May 30, 2023

Morton J. Posner
General Counsel
Justice Management Division
U.S. Department of Justice
145 N St. NE, Suite 8E.500
Washington, DC 20530

RE: COMMENTS ON WHISTLEBLOWER PROTECTION FOR FEDERAL BUREAU OF INVESTIGATION EMPLOYEES (DOCKET NO. JM 154; AG ORDER NO. 5618-2023) 88 FED. REG. 18487

Dear General Counsel Posner:

Thank you for the opportunity to submit comments on the proposed update to the Department of Justice's regulations on the protection of whistleblowers in the Federal Bureau of Investigation ("FBI").

INTRODUCTION

Accountability FBI, Inc. ("Accountability FBI") is a nonpartisan, nonprofit charitable and educational organization, which is dedicated to providing greater public accountability of the FBI, U.S. Department of Justice ("DOJ"), and other government entities, and educate the public about them, through public transparency of those institutions by providing legal services as follows:

1) representing FBI whistleblowers in making protected disclosures of government wrongdoing under 5 U.S.C. § 2303 or under the First Amendment to the U.S. Constitution;

2) litigating cases involving FBI employees' constitutional and due process rights which may set precedent to protect future whistleblowers;

3) making Freedom of Information Act requests of the FBI, DOJ, and other government entities, and litigating those requests that are denied or redacted, as appropriate, for public dissemination of the information obtained; and

4) providing other services that will further transparency and accountability of government entities and officials and educate the public about them.

Although recently established, Accountability FBI's president has ten years of experience as an FBI whistleblower, litigating First Amendment matters against the FBI, and counseling FBI employees on whistleblower and other employment matters.

Pursuant to Section IV.B.11 of the notice of proposed rulemaking (Invitation to Submit Comments and Recommendations to Enhance Fairness, Efficiency and Transparency Regarding Whistleblower Activity, Including to Provide Enhanced Protections for Whistleblowers) 88 Fed. Reg. 18493, Accountability FBI makes the following comments and four recommendations to "increase fairness, effectiveness, efficiency, and transparency, including to provide enhanced protections for whistleblowers…."

COMMENTS

Accountability FBI applauds DOJ's proposed changes as an important step towards creating an effective whistleblower program for the FBI. With the exception of maintaining a limited list of recipients for protected disclosures, as described in Section IV.B.1, 88 Fed. Reg. 18491, Accountability FBI supports all of the proposed changes as essential improvements to stop DOJ's abuse of FBI whistleblowers.

However, the substantial delay in proposing these regulations after legislative changes raises concerns. It has been almost seven years since the FBI Whistleblower Protection Enhancement Act of 2016 became law, which is the basis for most of the proposed changes. That is far too long. Congress just passed another significant improvement allowing FBI whistleblowers to take their retaliation claims to the Merit Systems Protection Board ("MSPB"). That change should be included in these regulations, so DOJ's regulations are not inconsistent with statutory protections for another several years.

Unfortunately, these proposed regulations do not address the FBI's current methods of abusing its authority to silence whistleblowers as defined by these regulations, as well as other employees who seek to disclose government wrongdoing under the First Amendment.

Specifically,

1) the FBI retaliates at will against legitimate disclosures of unclassified allegations of wrongdoing outside the list of recipients in 5 U.S.C. § 2303(a)(1),

2) the FBI abuses the security clearance process to evade whistleblower or constitutional protections available to employees, and

3) the FBI violates the DOJ's regulations on prepublication review to conceal unclassified allegations of wrongdoing that are protected First Amendment speech.

Accountability FBI agrees with DOJ that the Attorney General has the authority under 5 U.S.C. § 301 to prescribe regulations beyond the whistleblower protections in 5 U.S.C. § 2303. *See* Section IV.A.3, 88 Fed. Reg. 18491. In addition to the changes in these proposed regulations under that authority, the Attorney General should use that same authority to correct these gaps in FBI whistleblower protections and make sure that FBI employees will be fairly treated and protected when they disclose allegations of government wrongdoing.

RECOMMENDATIONS

Accountability FBI makes the following four recommendations.

