



NATIONAL RECONNAISSANCE OFFICE
Office of Inspector General
14675 Lee Road
Chantilly, VA 20151-1715



22 March 2023

MEMORANDUM FOR THE RECORD

SUBJECT: (U//~~FOUO~~) Report of Investigation: Alleged Whistleblower
Reprisal (Case Number 20-0130-C)

(U) PREDICATION AND SUMMARY

(U//~~FOUO~~) The National Reconnaissance Office (NRO) Office of Inspector General (OIG) initiated this whistleblower reprisal review based on a complaint received from [redacted] (Complainant) on 2 July 2020. At all times relevant to this review, Complainant was an NRO contractor employee, first under the [redacted] contract, [redacted] then under the follow-on [redacted] contract, [redacted], which was awarded in 2016.¹ Complainant was debriefed from NRO accesses on 30 June 2022. Both the [redacted] and the follow-on [redacted] contracts procured [redacted] for NRO facilities. Complainant alleged he was reprimed against by his contractor company managers, namely, Program Manager [redacted] and Assistant Program Manager [redacted], after making four disclosures to various individuals or entities over a period of several years.² At all times relevant to this review, [redacted] was the Program Manager for the [redacted] contract and subsequently the [redacted] contract, and [redacted] [redacted] was the Assistant Program Manager for the [redacted] contract.³

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(U//~~FOUO~~) The OIG did not substantiate Complainant's allegations of reprisal. The evidence was insufficient to determine by a preponderance of the evidence that Complainant established a *prima*

¹ (U//~~FOUO~~) In October 2018, [redacted] acquired [redacted] [redacted], the contractor company that was awarded the [redacted] Contract in 2016. For the purposes of this review, the OIG refers to Complainant's contractor employer by the name it was doing business as at the time of the relevant event.

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² (U//~~FOUO~~) Complainant made no allegations of reprisal against any other [redacted] contractor personnel or any United States Government personnel. Therefore, the OIG's assessment was limited to allegations against [redacted] [redacted]

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³ (U//~~FOUO~~) The relevant events relating to [redacted] took place after the award of the [redacted] contract in 2016; therefore, any role he may have had on the predecessor contract is not defined.

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facie case of reprisal. Three of Complainant's four alleged disclosures took place before enactment of the *Foreign Intelligence Surveillance Act (FISA) Amendments Reauthorization Act of 2017*; thus, at the time of these disclosures, the legal protections afforded to Intelligence Community (IC) whistleblowers did not yet include IC contractors. Consequently, these disclosures could not constitute a "protected disclosure," which could form, in whole or in part, the predicate for an ensuing adverse personnel action and trigger corresponding whistleblower reprisal protections, because such protections did not exist at the time of Complainant's disclosures. Complainant's fourth alleged disclosure took place in February 2020, after enactment of the *FISA Amendments Reauthorization Act of 2017* on 19 January 2018, which amended 50 United States Code (U.S.C.) § 3234 to include certain protections for IC contractors against reprisal by other IC contractor employees. However, Complainant's fourth disclosure was made to individuals who were not expressly designated to receive such disclosures pursuant to the controlling authorities, and therefore could not constitute a "protected disclosure," which could form, in whole or in part, the predicate for an ensuing adverse personnel action and trigger corresponding whistleblower reprisal protections. The OIG's detailed findings and conclusions are set forth below.

(U) **CRITERIA**

(U) 50 U.S.C. § 3234, *Prohibited personnel practices in the intelligence community*, 7 July 2014, amended 19 January 2018.⁴

(U) Complainant's purported disclosures were made between 2014 and/or 2015 through February 2020. Resultantly, a number of IC whistleblower protections are addressed in this review.⁵ As background, Presidential Policy Directive 19 (PPD-19), issued in October 2012, provided government employees in the IC with whistleblower reprisal protections against adverse personnel actions and authorized a process to review whistleblower reprisal complaints. Relevant to Complainant's alleged reprisal, PPD-19 did not extend protections against adverse personnel actions to IC contractor whistleblowers. Since the issuance of PPD-19 in 2012, four principal

⁴ (U) As explained in further detail below, during the period of time relevant to this matter, there were two legislative updates that revised pertinent provisions of 50 U.S.C. § 3234--the first on 19 January 2018 and the second on 15 March 2022. The OIG assessed that the law in effect at the time the respective event occurred is the appropriate criteria, which in Complainant's case was either the version enacted on 7 July 2014 or the amended version enacted on 19 January 2018.

⁵ (U//~~FOUO~~) Complainant made no allegations of reprisal relative to his eligibility for access to classified information pursuant to 50 U.S.C. § 3341. Therefore, the scope of this review was limited to allegations that invoked 50 U.S.C. § 3234, *Prohibited personnel practices in the intelligence community*, as set forth herein.

