No. 22-70013

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAMUEL JAMES KENT

Petitioner,

v.

DARRYL LACOUNTE, Director of the United States Bureau of Indian Affairs; et al.,

Respondents

On Appeal from the United States Department of the Interior
DOI No. OP-PI-21-0685

PETITIONER OPENING BRIEF

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I.INTRODUCTION

The protection of whistleblowers from retaliation has a deeply rooted and robust tradition in the United States of America. Beginning with a resolution passed by the Continental Congress on July 30, 17781, and continuing through the most recent congressional session2, Congress has unequivocally recognized that protecting individuals who report fraud, waste, and abuses of authority from retaliation serves a vital function in ensuring political accountability and protecting the public purse. The same virtues undergirding this tradition were foremost amongst Congress's considerations in addressing the fact that the increasing proportion of the federal budget spent on prime awards to contractors and grantees was being subjected to a disproportionate amount of risk for fraud, waste, and abuse.

This risk was attributable, in part, to Congress historically taking a "piecemeal" approach when creating federal whistleblower protections for private sector employees that limited their coverage to specific circumstances. This

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[1] Papers of Continental Congress No. 136, II, folio 427 (July 30, 1778). The resolution was passed in response to a petition submitted to the Continental Congress by two Revolutionary Sailors that were arrested for reporting a commander of the Continental Navy who participated in the torture of captured British Sailors. The resolution held that "it is the duty of all persons in the service of the United States, as well as all other the inhabitants thereof, to give the earliest information to Congress or other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states, which may come to their knowledge". The Continental Congress also authorized payment for legal counsel to ensure the two revolutionary sailors could adequately defend themselves. Later, on May 22, 1779, the Continental Congress provided $1,418 to cover the cost of the whistleblowers defense and directed a "Sam. Adams" to ensure their lawyer, William Channing, was paid.

[2] See H.R.2988 - Whistleblower Protection Improvement Act of 2021; H.R.7245 - PCAOB Whistleblower Protection Act of 2022; S.3977 - SEC Whistleblower Reform Act of 2022;

resulted in the creation of a gap in the law within which employees of federal civilian contractors, subcontractors, grantees, subgrantees, and private service contractors were not extended whistleblower protections comparable to Federal Government employees working in the public sector[3]. Considering the increasing percentage of the federal workforce that fall within this gap, Congress sought to implement legislation that would:

> "...address current gaps in whistleblower protections for the individuals that work on projects funded by the over $1 trillion in contracts and grant funding provided by the Federal Government each year"[4].

The solution would come in the form of extending the whistleblower protections included under section 1553 of the American Recovery and Reinvestment Act of 2009 (ARRA)[5]. Where the whistleblower protections included under section 1553 were limited to funds awarded under the ARRA, the legislation introduced by the 112th Congress[6] was intended to create permanent whistleblower rights for all Federal Government contractors, subcontractors, and grantees, including those within the intelligence community (IC). While the original bill was not signed into law, the concept was included in the National

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[3] *Whistblower Protections For Government Contractors: Hearing on S.241 before the Ad Hoc Subcomm. On Contract Oversight of the S. Comm. On Homeland Security and Governmental Affairs,* 112th Cong. (2011) (statement of Senator Ronald Johnson

[4] *Senate Report 114-270,* Pg. 2.

[5] Pub. L. 111-5.

[6] S. 241, the Non-Federal Employee Whistleblower Protection Act of 2012 (112th Cong.).

Defense Authorization Act (NDAA) for Fiscal Year 2013, as a four-year pilot program that excluded IC contractors.[7] Four years later, the whistleblower protections provided in the NDAA pilot program were made permanent four years later when Pub. L. 114-261 was signed into law as "An Act to enhance whistleblower protections for contractor and grantee employees"("Act")[8]. Notably, amendments to the Act remain consistent with Congress's intent to whistleblower protections to a broad class of individuals working on federally funded projects by expanding the scope of individuals covered to include subcontractors, subgrantees, and personal service contractors[9].

Nevertheless, on January 5, 2022, Director Darryl LaCounte of the United States Bureau of Indian Affairs ("BIA") chose to disregard Congresses' unambiguously expressed intent that the whistleblower protections afforded under the Act should "appl[y] to *any* federal contract or grant and is not limited to a particular appropriation or class of grant" *Tex. Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350, 354 (5th Cir. 2021)(emphasis in original). Instead, the BIA Director denied Petitioner relief under 41 U.S.C. § 4712(c), despite the fact his allegation of whistleblower retaliation was substantiated following an investigation conducted

[7] Pub. L. No. 112-239, 828 (112th Cong.).
[8] Codified at 41 U.S.C. § 4712.
[9] Pub. L. 114–261. Subsec. (a)(1) and Pub. L. 116–260 Subsec. (a)(3)(A), (b)(1), (c), (d), and (f).

by the Office of the Inspector General for the United States Department of the Interior ("DOI OIG")[10]. The Order[11] issued by the BIA Director was unsupported by the record, issued without the authority to do so, and based upon a clearly erroneous interpretation of the Act which contradicts the legal determinations articulated by the United States Department of the Interior's (DOI) in the adjudication of a similarly situated whistleblower. Moreover, the reasoning articulated by the BIA Director to justify denying Petitioner's claim for relief has the effect of establishing a new substantive rule that necessarily applies to every individual employed by an Indian Self-Determination and Education Assistance of 1975[12] ("ISDEAA") contractor. The pronouncement of this new substantive rule is a violation of the rulemaking requirements of the Administrative Procedures Act[13] ("APA") and provisions of the ISDEAA[14].

Therefore, Petitioner respectfully submits that the effectuation of Congress's will to protect employees of federal contractors and grantees from whistleblower retaliation necessitates setting aside the arbitrary and capricious Order issued by the BIA Director and invalidating the clearly erroneous interpretation upon which

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[10] 1-CAR-14-34.
[11] 1-CAR41.
[12] 25 U.S.C. § 5301, *et seq.*
[13] 5 U.S.C. § 553, *et seq.*
[14] 25 U.S.C. § 5328.

it was based. Petitioner further submits the substantive rule created by Order should be vacated as an unlawful agency action that exceeded the authority delegated to either the Secretary of the U.S. Department of the Interior (Secretary) or the BIA Director and violated the requirements of the ISDEAA and the APA. Finally, Petitioner request the Court order the Secretary to grant Petitioner the relief in accordance with the provisions of 41 U.S.C. § 4712(c)(1).

II. JURISDICTIONAL STATEMENT

This case is an appeal from the January 5, 2022 Order of the Director of the U.S. Bureau of Indian Affairs, Darryl LaCounte ("BIA Director"), in which the BIA Director denied Petitioner's request for relief under the U.S. Department of Interior case number OI-PI-21-0685-I[15] . The BIA Director purportedly exercised jurisdiction to adjudicate Petitioner's claim pursuant to 41 U.S.C. § 4712(c) and in his capacity "As the head of the cognizant U.S. Department of the Interior bureau". This Court has jurisdiction to review this petition pursuant to 41 U.S.C. § 4712(c)(5) and the judicial review provisions of the Administrative Procedure Act at 5 U.S.C. § 706 et seq.

Petitioner Samuel James Kent timely filed a petition for review on January 24, 2022[16].

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[15] 1-CAR-41.
[16] 41 U.S.C. § 4712(c)(5)

III.ISSUE(S) PRESENTED

The issues presented in this case are as follows:

1. Whether the BIA Director erred in interpreting 41 U.S.C. § 4712 as not applying to Indian Self-Determination and Education Assistance Act[17] agreements.
2. Whether the BIA Director exceeded the limitations of his delegated authority in issuing the Order to deny Petitioner relief.
3. Whether the Bureau of Indian Affairs and the BIA Director acted arbitrarily and capriciously in denying Petitioner relief pursuant to 41 U.S.C. § 4712(c).
4. Whether the BIA Director's Order has the effect of promulgating a substantive rule in violation of the Administrative Procedures Act and the Indian Self-Determination and Education Assistance Act's rulemaking requirements.[18]

IV.STATEMENT OF ADDENDUM

The full text of the relevant constitutional provisions, statutory provisions, and rules are set forth in the addendum filed concurrently with this brief. See 9th Cir. R. 28-2.7.

V.STATEMENT OF THE CASE

This case presents the Court with an important opportunity to disabuse the U.S. Department of the Interior and the U.S. Bureau of Indian Affairs of the notion that the administrative process is a viable mechanism for abdicating from a statutorily imposed mandate to the detriment of an individual's rights. As such, while it is incontrovertible that the judicial review of administrative actions is typically limited in its scope (*Judulang v. Holder*, 565 U.S. 42, 52–53, 132 S. Ct. 476, 483, 181 L. Ed. 2d 449 (2011), and "compiled in the course of informal agency action in which a hearing has not occurred" (*Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S. Ct. 1598, 1607, 84 L. Ed. 2d 643 (1985), Petitioner respectfully submits a determination of the arbitrary and capricious nature of the agency action contested in the petition for judicial review filed with this Court on January 24, 2022, necessitates a "thorough, probing, in-depth review" *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971) of Respondents repeated efforts to absolve themselves of their congressionally mandated duty to protect the rights of whistleblowers. This Court has recognized the permissibility of considering "extra-record evidence" only in 'limited

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[17] 25 U.S.C. § 5328 *et seq.*
[18] 5 U.S.C. § 553

circumstances that are 'narrowly construed and applied.'" *Goffney v. Becerra*, 995 F.3d 737, 747–48 (9th Cir.), cert. denied, 211 L. Ed. 2d 366, 142 S. Ct. 589 (2021). Petitioner believes the Court will conclude this case presents a circumstance qualifying for such an exception and the examination of extra-record evidence will beneficially serve the Court's review.

As such, this case began with Petitioner's submission of a whistleblower reprisal complaint to the DOI OIG on July 15, 2019[19] ("Complaint"). Petitioner was subsequently contacted by the DOI OIG[20] and evidence and testimony was provided by the Petitioner in support of his claim of unlawful whistleblower retaliation. Insofar as Petitioner was aware, on September 10, 2019, the DOI OIG informed Petitioner that the decision was made not to initiate a formal investigation of the Petitioner's retaliation claim pursuant to 41 U.S.C. § 4712(b) for several potential reasons, including the fact that some of the federal grant programs identified in Petitioner whistleblower complaint were awarded under the authority of the ISDEAA. Nevertheless, the DOI OIG informed Petitioner that his retaliation complaint was forwarded to the BIA and the DOI OIG would make a

[19] See Attachment Pg.1-12
[20] Assigned DOI OIG Case Number OI-HQ-19-0707-R.

final determination whether to formally investigate Petitioner's retaliation claim once the DOI OIG received a response from the BIA.

As Petitioner endeavored to have this preliminary determination reconsidered, the DOI OIG contacted Petitioner on October 30, 2019, and informed him the DOI OIG chose to initiate a new and separate preliminary review[21] of his Complaint[22]. While corresponding with the DOI OIG under case number 20-0087, Petitioner was informed the DOI OIG's preliminary determination to not initiate a formal investigation of Petitioner's Complaint was due to the DOI OIG's concern of whether the whistleblower protections afforded under the Act included ISDEAA agreements[23]. The DOI OIG informed Petitioner that "an independent legal review of the [Act] specifically as it pertains to tribal sovereignty laws"[24]. On December 12, 2019, the DOI OIG informed the Petitioner that the BIA provided a response to the DOI OIG regarding case number OI-HQ-19-0707-R. The DOI OIG stated the response they received was sufficient for their purposes and case number OI-HQ-19-0707-R was closed. [25]

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[21] Assigned DOI OIG Case # 20-0087.
[22] Petitioner was informed on this date that "the fraud portion of [Petitioner's] complaint has been referred to the BIA for a response, it is [the DOI OIG's] policy to wait until they conclude their investigation and review the results before we consider opening an investigation within the OIG".
[23] See Attachment 2 Pg. 13.
[24] *Id.*
[25] See Attachment 3 Pg. 14.

Upon receiving this information, Petitioner sought an explanation from the DOI OIG to reconcile this action with information previously provided by the DOI OIG and the 180-day timeframe within which OIG investigations are to be completed pursuant to 41 U.S.C. § 4712(b)(2)(A). While the requested clarification was not provided, the DOI OIG, evidently, was able to conclude their intra-agency legal review of the jurisdictional scope of the Act, review the totality of information Petitioner provided in DOI OIG case numbers OI-HQ-19-0707-R and 20-0087, and determinate Petitioner's Complaint failed to allege a violation under 41 U.S.C. § 4712(b)(2)(A) in just 8-days.

Unbeknownst to the Petitioner at the time, a subsequent Freedom of Information Act[26] submitted by the Petitioner would reveal the DOI OIG produced an investigative report[27] regarding Petitioner's Complaint, and Respondent BIA Director provided a memorandum response to the Petitioner's Complaint on November 21, 2019 ("Memorandum").[28] Respondent BIA Director's Memorandum directly addressed Petitioner's claim of unlawful whistleblower retaliation in the form of the termination of his employment[29] and provided the

[26] 5 U.S.C. § 552.
[27] See Attachment 4 Pg. 15-20.
[28] See Attachment 5, Pg. 21-24
[29] This specific claim is addressed under allegation 5 of Respondents memorandum under the heading "Restricted Federal Agency Communications".

DOI OIG with the recommendation that "no further action" be taken on Petitioner's complaint. The explanation provided for Respondent BIA Director's recommendation is:

> "The BIA determined that [Petitioner's] allegation is an internal matter between the complainant and the tribe. It is the BIA's policy not to interfere with the governance of tribes allowing them to utilize their own processes, including staffing decisions."[30]

Despite having a dispositive effect on Petitioner's Complaint, Petitioner was not provided a final agency order required by 41 U.S.C. § 4712(c), which included both Respondent BIA's determination and Respondent BIA Director's explanation for making the recommendations in the Memorandum. As a result, the details of the preliminary actions of the DOI OIG and Respondents effectively demonstrate the manner in which Respondents' actions that are being contested in the instant case were repeatedly alluded to as the informal justification for denying or delaying Petitioner's claim from progressing within the adjudicative process set forth in the Act. Respondent's failure to pronounce their legal determination in a formalized final agency action consistent with the requirements of the Act instead resulted in Petitioner's claim languishing at the preliminary stages of the statutorily established process until such time that Petitioner was notified his complaint would

[30] See Attachment 4 Pg. 23.

not be investigated for a wholly unrelated merit-based determination that contradicted all the information previously communicated to the Petitioner.

Thus, Respondent's concealment of the actual reason for determining Petitioner to be ineligible for whistleblower protections under the Act deprived him of the ability to seek meaningful judicial review simultaneous to those determinations having a concrete legal consequence on Petitioner's rights and the obligations of recipients of federal financial assistance under the ISDEAA. If Petitioner was provided the Respondents' actual reasons for recommending the DOI OIG not investigate Petitioner's Complaint, the standard articulated by the U.S. Supreme Court in *Bennett v. Spear,*[31] would have provided Petitioner adequate grounds to seek contemporaneous review of the DOI OIG's final agency action of declining to investigate Petitioner's Complaint under the Act. Respondents' recommendation to the DOI OIG is the direct cause of the DOI OIG's decision not investigate Petitioner's complaint. Consequently, Respondents' were able to evade judicial review of the basis articulated in the Memorandum provided to the DOI OIG alongside the recommendation not to take any further action on Petitioner's Complaint. This resulted in Petitioner being subjected to a

[31] Bennett v. Spear , 520 U.S. 154, 177–78, 117 S. Ct. 1154, 1168, 137 L. Ed. 2d 281 (1997)

two-and-a-half-year administrative process that was inconsistent and ambiguous at best and, at worst, dilatory and intentionally misleading.

Nevertheless, Petitioner sought judicial review for the final agency actions of which Petitioner was provided a determination in response to his Complaint. First, Petitioner filed a petition for review before this Court on February 13, 2019, pursuant to 41 U.S.C. § 4712(c)(5).[32] While the focus of the petition for review under case 20-70391 was ultimately a final agency action of the DOI OIG, there existed significant incongruity between the informally provided basis the DOI OIG provided about the applicability of the Act to federal financial assistance awards made pursuant the ISDEAA and the DOI OIG's formally stated reason for deciding not to investigate Petitioner's Complaint. In deciding not investigate Petitioner's Complaint, the DOI OIG cited the response the BIA provided to the DOI OIG as directly impacting the DOI OIG's decision to close Petitioner's Complaint. However, the DOI OIG's formally stated reason for declining to investigate Petitioner's Complaint was based on the merit of the claim underlying Petitioner's complaint. This clearly contradicted the informal reasons Petitioner was previously provided by the DOI OIG, which they attributed to the response provided by the BIA. These contradictions were central to Petitioner's argument in

[32] See U.S. Court of Appeals for the Ninth Circuit Case # 20-70391, Kent v. U.S. DOI OIG et al.

challenging the DOI OIG's preliminary determination and are included here to illustrate the characteristics of Respondents' conduct in responding to the Complaint that is the subject of the Court's review in the instant case. On January 26, 2021, the petition for review in case 20-70391 was dismissed by this Court for want of subject matter jurisdiction to directly review the agency action presented.[33]

Following the dismissal of the petition for review filed under case 20-70391, Petitioner's sought review under the APA with the filing of a civil complaint on February 16, 2021, in the United States District Court of the Eastern District of California ("Eastern District").[34] Finding that no real property was at issue and in consideration of Petitioner's current physical address, the Eastern District entered an order transferring the case to the United States District Court for the District of Oregon ("District of Oregon") on February 18, 2021.[35] On February 24, 2021, Petitioner's complaint was filed in the District of Oregon under case 3:21-CV-00291-MO.[36] While in the District of Oregon, Defendants informed the DOI OIG would be initiating a new investigation of Petitioner's Complaint. On July 20, 2021, Defendants moved to stay proceedings in the District of Oregon for the

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[33] *Id.* at Dkt. #36.
[34] See Kent v. Office of the Inspector General, et al., United States District Court for the Eastern District of California Case # 2:21-CV-00296-JAM-AC.
[35] *Id.*at Dkt. # 3.
[36] See Kent v. Office of the Inspector General, et al., United States District Court for the District of Oregon Case # 3:21-CV-00291-MO at Dkt. #5.

purpose of allowing Defendant DOI OIG to complete their recently initiated investigation.[37] Defendants argued a stay of proceedings in the District of Oregon was necessary to allow Defendant DOI OIG to complete their recently initiated investigation, which they claimed would likely moot or significantly narrow the issues presented in Petitioner's lawsuit. Moreover, Defendants alleged they did not create an administrative record for the determinations being challenged by Petitioner[38] and Defendants would be prejudiced if they were required to proceed without evidence that will support their findings.[39]

Foreshadowing the inevitability of the instant case before the Court, Defendant's motion to stay specified the investigation initiated by the DOI OIG was conditioned on the DOI OIG not conceding the Act applied to Petitioner's Complaint. Despite this condition calling into question the basis of the DOI OIG's statutory authority for conducting the investigation of Petitioner's Complaint, the District of Oregon granted Defendant's motion over Petitioner's objections. The District of Oregon denied Petitioner subsequent movement for reconsideration[40] of the order granting Defendant's motion to stay, and Petitioner's motion to certify the order for interlocutory appeal was instead filed as an interlocutory appeal in

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[37] *Id.* at Dkt. # 29.
[38] *Id.* at Dkt. #29, Pg. 7 ¶, ¶2.
[39] *Id.* at Dkt. #29, Pg. 11, ¶2.
[40] *Id,* at Dkt. #34.

this Court as U.S. Court of Appeals for the Ninth Circuit case number 21-35739.[41] The interlocutory appeal in case number 21-35739 was dismissed by this Court for want of jurisdiction on September 17, 2021.[42]

The DOI OIG's most recently initiated investigation of Petitioner's Complaint proceeded under DOI OIG case number OI-PI-21-0685-I and a Report of Investigation ("ROI") substantiating Petitioner's Complaint of unlawful retaliation was produced on December 6, 2021.[43] The DOI OIG's ROI stated "Pursuant to 41 U.S.C. § 4712(b)(1), we are providing this report to the Secretary of the Interior for any action deemed appropriate."[44] Thirty days later, Respondent BIA Director issued the Order[45] that is the subject of this case. Respondent BIA Director's Order states the authority for issuing the Order stems from their role as "the head of the competent U.S. Department of the Interior Bureau."[46] Respondent BIA Director's Order denied Petitioner relief under 41 U.S.C. § 4712(c), citing the basis of its determination to be "upon legal review, it is clear that 41 U.S.C. § 4712 does not apply to Indian Self-Determination and Education Assistance Act agreements under Public Law 93-638, including the HIP and TTP administered by

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[41] See Samuel Kent v. Office of the Inspector General et al., Case # 21-35739 at Dkt. #1.
[42] *Id.* at Dkt. Entry #2.
[43] 1-CAR-8-29.
[44] 1-CAR-9
[45] 1-CAR-36.
[46] 1-CAR-36, ¶ #1.

the PRTC in this case."[47] Following the receipt of Respondent BIA Director's Order, Petitioner timely filed a petition for review in this Court on January 24, 2022,[48] pursuant to 41 U.S.C. § 4712(c)(5).

VI.SUMMARY OF THE ARGUMENT

Respondent BIA Director erroneously interpreted the Act to exclude whistleblower protections to employees of recipients of assistance agreements awarded pursuant to or under the authority of the ISDEAA. In interpreting the Act to exclude ISDEAA assistance agreements, the BIA Director's construction of the Act is contradictory to the plain and unambiguously expressed intent of Congress expressed in the text. Accordingly, the BIA Director's order cannot be upheld according to the framework established by the Supreme Court in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Furthermore, the basis for the BIA Director's Order fail to satisfy the burden of proof requirements established by the Supreme Court precedent, where a party seeks the validation of a statutory interpretation that requires a special exception to conduct prohibited by the statute. The only individuals excluded from the whistleblower protections provided by the Act are those employed by a recipient of federal funds that meets the definition for being an element of the

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[47] 1-CAR-36, ¶2.
[48] See Dkt. Entry #1.

intelligence community as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)) .

Respondents' interpretation of the Act also contradicts the legislative history that unambiguously demonstrates the whistleblower protections provided in the Act were previously interpreted by Respondents and this Court to include ISDEAA agreements. These protections were included in whistleblower protections Congress enacted that relied on narrower language than the scope of individual eligible for coverage in the Act. Finally, Respondents' construction of the Act is contradicted by evidence included in the Certified Administrative Record and has the effect of establishing a new substantive rule that excludes an entire class of similarly situated individuals from the scope of the Act's whistleblower protections. Respondent did were not delegated authority by Congress to create rules under the Act that carry the force and effect of law. Therefore, Respondents' actions are arbitrary and capricious according to the requirements of the APA because they are inherently not in accordance with the law and in conflict with Congress's will.

VII.ARGUMENT

1. THE BIA DIRECTOR'S INTERPRETATION OF THE ACT IS ERRONEOUS AND CONTRADICTS THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE ACT.

While the BIA Director's Order does not provide the details of the underlying legal analysis or evidence relied upon in the "legal review"[49] preceding the determination instantly before the Court, Petitioner submits the plain text of the Act unambiguously demonstrates the Order denying Petitioner the remedies afforded in 41 U.S.C. § 4712(c)(1)(A)-(C) is based upon an erroneous interpretation of the law. Petitioner respectfully submits the Court may resolve the question of whether the BIA Director's determination that "[The Act] does not apply to Indian Self-Determination and Education Assistance Act agreements made under Public Law 93-638."[50] is based upon a permissible construction of the Act by applying well-established principles of statutory interpretation. This process is best suited to cases, like the instant matter, where the prevention of a manifest injustice necessitates the Court's exercise of its power under Article III of the United States Constitution[51] to act as "the final authority on issues of statutory construction" to "reject [an] administrative constructions [that is] contrary to clear

[49] 1-CAR-41.
[50] *Id.*
[51] U.S. Const. art. III, § 2, cl. 1.

congressional intent." E. Bay Sanctuary Covenant v. Biden, 993 F.3d 640, 669 (9th Cir. 2021)(quoting Chevron, 467 U.S. at 843 n.9, 104 S.Ct. 2778).

Moreover, the application of the principles of statutory interpretation to resolve the question of the permissibility of the BIA Director's construction of the Act is consistent with the "presum[ption] that [the] legislature says in a statute what it means and means in a statute what it says." *Pit River Tribe v. Bureau of Land Mgmt.,* 939 F.3d 962, 970 (9th Cir. 2019) (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004)) (internal quotation marks omitted). In so doing, Petitioner respectfully submits the Court will ensure the central purpose of judicial review is fulfilled by "ascertaining the intent of Congress and by giving effect to its legislative will." *Pit River Tribe,* 939 F.3d at 970 (quoting *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 720 (9th Cir. 2003) (internal quotation marks omitted).

When reviewing the statutory interpretations of a federal agency, this Court applies the standard articulated by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Under *Chevron* step one, the Court asks "whether Congress has directly spoken to the precise question at issue." *Id.* At that point, "[i]f the intent of Congress is clear, that is the end of the matter; ... [Courts] must give

effect to the unambiguously expressed intent of Congress." *Id.* (quoting *Chevron,* 467 U.S. at 842-43, 104 S. Ct. 2778).

The plainness or ambiguity of statutory language is "determined [not only] by reference to the language itself, [but also] the specific context in which that language is used, and the broader context of the statute as a whole." *Yates v. United States*, 574 U.S. 528, 537, 135 S. Ct. 1074, 1081–82, 191 L. Ed. 2d 64 (2015). (Citing *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). Statutory language can be considered unambiguous where it is "plain to anyone reading the Act" that the statute encompasses the conduct at issue. *Salinas v. United States*, 522 U.S. 52, 60, 118 S. Ct. 469, 475, 139 L. Ed. 2d 352 (1997) (Citing *Gregory v. Ashcroft, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991)*

In circumstances where the Court finds "the statute is silent or ambiguous with respect to the specific issue, [the Court] must ask" at *Chevron* step two "whether the [interpretation] by the agency are based on a permissible construction of the statute." (*Chevron*, 467 U.S. at 843, 104 S.Ct. 2778). If they are, we "must defer to the agency." *Safer Chemicals, Healthy Fams. v. U.S. Env't Prot. Agency*, 943 F.3d 397, 422 (9th Cir. 2019). The Court does not, however, defer to interpretations by a federal agency that "construe[s] a statute in a way that is contrary to congressional intent or that frustrates congressional policy." *Safer*

Chemicals, Healthy Families, 943 F.3d at 422; or those interpretations that are clearly contrary to the plain and sensible meaning of the statute. *Mota v. Mukasey*, 543 F.3d 1165, 1167 (9th Cir. 2008). Additionally, the Court will not defer to agency decisions that conflict with circuit precedent. *Melkonian v. Ashcroft,* 320 F.3d 1061, 1065 (9th Cir.2003).

In cases involving a question of statutory construction, analysis "begin by analyzing the statutory language, "assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose." *Hardt v. Reliance Standard Life Ins. Co.,* 560 U.S. 242, 251, 130 S. Ct. 2149, 2156, 176 L. Ed. 2d 998 (2010) (quoting *Gross v. FBL Financial Services, Inc.,* 557 U.S. 167, 175, 129 S.Ct. 2343, 2350, 174 L.Ed.2d 119 (2009) (internal quotation marks omitted). In so doing, it is eminently clear the Act provides no textual support for the BIA Director's construction. The statutory text relevant to the question presented in this case are located at §4712(a)(1), which defines the individuals that are within the scope of the Act's protections, and §4712(f)(1)-(2), which addresses the exception to the broad category of individuals covered by §4712(a)(1). The broad scope of individuals Congress intended to provide whistleblower protections for under the Act is unambiguously expressed in §4712(a)(1), which states:

> "[a]n *employee* of a *contractor, subcontractor, grantee, or subgrantee or personal services contractor*… [that discloses]…information that the employee reasonably believes is evidence of gross mismanagement of a *Federal*

> *contract or grant*, a gross waste of *federal funds*, an abuse of authority relating to a *Federal contract or grant*"[52]

(Emphasis added). The Act also makes explicitly clear which individuals are not eligible for the whistleblower protections in §4712(f)(1)-(2). Importantly, Congress's intent regarding those individuals that would not be provided protections by the Act is expressed in a particularly detailed manner. This subsection begins by describing the individuals excluded from the Act's coverage with broad language that is subsequently refined to fit within the overall context of the Act. The first clause of subsection §47121(f)(1) states "This section shall not apply to *any element of the intelligence community* as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).[53] This scope is further narrowed in §4712(f)(2) by detailing not only the individuals who are ineligible for the Act's protection, but also specifying both the type of information disclosed and the manner in which it was obtained.[54] Congress intent to avoid any confusion regarding the Intelligence Community being excluded from the protection

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[52] 41 U.S.C. § 4712(a)(1).
[53] 41 U.S.C. § 4712(f)(1)
[54] 41 U.S.C. § 4712(f)(2) provides: "This section shall not apply to an employee of a contractor, subcontractor, grantee, subgrantee, or personal service contractor of any element of the intelligence community if such disclosure-(A)relates to activity of an element of the intelligence community (B) was discovered during a contract, subcontract, grantee, subgrantee, or personal service contractor services provided to an element of the intelligence community."

provided by the Act is further reinforced by inclusion of §4712(h), that provides additional guidance for the construction of the exception in §4712(f)(1)-(2).

Considered altogether, the language of the Act makes Congress's intent clear under section §4712(a)(1) which individuals are eligible for whistleblower protections and §4712(f)(1)-(2) makes clear which individuals are ineligible for the protections afforded by the Act. Therefore, the very language of the Act "[speaks] to the precise question at issue[s]." in this case. *Chevron*, 467 U.S. at 842. Contrary to the BIA Director's construction of the Act, ISDEAA contracts are not included in the provisions of the Act containing the sole exception to the broad scope of individuals Congress intended to provide whistleblower protections. The degree of detail Congress chose to use in describing the individuals that are excluded from the Act's coverage evidences Congress ability and consideration of the individuals they did not wish to extend whistleblower protections to and "the preeminent canon of statutory interpretation requires [courts] to "presume that [the] legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC v. United States,* 541 U.S. 176, 183, 124 S. Ct. 1587, 1593, 158 L. Ed. 2d 338 (2004) *(*quoting *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253–254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992).

Any possibility for ambiguity to manifest in the process of determining whether an employee of a "contractor, subcontractor, grantee, subgrantee, or personal service contractor"[55] that faces reprisal for making a protected disclosure related to *"federal funds*" (emphasis added)[56] would somehow not qualify for the protections provided in the Act are resolved by the clarification provided by §4712(f)(1)-(2). Here, Congress explicitly identifies the sole circumstance in which an individual is excluded from the broad scope of §4712(a)(1). Petitioner submits the comprehensiveness of this statutory regime demonstrates that in deciding which individuals are not covered by the Act "Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. Immigr. & Customs Enf't,* 543 U.S. 335, 341, 125 S. Ct. 694, 700, 160 L. Ed. 2d 708 (2005). Accordingly, [this Court should not] lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply." *Id.* Respondents' construction of the Act would require this Court to condone an interpretation of the Act that adds an additional exemption that is not reflect in the text. The Supreme Court has directly spoken to the impermissibility of constructing statutes in this manner in stating "[c]ourts has

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[55] 41 U.S.C. § 4712(a)(1).
[56] *Id.*

no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that… Congress "must have intended" something broader. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794, 134 S. Ct. 2024, 2034, 188 L. Ed. 2d 1071 (2014).

The principles of statutory interpretation that counsel the exercise of greater reluctance to accepting an interpretation dependent upon language that are not present in the text is particularly relevant to this case given Congress's attention to providing clarity on the limitations of the Act's coverage. Respondent's interpretation of the Act would require this Court to accept the proposition that Congress chose *not* to include any textual indication of their intent to exclude ISDEAA agreements from Act's coverage in the two separate subsections dedicated to defining the Act's limitations. Petitioner respectfully submits this would contradict this Court's decisions that [c]lear statutory text overrides a contrary agency interpretation." *AK Futures LLC v. Boyd St. Distro, LLC*, 35 F.4th 682, 692 (9th Cir. 2022). Moreover, it is a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 328, 134 S. Ct. 2427, 2446, 189 L. Ed. 2d 372 (2014). Respondents therefore lack the authority to include an additional exception for ISDEAA agreements where the text of the Act makes clear Congress did not provide for it.

Furthermore, Petitioner respectfully submits the grounds provided by Respondent to justify the BIA Director's construction of the statute do not satisfy "the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *N.L.R.B. v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711, 121 S. Ct. 1861, 1866, 149 L. Ed. 2d 939 (2001) (quoting *FTC v. Morton Salt Co.,* 334 U.S. 37, 44–45, 68 S.Ct. 822, 92 L.Ed. 1196 (1948)). When the Federal Courts review the legality of a federal agency action, "[i]t is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 50, 103 S. Ct. 2856, 2870, 77 L. Ed. 2d 443 (1983). In the instant matter, the totality of the basis for ISDEAA contracts being excluded from the Act is "Upon legal review, it is clear that 41 U.S.C. § 4712 does not apply to Indian Self Determination and Education Act agreements made under Public Law 94-638.[57] Respondents do not point to any provision of the Act to support this construction nor do they provide any of the language of the Act to support their determination. Therefore, Petitioner respectfully submits Respondents have failed to meet their burden of proving the Act does not apply to

[57] 1-CAR-41.

ISDEAA agreements. Petitioner further suggest Respondents' failure to meet this burden according to the justification provided in the Order denying relief is dispositive in this case because, as the Supreme Court has previously held, "(A) simple but fundamental rule of administrative law… is…that a reviewing court… must judge the propriety of such action solely by the grounds invoked by the agency." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169, 83 S. Ct. 239, 246, 9 L. Ed. 2d 207 (1962). Petitioner submits Respondents are therefore bound by the justification proffered in the BIA Director's Order and "the courts may not accept appellate counsel's *post hoc* rationalizations for agency action. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 50, 103 S. Ct. 2856, 2870, 77 L. Ed. 2d 443 (1983) (citing *Burlington,* 371 U.S. at 168.)

Lastly, Petitioner submits the Supreme Court has recently provided guidance on the issue presented in this case. In *Bostock v. Clayton Cnty., Georgia,* 207 L. Ed. 2d 218, 140 S. Ct. 1731 (2020), the Supreme Court addressed the question of whether Congress's silence on the matter of an individual's homosexuality or transgender status from the list of protected characteristics

included in Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352)[58] should be interpreted to tacitly exempt them from the protections from discrimination provided therein. The Supreme Court recognized "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second" *Bostock,* 140 U.S. at 1747. Consequently, the Supreme Court held:

> "there [is no] such thing as a canon of donut holes, in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule."

*Id. (*internal quotation marks omitted). Petitioner submits the question presented in this case is analogous to issue resolved by the Supreme Court in *Bostock*, in that Respondents have similarly alleged Congress's failure to specific ISDEAA agreements within the broad category of funding mechanisms identified in §4712(a)(1) similarly constitutes a tacit exception from the scope of the Act. However, Respondent's construction of the Act to differentiate recipients of ISDEAA contracts as special that categorizes them as something other than a "contractor, subcontractor, grantee, subgrantee, or personal service contractor"[59]

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[58] 42 U.S.C. § 2000e–2(a)(1).

[59] *Id.*

was rejected by the Supreme Court *Cherokee Nation of Oklahoma v. Leavitt,* 543 U.S. 631, 125 S. Ct. 1172, 161 L. Ed. 2d 66 (2005). In *Cherokee Nation,* the Supreme Court rejected the Government's argument that ISDEAA contracts are "a special kind of self-determination contrac[t]" with a "unique, government-to-government nature" that differentiates it from "standard…contracts." *Cherokee Nation,* 543 U.S. at 638. Instead, the Supreme Court found the language of the ISDEAA "strongly suggests that Congress, *in respect to the binding nature of a promise,* meant to treat alike promises made under the Act and ordinary contractual promises" *Id.* (emphasis in original). Within the ISDEAA, the Supreme Court found it:

> "uses the word contract 426 times to describe the nature of the Government's promise; and the word contract normally refers to "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty,"

Cherokee Nation, 543 U.S. at 639 (internal quotations omitted). The Supreme Court further found the ISDEAA's general purpose general purposes do not support any special treatment. Instead, the Supreme Court recognized the ISDEAA sought the promotion of greater tribal self-reliance by providing "effective and meaningful participation by the Indian people" in, and less "Federal domination" of, "programs for, and services to, Indians." *Id.* Within this context, the Supreme Court found provisions of the ISDEAA stating they were not to be construed to be

procurement contracts[60] was intended to "relieve tribes and the Government of the technical burdens that often accompany procurement" *Cherokee Nation,* 543 U.S. at 640. Nevertheless, the Supreme Court did not interpret provisions such as these to "weaken a contract's binding nature." *Id.* The Supreme Court was therefore not convinced by the government's argument that a different legal rule should apply in considering a contractor's freedom to purse the appropriate legal remedies arising from the Government breaking its contractual promise. *Cherokee Nation,* 543 U.S. at 642. As such, the Supreme Court found "in the context of Government contracts" *Cherokee Nation,* 543 U.S. at 644, the statutory language of the ISDEAA did not qualify "for a special, rather than ordinary, interpretation." *Id.*

Accordingly, the Supreme Court clarified in *Cherokee Nation* that ISDEAA contracts do not receive any special treatment and are subject to the application of ordinary legal rules as ordinary Government contracts in determining the appropriate legal remedy where a party has broken a contractual promise. It follows that ISDEAA contracts would not receive any special treatment that would differentiate them from the ordinary "contract[s], subcontract[s], grant[s], subgrant[s] and personal service contract[s]"[61] that prohibits them from retaliating

[60] 25 U.S.C. §5304(j)(1)-(2)
[61] 41 U.S.C. § 4712(a)(1).

against an employee that made a qualifying protected disclosure. Consequently, under the Supreme Court's decision in *Bostock,* ISDEAA agreements, being correctly interpreted as an ordinary Government contract, "falls within [the] more general statutory rule" *Bostock,* 140 U.S. at 1747, of §4712(a)(1). As such, Congress's silence as to ISDEAA agreements in particular does not create a tacit exception that result in their exclusion from the scope of §4712(a)(1). Instead, Congress's decision to not include such an exception directs "courts [to] apply the broad rule." *Bostock,* 140 U.S. at 1747, and interpret the Act to include ISDEAA agreements within the scope of its coverage.

The plain language of the Act makes clear Congress has "directly spoken to the precise question at issue." *Chevron,* 467 U.S. at 842, and the text does not provide any indication of an intent to exclude employees subjected to reprisals for making a protected disclosure related to an ISDEAA agreement. Thus, under the framework established by the Supreme Court in *Chevron* "that is the end of the matter ... [and this Courts] must give effect to the unambiguously expressed intent of Congress." *Id.* Should the Court determine any ambiguity exists in the language of the statute addressing the applicability of the Act to ISDEAA agreements, Petitioner respectfully submits the rules of statutory interpretation demonstrate the BIA Director's construction of the Act is impermissible. The explanation provided by Respondents does not satisfy their burden of proving ISDEAA agreements are

also excepted from the Act's coverage. Respondents' interpreting the Act to include an exception that has not been included the legislation drafted by Congress conflicts with the presumption that Congress "says in a statute what it means and means in a statute what it says there." *BedRoc Ltd,* 541 U.S. at 183.

In addition, Respondent's interpretation could not be upheld under step two of the *Chevron* framework because it would require the Court to uphold an interpretation that excludes individuals otherwise eligible for the protections afforded by the Act. Such an interpretation would be "contrary to congressional intent" *Safer Chemicals, Healthy Families*, 943 F.3d at 422 of limiting the exceptions to the Act's coverage to the individuals identified in §4712(f)(1)-(2) and it would have the effect of "frustrat[ing] congressional policy." *Id.* of protecting individuals that disclose the fraud, waste and abuse of federal funds. For the foregoing reasons, Respondents' denial of relief to Petitioner is based upon an impermissible construction and this Court should not "accept an interpretation clearly contrary to the plain meaning of a statute's text." *Hui Ran Mu v. Barr,* 936 F.3d 929, 932 (9th Cir. 2019). Accordingly, Petitioner respectfully submits this Court should set aside the BIA Director's January 5, 2022, Order.

2. THE BIA DIRECTOR'S INTERPRETATION OF THE ACT CONTRADICTS THE ACT'S LEGISLATIVE HISTORY, THE PRIOR DECISIONS OF THIS COURT, AND RESPONDENTS PREVIOUS CONSTRUCTION OF ANALOGOUS STATUTORY LANGUAGE.

In addition to the Act's plain language, the "broader context of the statute as a whole" *Yates,* 574 U.S at 537, makes Congress's intent in expanding whistleblower protections under the Act unambiguously contradicts the construction offered by Respondents. Where due consideration is afforded to the legislative background against which the language of the Act was drafted in addition to analogous statutory provisions cited by Congress as the basis from which the Act was created, it is "plain to anyone reading the Act that the statute encompasses the conduct at issue." *Salinas,* 522 U.S. at 60. (Internal quotations omitted). Illustrating the clarity provided by the broader context of the Act is best accomplished by reviewing the Senate Report of the Committee on Homeland Security and Government Affairs ("Senate Report")[62] that accompanied the Senate Bill that was ultimately singed into law as the Act in question.

It is well established that, when Federal Courts endeavor to interpret the meaning of statutory provisions, "[they] begin 'where all such inquiries must begin: with the language of the statute itself.'" *Republic of Sudan v. Harrison,* 203

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[62] "To Enhance Whistleblower Protection For Contractor and Grantee Employees", Senate Report 114-270, 114th Congress 2d Session. June 7, 2016.

L. Ed. 2d 433, 139 S. Ct. 1048, 1056 (2019) (quoting *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 412, 132 S.Ct. 1670, 182 L.Ed.2d 678 (2012). Nevertheless, legislative history has been relied upon by the Federal Courts as an aid to framing the appropriate context within which statutory language must be interpreted to being clarity to Congress's intent. In *Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767, 782 (2018)* Supreme Court Justice Sotomayor's concurring opinion states:

> "[b]ills presented to Congress for consideration are generally accompanied by a committee report."…"Such reports are typically circulated...before a bill is to be considered on the floor and provide Members of Congress and their staffs with information about a bill's *context, purpose, purpose policy implications, and details*."

*Id. (*emphasis added). Accordingly, Petitioner submits Congressional Reports may be relied upon as an extra-textual interpretive tool that can assists Federal Courts to an interpretation of a statutory provision that maintains fidelity to the original intent of Congress. The instant case is one such circumstances because the Senate Report associated with the Act supplies direct evidence of Respondents' prior recognition of Congress's intent for ISDEAA agreements not to be excluded from the scope of Federal whistleblower protection legislation and therefore speaks directly to the incompatibility of the BIA Director's construction with the unambiguously expressed will of Congress.

Referencing first to the language of the relevant provisions of the Act, §4712(a)(1) establishes the individuals Congress intended to include in the scope of the protections provided by the Act. Petitioner submits Congress intentionally cast a wide net in defining the individuals within the scope of the Act's protection by including "An employee of a contractor, subcontractor, grantee, subgrantee, or personal service contractor."[63] In doing so, Congress sought to simultaneously address the rapidly expanding portion of the federal budget devoted to the payment of "prime awards to contractors, grantees, states and localities and others."[64]; and ensure the scope of the Act's coverage would not be limited based on the type of funding mechanism within which a Non-Federal entity[65] ("NFE") received Federal funds.

These efforts were predicated on Congress's recognition that the language of the Act's predecessor, §1553 of the American Recovery and Reinvestment Act of 2009 ("ARRA")[66] included a loophole that NFE's could exploit to circumvent the statutory prohibition on retaliating against an individual that disclosed the fraud, waste, and abuse of federal funds. This loophole resulted from §1553(a)(1)-(5)

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[63] 41 U.S.C. 4712(a)(1).
[64] "Senate Report", Supra, note 61 pg. 3. Quoting testimony of the Director of Public Policy at the Project on Government Oversight Angela Cantebury.
[65] "Non-Federal entity (NFE) means a State, local government, Indian tribe, Institution of Higher Education (IHE), or nonprofit organization that carries out a Federal award as a recipient or subrecipient." 2 C.F.R. 200 Subpart A. 78 FR 78608, Dec. 26 2013.
[66] Pub. L. 111-5, Division A, Title XV § 1553. 123 stat. 297-302. (2009).

limiting the whistleblower protections to disclosures related to "covered funds". Stated otherwise, the scope of the whistleblower protections provided in §1553 of the ARRA only applied to the protected disclosure made in regards to federal funds an NFE received pursuant to the authority delegated by the ARRA. This limitation was specifically identified by Congress and addressed in the section "II. Background And The Need For Legislation" portion of the Senate Report[67] in addition to testimony from a hearing cited in the Senate Report[68]. The Senate Report highlights Congress's recognition of the need for "extending whistleblower coverage to *all* Federal contractors." [69].

The concept of a single law that provided broad whistleblower protections to all recipients of federal funds would first be introduced as Senate Bill 241[70], which included whistleblower protection for the Intelligence Community. Senate Bill 241, in its original form, was not signed into law, however, "the concept" of broad whistleblower protections "was included [in §828] of the National Defense Authorization Act for Fiscal Year 2013 ("NDAA"), but as a four-year pilot

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[67] Senate Report, supra, note 61, pg. 3 states "The ARRA whistleblower provisions, while significant, only extended to contracts funded by stimulus funds, which make up only a small portion of Federal Government Contract."
[68] Whistleblower Protections for Government Contractors, Hearing Before the Senate Homeland Security and Governmental Affairs Subcommittee on Contracting and Oversight, Dec. 6 2011, 112th Congress.
[69] Senate Report, supra, note 61, pg. 3.
[70] S.241, the Non-Federal Employee Whistleblower Protection Act of 2012 (112th Congress)

program that excluded IC contractors."[71] The language of the four-year pilot program identified scope of the whistleblower protections as covering "An employee of a contractor, subcontractor, or grantee"[72]. However, consistent with Congress's intent to include the employees of *all* recipients of federal funds *except* those excluded pursuant to §4712(f)(1)-(2), the language of the Act has been amended twice to extend its coverage for the employees of subcontractors, subgrantees, and personal service contractors that receive federal funds.[73]

Petitioner respectfully submits the Act's legislative history supports the construction that recognizes Congress intended to provide whistleblower protections that covered individual employed by the growing number of NFE that receive federal funds, regardless of the funding mechanism within which the federal funds. The only limitation Congress intended to place on the scope of these protections involve the Intelligence Community, and this is unambiguously stated in §4712(f)(1)-(2) and reiterated in §4712(h). These legislative developments are relevant to the case presently before the Court because they demonstrate the consistent intent of Congress to provide whistleblower protections to the employees of NFEs that receive federal funds, with limited exception, for the past

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[71] Senate Report, supra, note 61, pg. 4. Citing Pub. L. No. 112-239, 828 (112th Cong.) (2013), codified at 41 U.S.C. §4712.
[72] Pub. L. 112-239, Division A, Title VII Subtitle C § 828(a)(1).
[73] See Pub. L. 116-260, §801(1)-§801(6) and Pub. L. 117-263, §807 et. seq.

fourteen years.[74] In so doing, Congress communicated the individuals intended to be covered by the Act using statutory language that is virtually identical.