1) **Incorporate into regulations recent statutory changes allowing FBI whistleblowers to appeal reprisal matters to the MSPB.**

Reason: Congress passed changes to 5 U.S.C. § 2303 in the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 5304, 136 Stat. 3250 (2022). Those changes allow FBI whistleblowers to either appeal a final determination of a whistleblower reprisal claim to the MSPB or to seek corrective action from the MSPB 180 days after their reprisal allegation is received by the FBI. It has taken DOJ almost seven years to begin the process to update the changes to regulations from the FBI Whistleblower Protection Enhancement Act of 2016. The recent changes can be included in regulations now to make sure the regulations are consistent with statutory requirements.

2) **Remove the limited list of recipients for protected disclosures from 28 C.F.R. § 27.1(a) entirely and do not add proposed paragraph (c) to § 27.1.**

Reason: The FBI is the only federal law enforcement agency that does not have full whistleblower protections under 5 U.S.C. § 2302. One of the major differences between the FBI's protections and those of § 2302 is that FBI employees are only protected when they make their disclosures to a limited list of recipients. When FBI employees are operating as law enforcement officials, there is no legitimate reason for this limited list of recipients. Law enforcement officials are in a position to observe wrongdoing throughout the criminal justice system, to include violations by other law enforcement officials, prosecutors, defense attorneys, and judges. To properly protect citizens—whether they be defendants, victims, witnesses, or the public as a whole—law enforcement officials must be able to disclose wrongdoing outside of their agency or DOJ, to include the media and judicial officials.

Recently, DOJ's mishandling of high-profile cases involving sexual predators has been exposed, including wrongdoing by prosecutors and high-level FBI officials.[1] DOJ's failures in

[1] *See In re Wild*, 994 F.3d 1244, 1247-49 (11th Cir. 2021) (en banc) (describing DOJ's mishandling of the Jeffrey Epstein case including failure to notify crime victims of a non-prosecution agreement); U.S. Dep't of Justice Office of the Inspector General, *Investigation and Review of the Federal Bureau of Investigation's Handling of Allegations of Sexual Abuse by Former USA Gymnastics Physician Lawrence Gerard Nassar 21-093* (Jul. 2021) *available at* https://oig.justice.gov/sites/default/files/reports/21-093.pdf (last visited May 30, 2023) (describing FBI managers' mishandling of the Larry Nassar case).

these cases were exposed by the news media, not internal DOJ entities.[2] Ostensibly, FBI employees were in a position to observe the wrongdoing in these cases when it occurred, but those employees were not protected if they went to the media or a federal judge.

In the past, DOJ has claimed that FBI employees' protections should be limited to protect "national security."[3] However, when FBI employees are handling national security matters, they are still bound by laws and regulations protecting classified material. There is no need to limit their whistleblower protections. Also, many other federal law enforcement agencies, including those within DOJ other than the FBI, handle classified material, but still have the full protections of § 2302. For example, DOJ's Justice Manual outlines how crimes involving national security—which would presumably involve classified information—are enforced by the National Security Division.[4] Every Drug Enforcement Administration employee is required to have a Top Secret security clearance to handle national security information.[5] All Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") positions are considered national security information positions and most ATF employees are required to have a Top Secret clearance.[6] All of these DOJ employees are protected under § 2302.

Outside of DOJ, as of 2009 the Department of Homeland Security had approximately 208,000 employees of which approximately 70,000 had security clearances.[7] Yet, all Department of Homeland Security employees have full whistleblower protections under § 2302.

Thus, DOJ's resistance to providing the same protections to FBI employees that employees of every other federal law enforcement agency have appears to be based on a fear that DOJ wrongdoing, like the Epstein and Nassar cases, will be exposed, as opposed to any legitimate national security claim.

As DOJ has accurately stated in the proposed regulations, the Attorney General has the authority under 5 U.S.C. § 301 to prescribe regulations. Thus, he should use that authority to correct this mistake, which his Department has propagated in past administrations, and remove the requirement that FBI employees make disclosures to a limited list of entities before receiving protections.