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legislative actions have been enacted that codified elements of
Sections A, B, and C of PPD-19 (Enacting Statutes):

- Section 601 and 602 of Title VI of the *Intelligence Authorization Act for Fiscal Year 2014*, Public Law (P.L.) 113-126, codified provisions of Sections A and B of PPD-19 on 7 July 2014. 50 U.S.C. § 3234; 50 U.S.C. §3341(j).
- *The Foreign Intelligence Surveillance Reauthorization Act of 2017* (P.L. 115-118) expanded 50 U.S.C. § 3234 and 50 U.S.C. § 3341(j) to include whistleblower reprisal protections for IC contractors on 19 January 2018.
- *The Intelligence Authorization Act for Fiscal Years 2018, 2019, and 2020* (P.L. 116-92) codified provisions of PPD-19 Section C, *Inspector General External Review Panel*, on 20 December 2019. 50 U.S.C. § 3236.
- *The Intelligence Authorization Act for Fiscal Year 2022*, included as Division X of the *Consolidated Appropriations Act, 2022* (P.L. 117-103) made changes to 50 U.S.C. § 3234 and 50 U.S.C. § 3341(j) that incorporated most of the remaining inconsistencies between the Enacting Statutes and PPD-19 on 15 March 2022.

(U) As of the March 2022 updates, the language of the Enacting Statutes has effectively codified the protections provided in PPD-19. However, the OIG did not identify instances within the Enacting Statutes wherein Congress set forth a clear and manifest expression of legislative intent regarding the legislations' retroactive application, if any. The OIG assessed that Congress intended the Enacting Statutes to have prospective effect only.⁶ Thus, as it concerns IC contractors, protections against reprisal under 50 U.S.C. § 3234 only apply when the disclosures were made after the enactment of the *FISA Amendment Reauthorization Action of 2017* (19 January 2018).

(U) Nevertheless, PPD-19 has not been revoked, and it remains unclear at the time of this review whether the non-codified provisions of PPD-19 could still be utilized to the extent that they do not

⁶ (U) See, e.g., *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-73 (1994); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994).

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specifically contradict the statutory language.⁷ Specifically, as it pertains to this case, PPD-19 provides that reviews of reprisal in the IC shall be consistent, to the fullest extent possible, with the policies and procedures used to adjudicate alleged violations of 5 U.S.C. § 2302(b)(8). However, as noted above, PPD-19 does not apply to reprisal against IC contractors. Moreover, 50 U.S.C. § 3234 provided no guidance or standards on how to review reprisal complaints until the March 2022 amendments. With no binding or guiding authority, the OIG utilized the processes consistent, to the fullest extent possible, with the policies and procedures used to adjudicate alleged violations of 5 U.S.C. § 2302(b)(8).⁸

(U//~~FOUO~~) As amended on 19 January 2018, 50 U.S.C. § 3234, *Prohibited personnel practices in the intelligence community*, provides in pertinent part that:

- c) Any employee of a contractor, subcontractor, grantee, subgrantee, or personal services contractor, of a covered intelligence community element who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to any contractor employee as a reprisal for a lawful disclosure of information by the contractor employee to the Director of National Intelligence (or an employee designated by the Director of National Intelligence for such purpose), the Inspector General of the Intelligence Community, the head of the contracting agency (or an employee designated by the head of that agency for such purpose), the appropriate

⁷ (U) When Congress has spoken on a matter, executive authority is curtailed. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 682 (1952). (Jackson, J. concurring.) "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." Thus, where the Enacting Statutes and PPD-19 are in direct conflict, the statutes control. The Enacting Statutes also control where they are more expansive. See also the Office of the Inspector General of the Intelligence Community's *Report on Intelligence Community Whistleblower Matters & Harmonization of Processes and Procedures*, 4 March 2021 (Whistleblower Harmonization report), which is incorporated herein by reference. The Enacting Statutes were enacted subsequent to PPD-19, giving the statutes even further primacy over the presidential proclamation. See, e.g., *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322 (1996); holding executive order was preempted by statute.

⁸ (U) In the absence of any other guiding authority or direction as it relates to an IC contractor's allegation of whistleblower reprisal that pre-dates the March 2022 amendments to 50 U.S.C. § 3234, the OIG determined this construct, which is the same as that used by the OIG in investigations of reprisal against government employees, provides a sufficient foundation of substantive law and analytic framework to guide the assessment of whistleblower reprisal complaints raised by an IC contractor.

