

6 **SEC. 2. CLARIFICATION OF DISCLOSURES COVERED.**

7 Section 2302(b)(8) of title 5, United States Code, is
8 amended—

9 (1) in subparagraph (A)—

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

1 employee or applicant reasonably believes is evi-
2 dence of”; and

3 (B) in clause (i), by striking “a violation”
4 and inserting “any violation”;
5 (2) in subparagraph (B)—

6 (A) by striking “which the employee or ap-
7 plicant reasonably believes evidences” and in-
8 serting “, without restriction as to time, place,
9 form, motive, context, or prior disclosure made
10 to any person by an employee or applicant, in-
11 cluding a disclosure made in the ordinary
12 course of an employee’s duties, to the Special
13 Counsel, or to the Inspector General of an
14 agency or another employee designated by the
15 head of the agency to receive such disclosures,
16 of information that the employee or applicant
17 reasonably believes is evidence of”; and

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

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

22 “(C) any disclosure that—

23 “(i) is made by an employee or appli-
24 cant of information required by law or Ex-
25 ecutive order to be kept secret in the inter-

est of national defense or the conduct of foreign affairs that the employee or applicant reasonably believes is direct and specific evidence of—

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

“(II) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; or

“(III) a false statement to Congress on an issue of material fact; and
“(ii) is made to—

“(I) a member of a committee of Congress having a primary responsibility for oversight of a department, agency, or element of the Federal Government to which the disclosed information relates and who is authorized to receive information of the type disclosed;

“(II) any other Member of Congress who is authorized to receive information of the type disclosed; or

1 “(III) an employee of Congress
2 who has the appropriate security
3 clearance and is authorized to receive
4 information of the type disclosed.”.

5 **SEC. 3. COVERED DISCLOSURES.**

6 Section 2302(b) of title 5, United States Code, is
7 amended—

8 (1) in the matter following paragraph (12), by
9 striking “This subsection” and inserting the fol-
10 lowing:

11 “This subsection”; and

12 (2) by adding at the end the following:

13 “In this subsection, the term ‘disclosure’ means a formal
14 or informal communication or transmission.”.

15 **SEC. 4. REBUTTABLE PRESUMPTION.**

16 Section 2302(b) of title 5, United States Code, is
17 amended by adding after the matter following paragraph
18 (12) (as amended by section 3) the following: “For pur-
19 poses of paragraph (8), any presumption relating to the
20 performance of a duty by an employee who has authority
21 to take, direct others to take, recommend, or approve any
22 personnel action may be rebutted by substantial evi-
23 dence.”.

1 **SEC. 5. NONDISCLOSURE POLICIES, FORMS, AND AGREE-**
2 **MENTS; SECURITY CLEARANCES; AND RETAL-**
3 **IATORY INVESTIGATIONS.**

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

6 (1) in clause (x), by striking “and” after the
7 semicolon; and

8 (2) by redesignating clause (xi) as clause (xiv)
9 and inserting after clause (x) the following:

10 “(xi) the implementation or enforcement of
11 any nondisclosure policy, form, or agreement;

12 “(xii) a suspension, revocation, or other de-
13 termination relating to a security clearance;

14 “(xiii) an investigation of an employee or
15 applicant for employment because of any activ-
16 ity protected under this section; and”.

17 (b) **PROHIBITED PERSONNEL PRACTICE.**—Section
18 2302(b) of title 5, United States Code, is amended—

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

21 (2) in paragraph (12), by striking the period
22 and inserting a semicolon; and

23 (3) by inserting after paragraph (12) the fol-
24 lowing:

1 “(13) implement or enforce any nondisclosure
2 policy, form, or agreement, if such policy, form, or
3 agreement does not contain the following statement:

4 ““These provisions are consistent with and
5 do not supersede, conflict with, or otherwise
6 alter the employee obligations, rights, or liabilities
7 created by Executive Order No. 12958 (50
8 U.S.C. 435 note); section 7211 of title 5,
9 United States Code (relating to employees’
10 right to petition Congress); section 1034 of title
11 10, United States Code (relating to protected
12 communications; prohibition of retaliatory personnel
13 actions); section 2302(b)(8) of title 5,
14 United States Code (relating to disclosures of
15 violations of law, gross mismanagement, and
16 certain other matters); the Intelligence Identi-
17 ties Protection Act of 1982 (50 U.S.C. 421 et
18 seq.) (relating to disclosures that could expose
19 confidential Government agents); and the statutes
20 which protect against disclosures that
21 could compromise national security, including
22 sections 641, 793, 794, 798, and 952 of title
23 18, United States Code, and section 4(b) of the
24 Subversive Activities Control Act of 1950 (50
25 U.S.C. 783(b)). The definitions, requirements,

1 obligations, rights, sanctions, and liabilities cre-
 2 ated by such Executive order and such statu-
 3 tory provisions are incorporated into this agree-
 4 ment and are controlling.’; or

5 “(14) conduct, or cause to be conducted, an in-
 6 vestigation of an employee or applicant for employ-
 7 ment because of any activity protected under this
 8 section.”.

