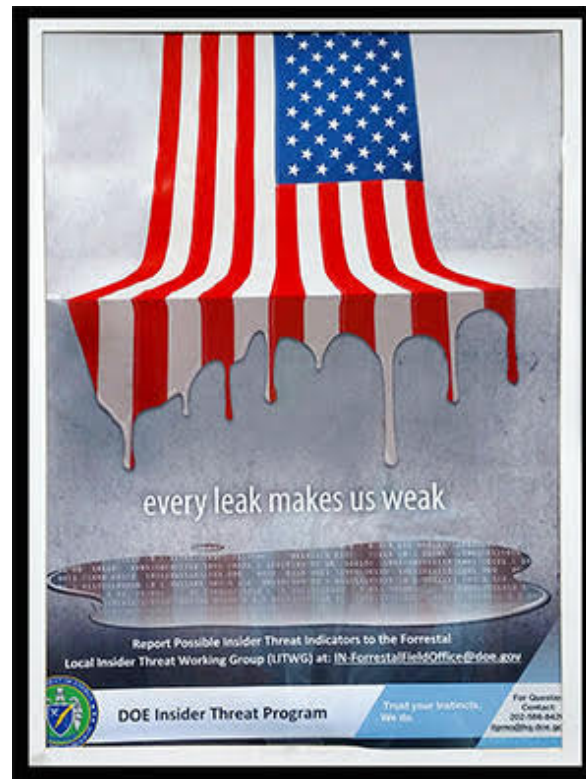


August 14, 2017

Acting Special Counsel Adam Miles  
U.S. Office of Special Counsel  
1730 M St. NW  
Suite 218  
Washington, DC 20036

Dear Acting Special Counsel Adam Miles,

The Project On Government Oversight (POGO) requests an investigation into a potential violation of the Whistleblower Protection Enhancement Act (WPEA) by the Department of Energy (DOE). DOE appears to have violated the requirement to include—in all nondisclosure policies, forms, and agreements—language clarifying that such management communications do not override employees’ rights to blow the whistle.<sup>1</sup> Specifically, DOE has created and placed posters in its headquarters that state “every leak makes us weak,” and urge staff to “Report Possible Insider Threat Indicators to the Forrestal Local Insider Threat Working Group.”<sup>2</sup> (DOE headquarters is located in the Forrestal Building.)



<sup>1</sup> 5 U.S.C. § 2302(b)(13); 5 U.S.C. §2302 – “Prohibited personnel practices”

<sup>2</sup> Hannah Northey, “Leakers take the risk despite crackdown,” *E&E News*, August 9, 2017.  
<https://www.eenews.net/greenwire/stories/1060058590> (Downloaded August 10, 2017)

Whistleblowers are the nation’s first line of defense against waste, fraud, abuse, and illegality within the federal government. Even if inadvertent, deterring whistleblowing in an effort to stymie leaks makes the federal government less effective and less efficient. We recognize the security risks posed by insider threats and leaks of classified information—however—this communication by DOE management could be chilling legitimate whistleblowing because it fails to provide information about whistleblower rights, or distinguish between leaks of classified information and disclosures of unclassified government wrongdoing. (Civilian federal employees have the right to disclose wrongdoing to the media as long as the information is not classified or otherwise protected from disclosure by statute.)<sup>3</sup>

The U.S. Office of Special Counsel (OSC) has broadly interpreted 5 USC § 2302 (b)(13) to consider management communications, including emails to staff, that fail to include required whistleblower disclosure language as violations of the law that require corrective action.<sup>4</sup>

Most federal employees are not experts on the nuances of whistleblower protections, and thus the government should err on the side of caution when guiding employees on nondisclosure practices. That is why, after considering this and the inherent power balance between employees and their employers, Congress legally requires the inclusion of specific language when management issues communication guidelines. Without such clarification, staff could erroneously get the impression that any unauthorized communication outside of their chain-of-command is prohibited. The ambiguity of the word “leak” without any qualifier in the DOE posters exacerbates this concern.