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inspector general of the contracting agency, a congressional intelligence committee, or a member of a congressional intelligence committee, which the contractor employee reasonably believes evidences (1) a violation of any Federal law, rule, or regulation (including with respect to evidence of another employee or contractor employee accessing or sharing classified information without authorization); or (2) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(U) **STANDARD OF REVIEW**

(U) In analyzing whistleblower reprisal claims pursuant to 50 U.S.C. § 3234, the NRO OIG employs a two-stage test consistent with the process used in Title 5 whistleblower reprisal allegations. The standard of proof for the first stage of the whistleblower reprisal analysis is by preponderant evidence. To meet this standard, the relevant evidence must be of a degree of proof that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

1. (U) Stage One - *Prima Facie* Test

(U) To satisfy the first stage of the test for reprisal, there must be proof by preponderant evidence establishing the three elements of a claim of reprisal:

- (1) Complainant made, or was perceived⁹ as having made, or prepared to make, a protected disclosure;¹⁰

⁹ (U) An individual who is perceived as a whistleblower is still entitled to whistleblower protections, even if he or she has not made protected disclosures. See *King v. Department of the Army*, 116 M.S.P.R. 689, ¶ 6 (2011).

¹⁰ (U) While (unlike PPD-19) 50 U.S.C. § 3234 does not put forth a specific definition for "protected disclosure," the OIG applied in its analysis the language in 50 U.S.C. § 3234(c) that most closely parallels the definition of "protected disclosure" as provided in PPD-19.

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- (2) An unfavorable personnel action was taken against or a favorable personnel action was withheld from Complainant;¹¹ and
- (3) The protected disclosure was a contributing factor in the personnel action taken against Complainant.¹²

(U) If a preponderance of the evidence supports the three elements above, the investigation will proceed to the second stage of the analysis.

2. (U) Stage Two - Agency Rebuttal

(U) The standard of proof for the second stage of the analysis is by "clear and convincing" evidence.¹³ To satisfy this standard, the relevant evidence must be of a degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established.¹⁴ It is a higher standard than preponderance of the evidence but lower than the criminal standard of "beyond a reasonable doubt."

(U) The second stage of the analysis requires proof by clear and convincing evidence that the Agency would have taken or withheld the personnel action(s) against the complainant absent the protected disclosure.¹⁵ In determining whether "clear and convincing" evidence

¹¹ (U) The 15 March 2022 amendments to 50 U.S.C. § 3234 included language adding protections from threats of reprisals for both IC contractors and government employees; however, as previously stated, the OIG assessed this matter under the authorities in effect at the time of each event. Until 2022, 50 U.S.C. § 3234, unlike 5 U.S.C. § 2302, did not contain a provision that addressed or offered protection from threats of reprisals. While PPD-19 also contains language that prohibits threats of personnel actions as reprisal for protected whistleblowing, as previously discussed, PPD-19 protections do not extend to contractors. In addition, while the July 2014 amendments to 50 U.S.C. § 3341(j) included protections against threats of reprisal, Complainant made no allegations of reprisal relative to his eligibility for access to classified information and, therefore, 50 U.S.C. § 3341 is not applicable to the case at hand.

¹² (U) For the purposes of this analysis, a "contributing factor" means "any disclosure that affects an agency's decision to threaten, propose, take, or not take a personnel action with respect to the individual making the disclosure." 5 Code of Federal Regulations (C.F.R.) § 1209.4(d).

¹³ (U) 5 C.F.R. § 1209.7(b).

¹⁴ (U) 5 C.F.R. § 1209.4(e).

¹⁵ (U) 5 C.F.R. § 1209.4(e). "Evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion." *Whitmore v. Department of Labor*, 680 F.3d. 1353, 1368 (Fed. Cir. 2012).

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exists to support the agency's action(s), the following three factors¹⁶ are primarily considered, along with other relevant evidence:

- (1) The strength of the agency's evidence in support of legitimate reasons for the personnel action(s);
- (2) The existence and strength of any motive to retaliate on the part of the agency official(s) who were involved in the decision to take (or not take) the personnel action(s); and
- (3) Any evidence the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

(U) If clear and convincing evidence establishes that the agency would have taken or withheld the personnel action absent the protected disclosure(s), then the reprisal allegation will not be substantiated. Conversely, if the facts do not support by clear and convincing evidence that the personnel action(s) would have been taken or withheld absent the protected disclosure(s), then the reprisal allegation will be substantiated.

(U//~~FOUO~~) The OIG reviewed [redacted] allegations set forth in his 2 July 2020 interview with the OIG, a 15 September follow-up interview, and documentary evidence, as appropriate.

