

**ATTORNEY/CLIENT AND ATTORNEY WORK PRODUCT
PRIVILEGED AND CONFIDENTIAL COMMUNICATION**

September 22, 2022

MEMORANDUM FOR: --- *Manager* ---
 --- *Title* ---, Office of National Assessments & Integration

THROUGH: --- *Attorney* ---
 --- *Title* ---
 Resilience–Preparedness and Continuity Legal Division

FROM: --- *Attorney* ---
 --- *Title* ---
 Resilience–Preparedness and Continuity Legal Division

**SUBJECT: Whistleblower Reports and Unauthorized Disclosure of
Nonpublic Information to Media Outlets Regarding the Strategic
National Risk Assessment (SNRA) Planning Tool.**

Question: Whether an employee’s disclosure of nonpublic information to media outlets constitutes a protected activity under the Whistleblower Protection Act (WPA) and whether this activity violates federal ethics regulations when carried out without approval during official time.

Executive Summary (BLUF):

Office of Chief Counsel (OCC) asserts that the employee’s disclosure of nonpublic information to media outlets most likely is not protected under section 5 U.S.C. § 2302(b)(8)(A) of the WPA because it does not rise to disclosure of gross mismanagement, does not identify a problem that creates a real risk of significant adverse impact to FEMA’s ability to accomplish its mission, and was made outside of the DHS WPA reporting process.

There is no evidence that DHS/FEMA authorized the employee to release any nonpublic information regarding the SNRA and its capabilities to the general public through media outlets, as any such disclosures are most likely a violation of 5 CFR § 2635.703. Additionally, the employee disclosed nonpublic information during duty time; however, OCC does not possess enough knowledge on the level of effort or the amount of time expended. OCC defers to the employee’s chain of command to determine if these efforts at disclosing nonpublic information interfered with the employee expending an honest effort and a reasonable proportion of his time in the performance of official duties, in violation of 5 C.F.R. § 2635.705. Because the employee has at a minimum disclosed nonpublic information without authorization, most likely in violation of 5 C.F.R. § 2635.703, OCC recommends that either the employee self-report or his chain of command report this violation of the Standards of Professional Conduct to OPR as required under FEMA Directive: Office of Professional Responsibility. #112-13 Rev.1, at 4.

Additionally, OCC recommends that the employee’s immediate supervisor or another member within his chain of command, in coordination with Labor Employee Relations, meet with the

employee to counsel him in accordance with the Recommendations section in this memorandum on the WPA reports. The goal of the conversation is not to chill the employee's desire to make disclosures pursuant to WPA; rather, the goal is to ensure disclosures are made pursuant to DHS guidance and in accordance with the law and federal ethics regulations.

Factual Summary:

A National Integration Center (NIC) employee disclosed nonpublic information to media outlets that pertains to the SNRA, a FEMA planning tool. As explained in an accompanying file titled SNRA – A partial FAQ – 2019/03/19 (attached), the employee details that he is making this disclosure because, in his opinion, the SNRA “has been stuck for seven years, and [he does] not think it will be resolved as long as it stays inside the Executive Branch, or any time soon in court”. The employee also states that “the White House decided it wanted to edit the [SNRA] findings... [i]t has been buried since.” And he goes on to state that “FEMA cites the deliberative process privilege: protecting the integrity of the decision-making process within the agency” for its decision regarding the SNRA planning tool. The employee acknowledges that he exhausted his administrative appeals, but he disagrees with DHS/FEMA's decisions regarding this tool, which in the employee's opinion has been buried and is not useful and requires outside intervention.

Discussion:

Disclosures of nonpublic information to media outlets most likely not protected under section 5 U.S.C. § 2302(b)(8)(A) of the WPA because it does not rise to disclosure of gross mismanagement, does not identify a problem that creates a real risk of significant adverse impact to FEMA's ability to accomplish its mission, and was made outside of the DHS WPA reporting process.

Whistleblowers perform an important service by reporting what they reasonably believe to be evidence of waste, fraud, abuse, or mismanagement. DHS employees, contractors, subcontractors, grantees, and personal services contractors are protected by law from retaliation for making a protected disclosure.

The Whistleblower Protection Act, (WPA), Pub. L. No. 101-12, codified as amended at 5 U.S.C. § 2302, provides protection to employees who disclose information they reasonably believe evidence (i) a violation of law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8)(A). The WPA “provides most federal agency employees with protection against agency reprisals for whistleblowing activity”, including “gross mismanagement”, which is relevant here.

Although the WPA does not specify to whom a disclosure must be made to constitute a protected disclosure, DHS provides guidance on how an employee should make a WPA report.