Additionally, since the introduction of the concept of whistleblower protections for employees of NFE that receive federal funds in a grant or contract, Congress has only excluded individuals involved with the Intelligence Community from the otherwise broad scope of the protections. The exclusion of individuals from scope of protections provided in this context is likely the result of the United States Government's "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *C.I.A. v. Sims*, 471 U.S. 159, 175, 105 S. Ct. 1881, 1891, 85 L. Ed. 2d 173 (1985) (citing *Snepp v. United States,* 444 U.S. 507, 509, n. 3, 100 S.Ct. 763, 765, n. 3, 62 L.Ed.2d 704 (1980) (*per curiam*). It is therefore reasonable to conclude Congress excluded this category of individuals from the scope of the protections provided by the Act and its forebears to avoid the possibility for the disclosure of classified information that could jeopardize national security of compromise the operations of foreign intelligence services. Therefore, the

[74] See language utilized to identify individuals covered by the whistleblower protections in Pub. L. 111-5 §1553(a)(1)-(4) *cf,* with Pub. L. 112-239 §828(a)(1), and 41 U.S.C. §4712(a)(1).

exclusion of individuals involved with the Intelligence Community reflects Congress's consideration of the possibility for the whistleblower protections provided in this area to inadvertently impede other important national interests or policy goals and, where it has deemed appropriate, included language in the legislation to avoid these consequences.

Notably, there has been no indication within the legislative history of Congress's intent to also exclude ISDEAA agreements from the coverage of the Act and related legislation. This is despite Congress having the opportunity include language that would suggest their intent to exclude ISDEAA agreements from the whistleblower protections provided by the Act in §1553 of the ARRA in 2009, §828 of the NDAA in 2013, or the two occasions when the Act was amended in 2020[75] and 2022[76]. Importantly, the 2020 and 2022 amendments to the Act did not include an exception for ISDEAA agreements despite the issue of the whistleblower protections provided in the Act's predecessor being directly addressed by Respondents adjudication of an individual alleging a prohibited reprisal concerning an agreement under the ISDEAA and this Court's subsequent

[75] See Pub. L. 116-260, §801(1)-(6)
[76] See Pub. L. 117-263, §807 et seq.

decision in *Chippewa Cree Tribe of Rocky Boy's Rsrv., Montana v. U.S. Dep't of Interior*, 900 F.3d 1152 (9th Cir. 2018).

Like this case, Respondents adjudicated the a claim in favor of an individual that that made a protect disclosure related to ARRA funds provided in an ISDEAA agreement. On December 19, 2014, Respondent provided its preliminary determination in this matter and explicitly recognized the application of the ARRA's whistleblower protections to the ISDEAA agreement in question.[77] The preliminary determination states "In September 2009, [Chippewa Cree Tribe] and the Department's Bureau of Reclamation (USBR) entered Modification No. 6 to CCT's Annual Funding Agreement No. 06NA602127 (ROI Att. 6) *pursuant to P.L. 39-638*." (emphasis added). Respondents further maintained their interpretation of §1553 of the ARRA's whistleblower protections to the ISDEAA agreement at issue a subsequent final disposition wherein the employee subjected to the unlawful reprisal was determined to be entitled to relief.[78] This Court subsequently upheld Respondent's determination in this case, in part, based upon the recognition of Congress's intent

[77] United States Department of the Interior, Office of the Solicitor, Re: U.S. Department of the Interior, Office of the Inspector General Report of Investigation U.S. Bureau of Reclamation ARRA Funds- Case No. 01-CO-13-0243-I (Blatt-St. Marks), December 19, 2014.
[78] United States Department of the Interior, Office of the Solicitor, Re: Final Disposition in the Matter U.S. Department of the Interior, Office of the Inspector General Report of Investigation U.S. Bureau of Reclamation ARRA Funds- Case. No. OI-CO-13-0243-I (St. Marks), April 24, 2015.

> "To safeguard [ARRA] funds, Congress implemented a historic level of transparency, oversight, and accountability, including protections for [f]ederal and state whistleblowers who report fraud and abuse. Rep. No. 111-4, at 2-3 (2009).

Chippewa Cree Tribe, 900 F.3d at 1158 (internal quotation marks omitted). In *Chippewa Cree Tribe,* this court rejected the argument that the ARRA's protections did not apply to the whistleblower, based on the argument he was not an "employee" for the purposes of the definition provided in the ARRA. Once again, this Court correct rejected this argument in recognizing "It would have substantially weakened those safeguards if Congress had excepted from protection all elected officials, particularly because these officials will often be in a good position to identify and report fraud." *Id.*

Considering this Court's decisions in *Chippewa Cree Tribe*, it stands to reason that if Congress intended to exclude ISDEAA agreements from the scope of the Act's coverage, it would have done so. As previously discussed, the whistleblower protections provided in the Act were based upon those provided in the ARRA but expanded to include all federal funds except for those that involved the Intelligence Community. It is therefore reasonable to conclude that in this case that when "Congress adopt[s] the language used in [an] earlier act, [federal courts] presume that Congress adopted also the construction given by this Court to such language, and made it a part of the enactment." *Georgia v. Public.Resource.Org,*

Inc., 206 L. Ed. 2d 732, 140 S. Ct. 1498, 1510 (2020) (quoting *Helsinn Healthcare S. A.* v. *Teva Pharmaceuticals USA*, *Inc.*, 586 U.S. ——, 139 S.Ct. 628, 634 202 L.Ed.2d 551 (2019) (internal quotation marks omitted). Therefore, it is evident that Respondent's construction of the Act to exclude ISDEAA agreements conflicts with Congress's intent in providing whistleblower protections employees of NFE's that receive federal funds, as illustrated by the Act's legislative history, this Court's judicial interpretation of analogous statutory provisions, and Respondent's own interpretation of the less expansive language in the ARRA.

While this court has recognized "an agency's 'new' position is entitled to deference so long as the agency acknowledges and explains the departure from its prior views." *Int'l Bhd. of Teamsters, Loc. 2785 v. Fed. Motor Carrier Safety Admin.,* 986 F.3d 841, 850 (9th Cir.), *cert. denied sub nom. Trescott v. Fed. Motor Carrier Safety Admin.*, 142 S. Ct. 93 (2021), Petitioner submits the justification of "Upon legal review, it is clear that 41 U.S.C. § 4712 does not apply to Indian Self-Determination and Education Act agreements"[79] falls short of "the requirement that an agency provide reasoned explanation" *F.C.C. v. Fox Television Stations, Inc.,* 556 U.S. 502, 515–16, 129 S. Ct. 1800, 1811, 173 L. Ed. 2d 738 (2009), for a departure from a prior statutory interpretation.

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[79] 1-CAR-36.

Accordingly, based on Respondents failure to provide the required explanation for the contradictory interpretation used to deny relief in this case, Petitioner respectfully submits this Court may rely upon the Act's plain language, legislative history, and prior judicial and administrative interpretations to conclude Congress intended for ISDEAA agreements to be included within the scope of the Act's coverage. Therefore, Petitioner respectfully submits this Court should "reject [Respondents] constructions that [is] contrary to clear congressional intent [and] frustrate the policy that Congress sought to implement." *Schneider v. Chertoff*, 450 F.3d 944, 952 (9th Cir. 2006)

3. RESPONDENT'S ACTED ARBITRARILY AND CAPRICIOUSLY IN DENYING PETITIONER RELIEF PURSUANT TO 41 U.S.C. § 4712(C).

The APA sets forth "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts" and "requires agencies to engage in 'reasoned decisionmaking[.]'" *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020) (citations omitted). The APA authorizes Federal Courts to set aside agency decisions if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[80] *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 866 (9th Cir. 2017). The

[80] 5 U.S.C. § 706(2)(A)

APA's "arbitrary and capricious" standard "requires that agency action be reasonable and reasonably explained." *Fed. Commc'ns Comm'n v. Prometheus Radio Project,* 209 L. Ed. 2d 287, 141 S. Ct. 1150, 1158 (2021). In order to survive judicial review under the APA, an agency must Nevertheless, the agency must demonstrate their decision is the result of having "examine[d] the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Wildwest Inst. v. Kurth*, 855 F.3d 995, 1002 (9th Cir. 2017) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Importantly, an agency's decision can be upheld only on the basis of the reasoning in the decision: "[i]t is a foundational principle of administrative law" that judicial review of agency action is limited to the grounds that the agency invoked when it took the action." *Transportation Div. of the Int'l Ass'n of Sheet Metal, Air, Rail, & Transportation Workers v. Fed. R.R. Admin.*, 988 F.3d 1170, 1178 (9th Cir. 2021) (quoting *Regents of the Univ. of California*, 140 S. Ct. at 1905–07)).

Respondents acted arbitrarily and capriciously when this standard is applied to Respondent's denial of relief to Petitioner. The basis for the BIA Director denying relief to the Petitioner is stated in the Order as a result of the Act not apply to ISDEAA agreements "made under Public Law 93-638, including the HIP and

TTP administered by the PRTC in this case."[81] However, the Certified Administrative Record Respondents filed in this case includes a copy of the Tribal Transportation Program Agreement A13AP00123 ("TTP Agreement"), between Petitioner's former employer and the United States Department of the Interior, Bureau of Indian Affairs.[82] This agreement was central to the protected disclosures made by the Petitioner that resulted in the retaliation that was submitted to the DOI OIG. Petitioner's complaint of unlawful retaliation was substantiated by the DOI OIG, following their investigation under DOI OIG case number OI-PI-21-0685-I[83].

Article I, Section I of the TTP Agreement states:

> "This Tribal Transportation Agreement is entered into…..under the authority granted by Chapter 2 of Title 23, United States Code, as amended by the Moving Ahead for Progress in the 21st Century Act (MAP-21). Pub. L. 112-141 (July 6, 2012).[84]

The TTP Agreement further states:

> "This agreement is made pursuant to 23 U.S.C. § 202(a)(2)(B), the TTP Regulations, and as authorized by the Indian Self-Determination and Education and Assistance Act (hereinafter "the ISDEAA"), Pub. L. 93-638, as amended…, *for purpose of Tort Claims Act Coverage and application of the Prompt Payment Act.*" (emphasis added)[85]

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[81] 1-CAR-36.
[82] 3A-CAR-213-231.
[83] 1-CAR-9-29.
[84] 1-CAR-214.
[85] *Id.*

According to this language, the TTP Agreement's that were the subject of Petitioner's protected disclosures are not ISDEAA agreements, as stated in the BIA Director's Order. According to the terms of the TTP Agreement, the statutory authority under which the federal funds were provided to Petitioner's former employer is Pub. L. 112-141[86], not Pub. L. 93-638. The TTP Agreement makes clear ISDEAA application to the TTP Agreement is limited to the purpose of the eligibility for coverage of the Tort Claims Act and the Application of the Prompt Payment Act only. Further evidence of the fact that the TTP Agreements that were the subject of Petitioner's disclosures were not ISDEAA agreements is provided based on the definition of a "self-determination contract" provided in the ISDEAA. A self-determination contract is defined in 25 U.S.C. 5304(j) as:

> "a contract entered into under subchapter I (or a grant or cooperative agreement used under section 5308 of this title) between a Tribal organization and the appropriate Secretary for the planning, conduct, and administration of program and services that are otherwise provided to Indian Tribes and members of Indian Tribes pursuant to Federal law, subject to the condition that, except as provided in section 5324(a)(3) of this title, no contract entered into under subchapter I (or grant or cooperative agreement under section 5308 of this title) shall be
>
> (1) considered to be a procurement contract; or

[86] Petitioner's protected disclosures also included a TTP Agreement entered into by the Pit River Tribe and the U.S. Department of Interior pursuant to the Fixing America's Surface Transportation Act pursuant to Pub. L. 114–94, however, this agreement was not included in the Certified Administrative Record.

> (2) except as provided in section 5328 (a)(1) of this title, subject to any Federal procurement law (including regulations)." [87]

According to the terms of the TTP Agreement and the ISDEAA definition of an ISDEAA agreement, the TTP Agreements that were the subject of Petitioner's protected disclosures are not eligible for the justification provided for Respondents denial of the relief Petitioner was entitled to pursuant to the Act. The source of the Congressional authorization under which the funds Petitioner's former employer were received is Title 23 of the United States Code, not Title 25. Furthermore, the TTP agreements are subject to different regulations than ISDEAA agreements.[88] Lastly, the ISDEAA requires each self-determination contract entered into to contain or incorporate by reference the provision of the model agreement described in 25 U.S.C. § 5329(c). A review of the TTP Agreement provided in the Certified Administrative Record clearly demonstrates it is not the same as the statutorily required model agreement Congress has required to be used for all ISDEAA agreements.

Petitioner submits the arbitrary and capricious nature of decision subject to this Court's review is demonstrated by Respondents' failure to consider or address

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[87] 25 U.S.C. 5304(j)

[88] TTP Agreements are subject to the regulations codified at 25 C.F.R. 170 et seq, and ISDEAA agreements are subject to the regulations codified at 25 C.F.R. 900.

the incongruity between the justification provided in the BIA Director's Order with the evidence provided in the Certified Administrative Record. The existence of evidence contradicting the basis Respondents' provided for their decision evidences the denial of relief in this matter was not "based on a consideration of the relevant factors and… there has been a clear error of judgment," *Dept. of Homeland Sec.,* 140 U.S. at 1905. Furthermore, the justification articulated by Respondents' in the BIA Director's January 5, 2022 Order is substantially different from the grounds articulated in the November 21, 2019 Memorandum that was relied upon by the DOI OIG in deciding not to initiate an investigation of Petitioner's Complaint as required by 41 U.S.C. § 4712(b). The BIA Director's Order disposes of Petitioner's complaint on the grounds the Act does not cover the federal funds included in the grant and contract agreements that were subject to the Petitioner's protected disclosures.

In contrast, the Memorandum recommended no further action be taken in response to Petitioner's Complaint because "this allegation is an internal matter between the complainant and the tribe. It is the BIA's policy not to interfere with the governance of tribes".[89] Again, the basis the BIA Director provided to the DOI OIG in the November 21, 2019 Memorandum not only reflects Respondents'

[89] See Attachment 5 Pg. 3.

failure to consider Petitioner's eligibility for the whistleblower protections provided under the Act, but the BIA Director's January 5, 2022 Order does not account for the change in Respondents' considerations of Petitioner's complaint that resulted in it no longer being considered an "internal matter" that was outside the scope of federal jurisdiction and therefore ineligible for further investigation by the DOI OIG. Respondents' basis for denying Petitioner relief, as expressed in the November 21, 2019, Memorandum led to Petitioner being deprived the opportunity to begin the process to obtain relief as Congress provided for approximately two years. In order to do so, Petitioner had to first petition this Court for review in this Court and the U.S. Court for the District of Oregon. Once these efforts culminated in Petitioner's claim being substantiated by the DOI OIG, Respondents' then changed the basis for denying Petitioner relief without explanation for the change and again denied Petitioner relief for reasons that are easily disputed by the information available in evidence Respondents' claim to have considered in rendering their decision. Petitioner submits, in addition to the Respondents' relying on a plainly erroneous construction of the Act, these actions are clearly "not in accordance with the law."[90] that Congress envisioned in extending whistleblower protections to the employees of NFE's that receive federal funds. Furthermore, the

[90] 5 U.S.C. § 706(2)(A).

"unexplained inconsistency' in [Respondents'] policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice. *Encino Motorcars, LLC v. Navarro,* 579 U.S. 211, 226, 136 S. Ct. 2117, 2128, 195 L. Ed. 2d 382 (2016). Petitioner submits Respondents' denied Petitioner the opportunity to seek review for the reasons stated in the BIA Director's November 21, 2019, Memorandum despite those reasons having a legal consequence on Petitioner's rights under the Act that rise to the level of being a final agency action subject to judicial review under *Bennett v. Spear.* These actions resulted in Petitioner's ability to seek review by this Court being delayed by approximately five-years. Petitioner submits the failure to dignify these actions with the kind of explanation required by the APA further demonstrates the Respondents' decision in this case lacks any basis in the Act that can be upheld by the Court.

Lastly, Petitioner submits the BIA Director lacked the authority to issue the order denying Petitioner's claim for relief. The BIA Director's Order states "As the head of the *cognizant* U.S. Department of the Interior Bureau, I am issuing the following order."[91](emphasis added). The BIA Director's Order does not cite where the authority to issue a binding adjudicative order is delegated from, however, "Administrative agencies are creatures of statute. They accordingly

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[91] 1-CAR-36.

possess only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 211 L. Ed. 2d 448, 142 S. Ct. 661, 665 (2022). The authority to order or deny relief in the Act is contained in §4712(c)(1), and is stated as "the head of the executive agency concerned…" The definition for "agency head" for the purpose of the Act's location within the Title 41 of the United States Code is provided in 41 U.S.C. § 151 and states defines agency head as "In division C, the term "agency head" means the head or any assistant head of an executive agency."[92]. Based on this definition, only the Secretary of the United States Department of the Interior or the Assistant Secretary of the United States Department of the Interior are vested with the authority to issue an adjudicative order under the Act. Neither provision mention the delegation of authority to the head of the cognizant Bureau at the United States Department of Interior or provide the BIA Director with the authority to deny Petitioner relief under the Act.

The designation of a "cognizant" agency in reference to federal financial assistance appears to be limited to the meaning provided in the Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Award, which designates the cognizant agency for audits and the cognizant agency

[92]"41 U.S.C. § 4712 is codified in Division C of Title 41 of the United States Code.

for indirect costs. The definition of a cognizant agency for both of these roles are provided in 2 C.F.R. § 200.18[93] and 2 C.F.R. § 200.19[94] respectively. Neither the definitions provided for the responsibilities of a cognizant agency for either or these role or the responsibility for the cognizant agency for audits described in 2 C.F.R. § 200.513(a) provide the BIA Director with the delegation of authority required to issue an Order denying relief pursuant to the §4712(c) of the Act. Moreover, no such delegation of authority is contained within the U.S. Department of Interior Departmental Manual (DM) Delegation Series (Series 03). The authorities delegated to the BIA Director are located in Part 230 DM Chapter 1. This part authorizes the BIA Director to exercise the program authority of the Principle Deputy Assistant Secretary- Indian Affairs (PDAS-IA) with respect to the supervision, management, and operation of programs under their authority. The authorities delegated to the PDAS-IA include the "*administrative authorities* of the

[93] Cognizant agency for audit means the Federal agency designated to carry out the responsibilities described in § 200.513(a). The cognizant agency for audit is not necessarily the same as the cognizant agency for indirect costs. A list of cognizant agencies for audit can be found on the Federal Audit Clearinghouse (FAC) website.

[94] Cognizant agency for indirect costs means the Federal agency responsible for reviewing, negotiating, and approving cost allocation plans or indirect cost proposals developed under this part on behalf of all Federal agencies. The cognizant agency for indirect cost is not necessarily the same as the cognizant agency for audit. For assignments of cognizant agencies see the following: (4) For Indian tribes: Appendix VII to this part, paragraph D.1.

Assistant Secretary- Indian Affairs necessary to fulfill the responsibilities identified in Part 110 DM 8.2[95](emphasis added).

Based upon the internal delegation of authority within the U.S. Department of Interior Departmental Manual, the BIA Director was not vested with the authority to exercise the statutory authority delegated to the Secretary of the Interior to adjudicate Petitioner's claim for relief. Importantly, the delegation of authority in 230 DM Chapter 1 limits the authorities of the PDAS-IA that can be delegated to the BIA Director to administrative authorities, not the authority expressly delegated by statute to the agency head of the U.S. Department of the Interior. Petitioner submits the BIA Director's exercise of authority that was not lawfully delegated to them is particularly significant in this matter given the fact the BIA Director's Order effectively created a new legislative rule that would apply to all similarly situated employees of NFE's that are awarded ISDEAA agreements under P.L. 93-638.

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[95] Part 110 DM 8.2 Provides : Principal Deputy Assistant Secretary – Indian Affairs. The Principal Deputy Assistant Secretary – Indian Affairs (PDAS) serves as the first assistant and principal advisor to the Assistant Secretary – Indian Affairs in developing and interpreting program policies affecting Indian Affairs (IA) and discharges the duties assigned by the Assistant Secretary – Indian Affairs. The PDAS manages, directs, and coordinates functions to strengthen the government-togovernment relationship with Indian tribes and Alaska Native villages in support of the Federal policy of Indian Self-Determination; is responsible for new and revised regulations to address new statutory requirements; development and management of the IA dispute resolution program and implementation of CORE PLUS; and regulation of Indian gaming. The following offices report to the PDAS:

Under the APA, "substantive rules are those that have the force and effect of law, while interpretive rules are those that merely advise the public of the agency's construction of the statutes and rules which it administers." *Azar v. Allina Health Servs*., 204 L. Ed. 2d 139, 139 S. Ct. 1804, 1811 (2019). (Internal quotations omitted). This Court has previously characterized legislative rules as "create[ing] rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress." *Miller v. California Speedway Corp*., 536 F.3d 1020, 1033 (9th Cir. 2008) (quoting *Hemp Indus. Ass'n v. DEA,* 333 F.3d 1082, 1087 (9th Cir.2003). In discussing the characteristics of a substantive rule, the Supreme Court has "described a substantive rule—or a legislative-type rule, as one affecting individual rights and obligations. This characteristic is an important touchstone for distinguishing those rules that may be binding or have the force of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02, 99 S. Ct. 1705, 1717–18, 60 L.Ed. 2d 208 (1979)(Internal quotations and citations omitted). Furthermore, the Supreme Court has recognized administrative agencies are free to choose either rulemaking or adjudications to make policy or establish rules. *See SEC v. Chenery Corp.,* 332 U.S. 194, 202-03 (1947).

The BIA Director's Order articulated an interpretation of the Act that would except exclude all employees working under ISDEAA agreements from the protections provided in the Act. Petitioner submits this action bears the defining

characteristic of having "the force and effect of law" *Azar*, 139 U.S. at 1811, because it "conclusively affect the rights of private parties.", and "effect[s] a change in existing law." *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994). However, BIA Director was not vested with the appropriate delegation of authority from Congress, that is required to alter rights Congress afforded to individuals in the Act. In the context of the ISDEAA, the authority to promulgate rules was authorized by Congress under 25 U.S.C. § 5328(a)(1). In promulgating regulations based on this authority, the Secretary was required to conform with the rulemaking requirements under 5 U.S.C. §552 & 553 and 25 U.S.C. § 5328(c), (d), and (e). Following their promulgation, 25 U.S.C. 5328(a)(1)(2)(A)(ii) requires they be included as a single set of regulations in Title 25 of the Code of Federal Regulations. Furthermore, 25 U.S.C. § 5328(c) provides for the steps the Secretary is required to comply with in order to revise or amend the regulations application to ISDEAA agreements.

Petitioner submits the Certified Administrative Record, Congressional Records, or the Code of Federal Regulation provide any evidence of Respondents' compliance with these requirements to evidence the lawfulness of the legislative rule established in the BIA Director's Order. The Certified Administrative Record also contains no evidence to suggest Petitioner's prior employer sought or even considered seeking a exception or waiver of any regulation or requirement as

required under 25 U.S.C. § 5328(e) of the ISDEAA, that would sanction their actions in retaliating against Petitioner for disclosing evidence of the fraud, waste, and abuse of federal funds The absence of such evidence results from the Respondents' not possessing the authority to create a class-wide exception for ISDEAA agreements that would permit NFE's that receive federal funds in those agreements to retaliate against individuals that make a lawful disclosure of their employer engaging in the fraud, waste and abuse of federal funds. Petitioner respectfully suggest Congress would not delegate Respondents the authority to establish such an exception because it contradicts the purpose Congress established the whistleblower protections provided under the Act. As the Supreme Court recognized "agencies power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires". *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 291, 133 S. Ct. 1863, 1864–65, 185 L. Ed. 2d 941 (2013). As such, Respondents' denial of Petitioner's claim for relief was ultra vires in that it was outside the scope of Respondents' authority and thereby inherently not in accordance with the Act or any lawful delegation of authority by Congress.

VIII.CONCLUSION

For the foregoing reasons, Petitioner respectfully submits Respondents' Order denying Petitioner relief is based upon an erroneous interpretation of the Act

as excluding ISDEAA agreements from the scope of its coverage. Respondents' have not met their burden of establishing Congress intended to exclude ISDEAA agreements from the Act in the provisions where other exceptions are clearly articulated and the legislative history, Respondents' prior administrative interpretation, and this Court's prior review have interpreted identical statutory language included in the Act's predecessor as including ISDEAA agreements within the scope of its coverage. Finally, the existence of evidence in the Certified Administrative Record Respondent that contradicts the basis relied upon by the BIA Director in denying Petitioner's claim for relief in conjunction with Respondents' actions having the effect of promulgating a substantive rule for which they were not delegated authority by Congress all demonstrate Respondents' Order is arbitrary and capricious because it is not in accordance with the law and Congress intent in enacting the whistleblower protections in the Act. Wherefore, , Petitioner respectfully submits this Court should set aside the BIA Director's Order denying relief and order Respondents' grant Petitioner the relief provided under 41 U.S.C. § 4712(c)(1)-(3).

Respectfully Submitted,

Samuel James Kent

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Hotline No: E003502

Submit Date: 7/15/2019 6:27:44 PM

For more information regarding your rights and responsibilities under the whistleblower protection laws, please refer to the following OIG Whistleblower Protection Program resources:

- **Online:** https://www.doioig.gov/complaints/whistleblower-protection
- **Email:** whistleblowerprotection@doioig.gov
- **Telephone:** (202) 208-4600

If you believe you have been retaliated against for disclosing misconduct involving the U.S. Department of the Interior, please complete and submit this form by pressing the SUBMIT button below. If you are unable to submit this form directly online, you may select one of the alternative methods listed at the bottom of this form.

Your Contact Information

First Name	**Samuel**
Last Name	**Kent**
Title/Grade	
Address	**4420 Brittany Drive**
City	**Redding**
State	**California(CA)**
Zip Code	**96002**
Phone number	**360-852-0486**
Email	**samuelkent2@gmail.com**

Complaint Information

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1. What is your current status? *(Please select one.)*

Applicant for employment
Current DOI employee
Former DOI employee
Applicant for DOI employment
x Employee of a contractor, subcontractor, or DOI grantee
Not a federal employee, but your employer received Recovery Act funds
Other

If you selected "Other" please specify:

2. Did you disclose any of the following? *(Please mark all that apply.)*

x Violation of law, rule, or regulation
x Gross mismanagement
x Gross waste of funds
x Abuse of authority
x Substantial and specific danger to public health or safety
Censorship related to scientific research or analysis

3. What was the content of your disclosure(s)?

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The content of my disclosure included the fraud, waste, abuse, and potential theft of Federal grant funds awarded to a Federally Recognized Tribe. The disclosure was related to multiple grant programs which were awarded to the Tribe from 2013-2019. The types of abuses which took place ranged from the mismanagement of Federal funds resulting in the misuse, theft, or waste of over $13 million dollars.

4. To whom did you make the disclosure(s)?

   These disclosures were made to my immediate supervisor Jake Suppah- The Pit River Tribe's CFO, Charles White- The Pit River Tribal Administrator, Agnes Gonzalez- The Pit River Tribal Chairperson and Brandy McDaniels- The Pit River Tribal Treasurer.

5. How did you make the disclosure(s)? *(Verbally? In writing?)*

   Disclosures were made both verbally and in writing.

6. When did you make the disclosure(s)? *(Month/Day/Year)*

   February 26, 2019: Following a meeting between the Tribe's CFO Jake Suppah and the Tribal Administrator Charles White in which I expressed my concern that a significant amount of Federal funds were missing, an investigation was conducted under the orders of the Tribal Administrator. An email was sent to my supervisor Jake Suppah which outlined the fact that the Tribe's bank-account which housed all of the Federal funds it was advanced was missing $5,266,004.82. This information was based on the comparison of the Tribe's accounting system data to the amount of Federal funds which had been drawn down from the Automated Standard for Application of Payment (ASAP) system. This reported was titled the "ATTG reconstruction" due to the name of the depository account where

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all of the Tribe's grant funds were housed having been named after one of the BIA Tribal Programs in which they had historically received funding, the Aid to Tribal Governments program.

March 13, 2019: I notified the Tribe's CFO Jake Suppah and the accounting supervisor Alex Urena that funds advanced to the Tribe under the BIA Housing Improvement Program (HIP) agreement A17AV01014 needed to be segregated out from the rest of the grant funds aggregated in the Tribe's grant account.

May 17, 2019: After following up with the Tribe's CFO regarding whether he shared the information in the original ATTG Re-construction with the Tribal Administrator- Charles White, a second reconstruction was completed and emailed to Jake Suppah. The reconstruction provided on that date outlined that $4,708,254.15 in Federal funds was missing.

June 4, 2019: An email was sent to my direct supervisor Jake Suppah informing him that at this point the Federal funds missing from the grant accounts exceeded the cumulative total of all the Tribe's other bank accounts combined.

June 26, 2019: After not receiving a response from the CFO Jake Suppah, an email was sent to the Tribal Administrator Charles White with the ATTG Re-construction document. Jake Suppah was included in the email. The email requested to meet with both of them to discuss these matters.

June 28, 2019: An email was sent to CFO Jake Suppah and accounting supervisor Alex Urena notifying them that the $1,019,882.84 of the indirect cost that was booked in the Tribe's accounting system had been calculated incorrectly. This email was in response to recently discovering the supporting documents for the IDC charge. Prior to this, several discussions were held between the three of us in which I expressed my objection to the booking of indirect cost charges against the Tribe's Tribal Transportation Program for prior periods which could not be substantiated. It is my understanding that these charges were recorded to

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reduce the amount of unearned revenue on the Tribe's balance sheet, which had been the cause of audit findings for the past several years.

July 9, 2019: An email was sent to CFO Jake Suppah outlining my concerns for the amount of rental expenses the Tribe's economic development arm (the Kwahn Corporation) had been charging the Tribe's Roads Department for use of a vacant lot and metal building. My concern was due to rent expenses being collected for a 12 month period without an active lease and the amounts being charged is higher than the allowable regulatory amounts. The Pit River Tribe's Roads Department is funded by the Tribal Transportation Program.

July 10th, 2019: A notice of non-compliance with the provisions of the Pit River Tribe's Tribal Transportation Agreement A16AP00252 and A13AP00123 was submitted to CFO Jake Suppah, Tribal Administrator Charles White, and Tribal Chairperson Agnes Gonzalez. The notice was in regards to non-compliance with provisions of the Tribe's Referenced Funding Agreement requiring TTP funds to be segregated from other Federal funds and accounted for separately.

July 10th, 2019: A email was sent to the Tribal Chairperson Agnes Gonzalez with the ATTG Re-construction. The email was sent in response to a request to address the Pit River Tribal Council regarding these matters being denied by the Tribal Chairperson.

7. Was an unfavorable personnel action taken or threatened against you, or was a favorable personnel action withheld or threatened to be withheld from you?

Yes

8. What was the alleged personnel action(s)?

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Denial of compensation commensurate with duties performed and unlawful termination of employment.

9. Who took or threatened the alleged personnel action(s)? *(Please list name(s) and title(s), and contact information of the person(s) who acted against you.)*

Jake Suppah- Pit River Tribe Chief Financial Officer.

10. When did the alleged personnel action(s) occur? *(Month/Day/Year)*

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On December 17th, 2019, during my 90-day review, I requested that CFO Jake Suppah alter my job description in order to encompass all of the grant-related activities in which I engaged in. I informed Mr. Suppah that the work I was doing far exceeded the duties outlined in my original job description and much of the inter-governmental coordination with the Tribe's various funding agencies, the development of financial reports and budgets, indirect cost calculations, and financial systems management were often handled by the CFO. I informed Mr. Suppah that I did not feel comfortable assisting him in many of these matters due to my concerns about the misuse of Federal funds and his frequent absences from work. My request and my concerns were dismissed.

On April 21st, 2019 I emailed CFO Jake Suppah to again request my position and compensation levels be review. I informed him that the costs of transportation to and from work consumed a large amount of my pay due to the distance that had to be traveled and this was taking a considerable toll on my financial stability. This request was again denied.

On July 11th, 2019, I was informed that my employment with the Tribe was terminated. I was informed that the termination was in response to
1. Being in contact with Federal Agencies after being instructed not to be. This directive was given after the Tribe was notified that $113,000 would need to be repaid for the BIA HIP Program and a notice to cease the co-mingling of Federal funds would follow.
2. Allegations that I attempted to steal Tribal Property the previous evening. This was a result of being directed by the Tribal Chairperson to clean out the personal belongings of my mother Elizabeth Sato, who was also recently terminated. When the personal items were checked by the Tribal Chairperson, I was told documents which my mother informed me were personal documents were the property of the Tribe and subsequently seized.

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11. Were there other individuals involved in recommending, approving, or influencing the alleged personnel action(s)? *(Who was involved? How were they involved? When were they involved? Do you have an organization chart that you can provide, if applicable?)*

The Pit River Tribal Chairperson Agnes Gonzalez- I believe Agnes was the individual that falsely claimed I attempted to steal tribal property the day before my termination. Agnes was also provided a copy of the report document regarding the amount of funds missing from the Tribe's grant fund account the night before my termination. Agnes was also present on the day of my termination.

Pit River Tribal Administrator Charles White- Charles was made aware of my concerns regarding the misuse of Federal funds and actively attempted to restrict my ability to transmit this information to the Pit River Tribal Council. Charles also approved the expenditure of Federal funds on activities and services under practices which were expressly not allowed with respect to procurement and purchasing.

12. Did the person(s) who acted against you have knowledge of your disclosure(s) or believe that you made a disclosure(s)?

Yes. The person who acted against me was given disclosures regarding the misuse of Federal funds on almost a daily basis.

13. When did the person(s) who acted against you become aware of the disclosure (s)?

The person who acted against me was one of the individuals disclosures were made to as it was understanding he was responsible for taking the administrative action necessary to resolve them. Mr. Suppah was the first individual that was informed of any matters of non-compliance discovered.

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14. How do you know that the person(s) who acted against you was/were aware of the disclosure(s)?

I spoke with Mr. Suppah on nearly a daily basis regarding the disclosures and urged him to report these findings to the Tribal Council or the Federal Awarding Agencies who provided grant funds. On the day of my termination, Mr. Suppah also stated he was "tired of looking over his shoulder" as a reason for my termination.

15. Was anything else done in response to your disclosure(s) by the person(s) who acted against you? *(What was done, specifically?)*

I was the only employee who's timesheet was scrutinized during every pay period. Oftentimes this resulted in overtime hours that were worked not being compensated.

16. Did the alleged personnel action(s) occur after you made the disclosure(s)?

Yes

17. How much time passed between your disclosure(s) and the alleged personnel action(s)?

less than 24 hours.

18. Why do you believe the alleged personnel action(s) was taken, withheld, or threatened?

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I believe the personnel action was taken to reduce the likelihood that the information I had discovered from being disclosed to the Federal awarding agencies. The severity of scrutiny of my work hours and the restriction of access to financial data coincided with the number of disclosures being reported.

19. What were the reasons provided to you by the person(s) who acted against you for taking, withholding, or threatening the alleged personnel action(s)?

I was informed that the personnel actions taken against me were a result of a senior awarding official at the BIA named Victoria May being made aware of the fact the Tribe was co-mingling HIP funds and also the notification the Tribe was over-funded under HIP agreement A17AV01014 by $113,000, which would have to be repaid. My supervisor Mr. Suppah stated that my correspondence with the BIA should have been "internally vetted" and I was therefore no longer allowed to communicate with Federal agency representatives directly.

20. Does your complaint involve an allegation that an action was taken which affected your eligibility for access to classified information?

Yes. The more instances of non-compliance I discovered the less access I was provided to efficiently review the Tribe's Federal Programs for compliance. Within the Tribe's accounting system, I was no longer allowed to view the allocation of employee hours across Federal programs to ensure each program carrying their fair share of costs and my ability to view purchasing requests were also removed.

21. Are there witnesses who can corroborate your claims? (*Please provide names and contact information.)*

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Tim Wilhite- USEPA: Tim Wilhite is the Project Officer the Performance Partnership Grant program awarded to the Tribe. During my termination, I was informed the Federal agency representative I contacted was Tim Wilhite. In fact, Tim Wilhite had called me directly at my desk phone. The Tribe does not have caller-ID, so I would have not been able to identify it was an agency representative. Phone: 530-841-4400 Email: Wilhite.Timothy@epa.gov

Elizabeth Sato: previous HR Director for the Pit River Tribe. email:risetoexcellence@gmail.com Phone: 503-577-8976

22. Do you have a complaint pending in another forum (e.g. EEOC, OSC, MSPB, etc.) involving these same allegations?

No

If yes, please provide the dates, who did the review, and the current status of the complaint.

*****PLEASE NOTE: Documentation can be provided upon request. Unable to upload PDF documents due to file size. Please contact me at samuelkent2@gmail.com regarding submission of documentation and related materials. Thank you.*****

Attachments

If you have supporting documentation, please attach files here

PLEASE SELECT ONE:

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X By checking this box, I agree that the OIG can disclose my name and other informationI provide, if necessary, to ensure my issues are addressed.

By checking this box, I am requesting confidentiality, meaning I am providing the OIG my name, but I request that the OIG not disclose my name outside the OIG. I understand that this may result in my issues going unaddressed, as the OIG will be unable to coordinate with my agency concerning the allegations.

If you have additional information pertinent to your complaint, please provide that information via one of the below alternative methods:

- **E-mail:** Complete and submit this form and any supporting documents by e-email to: oig_hotline@doioig.gov
- **Telephone:** OIG Hotline's Toll-Free Number: 1-800-424-5081
- **Fax:** Complete and fax this form and any supporting documents to: 703-487-5402 (Attention: Intake Management Unit)
- **US Mail:** Complete and mail this form and any supporting documents to:
  Office of Inspector General
  Department of the Interior
  Attention: Intake Management Unit
  381 Elden Street, Suite 3000
  Herndon, VA 20170

samuelkent2@gmail.com

From: [redacted]@doioig.gov>
Sent: Wednesday, November 27, 2019 6:49 AM
To: Samuel Kent
Subject: 20-0087 Update 11/27/2019

Good morning, Mr. Kent,

I received your voicemail. Thank you very much for your patience. We are now working with the Office of General Counsel as well, so I am asking that you hang on just a bit longer. I understand your frustration, but please know we are actively addressing what you've presented.

The issue we are currently trying to resolve is the indecisiveness of the NDAA, in that Congress was not clear on legal jurisdiction regarding tribal issues.

Both the TTP and HIP are 638 funds (passthrough from DOT in the case of the TTP).

Since your allegations are new territory for the NDAA, the legal process of determining jurisdiction needs to be completed before we can determine the appropriate action and venue for your complaint.

I spoke with our WPO Attorney again this morning, and they are working with OGC on an independent legal review of the NDAA specifically as it pertains to tribal sovereignty laws. It has not been a speedy process, but that ensures a thorough review.

Please hold on a bit longer, as whatever you and I discuss when we do talk will be formatted entirely on their final legal opine. I want to be sure that whatever the outcome, you are certain of the way forward when we are done speaking.

Thank you again for your continued understanding as we navigate these new legal concerns. This will, no doubt, pave the way for any future similar issues that arise from others in your same situation. A process well worth adjudging.

I will reach out to you again sometime next week, as I am scheduled to speak with the WPO and OGC on their progress after the holiday weekend.

Thank you.

[redacted]
Special Agent

Department of the Interior
Office of Inspector General
Investigative Support Division

phone: [redacted]
fax: [redacted]

samuelkent2@gmail.com

From: [redacted]@doioig.gov>
Sent: Friday, December 13, 2019 10:30 AM
To: Samuel Kent
Subject: Re: [EXTERNAL] RE: OI-HQ-19-0707-R

Mr. Kent,

I am unable to verify what you and ASAC [redacted] and SA [redacted] discussed, as I was not part of those conversations. But it would appear that at some point (before I got involved) the OIG decided to initiate your second and current complaint (the one about which you and I have been conversing), concerning the retaliation, before receiving the response from BIA. I am unsure who made that decision, or when, but it may have been based on the recognition that we wanted to get the legal review in progress (knowing it would be lengthy), so decided not to wait.

So, in an effort to clarify, we referred the fraud portion of your allegations to BIA for investigation and response under OI-HQ-19-0707-R. BIA conducted their investigation and provided us with their response, which was sufficient for our purposes. As such, OI-HQ-19-0707-R has been closed in our files, and there is no additional action required by the OIG. Again, I am not able to release any details regarding the BIA investigation (which focused on the fraud allegations), but you may submit a FOIA request for that information.

Your current complaint (20-0087) pertains specifically to the retaliation portion of your allegations, and compiles all the retaliation information from your initial complaint(OI-HQ-19-0707-R), as well as all the new information you've provided to me since our correspondence began. As you know, it is still in the complaint vetting stage, and is pending an OGC opine.

OGC is the OIG's Office of General Counsel. General Counsel provides independent legal advice to the Inspector General and the entire staff of the Office of Inspector General. This legal guidance covers the full range of activities within OIG, including investigations, audits, inspections, and evaluations.

SOL is DOI's Solicitor's Office. They are completely separate from OGC, and handle legal matters pertaining to the rest of DOI, its bureaus and offices, and its employees.

I hope this helps clarify things.

[redacted]
Special Agent

Department of the Interior
Office of Inspector General
Investigative Support Division

phone: [redacted]
fax: [redacted]

OFFICE OF
INSPECTOR GENERAL
U.S. DEPARTMENT OF THE INTERIOR

INVESTIGATIVE ACTIVITY REPORT

Case Number **19-0707**	
Reporting Office **Sacramento, CA**	**Report Date** **August 27, 2019**
Report Subject **Summary of Investigative Activity for Complaint**	

On July 15, 2019, the U.S. Department of the Interior (DOI), Office of Inspector General (OIG) received a complaint via a hotline submission from Samuel J. Kent, (former) Grants and Contracts Specialist, Pit River Tribe, Burney, CA. Kent alleged he was being reprised against, was denied compensation commensurate with the duties he performed, and was unlawfully terminated by the Pit River Tribe due to reporting fraud, waste, and mismanagement to the Bureau of Indian Affairs (BIA). Kent's complaint included details regarding the commingling of BIA Housing Improvement Program (HIP) funds with other Federal funds, missing Federal funds, and incorrectly calculated indirect costs. Kent also included information which detailed his correspondence with (b) (7)(C) (b) (7)(C) Pit River Tribe, leading up to his employment being terminated on July 11, 2019.

Agent Note: Kent identified (b) (7)(C) *as the BIA* (b) (7)(C) *he reported the alleged commingling and over-awarding of HIP funds to.*

Between August 20 - 21, 2019, Special Agent (b) (7)(C) met and corresponded with (b) (7)(C) (b) (7)(C), BIA, to obtain information regarding BIA grant funding to the Pit River Tribe and to determine whether (b) (7)(C) was aware of any specific issues related to the Tribe. (b) (7)(C) explained the Pit River Tribe was sanctioned by BIA for delinquent single audit reports for the past 3 years. (b) (7)(C) related (b) (7)(C) was unaware of any missing Federal/BIA funds or any specific issues at the Pit River Tribe. During an initial discussion with the OIG, (b) (7)(C) related (b) (7)(C) recalled corresponding with somebody at the Pit River Tribe, but could not remember the individual's name and conceded the correspondence (b) (7)(C) recalled may have been with an individual from a separate tribe.

(b) (7)(C) subsequently reviewed (b) (7)(C) records/system and forwarded the OIG a response regarding (b) (7)(C) correspondence with the Pit River Tribe. Upon review of (b) (7)(C) past emails, (b) (7)(C) identified Kent as the individual (b) (7)(C) corresponded with from Pit River Tribe about HIP agreement # A17AV01014 and the commingling of Federal funds. (b) (7)(C) also provided the OIG with documentation related to Pit River Tribe, including the Automated Standard Application for Payments (ASAP) report and a letter to the Tribe regarding a $113,000 over payment relating to the HIP program. In addition, (b) (7)(C) provided the

Reporting Official/Title (b) (7)(C) /Special Agent	Signature Digitally signed.

Authentication Number: 7117EA0E987A11FFB2F362D58AA1D72D

OIG with a copy of the 2015 audit report as well as letters [redacted] sent to the Tribe regarding their delinquent 2016 – 2018 audit reports.

Alleged Commingled Federal Funds

Kent's complaint related on March 13, 2019, he notified Pit River Tribe's [redacted], and [redacted] that funds advanced to the Tribe under the BIA HIP agreement # A17AV01014 needed to be segregated out from the rest of the grant funds aggregated in the Tribe's grant account.

An OIG review of BIA funding to the Pit River Tribe revealed $305,023 was awarded by BIA under HIP agreement # A17AV01014, which covers improvements to housing made from September 19, 2017 through September 20, 2018, of which the Tribe has received/drawn down $337,023. A letter to the Tribe from [redacted] dated July 3, 2019, provided the Pit River Tribe with a breakdown of the funding and a request to return $113,000 in over awarded funds. The letter also notified the Tribe that commingling Federal funds is an illegal practice and should be rectified. See Appendix 1 for a copy of the letter dated July 3, 2019.

Alleged Missing Federal Funds and Inaccurate Indirect Cost Calculations

Kent's complaint related he notified [redacted] and [redacted] on February 26, 2019 that $5,266,004.82 in Federal funds were "missing" based on his comparison of the Tribe's accounting system data to the amount of Federal funds which had been drawn down according to the ASAP report. Kent's complaint noted a reconstruction on May 17, 2019 later showed $4,708,254.15 in Federal funds was missing. Kent's complaint also noted he sent an email to [redacted] and [redacted] notifying them that the $1,019,882.84 of indirect costs booked in the Tribe's accounting system was calculated incorrectly.

Agent Note: Kent's complaint alleged missing Federal funds and inaccurate indirect cost calculations, however, there were no specific allegations of fraud or theft against any member of the Pit River Tribe.

An OIG review of the Schedule of Federal Expenditures (SEFA) located within the Pit River Tribe's 2015 Audit Report revealed the Tribe received BIA HIP funds totaling $148,454 which represents less than 5% of the approximate $3.6 million in total Federal awards received in 2015. See Appendix 2 for the Tribe's 2015 SEFA.

Our review of the findings detailed within the 2015 Audit Report revealed multiple issues related to inadequate internal controls and records, including a repeat finding in 2014 which highlighted the need for significant adjusting journal entries to reconcile the Tribe's general ledger and SEFA (see Figure 1 and Figure 2 below).

Figure 1: 2015 Audit Report Finding #2015-001 (p 69 of 74)

Audit Finding #2015-001

Condition: A prior period adjustment was required to adjust the beginning balances of several balance sheet accounts. In addition, several significant adjusting journal entries were required to reconcile the Tribe's general ledger, and closing entries were required for SEFA preparation.

Management is aware of the need for accurate financial records to base its decisions, and will ensure that all transactions are recorded to the General Ledger and that supporting schedules will be reconciled to the General Ledger balances at least quarterly.

Figure 2: Prior Audit Finding #2014-001 (p 72 of 74)

Summary Schedule of Prior Audit Findings

Year Ended December 31, 2015

Findings from the year ended December 31, 2014

Finding #2014-001

Condition: During the course of the audit, several significant adjusting journal entries were required to reconcile the Tribe's general ledger, and closing entries were required for SEFA preparation.

Status: Unresolved, repeated as finding 2015-001

Kent's complaint did not specify which period the $1,019,882.84 in indirect costs were attributed to, however, an OIG review of the Pit River Tribe's 2015 Audit Report revealed the Tribe had an approved indirect cost rate of 30.57% for 2015 (see Figure 3 below).

Figure 3: Indirect Cost Rate for 2015

NOTE 10 – INDIRECT COSTS:

Indirect costs are organizational wide costs and administration costs that benefit multiple activities and functions. These costs must be submitted to the oversight agency, the United States Department of the Interior, for approval to be charged to federal grants. The Tribe used their approved indirect cost rate of 30.57% for 2015.