(b)(3)

(U) **BACKGROUND AND ALLEGATIONS**

(U//~~FOUO~~) During all times relevant to this review, Complainant was an NRO contractor employee, first under the [redacted] contract, then under the follow-on [redacted] contract, which was awarded in 2016. He served as a [redacted] on the [redacted] of the [redacted].¹⁷ During all times relevant to this review, [redacted] served as the Program Manager for the [redacted] contract and subsequently the [redacted] contract, and [redacted] served as the Assistant Program Manager for the [redacted] contract. Both individuals provided management and supervision to Complainant.

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(U//~~FOUO~~) During his 2 July 2020 OIG interview, Complainant cited four instances wherein he purportedly made disclosures to multiple individuals of actions he deemed inappropriate by his contractor company managers or other company employees. Complainant claimed

¹⁶ (U) *Carr v. Social Security Admin.*, 185 F.3d 1318, 1323 (Fed.Cir.1999), states that it is appropriate to consider the strength of the Agency's evidence in support of its personnel action when determining whether the Agency has shown clear and convincing evidence that it would have taken that action in the absence of the employee's protected disclosure.

¹⁷ (U//~~FOUO~~) NRO security records show Complainant was debriefed from NRO accesses on 30 June 2022.

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that, based on one or more of these disclosures, he was reprimed against by either or both [redacted] and [redacted]. On 15 September 2020, Complainant made an additional allegation of reprisal to the OIG wherein he alleged that [redacted] and [redacted] attempted to reprise against him through another personnel action. The following alleged disclosures and personnel actions form the scope of this review:

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(U//~~FOUO~~) **Disclosure 1:** In or around 2014 or 2015,¹⁸ Complainant purportedly notified the then [redacted]

[redacted] in the presence of [redacted] that his company (at the time [redacted] had purchased faulty [redacted]. Complainant alleged that the [redacted] failed to [redacted] failed to [redacted] properly, and were generally designed poorly.

(b)(3)

(U//~~FOUO~~) **Alleged Personnel Action as Reprisal for Disclosure 1 (Reprisal 1):** Complainant stated that based on his complaint regarding the faulty [redacted] he was passed over for promotion to [redacted] team lead on more than one occasion. Complainant alleged that one example occurred in 2019 when [redacted] management hired a new [redacted] manager with no internal vacancy announcement for the position.

(b)(3)

(U//~~FOUO~~) **Disclosure 2:** At some point from approximately 2015 to 2016,¹⁹ Complainant brought to [redacted] attention that [redacted] had himself made comments to a female [redacted] regarding her hairstyle, and that his comments about the female [redacted] appearance were inappropriate.²⁰ The female [redacted] subsequently complained to an unspecified Equal Employment Opportunity office. [redacted] was purportedly "cautioned" by the then [redacted] for his comments.

(b)(3)

(U//~~FOUO~~) **Alleged Personnel Action as Reprisal for Disclosure 2 (Reprisal 2):** Complainant stated that because of his complaint to [redacted] regarding [redacted] comments to the female [redacted] and the corresponding "caution" that the then [redacted] gave [redacted] Complainant was passed over in his pursuit of becoming the [redacted] team lead.

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¹⁸ (U//~~FOUO~~) In his OIG interview on 2 July 2020, Complainant indicated that the event(s) in question took place "approximately five to six years ago." As such, the OIG assessed that the events likely took place sometime between July 2014 and July 2015.

¹⁹ (U//~~FOUO~~) In his OIG interview on 2 July 2020, Complainant indicated that the event(s) in question took place "approximately four to five years ago." As such, the OIG assessed that the events likely took place sometime between July 2015 and July 2016.

²⁰ (U//~~FOUO~~) The female officer subsequently complained to an unspecified Equal Employment Opportunity office. [redacted] was purportedly "cautioned" by the-then [redacted] for his comments.

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(U//~~FOUO~~) **Disclosure 3:** In early 2017,²¹ Complainant informed the Contracting Officer's Technical Representative (COTR) for the [redacted] contract that [redacted] deliberately withheld or removed [redacted] and [redacted] apparatuses from equipment purchase requests that were supposed to be purchased through the contract.

(b)(3)

(U//~~FOUO~~) **Alleged Personnel Action as Reprisal for Disclosure 3 (Reprisal 3):** Complainant stated that this disclosure caused his management to bypass him for the [redacted] team lead position.

(U//~~FOUO~~) **Disclosure 4:** In February 2020, Complainant reported to the COTR for the [redacted] contract and [redacted] an allegation of an unauthorized disclosure of classified information--namely, that during a [redacted] [redacted] an [redacted] supervisor discussed [redacted] [redacted] exercises and protocols with an individual not affiliated with the NRO. Complainant learned of the potential unauthorized disclosure from a subordinate [redacted] officer.