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[2] *See* Julie K. Brown, *How a future Trump Cabinet member gave a serial sex abuser the deal of a lifetime*, MIAMI HERALD (Nov. 28, 2018) *available at* https://www.miamiherald.com/news/local/article220097825.html (preserved Aug. 19, 2021); *Dozens sexually assaulted by Larry Nassar while FBI knew about allegations*, ASSOCIATED PRESS (Feb. 3, 2018) *available at* https://www.sltrib.com/sports/2018/02/03/dozens-sexually-assaulted-by-larry-nasser-while-fbi-knew-about-allegations/AP%202018/AP%202018/ (last visited May 17, 2023).

[3] 162 Cong. Rec. S7129 (daily ed. Dec. 9, 2016) (statement of Sen. Charles Grassley) (describing how FBI and DOJ officials used "national security" as a false premise to object to judicial review of FBI whistleblower claims).

[4] DOJ, *Justice Manual* § 9-90.010, Mar. 2016, *available at* https://www.justice.gov/jm/jm-9-90000-national-security#9-90.010.

[5] DOJ Office of the Inspector General, *Report of Investigation of the Actions of Former DEA Leadership in Connection with the Reinstatement of a Security Clearance* (Sep. 2017) at 7, *available at* https://oig.justice.gov/reports/2017/o1704.pdf (last visited May 17, 2023).

[6] DOJ Office of the Inspector General, *The Department's and Components' Personnel Security Processes* (Sept. 2012) at 10, *available at* https://oig.justice.gov/reports/2012/e1203.pdf (last visited May 17, 2023).

[7] Department of Homeland Security Office of the Inspector General, *The DHS Personnel Security Process* (May 2009) at 11, *available at* https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/OIG_09-65_May09.pdf (last visited May 17, 2023).

3) Provide a regulation stopping the FBI from suspending security clearances of employees or suspending them from duty without pay until legal or administrative action is taken against them.

Reason: The FBI has a history of abusing its authority over employees' security clearances to retaliate against whistleblowers. The FBI suspends their security *clearances*, or "eligibility" to access classified information. This is separate from suspending an employee's *access* to classified material which may be done at any time for any reason. A clearance is based on an employee's background showing that they are trustworthy to handle classified material, while actual authority to access classified material is based on an employee having a clearance but also having a need-to-know the classified material.[8] Under the Code of Federal Regulations, once an employee has been granted a clearance, the employee has specific rights before that clearance can be revoked. *See* 28 C.F.R. § 17.47. There is no provision in executive orders or federal regulations for a clearance to be suspended, though.

By *suspending* employees' *clearances* instead of just their access to classified material, the FBI justifies suspending the employee immediately, indefinitely without pay by claiming the clearance is a requirement for employment, even though no such requirement is in the FBI's employment agreement. Suspending employees' clearances instead of just their access also allows the FBI to suspend from duty employees who have no need-to-know classified information anyway, like those who investigate criminal matters.

While the employees are suspended indefinitely without pay, the FBI requires them to abide by DOJ regulations and obtain permission to take other employment that could offset their lost FBI income. *See* 5 C.F.R. 3801.106(b)(1). The FBI then routinely denies the employees that permission forcing them to suffer severe financial distress. A well-documented case of this sort of abuse is described in *Zummer v. Sallet*, 37 F.4th 996, 1000-02 (5th Cir. 2022), involving Accountability FBI's president. Although that case involved an employee who disclosed unclassified allegations of DOJ attorneys favoring a sexual predator state prosecutor to a federal judge under the First Amendment, as opposed to one of the approved entities under 5 U.S.C. § 2303(a)(1), it exemplifies the FBI's abuse of the security clearance process.

Because of the massive financial distress caused by this dual suspension and bar from other employment, employees often resign long before the retaliation can be investigated. Even with the limited, and uncertain, protections provided under Presidential Policy Directive ("PPD") 19 and 50 U.S.C. § 3341(j), employees cannot survive financially without any income while these administrative processes drag on. Also, employees whose clearances are suspended, as opposed to revoked, cannot avail themselves of these protections at all, or at least for one year. *See* 50 U.S.C. § 3341(j)(4)(A).