Alleged Reprisal by Pit River Tribe Against Samuel Kent

Kent's complaint alleged his employment with the Tribe was terminated on July 11, 2019, due to being in contact with Federal agencies after being instructed not to be and due to allegations that he attempted to steal tribal property. Regarding the allegation against him of theft, Kent related he was directed by (b) (7)(C) , to clean out the personal belongings of (b) (7)(C) (b) (7)(C) , who was also (b) (7)(C) .

An OIG review of the documentation provided by Kent revealed in addition to his reports of commingling Federal funds, missing Federal funds, and inaccurate indirect cost calculations to the Tribal leadership, Kent had the following personnel-related correspondence with the Tribe's (b) (7)(C) (b) (7)(C)

- March 20, 2019
  - Kent requested approval to work overtime to complete work tasks relating to grants and contracts held by the tribe.
  - (b) (7)(C) Kent's request for overtime, however, noted the overtime would need to be worked onsite and not from a remote location.
- April 21, 2019
  - Kent requested a wage rate increase due to the high cost of commuting to work.
  - (b) (7)(C) Kent's request citing the established wage scale and tight operating budget.
- April 25, 2019
  - Kent requested to work 40 hours remotely while out of state for personal matters.
  - (b) (7)(C) Kent's request citing the policy for hourly employees.
- May 24, 2019
  - Kent requested monthly cell phone reimbursement.
  - (b) (7)(C) Kent's request citing tribal policy relating to cell phone reimbursements.

On July 11, 2019, Kent's employment with the Pit River tribe was terminated and on July 16, 2019, Kent filed a "Grievance of Termination."

Appendix 1: July 3, 2019 Letter to Pit River Tribe from (b) (7)(C)

Pit River HIP breakout:

Award document (SF26) awarded line item 10 for $145,000.00 using 17XA2100DD Funds, and line item 20 for $9,991 using 12XA2100DD, totaling $154,991.00. However, per the BIA-(b) (7)(C) recommended to change the funding and wanted to use the old funds first and Modification one (1) was issued as follows: line item 30 for $21,231 using 16XA2100DD and line item 40 for $91,769.00 using 15XA2100DD; total to $113,000.00. This is why the last sentence indicated to leave the line item 10 in the ASAP system until notified by the Awarding Official.

The true amount that was to be awarded to Pit River HIP for:

Award Document (SF26): $145,000 – $113,000 + $9,991 = $41,991

Mod-1 (SF30) exchanging and substituting line item 30 for $21,231 using 16X funds and line item 40 for $91,769.00 using 15X funds, totaling $113,000; plus line item 50 was for HIP-Contract Support Cost (CSC) funds $33,082.00 to help the Tribe with their administrative expenses, this would include the travel and training that was done on April 29, 2019 by (b) (7)(C)

Mod-2 (SF30) awarded $3,950 for renovation, per tribe's justification letter. The letter does not mention any HIP applicant.

Total HIP award was to be: $145,000.00 (b) (7)(C) + $9,991 (b) (7)(C) +$3,950 (renovation) = $158,941.00; plus the CSC funds of $33,082.00;

Grand total: $158,941 + $33,082.00 = $192,032.00

However, the current balance is:

($145,000 + $9,991 + $21,231 + $91,769 + $3,950 = $271,941 + $33,082 = $305,023.00)

$305,023.00 – 113,000.00 = $192,032.00

This comes back to the $113,000.00 that was over awarded in this contract. Tribe will have to return the $113,000.00 by redepositing and crediting line item 10 issued from the Award Document (SF26), Contract number A17AV01014.

I also read your email and you mentioned that ATTG and Indian Health Service made payments to the HIP account/HIP program this particular practice is considered as commingling of Federal Funds and is illegal practice should NOT be practiced at all. Pit River Finance Department should understand this, as this will appear on the Tribe's Single Audit Report. I highly recommend that Pit River Finance Department end the commingling and cease from Due To and Due From using Federal Government funds. I did review the past audit report that we have on file and it appears that the Tribe is experiencing internal control issues, that would lead to misappropriation of federal funds.

Respectfully,

(b) (7)(C)

(b) (7)(C)

AOCS #: BIA-2018-L2-000036 Dated: July 3, 2019

Appendix 2: Schedule of Federal Expenditures for Year Ended December 31, 2015

Federal Grantor/Program Title	Identification Number	CFDA Number	Total Expenditures
U.S. Department of the Interior:			
Bureau of Indian Affairs			
Aid to Tribal Governments (CTGP)	A12AV00539	15.020	$ 498,460
Contract Support	A12AV00539	15.024	22,789
Indian Reservation Roads Program	A12AV00539	15.033	120
BIA Noxious Weeds	A12AV00539	15.034	819
XL Reservation Water Master Program	A12AV00539	15.037	36,531
BIA Clean Up	A12AV00539	15.041	74
Safety of Dams on Indian Lands	A12AV00539	15.065	1,006
Housing Improvement Program (HIP)	A12AV00539	15.141	148,454
Wildlife Urban Interface (045)	A12AV00539	15.228	175
InterTribal Buffalo Council	Unknown	15.231	33,242
Total U.S. Department of the Interior, Bureau of Indian Affairs			741,670
National Park Service			
Historic Preservation-Tribal Historic Officer	Unknown	15.904	95,609
Total U.S. Department of the Interior			$ 837,279
U.S. Department of Agriculture:			
U.S. Forest Service			
Natural Resource Conservation Service	Unknown	10.912	$ 152,675
Lassen NF (042)	10-PA-11050650-023	10.664	15,693
Forest Service-Shasta County	08-CS-11051400-050	10.664	1,908
		Sub Total	17,601
Total U.S. Department of Agriculture			$ 170,276
U.S. Department of Transportation:			
Highway Planning and Construction Cluster			
Tribal Transportation (Formerly IRRP) From Federal Highway	A13AP00123	20.205	$ 1,899,087
Total Highway Planning and Construction Cluster			1,899,087
Total U.S. Department of Transportation			$ 1,899,087
U.S. Department of Environmental Protection Agency:			
Public Water Systems Compliance	Unknown	66.605	$ 43,784
CWA 106/319	BG97998414	66.605	1,165
Performance Partnership	BG-97998414	66.605	299,870
		Sub Total	344,819
EPA SWAP	DI99T02201	66.473	37,692
General Assistance Program	GA96918101	66.926	106
Total U.S. Department of Environmental Protection Agency			$ 382,617
U.S. Department of Health and Human Services			
LIHEAP	2013G992201	93.568	$ 57,474
Administration for Native Americans	90AT0014-03-00	93.092	203,341
Head Start	Unknown	93.600	64,994
Indian Health Services	Unknown	93.193	23,314
Total U.S. Department of Health and Human Services			$ 349,123
Total Federal Awards			$ 3,638,382

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, DC 20240

NOV 2 1 2019

Memorandum

To: Matthew Elliot
Assistant Inspector General for Investigations
Office of Inspector General

From: Director, Bureau of Indian Affairs

Subject: DOI-OIG Case File Number: OI-HQ-19-19-0707-R
Mismanagement of Federal Funds and Improper Termination

This memorandum is in response to your email dated September 11, 2019 concerning a complaint filed by Samuel Kent alleging that the Pit River Tribe: 1) mismanaged federal funding from 2013-2019; and 2) terminated Mr. Kent's employment with the Pit River Tribe as a direct result of unauthorized disclosures to federal agencies and allegations of tribal property theft. Specifically, the complainant alleges that the Pit River Tribe commingles Housing Improvement Program (HIP) funds, and that Tribal Transportation Program are not in compliance with the referenced funding agreement. In consultation with the BIA Pacific Region, the BIA provides the following:

Allegation 1: Comingling A17AV01014 Funds by Pit River Tribe

The allegation states, in part, that "On March 13, 2019 I notified the Tribe's CFO Jake Suppah and the accounting supervisor Alex Urena that funds advanced to the Tribe under the BIA Housing Improvement Program (HIP) agreement A17AV01014 needed to be segregated out from the rest of the grant funds aggregated in the Tribe's bank account".

Ms. Victoria May, Indian Self-Determination Officer, BIA Pacific Regional Office was interviewed to affirm potential abnormalities or area(s) of concern related to the management and accounting of federal funding awarded to the Pit River Tribe by the BIA. Ms. May confirmed that the Pacific Region issued notice to Pit River Tribe advising the Tribe to cease commingling of federal funds. The Pacific Region acknowledges that commingling of federal funds occurs at the Pit River Tribe. However, contract A17AV01014 closed in good standing

with Pacific Region. Therefore, BIA recommends no further action be taken regarding this allegation.

Allegation 2: Comingling A16AP00252 and A13AP00123 Funds by Pit River Tribe

The allegation states that "On July 10, 2019, A notice of non-compliance with the provisions of the Pit River Tribe's Tribal Transportation Agreement A16AP00252 and A13AP00123 was submitted to CFO Suppah, Tribal Administrator, Charles White and Tribal Chairperson Agnes Gonzales. The notice was in regards to non-compliance with provisions of the tribe's referenced funding agreement requiring TPP funds to be segregated from other federal funds and accounted for separately".

BIA interviewed Ms. Scarlett Carmona, Transportation Specialist, BIA Pacific Region Division of Transportation to determine potential abnormalities or area(s) of concern related to the contract management of A16AP00252 and A13AP00123. Ms. Carmona stated that she was unaware of any non-compliance notice issued to the Pit River Tribe by the Tribal Transportation Division, BIA or Federal Highway Administration and believes that the referenced notice is an internal communications within the Pit River Tribe. Ms. Carmona stated that to the best of her knowledge, the Tribal Transportation Program Funds awarded to Pit River Tribe are monitored, tracked and expended consistent with their contract awards. Therefore, BIA recommends no further action regarding this allegation

Allegation 3: Indirect Cost Reimbursement Rates

The allegation states that "On June 28, 2019 an email was sent to CFO Jake Suppah and accounting supervisor Alex Urena notifying them that the $1,019,882.84 of the indirect cost that was booked in the Tribe's accounting system had been calculated incorrectly. This email was in response to recently discovering the supporting documents for the IDC charge. Prior to this, several discussions were held between the three of us in which I expressed my objection to the booking of indirect cost charges against the Tribe's Tribal Transportation Program for periods which could not be substantiated. It is my understanding that these charges were recorded to reduce the amount of unearned revenue on the Tribe's balance sheet, which had been the cause of audit findings for the past several years".

BIA interviewed Ms. Carmona regarding the potential of indirect cost (IDC) and/or contract support cost (CSC) allocation concerns. Ms. Carmona stated that to the best of her knowledge the Pit River Tribe maintains compliance for IDC reimbursement rates as negotiated with the Tribe's cognizant agency. BIA believes that the statement made by the complainant may be an internal matter between the complainant and the tribe. It is BIA's policy not to interfere with the governance of tribes allowing them to utilize their own processes, including administrative decisions. BIA recommends no further action regarding this allegation.

Allegation 4: Lease/Rental Cost Recovery

The allegation states that "On July 09, 2019 an email was sent to CFO Jake Suppah outlining my concerns for the amount of rental expenses the Tribe's economic development arm (the Kwahn Corporation) had been charging the Tribe's Roads Department for use of a vacant lot and metal building. My concern was due to rent expenses being collected for a 12 month period without an active lease and the amounts being charge is higher than the allowable regulatory amounts. The Pit River Tribe's Roads Department is funded by the Tribal Transportation Program.

The BIA determined that this allegation is an internal leasing matter between a tribal enterprise and the tribe. It is the BIA's policy not to interfere with the governance of tribes allowing them to utilize their own processes, including operational decisions. Therefore, BIA recommends no further action regarding this allegation.

Allegation 5: Restricted Federal Agency Communications

The allegation states, in part, that "On July 11, 2019 I was informed that my employment with the Tribe was terminated. I was informed that the termination was in response to 1. Being in contact with federal agencies after being instructed not to be. This directive was given after the Tribe was notified that $113,000 would need to be repaid for the BIA HIP Program and a notice to cease the co-mingling of federal funds would follow".

The BIA determined that this allegation is an internal matter between the complainant and the tribe. It is the BIA's policy not to interfere with the governance of tribes allowing them to utilize their own processes, including staffing decisions. Therefore, BIA recommends no further action regarding this allegation.

Allegation 6: Repayment of A17AV01014 Contract Funds

The allegation states that "I was informed that the personnel action taken against me were a result of a senior awarding official at the BIA named Victoria May being made of the fact the Tribe was comingling HIP funds and also the notification the Tribe was overfunded under HIP agreement A17AV01014 by $113,000, which would have to be repaid.

Ms. Victoria May, Indian Self-Determination Officer, BIA Pacific Regional Office was interviewed regarding the award of A17AV01014 by the BIA. Ms. May verified that $113,000 was over-awarded to the tribe's HIP. As a result, the BIA and the tribe negotiated an amendment to their existing self-determination agreement to allow an individual or families deemed eligible for HIP services. The Pit River Tribe has identified a qualified HIP applicant and intends to

disburse the remainder of the $113,000 to the Pit River Housing Authority for renovation costs. BIA concludes that the over-award was unintentional and has been corrected. BIA recommends no further action to be taken on this issue.

Conclusion:

As a result of our administrative investigation, the BIA concludes that no further actions are required. The BIA maintains a relationship with the Pit River Tribe and continues to provide technical assistance when requested by the tribe.

If you have any questions or need additional information regarding this matter, please do not hesitate to contact Amy Dutschke, Regional Director, Pacific Region at (916) 978-6000.

§ 200.11 CFDA program title.

CFDA program title means the title of the program under which the Federal award was funded in the CFDA.

§ 200.12 Capital assets.

Capital assets means tangible or intangible assets used in operations having a useful life of more than one year which are capitalized in accordance with GAAP. Capital assets include:

(a) Land, buildings (facilities), equipment, and intellectual property (including software) whether acquired by purchase, construction, manufacture, lease-purchase, exchange, or through capital leases; and

(b) Additions, improvements, modifications, replacements, rearrangements, reinstallations, renovations or alterations to capital assets that materially increase their value or useful life (not ordinary repairs and maintenance).

§ 200.13 Capital expenditures.

Capital expenditures means expenditures to acquire capital assets or expenditures to make additions, improvements, modifications, replacements, rearrangements, reinstallations, renovations, or alterations to capital assets that materially increase their value or useful life.

§ 200.14 Claim.

Claim means, depending on the context, either:

(a) A written demand or written assertion by one of the parties to a Federal award seeking as a matter of right:

(1) The payment of money in a sum certain;

(2) The adjustment or interpretation of the terms and conditions of the Federal award; or

(3) Other relief arising under or relating to a Federal award.

(b) A request for payment that is not in dispute when submitted.

§ 200.15 Class of Federal awards.

Class of Federal awards means a group of Federal awards either awarded under a specific program or group of programs or to a specific type of non-Federal entity or group of non-Federal entities to which specific provisions or exceptions may apply.

§ 200.16 Closeout.

Closeout means the process by which the Federal awarding agency or pass-through entity determines that all applicable administrative actions and all required work of the Federal award have been completed and takes actions as described in § 200.343 Closeout.

§ 200.17 Cluster of programs.

Cluster of programs means a grouping of closely related programs that share common compliance requirements. The types of clusters of programs are research and development (R&D), student financial aid (SFA), and other clusters. ''Other clusters'' are as defined by OMB in the compliance supplement or as designated by a state for Federal awards the state provides to its subrecipients that meet the definition of a cluster of programs. When designating an ''other cluster,'' a state must identify the Federal awards included in the cluster and advise the subrecipients of compliance requirements applicable to the cluster, consistent with § 200.331 Requirements for pass-through entities, paragraph (a). A cluster of programs must be considered as one program for determining major programs, as described in § 200.518 Major program determination, and, with the exception of R&D as described in § 200.501 Audit requirements, paragraph (c), whether a program-specific audit may be elected.

§ 200.18 Cognizant agency for audit.

Cognizant agency for audit means the Federal agency designated to carry out the responsibilities described in § 200.513 Responsibilities, paragraph (a). The cognizant agency for audit is not necessarily the same as the cognizant agency for indirect costs. A list of cognizant agencies for audit may be found at the FAC Web site.

§ 200.19 Cognizant agency for indirect costs.

Cognizant agency for indirect costs means the Federal agency responsible for reviewing, negotiating, and approving cost allocation plans or indirect cost proposals developed under this part on behalf of all Federal agencies.

§ 200.14 Claim.

Claim means, depending on the context, either:

(a) A written demand or written assertion by one of the parties to a Federal award seeking as a matter of right:

(1) The payment of money in a sum certain;

(2) The adjustment or interpretation of the terms and conditions of the Federal award; or

(3) Other relief arising under or relating to a Federal award.

(b) A request for payment that is not in dispute when submitted.

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Cognizant agency for audit means the Federal agency designated to carry out the responsibilities described in § 200.513 Responsibilities, paragraph (a). The cognizant agency for audit is not necessarily the same as the cognizant agency for indirect costs. A list of cognizant agencies for audit may be found at the FAC Web site.

§ 200.19 Cognizant agency for indirect costs.

Cognizant agency for indirect costs means the Federal agency responsible for reviewing, negotiating, and approving cost allocation plans or indirect cost proposals developed under this part on behalf of all Federal agencies. The cognizant agency for indirect cost is not necessarily the same as the cognizant agency for audit. For assignments of cognizant agencies see the following:

(a) For IHEs: Appendix III to Part 200—Indirect (F&A) Costs Identification and Assignment, and Rate Determination for Institutions of Higher Education (IHEs), paragraph C.11.

(b) For nonprofit organizations: Appendix IV to Part 200—Indirect (F&A) Costs Identification and Assignment, and Rate Determination for Nonprofit Organizations, paragraph C.2.a.

(c) For state and local governments: Appendix V to Part 200—State/Local Governmentwide Central Service Cost Allocation Plans, paragraph F.1.

(d) For Indian tribes: Appendix VII to Part 200—States and Local Government and Indian Tribe Indirect Cost Proposal, paragraph D.1.

[78 FR 78608, Dec. 26, 2013, as amended at 79 FR 75880, Dec. 19, 2014; 80 FR 54407, Sept. 10, 2015]

§ 200.20 Computing devices.

Computing devices means machines used to acquire, store, analyze, process, and publish data and other information electronically, including accessories (or ''peripherals'') for printing, transmitting and receiving, or storing electronic information. See also §§ 200.94

Title 2 —Grants and Agreements
Subtitle A —Office of Management and Budget Guidance for Grants and Agreements
Chapter II —Office of Management and Budget Guidance
Part 200 —Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards
Subpart F —Audit Requirements
Federal Agencies

Authority: 31 U.S.C. 503
Source: 78 FR 78608, Dec. 26, 2013, unless otherwise noted.

§ 200.513 Responsibilities.

(a)

(1) ***Cognizant agency for audit responsibilities.*** A non-Federal entity expending more than $50 million a year in Federal awards must have a cognizant agency for audit. The designated cognizant agency for audit must be the Federal awarding agency that provides the predominant amount of funding directly (direct funding) (as listed on the Schedule of expenditures of Federal awards, see § 200.510(b)) to a non-Federal entity unless OMB designates a specific cognizant agency for audit. When the direct funding represents less than 25 percent of the total expenditures (as direct and subawards) by the non-Federal entity, then the Federal agency with the predominant amount of total funding is the designated cognizant agency for audit.

(2) To provide for continuity of cognizance, the determination of the predominant amount of direct funding must be based upon direct Federal awards expended in the non-Federal entity's fiscal years ending in 2019, and every fifth year thereafter.

(3) Notwithstanding the manner in which audit cognizance is determined, a Federal awarding agency with cognizance for an auditee may reassign cognizance to another Federal awarding agency that provides substantial funding and agrees to be the cognizant agency for audit. Within 30 calendar days after any reassignment, both the old and the new cognizant agency for audit must provide notice of the change to the FAC, the auditee, and, if known, the auditor. The cognizant agency for audit must:

(i) Provide technical audit advice and liaison assistance to auditees and auditors.

(ii) Obtain or conduct quality control reviews on selected audits made by non-Federal auditors, and provide the results to other interested organizations. Cooperate and provide support to the Federal agency designated by OMB to lead a governmentwide project to determine the quality of single audits by providing a reliable estimate of the extent that single audits conform to applicable requirements, standards, and procedures; and to make recommendations to address noted audit quality issues, including recommendations for any changes to applicable requirements, standards and procedures indicated by the results of the project. The governmentwide project can rely on the current and on-going quality control review work performed by the agencies, State auditors, and professional audit associations. This governmentwide audit quality project must be performed once every 6 years (or at such other interval as determined by OMB), and the results must be public.

(iii) Promptly inform other affected Federal agencies and appropriate Federal law enforcement officials of any direct reporting by the auditee or its auditor required by GAGAS or statutes and regulations.

(iv) Advise the community of independent auditors of any noteworthy or important factual trends related to the quality of audits stemming from quality control reviews. Significant problems or quality issues consistently identified through quality control reviews of audit reports must be referred to appropriate state licensing agencies and professional bodies.

(v) Advise the auditor, Federal awarding agencies, and, where appropriate, the auditee of any deficiencies found in the audits when the deficiencies require corrective action by the auditor. When advised of deficiencies, the auditee must work with the auditor to take corrective action. If corrective action is not taken, the cognizant agency for audit must notify the auditor, the auditee, and applicable Federal awarding agencies and pass-through entities of the facts and make recommendations for follow-up action. Major inadequacies or repetitive substandard performance by auditors must be referred to appropriate state licensing agencies and professional bodies for disciplinary action.

(vi) Coordinate, to the extent practical, audits or reviews made by or for Federal agencies that are in addition to the audits made pursuant to this part, so that the additional audits or reviews build upon rather than duplicate audits performed in accordance with this part.

(vii) Coordinate a management decision for cross-cutting audit findings (see in § 200.1 of this part) that affect the Federal programs of more than one agency when requested by any Federal awarding agency whose awards are included in the audit finding of the auditee.

(viii) Coordinate the audit work and reporting responsibilities among auditors to achieve the most cost-effective audit.

(ix) Provide advice to auditees as to how to handle changes in fiscal years.

(b) ***Oversight agency for audit responsibilities.*** An auditee who does not have a designated cognizant agency for audit will be under the general oversight of the Federal agency determined in accordance with § 200.1 *oversight agency for audit.* A Federal agency with oversight for an auditee may reassign oversight to another Federal agency that agrees to be the oversight agency for audit. Within 30 calendar days after any reassignment, both the old and the new oversight agency for audit must provide notice of the change to the FAC, the auditee, and, if known, the auditor. The oversight agency for audit:

(1) Must provide technical advice to auditees and auditors as requested.

(2) May assume all or some of the responsibilities normally performed by a cognizant agency for audit.

(c) ***Federal awarding agency responsibilities.*** The Federal awarding agency must perform the following for the Federal awards it makes (See also the requirements of § 200.211):

(1) Ensure that audits are completed and reports are received in a timely manner and in accordance with the requirements of this part.

(2) Provide technical advice and counsel to auditees and auditors as requested.

(3) Follow-up on audit findings to ensure that the recipient takes appropriate and timely corrective action. As part of audit follow-up, the Federal awarding agency must:

(i) Issue a management decision as prescribed in § 200.521;

(ii) Monitor the recipient taking appropriate and timely corrective action;

(iii) Use cooperative audit resolution mechanisms (see the definition of *cooperative audit resolution* in § 200.1 of this part) to improve Federal program outcomes through better audit resolution, follow-up, and corrective action; and

(iv) Develop a baseline, metrics, and targets to track, over time, the effectiveness of the Federal agency's process to follow-up on audit findings and on the effectiveness of Single Audits in improving non-Federal entity accountability and their use by Federal awarding agencies in making award decisions.

(4) Provide OMB annual updates to the compliance supplement and work with OMB to ensure that the compliance supplement focuses the auditor to test the compliance requirements most likely to cause improper payments, fraud, waste, abuse or generate audit finding for which the Federal awarding agency will take sanctions.

(5) Provide OMB with the name of a single audit accountable official from among the senior policy officials of the Federal awarding agency who must be:

(i) Responsible for ensuring that the agency fulfills all the requirements of paragraph (c) of this section and effectively uses the single audit process to reduce improper payments and improve Federal program outcomes.

(ii) Held accountable to improve the effectiveness of the single audit process based upon metrics as described in paragraph (c)(3)(iv) of this section.

(iii) Responsible for designating the Federal agency's key management single audit liaison.

(6) Provide OMB with the name of a key management single audit liaison who must:

(i) Serve as the Federal awarding agency's management point of contact for the single audit process both within and outside the Federal Government.

(ii) Promote interagency coordination, consistency, and sharing in areas such as coordinating audit follow-up; identifying higher-risk non-Federal entities; providing input on single audit and follow-up policy; enhancing the utility of the FAC; and studying ways to use single audit results to improve Federal award accountability and best practices.

(iii) Oversee training for the Federal awarding agency's program management personnel related to the single audit process.

(iv) Promote the Federal awarding agency's use of cooperative audit resolution mechanisms.

(v) Coordinate the Federal awarding agency's activities to ensure appropriate and timely follow-up and corrective action on audit findings.

(vi) Organize the Federal cognizant agency for audit's follow-up on cross-cutting audit findings that affect the Federal programs of more than one Federal awarding agency.

(vii) Ensure the Federal awarding agency provides annual updates of the compliance supplement to OMB.

(viii) Support the Federal awarding agency's single audit accountable official's mission.

[78 FR 78608, Dec. 26, 2013, as amended at 79 FR 75887, Dec. 19, 2014; 85 FR 49573, Aug. 13, 2020]

SEC. 2. *Revocation of Orders*. Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs) [former 5 U.S.C. 601 note], Executive Order 13777 of February 24, 2017 (Enforcing the Regulatory Reform Agenda) [former 5 U.S.C. 601 note], Executive Order 13875 of June 14, 2019 (Evaluating and Improving the Utility of Federal Advisory Committees) [former 5 U.S.C. App. note], Executive Order 13891 of October 9, 2019 (Promoting the Rule of Law Through Improved Agency Guidance Documents) [former 5 U.S.C. 601 note], Executive Order 13892 of October 9, 2019 (Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication) [formerly set out above], and Executive Order 13893 of October 10, 2019 (Increasing Government Accountability for Administrative Actions by Reinvigorating Administrative PAYGO) [former 5 U.S.C. 601 note], are hereby revoked.

SEC. 3. *Implementation*. The Director of the Office of Management and Budget and the heads of agencies shall promptly take steps to rescind any orders, rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing the Executive Orders identified in section 2 of this order, as appropriate and consistent with applicable law, including the Administrative Procedure Act, 5 U.S.C. 551 *et seq*. If in any case such rescission cannot be finalized immediately, the Director and the heads of agencies shall promptly take steps to provide all available exemptions authorized by any such orders, rules, regulations, guidelines, or policies, as appropriate and consistent with applicable law. In addition, any personnel positions, committees, task forces, or other entities established pursuant to the Executive Orders identified in section 2 of this order, including the regulatory reform officer positions and regulatory reform task forces established by sections 2 and 3 of Executive Order 13777 [former 5 U.S.C. 601 note], shall be abolished, as appropriate and consistent with applicable law.

SEC. 4. *General Provisions*. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

J.R. BIDEN, JR.

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format—

(i) that have been released to any person under paragraph (3); and

(ii)(I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

(II) that have been requested 3 or more times; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the

record where the deletion was made. Each agency shall also maintain and make available for public inspection in an electronic format current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term ''search'' means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)))[1] shall not make any record available under this paragraph to—

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

[1] See References in Text note below.

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term ''a representative of the news media'' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ''news'') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only

the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii) (II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(viii)(I) Except as provided in subclause (II), an agency shall not assess any search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees) under this subparagraph if the agency has failed to comply with any time limit under paragraph (6).

(II)(aa) If an agency has determined that unusual circumstances apply (as the term is defined in paragraph (6)(B)) and the agency provided a timely written notice to the requester in accordance with paragraph (6)(B), a failure described in subclause (I) is excused for an additional 10 days. If the agency fails to comply with the extended time limit, the agency may not assess any search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees).

(bb) If an agency has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, an agency may charge search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees) if the agency has provided a timely written notice to the requester in accordance with paragraph (6)(B) and the agency has discussed with the requester via written mail, electronic mail, or telephone (or made not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with paragraph (6)(B)(ii).

(cc) If a court has determined that exceptional circumstances exist (as that term is defined in paragraph (6)(C)), a failure described in subclause (I) shall be excused for the length of time provided by the court order.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D) Repealed. Pub. L. 98–620, title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357.]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall—

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of—

(I) such determination and the reasons therefor;

(II) the right of such person to seek assistance from the FOIA Public Liaison of the agency; and

(III) in the case of an adverse determination—

(aa) the right of such person to appeal to the head of the agency, within a period determined by the head of the agency that is not less than 90 days after the date of such adverse determination; and

(bb) the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency, and notify the requester of the right of the requester to seek dispute resolution services from the Office of Government Information Services. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, ''unusual circumstances'' means, but only to the extent reasonably necessary to the proper processing of the particular requests—

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to com-

plete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term ''exceptional circumstances'' does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure—

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term ''compelling need'' means—

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall—

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including—

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(8)(A) An agency shall—

(i) withhold information under this section only if—

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

(II) disclosure is prohibited by law; and

(ii)(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and

(II) take reasonable steps necessary to segregate and release nonexempt information; and

(B) Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3).

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States and to the Director of the Office of Government Information Services a report which shall cover the preceding fiscal year and which shall include—

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the

preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency—

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests;

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests;

(P) the number of times the agency denied a request for records under subsection (c); and

(Q) the number of records that were made available for public inspection in an electronic format under subsection (a)(2).

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available for public inspection in an electronic format. In addition, each agency shall make the raw statistical data used in each report available in a timely manner for public inspection in an electronic format, which shall be made available—

(A) without charge, license, or registration requirement;

(B) in an aggregated, searchable format; and

(C) in a format that may be downloaded in bulk.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Oversight and Government Reform of the House of Representatives and the Chairman and ranking minority member of the Committees on Homeland Security and Governmental Affairs and the Judiciary of the Senate, no later than March 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6)(A) The Attorney General of the United States shall submit to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on the Judiciary of the Senate, and the President a report on or before March 1 of each calendar year, which shall include for the prior calendar year—

(i) a listing of the number of cases arising under this section;

(ii) a listing of—

(I) each subsection, and any exemption, if applicable, involved in each case arising under this section;

(II) the disposition of each case arising under this section; and

(III) the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4); and

(iii) a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(B) The Attorney General of the United States shall make—

(i) each report submitted under subparagraph (A) available for public inspection in an electronic format; and

(ii) the raw statistical data used in each report submitted under subparagraph (A) available for public inspection in an electronic format, which shall be made available—

(I) without charge, license, or registration requirement;

(II) in an aggregated, searchable format; and

(III) in a format that may be downloaded in bulk.

(f) For purposes of this section, the term—

(1) ''agency'' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) ''record'' and any other term used in this section in reference to information includes—

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make available for public inspection in an electronic format, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including—

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration. The head of the Office shall be the Director of the Office of Government Information Services.

(2) The Office of Government Information Services shall—

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) identify procedures and methods for improving compliance under this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a nonexclusive alternative to litigation and may issue advisory opinions at the discretion of the Office or upon request of any party to a dispute.

(4)(A) Not less frequently than annually, the Director of the Office of Government Information Services shall submit to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on the Judiciary of the Senate, and the President—

(i) a report on the findings of the information reviewed and identified under paragraph (2);

(ii) a summary of the activities of the Office of Government Information Services under paragraph (3), including—

(I) any advisory opinions issued; and

(II) the number of times each agency engaged in dispute resolution with the assistance of the Office of Government Information Services or the FOIA Public Liaison; and

(iii) legislative and regulatory recommendations, if any, to improve the administration of this section.

(B) The Director of the Office of Government Information Services shall make each report submitted under subparagraph (A) available for public inspection in an electronic format.

(C) The Director of the Office of Government Information Services shall not be required to obtain the prior approval, comment, or review of any officer or agency of the United States, including the Department of Justice, the Archivist of the United States, or the Office of Management and Budget before submitting to Congress, or any committee or subcommittee thereof, any reports, recommendations, testimony, or comments, if such submissions include a statement indicating that the views expressed therein are those of the Director and do not necessarily represent the views of the President.

(5) The Director of the Office of Government Information Services may directly submit additional information to Congress and the President as the Director determines to be appropriate.

(6) Not less frequently than annually, the Office of Government Information Services shall conduct a meeting that is open to the public on the review and reports by the Office and shall allow interested persons to appear and present oral or written statements at the meeting.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j)(1) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(2) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency—

(A) have agency-wide responsibility for efficient and appropriate compliance with this section;

(B) monitor implementation of this section throughout the agency and keep the head of

the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(C) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(D) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(E) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply;

(F) offer training to agency staff regarding their responsibilities under this section;

(G) serve as the primary agency liaison with the Office of Government Information Services and the Office of Information Policy; and

(H) designate 1 or more FOIA Public Liaisons.

(3) The Chief FOIA Officer of each agency shall review, not less frequently than annually, all aspects of the administration of this section by the agency to ensure compliance with the requirements of this section, including—

(A) agency regulations;

(B) disclosure of records required under paragraphs (2) and (8) of subsection (a);

(C) assessment of fees and determination of eligibility for fee waivers;

(D) the timely processing of requests for information under this section;

(E) the use of exemptions under subsection (b); and

(F) dispute resolution services with the assistance of the Office of Government Information Services or the FOIA Public Liaison.

(k)(1) There is established in the executive branch the Chief FOIA Officers Council (referred to in this subsection as the ''Council'').

(2) The Council shall be comprised of the following members:

(A) The Deputy Director for Management of the Office of Management and Budget.

(B) The Director of the Office of Information Policy at the Department of Justice.

(C) The Director of the Office of Government Information Services.

(D) The Chief FOIA Officer of each agency.

(E) Any other officer or employee of the United States as designated by the Co-Chairs.

(3) The Director of the Office of Information Policy at the Department of Justice and the Director of the Office of Government Information Services shall be the Co-Chairs of the Council.

(4) The Administrator of General Services shall provide administrative and other support for the Council.

(5)(A) The duties of the Council shall include the following:

(i) Develop recommendations for increasing compliance and efficiency under this section.

(ii) Disseminate information about agency experiences, ideas, best practices, and innovative approaches related to this section.

(iii) Identify, develop, and coordinate initiatives to increase transparency and compliance with this section.

(iv) Promote the development and use of common performance measures for agency compliance with this section.

(B) In performing the duties described in subparagraph (A), the Council shall consult on a regular basis with members of the public who make requests under this section.

(6)(A) The Council shall meet regularly and such meetings shall be open to the public unless the Council determines to close the meeting for reasons of national security or to discuss information exempt under subsection (b).

(B) Not less frequently than annually, the Council shall hold a meeting that shall be open to the public and permit interested persons to appear and present oral and written statements to the Council.

(C) Not later than 10 business days before a meeting of the Council, notice of such meeting shall be published in the Federal Register.

(D) Except as provided in subsection (b), the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents that were made available to or prepared for or by the Council shall be made publicly available.

(E) Detailed minutes of each meeting of the Council shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the Council. The minutes shall be redacted as necessary and made publicly available.

(*l*) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(m)(1) The Director of the Office of Management and Budget, in consultation with the Attorney General, shall ensure the operation of a consolidated online request portal that allows a member of the public to submit a request for records under subsection (a) to any agency from a single website. The portal may include any additional tools the Director of the Office of Management and Budget finds will improve the implementation of this section.

(2) This subsection shall not be construed to alter the power of any other agency to create or maintain an independent online portal for the submission of a request for records under this section. The Director of the Office of Management and Budget shall establish standards for interoperability between the portal required under paragraph (1) and other request processing

software used by agencies subject to this section.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 383; Pub. L. 90–23, § 1, June 5, 1967, 81 Stat. 54; Pub. L. 93–502, §§ 1–3, Nov. 21, 1974, 88 Stat. 1561–1564; Pub. L. 94–409, § 5(b), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 95–454, title IX, § 906(a)(10), Oct. 13, 1978, 92 Stat. 1225; Pub. L. 98–620, title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357; Pub. L. 99–570, title I, §§ 1802, 1803, Oct. 27, 1986, 100 Stat. 3207–48, 3207–49; Pub. L. 104–231, §§ 3–11, Oct. 2, 1996, 110 Stat. 3049–3054; Pub. L. 107–306, title III, § 312, Nov. 27, 2002, 116 Stat. 2390; Pub. L. 110–175, §§ 3, 4(a), 5, 6(a)(1), (b)(1), 7(a), 8–10(a), 12, Dec. 31, 2007, 121 Stat. 2525–2530; Pub. L. 111–83, title V, § 564(b), Oct. 28, 2009, 123 Stat. 2184; Pub. L. 114–185, § 2, June 30, 2016, 130 Stat. 538.)

HISTORICAL AND REVISION NOTES
1966 ACT

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1002.	June 11, 1946, ch. 324, § 3, 60 Stat. 238.

In subsection (b)(3), the words ''formulated and'' are omitted as surplusage. In the last sentence of subsection (b), the words ''in any manner'' are omitted as surplusage since the prohibition is all inclusive.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

1967 ACT

Section 1 [of Pub. L. 90–23] amends section 552 of title 5, United States Code, to reflect Public Law 89–487.

In subsection (a)(1)(A), the words ''employees (and in the case of a uniformed service, the member)'' are substituted for ''officer'' to retain the coverage of Public Law 89–487 and to conform to the definitions in 5 U.S.C. 2101, 2104, and 2105.

In the last sentence of subsection (a)(2), the words ''A final order * * * may be relied on * * * only if'' are substituted for ''No final order * * * may be relied upon * * * unless''; and the words ''a party other than an agency'' and ''the party'' are substituted for ''a private party'' and ''the private party'', respectively, on authority of the definition of ''private party'' in 5 App. U.S.C. 1002(g).

In subsection (a)(3), the words ''the responsible employee, and in the case of a uniformed service, the responsible member'' are substituted for ''the responsible officers'' to retain the coverage of Public Law 89–487 and to conform to the definitions in 5 U.S.C. 2101, 2104, and 2105.

In subsection (a)(4), the words ''shall maintain and make available for public inspection a record'' are substituted for ''shall keep a record * * * and that record shall be available for public inspection''.

In subsection (b)(5) and (7), the words ''a party other than an agency'' are substituted for ''a private party'' on authority of the definition of ''private party'' in 5 App. U.S.C. 1002(g).

In subsection (c), the words ''This section does not authorize'' and ''This section is not authority'' are substituted for ''Nothing in this section authorizes'' and ''nor shall this section be authority'', respectively.

5 App. U.S.C. 1002(g), defining ''private party'' to mean a party other than an agency, is omitted since the words ''party other than an agency'' are substituted for the words ''private party'' wherever they appear in revised 5 U.S.C. 552.

5 App. U.S.C. 1002(h), prescribing the effective date, is omitted as unnecessary. That effective date is prescribed by section 4 of this bill.

Editorial Notes

REFERENCES IN TEXT

The National Security Act of 1947, referred to in subsec. (a)(3)(E), is act July 26, 1947, ch. 343, 61 Stat. 495, which was formerly classified principally to chapter 15 (§ 401 et seq.) of Title 50, War and National Defense, prior to editorial reclassification in chapter 44 (§ 3001 et seq.) of Title 50. Section 3 of the Act is now classified to section 3003 of Title 50. For complete classification of this Act to the Code, see Tables.

The date of enactment of the OPEN FOIA Act of 2009, referred to in subsec. (b)(3)(B), is the date of enactment of Pub. L. 111–83, which was approved Oct. 28, 2009.

CODIFICATION

Section 552 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2243 of Title 7, Agriculture.

AMENDMENTS

2016—Subsec. (a)(2). Pub. L. 114–185, § 2(1)(A)(i), in introductory provisions, substituted ''for public inspection in an electronic format'' for ''for public inspection and copying''.

Pub. L. 114–185, § 2(1)(A)(iii), in concluding provisions, substituted ''public inspection in an electronic format current'' for ''public inspection and copying current''.

Subsec. (a)(2)(D). Pub. L. 114–185, § 2(1)(A)(ii), added subpar. (D) and struck out former subpar. (D) which read as follows: ''copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and''.

Subsec. (a)(4)(A)(viii). Pub. L. 114–185, § 2(1)(B), added cl. (viii) and struck out former cl. (viii) which read as follows: ''An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.''

Subsec. (a)(6)(A)(i). Pub. L. 114–185, § 2(1)(C)(i), substituted ''making such request of—'' for ''making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and'' and added subcls. (I) to (III).

Subsec. (a)(6)(B)(ii). Pub. L. 114–185, § 2(1)(C)(ii), substituted ''the agency, and notify the requester of the right of the requester to seek dispute resolution services from the Office of Government Information Services.'' for ''the agency.''

Subsec. (a)(8). Pub. L. 114–185, § 2(1)(D), added par. (8).

Subsec. (b)(5). Pub. L. 114–185, § 2(2), amended par. (5) generally. Prior to amendment, par. (5) read as follows: ''inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;''.

Subsec. (e)(1). Pub. L. 114–185, § 2(3)(A)(i), in introductory provisions, inserted ''and to the Director of the Office of Government Information Services'' after ''United States''.

Subsec. (e)(1)(P), (Q). Pub. L. 114–185, § 2(3)(A)(ii)–(iv), added subpars. (P) and (Q).

Subsec. (e)(3). Pub. L. 114–185, § 2(3)(B), added par. (3) and struck out former par. (3) which read as follows: ''Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.''

Subsec. (e)(4). Pub. L. 114–185, § 2(3)(C), substituted ''Oversight and Government Reform'' for ''Government

Reform and Oversight'' and ''March'' for ''April'' and inserted ''Homeland Security and'' before ''Governmental Affairs''.

Subsec. (e)(6). Pub. L. 114–185, §2(3)(D), added par. (6) and struck out former par. (6) which read as follows: ''The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.''

Subsec. (g). Pub. L. 114–185, §2(4), in introductory provisions, substituted ''available for public inspection in an electronic format'' for ''publicly available upon request''.

Subsec. (h)(1). Pub. L. 114–185, §2(5)(A), inserted at end ''The head of the Office shall be the Director of the Office of Government Information Services.''

Subsec. (h)(2)(C). Pub. L. 114–185, §2(5)(B), added subpar. (C) and struck out former subpar. (C) which read as follows: ''recommend policy changes to Congress and the President to improve the administration of this section.''

Subsec. (h)(3). Pub. L. 114–185, §2(5)(C), added par. (3) and struck out former par. (3) which read as follows: ''The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.''

Subsec. (h)(4) to (6). Pub. L. 114–185, §2(5)(D), added pars. (4) to (6).

Subsec. (j). Pub. L. 114–185, §2(6), added subsec. (j) and struck out former subsec. (j) which read as follows: ''Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).''

Subsec. (k). Pub. L. 114–185, §2(6), added subsec. (k) and struck out former subsec. (k) which related to authority and responsibilities of the Chief FOIA Officer.

Subsec. (m). Pub. L. 114–185, §2(7), added subsec. (m).

2009—Subsec. (b)(3). Pub. L. 111–83 added par. (3) and struck out former par. (3) which read as follows: ''specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;''.

2007—Subsec. (a)(4)(A)(ii). Pub. L. 110–175, §3, inserted concluding provisions.

Subsec. (a)(4)(A)(viii). Pub. L. 110–175, §6(b)(1)(A), added cl. (viii).

Subsec. (a)(4)(E). Pub. L. 110–175, §4(a), designated existing provisions as cl. (i) and added cl. (ii).

Subsec. (a)(4)(F). Pub. L. 110–175, §5, designated existing provisions as cl. (i) and added cls. (ii) and (iii).

Subsec. (a)(6)(A). Pub. L. 110–175, §6(a)(1), inserted concluding provisions.

Subsec. (a)(6)(B)(ii). Pub. L. 110–175, §6(b)(1)(B), inserted after the first sentence ''To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency.''

Subsec. (a)(7). Pub. L. 110–175, §7(a), added par. (7).

Subsec. (b). Pub. L. 110–175, §12, in concluding provisions, inserted '', and the exemption under which the deletion is made,'' after ''The amount of information deleted'' in second sentence and after ''the amount of the information deleted'' in third sentence.

Subsec. (e)(1)(B)(ii). Pub. L. 110–175, §8(a)(1), inserted ''the number of occasions on which each statute was relied upon,'' after ''subsection (b)(3),''.

Subsec. (e)(1)(C). Pub. L. 110–175, §8(a)(2), inserted ''and average'' after ''median''.

Subsec. (e)(1)(E). Pub. L. 110–175, §8(a)(3), inserted before semicolon '', based on the date on which the requests were received by the agency''.

Subsec. (e)(1)(F) to (O). Pub. L. 110–175, §8(a)(4), (5), added subpars. (F) to (M) and redesignated former subpars. (F) and (G) as (N) and (O), respectively.

Subsec. (e)(2). Pub. L. 110–175, §8(b)(2), added par. (2). Former par. (2) redesignated (3).

Subsec. (e)(3). Pub. L. 110–175, §8(b)(1), (c), redesignated par. (2) as (3) and inserted at end ''In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.'' Former par. (3) redesignated (4).

Subsec. (e)(4) to (6). Pub. L. 110–175, §8(b)(1), redesignated pars. (3) to (5) as (4) to (6), respectively.

Subsec. (f)(2). Pub. L. 110–175, §9, added par. (2) and struck out former par. (2) which read as follows: '' 'record' and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.''

Subsecs. (h) to (*l*). Pub. L. 110–175, §10(a), added subsecs. (h) to (*l*).

2002—Subsec. (a)(3)(A). Pub. L. 107–306, §312(1), inserted ''and except as provided in subparagraph (E),'' after ''of this subsection,''.

Subsec. (a)(3)(E). Pub. L. 107–306, §312(2), added subpar. (E).

1996—Subsec. (a)(2). Pub. L. 104–231, §4(4), (5), in first sentence struck out ''and'' at end of subpar. (B) and inserted subpars. (D) and (E).

Pub. L. 104–231, §4(7), inserted after first sentence ''For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means.''

Pub. L. 104–231, §4(1), in second sentence substituted ''staff manual, instruction, or copies of records referred to in subparagraph (D)'' for ''or staff manual or instruction''.

Pub. L. 104–231, §4(2), inserted before period at end of third sentence '', and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made''.

Pub. L. 104–231, §4(3), inserted after third sentence ''If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made.''

Pub. L. 104–231, §4(6), which directed the insertion of the following new sentence after the fifth sentence ''Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999.'', was executed by making the insertion after the sixth sentence, to reflect the probable intent of Congress and the addition of a new sentence by section 4(3) of Pub. L. 104–231.

Subsec. (a)(3). Pub. L. 104–231, §5, inserted subpar. (A) designation after ''(3)'', redesignated subpars. (A) and (B) as cls. (i) and (ii), respectively, and added subpars. (B) to (D).

Subsec. (a)(4)(B). Pub. L. 104–231, §6, inserted at end ''In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).''

Subsec. (a)(6)(A)(i). Pub. L. 104–231, §8(b), substituted ''20 days'' for ''ten days''.

Subsec. (a)(6)(B). Pub. L. 104–231, §7(b), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: ''In unusual circumstances as specified in this subparagraph, the time limits prescribed in ei-

ther clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, 'unusual circumstances' means, but only to the extent reasonably necessary to the proper processing of the particular request—

''(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

''(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

''(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.''