(b)(3)

(U//~~FOUO~~) **Alleged Personnel Action as Reprisal for Disclosure 4 (Reprisal 4):** Complainant stated that based on this disclosure, [redacted] and other unspecified [redacted] managers may withhold promotions and/or may not select him for new positions within the company.

(b)(3)

(U//~~FOUO~~) **Additional Allegation of Reprisal (Reprisal 5):** On 15 September 2020, Complainant alleged that [redacted] and [redacted] engaged in a scheme in an attempt to remove Complainant from the company by trying to convince him to apply for a corporate training officer position that was not directly billed to the [redacted] contract. Complainant stated his belief that if he was hired for that training officer position, [redacted] and/or [redacted] could more easily terminate his employment with [redacted]. Complainant ultimately did not apply for the position.

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(U) ANALYSIS

(U) Stage One Analysis - Prima Facie Test

(U) Element #1: Did Complainant make or prepare to make a lawful disclosure, or was Complainant perceived as having made or prepared to make a lawful disclosure?

(U) In accordance with 50 U.S.C. § 3234(c), a protected disclosure by an employee of an intelligence community contractor

²¹ (U//~~FOUO~~) In his OIG interview on 2 July 2020, Complainant indicated that the event(s) in question took place "in early 2017."

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occurs when the contractor employee makes a disclosure to a party designated to receive such disclosures, and the disclosure conveys information the contractor employee reasonably believes evidences a violation of any Federal law, rule, or regulation, gross mismanagement,²² a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. Under the language as amended on 19 January 2018, the parties designated to receive a protected disclosure from an intelligence community contractor included the Director of National Intelligence (DNI), or an employee designated by the DNI for such purpose, the Inspector General of the Intelligence Community, the head of the contracting agency, or an employee designated by the head of that agency for such purpose, the appropriate inspector general of the contracting agency, a congressional intelligence committee, or a member of a congressional intelligence committee.

(U) The test for determining whether a complainant had a reasonable belief²³ that his or her disclosure(s) revealed potential government misconduct is whether a disinterested observer, with knowledge of the essential facts known to and readily ascertainable by the employee, could reasonably conclude that the actions of the government constituted potential wrongdoing as set forth in the appropriate authorities. The employee need not show that the matter disclosed actually established a violation of one of the above-noted categories of government wrongdoing. Rather, the individual must show that the matter disclosed was one for which a reasonable person, in the same position as the whistleblower, would have believed evidenced government wrongdoing.²⁴

~~(U//FOUO)~~ Disclosure 1: Complainant's Communication to the
[redacted] Regarding Faulty [redacted]

(b)(3)

²² (U) As noted above, 50 U.S.C. § 3234(c) was amended on 15 March 2022 by the *Intelligence Authorization Act for Fiscal Year 2022* to, among other changes, strike the phrase "gross mismanagement" and replace it with "mismanagement." For the purposes of this review, the OIG assessed Complainant's alleged disclosures under the statutory language in effect at the time each communication was made.

²³ (U) 5 C.F.R. § 1209.4. See also, *Lachance v. White*, 174 F.3d 1378, 1381 (Fed.Cir.1999).

²⁴ (U) *Schneider v. Department of Homeland Security*, 98 M.S.P.R. 377, ¶ 8 (2005).

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(U//~~FOUO~~) The OIG assessed Complainant's Disclosure 1 to the then [] that [] had purchased faulty [] under the contract constituted a disclosure of information that Complainant reasonably believed evidenced a substantial and specific danger to public health and safety.²⁵ However, Complainant's Disclosure 1 took place in or around 2014 or 2015, prior to enactment of the *FISA Amendments Reauthorization Act of 2017* on 19 January 2018. At the time of Complainant's communication to the then [] the legal protections afforded to IC whistleblowers did not extend to IC contractors; thus, Complainant's Disclosure 1 could not constitute a "protected disclosure," which could form the predicate for an ensuing personnel action and trigger corresponding whistleblower reprisal protections, because such protections did not exist at the time of Complainant's disclosure.²⁶

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**(U//~~FOUO~~) Disclosure 2: Complainant's Communication to []
[] Concerning [] Comments Regarding a Female
Employee**

(b)(3)

(U//~~FOUO~~) The OIG assessed that Complainant's communication to [] constituted a disclosure of information that Complainant reasonably believed evidenced a potential violation of law, rule, or regulation--namely, that [] comments to a female employee regarding her hairstyle implicated antidiscrimination and antiharassment policies. However, Complainant's Disclosure 2 took place in or around 2015 or 2016, prior to enactment of the *FISA Amendments Reauthorization Act of 2017* on 19 January 2018. At the time of Complainant's communication to [] the protections afforded to IC whistleblowers did not extend to IC contractors; thus, Complainant's Disclosure 2 could not constitute a "protected disclosure," which could form the predicate for an ensuing personnel action and trigger corresponding whistleblower reprisal protections, because such protections did not exist at the time of Complainant's disclosure.²⁷

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**(U//~~FOUO~~) Disclosure 3: Complainant's Communication to the []
[] COTR Regarding Equipment Improperly Withheld from
Purchase Requests**

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²⁵ (U//~~FOUO~~) This investigation focused solely on the allegations of reprisal and did not examine the underlying allegations contained in Complainant's communications.