DHS, generally, provides, that an employee may make a WPA report to: The employee's immediate supervisor or someone higher up within their chain of command; DHS OIG; or U.S. Office of Special Counsel (OSC). DHS guidance also states that a disclosure of waste, fraud, or abuse that includes classified information is not a protected disclosure under the whistleblower laws unless the disclosure is made in accordance with the law and rules that govern the proper handling and

transmission of classified information. In any event, disclosures of nonpublic information to the media do not constitute protected disclosures.

The WPA does not require that whistleblowers establish gross mismanagement by irrefragable proof. Rather, in *Kohler v. FEMA*, the Southern District of New York held that any disclosure of information by an employee, which the employee reasonably believes evidences gross mismanagement requires the employee to disclose “such serious errors by the agency that a conclusion that the agency erred is not debatable among reasonable people, and the matter is the subject of the disclosure must be significant.” *See*, No. 1: 17-cv-07839-ALC, 2021 U.S. Dist. LEXIS 64995, at 81-82 (S.D.N.Y. Apr. 2, 2021) (citing *White v. Dep’t of the Air Force*, 391 F.3d 1377, 1382 (Fed. Cir. 2004)). A purely subjective perspective of an employee is not sufficient. *Groseclose v. Dep’t of the Navy*, 459 F. App’x 918, 922 (Fed. Cir. 2012) (citing *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999)). “Mere differences of opinion between an employee and his agency superiors as to the proper approach to a particular problem or the most appropriate course of action do not rise to the level of gross mismanagement.” *See*, *White v. Dep’t. of the Air Force*, 391 F.3d 1377, 1381 (Fed. Cir. 2004), *see also*, *Stella v. Mineta*, 284 F.3d 135, 142, 350 U.S. App. D.C. 300 (2002) (citing 5 U.S.C. § 2302(b)(8)).

Here, the employee released nonpublic information to media outlets pursuant to 5 U.S.C. § 2302. However, the employee failed to make such disclosures of nonpublic information according to the process prescribed by DHS for WPA reports. By the employee’s own account, his disclosures of nonpublic information do not involve any violation of law, rule, or regulation, or classified information. The employee acknowledges that his disclosures contain some information he obtained pursuant to a FOIA request and appears to reasonably know that some of the information he is disclosing is nonpublic information.

A review of emails issued by the employee between August 30, 2022 and September 15, 2022 shows that employee’s disclosures are transmitted directly to media outlets via his personal email and via his FEMA official email account. In some emails, the employee refers to himself as a transparent Whistleblower, denoting that his chain of command is aware that he makes said reports. However, none of the reports are submitted to the employee’s chain of command, DHS OIG, or OSC, as required by DHS policy. The employee subsequently forwards copies of his disclosures to his chain of command for awareness. At no time are the disclosures made to DHS OIG or OSC. Instead of following the DHS WPA reporting process, the employee knowingly discloses nonpublic information to media outlets as a means to seek outside intervention to overcome FEMA’s management decisions regarding the SNRA planning tool. Since the employee did not follow the proper reporting process, his disclosures are not protected under the WPA.

Additionally, while not the primary issue, it is worth noting that the employee’s documented rationale for his nonpublic information disclosures (*see*, SNRA – A partial FAQ – 2019/03/19), shows that his disclosures are unlikely to rise to a protected WPA, gross mismanagement, disclosure with the meaning of the statute (5 U.S.C. § 2302(b)(8)(A)) because by the employee’s own rationale, the purpose of the disclosures is to obtain outside intervention to overcome a management decision regarding the SNRA planning tool.

The has employee disclosed nonpublic information to media outlets on numerous instances. These disclosures are outside of the WPA reporting method prescribed by DHS. These disclosures of nonpublic information to media outlets are also likely not protected by the WPA because they are unlikely to rise to a protected gross mismanagement disclosure withing the meaning of the statute because, by the employee's own account, he merely disagrees with a management decision regarding the SNRA planning tool.

Disclosures of nonpublic information, without authorization, is most likely a violation of 5 CFR § 2635.703.

5 C.F.R. § 2635.703(a) among other regulations, prohibits federal employees from using nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure. Subsection (b) defines *nonpublic information* as information that the employee gains by reason of federal employment and that he knows or reasonably should know has not been made available to the general public. It includes information that he knows or reasonably should know:

- (1) Is routinely exempt from disclosure under 5 U.S.C. § 552 or otherwise protected from disclosure by statute, Executive order or regulation;
- (2) Is designated as confidential by an agency; or
- (3) Has not actually been disseminated to the general public and is not authorized to be made available to the public on request.