9 (c) BOARD AND COURT REVIEW OF ACTIONS RELAT-
 10 ING TO SECURITY CLEARANCES.—

11 (1) IN GENERAL.—Chapter 77 of title 5, United
 12 States Code, is amended by inserting after section
 13 7702 the following:

14 **“§ 7702a. Actions relating to security clearances**

15 “(a) In any appeal relating to the suspension, revoca-
 16 tion, or other determination relating to a security clear-
 17 ance, the Merit Systems Protection Board or any review-
 18 ing court—

19 “(1) shall determine whether section 2302 was
 20 violated;

21 “(2) may not order the President to restore a
 22 security clearance; and

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

1 “(b)(1) If, in any final judgment, the Board or court
2 declares that any suspension, revocation, or other deter-
3 mination with regard to a security clearance was made in
4 violation of section 2302, the affected agency shall conduct
5 a review of that suspension, revocation, or other deter-
6 mination, giving great weight to the Board or court judg-
7 ment.

8 “(2) Not later than 30 days after any Board or court
9 judgment declaring that a security clearance suspension,
10 revocation, or other determination was made in violation
11 of section 2302, the affected agency shall issue an unclas-
12 sified report to the congressional committees of jurisdic-
13 tion (with a classified annex if necessary), detailing the
14 circumstances of the agency’s security clearance suspen-
15 sion, revocation, or other determination. A report under
16 this paragraph shall include any proposed agency action
17 with regard to the security clearance.

18 “(c) An allegation that a security clearance was re-
19 voked or suspended in retaliation for a protected disclo-
20 sure shall receive expedited review by the Office of Special
21 Counsel, the Merit Systems Protection Board, and any re-
22 viewing court.”.

23 (2) CLERICAL AMENDMENT.—The table of sec-
24 tions for chapter 77 of title 5, United States Code,

1 is amended by inserting after the item relating to
2 section 7702 the following:

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

3 **SEC. 6. EXCLUSION OF AGENCIES BY THE PRESIDENT.**

4 Section 2302(a)(2)(C) of title 5, United States Code,
5 is amended by striking clause (ii) and inserting the fol-
6 lowing:

7 “(ii)(I) the Federal Bureau of Inves-
8 tigation, the Central Intelligence Agency,
9 the Defense Intelligence Agency, the Na-
10 tional Imagery and Mapping Agency, and
11 the National Security Agency; and

12 “(II) as determined by the President,
13 any Executive agency or unit thereof the
14 principal function of which is the conduct
15 of foreign intelligence or counterintel-
16 ligence activities, if the determination (as
17 that determination relates to a personnel
18 action) is made before that personnel ac-
19 tion; or”.

20 **SEC. 7. ATTORNEY FEES.**

21 Section 1204(m)(1) of title 5, United States Code,
22 is amended by striking “agency involved” and inserting
23 “agency with which the prevailing party is employed or
24 has applied for employment”.

1 **SEC. 8. COMPENSATORY DAMAGES.**

2 Section 1214(g)(2) of title 5, United States Code, is
3 amended by inserting “compensatory or” after “foresee-
4 able”.

5 **SEC. 9. DISCIPLINARY ACTION.**

6 Section 1215(a) of title 5, United States Code, is
7 amended by striking paragraph (3) and inserting the fol-
8 lowing:

9 “(3)(A) A final order of the Board may impose—

10 “(i) disciplinary action consisting of removal,
11 reduction in grade, debarment from Federal employ-
12 ment for a period not to exceed 5 years, suspension,
13 or reprimand;

14 “(ii) an assessment of a civil penalty not to ex-
15 ceed \$1,000; or

16 “(iii) any combination of disciplinary actions
17 described in clause (i) and an assessment described
18 in clause (ii).