Subsec. (a)(6)(C). Pub. L. 104–231, § 7(c), designated existing provisions as cl. (i) and added cls. (ii) and (iii).

Subsec. (a)(6)(D). Pub. L. 104–231, § 7(a), added subpar. (D).

Subsec. (a)(6)(E), (F). Pub. L. 104–231, § 8(a), (c), added subpars. (E) and (F).

Subsec. (b). Pub. L. 104–231, § 9, inserted at end of closing provisions ''The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made.''

Subsec. (e). Pub. L. 104–231, § 10, amended subsec. (e) generally, revising and restating provisions relating to reports to Congress.

Subsec. (f). Pub. L. 104–231, § 3, amended subsec. (f) generally. Prior to amendment, subsec. (f) read as follows: ''For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.''

Subsec. (g). Pub. L. 104–231, § 11, added subsec. (g).

1986—Subsec. (a)(4)(A). Pub. L. 99–570, § 1803, amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: ''In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.''

Subsec. (b)(7). Pub. L. 99–570, § 1802(a), amended par. (7) generally. Prior to amendment, par. (7) read as follows: ''investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;''.

Subsecs. (c) to (f). Pub. L. 99–570, § 1802(b), added subsec. (c) and redesignated former subsecs. (c) to (e) as (d) to (f), respectively.

1984—Subsec. (a)(4)(D). Pub. L. 98–620 repealed subpar. (D) which provided for precedence on the docket and expeditious disposition of district court proceedings authorized by subsec. (a).

1978—Subsec. (a)(4)(F). Pub. L. 95–454 substituted references to the Special Counsel for references to the Civil Service Commission wherever appearing and reference to his findings for reference to its findings.

1976—Subsec. (b)(3). Pub. L. 94–409 inserted provision excluding section 552b of this title from applicability of exemption from disclosure and provision setting forth conditions for statute specifically exempting disclosure.

1974—Subsec. (a)(2). Pub. L. 93–502, § 1(a), substituted provisions relating to maintenance and availability of current indexes, for provisions relating to maintenance and availability of a current index, and inserted provisions relating to publication and distribution of copies of indexes or supplements thereto.

Subsec. (a)(3). Pub. L. 93–502, § 1(b)(1), substituted provisions requiring requests to reasonably describe records for provisions requiring requests, for identifiable records, and struck out provisions setting forth procedures to enjoin agencies from withholding the requested records and ordering their production.

Subsec. (a)(4), (5). Pub. L. 93–502, § 1(b)(2), added par. (4) and redesignated former par. (4) as (5).

Subsec. (a)(6). Pub. L. 93–502, § 1(c), added par. (6).

Subsec. (b)(1). Pub. L. 93–502, § 2(a), designated existing provisions as cl. (A), substituted ''authorized under criteria established by an'' for ''required by'', and added cl. (B).

Subsec. (b)(7). Pub. L. 93–502, § 2(b), substituted provisions relating to exemption for investigatory records compiled for law enforcement purposes, for provisions relating to exemption for investigatory files compiled for law enforcement purposes.

Subsec. (b), foll. par. (9). Pub. L. 93–502, § 2(c), inserted provision relating to availability of segregable portion of records.

Subsecs. (d), (e). Pub. L. 93–502, § 3, added subsecs. (d) and (e).

1967—Subsec. (a). Pub. L. 90–23 substituted introductory statement requiring every agency to make available to the public certain information for former introductory provision excepting from disclosure (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating to internal management of an agency, covered in subsec. (b)(1) and (2) of this section.

Subsec. (a)(1). Pub. L. 90–23 incorporated provisions of: former subsec. (b)(1) in (A), inserting requirement of publication of names of officers as sources of information and provision for public to obtain decisions, and striking out publication requirement for delegations by the agency of final authority; former subsec. (b)(2), introductory part, in (B); former subsec. (b)(2), concluding part, in (C), inserting publication requirement for rules of procedure and descriptions of forms available or the places at which forms may be obtained; former subsec. (b)(3), introductory part, in (D), inserting requirement of general applicability of substantive rules and interpretations, added clause (E), substituted exemption of any person from failure to resort to any matter or from being adversely affected by any matter required to be published in the Federal Register but not so published for former subsec. (b)(3), concluding part, excepting from publication rules addressed to and served upon named persons in accordance with laws and final sentence reading ''A person may not be required to resort to organization or procedure not so published'' and inserted provision deeming matter, which is reasonably available, as published in the Federal Register when such matter is incorporated by reference

in the Federal Register with the approval of its Director.

Subsec. (a)(2). Pub. L. 90–23 incorporated provisions of former subsec. (c), provided for public copying of records, struck out requirement of agency publication of final opinions or orders and authority for secrecy and withholding of opinions and orders required for good cause to be held confidential and not cited as precedents, latter provision now superseded by subsec. (b) of this section, designated existing subsec. (c) as clause (A), including provision for availability of concurring and dissenting opinions, inserted provisions for availability of policy statements and interpretations in clause (B) and staff manuals and instructions in clause (C), deletion of personal identifications from records to protect personal privacy with written justification therefor, and provision for indexing and prohibition of use of records not indexed against any private party without actual and timely notice of the terms thereof.

Subsec. (a)(3). Pub. L. 90–23 incorporated provisions of former subsec. (d) and substituted provisions requiring identifiable agency records to be made available to any person upon request and compliance with rules as to time, place, and procedure for inspection, and payment of fees and provisions for Federal district court proceedings de novo for enforcement by contempt of noncompliance with court's orders with the burden on the agency and docket precedence for such proceedings for former provisions requiring matters of official record to be made available to persons properly and directly concerned except information held confidential for good cause shown, the latter provision superseded by subsec. (b) of this section.

Subsec. (a)(4). Pub. L. 90–23 added par. (4).

Subsec. (b). Pub. L. 90–23 added subsec. (b) which superseded provisions excepting from disclosure any function of the United States requiring secrecy in the public interest or any matter relating to internal management of an agency, formerly contained in former subsec. (a), final opinions or orders required for good cause to be held confidential and not cited as precedents, formerly contained in subsec. (c), and information held confidential for good cause found, contained in former subsec. (d) of this section.

Subsec. (c). Pub. L. 90–23 added subsec. (c).

Statutory Notes and Related Subsidiaries

CHANGE OF NAME

Committee on Oversight and Government Reform of House of Representatives changed to Committee on Oversight and Reform of House of Representatives by House Resolution No. 6, One Hundred Sixteenth Congress, Jan. 9, 2019.

EFFECTIVE DATE OF 2016 AMENDMENT

Pub. L. 114–185, §6, June 30, 2016, 130 Stat. 544, provided that: ''This Act [amending this section and section 3102 of Title 44, Public Printing and Documents, and enacting provisions set out as notes under this section and section 101 of this title], and the amendments made by this Act, shall take effect on the date of enactment of this Act [June 30, 2016] and shall apply to any request for records under section 552 of title 5, United States Code, made after the date of enactment of this Act.''

EFFECTIVE DATE OF 2007 AMENDMENT

Pub. L. 110–175, §6(a)(2), Dec. 31, 2007, 121 Stat. 2526, provided that: ''The amendment made by this subsection [amending this section] shall take effect 1 year after the date of enactment of this Act [Dec. 31, 2007].''

Pub. L. 110–175, §6(b)(2), Dec. 31, 2007, 121 Stat. 2526, provided that: ''The amendment made by this subsection [amending this section] shall take effect 1 year after the date of enactment of this Act [Dec. 31, 2007] and apply to requests for information under section 552 of title 5, United States Code, filed on or after that effective date.''

Pub. L. 110–175, §7(b), Dec. 31, 2007, 121 Stat. 2527, provided that: ''The amendment made by this section [amending this section] shall take effect 1 year after the date of enactment of this Act [Dec. 31, 2007] and apply to requests for information under section 552 of title 5, United States Code, filed on or after that effective date.''

Pub. L. 110–175, §10(b), Dec. 31, 2007, 121 Stat. 2530, provided that: ''The amendments made by this section [amending this section] shall take effect on the date of enactment of this Act [Dec. 31, 2007].''

EFFECTIVE DATE OF 1996 AMENDMENT

Pub. L. 104–231, §12, Oct. 2, 1996, 110 Stat. 3054, provided that:

''(a) IN GENERAL.—Except as provided in subsection (b), this Act [amending this section and enacting provisions set out as notes below] shall take effect 180 days after the date of the enactment of this Act [Oct. 2, 1996].

''(b) PROVISIONS EFFECTIVE ON ENACTMENT [sic].—Sections 7 and 8 [amending this section] shall take effect one year after the date of the enactment of this Act [Oct. 2, 1996].''

EFFECTIVE DATE OF 1986 AMENDMENT

Pub. L. 99–570, title I, §1804, Oct. 27, 1986, 100 Stat. 3207–50, provided that:

''(a) The amendments made by section 1802 [amending this section] shall be effective on the date of enactment of this Act [Oct. 27, 1986], and shall apply with respect to any requests for records, whether or not the request was made prior to such date, and shall apply to any civil action pending on such date.

''(b)(1) The amendments made by section 1803 [amending this section] shall be effective 180 days after the date of enactment of this Act [Oct. 27, 1986], except that regulations to implement such amendments shall be promulgated by such 180th day.

''(2) The amendments made by section 1803 [amending this section] shall apply with respect to any requests for records, whether or not the request was made prior to such date, and shall apply to any civil action pending on such date, except that review charges applicable to records requested for commercial use shall not be applied by an agency to requests made before the effective date specified in paragraph (1) of this subsection or before the agency has finally issued its regulations.''

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–620 not applicable to cases pending on Nov. 8, 1984, see section 403 of Pub. L. 98–620, set out as an Effective Date note under section 1657 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95–454 effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95–454, set out as a note under section 1101 of this title.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–409 effective 180 days after Sept. 13, 1976, see section 6 of Pub. L. 94–409, set out as an Effective Date note under section 552b of this title.

EFFECTIVE DATE OF 1974 AMENDMENT

Pub. L. 93–502, §4, Nov. 21, 1974, 88 Stat. 1564, provided that: ''The amendments made by this Act [amending this section] shall take effect on the ninetieth day beginning after the date of enactment of this Act [Nov. 21, 1974].''

EFFECTIVE DATE OF 1967 AMENDMENT

Pub. L. 90–23, §4, June 5, 1967, 81 Stat. 56, provided that: ''This Act [amending this section] shall be effective July 4, 1967, or on the date of enactment [June 5, 1967], whichever is later.''

SHORT TITLE OF 1996 AMENDMENT

Pub. L. 104–231, §1, Oct. 2, 1996, 110 Stat. 3048, provided that: ''This Act [amending this section and enacting

provisions set out as notes under this section] may be cited as the 'Electronic Freedom of Information Act Amendments of 1996'.''

SHORT TITLE OF 1986 AMENDMENT

Pub. L. 99–570, title I, §1801, Oct. 27, 1986, 100 Stat. 3207–48, provided that: ''This subtitle [subtitle N (§§1801–1804) of title I of Pub. L. 99–570, amending this section and enacting provisions set out as a note under this section] may be cited as the 'Freedom of Information Reform Act of 1986'.''

SHORT TITLE

This section is popularly known as the ''Freedom of Information Act''.

REVIEW AND ISSUANCE OF REGULATIONS

Pub. L. 114–185, §3, June 30, 2016, 130 Stat. 544, provided that:

''(a) IN GENERAL.—Not later than 180 days after the date of enactment of this Act [June 30, 2016], the head of each agency (as defined in section 551 of title 5, United States Code) shall review the regulations of such agency and shall issue regulations on procedures for the disclosure of records under section 552 of title 5, United States Code, in accordance with the amendments made by section 2 [amending this section].

''(b) REQUIREMENTS.—The regulations of each agency shall include procedures for engaging in dispute resolution through the FOIA Public Liaison and the Office of Government Information Services.''

TREATMENT OF INFORMATION IN CATCH A SERIAL OFFENDER PROGRAM FOR CERTAIN PURPOSES

Pub. L. 116–92, div. A, title V, §550, Dec. 20, 2019, 133 Stat. 1379, provided that:

''(a) TREATMENT UNDER FOIA.—Victim disclosures under the Catch a Serial Offender Program shall be withheld from public disclosure under paragraph (b)(3) of section 552 of title 5, United States Code (commonly referred to as the 'Freedom of Information Act').

''(b) PRESERVATION OF RESTRICTED REPORT.—The transmittal or receipt in connection with the Catch a Serial Offender Program of a report on a sexual assault that is treated as a restricted report shall not operate to terminate its treatment or status as a restricted report.''

PROTECTED NATIONAL SECURITY DOCUMENTS

Pub. L. 111–83, title V, §565, Oct. 28, 2009, 123 Stat. 2184, provided that:

''(a) SHORT TITLE.—This section may be cited as the 'Protected National Security Documents Act of 2009'.

''(b) Notwithstanding any other provision of the law to the contrary, no protected document, as defined in subsection (c), shall be subject to disclosure under section 552 of title 5, United States Code[,] or any proceeding under that section.

''(c) DEFINITIONS.—In this section:

''(1) PROTECTED DOCUMENT.—The term 'protected document' means any record—

''(A) for which the Secretary of Defense has issued a certification, as described in subsection (d), stating that disclosure of that record would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States; and

''(B) that is a photograph that—

''(i) was taken during the period beginning on September 11, 2001, through January 22, 2009; and

''(ii) relates to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States in operations outside of the United States.

''(2) PHOTOGRAPH.—The term 'photograph' encompasses all photographic images, whether originals or copies, including still photographs, negatives, digital images, films, video tapes, and motion pictures.

''(d) CERTIFICATION.—

''(1) IN GENERAL.—For any photograph described under subsection (c)(1), the Secretary of Defense shall issue a certification if the Secretary of Defense determines that disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.

''(2) CERTIFICATION EXPIRATION.—A certification and a renewal of a certification issued pursuant to subsection (d)(3) shall expire 3 years after the date on which the certification or renewal, [sic] is issued by the Secretary of Defense.

''(3) CERTIFICATION RENEWAL.—The Secretary of Defense may issue—

''(A) a renewal of a certification at any time; and

''(B) more than 1 renewal of a certification.

''(4) NOTICE TO CONGRESS.—The Secretary of Defense shall provide Congress a timely notice of the Secretary's issuance of a certification and of a renewal of a certification.

''(e) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to preclude the voluntary disclosure of a protected document.

''(f) EFFECTIVE DATE.—This section shall take effect on the date of enactment of this Act [Oct. 28, 2009] and apply to any protected document.''

FINDINGS

Pub. L. 110–175, §2, Dec. 31, 2007, 121 Stat. 2524, provided that: ''Congress finds that—

''(1) the Freedom of Information Act [probably means Pub. L. 89–487 which amended section 1002 of former Title 5, Executive Departments and Government Officers and Employees, see Historical and Revision notes above] was signed into law on July 4, 1966, because the American people believe that—

''(A) our constitutional democracy, our system of self-government, and our commitment to popular sovereignty depends upon the consent of the governed;

''(B) such consent is not meaningful unless it is informed consent; and

''(C) as Justice Black noted in his concurring opinion in Barr v. Matteo (360 U.S. 564 (1959)), 'The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees.';

''(2) the American people firmly believe that our system of government must itself be governed by a presumption of openness;

''(3) the Freedom of Information Act establishes a 'strong presumption in favor of disclosure' as noted by the United States Supreme Court in United States Department of State v. Ray (502 U.S. 164 (1991)), a presumption that applies to all agencies governed by that Act;

''(4) 'disclosure, not secrecy, is the dominant objective of the Act,' as noted by the United States Supreme Court in Department of Air Force v. Rose (425 U.S. 352 (1976));

''(5) in practice, the Freedom of Information Act has not always lived up to the ideals of that Act; and

''(6) Congress should regularly review section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), in order to determine whether further changes and improvements are necessary to ensure that the Government remains open and accessible to the American people and is always based not upon the 'need to know' but upon the fundamental 'right to know'.''

LIMITATION ON AMOUNTS OBLIGATED OR EXPENDED FROM CLAIMS AND JUDGMENT FUND

Pub. L. 110–175, §4(b), Dec. 31, 2007, 121 Stat. 2525, provided that: ''Notwithstanding section 1304 of title 31,

United States Code, no amounts may be obligated or expended from the Claims and Judgment Fund of the United States Treasury to pay the costs resulting from fees assessed under section 552(a)(4)(E) of title 5, United States Code. Any such amounts shall be paid only from funds annually appropriated for any authorized purpose for the Federal agency against which a claim or judgment has been rendered.''

NONDISCLOSURE OF CERTAIN PRODUCTS OF COMMERCIAL SATELLITE OPERATIONS

Pub. L. 108–375, div. A, title IX, §914, Oct. 28, 2004, 118 Stat. 2029, provided that:

''(a) MANDATORY DISCLOSURE REQUIREMENTS INAPPLICABLE.—The requirements to make information available under section 552 of title 5, United States Code, shall not apply to land remote sensing information.

''(b) LAND REMOTE SENSING INFORMATION DEFINED.—In this section, the term 'land remote sensing information'—

''(1) means any data that—

''(A) are collected by land remote sensing; and

''(B) are prohibited from sale to customers other than the United States Government and United States Government-approved customers for reasons of national security pursuant to the terms of an operating license issued pursuant to the Land Remote Sensing Policy Act of 1992 ([former] 15 U.S.C. 5601 et seq.) [now 51 U.S.C. 60101 et seq.]; and

''(2) includes any imagery and other product that is derived from such data and which is prohibited from sale to customers other than the United States Government and United States Government-approved customers for reasons of national security pursuant to the terms of an operating license described in paragraph (1)(B).

''(c) STATE OR LOCAL GOVERNMENT DISCLOSURES.—Land remote sensing information provided by the head of a department or agency of the United States to a State, local, or tribal government may not be made available to the general public under any State, local, or tribal law relating to the disclosure of information or records.

''(d) SAFEGUARDING INFORMATION.—The head of each department or agency of the United States having land remote sensing information within that department or agency or providing such information to a State, local, or tribal government shall take such actions, commensurate with the sensitivity of that information, as are necessary to protect that information from disclosure other than in accordance with this section and other applicable law.

''(e) ADDITIONAL DEFINITION.—In this section, the term 'land remote sensing' has the meaning given such term in section 3 of the Land Remote Sensing Policy Act of 1992 ([former] 15 U.S.C. 5602) [now 51 U.S.C. 60101].

''(f) DISCLOSURE TO CONGRESS.—Nothing in this section shall be construed to authorize the withholding of information from the appropriate committees of Congress.''

DISCLOSURE OF ARSON, EXPLOSIVE, OR FIREARM RECORDS

Pub. L. 108–7, div. J, title VI, §644, Feb. 20, 2003, 117 Stat. 473, provided that: ''No funds appropriated under this Act or any other Act with respect to any fiscal year shall be available to take any action based upon any provision of 5 U.S.C. 552 with respect to records collected or maintained pursuant to 18 U.S.C. 846(b), 923(g)(3) or 923(g)(7), or provided by Federal, State, local, or foreign law enforcement agencies in connection with arson or explosives incidents or the tracing of a firearm, except that such records may continue to be disclosed to the extent and in the manner that records so collected, maintained, or obtained have been disclosed under 5 U.S.C. 552 prior to the date of the enactment of this Act [Feb. 20, 2003].''

DISCLOSURE OF INFORMATION ON JAPANESE IMPERIAL GOVERNMENT

Pub. L. 106–567, title VIII, Dec. 27, 2000, 114 Stat. 2864, as amended by Pub. L. 108–199, div. H, §163, Jan. 23, 2004, 118 Stat. 452; Pub. L. 109–5, §1, Mar. 25, 2005, 119 Stat. 19, provided that:

''SEC. 801. SHORT TITLE.

''This title may be cited as the 'Japanese Imperial Government Disclosure Act of 2000'.

''SEC. 802. DESIGNATION.

''(a) DEFINITIONS.—In this section:

''(1) AGENCY.—The term 'agency' has the meaning given such term under section 551 of title 5, United States Code.

''(2) INTERAGENCY GROUP.—The term 'Interagency Group' means the Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group established under subsection (b).

''(3) JAPANESE IMPERIAL GOVERNMENT RECORDS.—The term 'Japanese Imperial Government records' means classified records or portions of records that pertain to any person with respect to whom the United States Government, in its sole discretion, has grounds to believe ordered, incited, assisted, or otherwise participated in the experimentation on, and persecution of, any person because of race, religion, national origin, or political opinion, during the period beginning September 18, 1931, and ending on December 31, 1948, under the direction of, or in association with—

''(A) the Japanese Imperial Government;

''(B) any government in any area occupied by the military forces of the Japanese Imperial Government;

''(C) any government established with the assistance or cooperation of the Japanese Imperial Government; or

''(D) any government which was an ally of the Japanese Imperial Government.

''(4) RECORD.—The term 'record' means a Japanese Imperial Government record.

''(b) ESTABLISHMENT OF INTERAGENCY GROUP.—

''(1) IN GENERAL.—Not later than 60 days after the date of the enactment of this Act [Dec. 27, 2000], the President shall designate the Working Group established under the Nazi War Crimes Disclosure Act (Public Law 105–246; 5 U.S.C. 552 note) to also carry out the purposes of this title with respect to Japanese Imperial Government records, and that Working Group shall remain in existence for 6 years after the date on which this title takes effect. Such Working Group is redesignated as the 'Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group'.

''(2) MEMBERSHIP.—[Amended Pub. L. 105–246, set out as a note below.]

''(c) FUNCTIONS.—Not later than 1 year after the date of the enactment of this Act [Dec. 27, 2000], the Interagency Group shall, to the greatest extent possible consistent with section 803—

''(1) locate, identify, inventory, recommend for declassification, and make available to the public at the National Archives and Records Administration, all classified Japanese Imperial Government records of the United States;

''(2) coordinate with agencies and take such actions as necessary to expedite the release of such records to the public; and

''(3) submit a report to Congress, including the Committee on Government Reform [now Committee on Oversight and Reform] and the Permanent Select Committee on Intelligence of the House of Representatives, and the Committee on the Judiciary and the Select Committee on Intelligence of the Senate, describing all such records, the disposition of such records, and the activities of the Interagency Group and agencies under this section.

''(d) FUNDING.—There is authorized to be appropriated such sums as may be necessary to carry out the provisions of this title.

''SEC. 803. REQUIREMENT OF DISCLOSURE OF RECORDS.

''(a) RELEASE OF RECORDS.—Subject to subsections (b), (c), and (d), the Japanese Imperial Government Records Interagency Working Group shall release in their entirety Japanese Imperial Government records.

''(b) EXEMPTIONS.—An agency head may exempt from release under subsection (a) specific information, that would—

''(1) constitute an unwarranted invasion of personal privacy;

''(2) reveal the identity of a confidential human source, or reveal information about an intelligence source or method when the unauthorized disclosure of that source or method would damage the national security interests of the United States;

''(3) reveal information that would assist in the development or use of weapons of mass destruction;

''(4) reveal information that would impair United States cryptologic systems or activities;

''(5) reveal information that would impair the application of state-of-the-art technology within a United States weapon system;

''(6) reveal United States military war plans that remain in effect;

''(7) reveal information that would impair relations between the United States and a foreign government, or undermine ongoing diplomatic activities of the United States;

''(8) reveal information that would impair the current ability of United States Government officials to protect the President, Vice President, and other officials for whom protection services are authorized in the interest of national security;

''(9) reveal information that would impair current national security emergency preparedness plans; or

''(10) violate a treaty or other international agreement.

''(c) APPLICATIONS OF EXEMPTIONS.—

''(1) IN GENERAL.—In applying the exemptions provided in paragraphs (2) through (10) of subsection (b), there shall be a presumption that the public interest will be served by disclosure and release of the records of the Japanese Imperial Government. The exemption may be asserted only when the head of the agency that maintains the records determines that disclosure and release would be harmful to a specific interest identified in the exemption. An agency head who makes such a determination shall promptly report it to the committees of Congress with appropriate jurisdiction, including the Committee on the Judiciary and the Select Committee on Intelligence of the Senate and the Committee on Government Reform [now Committee on Oversight and Reform] and the Permanent Select Committee on Intelligence of the House of Representatives.

''(2) APPLICATION OF TITLE 5.—A determination by an agency head to apply an exemption provided in paragraphs (2) through (9) of subsection (b) shall be subject to the same standard of review that applies in the case of records withheld under section 552(b)(1) of title 5, United States Code.

''(d) RECORDS RELATED TO INVESTIGATIONS OR PROSECUTIONS.—This section shall not apply to records—

''(1) related to or supporting any active or inactive investigation, inquiry, or prosecution by the Office of Special Investigations of the Department of Justice; or

''(2) solely in the possession, custody, or control of the Office of Special Investigations.

''SEC. 804. EXPEDITED PROCESSING OF REQUESTS FOR JAPANESE IMPERIAL GOVERNMENT RECORDS.

''For purposes of expedited processing under section 552(a)(6)(E) of title 5, United States Code, any person who was persecuted in the manner described in section 802(a)(3) and who requests a Japanese Imperial Government record shall be deemed to have a compelling need for such record.

''SEC. 805. EFFECTIVE DATE.

''The provisions of this title shall take effect on the date that is 90 days after the date of the enactment of this Act [Dec. 27, 2000].''

NAZI WAR CRIMES DISCLOSURE

Pub. L. 105–246, Oct. 8, 1998, 112 Stat. 1859, as amended by Pub. L. 106–567, § 802(b)(2), Dec. 27, 2000, 114 Stat. 2865, provided that:

''SECTION 1. SHORT TITLE.

''This Act may be cited as the 'Nazi War Crimes Disclosure Act'.

''SEC. 2. ESTABLISHMENT OF NAZI WAR CRIMINAL RECORDS INTERAGENCY WORKING GROUP.

''(a) DEFINITIONS.—In this section the term—

''(1) 'agency' has the meaning given such term under section 551 of title 5, United States Code;

''(2) 'Interagency Group' means the Nazi War Criminal Records Interagency Working Group [redesignated Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group, see section 802(b)(1) of Pub. L. 106–567, set out above] established under subsection (b);

''(3) 'Nazi war criminal records' has the meaning given such term under section 3 of this Act; and

''(4) 'record' means a Nazi war criminal record.

''(b) ESTABLISHMENT OF INTERAGENCY GROUP.—

''(1) IN GENERAL.—Not later than 60 days after the date of enactment of this Act [Oct. 8, 1998], the President shall establish the Nazi War Criminal Records Interagency Working Group, which shall remain in existence for 3 years after the date the Interagency Group is established.

''(2) MEMBERSHIP.—The President shall appoint to the Interagency Group individuals whom the President determines will most completely and effectively carry out the functions of the Interagency Group within the time limitations provided in this section, including the Director of the Holocaust Museum, the Historian of the Department of State, the Archivist of the United States, the head of any other agency the President considers appropriate, and no more than 4 other persons who shall be members of the public, of whom 3 shall be persons appointed under the provisions of this Act in effect on October 8, 1998..[sic] The head of an agency appointed by the President may designate an appropriate officer to serve on the Interagency Group in lieu of the head of such agency.

''(3) INITIAL MEETING.—Not later than 90 days after the date of enactment of this Act, the Interagency Group shall hold an initial meeting and begin the functions required under this section.

''(c) FUNCTIONS.—Not later than 1 year after the date of enactment of this Act [Oct. 8, 1998], the Interagency Group shall, to the greatest extent possible consistent with section 3 of this Act—

''(1) locate, identify, inventory, recommend for declassification, and make available to the public at the National Archives and Records Administration, all classified Nazi war criminal records of the United States;

''(2) coordinate with agencies and take such actions as necessary to expedite the release of such records to the public; and

''(3) submit a report to Congress, including the Committee on the Judiciary of the Senate and the Committee on Government Reform and Oversight [now Committee on Oversight and Reform] of the House of Representatives, describing all such records, the disposition of such records, and the activities of the Interagency Group and agencies under this section.

''(d) FUNDING.—There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

''SEC. 3. REQUIREMENT OF DISCLOSURE OF RECORDS REGARDING PERSONS WHO COMMITTED NAZI WAR CRIMES.

''(a) NAZI WAR CRIMINAL RECORDS.—For purposes of this Act, the term 'Nazi war criminal records' means classified records or portions of records that—

''(1) pertain to any person with respect to whom the United States Government, in its sole discretion, has grounds to believe ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

''(A) the Nazi government of Germany;

''(B) any government in any area occupied by the military forces of the Nazi government of Germany;

''(C) any government established with the assistance or cooperation of the Nazi government of Germany; or

''(D) any government which was an ally of the Nazi government of Germany; or

''(2) pertain to any transaction as to which the United States Government, in its sole discretion, has grounds to believe—

''(A) involved assets taken from persecuted persons during the period beginning on March 23, 1933, and ending on May 8, 1945, by, under the direction of, on behalf of, or under authority granted by the Nazi government of Germany or any nation then allied with that government; and

''(B) such transaction was completed without the assent of the owners of those assets or their heirs or assigns or other legitimate representatives.

''(b) RELEASE OF RECORDS.—

''(1) IN GENERAL.—Subject to paragraphs (2), (3), and (4), the Nazi War Criminal Records Interagency Working Group shall release in their entirety Nazi war criminal records that are described in subsection (a).

''(2) EXCEPTION FOR PRIVACY, ETC.—An agency head may exempt from release under paragraph (1) specific information, that would—

''(A) constitute a clearly unwarranted invasion of personal privacy;

''(B) reveal the identity of a confidential human source, or reveal information about the application of an intelligence source or method, or reveal the identity of a human intelligence source when the unauthorized disclosure of that source would clearly and demonstrably damage the national security interests of the United States;

''(C) reveal information that would assist in the development or use of weapons of mass destruction;

''(D) reveal information that would impair United States cryptologic systems or activities;

''(E) reveal information that would impair the application of state-of-the-art technology within a United States weapon system;

''(F) reveal actual United States military war plans that remain in effect;

''(G) reveal information that would seriously and demonstrably impair relations between the United States and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the United States;

''(H) reveal information that would clearly and demonstrably impair the current ability of United States Government officials to protect the President, Vice President, and other officials for whom protection services, in the interest of national security, are authorized;

''(I) reveal information that would seriously and demonstrably impair current national security emergency preparedness plans; or

''(J) violate a treaty or international agreement.

''(3) APPLICATION OF EXEMPTIONS.—

''(A) IN GENERAL.—In applying the exemptions listed in subparagraphs (B) through (J) of paragraph (2), there shall be a presumption that the public interest in the release of Nazi war criminal records will be served by disclosure and release of the records. Assertion of such exemption may only be made when the agency head determines that disclosure and release would be harmful to a specific interest identified in the exemption. An agency head who makes such a determination shall promptly report it to the committees of Congress with appropriate jurisdiction, including the Committee on the Judiciary of the Senate and the Committee on Government Reform and Oversight [now Committee on Oversight and Reform] of the House of Representatives. The exemptions set forth in paragraph (2) shall constitute the only authority pursuant to which an agency head may exempt records otherwise subject to release under paragraph (1).

''(B) APPLICATION OF TITLE 5.—A determination by an agency head to apply an exemption listed in subparagraphs (B) through (I) of paragraph (2) shall be subject to the same standard of review that applies in the case of records withheld under section 552(b)(1) of title 5, United States Code.

''(4) LIMITATION ON APPLICATION.—This subsection shall not apply to records—

''(A) related to or supporting any active or inactive investigation, inquiry, or prosecution by the Office of Special Investigations of the Department of Justice; or

''(B) solely in the possession, custody, or control of that office.

''(c) INAPPLICABILITY OF NATIONAL SECURITY ACT OF 1947 EXEMPTION.—Section 701(a) of the National Security Act of 1947 (50 U.S.C. 431[(a)]) [now 50 U.S.C. 3141(a)] shall not apply to any operational file, or any portion of any operational file, that constitutes a Nazi war criminal record under section 3 of this Act.

''SEC. 4. EXPEDITED PROCESSING OF FOIA REQUESTS FOR NAZI WAR CRIMINAL RECORDS.

''(a) EXPEDITED PROCESSING.—For purposes of expedited processing under section 552(a)(6)(E) of title 5, United States Code, any requester of a Nazi war criminal record shall be deemed to have a compelling need for such record.

''(b) REQUESTER.—For purposes of this section, the term 'requester' means any person who was persecuted in the manner described under section 3(a)(1) of this Act who requests a Nazi war criminal record.

''SEC. 5. EFFECTIVE DATE.

''This Act and the amendments made by this Act shall take effect on the date that is 90 days after the date of enactment of this Act [Oct. 8, 1998].''

CONGRESSIONAL STATEMENT OF FINDINGS AND PURPOSE; PUBLIC ACCESS TO INFORMATION IN ELECTRONIC FORMAT

Pub. L. 104–231, §2, Oct. 2, 1996, 110 Stat. 3048, provided that:

''(a) FINDINGS.—The Congress finds that—

''(1) the purpose of section 552 of title 5, United States Code, popularly known as the Freedom of Information Act, is to require agencies of the Federal Government to make certain agency information available for public inspection and copying and to establish and enable enforcement of the right of any person to obtain access to the records of such agencies, subject to statutory exemptions, for any public or private purpose;

''(2) since the enactment of the Freedom of Information Act in 1966, and the amendments enacted in 1974 and 1986, the Freedom of Information Act has been a valuable means through which any person can learn how the Federal Government operates;

''(3) the Freedom of Information Act has led to the disclosure of waste, fraud, abuse, and wrongdoing in the Federal Government;

''(4) the Freedom of Information Act has led to the identification of unsafe consumer products, harmful drugs, and serious health hazards;

''(5) Government agencies increasingly use computers to conduct agency business and to store publicly valuable agency records and information; and

''(6) Government agencies should use new technology to enhance public access to agency records and information.

''(b) PURPOSES.—The purposes of this Act [see Short Title of 1996 Amendment note above] are to—

''(1) foster democracy by ensuring public access to agency records and information;

''(2) improve public access to agency records and information;

''(3) ensure agency compliance with statutory time limits; and

''(4) maximize the usefulness of agency records and information collected, maintained, used, retained, and disseminated by the Federal Government.''

FREEDOM OF INFORMATION ACT EXEMPTION FOR CERTAIN OPEN SKIES TREATY DATA

Pub. L. 103–236, title V, § 533, Apr. 30, 1994, 108 Stat. 480, provided that:

''(a) IN GENERAL.—Data with respect to a foreign country collected by sensors during observation flights conducted in connection with the Treaty on Open Skies, including flights conducted prior to entry into force of the treaty, shall be exempt from disclosure under the Freedom of Information Act—

''(1) if the country has not disclosed the data to the public; and

''(2) if the country has not, acting through the Open Skies Consultative Commission or any other diplomatic channel, authorized the United States to disclose the data to the public.

''(b) STATUTORY CONSTRUCTION.—This section constitutes a specific exemption within the meaning of section 552(b)(3) of title 5, United States Code.

''(c) DEFINITIONS.—For the purposes of this section—

''(1) the term 'Freedom of Information Act' means the provisions of section 552 of title 5, United States Code;

''(2) the term 'Open Skies Consultative Commission' means the commission established pursuant to Article X of the Treaty on Open Skies; and

''(3) the term 'Treaty on Open Skies' means the Treaty on Open Skies, signed at Helsinki on March 24, 1992.''

Executive Documents

CLASSIFIED NATIONAL SECURITY INFORMATION

For provisions relating to a response to a request for information under this section when the fact of its existence or nonexistence is itself classified or when it was originally classified by another agency, see Ex. Ord. No. 13526, § 3.6, Dec. 29, 2009, 75 F.R. 718, set out as a note under section 3161 of Title 50, War and National Defense.

EXECUTIVE ORDER NO. 12174

Ex. Ord. No. 12174, Nov. 30, 1979, 44 F.R. 69609, which related to minimizing Federal paperwork, was revoked by Ex. Ord. No. 12291, Feb. 17, 1981, 46 F.R. 13193, formerly set out as a note under section 601 of this title.

EX. ORD. NO. 12600. PREDISCLOSURE NOTIFICATION PROCEDURES FOR CONFIDENTIAL COMMERCIAL INFORMATION

Ex. Ord. No. 12600, June 23, 1987, 52 F.R. 23781, provided:

By the authority vested in me as President by the Constitution and statutes of the United States of America, and in order to provide predisclosure notification procedures under the Freedom of Information Act [5 U.S.C. 552] concerning confidential commercial information, and to make existing agency notification provisions more uniform, it is hereby ordered as follows:

SECTION 1. The head of each Executive department and agency subject to the Freedom of Information Act [5 U.S.C. 552] shall, to the extent permitted by law, establish procedures to notify submitters of records containing confidential commercial information as described in section 3 of this Order, when those records are requested under the Freedom of Information Act [FOIA], 5 U.S.C. 552, as amended, if after reviewing the request, the responsive records, and any appeal by the requester, the department or agency determines that it may be required to disclose the records. Such notice requires that an agency use good-faith efforts to advise submitters of confidential commercial information of the procedures established under this Order. Further, where notification of a voluminous number of submitters is required, such notification may be accomplished by posting or publishing the notice in a place reasonably calculated to accomplish notification.

SEC. 2. For purposes of this Order, the following definitions apply:

(a) ''Confidential commercial information'' means records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(b) ''Submitter'' means any person or entity who provides confidential commercial information to the government. The term ''submitter'' includes, but is not limited to, corporations, state governments, and foreign governments.

SEC. 3. (a) For confidential commercial information submitted prior to January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law, provide a submitter with notice pursuant to section 1 whenever:

(i) the records are less than 10 years old and the information has been designated by the submitter as confidential commercial information; or

(ii) the department or agency has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(b) For confidential commercial information submitted on or after January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law, establish procedures to permit submitters of confidential commercial information to designate, at the time the information is submitted to the Federal government or a reasonable time thereafter, any information the disclosure of which the submitter claims could reasonably be expected to cause substantial competitive harm. Such agency procedures may provide for the expiration, after a specified period of time or changes in circumstances, of designations of competitive harm made by submitters. Additionally, such procedures may permit the agency to designate specific classes of information that will be treated by the agency as if the information had been so designated by the submitter. The head of each Executive department or agency shall, to the extent permitted by law, provide the submitter notice in accordance with section 1 of this Order whenever the department or agency determines that it may be required to disclose records:

(i) designated pursuant to this subsection; or

(ii) the disclosure of which the department or agency has reason to believe could reasonably be expected to cause substantial competitive harm.

SEC. 4. When notification is made pursuant to section 1, each agency's procedures shall, to the extent permitted by law, afford the submitter a reasonable period of time in which the submitter or its designee may object to the disclosure of any specified portion of the information and to state all grounds upon which disclosure is opposed.

SEC. 5. Each agency shall give careful consideration to all such specified grounds for nondisclosure prior to making an administrative determination of the issue. In all instances when the agency determines to disclose the requested records, its procedures shall provide that the agency give the submitter a written statement briefly explaining why the submitter's objections are not sustained. Such statement shall, to the extent permitted by law, be provided a reasonable number of days prior to a specified disclosure date.

SEC. 6. Whenever a FOIA requester brings suit seeking to compel disclosure of confidential commercial information, each agency's procedures shall require that the submitter be promptly notified.

SEC. 7. The designation and notification procedures required by this Order shall be established by regulations, after notice and public comment. If similar procedures or regulations already exist, they should be reviewed for conformity and revised where necessary. Existing procedures or regulations need not be modified if they are in compliance with this Order.

SEC. 8. The notice requirements of this Order need not be followed if:

(a) The agency determines that the information should not be disclosed;

(b) The information has been published or has been officially made available to the public;

(c) Disclosure of the information is required by law (other than 5 U.S.C. 552);

(d) The disclosure is required by an agency rule that (1) was adopted pursuant to notice and public comment, (2) specifies narrow classes of records submitted to the agency that are to be released under the Freedom of Information Act [5 U.S.C. 552], and (3) provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm;

(e) The information requested is not designated by the submitter as exempt from disclosure in accordance with agency regulations promulgated pursuant to section 7, when the submitter had an opportunity to do so at the time of submission of the information or a reasonable time thereafter, unless the agency has substantial reason to believe that disclosure of the information would result in competitive harm; or

(f) The designation made by the submitter in accordance with agency regulations promulgated pursuant to section 7 appears obviously frivolous; except that, in such case, the agency must provide the submitter with written notice of any final administrative disclosure determination within a reasonable number of days prior to the specified disclosure date.

SEC. 9. Whenever an agency notifies a submitter that it may be required to disclose information pursuant to section 1 of this Order, the agency shall also notify the requester that notice and an opportunity to comment are being provided the submitter. Whenever an agency notifies a submitter of a final decision pursuant to section 5 of this Order, the agency shall also notify the requester.

SEC. 10. This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

RONALD REAGAN.

EX. ORD. NO. 13110. NAZI WAR CRIMES AND JAPANESE IMPERIAL GOVERNMENT RECORDS INTERAGENCY WORKING GROUP

Ex. Ord. No. 13110, Jan. 11, 1999, 64 F.R. 2419, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Nazi War Crimes Disclosure Act (Public Law 105–246) (the ''Act'') [5 U.S.C. 552 note], it is hereby ordered as follows:

SECTION 1. *Establishment of Working Group.* There is hereby established the Nazi War Criminal Records Interagency Working Group [now Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group] (Working Group). The function of the Group shall be to locate, inventory, recommend for declassification, and make available to the public at the National Archives and Records Administration all classified Nazi war criminal records of the United States, subject to certain designated exceptions as provided in the Act. The Working Group shall coordinate with agencies and take such actions as necessary to expedite the release of such records to the public.

SEC. 2. *Schedule.* The Working Group should complete its work to the greatest extent possible and report to the Congress within 1 year.

SEC. 3. *Membership.* (a) The Working Group shall be composed of the following members:

(1) Archivist of the United States (who shall serve as Chair of the Working Group);

(2) Secretary of Defense;

(3) Attorney General;

(4) Director of Central Intelligence;

(5) Director of the Federal Bureau of Investigation;

(6) Director of the United States Holocaust Memorial Museum;

(7) Historian of the Department of State; and

(8) Three other persons appointed by the President.

(b) The Senior Director for Records and Access Management of the National Security Council will serve as the liaison to and attend the meetings of the Working Group. Members of the Working Group who are full-time Federal officials may serve on the Working Group through designees.

SEC. 4. *Administration.* (a) To the extent permitted by law and subject to the availability of appropriations, the National Archives and Records Administration shall provide the Working Group with funding, administrative services, facilities, staff, and other support services necessary for the performance of the functions of the Working Group.

(b) The Working Group shall terminate 3 years from the date of this Executive order.

WILLIAM J. CLINTON.

EX. ORD. NO. 13392. IMPROVING AGENCY DISCLOSURE OF INFORMATION

Ex. Ord. No. 13392, Dec. 14, 2005, 70 F.R. 75373, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to ensure appropriate agency disclosure of information, and consistent with the goals of section 552 of title 5, United States Code, it is hereby ordered as follows:

SECTION 1. *Policy.*

(a) The effective functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well informed. For nearly four decades, the Freedom of Information Act (FOIA) [5 U.S.C. 552] has provided an important means through which the public can obtain information regarding the activities of Federal agencies. Under the FOIA, the public can obtain records from any Federal agency, subject to the exemptions enacted by the Congress to protect information that must be held in confidence for the Government to function effectively or for other purposes.

(b) FOIA requesters are seeking a service from the Federal Government and should be treated as such. Accordingly, in responding to a FOIA request, agencies shall respond courteously and appropriately. Moreover, agencies shall provide FOIA requesters, and the public in general, with citizen-centered ways to learn about the FOIA process, about agency records that are publicly available (e.g., on the agency's website), and about the status of a person's FOIA request and appropriate information about the agency's response.

(c) Agency FOIA operations shall be both results-oriented and produce results. Accordingly, agencies shall process requests under the FOIA in an efficient and appropriate manner and achieve tangible, measurable improvements in FOIA processing. When an agency's FOIA program does not produce such results, it should be reformed, consistent with available resources appropriated by the Congress and applicable law, to increase efficiency and better reflect the policy goals and objectives of this order.

(d) A citizen-centered and results-oriented approach will improve service and performance, thereby

strengthening compliance with the FOIA, and will help avoid disputes and related litigation.

SEC. 2. *Agency Chief FOIA Officers.*

(a) *Designation.* The head of each agency shall designate within 30 days of the date of this order a senior official of such agency (at the Assistant Secretary or equivalent level), to serve as the Chief FOIA Officer of that agency. The head of the agency shall promptly notify the Director of the Office of Management and Budget (OMB Director) and the Attorney General of such designation and of any changes thereafter in such designation.

(b) *General Duties.* The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency:

(i) have agency-wide responsibility for efficient and appropriate compliance with the FOIA;

(ii) monitor FOIA implementation throughout the agency, including through the use of meetings with the public to the extent deemed appropriate by the agency's Chief FOIA Officer, and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing the FOIA, including the extent to which the agency meets the milestones in the agency's plan under section 3(b) of this order and training and reporting standards established consistent with applicable law and this order;

(iii) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to carry out the policy set forth in section 1 of this order;

(iv) review and report, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing the FOIA; and

(v) facilitate public understanding of the purposes of the FOIA's statutory exemptions by including concise descriptions of the exemptions in both the agency's FOIA handbook issued under section 552(g) of title 5, United States Code, and the agency's annual FOIA report, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply.

(c) *FOIA Requester Service Center and FOIA Public Liaisons.* In order to ensure appropriate communication with FOIA requesters:

(i) Each agency shall establish one or more FOIA Requester Service Centers (Center), as appropriate, which shall serve as the first place that a FOIA requester can contact to seek information concerning the status of the person's FOIA request and appropriate information about the agency's FOIA response. The Center shall include appropriate staff to receive and respond to inquiries from FOIA requesters;

(ii) The agency Chief FOIA Officer shall designate one or more agency officials, as appropriate, as FOIA Public Liaisons, who may serve in the Center or who may serve in a separate office. FOIA Public Liaisons shall serve as supervisory officials to whom a FOIA requester can raise concerns about the service the FOIA requester has received from the Center, following an initial response from the Center staff. FOIA Public Liaisons shall seek to ensure a service-oriented response to FOIA requests and FOIA-related inquiries. For example, the FOIA Public Liaison shall assist, as appropriate, in reducing delays, increasing transparency and understanding of the status of requests, and resolving disputes. FOIA Public Liaisons shall report to the agency Chief FOIA Officer on their activities and shall perform their duties consistent with applicable law and agency regulations;

(iii) In addition to the services to FOIA requesters provided by the Center and FOIA Public Liaisons, the agency Chief FOIA Officer shall also consider what other FOIA-related assistance to the public should appropriately be provided by the agency;

(iv) In establishing the Centers and designating FOIA Public Liaisons, the agency shall use, as appropriate, existing agency staff and resources. A Center shall have appropriate staff to receive and respond to inquiries from FOIA requesters;

(v) As determined by the agency Chief FOIA Officer, in consultation with the FOIA Public Liaisons, each agency shall post appropriate information about its Center or Centers on the agency's website, including contact information for its FOIA Public Liaisons. In the case of an agency without a website, the agency shall publish the information on the Firstgov.gov website or, in the case of any agency with neither a website nor the capability to post on the Firstgov.gov website, in the Federal Register; and

(vi) The agency Chief FOIA Officer shall ensure that the agency has in place a method (or methods), including through the use of the Center, to receive and respond promptly and appropriately to inquiries from FOIA requesters about the status of their requests. The Chief FOIA Officer shall also consider, in consultation with the FOIA Public Liaisons, as appropriate, whether the agency's implementation of other means (such as tracking numbers for requests, or an agency telephone or Internet hotline) would be appropriate for responding to status inquiries.

