

Calendar No. 782

108TH CONGRESS
2D SESSION

S. 2628

[Report No. 108–392]

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

JULY 8, 2004

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

OCTOBER 8, 2004

Reported by Ms. COLLINS, without amendment

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-

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”; and

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

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

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

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

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

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

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

22 (B) by redesignating clause (xi) as clause
 23 (xiv) and inserting after clause (x) the fol-
 24 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
2 do not supersede, conflict with, or otherwise
3 alter the employee obligations, rights, or liabilities
4 created by Executive Order No. 12958;
5 section 7211 of title 5, United States Code
6 (governing disclosures to Congress); section
7 1034 of title 10, United States Code (governing
8 disclosure to Congress by members of the military);
9 section 2302(b)(8) of title 5, United
10 States Code (governing disclosures of illegality,
11 waste, fraud, abuse, or public health or safety
12 threats); the Intelligence Identities Protection
13 Act of 1982 (50 U.S.C. 421 et seq.) (governing
14 disclosures that could expose confidential Government
15 agents); and the statutes which protect
16 against disclosures that could compromise national
17 security, including sections 641, 793,
18 794, 798, and 952 of title 18, United States
19 Code, and section 4(b) of the Subversive Activities
20 Control Act of 1950 (50 U.S.C. 783(b)).
21 The definitions, requirements, obligations,
22 rights, sanctions, and liabilities created by such
23 Executive order and such statutory provisions
24 are incorporated into this agreement and are
25 controlling.’; or

1 “(14) conduct, or cause to be conducted, an in-
 2 vestigation, other than any ministerial or nondis-
 3 cretionary fact finding activities necessary for the
 4 agency to perform its mission, of an employee or ap-
 5 plicant for employment because of any activity pro-
 6 tected under this section.”.

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

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

12 **“§ 7702a. Actions relating to security clearances**

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

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

19 “(2) may not order the President or the des-
 20 ignee of the President to restore a security clearance
 21 or otherwise reverse a determination of clearance
 22 status or reverse an access determination; 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 regards to a security clearance or access
4 determination was made in violation of paragraph (8) or
5 (9) of section 2302(b), the affected agency shall conduct
6 a review of that suspension, revocation, access determina-
7 tion, or other determination, giving great weight to the
8 Board or court judgment.

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

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

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

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

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

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

13 “(ii)(I) the Federal Bureau of Inves-
 14 tigation, the Central Intelligence Agency,
 15 the Defense Intelligence Agency, the Na-
 16 tional Imagery and Mapping Agency, the
 17 National Security Agency; and

18 “(II) as determined by the President,
 19 any executive agency or unit thereof the
 20 principal function of which is the conduct
 21 of foreign intelligence or counterintel-
 22 ligence activities, if the determination (as
 23 that determination relates to a personnel
 24 action) is made before that personnel ac-
 25 tion; or”.

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

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

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

9 “(i) disciplinary action consisting of re-
 10 moval, reduction in grade, debarment from
 11 Federal employment for a period not to exceed
 12 5 years, suspension, or reprimand;

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

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

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

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

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

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

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

23 (j) JUDICIAL REVIEW.—

1 (1) IN GENERAL.—Section 7703(b)(1) of title
2 5, United States Code, is amended to read as fol-
3 lows:

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

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

20 (2) REVIEW OBTAINED BY OFFICE OF PER-
21 SONNEL MANAGEMENT.—Section 7703(d) of title 5,
22 United States Code, is amended to read as follows:
23 “(d)(1) Except as provided under paragraph (2), this
24 paragraph shall apply to any review obtained by the Direc-
25 tor of the Office of Personnel Management. The Director

1 of the Office of Personnel Management may obtain review
2 of any final order or decision of the Board by filing, within
3 60 days after the date the Director received notice of the
4 final order or decision of the Board, a petition for judicial
5 review in the United States Court of Appeals for the Fed-
6 eral Circuit if the Director determines, in his discretion,
7 that the Board erred in interpreting a civil service law,
8 rule, or regulation affecting personnel management and
9 that the Board's decision will have a substantial impact
10 on a civil service law, rule, regulation, or policy directive.
11 If the Director did not intervene in a matter before the
12 Board, the Director may not petition for review of a Board
13 decision under this section unless the Director first peti-
14 tions the Board for a reconsideration of its decision, and
15 such petition is denied. In addition to the named respond-
16 ent, the Board and all other parties to the proceedings
17 before the Board shall have the right to appear in the pro-
18 ceeding before the Court of Appeals. The granting of the
19 petition for judicial review shall be at the discretion of the
20 Court of Appeals.