19 “(B) In any case in which the Board finds that an
20 employee has committed a prohibited personnel practice
21 under section 2302(b) (8) or (9), the Board shall impose
22 disciplinary action if the Board finds that the activity pro-
23 tected under section 2302(b) (8) or (9) was a significant
24 motivating factor, even if other factors also motivated the
25 decision, for the employee’s decision to take, fail to take,
26 or threaten to take or fail to take a personnel action, un-

1 less that employee demonstrates, by a preponderance of
2 the evidence, that the employee would have taken, failed
3 to take, or threatened to take or fail to take the same
4 personnel action, in the absence of such protected activ-
5 ity.”.

6 **SEC. 10. DISCLOSURES TO CONGRESS.**

7 Section 2302 of title 5, United States Code, is
8 amended by adding at the end the following:

9 “(f) Each agency shall establish a process that pro-
10 vides confidential advice to employees on making a lawful
11 disclosure to Congress of information that is specifically
12 required by law or Executive order to be kept secret in
13 the interest of national defense or the conduct of foreign
14 affairs.”.

15 **SEC. 11. AUTHORITY OF SPECIAL COUNSEL RELATING TO**
16 **CIVIL ACTIONS.**

17 (a) REPRESENTATION OF SPECIAL COUNSEL.—Sec-
18 tion 1212 of title 5, United States Code, is amended by
19 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 (b) JUDICIAL REVIEW OF MERIT SYSTEMS PROTEC-
4 TION BOARD DECISIONS.—Section 7703 of title 5, United
5 States Code, is amended by adding at the end the fol-
6 lowing:

7 “(e)(1) Except as provided in paragraph (2), this
8 paragraph shall apply to any review obtained by the Spe-
9 cial Counsel. The Special Counsel may obtain review of
10 any final order or decision of the Board by filing a petition
11 for judicial review in the United States Court of Appeals
12 for the Federal Circuit if the Special Counsel determines,
13 in the discretion of the Special Counsel, that the Board
14 erred in deciding a case arising under section 2302(b)(8)
15 or subchapter III of chapter 73 and that the Board’s deci-
16 sion will have a substantial impact on the enforcement of
17 section 2302(b)(8) or subchapter III of chapter 73. If the
18 Special Counsel was not a party or did not intervene in
19 a matter before the Board, the Special Counsel may not
20 petition for review of a Board decision under this section
21 unless the Special Counsel first petitions the Board for
22 reconsideration of its decision, and such petition is denied.
23 In addition to the named respondent, the Board and all
24 other parties to the proceedings before the Board shall
25 have the right to appear in the proceedings before the

1 Court of Appeals. The granting of the petition for judicial
2 review shall be at the discretion of the Court of Appeals.
3 “(2) During the 5-year period beginning on the effec-
4 tive date of the Whistleblower Protection Enhancement
5 Act, this paragraph shall apply to any review obtained by
6 the Special Counsel. The Special Counsel may obtain re-
7 view of any final order or decision of the Board by filing
8 a petition for judicial review in the United States Court
9 of Appeals for the Federal Circuit or any court of appeals
10 of competent jurisdiction as provided under subsection
11 (b)(2) if the Special Counsel determines, in the discretion
12 of the Special Counsel, that the Board erred in deciding
13 a case arising under section 2302(b)(8) or subchapter III
14 of chapter 73 and that the Board’s decision will have a
15 substantial impact on the enforcement of section
16 2302(b)(8) or subchapter III of chapter 73. If the Special
17 Counsel was not a party or did not intervene in a matter
18 before the Board, the Special Counsel may not petition
19 for review of a Board decision under this section unless
20 the Special Counsel first petitions the Board for reconsid-
21 eration of its decision, and such petition is denied. In addi-
22 tion to the named respondent, the Board and all other
23 parties to the proceedings before the Board shall have the
24 right to appear in the proceedings before the court of ap-

1 peals. The granting of the petition for judicial review shall
2 be at the discretion of the court of appeals.”.

3 **SEC. 12. JUDICIAL REVIEW.**

4 (a) IN GENERAL.—Section 7703(b) of title 5, United
5 States Code, is amended by striking the matter before
6 paragraph (2) and inserting the following:

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

15 “(B) During the 5-year period beginning on the effec-
16 tive date of the Whistleblower Protection Enhancement
17 Act, a petition to review a final order or final decision of
18 the Board shall be filed in the United States Court of Ap-
19 peals for the Federal Circuit or any court of appeals of
20 competent jurisdiction as provided under subsection
21 (b)(2). Notwithstanding any other provision of law, any
22 petition for review must be filed within 60 days after the
23 date the petitioner received notice of the final order or
24 decision of the Board.”.