In this instance, the employee has disclosed nonpublic information to media outlets without authorization in an effort to obtain outside intervention to change Executive Branch (White House, DHS and FEMA) decisions to regarding the SNRA planning tool. Although the employee did obtain some information pursuant to a FOIA request, not all of the information he has disseminated to media outlets was made available to the general public by FEMA. This point is demonstrated by the fact that the employee denotes in his emails and FAQ document that he is sharing "All unclassified" information, indicating that he knows the information is nonpublic. Undeniably, the employee does not have a pecuniary gain in the release of this nonpublic information; rather, it appears his gain is personal satisfaction. Either way, the unauthorized nonpublic information disclosure could cause a gain for a media outlet.

The employee acknowledges that he has exhausted his administrative appeals on this SNRA matter; however, he disagrees with DHS/FEMA's decisions and is not satisfied by FEMA's decision to rely on the deliberative process privilege. There is no evidence that DHS/FEMA has authorized the employee to release any information regarding the SNRA and its capabilities to the general public, as such disclosures regarding the SNRA planning tool are a violations of 5 C.F.R. § 2635.703 (Use of nonpublic information).

FEMA's Office of Professional Responsibility (OPR) Directive, states that "FEMA personnel must immediately report to OPR or the DHS OIG allegations that constitute a violation of state or federal law, DHS or FEMEA regulation or policy, or any other applicable standard of conduct." See,

[FEMA Directive: Office of Professional Responsibility. #112-13 Rev.1](#), at 4. Accordingly, the employee's misconduct must be immediately reported to OPR for investigation. It is worth noting, that the employee can self-report if he wishes to, if he does not want to self-report, his immediate supervisor or chain of command must report the allegations of misconduct to OPR.

Disclosures of nonpublic information to media outlets is potentially a violation of 5 C.F.R. § 2635.705, if the activity precludes the employee from expending an honest effort and a reasonable proportion of his time in the performance of official duties.

5 C.F.R. § 2635.705(a) use of an employee's own time, provides that unless authorized in accordance with law or regulations to use such time for other purposes, an employee shall use official time in an honest effort to perform official duties. An employee not under a leave system, including a Presidential appointee exempted under 5 U.S.C. § 6301(2), has an obligation to expend an honest effort and a reasonable proportion of his time in the performance of official duties.

A review of communiques issued by the employee to media outlets between August 30, 2022 and September 15, 2022 demonstrate the employee sent numerous emails during his duty time that were not part of his official duties. The employee's immediate supervisor informed OCC that he has counseled the employee on this matter in the past; however, OCC does not have visibility on the level of effort the employee exerts during his official time to send out these emails to media outlets using federal equipment, email and time. OCC defers to the employee's chain of command to determine if the employee's efforts sending out emails to media outlets precludes him from expending an honest effort and a reasonable proportion of his time in the performance of his official duties.

Recommendations:

Report Personnel Misconduct Immediately to OPR or DHS OIG.

The employee disclosed nonpublic information to media outlets without authorization, most likely in violation of 5 C.F.R. § 2635.703, this conduct constitutes a violation of the Standards of Professional Conduct and must be immediately reported to OPR or DHS OIG.

Additionally, if the employee's chain of command determines that the employee's use of official time preclude him from expending an honest effort and reasonable proportion of his time in the performance of his official duties, this activity is likely violation of 5 C.F.R. § 2635.705(a) and must also be immediately reported to OPR.

WPA Reports

OCC recommends that the employee's immediate supervisor or another member within his chain of command, in coordination with Labor Employee Relations, meet with the employee to discuss the employee's failure to follow the DHS prescribed WPA reporting process and his unauthorized disclosure of nonpublic information to media outlets.

WPA Reports and Unauthorized Disclosure of Nonpublic Information

At the onset of the meeting, acknowledge that the WPA was established to ensure that employees who engage in protected disclosures are free from fear of reprisal for their disclosures. However, employees are not protected from disciplinary action when their disclosures are outside the law and policies, as is the case here.

Expressly inform the employee that the goal of the conversation is not to chill the employee's desire to make disclosures pursuant to WPA; rather, the goal is to ensure disclosures are made pursuant to DHS guidance and in accordance with the law and federal ethics regulations. Thus, the employee should submit his WPA report to his immediate supervisor or someone higher up within his chain of command; DHS OIG; or U.S. Office of Special Counsel (OSC). The WPA does not require an employee inform his immediate supervisor or chain of command of a WPA report.

Inform the employee that retaliation against an employee or applicant for making a protected disclosure is prohibited by 5 U.S.C. § 2302. Retaliation is the taking, failing to take, or threatening to take a personnel action because of an employee's whistleblowing. If believes he has been the victim of whistleblower retaliation, he may file a written complaint to the OIG Hotline or to the U.S. Office of Special Counsel (OSC) (Form OSC-11) at www.osc.gov. OSC has primary jurisdiction over retaliation complaints for most federal employees, including all DHS employees.