²⁶ (U//~~FOUO~~) Because Complainant's Disclosure 1 occurred before 50 U.S.C. § 3234 was amended to include IC contractors in the reprisal protections afforded to IC whistleblowers, the OIG did not assess whether the [] was designated to receive such a disclosure from Complainant in accordance with the statute.

²⁷ (U//~~FOUO~~) Because Complainant's Disclosure 2 occurred before 50 U.S.C. § 3234 was amended to include IC contractors in the reprisal protections afforded to IC whistleblowers, the OIG did not assess whether [] was designated to receive such a disclosure from Complainant under the statute.

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(U//~~FOUO~~) The OIG assessed that Complainant's Disclosure 3 to the then [] COTR did not constitute a disclosure of information that Complainant reasonably believed evidenced one or more of the categories of wrongdoing enumerated in whistleblower protection authorities. Even presuming that Complainant had reasonable belief that the events he reported had in fact occurred, in reviewing the records and information, the OIG did not find sufficient evidence to support that [] alleged failure to procure certain [] equipment through the [] contract vehicle would have violated a law, rule, or regulation. While a complainant alleging whistleblower reprisal is not required to identify the particular statutory or regulatory provision that has potentially been violated, the complainant must make more than a vague, conclusory, or unsupported allegation of wrongdoing. Furthermore, the OIG did not find sufficient evidence to support that the information in Disclosure 3 constituted gross mismanagement, a gross waste of funds, or an abuse of authority, or otherwise constituted a substantial and specific danger to public health or safety.

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(b)(3)

(U//~~FOUO~~) Separate and apart from the OIG's assessment as to whether Complainant's Disclosure 3 related to one of the enumerated categories of wrongdoing, the exchange took place in "early 2017," prior to enactment of the *FISA Amendments Reauthorization Act of 2017* on 19 January 2018. At the time of Complainant's communication to the COTR, the protections afforded to IC whistleblowers did not extend to IC contractors; thus, Complainant's Disclosure 3 could not constitute a "protected disclosure," which could form the predicate for an ensuing personnel action and trigger corresponding whistleblower reprisal protections, because such protections did not exist at the time of Complainant's disclosure.²⁸

(U//~~FOUO~~) Disclosure 4: Complainant's Communications to the [] COTR and [] Regarding Improper Release of Classified Information

(U) The NRO Integrated Classification Guide provides that the fact that the NRO plans and trains for [] contingencies, has personnel accountability procedures, and uses recall rosters is UNCLASSIFIED. However, because the very nature of [] requires [] strategies to be rigidly protected and controlled, [] related planning products are classified, at a minimum, S//REL TO USA, FVEY. [] training, testing, and exercises, including specific dates and times of continuity tests and exercises, are S//REL TO USA, FVEY.

(b)(3)

²⁸ (U//~~FOUO~~) Because the Complainant's Disclosure 3 occurred before 50 U.S.C. § 3234 was amended to include IC contractors in the reprisal protections afforded to IC whistleblowers, the OIG did not assess whether the COTR for the [] contract was designated to receive such a disclosure from Complainant under the statute.

(b)(3)

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(U//~~FOUO~~) The OIG assessed that Complainant's communications to the [redacted] COTR and [redacted] constituted a disclosure of information that Complainant reasonably believed evidenced a potential violation of law, rule, or regulation--namely, that the [redacted] contractor supervisor may have disclosed classified information to an individual who was not authorized to receive it. Complainant's Disclosure 4 took place in February 2020, after enactment of the *FISA Amendments Reauthorization Act of 2017* on 19 January 2018. Therefore, at the time of Complainant's disclosure, 50 U.S.C. § 3234 had been amended to include IC contractors in the reprisal protections afforded to IC whistleblowers.