SEC. 3. *Review, Plan, and Report.*

(a) *Review.* Each agency's Chief FOIA Officer shall conduct a review of the agency's FOIA operations to determine whether agency practices are consistent with the policies set forth in section 1 of this order. In conducting this review, the Chief FOIA Officer shall:

(i) evaluate, with reference to numerical and statistical benchmarks where appropriate, the agency's administration of the FOIA, including the agency's expenditure of resources on FOIA compliance and the extent to which, if any, requests for records have not been responded to within the statutory time limit (backlog);

(ii) review the processes and practices by which the agency assists and informs the public regarding the FOIA process;

(iii) examine the agency's:

(A) use of information technology in responding to FOIA requests, including without limitation the tracking of FOIA requests and communication with requesters;

(B) practices with respect to requests for expedited processing; and

(C) implementation of multi-track processing if used by such agency;

(iv) review the agency's policies and practices relating to the availability of public information through websites and other means, including the use of websites to make available the records described in section 552(a)(2) of title 5, United States Code; and

(v) identify ways to eliminate or reduce its FOIA backlog, consistent with available resources and taking into consideration the volume and complexity of the FOIA requests pending with the agency.

(b) *Plan.*

(i) Each agency's Chief FOIA Officer shall develop, in consultation as appropriate with the staff of the agency (including the FOIA Public Liaisons), the Attorney General, and the OMB Director, an agency-specific plan to ensure that the agency's administration of the FOIA is in accordance with applicable law and the policies set forth in section 1 of this order. The plan, which shall be submitted to the head of the agency for approval, shall address the agency's implementation of the FOIA during fiscal years 2006 and 2007.

(ii) The plan shall include specific activities that the agency will implement to eliminate or reduce the agency's FOIA backlog, including (as applicable) changes that will make the processing of FOIA requests more streamlined and effective, as well as increased reliance on the dissemination of records that can be made available to the public through a website or other means that do not require the public to make a request for the records under the FOIA.

(iii) The plan shall also include activities to increase public awareness of FOIA processing, including as appropriate, expanded use of the agency's Center and its FOIA Public Liaisons.

(iv) The plan shall also include, taking appropriate account of the resources available to the agency and the mission of the agency, concrete milestones, with specific timetables and outcomes to be achieved, by which the head of the agency, after consultation with the OMB Director, shall measure and evaluate the agency's success in the implementation of the plan.

(c) *Agency Reports to the Attorney General and OMB Director.*

(i) The head of each agency shall submit a report, no later than 6 months from the date of this order, to the Attorney General and the OMB Director that summarizes the results of the review under section 3(a) of this order and encloses a copy of the agency's plan under section 3(b) of this order. The agency shall publish a copy of the agency's report on the agency's website or, in the case of an agency without a website, on the Firstgov.gov website, or, in the case of any agency with neither a website nor the capability to publish on the Firstgov.gov website, in the Federal Register.

(ii) The head of each agency shall include in the agency's annual FOIA reports for fiscal years 2006 and 2007 a report on the agency's development and implementation of its plan under section 3(b) of this order and on the agency's performance in meeting the milestones set forth in that plan, consistent with any related guidelines the Attorney General may issue under section 552(e) of title 5, United States Code.

(iii) If the agency does not meet a milestone in its plan, the head of the agency shall:

(A) identify this deficiency in the annual FOIA report to the Attorney General;

(B) explain in the annual report the reasons for the agency's failure to meet the milestone;

(C) outline in the annual report the steps that the agency has already taken, and will be taking, to address the deficiency; and

(D) report this deficiency to the President's Management Council.

SEC. 4. *Attorney General.*

(a) *Report.* The Attorney General, using the reports submitted by the agencies under subsection 3(c)(i) of this order and the information submitted by agencies in their annual FOIA reports for fiscal year 2005, shall submit to the President, no later than 10 months from the date of this order, a report on agency FOIA implementation. The Attorney General shall consult the OMB Director in the preparation of the report and shall include in the report appropriate recommendations on administrative or other agency actions for continued agency dissemination and release of public information. The Attorney General shall thereafter submit two further annual reports, by June 1, 2007, and June 1, 2008, that provide the President with an update on the agencies' implementation of the FOIA and of their plans under section 3(b) of this order.

(b) *Guidance.* The Attorney General shall issue such instructions and guidance to the heads of departments and agencies as may be appropriate to implement sections 3(b) and 3(c) of this order.

SEC. 5. *OMB Director.* The OMB Director may issue such instructions to the heads of agencies as are necessary to implement this order, other than sections 3(b) and 3(c) of this order.

SEC. 6. *Definitions.* As used in this order:

(a) the term ''agency'' has the same meaning as the term ''agency'' under section 552(f)(1) of title 5, United States Code; and

(b) the term ''record'' has the same meaning as the term ''record'' under section 552(f)(2) of title 5, United States Code.

SEC. 7. *General Provisions.*

(a) The agency reviews under section 3(a) of this order and agency plans under section 3(b) of this order shall be conducted and developed in accordance with applicable law and applicable guidance issued by the President, the Attorney General, and the OMB Director, including the laws and guidance regarding information technology and the dissemination of information.

(b) This order:

(i) shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations;

(ii) shall not be construed to impair or otherwise affect the functions of the OMB Director relating to budget, legislative, or administrative proposals; and

(iii) is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.

GEORGE W. BUSH.

EX. ORD. NO. 13642. MAKING OPEN AND MACHINE READABLE THE NEW DEFAULT FOR GOVERNMENT INFORMATION

Ex. Ord. No. 13642, May 9, 2013, 78 F.R. 28111, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

SECTION 1. *General Principles.* Openness in government strengthens our democracy, promotes the delivery of efficient and effective services to the public, and contributes to economic growth. As one vital benefit of open government, making information resources easy to find, accessible, and usable can fuel entrepreneurship, innovation, and scientific discovery that improves Americans' lives and contributes significantly to job creation.

Decades ago, the U.S. Government made both weather data and the Global Positioning System freely available. Since that time, American entrepreneurs and innovators have utilized these resources to create navigation systems, weather newscasts and warning systems, location-based applications, precision farming tools, and much more, improving Americans' lives in countless ways and leading to economic growth and job creation. In recent years, thousands of Government data resources across fields such as health and medicine, education, energy, public safety, global development, and finance have been posted in machine-readable form for free public use on Data.gov. Entrepreneurs and innovators have continued to develop a vast range of useful new products and businesses using these public information resources, creating good jobs in the process.

To promote continued job growth, Government efficiency, and the social good that can be gained from opening Government data to the public, the default state of new and modernized Government information resources shall be open and machine readable. Government information shall be managed as an asset throughout its life cycle to promote interoperability and openness, and, wherever possible and legally permissible, to ensure that data are released to the public in ways that make the data easy to find, accessible, and usable. In making this the new default state, executive departments and agencies (agencies) shall ensure that they safeguard individual privacy, confidentiality, and national security.

SEC. 2. *Open Data Policy.* (a) The Director of the Office of Management and Budget (OMB), in consultation with the Chief Information Officer (CIO), Chief Technology Officer (CTO), and Administrator of the Office of Information and Regulatory Affairs (OIRA), shall issue an Open Data Policy to advance the management of Government information as an asset, consistent with my memorandum of January 21, 2009 (Transparency and Open Government), OMB Memorandum M–10–06 (Open Government Directive), OMB and National Archives and Records Administration Memorandum M–12–18 (Managing Government Records Directive), the Office of Science and Technology Policy Memorandum of February 22, 2013 (Increasing Access to the Results of Federally Funded Scientific Research), and the CIO's strategy entitled ''Digital Government: Building a 21st Century Platform to Better Serve the American People.'' The Open Data Policy shall be updated as needed.

(b) Agencies shall implement the requirements of the Open Data Policy and shall adhere to the deadlines for specific actions specified therein. When implementing the Open Data Policy, agencies shall incorporate a full analysis of privacy, confidentiality, and security risks into each stage of the information lifecycle to identify information that should not be released. These review processes should be overseen by the senior agency official for privacy. It is vital that agencies not release information if doing so would violate any law or policy, or jeopardize privacy, confidentiality, or national security.

SEC. 3. *Implementation of the Open Data Policy*. To facilitate effective Government-wide implementation of the Open Data Policy, I direct the following:

(a) Within 30 days of the issuance of the Open Data Policy, the CIO and CTO shall publish an open online repository of tools and best practices to assist agencies in integrating the Open Data Policy into their operations in furtherance of their missions. The CIO and CTO shall regularly update this online repository as needed to ensure it remains a resource to facilitate the adoption of open data practices.

(b) Within 90 days of the issuance of the Open Data Policy, the Administrator for Federal Procurement Policy, Controller of the Office of Federal Financial Management, CIO, and Administrator of OIRA shall work with the Chief Acquisition Officers Council, Chief Financial Officers Council, Chief Information Officers Council, and Federal Records Council to identify and initiate implementation of measures to support the integration of the Open Data Policy requirements into Federal acquisition and grant-making processes. Such efforts may include developing sample requirements language, grant and contract language, and workforce tools for agency acquisition, grant, and information management and technology professionals.

(c) Within 90 days of the date of this order, the Chief Performance Officer (CPO) shall work with the President's Management Council to establish a Cross-Agency Priority (CAP) Goal to track implementation of the Open Data Policy. The CPO shall work with agencies to set incremental performance goals, ensuring they have metrics and milestones in place to monitor advancement toward the CAP Goal. Progress on these goals shall be analyzed and reviewed by agency leadership, pursuant to the GPRA Modernization Act of 2010 (Public Law 111–352).

(d) Within 180 days of the date of this order, agencies shall report progress on the implementation of the CAP Goal to the CPO. Thereafter, agencies shall report progress quarterly, and as appropriate.

SEC. 4. *General Provisions*. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of OMB relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) Nothing in this order shall compel or authorize the disclosure of privileged information, law enforcement information, national security information, personal information, or information the disclosure of which is prohibited by law.

(e) Independent agencies are requested to adhere to this order.

BARACK OBAMA.

FREEDOM OF INFORMATION ACT

Memorandum of President of the United States, Jan. 21, 2009, 74 F.R. 4683, provided:

Memorandum for the Heads of Executive Departments and Agencies

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, ''sunlight is said to be the best of disinfectants.'' In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.

I direct the Attorney General to issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the Federal Register. In doing so, the Attorney General should review FOIA reports produced by the agencies under Executive Order 13392 of December 14, 2005. I also direct the Director of the Office of Management and Budget to update guidance to the agencies to increase and improve information dissemination to the public, including through the use of new technologies, and to publish such guidance in the Federal Register.

This memorandum does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Director of the Office of Management and Budget is hereby authorized and directed to publish this memorandum in the Federal Register.

BARACK OBAMA.

§ 552a. Records maintained on individuals

(a) DEFINITIONS.—For purposes of this section—

(1) the term ''agency'' means agency as defined in section 552(e)[1] of this title;

(2) the term ''individual'' means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term ''maintain'' includes maintain, collect, use, or disseminate;

(4) the term ''record'' means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular as-

[1] See References in Text note below.

(4) A brief explanation of any changes in law that have affected the responsibilities of the agency under this section.

(k) Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.

(*l*) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any agency meeting or portion thereof required by any other provision of law to be open.

(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts, recordings, or minutes required by this section, which is otherwise accessible to such individual under section 552a of this title.

(Added Pub. L. 94–409, § 3(a), Sept. 13, 1976, 90 Stat. 1241; amended Pub. L. 104–66, title III, § 3002, Dec. 21, 1995, 109 Stat. 734.)

Editorial Notes

REFERENCES IN TEXT

Section 552(e) of this title, referred to in subsec. (a)(1), was redesignated section 552(f) of this title by section 1802(b) of Pub. L. 99–570.

180 days after the date of enactment of this section, referred to in subsec. (g), means 180 days after the date of enactment of Pub. L. 94–409, which was approved Sept. 13, 1976.

AMENDMENTS

1995—Subsec. (j). Pub. L. 104–66 amended subsec. (j) generally. Prior to amendment, subsec. (j) read as follows: ''Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).''

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE

Pub. L. 94–409, § 6, Sept. 13, 1976, 90 Stat. 1248, provided that:

''(a) Except as provided in subsection (b) of this section, the provisions of this Act [see Short Title note set out below] shall take effect 180 days after the date of its enactment [Sept. 13, 1976].

''(b) Subsection (g) of section 552b of title 5, United States Code, as added by section 3(a) of this Act, shall take effect upon enactment [Sept. 13, 1976].''

SHORT TITLE OF 1976 AMENDMENT

Pub. L. 94–409, § 1, Sept. 13, 1976, 90 Stat. 1241, provided: ''That this Act [enacting this section, amending sections 551, 552, 556, and 557 of this title, section 10 of Pub. L. 92–463, set out in the Appendix to this title, and section 410 of Title 39, and enacting provisions set out as notes under this section] may be cited as the 'Government in the Sunshine Act'.''

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions of law requiring submittal to Congress of any annual, semiannual, or other regular periodic report listed in House Document No. 103–7 (in which the report required by subsec. (j) of this section is listed on page 151), see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance.

TERMINATION OF ADMINISTRATIVE CONFERENCE OF UNITED STATES

For termination of Administrative Conference of United States, see provision of title IV of Pub. L. 104–52, set out as a note preceding section 591 of this title.

DECLARATION OF POLICY AND STATEMENT OF PURPOSE

Pub. L. 94–409, § 2, Sept. 13, 1976, 90 Stat. 1241, provided that: ''It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this Act [see Short Title note set out above] to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.''

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 383.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1003.	June 11, 1946, ch. 324, §4, 60 Stat. 238.

In subsection (a)(1), the words ''or naval'' are omitted as included in ''military''.

In subsection (b), the word ''when'' is substituted for ''in any situation in which''.

In subsection (c), the words ''for oral presentation'' are substituted for ''to present the same orally in any manner''. The words ''sections 556 and 557 of this title apply instead of this subsection'' are substituted for ''the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection''.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

Editorial Notes

CODIFICATION

Section 553 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2245 of Title 7, Agriculture.

Executive Documents

EXECUTIVE ORDER NO. 12044

Ex. Ord. No. 12044, Mar. 23, 1978, 43 F.R. 12661, as amended by Ex. Ord. No. 12221, June 27, 1980, 45 F.R. 44249, which related to the improvement of Federal regulations, was revoked by Ex. Ord. No. 12291, Feb. 17, 1981, 46 F.R. 13193, formerly set out as a note under section 601 of this title.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a[1] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

[1] So in original.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 384; Pub. L. 95–251, §2(a)(1), Mar. 27, 1978, 92 Stat. 183.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1004.	June 11, 1946, ch. 324, §5, 60 Stat. 239.

vides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

Statutory Notes and Related Subsidiaries

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of

tity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

(Pub. L. 93–638, § 3, Jan. 4, 1975, 88 Stat. 2203; Pub. L. 100–472, title I, § 102, Oct. 5, 1988, 102 Stat. 2285.)

Editorial Notes

CODIFICATION

Section was formerly classified to section 450a of this title prior to editorial reclassification and renumbering as this section.

AMENDMENTS

1988—Subsec. (b). Pub. L. 100–472 added subsec. (b) and struck out former subsec. (b) which read as follows: ''The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.''

§ 5303. Tribal and Federal advisory committees

Notwithstanding any other provision of law (including any regulation), the Secretary of the Interior and the Secretary of Health and Human Services are authorized to jointly establish and fund advisory committees or other advisory bodies composed of members of Indian tribes or members of Indian tribes and representatives of the Federal Government to ensure tribal participation in the implementation of the Indian Self-Determination and Education Assistance Act (Public Law 93–638) [25 U.S.C. 5301 et seq.].

(Pub. L. 101–644, title II, § 204, as added Pub. L. 103–435, § 22(b), Nov. 2, 1994, 108 Stat. 4575.)

Editorial Notes

REFERENCES IN TEXT

The Indian Self-Determination and Education Assistance Act, referred to in text, is Pub. L. 93–638, Jan. 4, 1975, 88 Stat. 2203, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 5301 of this title and Tables.

CODIFICATION

Section was enacted as part of the Indian Self-Determination and Education Assistance Act Amendments of 1990, and not as part of the Indian Self-Determination and Education Assistance Act which comprises this chapter.

Section was formerly classified to section 450a–1 of this title prior to editorial reclassification and renumbering as this section.

§ 5304. Definitions

For purposes of this chapter, the term—

(a) ''construction programs'' means programs for the planning, design, construction, repair, improvement, and expansion of buildings or facilities, including, but not limited to, housing, law enforcement and detention facilities, sanitation and water systems, roads, schools, administration and health facilities, irrigation and agricultural work, and water conservation, flood control, or port facilities;

(b) ''contract funding base'' means the base level from which contract funding needs are determined, including all contract costs;

(c) ''direct program costs'' means costs that can be identified specifically with a particular contract objective;

(d) ''Indian'' means a person who is a member of an Indian tribe;

(e) ''Indian tribe'' or ''Indian Tribe'' means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

(f) ''indirect costs'' means costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved;

(g) ''indirect cost rate'' means the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency;

(h) ''mature contract'' means a self-determination contract that has been continuously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization: *Provided*, That upon the request of a tribal organization or the tribal organization's Indian tribe for purposes of section 5321(a) of this title, a contract of the tribal organization which meets this definition shall be considered to be a mature contract;

(i) ''Secretary'', unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both;

(j) ''self-determination contract'' means a contract entered into under subchapter I (or a grant or cooperative agreement used under section 5308 of this title) between a Tribal organization and the appropriate Secretary for the planning, conduct, and administration of programs or services that are otherwise provided to Indian Tribes and members of Indian Tribes pursuant to Federal law, subject to the condition that, except as provided in section 5324(a)(3) of this title, no contract entered into under subchapter I (or grant or cooperative agreement used under section 5308 of this title) shall be—

(1) considered to be a procurement contract; or

(2) except as provided in section 5328(a)(1) of this title, subject to any Federal procurement law (including regulations);

(k) ''State education agency'' means the State board of education or other agency or officer primarily responsible for supervision

by the State of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law;

(*l*) ''Tribal organization'' or ''tribal organization'' means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: *Provided*, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant; and

(m) ''construction contract'' means a fixed-price or cost-reimbursement self-determination contract for a construction project, except that such term does not include any contract—

(1) that is limited to providing planning services and construction management services (or a combination of such services);

(2) for the Housing Improvement Program or roads maintenance program of the Bureau of Indian Affairs administered by the Secretary of the Interior; or

(3) for the health facility maintenance and improvement program administered by the Secretary of Health and Human Services.

(Pub. L. 93–638, §4, Jan. 4, 1975, 88 Stat. 2204; Pub. L. 100–472, title I, §103, Oct. 5, 1988, 102 Stat. 2286; Pub. L. 100–581, title II, §208, Nov. 1, 1988, 102 Stat. 2940; Pub. L. 101–301, §2(a)(1)–(3), May 24, 1990, 104 Stat. 206; Pub. L. 101–644, title II, §202(1), (2), Nov. 29, 1990, 104 Stat. 4665; Pub. L. 103–413, title I, §102(1), Oct. 25, 1994, 108 Stat. 4250; Pub. L. 116–180, title II, §201(a), Oct. 21, 2020, 134 Stat. 878.)

Editorial Notes

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 93–638, Jan. 4, 1975, 88 Stat. 2203, known as the Indian Self-Determination and Education Assistance Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 5301 of this title and Tables.

The Alaska Native Claims Settlement Act, referred to in subsec. (e), is Pub. L. 92–203, Dec. 18, 1971, 85 Stat. 688, which is classified generally to chapter 33 (§1601 et seq.) of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of Title 43, and Tables.

Subchapter I, referred to in subsec. (j), was in the original ''title I'', meaning title I of Pub. L. 93–638, known as the Indian Self-Determination Act, which is classified principally to subchapter I (§5321 et seq.) of this chapter. For complete classification of title I to the Code, see Short Title note set out under section 5301 of this title and Tables.

CODIFICATION

Section was formerly classified to section 450b of this title prior to editorial reclassification and renumbering as this section.

AMENDMENTS

2020—Subsec. (e). Pub. L. 116–180, §201(a)(2)(A), substituted '' 'Indian tribe' or 'Indian Tribe' means'' for '' 'Indian tribe' means''.

Subsec. (j). Pub. L. 116–180, §201(a)(1), added subsec. (j) and struck out former subsec. (j) which defined ''self-determination contract''.

Subsec. (*l*). Pub. L. 116–180, §201(a)(2)(B), substituted '' 'Tribal organization' or 'tribal organization' means'' for '' 'tribal organization' means''.

1994—Subsec. (g). Pub. L. 103–413, §102(1)(A), substituted ''indirect cost rate'' for ''indirect costs rate''.

Subsec. (m). Pub. L. 103–413, §102(1)(B)–(D), added subsec. (m).

1990—Subsec. (e). Pub. L. 101–301, §2(a)(1), inserted a comma before ''which is recognized''.

Subsec. (h). Pub. L. 101–644, §202(1), struck out ''in existence on October 5, 1988,'' before ''which meets this definition''.

Subsec. (j). Pub. L. 101–644, §202(2), substituted ''contract (or grant or cooperative agreement utilized under section 5308 of this title) entered'' for ''contract entered'' in two places.

Pub. L. 101–301, §2(a)(2), (3), substituted ''under this chapter'' for ''pursuant to this Act'' in two places and struck out ''the'' before ''Secretary''.

1988—Pub. L. 100–472 amended section generally, substituting subsecs. (a) to (*l*) for former subsecs. (a) to (d) and (f) which defined ''Indian'', ''Indian tribe'', ''Tribal organization'', ''Secretary'', and ''State education agency''.

Subsec. (h). Pub. L. 100–581, §208(a)(1), substituted ''by a tribal organization'' for ''by tribal organization''.

Pub. L. 100–581, §208(a)(2), which directed the amendment of subsec. (h) by substituting ''a tribal organization or the tribal organization's Indian tribe for purposes of section 5321(a) of this title'' for ''a tribal organization or a tribal governing body'' was executed by substituting the new language for ''a tribal organization or tribal governing body'' to reflect the probable intent of Congress.

Subsec. (j). Pub. L. 100–581, §208(b), substituted ''the Secretary for the planning'' for ''Secretary the planning'' and ''except as provided the last proviso in section 5324(a) of this title, no contract'' for ''no contract''.

§ 5305. Reporting and audit requirements for recipients of Federal financial assistance

(a) Maintenance of records

(1) Each recipient of Federal financial assistance under this chapter shall keep such records as the appropriate Secretary shall prescribe by regulation promulgated under sections 552 and 553 of title 5, including records which fully disclose—

(A) the amount and disposition by such recipient of the proceeds of such assistance,

(B) the cost of the project or undertaking in connection with which such assistance is given or used,

(C) the amount of that portion of the cost of the project or undertaking supplied by other sources, and

(D) such other information as will facilitate an effective audit.

(2) For the purposes of this subsection, such records for a mature contract shall consist of quarterly financial statements for the purpose of accounting for Federal funds, the annual single-agency audit required by chapter 75 of title 31[1] and a brief annual program report.

[1] So in original. Probably should be followed by a comma.

tion, the Secretary shall add the indirect cost funding amount awarded for a self-determination contract to the amount awarded for direct program funding for the first year and, subject to adjustments in the amount of direct program costs for the contract, for each subsequent year that the program remains continuously under contract.''

Subsec. (i). Pub. L. 103–413, §102(18), added subsec. (i) and struck out former subsec. (i) which read as follows: ''Within one month after October 5, 1988, the Secretary is mandated to establish a team in each area of the Bureau of Indian Affairs which consists of agency personnel (area personnel in the Navajo Area and in the case of Indian tribes not served by an agency) and tribal representatives for the purpose of analyzing the 'Indian Priority System' and other aspects of the budgeting and funding allocation process of the Bureau of Indian Affairs for the purpose of making a report to Congress with appropriate recommendations for changes and legislative actions to achieve greater tribal decision-making authority over the use of funds appropriated for the benefit of the tribes and their members. The report along with the analysis, findings and recommendations of the area teams shall be submitted to Congress within six months of October 5, 1988. The Secretary may submit to Congress separate comments on the information and recommendations on the report.''

Subsecs. (j) to (*o*). Pub. L. 103–413, §102(19), added subsecs. (j) to (*o*).

1990—Subsec. (e). Pub. L. 101–644 substituted ''1992'' for ''1988''.

Subsec. (f). Pub. L. 101–301, §2(a)(8), substituted ''prior to enactment of chapter 75 of title 31'' for ''prior to enactment of the Single Agency Audit Act of 1984 (chapter 75 of title 31)'', which for purposes of codification was translated as ''prior to October 19, 1984'', requiring no change in text.

Subsec. (i). Pub. L. 101–301, §2(a)(9), substituted ''agency personnel (area personnel in the Navajo Area and in the case of Indian tribes not served by an agency)'' for ''agency personnel''.

§ 5326. Indian Health Service: availability of funds for Indian self-determination or self-governance contract or grant support costs

Before, on, and after October 21, 1998, and notwithstanding any other provision of law, funds available to the Indian Health Service in this Act or any other Act for Indian self-determination or self-governance contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act [25 U.S.C. 5321 et seq.] and no funds appropriated by this or any other Act shall be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement entered into between an Indian tribe or tribal organization and any entity other than the Indian Health Service.

(Pub. L. 105–277, div. A, §101(e) [title II], Oct. 21, 1998, 112 Stat. 2681–231, 2681–280.)

Editorial Notes

References in Text

The Indian Self-Determination Act, referred to in text, is title I of Pub. L. 93–638, Jan. 4, 1975, 88 Stat. 2206, which is classified principally to this subchapter (§5321 et seq.). For complete classification of this Act to the Code, see Short Title note set out under section 5301 of this title and Tables.

Codification

Section was enacted as part of the Department of the Interior and Related Agencies Appropriations Act, 1999, and also as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, and not as part of the Indian Self-Determination and Education Assistance Act which comprises this chapter.

Section was formerly classified to section 450j–2 of this title prior to editorial reclassification and renumbering as this section.

§ 5327. Department of the Interior: availability of funds for Indian self-determination or self-governance contract or grant support costs

Notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended [25 U.S.C. 5321 et seq.], on and after November 29, 1999, funds available to the Department of the Interior for Indian self-determination or self-governance contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act of 1975 and on and after November 29, 1999, funds appropriated in this title[1] shall not be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact or funding agreement entered into between an Indian tribe or tribal organization and any entity other than an agency of the Department of the Interior.

(Pub. L. 106–113, div. B, §1000(a)(3) [title I, §113], Nov. 29, 1999, 113 Stat. 1535, 1501A–157.)

Editorial Notes

References in Text

The Indian Self-Determination Act of 1975, referred to in text, probably means the Indian Self-Determination Act, title I of Pub. L. 93–638, Jan. 4, 1975, 88 Stat. 2206, which is classified principally to this subchapter (§5321 et seq.). For complete classification of this Act to the Code, see Short Title note set out under section 5301 of this title and Tables.

This title, referred to in text, is title I of the Department of the Interior and Related Agencies Appropriations Act, 2000, as enacted by Pub. L. 106–113, div. B, §1000(a)(3), Nov. 29, 1999, 113 Stat. 1535, 1501A–135. For complete classification of this title to the Code, see Tables.

Codification

Section was enacted as part of the Department of the Interior and Related Agencies Appropriations Act, 2000, and not as part of the Indian Self-Determination and Education Assistance Act which comprises this chapter.

Section was formerly classified to section 450j–3 of this title prior to editorial reclassification and renumbering as this section.

Statutory Notes and Related Subsidiaries

Similar Provisions

Similar provisions were contained in Pub. L. 105–277, div. A, §101(e) [title I, §114], Oct. 21, 1998, 112 Stat. 2681–231, 2681–255.

§ 5328. Rules and regulations

(a) Authority of Secretaries of the Interior and of Health and Human Services to promulgate; time restriction

(1) Except as may be specifically authorized in this subsection, or in any other provision of this

[1] See References in Text note below.

chapter, the Secretary of the Interior and the Secretary of Health and Human Services may not promulgate any regulation, nor impose any nonregulatory requirement, relating to self-determination contracts or the approval, award, or declination of such contracts, except that the Secretary of the Interior and the Secretary of Health and Human Services may promulgate regulations under this chapter relating to chapter 171 of title 28, commonly known as the ''Federal Tort Claims Act'', chapter 71 of title 41, declination and waiver procedures, appeal procedures, reassumption procedures, discretionary grant procedures for grants awarded under section 5322 of this title, property donation procedures arising under section 5324(f) of this title, internal agency procedures relating to the implementation of this chapter, retrocession and tribal organization relinquishment procedures, contract proposal contents, conflicts of interest, construction, programmatic reports and data requirements, procurement standards, property management standards, and financial management standards.

(2)(A) The regulations promulgated under this chapter, including the regulations referred to in this subsection, shall be promulgated—

(i) in conformance with sections 552 and 553 of title 5 and subsections (c), (d), and (e) of this section; and

(ii) as a single set of regulations in title 25 of the Code of Federal Regulations.

(B) The authority to promulgate regulations set forth in this chapter shall expire if final regulations are not promulgated within 20 months after October 25, 1994.

(b) Conflicting laws and regulations

The provisions of this chapter shall supersede any conflicting provisions of law (including any conflicting regulations) in effect on the day before October 25, 1994, and the Secretary is authorized to repeal any regulation inconsistent with the provisions of this chapter.

(c) Revisions and amendments; procedures applicable

The Secretary of the Interior and the Secretary of Health and Human Services are authorized, with the participation of Indian tribes and tribal organizations, to revise and amend any rules or regulations promulgated pursuant to this section: *Provided*, That prior to any revision or amendment to such rules or regulations, the respective Secretary or Secretaries shall present the proposed revision or amendment to the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives and shall, to the extent practicable, consult with appropriate national or regional Indian organizations and shall publish any proposed revisions in the Federal Register not less than sixty days prior to the effective date of such rules and regulations in order to provide adequate notice to, and receive comments from, other interested parties.

(d) Consultation in drafting and promulgating; negotiation process; interagency committees; extension of deadlines

(1) In drafting and promulgating regulations as provided in subsection (a) of this section (including drafting and promulgating any revised regulations), the Secretary of the Interior and the Secretary of Health and Human Services shall confer with, and allow for active participation by, representatives of Indian tribes, tribal organizations, and individual tribal members.

(2)(A) In carrying out rulemaking processes under this chapter, the Secretary of the Interior and the Secretary of Health and Human Services shall follow the guidance of—

(i) subchapter III of chapter 5 of title 5, commonly known as the ''Negotiated Rulemaking Act of 1990''; and

(ii) the recommendations of the Administrative Conference of the United States numbered 82–4 and 85–5 entitled ''Procedures for Negotiating Proposed Regulations'' under sections 305.82–4 and 305.85–5 of title 1, Code of Federal Regulations, and any successor recommendation or law (including any successor regulation).

(B) The tribal participants in the negotiation process referred to in subparagraph (A) shall be nominated by and shall represent the groups described in this paragraph and shall include tribal representatives from all geographic regions.

(C) The negotiations referred to in subparagraph (B) shall be conducted in a timely manner. Proposed regulations to implement the amendments made by the Indian Self-Determination Contract Reform Act of 1994 shall be published in the Federal Register by the Secretary of the Interior and the Secretary of Health and Human Services not later than 180 days after October 25, 1994.

(D) Notwithstanding any other provision of law (including any regulation), the Secretary of the Interior and the Secretary of Health and Human Services are authorized to jointly establish and fund such interagency committees or other interagency bodies, including advisory bodies comprised of tribal representatives, as may be necessary or appropriate to carry out the provisions of this chapter.

(E) If the Secretary determines that an extension of the deadlines under subsection (a)(2)(B) of this section and subparagraph (C) of this paragraph is appropriate, the Secretary may submit proposed legislation to Congress for the extension of such deadlines.

(e) Exceptions in or waiver of regulations

The Secretary may, with respect to a contract entered into under this chapter, make exceptions in the regulations promulgated to carry out this chapter, or waive such regulations, if the Secretary finds that such exception or waiver is in the best interest of the Indians served by the contract or is consistent with the policies of this chapter, and is not contrary to statutory law. In reviewing each request, the Secretary shall follow the timeline, findings, assistance, hearing, and appeal procedures set forth in section 5321 of this title.

(Pub. L. 93–638, title I, §107, Jan. 4, 1975, 88 Stat. 2212; Pub. L. 96–88, title V, §509(b), Oct. 17, 1979, 93 Stat. 695; Pub. L. 100–472, title II, §207, Oct. 5, 1988, 102 Stat. 2295; Pub. L. 101–644, title II, §203(f), Nov. 29, 1990, 104 Stat. 4666; Pub. L. 103–413, title I, §105, Oct. 25, 1994, 108 Stat. 4269;

Pub. L. 103–435, §22(a)(1), Nov. 2, 1994, 108 Stat. 4575; Pub. L. 103–437, §10(c)(2), Nov. 2, 1994, 108 Stat. 4589; Pub. L. 104–133, §1, Apr. 25, 1996, 110 Stat. 1320; Pub. L. 104–287, §6(e), Oct. 11, 1996, 110 Stat. 3399.)

Editorial Notes

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a), (b), (d)(2)(A), (D), and (e), was in the original ''this Act'', meaning Pub. L. 93–638, Jan. 4, 1975, 88 Stat. 2203, known as the Indian Self-Determination and Education Assistance Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 5301 of this title and Tables.

The Indian Self-Determination Contract Reform Act of 1994, referred to in subsec. (d)(2)(C), is title I of Pub. L. 103–413, Oct. 25, 1994, 108 Stat. 4250, which enacted section 5329 of this title, amended this section and sections 5304, 5305, 5307, 5321, 5324, 5325, 5330, and 5331 of this title, and enacted provisions set out as a note under section 5301 of this title. For complete classification of this Act to the Code, see Short Title of 1994 Amendment note set out under section 5301 of this title and Tables.

CODIFICATION

Section was formerly classified to section 450k of this title prior to editorial reclassification and renumbering as this section.

In subsec. (a)(1), ''chapter 71 of title 41'' substituted for ''the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.)'' on authority of Pub. L. 111–350, §6(c), Jan. 4, 2011, 124 Stat. 3854, which Act enacted Title 41, Public Contracts.

AMENDMENTS

1996—Subsec. (a)(2)(B). Pub. L. 104–133 substituted ''20 months'' for ''18 months''.

Subsec. (b). Pub. L. 104–287 repealed Pub. L. 103–437, §10(c)(2)(A). See 1994 Amendment note below.

1994—Subsec. (a). Pub. L. 103–413, §105(1), added subsec. (a) and struck out former subsec. (a) which read as follows: ''The Secretaries of the Interior and of Health and Human Services are each authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out the provisions of this chapter: *Provided, however*, That all Federal requirements for self-determination contracts and grants under this Act shall be promulgated as regulations in conformity with sections 552 and 553 of title 5.''

Subsec. (b). Pub. L. 103–437, §10(c)(2)(A), which directed that subsec. (b) be repealed, was itself repealed by Pub. L. 104–287, §6(e). See Effective Date and Construction of 1996 Amendment note below.

Pub. L. 103–435, which directed substitution of ''Committee on Natural Resources'' for ''Committee on Interior and Insular Affairs'' in par. (2), could not be executed because ''Committee on Interior and Insular Affairs'' did not appear in text subsequent to amendment by Pub. L. 103–413, §105(1). See below.

Pub. L. 103–413, §105(1), added subsec. (b) and struck out former subsec. (b) which read as follows:

''(b)(1) Within three months from October 5, 1988, the Secretary shall consider and formulate appropriate regulations to implement the provisions of this Act, with the participation of Indian tribes. Such proposed regulations shall contain all Federal requirements applicable to self-determination contracts and grants under this Act.

''(2) Within six months from October 5, 1988, the Secretary shall present the proposed regulations to the Select Committee on Indian Affairs of the United States Senate and to the Committee on Interior and Insular Affairs of the United States House of Representatives.

''(3) Within seven months from October 5, 1988, the Secretary shall publish proposed regulations in the Federal Register for the purpose of receiving comments from tribes and other interested parties.

''(4) Within ten months from October 5, 1988, the Secretary shall promulgate regulations to implement the provisions of such Act.''

Subsec. (c). Pub. L. 103–437, §10(c)(2)(B), substituted ''Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives'' for ''Committees on Interior and Insular Affairs of the United States Senate and House of Representatives''.

Subsecs. (d), (e). Pub. L. 103–413, §105(2), added subsecs. (d) and (e).

1990—Subsec. (c). Pub. L. 101–644 inserted '', with the participation of Indian tribes and tribal organizations,'' after ''authorized''.

1988—Subsec. (a). Pub. L. 100–472, §207(a), substituted ''Health and Human Services'' for ''Health, Education, and Welfare'', and inserted proviso relating to promulgation of Federal requirements for self-determination contracts as regulations.

Subsec. (b). Pub. L. 100–472, §207(b), amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows:

''(1) Within six months from January 4, 1975, the Secretary of the Interior and the Secretary of Health and Human Services shall each to the extent practicable, consult with national and regional Indian organizations to consider and formulate appropriate rules and regulations to implement the provisions of this chapter.

''(2) Within seven months from January 4, 1975, the Secretary of the Interior and the Secretary of Health and Human Services shall each present the proposed rules and regulations to the Committees on Interior and Insular Affairs of the United States Senate and House of Representatives.

''(3) Within eight months from January 4, 1975, the Secretary of the Interior and the Secretary of Health and Human Services shall publish proposed rules and regulations in the Federal Register for the purpose of receiving comments from interested parties.

''(4) Within ten months from January 4, 1975, the Secretary of the Interior and the Secretary of Health and Human Services shall promulgate rules and regulations to implement the provisions of this chapter.''

Statutory Notes and Related Subsidiaries

CHANGE OF NAME

''Secretary of Health and Human Services'' substituted for ''Secretary of Health, Education, and Welfare'' in subsec. (c), pursuant to section 509(b) of Pub. L. 96–88, which is classified to section 3508(b) of Title 20, Education.

EFFECTIVE DATE AND CONSTRUCTION OF 1996 AMENDMENT

Pub. L. 104–287, §6(e), Oct. 11, 1996, 110 Stat. 3399, provided that: ''Effective November 2, 1994, section 10(c)(2)(A) of the Act of November 2, 1994 (Public Law 103–437, 108 Stat. 4589) [amending this section], is repealed and section 107(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450k(b)) [now 25 U.S.C. 5328(b)], as amended by section 105(1) of the Indian Self-Determination Act (Public Law 103–413, 108 Stat. 4269), is revived and shall read as if section 10(c)(2)(A) of the Act of November 2, 1994 (Public Law 103–437, 108 Stat. 4589), had not been enacted.''

§ 5329. Contract or grant specifications

(a) Terms

Each self-determination contract entered into under this chapter shall—

(1) contain, or incorporate by reference, the provisions of the model agreement described

HISTORICAL AND REVISION NOTES—CONTINUED

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
	41:403(8).	Pub. L. 93–400, §4(8), formerly §4(9), as added Pub. L. 98–577, title I, §102(3), Oct. 30, 1984, 98 Stat. 3067; redesignated as §4(8), Pub. L. 100–679, §3(c), Nov. 17, 1988, 102 Stat. 4056; Pub. L. 103–355, title VIII, §8001(b)(1)–(3), Oct. 13, 1994, 108 Stat. 3386.

SUBCHAPTER II—DIVISION B DEFINITIONS

§ 131. Acquisition

In division B, the term ''acquisition''—

(1) means the process of acquiring, with appropriated amounts, by contract for purchase or lease, property or services (including construction) that support the missions and goals of an executive agency, from the point at which the requirements of the executive agency are established in consultation with the chief acquisition officer of the executive agency; and

(2) includes—

(A) the process of acquiring property or services that are already in existence, or that must be created, developed, demonstrated, and evaluated;

(B) the description of requirements to satisfy agency needs;

(C) solicitation and selection of sources;

(D) award of contracts;

(E) contract performance;

(F) contract financing;

(G) management and measurement of contract performance through final delivery and payment; and

(H) technical and management functions directly related to the process of fulfilling agency requirements by contract.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3682.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
131	41:403(16).	Pub. L. 93–400, §4(16), as added Pub. L. 108–136, title XIV, §1411, Nov. 24, 2003, 117 Stat. 1663.

§ 132. Competitive procedures

In division B, the term ''competitive procedures'' means procedures under which an agency enters into a contract pursuant to full and open competition.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3682.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
132	41:403(5).	Pub. L. 93–400, §4(5), formerly §4(6), as added Pub. L. 98–369, title VII, §2731(3), July 18, 1984, 98 Stat. 1195; redesignated as §4(5), Pub. L. 100–679, §3(c), Nov. 17, 1988, 102 Stat. 4056; Pub. L. 103–355, title VIII, §8001(b)(1)–(3), Oct. 13, 1994, 108 Stat. 3386.

§ 133. Executive agency

In division B, the term ''executive agency'' means—

(1) an executive department specified in section 101 of title 5;

(2) a military department specified in section 102 of title 5;

(3) an independent establishment as defined in section 104(1) of title 5; and

(4) a wholly owned Government corporation fully subject to chapter 91 of title 31.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3682.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
133	41:403(1).	Pub. L. 93–400, §4(1), Aug. 30, 1974, 88 Stat. 797; Pub. L. 96–83, §3, Oct. 10, 1979, 93 Stat. 649; Pub. L. 98–191, §4, Dec. 1, 1983, 97 Stat. 1326; Pub. L. 103–355, title VIII, §8001(b)(1)–(3), Oct. 13, 1994, 108 Stat. 3386.

§ 134. Simplified acquisition threshold

In division B, the term ''simplified acquisition threshold'' means $250,000.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3682; Pub. L. 115–91, div. A, title VIII, §805, Dec. 12, 2017, 131 Stat. 1456.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
134	41:403(11).	Pub. L. 93–400, §4(11), as added Pub. L. 101–510, title VIII, §806(a)(1), Nov. 5, 1990, 104 Stat. 1592; Pub. L. 103–355, title IV, §4001, title VIII, §8001(b)(1), (2), Oct. 13, 1994, 108 Stat. 3338, 3386.

Editorial Notes

AMENDMENTS

2017—Pub. L. 115–91 substituted ''$250,000'' for ''$100,000''.

SUBCHAPTER III—DIVISION C DEFINITIONS

Statutory Notes and Related Subsidiaries

DEFINITIONS

For additional definitions of terms used in division C of this subtitle, with certain exceptions, see section 102 of Title 40, Public Buildings, Property, and Works.

§ 151. Agency head

In division C, the term ''agency head'' means the head or any assistant head of an executive agency, and may at the option of the Administrator of General Services include the chief official of any principal organizational unit of the General Services Administration.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3682.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
151	41:259(a).	June 30, 1949, ch. 288, title III, §309(a), 63 Stat. 397.

TITLE VIII—WHISTLEBLOWER PROTECTION

SEC. 801. PROTECTION AGAINST REPRISAL FOR FEDERAL SUBGRANTEE EMPLOYEES.

Section 4712 of title 41, United States Code, is amended—

(1) in subsection (a)(2)(G), by striking "or grantee" and inserting "grantee, or subgrantee";

(2) in subsection (a)(3)(A), by striking "contractor, subcontractor, or grantee" and inserting "contractor, subcontractor, grantee, or subgrantee";

(3) in subsection (b)(1), by striking "contractor or grantee" and inserting "contractor, subcontractor, grantee, or subgrantee";

(4) in subsection (c), by striking "contractor or grantee" each place it appears and inserting "contractor, subcontractor, grantee, or subgrantee";

(5) in subsection (d), by striking "and grantees" and inserting "grantees, and subgrantees"; and

(6) in subsection (f), by striking "or grantee" each place it appears and inserting "grantee, or subgrantee".

TITLE IX—DOTGOV ACT OF 2020

DOTGOV Online Trust in Government Act of 2020.
6 USC 101 note.

SEC. 901. SHORT TITLE.

This title may be cited as the "DOTGOV Online Trust in Government Act of 2020" or the "DOTGOV Act of 2020".

SEC. 902. FINDINGS.

6 USC 665 note.

Congress finds that—

(1) the .gov internet domain reflects the work of United States innovators in inventing the internet and the role that the Federal Government played in guiding the development and success of the early internet;

(2) the .gov internet domain is a unique resource of the United States that reflects the history of innovation and global leadership of the United States;

(3) when online public services and official communications from any level and branch of government use the .gov internet domain, they are easily recognized as official and difficult to impersonate;

(4) the citizens of the United States deserve online public services that are safe, recognizable, and trustworthy;

(5) the .gov internet domain should be available at no cost or a negligible cost to any Federal, State, local, or territorial government-operated or publicly controlled entity, including any Tribal government recognized by the Federal Government or a State government, for use in their official services, operations, and communications;

(6) the .gov internet domain provides a critical service to those Federal, State, local, Tribal, and territorial governments; and

(7) the .gov internet domain should be operated transparently and in the spirit of public accessibility, privacy, and security.

"(D) Consider disciplinary or corrective action against any official of the Department of Defense."; and

(B) in paragraph (2), by inserting ", subcontractor, grantee, subgrantee, or personal services contractor" after "contractor";

(4) in subsection (d), by striking "and subcontractors" and inserting ", subcontractors, grantees, subgrantees, or personal services contractors";

(5) in subsection (e)(2)—

(A) in the matter preceding subparagraph (A), by striking "or grantee of" and inserting "grantee, subgrantee, or personal services contractor of"; and

(B) in subparagraph (B), by striking "or grantee" and inserting "grantee, or subgrantee"; and

(6) in subsection (g)(5), by inserting "or grants" after "contracts".

(b) CIVILIAN CONTRACTS.—Section 4712 of title 41, United States Code, is amended—

(1) in subsection (a)—

(A) in paragraph (1), by striking "or subgrantee" and inserting "subgrantee,";

(B) in paragraph (2), by striking "or subgrantee" and inserting "subgrantee, or personal services contractor"; and

(C) in paragraph (3), by striking "or subgrantee" and inserting "subgrantee, or personal services contractor";

(2) in subsection (b)(1), by striking "or subgrantee concerned" and inserting "subgrantee, or personal services contractor concerned";

(3) in subsection (c)—

(A) in paragraph (1)—

(i) in the matter preceding subparagraph (A), by striking "or subgrantee concerned" and inserting "subgrantee, or personal services contractor concerned";

(ii) in subparagraph (A), by striking "or subgrantee" and inserting "subgrantee, or personal services contractor";

(iii) in subparagraph (B), by striking "or subgrantee" and inserting "subgrantee, or personal services contractor";

(iv) in subparagraph (C), by striking "or subgrantee" and inserting "subgrantee, or personal services contractor"; and

(v) by inserting at the end the following new subparagraph:

"(D) Consider disciplinary or corrective action against any official of the executive agency, if appropriate."; and

(B) in paragraph (2), by striking "or subgrantee" and inserting "subgrantee, or personal services contractor";

(4) in subsection (d), by striking "and subgrantees" and inserting "subgrantees, and personal services contractors"; and

(5) in subsection (f), by striking "or subgrantee" each place it appears and inserting "subgrantee, or personal services contractor".

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such subchapter is amended by adding at the end the following new item: 10 USC prec. 1701.

"1706. Government performance of certain acquisition functions.".

(b) REPEAL OF SUPERSEDED SECTION.—Section 820 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109–364; 10 U.S.C. 1701 note) is repealed.

SEC. 825. COMPETITION IN ACQUISITION OF MAJOR SUBSYSTEMS AND SUBASSEMBLIES ON MAJOR DEFENSE ACQUISITION PROGRAMS.