As Senator Charles Grassley (R-IA), Representative Mark Meadows (R-NC), and then-Representative Jason Chaffetz (R-UT) wrote in February, it is important to “alleviate any potential confusion for federal employees” when there are management communications that could “implicate whistleblower protection laws.”<sup>5</sup> Senator Grassley was responsible for the statutory provision in question. Representatives Elijah Cummings (D-MD)—who is an original sponsor of the WPEA along with Senator Grassley—and Frank Pallone (D-NJ) have similarly noted that these kinds of ambiguous management communications can create “the impression that the” administration “intends to muzzle whistleblowers.”<sup>6</sup> Any such impression can and should be remedied.

---

<sup>3</sup> *Department of Homeland Security v. MacLean*, 135 U.S. 913 (2015)

<sup>4</sup> U.S. Office of Special Counsel, “OSC’s Enforcement of the Anti-Gag Order Provision in Whistleblower Law,” January 25, 2017. <https://osc.gov/News/pr17-03.pdf> (Downloaded August 10, 2017)

<sup>5</sup> Letter from Senator Charles Grassley and Representatives Jason Chaffetz and Mark Meadows, to Mr. Donald McGahn, II, Counsel to the President, about whistleblower rights and recent “gag orders,” February 1, 2017. <https://www.judiciary.senate.gov/imo/media/doc/2017-02-01%20JEC%20MM%20CEG%20to%20White%20House%20Counsel%20-%20Protecting%20Whistleblowers.pdf> (Downloaded August 10, 2017)

<sup>6</sup> Letter from Representatives Elijah Cummings and Frank Pallone, Jr., to Mr. Donald McGahn, II, Counsel to the President, about whistleblower rights and recent gag orders, January 26, 2017. <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2017-01->

The posters at the heart of this complaint are part of DOE's Insider Threat Program, which contains similar protections. The Executive Order creating the Insider Threat program contemplates that agency communications could create the same erroneous impression discussed above. Therefore, consistent with the WPEA, the Executive Order explicitly states:

...the activities directed by this order shall not seek to deter, detect, or mitigate disclosures of information by Government employees or contractors that are lawful under and protected by the Intelligence Community Whistleblower Protection Act of 1998, Whistleblower Protection Act of 1989, Inspector General Act of 1978, or similar statutes, regulations, or policies.<sup>7</sup>

Without more specific language explaining the meaning of the work "leak," DOE may be in direct violation of the above provision from the Executive Order as well.

Additionally, appropriations law states:

No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who—  
  
prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee.<sup>8</sup>

One or more individuals at DOE were presumably involved in the creation of the posters and its anti-leak message could be interpreted by employees as an attempt to prevent unauthorized disclosures to Congress, and therefore may also be in conflict with appropriations law.

As with the WPEA provision and Insider Threat executive order, POGO believes DOE can correct this.

A key component to any remedy is clear communication from the highest levels of leadership in an organization. A strong message from DOE leaders to all employees and contractor staff stating that they are protected when blowing the whistle is the first step towards solving this

---

[26.EEC%20and%20Pallone%20to%20White%20House%20Counsel%20re.%20Agency%20Directives%20to%20Silence%20Employees.pdf](#) (Downloaded August 10, 2017)

<sup>7</sup> 3 CFR 13587, Executive Order 13587, *Structural Reforms to Improve the Security of Classified Networks and the Responsible Sharing and Safeguarding of Classified Information*, October 7, 2011. <https://www.gpo.gov/fdsys/pkg/CFR-2012-title3-vol1/pdf/CFR-2012-title3-vol1-eo13587.pdf> (Downloaded August 10, 2017)

<sup>8</sup> U.S. Congress, "Consolidated Appropriations Act, 2017 (P.L. 115-31), Introduced January 4, 2017, by Representative Paul Cook. <https://www.congress.gov/bill/115th-congress/house-bill/244/text> (Downloaded August 10, 2017)

problem. Again, for federal civilian employees, these protections include disclosures of wrongdoing to the press as long as the disclosures are not classified or otherwise protected by statute from public disclosure. OSC should also inquire into additional efforts to counter leaks by DOE and other agencies to determine if federal government communications regarding the Insider Threat program are appropriately including information about whistleblower rights as required by law and Executive Order. Another simple solution would be the immediate removal of the posters at the heart of this complaint.