(b)(3)

(U//~~FOUO~~) However, the language of 50 U.S.C. § 3234(c) does not support that either the COTR or [redacted] were officials designated to receive the type of information that was disclosed by Complainant. NRO Acquisition Manual (NAM) Part [redacted]

(b)(3)

[redacted] The COTR Appointment Letter²⁹ for the [redacted] contract set forth the COTR's authorized duties and responsibilities related to the contract. Relevant to this review, the COTR Appointment Letter noted in pertinent part:

In accordance with NRO Acquisition Manual (NAM) Clause [redacted] of the contract, this appointment authorizes you to oversee the contractor's technical efforts to ensure that performance is in strict accordance with the terms and conditions of the contract...You have been delegated broad authority to represent the Contracting Officer regarding the technical aspects of this contract. In this capacity, you are expected to provide guidance to the contractor that clarifies and supports the accomplishment of the technical objectives and requirements of the contract.

(b)(3)

(U//~~FOUO~~) The language in the COTR Appointment Letter provides that the COTR has the duty/responsibility to oversee the contractor's technical efforts to ensure the contractor's performance is in strict accordance with the terms and conditions of the contract. The OIG assessed that this delegation of authority could potentially support a position that the COTR Appointment letter effectively designates the COTR as a party to receive protected disclosures regarding information related to the technical performance of the contract pursuant to 50 U.S.C. § 3234(c). However, a potential unauthorized disclosure of classified information does not implicate any of the technical requirements of the [redacted] contract. Subsequently, for the purposes of 50 U.S.C. § 3234, a communication regarding an unauthorized disclosure of information does not fall within the scope

²⁹ (U//~~FOUO~~) See NAM Part [redacted]

(b)(3)

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of the subject matter for which the COTR is potentially designated to receive protected disclosures.

(U//~~FOUO~~) The OIG also reviewed NRO Directive (ND) 80-6, *Protecting Whistleblowers with Access to Classified Information*, issued 20 June 2013, which was updated in January 2019 to add language regarding protections for employees and contractors who allege reprisal for making a protected disclosure under the provisions of PPD-19. Appendix A of ND 80-6, "Glossary and Acronym List," provides that the definition of "Authorized Individuals" designated to receive protected disclosures from a contractor whistleblower include "the Contracting Officer or Contracting Officer's Technical Representative." However, while ND 80-6 was updated after the *FISA Amendment Reauthorization Action of 2017* incorporated whistleblower protections for IC contractors, ND 80-6 specifically limits the policy's application regarding contractors to decisions that affect Eligibility for Access to Classified Information made after the effective date of the ND. Consistent with the primacy afforded to the Enacting Statutes over PPD-19 discussed above, to the extent that the ND may be inconsistent with the Enacting Statutes, the Enacting Statutes control. Nevertheless, while IC contractors are entitled to the statutory whistleblower reprisal protections as provided under 50 U.S.C. § 3234 despite any inconsistencies with ND 80-6, ND 80-6 does not provide supplemental guidance or authority relevant to this review because Complainant made no allegations of reprisal relative to his eligibility for access to classified information. Per the explicit language of ND 80-6, the policy is not applicable to contractors except under those circumstances.³⁰

(U//~~FOUO~~) For example, ND 80-6, Section II, "Application," provides specifically that, with respect to contractors, the ND **only** applies to decisions that affect Eligibility for Access to Classified Information made after the effective date of the ND. Moreover, under the definition of "whistleblower reprisal" set forth in Appendix A, the meaning of whistleblower reprisal for contractors under the policy "is limited to Personnel Actions and decisions that affect Eligibility for Access to Classified Information." Since Complainant made no allegations of reprisal relative to his eligibility for access to classified information, the language of the ND specifically excluded Complainant from coverage under the policy. Moreover, NRO Office of General Counsel (OGC) advised the OIG that OGC has no records that evidence the Director, NRO formally designating any other NRO

³⁰ (U//~~FOUO~~) The OIG acknowledges that when ND 80-6 was updated in 2019, the new language did not appear to align with the 2018 amendments to 50 U.S.C. § 3234. While IC contractors are entitled to whistleblower reprisal protections as defined in the statute despite any apparent conflicts with NRO policies, the OIG cannot interpret the NRO as having intended to designate a COTR as an official who is authorized to receive a contractor's protected disclosures merely because the NRO could have made such a designation. 50 U.S.C. § 3234 did not require such a further designation to be made, and a plain reading of the language of the policy reflects the NRO did not do so.

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officials (other than the OIG) to received 50 U.S.C. § 3234 disclosures.