Section 202(c) of the Weapon Systems Acquisition Reform Act of 2009 (Public Law 111–23; 123 Stat. 1720; 10 U.S.C. 2430 note) is amended—

(1) in the matter preceding paragraph (1), by striking "fair and objective 'make-buy' decisions by prime contractors" and inserting "competition or the option of competition at the subcontract level";

(2) by redesignating paragraphs (1), (2), and (3) as paragraphs (2), (3), and (4), respectively; and

(3) by inserting before paragraph (2), as redesignated by paragraph (2) of this section, the following new paragraph (1):

"(1) where appropriate, breaking out a major subsystem, conducting a separate competition for the subsystem, and providing the subsystem to the prime contractor as Government-furnished equipment;".

SEC. 826. COMPLIANCE WITH BERRY AMENDMENT REQUIRED FOR UNIFORM COMPONENTS SUPPLIED TO AFGHAN MILITARY OR AFGHAN NATIONAL POLICE. Applicability.

(a) REQUIREMENT.—In the case of any textile components supplied by the Department of Defense to the Afghan National Army or the Afghan National Police for purposes of production of uniforms, section 2533a of title 10, United States Code, shall apply, and no exceptions or exemptions under that section shall apply.

(b) EFFECTIVE DATE.—This section shall apply to solicitations issued and contracts awarded for the procurement of such components after the date of the enactment of this Act.

SEC. 827. ENHANCEMENT OF WHISTLEBLOWER PROTECTIONS FOR CONTRACTOR EMPLOYEES.

(a) IN GENERAL.—Subsection (a) of section 2409 of title 10, United States Code, is amended—

(1) by inserting "(1)" before "An employee";

(2) in paragraph (1), as so designated—

(A) by inserting "or subcontractor" after "employee of a contractor";

(B) by striking "a Member of Congress" and all that follows through "the Department of Justice" and inserting "a person or body described in paragraph (2)"; and

(C) by striking "evidence of" and all that follows and inserting the following: "evidence of the following:

"(A) Gross mismanagement of a Department of Defense contract or grant, a gross waste of Department funds, an abuse of authority relating to a Department contract or grant, or a violation of law, rule, or regulation related to a Department

contract (including the competition for or negotiation of a contract) or grant.

"(B) Gross mismanagement of a National Aeronautics and Space Administration contract or grant, a gross waste of Administration funds, an abuse of authority relating to an Administration contract or grant, or a violation of law, rule, or regulation related to an Administration contract (including the competition for or negotiation of a contract) or grant.

"(C) A substantial and specific danger to public health or safety."; and

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

"(2) The persons and bodies described in this paragraph are the persons and bodies as follows:

"(A) A Member of Congress or a representative of a committee of Congress.

"(B) An Inspector General.

"(C) The Government Accountability Office.

"(D) An employee of the Department of Defense or the National Aeronautics and Space Administration, as applicable, responsible for contract oversight or management.

"(E) An authorized official of the Department of Justice or other law enforcement agency.

"(F) A court or grand jury.

"(G) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.

"(3) For the purposes of paragraph (1)—

"(A) an employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Department of Defense or National Aeronautics and Space Administration contract or grant shall be deemed to have made a disclosure covered by such paragraph; and

"(B) a reprisal described in paragraph (1) is prohibited even if it is undertaken at the request of a Department or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the Department or Administration official making the request.".

(b) INVESTIGATION OF COMPLAINTS.—Subsection (b) of such section is amended—

(1) in paragraph (1), by inserting "fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant," after "is frivolous,";

(2) in paragraph (2)—

(A) in subparagraph (A), by inserting ", fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant" after "is frivolous"; and

(B) in subparagraph (B), by inserting ", up to 180 days," after "such additional period of time"; and

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

"(3) The Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

"(A) made with the consent of the person alleging the reprisal;

"(B) made in accordance with the provisions of section 552a of title 5 or as required by any other applicable Federal law; or

"(C) necessary to conduct an investigation of the alleged reprisal.

"(4) A complaint may not be brought under this subsection more than three years after the date on which the alleged reprisal took place.".

(c) REMEDY AND ENFORCEMENT AUTHORITY.—Subsection (c) of such section is amended—

(1) in paragraph (1)(B), by striking "the compensation (including back pay)" and inserting "compensatory damages (including back pay)";

(2) in paragraph (2), by adding at the end following new sentence: "An action under this paragraph may not be brought more than two years after the date on which remedies are deemed to have been exhausted.";

(3) in paragraph (4), by striking "and compensatory and exemplary damages." and inserting ", compensatory and exemplary damages, and reasonable attorney fees and costs. The person upon whose behalf an order was issued may also file such an action or join in an action filed by the head of the agency.";

(4) in paragraph (5), by adding at the end the following new sentence: "Filing such an appeal shall not act to stay the enforcement of the order of the head of an agency, unless a stay is specifically entered by the court."; and

(5) by adding at the end the following new paragraphs:

"(6) The legal burdens of proof specified in section 1221(e) of title 5 shall be controlling for the purposes of any investigation conducted by an Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether discrimination prohibited under this section has occurred.

"(7) The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.".

(d) NOTIFICATION OF EMPLOYEES.—Such section is further amended—

(1) by redesignating subsections (d) and (e) as subsections (f) and (g), respectively; and

(2) by inserting after subsection (c) the following new subsection (d):

"(d) NOTIFICATION OF EMPLOYEES.—The Secretary of Defense and the Administrator of the National Aeronautics and Space Administration shall ensure that contractors and subcontractors of the Department of Defense and the National Aeronautics and Space Administration, as applicable, inform their employees in writing of the rights and remedies provided under this section, in the predominant native language of the workforce.".

(e) EXCEPTIONS FOR INTELLIGENCE COMMUNITY.—Such section is further amended by inserting after subsection (d), as added by subsection (d)(2) of this section, the following new subsection (e):

"(e) EXCEPTIONS.—(1) This section shall not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

"(2) This section shall not apply to any disclosure made by an employee of a contractor, subcontractor, or grantee of an element of the intelligence community if such disclosure—

"(A) relates to an activity of an element of the intelligence community; or

"(B) was discovered during contract, subcontract, or grantee services provided to an element of the intelligence community.".

(f) ABUSE OF AUTHORITY DEFINED.—Subsection (g) of such section, as redesignated by subsection (d)(1) of this section, is further amended by adding at the end the following new paragraph:

"(6) The term 'abuse of authority' means the following:

"(A) An arbitrary and capricious exercise of authority that is inconsistent with the mission of the Department of Defense or the successful performance of a Department contract or grant.

"(B) An arbitrary and capricious exercise of authority that is inconsistent with the mission of the National Aeronautics and Space Administration or the successful performance of an Administration contract or grant.".

(g) ALLOWABILITY OF LEGAL FEES.—Section 2324(k) of such title is amended—

(1) in paragraph (1), by striking "commenced by the United States or a State" and inserting "commenced by the United States, by a State, or by a contractor employee submitting a complaint under section 2409 of this title"; and

(2) in paragraph (2)(C), by striking "the imposition of a monetary penalty" and inserting "the imposition of a monetary penalty or an order to take corrective action under section 2409 of this title".

10 USC 2324 note.

(h) CONSTRUCTION.—Nothing in this section, or the amendments made by this section, shall be construed to provide any rights to disclose classified information not otherwise provided by law.

10 USC 2324 note. Applicability.

(i) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall take effect on the date that is 180 days after the date of the enactment of this Act, and shall apply to—

(A) all contracts awarded on or after such date;

(B) all task orders entered on or after such date pursuant to contracts awarded before, on, or after such date; and

(C) all contracts awarded before such date that are modified to include a contract clause providing for the applicability of such amendments.

Deadline.

(2) REVISION OF SUPPLEMENTS TO THE FAR.—Not later than 180 days after the date of the enactment of this Act, the Department of Defense Supplement to the Federal Acquisition Regulation and the National Aeronautics and Space Administration Supplement to the Federal Acquisition Regulation shall each be revised to implement the requirements arising under the amendments made by this section.

(3) INCLUSION OF CONTRACT CLAUSE IN CONTRACTS AWARDED BEFORE EFFECTIVE DATE.—At the time of any major modification to a contract that was awarded before the date that is 180

days after the date of the enactment of this Act, the head of the contracting agency shall make best efforts to include in the contract a contract clause providing for the applicability of the amendments made by this section to the contract.

SEC. 828. PILOT PROGRAM FOR ENHANCEMENT OF CONTRACTOR EMPLOYEE WHISTLEBLOWER PROTECTIONS.

(a) WHISTLEBLOWER PROTECTIONS.—

(1) IN GENERAL.—Chapter 47 of title 41, United States Code, is amended by adding at the end the following new section:

"§ 4712. Pilot program for enhancement of contractor protection from reprisal for disclosure of certain information

41 USC 4712.

"(a) PROHIBITION OF REPRISALS.—

"(1) IN GENERAL.—An employee of a contractor, subcontractor, or grantee may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.

"(2) PERSONS AND BODIES COVERED.—The persons and bodies described in this paragraph are the persons and bodies as follows:

"(A) A Member of Congress or a representative of a committee of Congress.

"(B) An Inspector General.

"(C) The Government Accountability Office.

"(D) A Federal employee responsible for contract or grant oversight or management at the relevant agency.

"(E) An authorized official of the Department of Justice or other law enforcement agency.

"(F) A court or grand jury.

"(G) A management official or other employee of the contractor, subcontractor, or grantee who has the responsibility to investigate, discover, or address misconduct.

"(3) RULES OF CONSTRUCTION.—For the purposes of paragraph (1)—

"(A) an employee who initiates or provides evidence of contractor, subcontractor, or grantee misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Federal contract or grant shall be deemed to have made a disclosure covered by such paragraph; and

"(B) a reprisal described in paragraph (1) is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

"(b) INVESTIGATION OF COMPLAINTS.—

Determination.
Reports.

"(1) SUBMISSION OF COMPLAINT.—A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of the executive agency involved. Unless the Inspector General determines that the complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor or grantee concerned, and the head of the agency.

"(2) INSPECTOR GENERAL ACTION.—

"(A) DETERMINATION OR SUBMISSION OF REPORT ON FINDINGS.—Except as provided under subparagraph (B), the Inspector General shall make a determination that a complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant or submit a report under paragraph (1) within 180 days after receiving the complaint.

"(B) EXTENSION OF TIME.—If the Inspector General is unable to complete an investigation in time to submit a report within the 180-day period specified in subparagraph (A) and the person submitting the complaint agrees to an extension of time, the Inspector General shall submit a report under paragraph (1) within such additional period of time, up to 180 days, as shall be agreed upon between the Inspector General and the person submitting the complaint.

"(3) PROHIBITION ON DISCLOSURE.—The Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

"(A) made with the consent of the person alleging the reprisal;

"(B) made in accordance with the provisions of section 552a of title 5 or as required by any other applicable Federal law; or

"(C) necessary to conduct an investigation of the alleged reprisal.

"(4) TIME LIMITATION.—A complaint may not be brought under this subsection more than three years after the date on which the alleged reprisal took place.

"(c) REMEDY AND ENFORCEMENT AUTHORITY.—

Deadline.
Determination.
Order.

"(1) IN GENERAL.—Not later than 30 days after receiving an Inspector General report pursuant to subsection (b), the head of the executive agency concerned shall determine whether there is sufficient basis to conclude that the contractor or grantee concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:

"(A) Order the contractor or grantee to take affirmative action to abate the reprisal.

"(B) Order the contractor or grantee to reinstate the person to the position that the person held before the

reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

"(C) Order the contractor or grantee to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency.

Deadlines.

"(2) EXHAUSTION OF REMEDIES.—If the head of an executive agency issues an order denying relief under paragraph (1) or has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under paragraph (b)(2)(B), not later than 30 days after the expiration of the extension of time, and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the contractor or grantee to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. An action under this paragraph may not be brought more than two years after the date on which remedies are deemed to have been exhausted.

"(3) ADMISSIBILITY OF EVIDENCE.—An Inspector General determination and an agency head order denying relief under paragraph (2) shall be admissible in evidence in any de novo action at law or equity brought pursuant to this subsection.

"(4) ENFORCEMENT OF ORDERS.—Whenever a person fails to comply with an order issued under paragraph (1), the head of the executive agency concerned shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorney fees and costs. The person upon whose behalf an order was issued may also file such an action or join in an action filed by the head of the executive agency.

"(5) JUDICIAL REVIEW.—Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the executive agency. Review shall conform to chapter 7 of title 5. Filing such an appeal shall not act to stay the enforcement of the order of the head of an executive agency, unless a stay is specifically entered by the court.

Time period.

"(6) BURDENS OF PROOF.—The legal burdens of proof specified in section 1221(e) of title 5 shall be controlling for the purposes of any investigation conducted by an Inspector General, decision by the head of an executive agency, or judicial or administrative proceeding to determine whether discrimination prohibited under this section has occurred.

"(7) RIGHTS AND REMEDIES NOT WAIVABLE.—The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.

"(d) NOTIFICATION OF EMPLOYEES.—The head of each executive agency shall ensure that contractors, subcontractors, and grantees of the agency inform their employees in writing of the rights and remedies provided under this section, in the predominant native language of the workforce.

"(e) CONSTRUCTION.—Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or to modify or derogate from a right or remedy otherwise available to the employee.

"(f) EXCEPTIONS.—(1) This section shall not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

"(2) This section shall not apply to any disclosure made by an employee of a contractor, subcontractor, or grantee of an element of the intelligence community if such disclosure—

"(A) relates to an activity of an element of the intelligence community; or

"(B) was discovered during contract, subcontract, or grantee services provided to an element of the intelligence community.

"(g) DEFINITIONS.—In this section:

"(1) The term 'abuse of authority' means an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned or the successful performance of a contract or grant of such agency.

"(2) The term 'Inspector General' means an Inspector General appointed under the Inspector General Act of 1978 and any Inspector General that receives funding from, or has oversight over contracts or grants awarded for or on behalf of, the executive agency concerned.

"(h) CONSTRUCTION.—Nothing in this section, or the amendments made by this section, shall be construed to provide any rights to disclose classified information not otherwise provided by law.

"(i) DURATION OF SECTION.—This section shall be in effect for the four-year period beginning on the date of the enactment of this section.".

41 USC prec. 4701.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

"4712. Pilot program for enhancement of contractor protection from reprisal for disclosure of certain information.".

41 USC 4712 note. Applicability.

(b) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by subsection (a) shall take effect on the date that is 180 days after the date of the enactment of this Act, and shall, during the period

section 4712 of title 41, United States Code, as added by such subsection, is in effect, apply to—

(A) all contracts and grants awarded on or after such date;

(B) all task orders entered on or after such date pursuant to contracts awarded before, on, or after such date; and

(C) all contracts awarded before such date that are modified to include a contract clause providing for the applicability of such amendments.

(2) REVISION OF FEDERAL ACQUISITION REGULATION.—Not later than 180 days after the date of the enactment of this Act, the Federal Acquisition Regulation shall be revised to implement the requirements arising under the amendments made by this section. Deadline.

(3) INCLUSION OF CONTRACT CLAUSE IN CONTRACTS AWARDED BEFORE EFFECTIVE DATE.—At the time of any major modification to a contract that was awarded before the date that is 180 days after the date of the enactment of this Act, the head of the contracting agency shall make best efforts to include in the contract a contract clause providing for the applicability of the amendments made by this section to the contract. Time period.

(c) SUSPENSION OF EFFECTIVENESS OF SECTION 4705 OF TITLE 41, UNITED STATES CODE, WHILE PILOT PROGRAM IS IN EFFECT.—Section 4705 of title 41, United States Code, is amended by adding at the end the following new subsection:

"(f) FOUR-YEAR SUSPENSION OF EFFECTIVENESS WHILE PILOT PROGRAM IS IN EFFECT.—While section 4712 of this title is in effect, this section shall not be in effect.".

(d) ALLOWABILITY OF LEGAL FEES.—Section 4310 of title 41, United States Code, is amended—

(1) in subsection (b), by striking "commenced by the Federal Government or a State" and inserting "commenced by the Federal Government, by a State, or by a contractor or grantee employee submitting a complaint under section 4712 of this title"; and

(2) in subsection (c)(3), by striking "the imposition of a monetary penalty" and inserting "the imposition of a monetary penalty or an order to take corrective action under section 4712 of this title".

(e) GOVERNMENT ACCOUNTABILITY OFFICE STUDY AND REPORT.—

(1) STUDY.—Not later than three years after the date of the enactment of this Act, the Comptroller General of the United States shall begin conducting a study to evaluate the implementation of section 4712 of title 41, United States Code, as added by subsection (a).

(2) REPORT.—Not later than four years after the date of the enactment of this Act, the Comptroller General shall submit to Congress a report on the results of the study required by paragraph (1), with such findings and recommendations as the Comptroller General considers appropriate.

SEC. 829. EXTENSION OF CONTRACTOR CONFLICT OF INTEREST LIMITATIONS. 10 USC 2302 note.

(a) ASSESSMENT OF EXTENSION OF LIMITATIONS TO CERTAIN ADDITIONAL FUNCTIONS AND CONTRACTS.—Not later than 180 days Deadline. Review.

days after the date of the enactment of this Act, the head of the contracting agency shall make best efforts to include in the contract a contract clause providing for the applicability of the amendments made by this section to the contract.

SEC. 828. PILOT PROGRAM FOR ENHANCEMENT OF CONTRACTOR EMPLOYEE WHISTLEBLOWER PROTECTIONS.

(a) WHISTLEBLOWER PROTECTIONS.—

(1) IN GENERAL.—Chapter 47 of title 41, United States Code, is amended by adding at the end the following new section:

"§ 4712. Pilot program for enhancement of contractor protection from reprisal for disclosure of certain information

41 USC 4712.

"(a) PROHIBITION OF REPRISALS.—

"(1) IN GENERAL.—An employee of a contractor, subcontractor, or grantee may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.

"(2) PERSONS AND BODIES COVERED.—The persons and bodies described in this paragraph are the persons and bodies as follows:

"(A) A Member of Congress or a representative of a committee of Congress.

"(B) An Inspector General.

"(C) The Government Accountability Office.

"(D) A Federal employee responsible for contract or grant oversight or management at the relevant agency.

"(E) An authorized official of the Department of Justice or other law enforcement agency.

"(F) A court or grand jury.

"(G) A management official or other employee of the contractor, subcontractor, or grantee who has the responsibility to investigate, discover, or address misconduct.

"(3) RULES OF CONSTRUCTION.—For the purposes of paragraph (1)—

"(A) an employee who initiates or provides evidence of contractor, subcontractor, or grantee misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Federal contract or grant shall be deemed to have made a disclosure covered by such paragraph; and

"(B) a reprisal described in paragraph (1) is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

"(b) INVESTIGATION OF COMPLAINTS.—

Determination.
Reports.

"(1) SUBMISSION OF COMPLAINT.—A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of the executive agency involved. Unless the Inspector General determines that the complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor or grantee concerned, and the head of the agency.

"(2) INSPECTOR GENERAL ACTION.—

"(A) DETERMINATION OR SUBMISSION OF REPORT ON FINDINGS.—Except as provided under subparagraph (B), the Inspector General shall make a determination that a complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant or submit a report under paragraph (1) within 180 days after receiving the complaint.

"(B) EXTENSION OF TIME.—If the Inspector General is unable to complete an investigation in time to submit a report within the 180-day period specified in subparagraph (A) and the person submitting the complaint agrees to an extension of time, the Inspector General shall submit a report under paragraph (1) within such additional period of time, up to 180 days, as shall be agreed upon between the Inspector General and the person submitting the complaint.

"(3) PROHIBITION ON DISCLOSURE.—The Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

"(A) made with the consent of the person alleging the reprisal;

"(B) made in accordance with the provisions of section 552a of title 5 or as required by any other applicable Federal law; or

"(C) necessary to conduct an investigation of the alleged reprisal.

"(4) TIME LIMITATION.—A complaint may not be brought under this subsection more than three years after the date on which the alleged reprisal took place.

"(c) REMEDY AND ENFORCEMENT AUTHORITY.—

Deadline.
Determination.
Order.

"(1) IN GENERAL.—Not later than 30 days after receiving an Inspector General report pursuant to subsection (b), the head of the executive agency concerned shall determine whether there is sufficient basis to conclude that the contractor or grantee concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:

"(A) Order the contractor or grantee to take affirmative action to abate the reprisal.

"(B) Order the contractor or grantee to reinstate the person to the position that the person held before the

reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

"(C) Order the contractor or grantee to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency.

Deadlines.

"(2) EXHAUSTION OF REMEDIES.—If the head of an executive agency issues an order denying relief under paragraph (1) or has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under paragraph (b)(2)(B), not later than 30 days after the expiration of the extension of time, and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the contractor or grantee to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. An action under this paragraph may not be brought more than two years after the date on which remedies are deemed to have been exhausted.

"(3) ADMISSIBILITY OF EVIDENCE.—An Inspector General determination and an agency head order denying relief under paragraph (2) shall be admissible in evidence in any de novo action at law or equity brought pursuant to this subsection.

"(4) ENFORCEMENT OF ORDERS.—Whenever a person fails to comply with an order issued under paragraph (1), the head of the executive agency concerned shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorney fees and costs. The person upon whose behalf an order was issued may also file such an action or join in an action filed by the head of the executive agency.

"(5) JUDICIAL REVIEW.—Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the executive agency. Review shall conform to chapter 7 of title 5. Filing such an appeal shall not act to stay the enforcement of the order of the head of an executive agency, unless a stay is specifically entered by the court.

Time period.

"(6) BURDENS OF PROOF.—The legal burdens of proof specified in section 1221(e) of title 5 shall be controlling for the purposes of any investigation conducted by an Inspector General, decision by the head of an executive agency, or judicial or administrative proceeding to determine whether discrimination prohibited under this section has occurred.

"(7) RIGHTS AND REMEDIES NOT WAIVABLE.—The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.

"(d) NOTIFICATION OF EMPLOYEES.—The head of each executive agency shall ensure that contractors, subcontractors, and grantees of the agency inform their employees in writing of the rights and remedies provided under this section, in the predominant native language of the workforce.

"(e) CONSTRUCTION.—Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or to modify or derogate from a right or remedy otherwise available to the employee.

"(f) EXCEPTIONS.—(1) This section shall not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

"(2) This section shall not apply to any disclosure made by an employee of a contractor, subcontractor, or grantee of an element of the intelligence community if such disclosure—

"(A) relates to an activity of an element of the intelligence community; or

"(B) was discovered during contract, subcontract, or grantee services provided to an element of the intelligence community.

"(g) DEFINITIONS.—In this section:

"(1) The term 'abuse of authority' means an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned or the successful performance of a contract or grant of such agency.

"(2) The term 'Inspector General' means an Inspector General appointed under the Inspector General Act of 1978 and any Inspector General that receives funding from, or has oversight over contracts or grants awarded for or on behalf of, the executive agency concerned.

"(h) CONSTRUCTION.—Nothing in this section, or the amendments made by this section, shall be construed to provide any rights to disclose classified information not otherwise provided by law.

"(i) DURATION OF SECTION.—This section shall be in effect for the four-year period beginning on the date of the enactment of this section.".

41 USC prec. 4701.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

"4712. Pilot program for enhancement of contractor protection from reprisal for disclosure of certain information.".

41 USC 4712 note. Applicability.

(b) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by subsection (a) shall take effect on the date that is 180 days after the date of the enactment of this Act, and shall, during the period

section 4712 of title 41, United States Code, as added by such subsection, is in effect, apply to—

(A) all contracts and grants awarded on or after such date;

(B) all task orders entered on or after such date pursuant to contracts awarded before, on, or after such date; and

(C) all contracts awarded before such date that are modified to include a contract clause providing for the applicability of such amendments.

(2) REVISION OF FEDERAL ACQUISITION REGULATION.—Not later than 180 days after the date of the enactment of this Act, the Federal Acquisition Regulation shall be revised to implement the requirements arising under the amendments made by this section. Deadline.

(3) INCLUSION OF CONTRACT CLAUSE IN CONTRACTS AWARDED BEFORE EFFECTIVE DATE.—At the time of any major modification to a contract that was awarded before the date that is 180 days after the date of the enactment of this Act, the head of the contracting agency shall make best efforts to include in the contract a contract clause providing for the applicability of the amendments made by this section to the contract. Time period.

(c) SUSPENSION OF EFFECTIVENESS OF SECTION 4705 OF TITLE 41, UNITED STATES CODE, WHILE PILOT PROGRAM IS IN EFFECT.—Section 4705 of title 41, United States Code, is amended by adding at the end the following new subsection:

"(f) FOUR-YEAR SUSPENSION OF EFFECTIVENESS WHILE PILOT PROGRAM IS IN EFFECT.—While section 4712 of this title is in effect, this section shall not be in effect.".

(d) ALLOWABILITY OF LEGAL FEES.—Section 4310 of title 41, United States Code, is amended—

(1) in subsection (b), by striking "commenced by the Federal Government or a State" and inserting "commenced by the Federal Government, by a State, or by a contractor or grantee employee submitting a complaint under section 4712 of this title"; and

(2) in subsection (c)(3), by striking "the imposition of a monetary penalty" and inserting "the imposition of a monetary penalty or an order to take corrective action under section 4712 of this title".

(e) GOVERNMENT ACCOUNTABILITY OFFICE STUDY AND REPORT.—

(1) STUDY.—Not later than three years after the date of the enactment of this Act, the Comptroller General of the United States shall begin conducting a study to evaluate the implementation of section 4712 of title 41, United States Code, as added by subsection (a).

(2) REPORT.—Not later than four years after the date of the enactment of this Act, the Comptroller General shall submit to Congress a report on the results of the study required by paragraph (1), with such findings and recommendations as the Comptroller General considers appropriate.

SEC. 829. EXTENSION OF CONTRACTOR CONFLICT OF INTEREST LIMITATIONS. 10 USC 2302 note.

(a) ASSESSMENT OF EXTENSION OF LIMITATIONS TO CERTAIN ADDITIONAL FUNCTIONS AND CONTRACTS.—Not later than 180 days Deadline. Review.

to facilitate tracking these funds through Treasury and agency accounting systems, the Secretary of the Treasury shall ensure that all funds appropriated in this Act shall be established in separate Treasury accounts, unless a waiver from this provision is approved by the Director of the Office of Management and Budget.

SEC. 1552. SET-ASIDE FOR STATE AND LOCAL GOVERNMENT REPORTING AND RECORDKEEPING.

Federal agencies receiving funds under this Act, may, after following the notice and comment rulemaking requirements under the Administrative Procedures Act (5 U.S.C. 500), reasonably adjust applicable limits on administrative expenditures for Federal awards to help award recipients defray the costs of data collection requirements initiated pursuant to this Act.

SEC. 1553. PROTECTING STATE AND LOCAL GOVERNMENT AND CONTRACTOR WHISTLEBLOWERS.

(a) PROHIBITION OF REPRISALS.—An employee of any non-Federal employer receiving covered funds may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of an employee's duties, to the Board, an inspector general, the Comptroller General, a member of Congress, a State or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct), a court or grand jury, the head of a Federal agency, or their representatives, information that the employee reasonably believes is evidence of—

(1) gross mismanagement of an agency contract or grant relating to covered funds;

(2) a gross waste of covered funds;

(3) a substantial and specific danger to public health or safety related to the implementation or use of covered funds;

(4) an abuse of authority related to the implementation or use of covered funds; or

(5) a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) or grant, awarded or issued relating to covered funds.

(b) INVESTIGATION OF COMPLAINTS.—

(1) IN GENERAL.—A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint regarding the reprisal to the appropriate inspector general. Except as provided under paragraph (3), unless the inspector general determines that the complaint is frivolous, does not relate to covered funds, or another Federal or State judicial or administrative proceeding has previously been invoked to resolve such complaint, the inspector general shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the person's employer, the head of the appropriate agency, and the Board.

(2) TIME LIMITATIONS FOR ACTIONS.—

(A) IN GENERAL.—Except as provided under subparagraph (B), the inspector general shall, not later than 180 days after receiving a complaint under paragraph (1)— Deadline.

Determination.

(i) make a determination that the complaint is frivolous, does not relate to covered funds, or another Federal or State judicial or administrative proceeding has previously been invoked to resolve such complaint; or

Reports.

(ii) submit a report under paragraph (1).

(B) EXTENSIONS.—

(i) VOLUNTARY EXTENSION AGREED TO BETWEEN INSPECTOR GENERAL AND COMPLAINANT.—If the inspector general is unable to complete an investigation under this section in time to submit a report within the 180-day period specified under subparagraph (A) and the person submitting the complaint agrees to an extension of time, the inspector general shall submit a report under paragraph (1) within such additional period of time as shall be agreed upon between the inspector general and the person submitting the complaint.

(ii) EXTENSION GRANTED BY INSPECTOR GENERAL.—If the inspector general is unable to complete an investigation under this section in time to submit a report within the 180-day period specified under subparagraph (A), the inspector general may extend the period for not more than 180 days without agreeing with the person submitting the complaint to such extension, provided that the inspector general provides a written explanation (subject to the authority to exclude information under paragraph (4)(C)) for the decision, which shall be provided to both the person submitting the complaint and the non-Federal employer.

(iii) SEMI-ANNUAL REPORT ON EXTENSIONS.—The inspector general shall include in semi-annual reports to Congress a list of those investigations for which the inspector general received an extension.

(3) DISCRETION NOT TO INVESTIGATE COMPLAINTS.—

(A) IN GENERAL.—The inspector general may decide not to conduct or continue an investigation under this section upon providing to the person submitting the complaint and the non-Federal employer a written explanation (subject to the authority to exclude information under paragraph (4)(C)) for such decision.

(B) ASSUMPTION OF RIGHTS TO CIVIL REMEDY.—Upon receipt of an explanation of a decision not to conduct or continue an investigation under subparagraph (A), the person submitting a complaint shall immediately assume the right to a civil remedy under subsection (c)(3) as if the 210-day period specified under such subsection has already passed.

(C) SEMI-ANNUAL REPORT.—The inspector general shall include in semi-annual reports to Congress a list of those investigations the inspector general decided not to conduct or continue under this paragraph.

(4) ACCESS TO INVESTIGATIVE FILE OF INSPECTOR GENERAL.—

(A) IN GENERAL.—The person alleging a reprisal under this section shall have access to the investigation file of

the appropriate inspector general in accordance with section 552a of title 5, United States Code (commonly referred to as the "Privacy Act"). The investigation of the inspector general shall be deemed closed for purposes of disclosure under such section when an employee files an appeal to an agency head or a court of competent jurisdiction.

(B) CIVIL ACTION.—In the event the person alleging the reprisal brings suit under subsection (c)(3), the person alleging the reprisal and the non-Federal employer shall have access to the investigative file of the inspector general in accordance with the Privacy Act.

(C) EXCEPTION.—The inspector general may exclude from disclosure—

(i) information protected from disclosure by a provision of law; and

(ii) any additional information the inspector general determines disclosure of which would impede a continuing investigation, provided that such information is disclosed once such disclosure would no longer impede such investigation, unless the inspector general determines that disclosure of law enforcement techniques, procedures, or information could reasonably be expected to risk circumvention of the law or disclose the identity of a confidential source.

(5) PRIVACY OF INFORMATION.—An inspector general investigating an alleged reprisal under this section may not respond to any inquiry or disclose any information from or about any person alleging such reprisal, except in accordance with the provisions of section 552a of title 5, United States Code, or as required by any other applicable Federal law.

(c) REMEDY AND ENFORCEMENT AUTHORITY.—

(1) BURDEN OF PROOF.—

(A) DISCLOSURE AS CONTRIBUTING FACTOR IN REPRISAL.—

(i) IN GENERAL.—A person alleging a reprisal under this section shall be deemed to have affirmatively established the occurrence of the reprisal if the person demonstrates that a disclosure described in subsection (a) was a contributing factor in the reprisal.

(ii) USE OF CIRCUMSTANTIAL EVIDENCE.—A disclosure may be demonstrated as a contributing factor in a reprisal for purposes of this paragraph by circumstantial evidence, including—

(I) evidence that the official undertaking the reprisal knew of the disclosure; or

(II) evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal.

(B) OPPORTUNITY FOR REBUTTAL.—The head of an agency may not find the occurrence of a reprisal with respect to a reprisal that is affirmatively established under subparagraph (A) if the non-Federal employer demonstrates by clear and convincing evidence that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure.

Deadline.
Determination.
Relief orders.

(2) AGENCY ACTION.—Not later than 30 days after receiving an inspector general report under subsection (b), the head of the agency concerned shall determine whether there is sufficient basis to conclude that the non-Federal employer has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief in whole or in part or shall take 1 or more of the following actions:

(A) Order the employer to take affirmative action to abate the reprisal.

(B) Order the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(C) Order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency or a court of competent jurisdiction.

Deadlines.

(3) CIVIL ACTION.—If the head of an agency issues an order denying relief in whole or in part under paragraph (1), has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under subsection (b)(2)(B)(i), within 30 days after the expiration of the extension of time, or decides under subsection (b)(3) not to investigate or to discontinue an investigation, and there is no showing that such delay or decision is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the employer to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury.

(4) JUDICIAL ENFORCEMENT OF ORDER.—Whenever a person fails to comply with an order issued under paragraph (2), the head of the agency shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorneys fees and costs.

(5) JUDICIAL REVIEW.—Any person adversely affected or aggrieved by an order issued under paragraph (2) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Review shall conform to chapter 7 of title 5, United States Code.

Deadline.

(d) NONENFORCEABILITY OF CERTAIN PROVISIONS WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBITRATION OF DISPUTES.—

(1) WAIVER OF RIGHTS AND REMEDIES.—Except as provided under paragraph (3), the rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment, including by any predispute arbitration agreement.

(2) PREDISPUTE ARBITRATION AGREEMENTS.—Except as provided under paragraph (3), no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of a dispute arising under this section.

(3) EXCEPTION FOR COLLECTIVE BARGAINING AGREEMENTS.—Notwithstanding paragraphs (1) and (2), an arbitration provision in a collective bargaining agreement shall be enforceable as to disputes arising under the collective bargaining agreement.

(e) REQUIREMENT TO POST NOTICE OF RIGHTS AND REMEDIES.—Any employer receiving covered funds shall post notice of the rights and remedies provided under this section.

(f) RULES OF CONSTRUCTION.—

(1) NO IMPLIED AUTHORITY TO RETALIATE FOR NON-PROTECTED DISCLOSURES.—Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or to modify or derogate from a right or remedy otherwise available to the employee.

(2) RELATIONSHIP TO STATE LAWS.—Nothing in this section may be construed to preempt, preclude, or limit the protections provided for public or private employees under State whistleblower laws.

(g) DEFINITIONS.—In this section:

(1) ABUSE OF AUTHORITY.—The term "abuse of authority" means an arbitrary and capricious exercise of authority by a contracting official or employee that adversely affects the rights of any person, or that results in personal gain or advantage to the official or employee or to preferred other persons.

(2) COVERED FUNDS.—The term "covered funds" means any contract, grant, or other payment received by any non-Federal employer if—

(A) the Federal Government provides any portion of the money or property that is provided, requested, or demanded; and

(B) at least some of the funds are appropriated or otherwise made available by this Act.

(3) EMPLOYEE.—The term "employee"—

(A) except as provided under subparagraph (B), means an individual performing services on behalf of an employer; and

(B) does not include any Federal employee or member of the uniformed services (as that term is defined in section 101(a)(5) of title 10, United States Code).

(4) NON-FEDERAL EMPLOYER.—The term "non-Federal employer"—

(A) means any employer—

(i) with respect to covered funds—

(I) the contractor, subcontractor, grantee, or recipient, as the case may be, if the contractor,

subcontractor, grantee, or recipient is an employer; and

(II) any professional membership organization, certification or other professional body, any agent or licensee of the Federal government, or any person acting directly or indirectly in the interest of an employer receiving covered funds; or

(ii) with respect to covered funds received by a State or local government, the State or local government receiving the funds and any contractor or subcontractor of the State or local government; and

(B) does not mean any department, agency, or other entity of the Federal Government.

(5) STATE OR LOCAL GOVERNMENT.—The term "State or local government" means—

(A) the government of each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, or any other territory or possession of the United States; or

(B) the government of any political subdivision of a government listed in subparagraph (A).

SEC. 1554. SPECIAL CONTRACTING PROVISIONS.

To the maximum extent possible, contracts funded under this Act shall be awarded as fixed-price contracts through the use of competitive procedures. A summary of any contract awarded with such funds that is not fixed-price and not awarded using competitive procedures shall be posted in a special section of the website established in section 1526.

TITLE XVI—GENERAL PROVISIONS—THIS ACT

RELATIONSHIP TO OTHER APPROPRIATIONS

SEC. 1601. Each amount appropriated or made available in this Act is in addition to amounts otherwise appropriated for the fiscal year involved. Enactment of this Act shall have no effect on the availability of amounts under the Continuing Appropriations Resolution, 2009 (division A of Public Law 110–329).

PREFERENCE FOR QUICK-START ACTIVITIES

SEC. 1602. In using funds made available in this Act for infrastructure investment, recipients shall give preference to activities that can be started and completed expeditiously, including a goal of using at least 50 percent of the funds for activities that can be initiated not later than 120 days after the date of the enactment of this Act. Recipients shall also use grant funds in a manner that maximizes job creation and economic benefit.

PERIOD OF AVAILABILITY

SEC. 1603. All funds appropriated in this Act shall remain available for obligation until September 30, 2010, unless expressly provided otherwise in this Act.

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

December 19, 2014

VIA E-MAIL and U.S. MAIL

Martha L. King, Esq.
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Re: U.S. Department of the Interior, Office of the Inspector General Report of Investigation U.S. Bureau of Reclamation ARRA Funds–Case No. 01-CO-13-0243-I (Blatt-St. Marks)

Dear Ms. King and Mr. Zack:

Pursuant to the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553, 123 Stat. 115, 297-302 (2009) (ARRA), this constitutes the determination of the U.S. Department of the Interior (Department) regarding Kenneth Blatt-St. Marks' allegation that the Chippewa Cree Tribe (CCT) subjected him to a prohibited reprisal as a result of making a protected disclosure. Based upon our consideration of the May 27, 2014 U.S. Department of the Interior, Office of Inspector General (OIG) Report of Investigation No. OI-CO-13-0243-I (ROI), we find that CCT engaged in a prohibited reprisal against Mr. Blatt-St. Marks.[1] A redacted version of the OIG ROI and relevant attachments are included here as Exhibit 1.

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[1] It is important to note that, pursuant to the ARRA provisions governing this matter, the agency head's role is to determine both whether a prohibited reprisal occurred and what the appropriate remedy for that prohibited reprisal should be. Accordingly, the Department has not revisited any of the findings contained in the ROI. The Department also has not examined the merits of the actions of any party other than the CCT. In addition, the Department has not examined the merits of any new allegations brought by the CCT Business Committee against Mr. Blatt-St. Marks in connection with its removal of him from the Tribal Chairman position on December 1, 2014. *See* CCT Resolution No. 190-14 (Dec. 1, 2014)(authorizing and approving the decision by the CCT Business Committee to expel Mr. Blatt-St. Marks for neglect of duty and gross misconduct pursuant to Article V § 2 of the CCT Constitution).

I. ARRA Standards and Applicability

A. Pertinent ARRA Procedures, Standards, and Remedies

Much like long-standing statutory whistleblower protection for federal employees with respect to the activities of federal agencies, Congress prohibited ARRA funding recipients (*i.e.*, "non-Federal employers") from taking reprisals against their own employees for making protected disclosures with respect to "covered" (*i.e.*, ARRA) funds or ARRA-funded activities. *See* ARRA §§ 1553(a); 1553(g)(4)("Non-Federal employer"); *compare* 5 U.S.C. § 2302(b)(8). When an individual submits a complaint alleging that he or she was subjected to a prohibited reprisal, the appropriate Office of Inspector General of the government agency having jurisdiction with respect to the covered funds must investigate it. ARRA § 1553(b)(1).

After receiving the Inspector General's findings, the agency head must determine whether a sufficient basis exists to find a prohibited reprisal by the "non-Federal employer" related to a protected disclosure.[2] *Id.* § 1553(c)(2). While a complainant carries the burden of demonstrating that the protected disclosure was a "contributing factor" in the reprisal, ARRA permits the complainant to prove the prohibited reprisal by circumstantial evidence, including the use of evidence of the employer's knowledge of the disclosure and the timing of the reprisal relative to the disclosure (with respect to timing, this is addressed in ARRA as "evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal"). *Id.* § 1553(c)(1)(A). The employer has the opportunity to rebut a complainant's showing that the disclosure was a contributing factor in the reprisal by demonstrating "by clear and convincing evidence that the employer would have taken the action constituting the reprisal in the absence of the disclosure." *Id.* § 1553(c)(1)(B).

If the agency head finds that there was a prohibited reprisal by the employer, the agency head shall either issue an order denying relief in whole or in part or take "1 or more of the following

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[2] ARRA defines a "non-Federal employer" as:

> [A]ny employer (i) with respect to covered funds— (I) the contractor, subcontractor, grantee, or recipient, as the case may be, if the contractor, subcontractor, grantee, or recipient is an employer; and (II) any professional membership organization, certification or other professional body, any agent or licensee of the Federal government, or any person acting directly or indirectly in the interest of an employer receiving covered funds . . .

ARRA, § 1553(g)(4). Likewise, Mr. Blatt-St. Marks comes within the broad definition of "employee" found in ARRA, § 1553(g)(3)(A): "an individual performing services on behalf of an employer . . . ." Moreover, it appears from the record that Mr. Blatt-St. Marks received a paycheck from CCT. *See* ROI at 13; Att. 67. In addition, CCT by contract expressly agreed to be subject to ARRA's whistleblower provisions. *See* discussion *infra* at 3-5.

actions:" (a) order that the employer "take affirmative action to abate the reprisal," (b) order the employer to "reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply . . . if the reprisal had not been taken," or (c) order that the employer pay the complainant's "costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant" in bringing the complaint of reprisal. *Id.* § 1553(c)(2).

B. ARRA Section 1553 Applies to CCT

In September 2009, CCT and the Department's Bureau of Reclamation (USBR) entered Modification No. 6 to CCT's Annual Funding Agreement No. 06NA602127 (ROI Att. 6) pursuant to P.L. 93-638. Under Modification No. 6, CCT received $19,860,000 in ARRA funding for the Rocky Boy's Rural Funding Water System. Modification No. 6 expressly incorporated ARRA §1610(b), summarizing that section as follows:

> The American Recovery and Reinvestment Act of 2009 (ARRA), P.L. 111-5, requires the Secretary to identify all projects to be conducted under the authority of Public Law 93-638 and other relevant Tribal contracting authorities. Pursuant to Section 1610(b) of ARRA, in each funding agreement that transfers ARRA funds to Tribes pursuant to self-determination contracting authorities, the Secretary "shall incorporate provisions to ensure that the agreement conforms with the provisions of this Act regarding timing for use of funds and transparency, oversight, reporting, and accountability, including review by the Inspectors General, the Accountability and Transparency Board, and Government Accountability Office, consistent with the objectives of this Act."[3]

Att. 6 at 2 (unless otherwise noted, further "Att." references are to attachments to the ROI).

Modification No. 6 also states that the "Tribe and Reclamation acknowledge that obligation and expenditure of ARRA funding under this modification is subject to the additional terms and conditions contained in Attachment No. 1 hereto, entitled 'Addendum to Tribal Contracting Agreement to Transfer Funds Pursuant to the American Recovery and Reinvestment Act of 2009.'" *Id.* at 3.

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[3] The actual statutory language provides, "All projects to be conducted under the authority of the Indian Self-Determination and Education Assistance Act, Tribally-Controlled Schools Act, the Sanitation and Facilities Act, the Native American Housing and Self-Determination Assistance Act and the Buy-Indian Act shall be identified by the appropriate Secretary and the appropriate Secretary shall incorporate provisions to ensure that the agreement conforms with the provisions of this Act regarding timing for use of funds and transparency, oversight, reporting, and accountability, including review by the Inspectors General, the Accountability and Transparency Board, and Government Accountability Office, consistent with the objectives of this Act." ARRA § 1610(b).

Attachment No. 1 includes the following language:

> 10. Prohibition of reprisals against contractor whistleblowers
>
> No employee of the Contractor or any subcontractor shall be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of the employee's duties, to the Recovery Accountability and Transparency Board, the Inspector General, the Comptroller General, a member of Congress, a state or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct), a court or grand jury, a Federal agency head, or their representatives, information that the employee reasonably believes is evidence of (1) gross mismanagement of this addendum/contract; (2) a gross waste of funds awarded pursuant to this addendum/contract; (3) a substantial and specific danger to public health or safety related to the implementation or use of funds awarded pursuant to this addendum/contract; (4) an abuse of authority related to the implementation or use of funds awarded pursuant to this addendum/contract; or (5) a violation of law, rule, or regulation related to this addendum/contract (including the competition for or negotiation of the addendum/contract). This prohibition is enforceable pursuant to processes set up by ARRA. Other provisions of section 1553 also apply.[4]

Id. at 9 (emphasis added).

The "Definitions" section of the Addendum identified "Recipient," "Contractor," or "Tribe" to mean the "Chippewa Cree Tribe, Chippewa Cree Construction Corporation, a federally-recognized Indian Tribe or Tribal Organization, as defined at 25 USC 450b." *Id.* at 7.[5] Finally,

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[4] This language tracks closely to ARRA § 1553(a), which provides: "An employee of any non-Federal employer receiving covered funds may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of the employee's duties, to the [Recovery Accountability and Transparency] Board, an inspector general, the Comptroller General, a member of Congress, a State or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct), a court or grand jury, the head of a Federal agency, or their representatives, information that the employee reasonably believes is evidence of – (1) gross mismanagement an agency contract or grant relating to covered funds; (2) a gross waste of covered funds; (3) a substantial and specific danger to public health or safety related to the implementation or use of covered funds; (4) an abuse of authority related to the implementation or use of covered funds; or (5) a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) or grant, awarded or issued relating to covered funds." (material in brackets added).

[5] The "Definitions" found in the Addendum to Modification No. 6 closely track the "Definitions" in ARRA. See *supra* n.2.

the Addendum provided that "in the event of a conflict between ARRA and any other provisions of law including the Indian Self-Determination and Education Assistance Act, the provision of ARRA and its objectives control." *Id.* at 11.[6]

For these reasons, and as further borne out in the following factual discussion, we conclude that ARRA's whistleblower provision, §1553, applies to the actions that CCT took with respect to Mr. Blatt-St. Marks that were the subject of the OIG ROI.

II. Findings of Fact

In issuing this determination, we rely on the following evidence set forth in the May 27, 2014 ROI, as well as recent public developments:

1. CCT through USBR has been receiving funding for construction of a pipeline to provide sustainable water to residents of the Rocky Boy's Reservation. ROI at 2.

2. On September 15, 2009, through Modification No. 6 to the Title IV Annual Funding Agreement between USBR and CCT (No. 06NA6002127), USBR provided CCT an additional $19,860,000 in ARRA funding. Att. 6.

3. CCT agreed that ARRA's whistleblower provisions would apply to the "obligation and expenditure of ARRA funding" provided under the obligation. Att. 6 at 3 and 9.

4. CCT awarded a contract to the Chippewa Cree Construction Company (C-4), a tribally-owned company to carry out work contemplated by Modification No. 6. Att. 4. Under Modification No. 8, dated September 9, 2010, USBR provided CCT with an additional $7,666,000 in ARRA funding to cover payments under the agreement for that fiscal year. Att. 5.