21 “(2) During the 5-year period beginning on the effec-
22 tive date of the Federal Employee Protection of Disclo-
23 sures Act, this paragraph shall apply to any review relat-
24 ing to paragraph (8) or (9) of section 2302(b) obtained
25 by the Director of the Office of Personnel Management.

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

20 (k) NONDISCLOSURE POLICIES, FORMS, AND AGREE-
 21 MENTS.—

22 (1) IN GENERAL.—

23 (A) REQUIREMENT.—Each agreement in
 24 Standard Forms 312 and 4414 of the Govern-
 25 ment and any other nondisclosure policy, form,

1 or agreement of the Government shall contain
2 the following statement: “These restrictions are
3 consistent with and do not supersede, conflict
4 with, or otherwise alter the employee obliga-
5 tions, rights, or liabilities created by Executive
6 Order No. 12958; section 7211 of title 5,
7 United States Code (governing disclosures to
8 Congress); section 1034 of title 10, United
9 States Code (governing disclosure to Congress
10 by members of the military); section 2302(b)(8)
11 of title 5, United States Code (governing disclo-
12 sures of illegality, waste, fraud, abuse or public
13 health or safety threats); the Intelligence Iden-
14 tities Protection Act of 1982 (50 U.S.C. 421 et
15 seq.) (governing disclosures that could expose
16 confidential Government agents); and the stat-
17 utes which protect against disclosure that may
18 compromise the national security, including sec-
19 tions 641, 793, 794, 798, and 952 of title 18,
20 United States Code, and section 4(b) of the
21 Subversive Activities Act of 1950 (50 U.S.C.
22 783(b)). The definitions, requirements, obliga-
23 tions, rights, sanctions, and liabilities created
24 by such Executive order and such statutory

1 provisions are incorporated into this agreement
2 and are controlling.”.

3 (B) ENFORCEABILITY.—Any nondisclosure
4 policy, form, or agreement described under sub-
5 paragraph (A) that does not contain the state-
6 ment required under subparagraph (A) may not
7 be implemented or enforced to the extent such
8 policy, form, or agreement is inconsistent with
9 that statement.

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

1 Justice that are essential to reporting a substantial
2 violation of law.

3 (l) CLARIFICATION OF WHISTLEBLOWER RIGHTS
4 FOR CRITICAL INFRASTRUCTURE INFORMATION.—Section
5 214(c) of the Homeland Security Act of 2002 (Public Law
6 107–296) is amended by adding at the end the following:
7 “For purposes of this section a permissible use of inde-
8 pendently obtained information includes the disclosure of
9 such information under section 2302(b)(8) of title 5,
10 United States Code.”.

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

20 (n) SCOPE OF DUE PROCESS.—

21 (1) SPECIAL COUNSEL.—Section
22 1214(b)(4)(B)(ii) of title 5, United States Code, is
23 amended by inserting “, after a finding that a pro-
24 tected disclosure was a contributing factor,” after
25 “ordered if”.

1 (2) INDIVIDUAL ACTION.—Section 1221(e)(2)
2 of title 5, United States Code, is amended by insert-
3 ing “, after a finding that a protected disclosure was
4 a contributing factor,” after “ordered if”.
5 (o) EFFECTIVE DATE.—This Act shall take effect 30
6 days after the date of enactment of this Act.

Calendar No. 782

108TH CONGRESS
2^D Session

S. 2628

[Report No. 108-392]

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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