22 May 2019

The Honorable Henry Kerner Special Counsel
Office of Special Counsel
1730 M St NW Washington, DC 20036

Dear Special Counsel Kerner:

The undersigned organizations concerned with government accountability and whistleblower protection request that the Office of Special Counsel (OSC) repeat its previously effective work investigating and obtaining corrective action against nondisclosure policies, forms and agreements that violate the "anti-gag" provisions in the Whistleblower Protection Enhancement Act (5 U.S.C. § 2302(b)(13)) and appropriations law. Your effective enforcement of the law has led to corrective action at the Department of Justice, the Department of Health and Human Services and the Department of Homeland Security.

However, it has come to our attention that the Department of Defense is exploiting similar, egregious violations of whistleblower protections. As you know, under the Government Accountability Project's leadership and the open government community helped draft, implement, and execute these statutes. We are alarmed at the clear and present violation of both the spirit and letter of these laws.

As the Office of Special Counsel (OSC) has instructed and enforced repeatedly, agencies and contractors paid through the appropriations process cannot implement or enforce nondisclosure policies, forms or agreements (NDAs) that restrain federal employees without "including required language that informs employees that their statutory right to blow the whistle supersedes the terms and conditions of the nondisclosure agreement or policy. (5 U.S.C. §2302(b)(13))."[1] Essentially, these anti-gag statutes require agencies include an addendum to their NDAs reaffirming that the restraints do not affect employees' rights to blow the whistle.[2] As Senator Charles Grassley (R-IA) noted in a letter to former Attorney General Jeff Sessions, a gag order in this context refers to "any policy that purports to restrict the communications of federal employees."

We were dismayed to learn that the Department of Defense is blatantly violating this whistleblower law.

On May 8th, Acting Secretary of Defense Patrick Shanahan issued an internal memorandum, obtained by the *Washington Post*, detailing the criteria through which Pentagon officials may provide information to congressional offices or committees.[3] According to the article, this memorandum outlines a half-dozen guidelines through which military officials may share information with Congress. Unfortunately, our understanding is that these guidelines do not include specific provisions allowing for whistleblowing, as mandated by statute.

This memorandum is clear and detailed in its restraint of employees from communications. However, it fails to include any mention of employee whistleblower rights as a controlling authority superseding these

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[1] January 25, 2017, "OSC's Enforcement of the Anti-Gag Order Provision in Whistleblower Law," https://osc.gov/News/pr17-03.pdf

[2] 5 USC §2302(b)(13); §§713 and 744, Consolidated Appropriations Act, 2016; Division E, Financial Services and General Government Appropriations Act, 2016; Title VII, General Provisions, Government-Wide.

[3] https://www.washingtonpost.com/world/national-security/lawmakers-bristle-at-new-rules-for-sharing-pentagon-information-with-congress/2019/05/21/79315df9-d792-41df-a42e-10df9af7306e_story.html

restrictions. Thus, it is in violation of the standards set forth by the Whistleblower Protection Enhancement Act and the Consolidated Appropriations Act, which are enforced by your agency. Similarly, this management communication operates against the merit system principles your agency enforces, rendering a violation of 5 USC §2302(b)(12).[4]

As you are familiar, the ramifications of this violation should not be trivialized as merely semantic omissions. Employees "reading their agencies' rules will not know they have the right to contact Congress or the media to expose misconduct despite their rights under the Whistleblower Protection Act or associated laws."[5] Or worse, even employees who know their rights may find themselves chilled from speaking out due to fear even of illegal discipline for violating agency policy. Indeed, an employee may be deterred from making a disclosure about illegal, harmful, wasteful, or other operational policy that betrays the agency's mission solely because communications with Congress surrounding operational information are expressly prohibited by this policy.

When an agency unlawfully gags its employees, it threatens the public's right to know of harmful abuses and the U.S. Government's ability to learn of and correct those abuses. As the agency charged with enforcing 5 USC §2302(b)(12) and (b)(13) we request you investigate these violations and other potential violations of law.

Sincerely,

Government Accountability Project

Open the Government

[4] Vis-à-vis the Lloyd-La Folleete, Act at 5 USC §7211; §§713 and 744 of the Consolidated Appropriations Act, 2016; Division E, Financial Services and General Government Appropriations Act, 2016.

[5] https://www.washingtonpost.com/news/posteverything/wp/2018/06/08/gag-orders-at-federal-agencies-are-violating-whistleblower-laws/?utm_term=.2475efdc4129