Despite these potential solutions, we are concerned by reports that the federal government is considering adopting a policy of continuously monitoring employees with security clearances to help identify insider threats, including the use of monitoring software.<sup>9</sup> OSC should reiterate its 2012 memorandum on agency monitoring policies, in which it “strongly” urges agencies “to evaluate their monitoring policies and practices, and take measures to ensure that these policies and practices do not interfere with or chill employees from using appropriate channels to disclose wrongdoing.”<sup>10</sup> At the time, the Office of Management and Budget circulated the OSC memo government-wide; and, in light of this administration’s renewed emphasis on the Insider Threat program, the time is ripe to reiterate OSC’s position.<sup>11</sup>

POGO does have one suggestion for a new memo, however.

In the 2012 memo, OSC emphasized the importance of ensuring that agency monitoring policies do not target whistleblowers who make disclosures to OSC or agency Inspectors General. This should be expanded to, at a minimum, include Congress. Whistleblowers who make disclosures to Congress should never, on this basis, be targeted by agency monitoring/Insider Threat programs. This would undermine the checks and balances between the branches of government and run afoul of at least the spirit of the Lloyd-LaFollete Act.

In sum, DOE’s management communications are likely to erroneously create the impression that government employees and contractors at DOE, and other agencies, have no legal avenue to

---

<sup>9</sup> Charles Clark, “Government Warms to Continuous Monitoring of Personnel With Clearances,” *Government Executive*, July 10, 2017. <http://www.govexec.com/management/2017/07/government-warms-continuous-monitoring-personnel-clearances/139303/> (Downloaded August 10, 2017)

<sup>10</sup> Memorandum from Carolyn Lerner, Special Counsel of the Office of Special Counsel, to executive departments and agencies, regarding agency monitoring policies and confidential whistleblower disclosures to the Office of Special Counsel and to Inspectors General, June 20, 2012. [https://osc.gov/Resources/omb\\_and\\_osc\\_memos\\_on\\_agency\\_monitoring\\_policies.pdf](https://osc.gov/Resources/omb_and_osc_memos_on_agency_monitoring_policies.pdf) (Downloaded August 10, 2017)

<sup>11</sup> Department of Justice, “Attorney General Jeff Sessions Delivers Remarks at Briefing on Leaks of Classified Materials Threatening National Security,” August 4, 2017. <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-delivers-remarks-briefing-leaks-classified-materials> (Downloaded August 10, 2017); Project On Government Oversight, “Press Statement: Department of Justice Press Conference to Address Leaks of Classified Material Threatening National Security,” August 4, 2017. <http://www.pogo.org/about/press-room/releases/2017/press-statement-doj-press-conference-to-address-leaks-of-classified-material.html> (Downloaded August 10, 2017)

blow the whistle on government waste, fraud, and abuse.<sup>12</sup> This needs to be remedied, fast. We urge OSC to investigate and work to resolve this concern.

My staff and I are available to discuss this matter further, and we thank you for your time and consideration of this matter.

Sincerely,



Danielle Brian  
Executive Director  
Project On Government Oversight

CC: The White House  
Rick Perry, Secretary of the Department of Energy  
Senator Charles Grassley  
Representative Mark Meadows  
Representative Elijah Cummings  
Representative Frank Pallone  
April Stephenson, Acting Inspector General, Department of Energy

---

<sup>12</sup> There are about 14,000 federal employees and “over 90,000 management and operating contractor and other contractor employees” who work at DOE headquarters and field locations. Department of Energy, “Strategic Plan, 2014-2018,” March 2014. [https://energy.gov/sites/prod/files/2014/04/f14/2014\\_dept\\_energy\\_strategic\\_plan.pdf](https://energy.gov/sites/prod/files/2014/04/f14/2014_dept_energy_strategic_plan.pdf) (Downloaded August 14, 2017)