5. On April 10, 2010, C-4 entered into a subcontract with Mr. Blatt-St. Marks (d/b/a/ Arrow Enterprises) to excavate, install water lines, and bond all joints as specified by pipeline project plans and specifications. Att. 8.

6. On August 14, 2012, Mr. Blatt-St. Marks contacted the OIG alleging the CCT Business Committee's questionable expenditure of tribal and federal funds, including ARRA funds provided to C-4. ROI at 2; Att. 9.

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[6] Similarly, Modification No. 8 to Annual Funding Agreement No. 06NA602127, dated September 9, 2010, obligated an additional $7,666,000 in ARRA funds to the Rocky Boy's project. Att. 5. It contained substantially identical language with respect to ARRA as found in Modification No. 6. *See* Modification No. 8 at 2, 3 (reference to "Attachment No. 1"), 7 (reference to § 1610(b)), and 9-10 ("Prohibition of reprisals against contractor whistleblowers").

7. On November 6, 2012, Mr. Blatt-St. Marks won a tribal election and became Chairman of the CCT Business Committee. ROI at 2; Att. 10.

8. On December 27, 2012, Mr. Blatt-St. Marks submitted a letter to USBR's Deputy Regional Director indicating that Mr. Blatt-St. Marks' office would continue to investigate potential conflicts of interest and ethical violations. ROI at 2-3; Att. 11.

9. In his December 27, 2012 letter to USBR, Mr. Blatt-St. Marks advised of the impending termination of the C-4 CEO, Mr. Tony Belcourt, who was suspected of embezzling ARRA funds. ROI at 3.

10. On January 23, 2013, Mr. Blatt-St. Marks met with USBR, advising that C-4 had submitted false Quarterly Financial Reports to USBR and that the CCT Business Committee had held an emergency meeting to "replenish $3.5 million in federal funds" provided by USBR for the CCT tribal water project. Att. 9.

11. As a result of Mr. Blatt-St. Marks' disclosures, OIG issued an audit report on December 16, 2013, and identified $12,914,545 in questioned costs, $4,379,460 of which was related to ARRA-funded contracts. Att. 15.

12. On March 5, 2013, Mr. Blatt-St. Marks issued an open letter to CCT members announcing his cooperation with federal agencies investigating the misuse of ARRA and non-ARRA federal funding. ROI at 3; Att. 16.

13. On March 9, 2013, Mr. Blatt-St. Marks requested whistleblower protection from the U.S. Attorney's Office, District of Montana. The U.S. Attorney forwarded the request to the OIG. OIG initiated an investigation on April 18, 2013. ROI at 15; Atts. 23 and 24.

14. On March 15, 2013, the CCT Business Committee held a closed door meeting and voted to suspend Mr. Blatt-St. Marks as CCT Chairman. The letter of suspension was signed by the following Business Committee members: Vice-Chairman Rick Morsette, John "Chance" Houle, Ted Whitford, Harlan Baker, Ted Demontiney, Dustin Whitford, Ted Russette III, and Gerald Small. ROI at 6; Att. 25.

15. On March 25, 2013, the Business Committee removed Mr. Blatt-St. Marks from the Chairman position for neglect of duty and gross mismanagement in violation of Article V, § 2 of the CCT Constitution.[7] ROI at 7; Att. 32.

[7] Subsequently, the charges that the Business Committee brought as its basis for removing Mr. Blatt-St. Marks from his position were that: (1) in allegedly acting without Business Committee approval, Blatt-St. Marks violated tribal law by knowingly and willfully appointing the Chief Judge in violation of the Chippewa Cree Tribe's Constitution; (2) Blatt-St. Marks violated tribal by-laws, by allegedly voting to hire a prospective employee, although he was not permitted to do so unless in the event of a tie vote by the remaining members of the Business Committee; (3)

16. On April 18, 2013, based on the OIG's investigation, including information provided by Mr. Blatt-St. Marks, a federal grand jury in Billings, Montana, returned an indictment against six individuals, including CCT Business Committee member John "Chance" Houle and C-4 CEO Tony Belcourt and his wife Hailey Belcourt. The indictment alleged a conspiracy to embezzle $311,000 in ARRA funds intended for the Rocky Boy's/North Central Montana Regional System. The charges included violations of federal statutes ranging from conspiracy to defraud the United States and theft from a program receiving federal funding to money laundering. A superseding indictment, filed on September 20, 2013, dropped the charges against Houle and amended the charges to include bribery for the remaining individuals.[8] ROI at 3; Atts. 19 and 20.

III. CCT Engaged in a Prohibited Reprisal

A. Mr. Blatt-St. Marks' disclosures were protected and were a contributing factor in his removal.

Based on an examination of the facts in the OIG ROI and Section 1553 of ARRA, we find that Mr. Blatt-St. Marks has met the burden of demonstrating under ARRA's whistleblower provision that, on March 25, 2013, he was subjected to a prohibited reprisal by CCT. A complainant may

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Blatt-St. Marks violated tribal law by allegedly verbally assaulting numerous employees; (4) Blatt-St. Marks violated tribal law by allegedly making inappropriate comments of a sexual nature to an employee; (5) Blatt-St. Marks violated the tribe's by-laws and code of ethics by allegedly trading in two cars belonging to the Tribe in order to purchase a $68,000 Cadillac Escalade for his own personal use and enjoyment; (6) Blatt-St. Marks allegedly released thousands of dollars to various members of the tribal community after he was sworn into office; and (7) Blatt-St. Marks as Chairman banned the use of tribal credit cards and allegedly knowingly and willfully used and continues to use a tribal credit card for unauthorized expenses. *See* ROI at 10-13; Atts. 25 and 58.

[8] C-4 CEO Tony Belcourt was convicted on federal corruption charges, including charges directly involving ARRA-funds, of embezzlement using a nominee vendor, Leischner, for pipe vending, "bribery/accepting" from a company called Hunter Burns Construction (HBC), and a $100,000 fraudulent mobilization payment to HBC. On August 15, 2014, Belcourt was sentenced by the federal district court, Billings, Montana, to seven and half years in prison and ordered to pay $667,183 in restitution, including $330,000 to CCT as related to the Rocky Boy's Reservation. *See United States v. Tony James Belcourt*, Judgment in a Criminal Case, U.S. District Court, District of Montana at Great Falls, 04:13-cr-00082, 4:13-cr-00039 and 4:13-cr-00099 (Aug. 15, 2014). On June 24, 2014, John "Chance" Houle, former CCT Business Committee member, was arrested and indicted on ten felonies. Houle pled guilty to four felonies, including one of bribery from HBC, directly involving ARRA funds. *United States v. John Chance Houle et al.* Indictment, U.S. District Court, District of Montana, Great Falls Division CR-14-45-GF-BMM (June 19, 2014), CR 14-50-GF-BMM (June 19, 2014) and CR 14-67-GF-BMM (December 1, 2014).

successfully demonstrate a violation of ARRA § 1553 if he can show that his protected disclosure was a "contributing factor" in his employer's reprisal against him. ARRA § 1553(c)(1)(A)(i). ARRA expressly permits a complainant to make such a showing by use of circumstantial evidence, including (1) evidence that the employer "knew of the disclosure;" or (2) evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal." *Id.* § 1553(c)(1)(A)(ii).

As an initial matter, Mr. Blatt-St. Marks became Chairman of CCT's business committee on November 6, 2012. ROI at 2; Att. 10. CCT was a recipient of well over $20 million in ARRA funds, through USBR, to fund the construction of infrastructure for a pipeline to provide sustainable water to residents of the Rocky Boy's Reservation. ROI at 2; Atts. 4 and 6. CCT awarded the contract to C-4 and, on April 10, 2010, C-4 entered into a subcontract with Mr. Blatt-St. Marks (d/b/a Arrow Enterprises) to excavate and install water lines and bond all joints as specified by the project's plans. ROI at 2; Att. 8.

Mr. Blatt-St. Marks' disclosures to Department officials were protected under ARRA because they related to "gross mismanagement of an agency contract or grant relating to covered funds" and "gross waste of covered funds." ARRA § 1553(a)(1) and (2). On August 14, 2012, Mr. Blatt-St. Marks contacted the OIG regarding the CCT Business Committee's alleged questionable expenditures of tribal and federal funds—including ARRA funds provided to C-4. In addition, on December 27, 2012, he wrote a letter informing USBR's Deputy Regional Director of a possible conflict of interest and ethical violations in performing ARRA-funded work by C-4 CEO Tony Belcourt. ROI at 3; Att. 11. On March 5, 2013, Mr. Blatt-St. Marks sent a letter to CCT members, announcing his intention to cooperate with and provide information to federal agencies in the investigation of misuse of federal funds on the Rocky Boy's Reservation. ROI at 3; Att. 16. These communications fit soundly within the category of disclosures that ARRA §1553 was enacted to protect.

Mr. Blatt-St. Marks has also demonstrated that his disclosures were a contributing factor in his removal. A complainant can demonstrate that a protected disclosure was a contributing factor in a prohibited reprisal action by showing that one or more individuals with actual or constructive knowledge of the disclosure took or influenced those taking the retaliatory action. *See, e.g., Aquino v. Department of Homeland Security*, 2014 M.S.P.B. 21, 121 M.S.P.R. 35, 2014 MSPB LEXIS 3374 at **17-18 (2014). Even assuming no one affiliated with CCT was aware of Mr. Blatt-St. Marks' disclosures to the Department in 2012 at the time he made them, then certainly by virtue of his CCT-wide letter of March 5, 2013, CCT members generally and CCT Business Committee members specifically knew of his intention to cooperate with OIG. Att.16. On March 25, 2013, in evident response to Mr. Blatt-St. Marks' letter, the Business Committee removed him from his Chairman position. ROI at 7; Att. 32. Thus, we conclude that the CCT Business Committee's removal of Mr. Blatt-St. Marks was influenced by persons having either actual or constructive knowledge of his protected disclosures.

Even if this evidence were not enough to find a § 1553(a) violation, the temporal proximity between Mr. Blatt-St. Marks' protected disclosures and his removal creates a sufficient basis for concluding that his protected disclosures were a contributing factor in his removal. *Aquino, su-*

pra, 2014 LEXIS 3374 at **19-21 (citing *Dorney v. Department of the Army*, 117 M.S.P.R. 480 at 11 (2012))("only days after learning about the appellant's disclosures, the appellant's supervisor reported to upper-level management his concerns about the . . . appellant's work performance, which was then exclusively relied upon . . . in proposing and effectuating the appellant's removal") (ellipses added). Mr. Blatt-St. Marks was removed within 20 days after issuing an open letter to the CCT membership concerning alleged misuse of ARRA funds. This is clearly "evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal." ARRA § 1553(c)(1)(A)(i)(II). Accordingly, Mr. Blatt-St. Marks has met the required burden.

B. CCT has failed to rebut by clear and convincing evidence Mr. Blatt-St. Marks' showing that his disclosure was a contributing factor in his removal.

Despite the showing made by the complainant, the Department may not find that CCT committed a prohibited reprisal against Mr. Blatt-St. Marks if CCT can demonstrate by "clear and convincing evidence" that it would have removed Mr. Blatt-St. Marks had he not made protected disclosures to OIG and USBR. ARRA § 1553(c)(1)(B). We find that CCT has failed to meet that standard.

CCT's documentary evidence of its basis for removing Mr. Blatt-St. Marks, provided in the form of a letter with exhibits purporting to show that CCT would have removed Mr. Blatt-St. Marks in the absence of the disclosures because of his various alleged misdeeds, is not persuasive. Not until August 25, 2013 —*five months* after Mr. Blatt-St. Marks' removal— did CCT provide this information to the OIG special agent investigating Mr. Blatt-St. Marks' complaint of prohibited reprisal. Even though OIG requested interviews with members of CCT's Business Committee, CCT submitted only written documentation in support of its allegations against Mr. Blatt-St. Marks. ROI at 13; Atts. 58 and 59. Accordingly, the evidence lacks both foundation and authentication, which greatly lessens its weight. *See generally* Federal Rules of Evidence 104 and 401. Moreover, CCT's documentary evidence fails conclusively to establish that Mr. Blatt-St. Marks acted improperly regarding the various transactions he is alleged to have conducted without authority. For the majority of the irregularities allegedly justifying Mr. Blatt-St. Marks' removal, we have found there to be at least equal evidence of full disclosure and/or tribal approval related to the transactions in issue.

Perhaps most tellingly, CCT undertook to remove Mr. Blatt-St. Marks only *after* he made his disclosures. Prior to that time, there is no indication of any CCT or Business Committee investigation or other activity with respect to any of the alleged misconduct offered as reasons for Mr. Blatt-St. Marks' removal. Further, as noted above, Mr. Blatt-St. Marks' removal appears so close in time to when his protected disclosures were made openly to the CCT membership, that a reasonable person could conclude that those disclosures were a contributing factor in his remov-

al. Accordingly, CCT has failed to show by "clear and convincing evidence" that it would have taken this action against Mr. Blatt-St. Marks in the absence of his protected disclosures.[9]

IV. Ordered Remedy

ARRA prescribes that if the agency head finds that there was a prohibited reprisal by a non-federal employer, then the agency head "shall take 1 or more of the following actions:"

(a) "Order the employer to take affirmative action to abate the reprisal,"

(b) "Order the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken," or

(c) "Order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant" in bringing the complaint of reprisal. ARRA § 1553(c)(2).

Recently, the Appellate Court of the Chippewa Cree Tribe, Rocky Boy's Indian Reservation issued a final opinion regarding the validity of an election protest challenging the results of the Special Election for Chairmanship held on July 30, 2013, wherein Mr. Blatt-St. Marks received the most votes. On November 19, 2014, the Appellate Court upheld the Tribal Court's ruling that the Election Board's validation of the protest was null and void and remanded the matter to the Election Board, stating that "[o]n the whole, the Election Board performed well in carrying out the special election, and the Tribe and Tribal membership have reason to be confident in the election results."[10]

Having found that CCT engaged in a prohibited reprisal, the Department is authorized to order relief consistent with the terms of ARRA, although we would prefer that CCT independently re-

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[9] "Clear and convincing evidence" is that degree of evidence that "produces in the mind of the trier of fact a firm belief as to the allegations sought to be established." Aquino v. Department of Homeland Security, 2014 M.S.P.B. 21, 121 M.S.P.R. 35, 2014 MSPB LEXIS 3374 at **10.

[10] We have learned that the CCT Business Committee has once again removed Mr. Blatt-St. Marks from his position as Tribal Chairman on December 1, 2014, based upon two new allegations of neglect of duty and gross misconduct under Article V, Section 2 of the Constitution for the Chippewa Cree Tribe (*see* Resolution No. 190-14 of CCT Rocky Boy's Reservation dated December 1, 2014). Our determination in this case, however, is limited only to consideration of the removal of Mr. Blatt-St. Marks by the Business Committee on March 25, 2013, and of the facts in the OIG ROI. This determination is a legal determination only with respect to whether a prohibited reprisal based upon a protected disclosure occurred. It should not be construed as an endorsement of any particular action or position taken by Mr. Blatt-St. Marks, nor a position regarding pending tribal leadership and election disputes.

solve this issue in accordance with the ARRA remedies set forth above. Based upon the record to date, including correspondence received from the complainant since July 2014 when the Department notified the parties of its engagement in this determination, we are not aware of specific relief sought by Mr. Blatt-St. Marks in connection with his ARRA complaint. Accordingly, no later than January 12, 2015, Mr. Blatt-St. Marks shall detail the relief, if any, that he seeks consistent with the terms of ARRA. We also will consider any submission by CCT, which should be submitted to the Department within fifteen (15) days after Mr. Blatt-St. Marks' submission is due. If the parties wish to enter into discussions or negotiations in an effort to settle this matter, they shall promptly notify the Department.

V. Right of Review

ARRA provides a right of appeal for "any person adversely affected or aggrieved by an order issued under [§ 1553(c)(2)]." ARRA § 1553(c)(5). Any such person may obtain review of this decision by petitioning the United States Court of Appeals for the circuit in which the reprisal is alleged to have occurred. *Id.* A petition seeking review of this decision must be filed no more than 60 days after issuance of the order." *Id.*

VI. Resolution of Issues Arising from December 16, 2013 Audit

Apart from this determination on Mr. Blatt-St. Marks' request for whistleblower protection, we understand that CCT has yet to resolve with USBR the issues arising out of OIG's December 16, 2013 audit report, *see* Att. 15, despite USBR's efforts to bring that matter to a close. Although USBR and CCT had a series of meetings during 2014 and made significant progress to address the audit findings, we understand that discussions have stalled in recent months. Notwithstanding the determination made here concerning Mr. Blatt-St. Marks' whistleblower status and any other issues currently facing CCT arising out of recent election and leadership disputes, we strongly encourage CCT to continue working with USBR to resolve as soon as possible all outstanding questions around the findings of the audit.

Sincerely,

Hilary Tompkins
Solicitor

Enclosure: Exhibit 1
(a) Report of Investigation No. 01-CO-13-0243-I (redacted)
(b) ROI Attachments 4, 5, 6, 8, 9, 10, 11, 15, 16, 19, 20, 23, 24, 25, 32, 58 and 59 (some attachments redacted)

cc: LeAnn Montes, Esq.

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

April 24, 2015

VIA E-MAIL and U.S. MAIL

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Re: Final Disposition in the Matter of U.S. Department of the Interior, Office of the Inspector General Report of Investigation U.S. Bureau of Reclamation ARRA Funds–Case No. 0I-CO-13-0243-I (St. Marks)

Dear Ms. King and Mr. Zack:

This opinion is the U.S. Department of the Interior's (Department) final disposition in the matter of Kenneth Blatt-St. Marks (St. Marks). This matter arises from St. Marks' allegation that the Chippewa Cree Tribe (CCT or Tribe) subjected him to a prohibited reprisal as a result of making a protected disclosure under the whistleblower provisions of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553, 123 Stat. 115, 297-302 (2009) (ARRA). Upon consideration of the initial record as well as the further submissions of the parties and for the reasons set forth in the body of this opinion, we confirm our initial determination issued on December 19, 2014, that CCT engaged in a prohibited reprisal against St. Marks when he was removed from the position of Chairman of the CCT Business Committee in March 2013.

Having found St. Marks entitled to relief, we now order the following relief pursuant to the terms of ARRA as further explained below:[1]

[1] Upon finding a prohibited reprisal by the employer, ARRA requires that the agency head take one or more of the following actions: (a) "[o]rder the employer to take affirmative action to abate the reprisal," (b) "[o]rder the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply . . . if the reprisal had not been taken," or (c) "[o]rder the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys fees and expert

- Back pay award of $277,333.30
- Front pay award of $202,666.54
- Travel costs of $2,955.60
- Legal fees and costs of $165,474.91

This constitutes a total monetary award of $648,430.35.

In addition, the Department orders that CCT should abate any further prohibited reprisals against St. Marks arising out of or relating to any protected disclosures he has made to the Department or any investigative authorities concerning ARRA funds provided to CCT.

I. Procedural History

ARRA funding recipients are prohibited from taking reprisals against their own employees for making protected disclosures with respect to "covered" (*i.e.*, ARRA) funds or ARRA-funded activities. *See* ARRA § 1553(a). When an individual submits a complaint alleging that he or she was subjected to a prohibited reprisal, the appropriate Office of Inspector General (IG) of the government agency having jurisdiction with respect to the covered funds must investigate it. ARRA § 1553(b)(1). After receiving the IG's findings, the agency head must determine whether a sufficient basis exists to find a prohibited reprisal by the "non-Federal employer" related to a protected disclosure. *Id.* § 1553(c)(2).

We considered information contained in the May 27, 2014, U.S. Department of the Interior, Office of Inspector General Report of Investigation No. OI-CO-13-0243-I (ROI) to determine that CCT engaged in a prohibited reprisal against St. Marks and that St. Marks was entitled to whistleblower protection. *See* December 19, 2014 Determination of Reprisal at 8-9 (hereinafter "Reprisal Determination"). Because St. Marks did not specify the relief that he was seeking and we otherwise did not have sufficient information upon which to determine proper relief, we directed in the Reprisal Determination that St. Marks submit a request for relief in light of the Department's findings. Reprisal Determination at 11. We also provided CCT an opportunity to respond to St. Marks' request for relief.[2]

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witnesses' fees) that were reasonably incurred by the complainant" in bringing the complaint of reprisal. ARRA § 1553(c)(2)(A)-(C).

[2] On January 9, 2015, CCT requested that the Department provide all additional documents referenced in the ROI that were not provided with the Reprisal Determination. Except for six documents that CCT agreed that it already has in its possession, on January 22-23, 2015, we provided to both parties all additional documents referenced in the ROI. In light of this release, we advised St. Marks that he could supplement his January 12 submission not later than January 30, 2015. We also advised CCT that any submission that it wished to provide was due on February 13, 2015.

On January 12, 2015, St. Marks, through his attorneys, submitted a 19-page document consisting of three sections. The submission was accompanied by 33 exhibits. With that submission, St. Marks requested: (1) certain restraints be placed upon the Business Committee's actions; (2) reinstatement as Chairman; and (3) various types of compensation (*i.e.*, "front" pay, back pay, construction contract-related amounts and damages, and costs and expenses, including attorneys fees, related to St. Marks' whistleblower complaint).

In a January 23, 2015 submission, St. Marks, by counsel, forwarded a January 20, 2015 order of the Chippewa Cree Tribal Court containing a number of procedural rulings in the 2013 matter of Arrow Enterprises versus Chippewa Cree Construction Company (C-4), et al., and C-4's counter-claim against Arrow Enterprises and St. Marks.

On January 30, 2015, St. Marks, by counsel, provided a third submission, which was accompanied by sixteen exhibits. Therein, he detailed further procedural developments—some nearly real-time—that, in his view, cast into question the efficacy of the Chippewa Cree Tribal Court as a forum for vindicating his rights. He reiterated his request that the Department order an abatement of reprisal against St. Marks, but that this now should extend to the tribal court system.

On February 13, 2015, CCT provided a 43-page submission accompanied by thirty-seven (37) exhibits ("CCT Submission"). The CCT Submission challenges the Reprisal Determination, asserting that St. Marks in fact "was removed pursuant to the Tribe's Constitution based on his extensive history of wrongdoing and fraudulent conduct." *Id.* at 2. Specifically, CCT's allegations include that St. Marks (1) defrauded CCT and the Federal Government through his company, Arrow Enterprises, by inflating equipment rental rates charged to the U.S. Department of Agriculture, engaging in bribery, and otherwise inflating costs on the Sewer Lagoon project; (2) harassed CCT employees Fawn Tadios, Georgie Russell, and other Rocky Boy Health Clinic staff prior to his March 2013 removal as Chairman; (3) abused, wasted and misused tribal funds by the unauthorized giving of money to friends and supporters and making an unauthorized automobile purchase following his November 2012 election as Chairman; (4) failed to perform certain contractual obligations subcontracted to Arrow Enterprises by the CCT-owned C-4; (5) made unlawful attempts to hire and fire tribal judges, some allegedly occurring after November 2014; and (6) took improper actions with respect to the tribal checking account. CCT also argues that (1) the Reprisal Determination and any relief ordered by the Department would be an unlawful intrusion on tribal sovereignty; (2) the ARRA whistleblower provisions do not apply to this matter; (3) the Department erred in how it applied the ARRA whistleblower provision; and (4) the relief requested by St. Marks is mooted or otherwise prohibited.

The parties have also provided us with a number of other documents regarding the myriad of disputes, elections, and tribal court matters related primarily to actions that occurred subsequent to the March 2013 removal.[3]

Finally, on April 24, 2015, St. Marks provided an additional submission presenting "costs and attorneys fees from December 2014 to March 2015."

II. Analysis

Notwithstanding the significant additional documentation developed and events that have occurred since St. Marks first was formally removed from his position in March 2013 by the CCT Business Committee, we have no reason to alter our conclusion that St. Marks' making of a protected disclosure was a "contributing factor" in his March 2013 removal and that he is entitled to relief under ARRA's whistleblower provision.[4] ARRA § 1553(c)(1)(A).

The focus of our inquiry is St. Marks' March 2013 removal and the record existing prior to and at the time of that removal. The ARRA statute requires us to consider the "inspector general report [provided] under subsection (b), [and] determine whether there is sufficient basis to conclude that the non-Federal employer has subjected the complainant to a reprisal prohibited by subsection (a)." *See* ARRA § 1553(c)(2); *see also Jackson v. Mabus*, 2014 U.S. Dist. LEXIS

[3] The Department has also received a number of other related communications from the parties in the course of our consideration of this matter, including: (1) February 4, 2015 letter from St. Marks' attorneys informing us that he was supplementing his earlier submissions and attaching "Special Election for Chairman and Business Committee Certification of Results" sheet showing St. Marks' re-election; (2) February 5, 2015 Resolution No. 07-15 of the CCT Business Committee purportedly limiting the Chairman's authority to act in a wide variety of matters only with Business Committee authorization; (3) February 27, 2015 letter from St. Marks' attorneys attaching (a) a February 15, 2015 CCT Business Committee letter to St. Marks setting out fifteen purported charges supporting his removal and setting a March 2, 2015 Business Committee meeting and (b) St. Marks' February 27 letter to the Business Committee declining on procedural grounds to call the Business Committee meeting; (4) March 4, 2015 letter from St. Marks' attorneys updating us on *Jonathan Windy Boy v. Chippewa Cree Election Board*, 2014-CV-CV-2014 pending in the CCT Tribal court and providing ten attachments of various orders and other procedural steps in the case; (5) March 3, 2015 letter from CCT's counsel providing copies of (a) the CCT Business Committee's Opinion of March 2, 2015 regarding fifteen charges brought against St. Marks and (b) a TRO issued by the CCT Tribal Court on March 2, 2015, in *Ricky Morsette v. Ken St. Marks*, 2015-CV-RO-2211, prohibiting St. Marks from acting as Chairman; (6) March 4, 2015 letter from St. Marks' attorneys advising that St. Marks received a March 3, 2015 letter from CCT conveying a TRO issued in the new case of *Ricky Morsette v. Ken St. Marks*, 2015-CV-RO-2211; and (7) a copy of a March 4, 2015 letter from CCT to USBR advising of CCT Business Committee Resolution No. 15-15 and the Business Committee's Opinion unanimously removing St. Marks from the position of Chairman for neglect of duty and gross misconduct.

[4] Although St. Marks was elected as CCT Chairman twice more in special elections held by CCT (elected the second time on July 30, 2013, and the third time on February 5, 2015) and subsequently removed by members of the CCT Business Committee following both of those elections, the ROI upon which we rely in making the Reprisal Determination and ordering relief in this decision pursuant to ARRA concerns only those facts around St. Marks' removal from the CCT Business Committee in March 2013.

95894 at **16-19 (D.D.C. 2014) (deciding authority was entitled to rely upon prior advisory opinion in reaching whistleblower determination; the "arbitrary and capricious" and "substantial evidence" tests are satisfied as deciding authority "need[s] only examine the evidence and explain its finding"). The deciding official "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962)).

Accordingly, CCT's attempts to include *post hoc* evidence of St. Marks' alleged misconduct are unavailing and are given no dispositive weight. As further explained below, we also reject CCT's claims that ARRA's whistleblower provisions do not apply here or that CCT was denied due process in the Department's review of this matter.

A. Nothing Bars the Application of ARRA's Whistleblower Provisions in this Matter

Although CCT argues that the Reprisal Determination infringes on tribal sovereignty and that ARRA's whistleblower provision has no application here, those arguments fail given the plain language of the agreements under which CCT received more than $27 million in ARRA funds from the United States. As presented in the Reprisal Determination, at 3-5, and recounted in our Findings of Fact 1-4 and n. 6 therein, CCT *expressly* subjected itself to ARRA's provisions generally and to its whistleblower provisions specifically when it entered into Modifications No. 6 and 8 to Annual Funding Agreement No. 06NA602127. Under those modifications executed in September of 2009 and September of 2010, CCT received, respectively, $19,860,000 and $7,666,000 in ARRA funding (totaling $27.5 million) to be applied to work on the Rocky Boy's/North Central Montana Regional Water System. *See* ROI Attachments 5 at 1 and 6 at 2.

It is difficult to imagine a more extensive and explicit incorporation of ARRA's whistleblower provisions than found in those modifications. Modification No. 6 and No. 8 contain the following provision:

> 10. Prohibition of reprisals against contractor whistleblowers
>
> No employee of the Contractor or any subcontractor shall be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of the employee's duties, to the Recovery Accountability and Transparency Board, the Inspector General, the Comptroller General, a member of Congress, a state or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or such other person working for the employer who has

> the authority to investigate, discover, or terminate misconduct), a court or grand jury, a Federal agency head, or their representatives, information that the employee reasonably believes is evidence of (1) gross mismanagement of this addendum/contract; (2) a gross waste of funds awarded pursuant to this addendum/contract; (3) a substantial and specific danger to public health or safety related to the implementation or use of funds awarded pursuant to this addendum/contract; (4) an abuse of authority related to the implementation or use of funds awarded pursuant to this addendum/contract; or (5) a violation of law, rule, or regulation related to this addendum/contract (including the competition for or negotiation of the addendum/contract). This prohibition is enforceable pursuant to processes set up by ARRA. Other provisions of section 1553 also apply.[5]

Modification No. 6 at 9; Modification No. 8 at 9-10.

The modifications define "Contractor" to include "Chippewa Cree Tribe, Chippewa Cree Construction Corporation, a federally-recognized Indian Tribe or Tribal Organization, as defined at 25 U.S.C. 450b." Modification No. 6 at 7. Further, the modifications that expressly apply ARRA's whistleblower provisions are signed by the CCT Tribal Chairman. *Id.* at 11. Contrary to CCT's assertions, nothing about the application of ARRA in the present circumstance impairs CCT's status as a sovereign tribal nation. In its sovereign capacity, CCT expressly agreed to be subject to ARRA's whistleblower provisions.

CCT's tribal sovereign immunity argument is likewise unpersuasive. The Department fully recognizes the long-standing principle that tribes are immune from lawsuits or court process filed by private parties and states except when it has clearly waived that immunity or Congress has abrogated that immunity. *See generally* Cohen's Handbook of Federal Indian Law § 7.05. Tribes do not, however, enjoy sovereign immunity against the United States. *U.S. v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986) (Indian nations are not immune from lawsuits filed against them by the United States). Thus, CCT does not have the shield of sovereign immunity against an action taken by the Department here to ensure that CCT abides by the requirements of ARRA to which CCT *expressly* agreed, including any action by the United States to enforce an order of the Department arising out of this matter in a court with jurisdiction.

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[5] In the same spirit as this express reference to ARRA's whistleblower provision in paragraph 10 of both modifications, the modifications signed by CCT note in their opening that "[p]ursuant to Section 1610(b) of ARRA, in each funding agreement that transfers ARRA funds to Tribes pursuant to self-determination contracting authorities, the Secretary 'shall incorporate provisions to ensure that the agreement, conforms with the provisions of [ARRA] regarding the timing for use of funds and transparency, oversight, reporting, and accountability, including review by the Inspectors General, the Accountability and Transparency Board, and Government Accountability Office, consistent with the objectives of this Act.'" *See* Modification No. 6 at 1 and Modification No. 8 at 2 (quoting ARRA § 1610(b)).

Finally, nothing in CCT's analysis changes our conclusion that St. Marks was a CCT "employee" as that term is defined by ARRA. In efforts to uphold Congress' mandate in ARRA to protect whistleblowers and fully address the kinds of illegal activity at which ARRA § 1553 was aimed, we find that a broad reading of "employee" is warranted. In undertaking his duties as Chairman on behalf of CCT, St. Marks was unquestionably "performing services on behalf of an employer," *see* ARRA § 1553(g)(3)(A), and CCT was providing him a paycheck for the services he was providing. *See* Reprisal Determination at 2, n. 2; ROI at 13; Att. 67. Accordingly, we have no reason to alter our finding that St. Marks is an "employee" under ARRA.

B. The Department Has Afforded CCT Sufficient Due Process

CCT contends that the Department is depriving CCT of procedural due process in this matter, arguing that the Department did not afford a hearing to allow CCT to test the evidence, present its case, and cross-examine witnesses (*see* CCT Submission at 36, 38-39, 40) and that the Department failed to consider CCT's voluminous factual record or to meet with tribal members to discuss the facts. *Id.* at 39. CCT cites to *Business Communications, Inc. v. U.S. Department of Education*, 739 F.3d 374 (8th Cir. 2013), where the Eighth Circuit held that the agency's order for reinstatement of an employee with back pay violated the employer's due process rights because the agency did not provide the employer with a hearing and because the pre- and post-deprivation procedures available under ARRA § 1553 did not provide any opportunity for the employer to confront and cross-examine adverse witnesses. *Business Communications*, 739 F.3d at 381. We find that the *Business Communications* decision is not persuasive here and may, indeed, be an erroneous application of law. Further, *Business Communications* is non-binding upon the jurisprudence of the Ninth Circuit, which is the court that would hear any appeal of this order. The *Business Communications* decision may, in effect, invalidate a reasonable implementation of ARRA's whistleblower provision in accordance with Congress' intent as demonstrated by ARRA's terms.

The ARRA whistleblower provision expressly directs the IG to prepare a report and the head of the agency to consider that IG report in order to determine whether there has been a prohibited reprisal. *See* §§ 1553(b)(1), (c)(2). It is the IG in the first instance that determines whether or not a complaint is "frivolous" and, if the complaint is not frivolous, investigates the complaint and then submits its findings. *See* §§ 1553(b)(1) – (2). The agency then must apply the specified burdens of proof to determine whether a prohibited reprisal occurred. *See* § 1553(c)(1).

There is nothing in ARRA suggesting that a hearing or any other particular procedure is required beyond that specified or that otherwise would meet minimum due process. *Compare* with general Federal whistleblower statute, *see* 5 U.S.C. § 2302(b)(8)(B), in which the roles of the

U.S. Office of Special Counsel and the U.S. Merit System Protection Board (MSPB) are specified. *See* 5 U.S.C. § 1221.[6] With ARRA, Congress evidently balanced the need for a relatively expeditious process, commended largely to agency discretion, to address whistleblower complaints related to a limited appropriation against a potentially lengthier, more elaborate hearing process.

The Department has provided CCT adequate due process in this case. Due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Just as there is no requirement as to the exact procedures to employ whenever a traditional judicial-type hearing is mandated (*compare Goss v. Lopez*, 419 U.S. 565 (1975); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Morrissey v. Brewer*, *supra*, with *Goldberg v. Kelly*, 397 U.S. 254 (1970)), there is no reason to require a judicial-type hearing in all circumstances. Further, "[r]equired procedures may vary according to the interests at stake, but [t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Target Training Int'l v. Lee*, 1 F. Supp. 3d 927, 950, 2014 U.S. Dist. LEXIS (N.D. Iowa 2014) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

As far as the Department conducting a meaningful consideration of the record and hearing CCT's evidence "at a meaningful time and in a meaningful manner"—*see Target Training Int'l, supra*—in this case, the IG conducted a detailed and lengthy consideration of all evidence. That consideration spanned at least the sixty-nine exhibits attached to the ROI, seven of which were Investigative Activity Reports (IAR) reflecting often extensive interviews conducted during the investigation, including interviews of CCT representatives. *See* ROI Atts. 9, 12, 27, 33, 34, 40, and 68. Congress, in ARRA, directed the Department to consider the IG's report and make a determination about whistleblower protection on the basis of that report. *Cf. Jackson v. Mabus*, *supra*, 2014 U.S. Dist. LEXIS 95894 at **16-17 (D.D.C. 2014) ("it is not inherently problematic for a [deciding official] to seek out one or more advisory opinions . . . and then rely on the reasons in those opinions in coming to its determination").

The Reprisal Determination was amply supported by the record before the Department and included the IG's and the Department's consideration of CCT's submissions. The Department also gave both parties further opportunity to supplement the record and advance their interests through additional briefing and submissions. Notably, none of the information provided by CCT was substantiated to a level that would present a factual dispute warranting further inquiry or

[6] "At the request of [a person] seeking corrective action under subsection (a), the Board shall issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that the testimony or production requested is not unduly burdensome and appears reasonably calculated to lead to the discovery of admissible evidence." 5 U.S.C. § 1221(d)(1) (bracket added). *Cf. McGrath v. Mukasey*, 2008 U.S. Dist. LEXIS 32120 at **12-13 (S.D.N.Y. 2008) (the whistleblower statute "extends varying levels of protection in an effort 'to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration,'") (citing *United States v. Fausto*, 484 U.S. 439, 445 (1988)).

cross-examination. Further, CCT attempts to buttress its position with after-the-fact accusations against St. Marks or matters beyond the scope of the present inquiry such as claims that St. Marks attempted to defraud CCT and the United States through his company Arrow Enterprises; failed to perform certain contractual obligations subcontracted to Arrow by C-4; attempted to fire tribal judges and terrorized tribal judges and court staff; and attempted to abuse tribal funds. *See* CCT Submission at 3-5; 9-10; and 14-17. Now reaffirming that previous decision and ordering relief to St. Marks, we have thoroughly considered CCT's submissions and all other evidence put before the Department on this matter. Accordingly, we conclude that in the Reprisal Determination and in this final disposition, the Department provided ample due process to CCT in accordance with the provisions of ARRA.

C. The Reprisal Determination is Supported by the Record

1. Standards for Agency Determination under ARRA

Under ARRA § 1553, the IG of the government agency having jurisdiction with respect to the covered funds must investigate whistleblower complaints. ARRA § 1553(b)(1). After receiving the IG's "report of the findings of the investigation," *id.*, the agency head must "determine whether there is sufficient basis to conclude that the non-Federal employer has subjected the complainant to a reprisal prohibited by subsection (a)." *Id.* § 1553(c)(2). ARRA thus expressly creates a process in which the IG is the initial fact-finder with respect to whistleblower complaints and the agency is then to make its determination based upon the IG report.

ARRA sets forth the pertinent burdens of proof governing an agency's determination. A whistleblower need only show that "a disclosure described in subsection (a) was a *contributing factor* in the reprisal." *Id.* § 1553(c)(1)(A)(i) (emphasis added). ARRA continues that a "disclosure may be demonstrated as a contributing factor in a reprisal . . . by circumstantial evidence, including (I) evidence that the official undertaking the reprisal knew of the disclosure; or (II) evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal." *Id.* § 1553(c)(1)(A)(ii). ARRA further specifies that the head of an agency "may not find the occurrence of a reprisal . . . affirmatively established under subparagraph (A) if the non-Federal employer demonstrates by clear and convincing evidence that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure." *Id.* § 1553(c)(1)(B).

We concluded in the Reprisal Determination that St. Marks' protected disclosure was a contributing factor in his removal from the Business Committee and that CCT did not overcome

that showing with "clear and convincing evidence" that it would have taken the same removal action in March 2013 against St. Marks absent the disclosure. *See* § 1553(c)(1)(B); Reprisal Determination at 9-10. In light of the parties' submissions following that decision, we reaffirm our finding that CCT failed to make the requisite showing.

2. The Department's Evaluation of the Evidence is Sound

As noted, in determining whether a protected disclosure was a contributing factor in a prohibited reprisal, the deciding agency can make such a finding based on circumstantial evidence, including (1) evidence that the official undertaking the reprisal knew of the disclosure; or (2) evidence that the reprisal occurred within a period of time after the disclosure that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal. ARRA § 1553(c)(A)(i)-(ii). The Reprisal Determination rested in part on facts falling into both of these categories of evidence.

CCT challenges that the Department's decision is not supported by the record, arguing that there is no evidence in the record that St. Marks sent an open letter dated March 5, 2013 to the CCT membership or that any member of the Business Committee was aware of his disclosures and cooperation with the IG and USBR regarding the alleged corruption at CCT. *See* CCT Submission at 32. This contention fails, however, in the face of the evidence before the Department.

Along with the IG's finding in the ROI that St. Marks issued the open letter dated March 5, 2013 that would have made CCT aware of his protected disclosures, *see* ROI at 3, the Department has confirmed that the IG's June 20, 2013 interview with CCT Tribal Judge Duane Gopher corroborates St. Marks' claim that St. Marks issued an open letter to the CCT membership. *See* **Attachment A** to this document (Excerpt from Transcript of June 20, 2013 Interview, at 11-12, supporting ROI Att. 27) (Judge Gopher stating that he "heard people talk about [the letter]"). The IG has also indicated to us that it confirmed in a March 4, 2015 discussion with Karen Blatt-St. Marks that, on March 8, 2013, she personally mailed approximately 300 copies of the March 5, 2013 letter to CCT members. Accordingly, the Department has a strong basis on which to confirm that the March 5, 2013 letter relied upon in the Reprisal Determination was in fact issued by St. Marks days before his removal from the Business Committee.

But even if the March 5, 2013 letter had not been issued, the record here is replete with evidence that CCT was well aware of St. Marks' communications to the IG and USBR a few short months before his removal. For example, the record shows that after St. Marks' November 2012 election, St. Marks was publically vocal with his suspicions that federal and tribal funds had been embezzled from CCT-owned Chippewa-Cree Construction Company (C-4), the Northern Winz Tribal Casino, and the CCT-owned business Plain Green. ROI Att. 9 at 2. Moreover, on

January 7, 2013, St. Marks directed CCT staff, including the CCT Attorney General LeAnn Montes, to provide documents to the IG in connection with the Department's investigation of C-4. *Id.* These facts are not so temporally distant from St. Marks' removal from the CCT Business Committee that the Department could not reasonably determine that a sufficient temporal connection exists to find that St. Marks' disclosures led to CCT's reprisal against him in March 2013.

Other incidents occurring around the time St. Marks was removed from the Business Committee in March 2013 also strongly suggest that CCT's reprisal was motivated by St. Marks' disclosures to the IG and USBR. On March 15, 2013, then-Business Committee member, John "Chance" Houle threatened to burn down St. Marks' house and harm St. Marks.[7] ROI at 5. St. Marks stated that an enrolled tribal member was purportedly approached by Houle to harm St. Marks because of his cooperation with federal investigators. ROI Att. 9 at 2. Joshua Seaton, former assistant to St. Marks, stated that two days after St. Marks was impeached by the Business Committee that he too was given a letter of termination. ROI Att. 34 at 1. Seaton said there were rumors on the Rocky Boy Reservation that individuals wanted to assault him for his affiliation with St. Marks and he believed that St. Marks could possibly get hurt by someone on the Reservation for bringing forward the information to the IG. *Id.* at 2. Further, St. Marks stated that tribal members could not speak ill of Houle due to repercussions such as job terminations on the reservation. ROI Att. 12 at 2. Following the standard set by ARRA, these facts offer, at the very least, significant circumstantial evidence that St. Marks' disclosures to the IG and USBR were a contributing factor in his removal from the Business Committee in March 2013.

In response, CCT suggests that the temporal link the Department identified is somehow broken by the fact that St. Marks began cooperation with the United States concerning CCT's alleged ARRA improprieties before his election in November 2012. CCT also asserts that there is no evidence of individuals objecting to St. Marks providing information to the Department or any other evidence that would indicate that St. Marks was in fact removed because of his disclosures and not because of his unlawful acts in office. CCT Submission at 2. To support its argument, CCT relies on *Gerhard v. D Constr. Inc.*, Civil Action No. 11-c-0631, 2012 U.S. Dist. LEXIS 35406 (March 14, 2012). CCT Submission at 36. The instant situation—one rife with threats and intimidation against individuals in the tribal community, including St. Marks, by those ultimately shown to have engaged in criminal wrongdoing—could not differ more than *Gerhard.*

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[7] Houle was indicted for embezzlement, tax evasion, obstruction of a federal grand jury investigation, and bribery directly involving ARRA funds (*see United States v. John Chance Houle, et al*, indictments, U.S. District Court, D. Montana, Great Falls, CR-14-45-GF-BMM, CR-14-50-GF-BMM and CR-14-67-GF-BMM) and, on December 8, 2014, pled guilty to four felonies, with sentencing initially set for March 19, 2015, but now continued until May 28.

In *Gerhard*, the plaintiff, a field safety inspector, identified potential OSHA violations at two projects receiving ARRA funding. *Id.* at **2-3. Later, the employer asked the plaintiff to attend a training program to perform work. The plaintiff did not attend the training program and the employer terminated him. *Id.* at *2. The district court held that the plaintiff failed to show his protected disclosures were a "contributing factor" in the employer's decision to end the plaintiff's employment. *Id.* at *3. The only evidence that existed in the record were the dates when the plaintiff's protected activity occurred and the date when the plaintiff was terminated; furthermore, there was no evidence in the record of any opposition from the defendant employer to the plaintiff's ARRA related entries in his safety audits or that the employer was even aware that the plaintiff was engaging in a protected activity under ARRA. *Id.* Unlike in *Gerhard*, the ROI in St. Marks' case provides both ample direct and circumstantial evidence upon which to reasonably conclude that there was a connection between St. Marks' communications to the Federal government about CCT's possible misuse of ARRA funds and the Business Committee's decision to remove St. Marks from the Chairman position. CCT has not provided any "clear and convincing" evidence that it would have proceeded with St. Marks' removal independent of his disclosure activities or proof that CCT was unaware of such activities.

3. CCT Does Not Meet the "Clear and Convincing Evidence" Standard

As stated above, in successfully rebutting ARRA whistleblower allegations, the employer must demonstrate "by clear and convincing evidence" that it would have taken the action in the absence of the employee's protected disclosure. ARRA § 1553(c)(1)(B). As demonstrated in the Reprisal Determination, CCT failed to meet that burden. Despite levying seven charges against St. Marks in March 2013 as purported justification for his removal from the Business Committee, CCT has failed to substantiate them with "clear and convincing evidence" that ARRA requires.[8] Each of the seven charges was examined by the IG. Following ARRA's mandates, we relied on that examination to reach the Reprisal Determination. Nothing offered by CCT, either prior to the Reprisal Determination or since then, has altered our view.

On Charge 1 (tribal judge removal and appointment charge), where CCT asserts that St. Marks violated Article XII, § 2 of the CCT Constitution by removing acting Chief Judge Michelle

[8] In this regard, the MSPB has held that in determining whether the employer has met the "clear and convincing" burden, the deciding official may consider "(1) the strength of the [employer's] evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of the [employer] officials who were involved in the decision; and (3) any evidence that the [employer] takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated." *See Shannon v. Department of Veteran's Affairs*, 2014 M.S.P.B. 41, 24, 2014 MSPB LEXIS 3593 at **24 (2014) (*citing to Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999)) (brackets added). Applying these guidelines only would further support our initial Reprisal Determination as well as this current Final Disposition.

Ereaux and unilaterally appointing Duane Gopher to the position, the IG found that the Business Committee did not submit evidence in support of the allegation. Further, Tribal Judge Gopher provided the IG agent a draft contract from former tribal attorney Joel Rosette. The transmission of that draft indicates that the Business Committee knew that Gopher was hired because Attorney Rosette only acted after the Business Committee approved the hiring of Judge Gopher. From this evidence one could reasonably conclude that the decision to remove Ereaux and hire Gopher was a Business Committee decision and that the Committee instructed the Tribe's attorney to draw up the contract. ROI at 11; Atts. 66 and 67.

On Charge 2 (St. Marks' unlawful voting charge), St. Marks submitted a written statement to the IG explaining that he acted in accordance with tribal election rules because when he was on the Business Committee, council members were allowed to cast one vote to hire a prospective employee. The IG found that the Business Committee minutes from a regular meeting held on December 22, 2012, showed that St. Marks supported one candidate that did not win Business Committee support. Another employment candidate would have won without any support from St. Marks. ROI at 11. As St. Marks' votes were inconsequential, these facts bring into question why this charge was even raised.