(U//~~FOUO~~) Finally, while 50 U.S.C. § 3234(c) was amended on 15 March 2022 to provide that a supervisor in the contractor's chain of command is a party authorized to receive a contractor's protected disclosure, Complainant's Disclosure 4 occurred in early 2020, prior to the amended language. As previously noted, the OIG assessed that Congress intended the Enacting Statutes to have prospective effect only. PPD-19 defines protected disclosure as "a disclosure of information by the employee to a supervisor in the employee's direct chain of command...". However, as stated above, PPD-19 does not extend whistleblower protections to IC contractor personnel. Thus, Complainant's Disclosure 4 to [redacted] could not constitute a "protected disclosure," which could form the predicate for an ensuing personnel action and trigger corresponding whistleblower protections. (b)(3)

(U//~~FOUO~~) In sum, Complainant's Disclosures 1, 2, and 3 were made prior to enactment of the *FISA Amendment Reauthorization Act of 2017* on 19 January 2018. In addition, Complainant, as an IC contractor, did not have any protections from whistleblower reprisal under PPD-19. Therefore, none of these three disclosures constituted a "protected disclosure," which could form the predicate for any ensuing personnel action and trigger corresponding whistleblower reprisal protections, because such protections did not exist at the time of Complainant's disclosures.³¹ Regarding Complainant's Disclosure 4, the disclosure took place after the *FISA Amendment Reauthorization Act of 2017* amended the language of 50 U.S.C. § 3234 to include whistleblower protections for IC contractors. However, while Complainant's concern pertained to information indicating a potential violation of law, rule, or regulation, Complainant's disclosure to the cognizant COTR and to his supervisor did not meet the requirement to submit such concerns to those individuals or entities, or any appropriate parties designated to receive such disclosures, as set forth in the statute. Therefore, Complainant's Disclosure 4 does not constitute a protected disclosure pursuant to the controlling authorities.

(U) Element #2: Was an unfavorable personnel action taken or a favorable personnel action withheld from Complainant?

(U//~~FOUO~~) The OIG did not assess this element because there was insufficient evidence to establish that any of Complainant's purported disclosures met the definition of a "protected disclosure," which could form the predicate for an ensuing personnel action and trigger corresponding whistleblower protections.

³¹ (U//~~FOUO~~) As stated above, because Complainant's Disclosures 1, 2, and 3 occurred before 50 U.S.C. § 3234 was amended to include IC contractors in the reprisal protections afforded to IC whistleblowers, the OIG did not assess whether the recipients were designated to receive such disclosures from Complainant under the statute.

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(U) Element #3: Were the disclosures a contributing factor in the alleged personnel action(s)?

(U//~~FOUO~~) The OIG did not assess this element because there was insufficient evidence to establish that any of Complainant's purported disclosures met the definition of a "protected disclosure," which could form the predicate for an ensuing personnel action and trigger corresponding whistleblower protections.

(U) Stage One - Prima Facie Test Overall Conclusions

(U//~~FOUO~~) The OIG determined by a preponderance of credible evidence that for the purposes of the Stage One analysis:

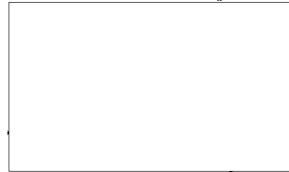
- (1) (U//~~FOUO~~) None of Complainant's communications constituted a protected disclosure. Complainant's Disclosures 1, 2, and 3 were made prior to enactment of the *FISA Amendment Reauthorization Act of 2017* on 19 January 2018, and as an IC contractor, Complainant did not have any protections from whistleblower reprisal under either the language of the Enacting Statutes in effect at the relevant time, or otherwise under PPD-19. While Complainant's Disclosure 4 took place after the enactment of the *FISA Amendment Reauthorization Act of 2017* and constituted a disclosure of information that Complainant reasonably believed evidenced a potential violation of law, rule, or regulation, neither the COTR nor [] were parties identified or otherwise designated as authorized recipients of such disclosures pursuant to relevant authorities.
- (2) (U//~~FOUO~~) Given the evidence does not establish that Complainant's communications met the criteria for a protected disclosure, the OIG did not assess whether an unfavorable personnel action was taken against, or a favorable personnel action was withheld from, Complainant.
- (3) (U//~~FOUO~~) Given the evidence does not establish that any of Complainant's communications met the criteria for a protected disclosure, the OIG was precluded from assessing whether any of the disclosures were a contributing factor in any of the alleged personnel action(s) at issue.

(b)(3)

(U//~~FOUO~~) Because the OIG determined the complaint did not meet all of the elements required to establish a *prima facie* case of whistleblower reprisal, the OIG did not initiate Stage Two of the analysis to assess whether clear and convincing evidence establishes that the alleged personnel actions taken against Complainant would have occurred absent Complainant's disclosures. Complainant's allegation of reprisal in this matter is unsubstantiated.

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(U//~~FOUO~~) On 21 March 2023, the OIG notified Complainant of the
investigative findings and advised him he could seek review of this
decision to the Inspector General of the Intelligence Community. The
OIG considers this matter closed.



Eric Beatty
Assistant Inspector General
for Investigations

(b)(3)