1 (b) REVIEW OBTAINED BY OFFICE OF PERSONNEL
2 MANAGEMENT.—Section 7703 of title 5, United States
3 Code, is amended by striking subsection (d) and inserting
4 the following:

5 “(d)(1) Except as provided in paragraph (2), this
6 paragraph shall apply to any review obtained by the Direc-
7 tor of the Office of Personnel Management. The Director
8 of the Office of Personnel Management may obtain review
9 of any final order or decision of the Board by filing, within
10 60 days after the date the Director received notice of the
11 final order or decision of the Board, a petition for judicial
12 review in the United States Court of Appeals for the Fed-
13 eral Circuit if the Director determines, in his discretion,
14 that the Board erred in interpreting a civil service law,
15 rule, or regulation affecting personnel management and
16 that the Board’s decision will have a substantial impact
17 on a civil service law, rule, regulation, or policy directive.
18 If the Director did not intervene in a matter before the
19 Board, the Director may not petition for review of a Board
20 decision under this section unless the Director first peti-
21 tions the Board for a reconsideration of its decision, and
22 such petition is denied. In addition to the named respond-
23 ent, the Board and all other parties to the proceedings
24 before the Board shall have the right to appear in the pro-
25 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 Whistleblower Protection Enhancement
5 Act, this paragraph shall apply to any review obtained by
6 the Director of the Office of Personnel Management. The
7 Director of the Office of Personnel Management may ob-
8 tain review of any final order or decision of the Board
9 by filing, within 60 days after the date the Director re-
10 ceived notice of the final order or decision of the Board,
11 a petition for judicial review in the United States Court
12 of Appeals for the Federal Circuit or any court of appeals
13 of competent jurisdiction as provided under subsection
14 (b)(2) if the Director determines, in his discretion, that
15 the Board erred in interpreting a civil service law, rule,
16 or regulation affecting personnel management and that
17 the Board’s decision will have a substantial impact on a
18 civil service law, rule, regulation, or policy directive. If the
19 Director did not intervene in a matter before the Board,
20 the Director may not petition for review of a Board deci-
21 sion under this section unless the Director first petitions
22 the Board for a reconsideration of its decision, and such
23 petition is denied. In addition to the named respondent,
24 the Board and all other parties to the proceedings before
25 the Board shall have the right to appear in the proceeding

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

4 **SEC. 13. NONDISCLOSURE POLICIES, FORMS, AND AGREE-**
5 **MENTS.**

6 (a) IN GENERAL.—

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

1 ing sections 641, 793, 794, 798, and 952 of title 18,
2 United States Code, and section 4(b) of the Subver-
3 sive Activities Act of 1950 (50 U.S.C. 783(b)). The
4 definitions, requirements, obligations, rights, sanc-
5 tions, and liabilities created by such Executive order
6 and such statutory provisions are incorporated into
7 this agreement and are controlling.”

8 (2) ENFORCEABILITY.—Any nondisclosure pol-
9 icy, form, or agreement described in paragraph (1)
10 that does not contain the statement required under
11 paragraph (1) may not be implemented or enforced
12 to the extent such policy, form, or agreement is in-
13 consistent with that statement.

14 (b) PERSONS OTHER THAN GOVERNMENT EMPLOY-
15 EES.—Notwithstanding subsection (a), a nondisclosure
16 policy, form, or agreement that is to be executed by a per-
17 son connected with the conduct of an intelligence or intel-
18 ligence-related activity, other than an employee or officer
19 of the United States Government, may contain provisions
20 appropriate to the particular activity for which such docu-
21 ment is to be used. Such form or agreement shall, at a
22 minimum, require that the person will not disclose any
23 classified information received in the course of such activ-
24 ity unless specifically authorized to do so by the United
25 States Government. Such nondisclosure forms shall also

1 make it clear that such forms do not bar disclosures to
2 Congress or to an authorized official of an executive agen-
3 cy or the Department of Justice that are essential to re-
4 porting a substantial violation of law.

5 **SEC. 14. CLARIFICATION OF WHISTLEBLOWER RIGHTS FOR**
6 **CRITICAL INFRASTRUCTURE INFORMATION.**

7 Section 214(c) of the Homeland Security Act of 2002
8 (Public Law 107–296; 6 U.S.C. 133(c)) is amended by
9 adding at the end the following: “For purposes of this sec-
10 tion a permissible use of independently obtained informa-
11 tion includes the disclosure of such information under sec-
12 tion 2302(b)(8) of title 5, United States Code.”.

13 **SEC. 15. EFFECTIVE DATE.**

14 This Act shall take effect 30 days after the date of
15 the enactment of this Act.

○