On Charges 3 (harassment charges) and 4 (sexual harassment charges), CCT's attorney submitted affidavits and a letter from individuals who alleged that they were subjected to the verbal harassment. ROI at 11-12; Atts. 60-65. Although the IG did not make a specific finding on the verbal harassment charges, the IG's interview with former CCT Tribal Judge Gopher indicates that the credibility of Fawn Tadios is questionable because she was not truthful of locations of the sexual harassment and her story contained inconsistencies. *See* ROI Att. 27, Interview of Duane Gopher. Further, Tadios' credibility is suspect because she has been indicted for and convicted of precisely the kinds of activities that St. Marks was attempting to bring to light as Chairman.[9]

On Charge 5 (vehicle purchase charge), the IG determined that the Tribe's motor pool operator, Angela Duran, prepared the check voucher for purchase of the vehicle. In addition, the check voucher contained St. Marks' signature and two other council members' signatures. ROI at 13; Att. 59; Ex. B. This evidence suggests that members of CCT's Business Committee were aware of the vehicle purchase and that St. Marks acted with tribal authorization.

[9] Ms. Tadios, former Chief Executive Officer of the Rocky Boy Health Clinic, was convicted of two counts of theft of tribal funds and one count of theft from a healthcare facility. *See United States v. Fawn Tadios*, U.S. District Court, D. Montana, Great Falls, No. 4:13-cr-00051. On October 22, 2014, she was sentenced to serve twelve months and one day in prison, to be followed by a two-year period of supervised release, and ordered to pay $15,000 in restitution.

On Charge 6 (making unauthorized payments of $2,000 to tribal members Larry Ray Stanley, Ozzie Windy Boy, and Linda M. Gopher in violation of tribal law), the IG found that the documents do not indicate that any official approved the transaction except St. Marks. But St. Marks explained that he gave money from his paycheck to members of the tribe who were having financial difficulties before he asked for a $50,000 decrease in his own salary. ROI Att. 67. The IG found that the evidence submitted to show wrongdoing by St. Marks was unclear. In addition, if the CCT Business Committee found such wrongdoing by St. Marks, it appears to us that CCT failed to refer this case to investigative authorities promptly. ROI at 13; Att. 67.

On Charge 7 (credit card-related claims), CCT submitted a tribal credit card account statement and alleged that St. Marks made unauthorized charitable payments to the National Congress of American Indians. The IG made no finding as to whether this documentary evidence proved that the transactions were unauthorized. ROI at 13; Att. 59, Ex. F. Nonetheless, CCT never took formal disciplinary action in a timely fashion regarding this charge.

Even if some of the charges against St. Marks remain open questions, the IG's examination of the evidence and ROI, as well as our examination demonstrate that there is not "clear and convincing evidence" that the CCT Business Committee would have removed St. Marks based on the seven charges raised against him in March 2013 had he not made protected disclosures to the IG and USBR. Notably, CCT never sought to formally discipline St. Marks until after St. Marks made his disclosures to USBR and the IG concerning the misuse of ARRA funds. Moreover, there is no evidence in the record to show that CCT ever sought a criminal referral concerning St. Marks' alleged misuse of funds until very recently. Furthermore, CCT's record on these charges lack contemporaneous evidence documenting discovery of the alleged unauthorized behavior and timely, formal CCT Business Committee (or other tribal entity) process and procedure to investigate and adjudicate any of the allegations. A laundry list of unsubstantiated findings in a tribal government document is wholly insufficient to support the drastic and significant measure of removing an elected official. Indeed, CCT's continued pursuit of all seven charges despite evidence either challenging or failing to support their veracity calls into question the Business Committee's credibility and motive and renders the charges as pretext. Accordingly, we find no reason to reverse our Reprisal Determination.[10]

4. Further Inquiries with the IG and the Office of the United States Attorney, District of Montana

In the days following our receipt of the CCT Submission, we contacted the IG in order to revisit various aspects of this matter. We spoke with IG agents in March 2015 who either had

[10] As noted in our summary of CCT's Submission, above, much of the wrongful conduct that CCT now offers as the basis for St. Marks' removal involves either events allegedly occurring well after his March 2013 or events not included in the seven charges brought against him in March 2013. *See* CCT Submission at 3-5; 9-10; 14-17.

investigated the initial seven charges raised against St. Marks leading to his removal in March 2013 or who continue to investigate allegations of corruption at CCT relating to various federally-funded projects, including claims made against St. Marks pertaining to the Sewer Lagoon waste water project and other aspects of the core pipeline project (referred to as the Tiber Project). *See* CCT Submission Exhibit B (November 21, 2014 Notice of Removal Hearing detailing Charges 8 and 9 that CCT has subsequently added to the seven original charges used to remove St. Marks); February 27, 2015 St. Marks letter (attaching February 15, 2015 CCT Business Committee letter to St. Marks setting out fifteen purported charges supporting his removal and setting a March 2, 2015 Business Committee meeting). None of those discussions gave us reason to alter our conclusions about the questionable validity of the charges used to remove St. Marks from the Business Committee in March 2013.

Indeed, those discussions yielded additional insightful facts. For example, we learned that on December 4, 2014, Assistant U.S. Attorney (AUSA) Carl Rostad wrote to CCT's counsel in response to a January 13, 2014 letter and December 3, 2014 email from CCT's counsel to the AUSA's office concerning alleged fraud and misuse of federal funds by St. Marks and his company, Arrow Enterprises. *See* CCT Submission, Exhibit KK.[11] In that December 4, 2014 letter, AUSA Rostad advised CCT's counsel that the U.S. Department of Agriculture IG had conducted an inquiry into allegations against St. Marks with respect to the Sewer Lagoon waste water project, but that the inquiry "was closed after finding no credible evidence for further investigation." *See* **Attachment B** to this document. AUSA Rostad further advised CCT that with respect to allegations of bribery that may have affected "the fresh-water pipeline project"—allegations that had been the "focus of several investigations"—a "review of thousands of financial records produced no information that St. Marks transferred funds to tribal officials." *Id.* AUSA Rostad also noted that "when the agent assigned to the whistle-blower case attempted to interview tribal officials about the allegations they all refused to be interviewed." *Id.* But AUSA Rostad did leave open that, "[i]f that has changed," CCT's counsel could provide the names of tribal officials to be interviewed. *Id.*

Shortly following issuance of AUSA Rostad's December 4, 2014 letter, there were several communications between CCT's counsel and the IG. *See* CCT's February 13, 2015 Submission, Exhibit JJ. The IG's December 10, 2014 email to CCT's counsel, which considered documents that CCT previously had provided to the IG through counsel by a December 8, 2014 email, stated in relevant part:

> In advance of our meeting [for the following week], I am formally requesting all documents in your, or the Chippewa Cree Tribe's possession that support the

[11] CCT's January 13, 2014 letter had with it the same three documents that CCT provided as Exhibits C, F and H to the CCT Submission. Accordingly, the allegations presented to the U.S. Attorney for Montana in January 2014 correspond to Charges 8 and 9 that the Business Committee currently maintains against St. Marks.

> Business Committee's allegation that Arrow Enterprises made fraudulent misrepresentations in connection with their work on the Rocky Boys North Central Montana water project, that Arrow Enterprises failed to properly excavate and install water lines and that Arrow Enterprises has breached their contractual obligations due to unsatisfactory and substandard quality of work, as detailed [in the] November 21, 2014 letter [of the Business Committee].
>
> Thank you for the documents you have forwarded. Possibly these are all of the documents that exist. If that is the case, I may need to simply conduct interviews with the five tribal officials who signed the November 21 letter. Based on my initial review of the documents provided, they appear to be summary statements by the tribe of yet unsupported allegations.
>
> In your earlier email, you noted that your firm had conducted an investigation into St. Marks' criminal conduct. If that is the case, would it be possible for you to forward your firm's investigative files, or investigative summaries?

In a December 11, 2014 email response, CCT's counsel stated that it had "conducted an investigation into allegations that Ken St. Marks defrauded the Tribe and various federal agencies of more than $2 million in both the pipeline and lagoon projects," but that "the Business Committee members were not witnesses to St. Marks' fraud." *See* CCT Submission, Exh. JJ (December 11, 2014 email from Richard J. Zack to IG agent). CCT's counsel went on to say that a "detailed description of St. Marks' criminal conduct is contained in our letter and in our counterclaims which were filed in Tribal Court and which we supplied to you previously." *Id.* This likely refers to CCT's January 13, 2014 letter to the U.S. Attorney for Montana. CCT's counsel stated further that "I am not sure what you mean by your statement that you 'simply need to confirm the specificity and attribution of the tribal allegations against St. Marks.' We have requested that you investigate the matter and refer it to the United States Attorney for prosecution. We renew that request now." *Id.* The IG has confirmed that following those exchanges in December 2014, it has had no further contact with CCT's counsel nor received any of the additional documentation requested in its December 8, 2014 email to CCT's counsel. These emails and other communications call sharply into question any CCT allegation that investigative authorities have failed or refused to engage with CCT tribe members or other possible witnesses to St. Marks' alleged wrongdoing.

Pertinent to the substance of CCT's latter allegations (Charges 8 and 9) against St. Marks, the IG has provided four Investigative Activity Reports (IAR). The first IAR documents an IG conversation with the USBR Deputy Regional Director on December 4, 2014. *See* **Attachment C1** to this Final Disposition. The IAR reveals that the Deputy Regional Director expressed doubt concerning claims that Arrow Enterprises had performed inadequate or substandard work

on the Tiber Project because all work had been "inspected, reviewed, certified and approved for payment by the tribe's project engineer – AE2S Engineering." *Id.* That is, C-4 had retained AE2S Engineering as the Tiber Project engineer in order to certify that Arrow's work was performed in accordance with Project plans and specifications. Had Arrow's work not been in conformance, AE2S Engineering "could be held financially liable for corrective action." *Id.*

The remaining IARs document the IG's conversations with a project engineer for USBR and a lead engineer from AE2S, on December 4, and with Dan Belcourt, C-4's attorney, on December 5. *See* **Attachments C2-C4** to this document. The USBR and AE2S engineers provided additional details confirming that Arrow Enterprises properly performed the work and could not have received payment had it done otherwise. *See* **Attachments C2-C3**. Attorney Belcourt did not provide any specific statement or evidence supporting Charge 8 against Arrow Enterprises and St. Marks, which he characterized only as a "civil matter." But he said that he would later provide the C-4 Board's response supporting allegations of St. Marks' "misrepresentations" and failure to pay Davis-Bacon wages. *See* **Attachment C4**. We are not aware of any additional evidence provided by Attorney Belcourt.

This newly learned information in our consideration of the parties' submissions following the issuance of the Reprisal Determination raises serious questions about the validity of Charges 8 and 9 raised against St. Marks in subsequent efforts to remove him from the Business Committee following his re-election and reinstatement as Chairman after he was initially removed in March 2013. While those charges are not specifically under consideration here, CCT's continued assertion of Charges 8 and 9 despite a lack of any supporting evidence as demonstrated by the IG's substantial review further harms CCT's credibility in maintaining Charges 1-7 against St. Marks and bolsters our conclusion that St. Marks' communications to the IG and USBR about possible ARRA-related corruption at CCT were a "contributing factor" in his March 2013 removal. *See* § 1553(c)(1)(A)(i). Further, we conclude from this new information that any allegation that CCT was deprived of any meaningful opportunity to meet with cognizant IG agents or other investigative officials is wholly without merit.

III. Relief Awarded

ARRA provides that if an agency head finds that there was a prohibited reprisal by the employer, the agency head take one or more of the following actions:

- order the employer to take affirmative action to abate the reprisal;
- order the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply . . . if the reprisal had not been taken; and/or

- order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys fees and expert witnesses' fees) that were reasonably incurred by the complainant" in bringing the complaint of reprisal.

ARRA § 1553(c)(2)(A)-(C). Finding that the Reprisal Determination should not be overturned, relief to St. Marks is ordered as follows:

1. Abatement

CCT is ordered to stop any and all reprisals against St. Marks arising out of or relating to his communications with the IG and USBR concerning ARRA-related funding for and activities by CCT.

2. Back Pay

St. Marks requests full back pay. *See* St. Marks' January 12, 2015 Submission at 17; Att. 29 at 1. Back pay is normally calculated from the date of the adverse action to the date of reinstatement. Actions taken in anticipation of an adverse action may influence the back pay calculation. *Lavelle v. Dep't of Navy*, 37 MSPR 86, 91 (1988) (on second, PFR, 40 MSPR 329, 332 (1989)). The first step in calculating a back pay award is to "compute for the period covered by the corrective action the pay, allowances, and differentials the employee would have received if the unjustified or unwarranted personnel action had not occurred." *See* 5 C.F.R. 550.805(a)(2); *Collins v. USPS*, 64 MSPR 684, 688-689 (1994). The typical back pay calculation is the difference between what the employee would have earned for the period of absence less the amount the employee actually earned. *Mascarenas v. Dept. of Defense*, 57 MSPR 425, 431 (1993). The back pay obligation of an agency terminates upon the employee's reinstatement. The agency must act reasonably concerning the exact date of reinstatement. *Saal v. Dep't of Navy*, 38 MSPR 670, 675-676 (1988).

St. Marks bases his back pay claim on the following calculation: when St. Marks was elected Chairman of CCT, his salary was $128,000 per year (approximately $10,666.66/month). St. Marks claims he was paid for only two months in 2013 leaving an unpaid principal balance of ten months' salary (totaling $106,666.66). We also understand that St. Marks has not been paid any of his annual salary in 2014 ($128,000) or for any of his salary that he would have earned as Chairman in 2015 through the date of this decision (April 2015) (4 months @ $10,666.66/month) (totaling $42,666.64). Accordingly, we order that St. Marks be paid $277,333.30 in back pay.

3. Front Pay

St. Marks requests that he be awarded "front pay" (*i.e.* payment through the end of the term for which he was elected) if the Department does not order his reinstatement as Chairman. *See* January 12, 2015 Submission at 17; Att. 29 at 2. As discussed below, the Department will not order reinstatement of St. Marks as Chairman. Given that St. Marks was eligible for a four-year term as Chairman ending in November 2016, we order that he is entitled to front pay from the date of this order through November 2016. Accordingly, CCT is ordered to pay St. Marks in monthly installments (at a rate of $10,666.66/month based on an annual salary of $128,000) starting May 2015[13] until November 2016 (the end date of the term for which St. Marks was elected). Alternatively, CCT may pay St. Marks a lump sum of $202,666.54 (19 months @ $10,666.66/month) immediately, which is the total sum of the salary that would be paid to St. Marks for the remainder of his term ending in November 2016.

Recognizing that St. Marks could win another special election held by the Tribe to fill the Chairman's position for the remainder of St. Marks existing term, or that St. Marks might be reinstated to the Chairman position through ongoing proceedings in the CCT judicial system challenging his removal, CCT is not required to provide front pay to St. Marks for any time that he actually serves as Chairman of the Business Committee from the date of this decision until his term expires in November 2016 *as long as* St. Marks is otherwise compensated by CCT for that service as Chairman at a rate based on his annual salary of $128,000.

4. Compensatory Damages

St. Marks requests compensatory damages for loss of business opportunities. *See* January 12, 2015 Submission at 17; Att. 29 at 2. Compensatory damages are available for a reprisal. *Simonton v. USPS*, 85 MSPR 189, 195 (2000). These damages can include pecuniary and non-pecuniary harm. Non-pecuniary losses are those that are not subject to precise quantification. Compensatory damages may include injury to professional standing, injury to character, and injury to credit standing. *Rountree v. Glickman*, EEOC Appeal No. 01941906, slip op. at 6 (July 7, 1995). *See also Currier v. U.S. Postal Serv.*, 72 MSPR 191, 196 (1996).

St. Marks alleges that he attempted to engage in a "1031" exchange to purchase a Days Inn in Billings, Montana, and also attempted to get a loan from more than one bank for this purpose. *See* January 12, 2015 Submission at 18. He alleges that because of the legal conflict in which he was engaged with CCT, he could not secure a loan to complete the purchase. St. Marks requests damages in the amount of $7,000 in lost appraisal fees and $250,000 in compensatory damages. *See* Att. 29 at 2.

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[13] Although this opinion is issued before the end of April 2015, because St. Marks' back pay calculation includes all of April 2015, the front pay calculation provided here begins with May 2015.

We deny St. Marks' request for compensatory damages. It is not clear from the evidence provided by St. Marks that his inability to complete the hotel purchase resulted from his removal from the Business Committee. While citing St. Marks' ongoing disputes with CCT as problematic, one potential lender noted that St. Marks' loan request was declined because the bank did not "provide loans to a business or individual for ventures that (1) are outside of their normal line or business, or (2) that are outside of the Bank's trade area." *See* January 12, 2015 Submission, Att. 29 (St. Marks' Affidavit and Independence Bank Letter). Another lender suggested that St. Marks loan application could be evaluated again once his various disputes with CCT were resolved. *Id.* (Email from Darin Maas, VP, Commercial Loan Officer to Karen St. Marks dated Tuesday, April 22, 2014). This communication, however, does not confirm that St. Marks was guaranteed to have had his loan request approved – let alone that he would have realized a $250,000 profit – if he had not been removed from the CCT Business Committee. Moreover, St. Marks' request for $250,000 as compensation for this lost business opportunity is speculative. He offers no evidence other than his own projection that he would have earned that amount of profit from the hotel purchase he sought. *Id.*, Att. 29 (St. Marks' Affidavit) at 2.

We also decline to order CCT to pay St. Marks the amount of $282,098.92 arising out of contracts between Arrow Construction Corporation and CCT. *See* submission dated January 12, 2015 at 17; Att. 29. In refusing to order this compensation, we take no position on the merits of the ongoing contractual dispute between Arrow and CCT. Rather, we recognize that a judicial proceeding concerning that matter is currently pending in the CCT Tribal Court and do not intend to interfere with its resolution of the dispute.

In declining to order the compensatory damages requested by St. Marks, we note that ARRA does not obligate us to order such relief even if we found that the loss complained of directly resulted from the prohibited reprisal. ARRA expressly provides the Department broad authority to order "[one] or more" types of relief provided in the statute upon finding a prohibited reprisal. *See* § 1553(c)(2)(A)-(C).

5. Travel Costs

St. Marks has requested travel and hotel costs associated with meeting and working with a U.S. Congressman, DOI, USBR, and OIG officials in regard to the prohibited reprisal by CCT. *See* submission January 12, 2015 at 17; Att. 29 at 2. St. Marks claims a total of $2,955.60 for such costs. *See* January 12, 2015 Submission, Att. 29 (St. Marks' Affidavit at 2 and Travel Invoices). We order CCT to reimburse St. Marks for these costs. As the costs were incurred in making protected disclosures about ARRA-related issues regarding CCT, St. Marks is entitled to reimbursement under § 1553(c)(2)(C), which covers costs and expenses reasonably incurred by the complainant in connection with bringing the complaint of reprisal.

6. Attorneys Fees and Costs

St. Marks has requested attorneys fees and costs associated with the whistleblower protection he has sought. *See* ARRA § 1553(c)(2)(C). A party requesting an award of attorneys fees and costs must show that the amount claimed, including the billing rates and the number of hours worked claimed, is reasonable. *Santella v. Special Counsel*, 86 MSPR 48, 66 ¶36 (2002). Reasonableness of fees may be determined in part by the quality and length of work product produced rather than on the strength or weakness of the position defeated. *Weaver v. Dept. of Army*, 29 MSPR 565, 568 (1985). In order to establish the appropriate hourly rate, the fee application must contain a fee agreement, if any, as well as the attorney's customary billing rate for similar work. *Mitchell v. Dep't of Health and Human Servs.*, 19 MSPR 206, 210 (1984). A request for attorneys fees must also be supported by citation to past fee awards or to comparable awards in the community to attorneys of comparable backgrounds, to demonstrate the reasonableness of the retainer rate. *Lizut v. Dep't of Navy*, 42 MSPR 3, 7 (1989).

Some factors courts look to when determining reasonableness of attorneys fees include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to the acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of professional relationship with the client; and (12) awards in similar cases. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

Having examined the attorney bills submitted by St. Marks, *see* January 12, 2015 Submission, Atts. 30-32, and Fredericks Peebles & Morgan LLP Letter dated April 24, 2015, we order that CCT pay him $165,474.91 to cover the legal fees and costs St. Marks has incurred.[14] Consistent

[14] This value is broken down as $162,014.91 (Fredericks, Peebles & Morgan LLP) and $3,460 (Rosette LLP). The Department concludes that fees and costs associated with matters not directly involving St. Marks' whistleblower matter, *e.g.* Arrow-related litigation and Tadios sexual harassment allegation, would not be recovered under this action. This is consistent with the Department's treatment of St. Marks' request for recovery in this matter of those funds at issue in the Arrow Enterprises v. C-4 contractual dispute now pending in the CCT Tribal Court. The Department thoroughly reviewed St. Marks' January 12, 2015 Submission, which included the Affidavit of St. Marks (Att. 29), Fredericks Peebles & Morgan LLP Attorneys Fees Invoices (filed under seal) (Att. 30), Rosette Invoices (filed under seal) (Att. 31) and Joe McKay's attorney fees (Att. 32), and the Fredericks Peebles & Morgan LLP Letter dated April 24, 2015 and its accompanying affidavit and invoices (filed under seal). The Department examined these bills and time descriptions closely to ensure that the time was spent working on the whistleblower matter and not ancillary disputes involving St. Marks and CCT. Because the McKay invoice (Att. 32) failed to sufficiently describe the work done on St. Marks' behalf in any meaningful way, we decline to add any of the total reflected on that invoice to the relief ordered in this opinion. The Department also declines to award any legal fees and costs incurred by St. Marks beyond January 30, 2015, which is the date on which St. Marks' final submission

with the standards set forth in guiding authority cited above, we find this amount of fees and costs is reasonable.

This constitutes a total monetary award to Mr. St. Marks of $648,430.35 for back pay, front pay, travel costs, and legal fees and related costs.

7. Reinstatement

We decline to order reinstatement of St. Marks as CCT Chairman. As suggested in the Reprisal Determination, where we also noted the ongoing struggle over St. Marks' efforts at restoration to the Chairman position, we do not believe such an order would be prudent here. *See* Reprisal Determination at 10 and n. 10. Proceedings challenging St. Marks' removal from the Business Committee are pending in the CCT courts. Thus, the Department will not order any relief that complicates the CCT judiciary's consideration of what relief, if any, should be awarded to St. Marks concerning reinstatement.

We do not reach this decision lightly, however. As found in our Reprisal Determination and confirmed here, CCT acted wrongfully towards St. Marks. Moreover, the numerous criminal indictments and convictions of CCT employees and officials create significant concern for the Department about the welfare of CCT's government and its members. Accordingly, we appreciate St. Marks' efforts to bring concerns about ARRA-related corruption and malfeasance at CCT to the attention of the United States. Still, in strong support and recognition of tribal sovereignty and self-determination, we decline at this time to inject the Department into an issue concerning tribal leadership further than is absolutely necessary. Accordingly, we award monetary relief to St. Marks as described above, and look to the CCT judiciary and electorate to resolve outstanding issues concerning CCT's leadership.

IV. Conclusion

Having considered the parties' various submissions along with relevant information from the Inspector General, we uphold the conclusion we reached in the Reprisal Determination and order relief to St. Marks as set forth above.

In accordance with ARRA § 1553(c)(5), any person adversely affected or aggrieved by an order issued under § 1553(c)(2) may obtain review of the order's conformance to § 1553(c), and any regulations issued to carry out this section, in the United States court of appeals for a circuit in

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was due to the Department concerning the remedy that should be ordered in this matter. Accordingly, the Department will order only $32,563.40 of the total reflected on the invoices submitted by St. Marks on April 24, 2015 be added to the amount of recoverable legal fees and costs.

which the reprisal is alleged to have occurred. Further, no petition seeking to review this order may be filed more than 60 days after issuance of this order. *Id.*

Sincerely,

Hilary C. Tomkins
Solicitor

Enclosures

cc: LeAnn Montes, Esq.

Calendar No. 506

114TH CONGRESS *2d Session*	SENATE	REPORT 114–270

TO ENHANCE WHISTLEBLOWER PROTECTION FOR CONTRACTOR AND GRANTEE EMPLOYEES

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 795

JUNE 7, 2016.—Ordered to be printed

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Calendar No. 506

114TH CONGRESS, *2d Session* | SENATE | REPORT 114–270

TO ENHANCE WHISTLEBLOWER PROTECTION FOR CONTRACTOR AND GRANTEE EMPLOYEES

JUNE 7, 2016.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 795]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 795) to enhance the whistleblower protection for contractor and grantee employees, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

CONTENTS

I. PURPOSE AND SUMMARY

The purpose of S. 795 is to improve the whistleblower rights of Federal contractors working on Federal contracts, grants and other programs. The bill would put whistleblowing protections related to individuals working on Federal civilian contracts and grants on par with those already existing related to individuals working on Federal defense contracts and grants by making the temporary civilian whistleblowing program permanent and extending these protections to subgrantees. It would also extend these protections to personal services contractors working on both defense and civilian grant programs.

II. Background and the Need for Legislation

This Committee has made it a priority to examine the root and contributing causes of whistleblower retaliation through investigations, hearings, and other oversight, and to identify ways in which gaps or weaknesses in current law can be addressed through legislation.[1]

S. 795 addresses current gaps in whistleblower protections for the individuals that work on projects funded by the over $1 trillion in contract and grant funding provided by the Federal Government each year.[2] Much of this contract and grant funding flows through the prime contractors and grantees to subcontractors and subgrantees, but employees of these subcontractors and subgrantees do not enjoy the same whistleblower protections that those working for the prime contractors do.

Section 1553 of The American Recovery and Reinvestment Act of 2009 (ARRA) established whistleblower protections for all recipients of stimulus funds, including all state and local government employees and all contractors, including within the intelligence community (IC).[3] During a December 6, 2011, hearing before the Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Contracting Oversight, the Chair of the Legislation Committee of the Council of Inspectors General on Integrity and Efficiency (CIGIE) testified that:

> . . . investigations and reviews of the whistleblower complaints had resulted in recovery of approximately $1.85 million as of April [2011]. One of the key provisions of ARRA is Section 1553 that gives the authority of [Offices of Inspectors General (OIGs)] to investigate reprisal complaints from non-Federal employee whistleblowers. Of the surveyed [Inspectors General (IGs)], 8 of the OIGs had received a total of 18 reprisal complaints, and 11 of those had been accepted for investigation. The majority of IGs that had received these complaints had not experienced any problems or concerns with implementing Section 1553 or in responding to the complainants' request to access the completed investigation file.[4]

The ARRA whistleblower provision, while significant, only extended to contracts funded by stimulus funds, which make up only a small portion of Federal Government contracts. During the 2011

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[1] *See, e.g., Blowing the Whistle on Retaliation: Accounts of Current and Former Federal Agency Whistleblowers: Hearing Before the Comm. on Homeland Security & Governmental Affairs*, 114th Cong. (2015), *available at http://www.hsgac.senate.gov/hearings/blowing-the-whistle-on-retaliation-accounts-of-current-and-former-federal-agency-whistleblowers; Improving VA Accountability: Examining First-Hand Accounts of Department of Veterans Affairs Whistleblowers: Hearing Before the Comm. on Homeland Security & Governmental Affairs*, 114th Cong. (2015), *available at http://www.hsgac.senate.gov/hearings/improving-va-accountability-examining-first-hand-accounts-of-department-of-veterans-affairs-whistleblowers*; Pub. L. No. 112–199 (112th Cong.) (2012); S. 2127, the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2015 (114th Cong.).

[2] *Overview of Awards by FY 2008–2015* (last visited Mar. 7, 2016) (online at: https://www.usaspending.gov/Pages/TextView.aspx?data=OverviewOfAwardsByFiscalYearTextView). the $438 billion in contracts and $614 billion in grants provided by the Federal Government in fiscal year (FY) 2015 alone.

[3] Pub. L. No. 111–5 (111th Cong.) (2009).

[4] *Whistleblower Protections for Government Contractors, Hearing Before the S. Homeland Sec. & Governmental Affairs Subcomm. On Contracting Oversight 6*, 112th Cong. (2011) [hereinafter *Whistleblower Protections*] (testimony of the Honorable Peggy Gustafson, Inspector General, U.S. Small Business Administration/Chair of the Legislation Committee of CIGIE), *available at* https://www.gpo.gov/fdsys/pkg/CHRG–112shrg72560/pdf/CHRG–112shrg72560.pdf.

subcommittee hearing, the Director of Public Policy at the Project On Government Oversight (POGO) testified on the need for extending whistleblower coverage to all Federal contractors:

> According to USAspending.gov, out of nearly $3.8 trillion in the federal budget in fiscal year 2011, roughly half was spent on prime awards to contractors, grantees, states and localities, and others. A recent POGO report illustrates the imperative of protecting whistleblowers in this growing workforce of federal contractors. In fact, in some federal offices contractor employees outnumber federal employees. Since 1999, the size of the federal employee workforce has remained relatively constant at about 2 million, while the contractor workforce has increased radically—from an estimated 4.4 million to 7.6 million 2005. In other words, the federal contractor workforce dwarfs the federal employee workforce nearly four-fold.[5]

Senator Rob Portman added that "whistleblower protections for non-Federal employees are nowhere more necessary and appropriate than in Federal contracting. We now spend over half a trillion dollars a year in contracts annually."[6] Similarly, Senator Claire McCaskill discussed the need for extending coverage to all Federal contractors noting that, "if we are not including contractors in the protection of the whistleblower legislation, then we have a huge problem here. If the whistleblowers that work for contractors do not have the same protections as Federal employees, we are saying to contractors we do not think wrongdoing by you is that important."[7]

Dr. Walter Tamosaitis, a former Department of Energy (DOE) government contractor manager in the $13 billion Waste Treatment Plant (WTP) project in Hanford, Washington, testified before the subcommittee based on his own experience having been terminated as a result of disclosing extensive government contractor waste. Dr. Tamosaitis described the risks of failing to cover Federal contractors, stating:

> With no whistleblower protection, the contractors do what they want. They actually make more money in DOE by not doing it right the first time. They get paid to build it, and then they get paid more to fix it, if it will run at all. And this cost [sic] the taxpayers billions at a time when our country's budget cannot afford it. The original WTP cost was about $4.6 billion, and now it is at over $13 billion in 10 years.[8]

To address this gap in law, Senators Claire McCaskill (D–MO), Jon Tester (D–MT) and Jim Webb (D–MT) introduced legislation in the 112th Congress that would have created permanent whistleblower rights for all Federal Government contractors, subcontractors, and grantees, including those within the IC.[9] Although the bill was not signed into law, the concept was included in the Na-

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[5] *Whistleblower Protections* 68–69 (statement of Angela Cantebury, Director of Public Policy, Project on Government Oversight).
[6] *Id.* at 3 (opening statement of Senator Rob Portman).
[7] *Id.* at 2 (opening statement of Senator Claire McCaskill).
[8] *Id.* at 19 (testimony of Dr. Walter Tamosaitis).
[9] S. 241, the Non-Federal Employee Whistleblower Protection Act of 2012 (112th Cong.).

tional Defense Authorization Act for Fiscal Year 2013, but as a four-year pilot program that excluded IC contractors.[10] In sum, the pilot program prohibits employees of a "contractor, subcontractor, or grantee" from being retaliated against for blowing the whistle on waste, mismanagement, and abuse occurring in relation to a Federal contract or grant, and provides employees with a mechanism for submitting complaints of such conduct to the inspector general of the relevant agency.[11] The pilot program is set to expire in 2017.[12]

Importantly, Congress extended the whistleblower protections only to the extent the private individual is making a disclosure that is related to "gross mismanagement" "an abuse of authority," "a substantial and specific danger to public health or safety," "or a violation of law, rule, or regulation" that is "related to a *Federal* contract or grant" or "a gross waste of *Federal* funds."[13] A private individual blowing the whistle on conduct occurring in relation to a private company that is not related to a Federal project must seek the protection of other laws that apply to private citizens.

Similar rights have existed for Department of Defense (DoD) contractors working on DoD Federal grants for decades.[14] In the years since the protections were first added, Congress expanded the DoD whistleblower protections to also cover grants,[15] subcontractors,[16] and finally, in 2014, grantees and subgrantees.[17]

Unlike the temporary, four-year program for civilian contracts, the rights of whistleblowers working on Federal defense contracts are not time-limited. S. 795 would remedy this unbalanced treatment by ensuring that contractors, subcontractors, grantees, and subgrantees of civilian Federal contracts and grants have the same rights as those working on defense contracts and grants.

Additionally, S. 795 would add another category of contract employees who would be protected from retaliation against whistleblowing: personal services contractors. Personal services contractors are contractors that contract their services directly with the Government, instead of as an employee of a private contracting company, but they are not currently covered under defense protections or the civilian pilot program.

One notable example of the need to include personal services contractors is the story of Mr. Leonard Cooper, a mechanical engineering expert who worked as a personal services contractor on embassy security for the State Department.[18] Mr. Cooper alleged to the Office of Special Counsel that he believes he was retaliated againstafter he disclosed to superiors that the Environmental Safety Protection Systems (ESPS) for embassies worldwide lack the instruments necessary to sense and account for the impact of constantly-changing wind conditions or wind that leaks into the building.[19] This creates global vulnerability to exposure by chemical, bi-

[10] Pub. L. No. 112–239, 828 (112th Cong.) (2013), codified at 41 U.S.C. § 4712.
[11] *Id.*
[12] *Id.*
[13] *Id.* (emphasis supplied).
[14] Pub. L. No. 99–500 (99th Cong.) (1986).
[15] Pub. L. No. 110–181 (110th Cong.) (2008).
[16] Pub. L. No. 112–239 (113th Cong.) (2013).
[17] Pub. L. No. 113–291 (113th Cong.) (2014), codified at 10 USC § 2409.
[18] Briefing by Government Accountability Project to Comm. staff (March 2016).
[19] Letter from the U.S. Office of Special Counsel to Mr. Leonard Y. Cooper (Mar. 21, 2014) (on file with Comm. staff).

ological, and radiological (CBR) attacks.[20] Mr. Cooper also disclosed that the design of new stand-alone safe haven facilities, called Compound Emergency Sanctuaries (CES), in the United States Embassy Compound in Tripoli, Libya does not protect occupants against arson or fire as a weapon, leading to their guaranteed death against that type of attack.[21] Although the United States Office of Special Counsel found a substantial likelihood that Mr. Cooper is correct and ordered a State Department investigation, his contract was not renewed.[22] As a personal services contractor, he arguably has no recourse under current law.

S. 795 would extend to subcontractors the existing laws prohibiting the Federal Government from reimbursing certain litigation or defense costs for contractors, including in their defense against retaliation claims by whistleblowers.[23] Federal taxpayers should not foot the legal bills for contractors who retaliate against employees that report waste, fraud and abuse of taxpayer dollars.

Current law does not require contracts signed before the effective date of the National Defense Authorization Act for Fiscal Year 2013 to be revised so as to include the new whistleblower protections.[24] This bill, however, would require companies to use best efforts to include these protections if there is a major modification to any contract that is currently grand-fathered in.

S. 795 would make the rights of civilian contractors permanent and make responsible corrections to existing protections for civilian and defense contractors to ensure that Federal Government contractors can safely report government waste, fraud, abuse and public health and safety threats.

III. Legislative History

Senator Claire McCaskill (D–MO.) introduced S. 795 on March 18, 2015. The bill was referred to the Committee on Homeland Security and Governmental Affairs. Senator Ron Johnson (R–WI.) joined as a cosponsor on February 9, 2016.

The Committee considered S. 795 at a business meeting on February 10, 2016. During the business meeting, a substitute amendment was offered by Senator McCaskill. The bill, as amended by the McCaskill substitute amendment, was ordered reported favorably by voice vote *en bloc*. Senators Johnson, McCain, Portman, Paul, Lankford, Ayotte, Ernst, Sasse, Carper, McCaskill, Tester, Baldwin, Heitkamp, Booker, and Peters were present for the vote.

Consistent with the Committee's order on technical and conforming changes at the meeting, the Committee reports the bill with a technical amendment by mutual agreement of the full Committee majority and minority staff.

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[20] Briefing by Government Accountability Project to Comm. staff (March 2016).
[21] *Id.*
[22] Letter from the U.S. Office of Special Counsel to Mr. Leonard Y. Cooper (Mar. 21, 2014) (on file with Comm. staff).
[23] 10 U.S.C. § 2324(k), 41 U.S.C. § 4310.
[24] *See* 10 U.S.C. § 2324 (note); 41 U.S.C. § 4712 (note).

IV. Section-by-Section Analysis of the Bill, as Reported

Section 1. Enhancement of whistleblower protection for contractor and grantee employees

Subsection (a) adds "personal services contractor" to the list of protected individuals working on defense contracts or grants for the Federal Government. It also makes permanent the four-year pilot program that provides whistleblower protections to certain individuals working on civilian contracts, and adds "personal services contractor" and "subgrantee" to the list of those protected individuals.

Subsection (b) prohibits reimbursement of legal fees accrued by a contractor, subcontractor, or personal services contractor in defense of reprisal claims brought by the Federal Government, a state, or by a contractor or grantee employee arising under the authority of the Federal whistleblower protections established for civilian and defense contracts.

Subsection (c) requires the head of each contracting agency to, at the time of any major contract modification, make best efforts to include the protections established under this bill and the National Defense Authorization Act for Fiscal Year 2013 in any contract awarded prior to the date of enactment of this bill.

V. Evaluation of Regulatory Impact

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. Congressional Budget Office Cost Estimate

May 27, 2016.

Hon. Ron Johnson, *Chairman,*
Committee on Homeland Security and Governmental Affairs,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the enclosed cost estimate for S. 795, a bill to enhance whistleblower protection for contractor and grantee employees.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

Keith Hall.

Enclosure.

S. 795—A bill to enhance whistleblower protection for contractor and grantee employees

S. 795 would amend federal law to permanently extend legal protections to certain nonfederal employees (contractors, subcontractors, grantees, and others employed by entities that receive federal funds) who report waste, fraud, or abuse involving federal funds. Specifically, under the bill, anyone who reports the misuse of fed-

eral funds could not be demoted, discharged, or discriminated against because of the disclosure. The current four-year pilot program that extends those same protections ends in December 2016.

The cost to implement S. 795 would depend on the number of whistleblower claims made by those nonfederal employees. Evidence from the pilot program that currently protects certain nonfederal employees from such discrimination suggests that the number of such claims brought by nonfederal employees has totaled less than 20 for each of the 26 major federal agencies. CBO estimates that implementing S. 795 would cost about $3,000 to investigate each claim, or about $5 million over the 2017–2021 period. Any such spending would be subject to the availability of appropriated funds. Enacting the bill could affect direct spending by agencies not funded through annual appropriations; therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net increase in spending by those agencies would be negligible. Enacting S. 795 would not affect revenues.

CBO estimates that enacting S. 795 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

S. 795 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

VI. Changes in Existing Law Made by the Bill, as Reported

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows: (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

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TITLE 10—ARMED FORCES

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PART IV—SERVICE, SUPPLY, AND PROCUREMENT

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CHAPTER 137—PROCUREMENT GENERALLY

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SEC. 2324. ALLOWABLE COSTS UNDER DEFENSE CONTRACTS

(a) * * *

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(k) PROCEEDING COSTS NOT ALLOWABLE.

(1) Except as otherwise provided in this subsection, costs incurred by a contractor, *subcontractor, or personal services contractor* in connection with any criminal, civil, or administrative proceeding commenced by the United States, by a State, or by a contractor, *subcontractor, or personal services contractor* employee submitting a complaint under section 2409 of this title are not allowable as reimbursable costs under a covered contract, subcontract, or personal services contract if the proceeding

(A) relates to a violation of, or failure to comply with, a Federal or State statute or regulation *or to any other activity described in subparagraphs (A) through (C) of section 2409(a)(1) of this title,* and

(B) results in a disposition described in paragraph (2).

(2) A disposition referred to in paragraph (1)(B) is any of the following:

(A) In the case of a criminal proceeding, a conviction (including a conviction pursuant to a plea of nolo contendere) by reason of the violation or failure referred to in paragraph (1).

(B) In the case of a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor, *subcontractor, or personal services contractor* liability on the basis of the violation or failure referred to in paragraph (1).

(C) In the case of any civil or administrative proceeding, the imposition of a monetary penalty or an order to take corrective action under section 2409 of this title by reason of the violation or failure referred to in paragraph (1).

(D) A final decision—

(i) to debar or suspend the contractor, *subcontractor, or personal services contractor*;

(ii) to rescind or void the contract, *subcontract, or personal services contract*; or

(iii) to terminate the contract, *subcontract, or personal services contract* for default;

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CHAPTER 141—MISCELLANEOUS PROCUREMENT PROVISIONS

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SEC. 2409. CONTRACTOR EMPLOYEES: PROTECTION FROM REPRISAL FOR DISCLOSURE OF CERTAIN INFORMATION

(a) PROHIBITION OF REPRISALS.

(1) An employee of a contractor, subcontractor, grantee, or subgrantee *or personal services contractor* may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of the following:

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TITLE 41—PUBLIC CONTRACTS

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Subtitle I—Federal Procurement Policy

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DIVISION C—PROCUREMENT

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TITLE 41—PUBLIC CONTRACTS

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Subtitle I—Federal Procurement Policy

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DIVISION C—PROCUREMENT

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CHAPTER 43—ALLOWABLE COSTS

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SEC. 4304. SPECIFIC COSTS NOT ALLOWABLE

(a) SPECIFIC COSTS.—The following costs are not allowable under a covered contract:

(1) * * *

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(15) Costs incurred by a contractor, *subcontractor, or personal services contractor* in connection with any criminal, civil, or administrative proceeding commenced by the Federal Government or a State, to the extent provided in section 4310 of this title.

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SEC. 4310. PROCEEDING COSTS NOT ALLOWABLE

(a) DEFINITIONS.—

(1) COSTS.—The term "costs", with respect to a proceeding, means all costs incurred by a contractor, *subcontractor, or personal services contractor,* whether before or after the commencement of the proceeding, including—

(A) administrative and clerical expenses;

(B) the cost of legal services, including legal services performed by an employee of the contractor*, subcontractor, or personal services contractor;*

(C) the cost of the services of accountants and consultants retained by the contractor, *subcontractor, or personal services contractor*; and

(D) the pay of directors, officers, and employees of the contractor, *subcontractor, or personal services contractor*

for time devoted by those directors, officers, and employees to the proceeding.

(2) PENALTY.—The term "penalty" does not include restitution, reimbursement, or compensatory damages.

(3) PROCEEDING.—The term "proceeding" includes an investigation.

(b) IN GENERAL.—Except as otherwise provided in this section, costs incurred by a contractor, *subcontractor, or personal services contractor* in connection with a criminal, civil, or administrative proceeding commenced by the Federal Government, by a State, or by a contractor, *subcontractor, or personal services contractor* or grantee employee submitting a complaint under section 4712 of this title are not allowable as reimbursable costs under a covered contract, *subcontract, or personal services contract* if the proceeding—

(1) relates to a violation of, or failure to comply with, a Federal or State statute or regulation *or to any other activity described in section 4712(a)(1) of this title*; and

(2) results in a disposition described in subsection (c).

(c) COVERED DISPOSITIONS.—A disposition referred to in subsection (b)(2) is any of the following:

(1) In a criminal proceeding, a conviction (including a conviction pursuant to a plea of nolo contendere) by reason of the violation or failure referred to in subsection (b).

(2) In a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor, *subcontractor, or personal services contractor* liability on the basis of the violation or failure referred to in subsection (b).

(3) In any civil or administrative proceeding, the imposition of a monetary penalty or an order to take corrective action under section 4712 of this title by reason of the violation or failure referred to in subsection (b).

(4) A final decision to do any of the following, by reason of the violation or failure referred to in subsection (b):

(A) Debar or suspend the contractor, *subcontractor, or personal services contractor.*

(B) Rescind or void the contract, *subcontract, or personal services contract.*

(C) Terminate the contract, *subcontract, or personal services contract* for default.

(5) A disposition of the proceeding by consent or compromise if the disposition could have resulted in a disposition described in paragraph (1), (2), (3), or (4).

(d) COSTS ALLOWED BY SETTLEMENT AGREEMENT IN PROCEEDING COMMENCED BY FEDERAL GOVERNMENT.—In the case of a proceeding referred to in subsection (b) that is commenced by the Federal Government and is resolved by consent or compromise pursuant to an agreement entered into by a contractor, *subcontractor, or personal services contractor* and the Federal Government, the costs incurred by the contractor, *subcontractor, or personal services contractor* in connection with the proceeding that are otherwise not allowable as reimbursable costs under subsection (b) may be allowed to the extent specifically provided in that agreement.

(e) COSTS SPECIFICALLY AUTHORIZED BY EXECUTIVE AGENCY IN PROCEEDING COMMENCED BY STATE.—In the case of a proceeding referred to in subsection (b) that is commenced by a State, the executive agency that awarded the covered contract, *subcontract, or personal services contract* involved in the proceeding may allow the costs incurred by the contractor, *subcontractor, or personal services contractor* in connection with the proceeding as reimbursable costs if the executive agency determines, in accordance with the Federal Acquisition Regulation, that the costs were incurred as a result of—

(1) a specific term or condition of the contract, *subcontract, or personal services contract;* or

(2) specific written instructions of the executive agency.

(f) OTHER ALLOWABLE COSTS.—

(1) IN GENERAL.—Except as provided in paragraph (3), costs incurred by a contractor, *subcontractor, or personal services contractor* in connection with a criminal, civil, or administrative proceeding commenced by the Federal Government or a State in connection with a covered contract, *subcontract, or personal services contract* may be allowed as reimbursable costs under the contract, *subcontract, or personal services contract* if the costs are not disallowable under subsection (b), but only to the extent provided in paragraph (2).

(2) AMOUNT OF ALLOWABLE COSTS.—

(A) MAXIMUM AMOUNT ALLOWED.—The amount of the costs allowable under paragraph (1) in any case may not exceed the amount equal to 80 percent of the amount of the costs incurred, to the extent that the costs are determined to be otherwise allowable and allocable under the Federal Acquisition Regulation.

(B) CONTENT OF REGULATIONS.—Regulations issued for the purpose of subparagraph (A) shall provide for appropriate consideration of the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the Federal Government as a party, and other factors as may be appropriate.

(3) WHEN OTHERWISE ALLOWABLE COSTS ARE NOT ALLOWABLE.—In the case of a proceeding referred to in paragraph (1), contractor, *subcontractor, or personal services contractor* costs otherwise allowable as reimbursable costs under this subsection are not allowable if—

(A) the proceeding involves the same contractor, *subcontractor, or personal services contractor* misconduct alleged as the basis of another criminal, civil, or administrative proceeding; and

(B) the costs of the other proceeding are not allowable under subsection (b).

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CHAPTER 47—MISCELLANEOUS

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Table of sections

SEC. 4712. [PILOT PROGRAM FOR ENHANCEMENT] ***ENHANCEMENT*** **OF CONTRACTOR PROTECTION FROM REPRISAL FOR DISCLOSURE OF CERTAIN INFORMATION**

(a) PROHIBITION OF REPRISALS.—

(1) IN GENERAL.—An employee of a contractor, subcontractor, [or grantee] *grantee, or subgrantee or personal services contractor,* may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.

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[(i) DURATION OF SECTION.—This section shall be in effect for the four-year period beginning on the date of that is 180 days after the date the enactment of this section.]

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