Thus, DOJ's regulations for FBI whistleblower protections are meaningless if the FBI can

[8] Section 1.2(a) of Executive Order No. 12,968 mandates, "No employee shall be granted access to classified information unless that employee has been determined to be eligible in accordance with this order and to possess a need-to-know." 60 Fed. Reg. 40246. Eligibility to access classified material is synonymous with having a "clearance."

use the security clearance process to force out employees who make protected disclosures or exercise their First Amendment rights to disclose wrongdoing. To protect these employees, DOJ should include a regulation that prevents the FBI from suspending an employee's clearance or prevents the FBI from suspending an employee without pay while administrative processes are pursued.

This does not stop the FBI from suspending an employee's *access* to classified material where it legitimately fears mishandling of sensitive national security information. It would simply require the FBI to place the employee on administrative leave or assign the employee to handle criminal or administrative matters that do not require access to classified material. In cases where the FBI truly fears an employee's access to classified material, the employee could be removed from the payroll through an arrest, charge, disciplinary action, or clearance revocation through the procedures outlined in 28 C.F.R. § 17.47. Furthermore, keeping the employee on the payroll would serve as an incentive for the FBI to diligently pursue those processes. Under the clearance-suspension framework the FBI currently uses, the FBI has every incentive to delay the process, cause the employee greater financial distress, and force the employee to resign.

4) Provide a regulation stopping the FBI from violating DOJ's prepublication review procedures.

Reason: Although FBI whistleblower disclosures are not necessarily protected by the First Amendment, free speech rights are another, and possibly more important, means for FBI employees to disclose government wrongdoing. The Supreme Court "has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights."[9] Because FBI employees are not protected when they disclose wrongdoing outside the limited list of recipients in 5 U.S.C. § 2303(a)(1), the First Amendment is the only means for FBI employees to make disclosures to the public or press.

Although the prior restraint of free speech is generally not allowed[10], like all DOJ employees, FBI employees' speech is burdened by "prepublication review." The FBI and other agencies that handle classified material can require their employees to submit their proposed First Amendment speech to their employer for review before publication to prevent the release of classified national security information.[11] However, two federal appeals courts have confirmed that the agencies cannot censor unclassified material.[12] DOJ's own policy, which controls the FBI's, only allows prepublication review to prevent the release of classified information, not unclassified material.[13]

Unfortunately, regardless of what the First Amendment, courts, and DOJ say, the FBI censors unclassified information from its employees' proposed speech. In 2009, a federal district judge described one FBI agent's experience with prepublication review as "a sad and discouraging

[9] *Lane v. Franks*, 134 S.Ct. 2369, 2377 (2014).
[10] *Turner Advertising Co. v. Nat'l Serv. Corp. (In re Nat'l Serv. Corp.)*, 742 F. 2d 859, 862 (5th Cir. 1984)
[11] *Snepp v. United States*, 444 U.S. 507, 511, 515–16 (1980).
[12] *United States v. Marchetti*, 466 F. 2d 1309, 1313, 1317 (4th Cir. 1972); *McGehee v. Casey*, 718 F.2d 1137, 1141–42 (D.C. Cir. 1983).
[13] 28 C.F.R. § 17.18(h).

tale about the determined efforts of the FBI to censor [speech]…severely criticizing the FBI's conduct of [a terrorism investigation]….In its efforts to suppress this information, the FBI repeatedly changed its position, presented formalistic objections…admitted finally that much of the material it sought to suppress was in fact in the public domain and had been all along, and…concede[d] that several of the reasons it originally offered for censorship no longer ha[d] any validity."[14] The only material the court determined the FBI could censor was the location of a "secured chamber,"[15] most likely a room designed for the protection of classified information.

Instead of reforming its prepublication review program after the court's criticism, the FBI doubled down on its violation of the First Amendment. Its 2015 policy maintained that the FBI had the authority to censor employees' unclassified speech. Ironically, the FBI cited the Freedom of Information Act ("FOIA"), which allows private citizens to obtain records from the government, as justification for this,[16] even though a federal appeals court had specifically held that First Amendment protections to speak were not the same as a request to obtain information from the government under FOIA.[17] Essentially, the right guaranteed under the Constitution to express what one already knows is separate from the statutory privilege granted citizens by Congress to obtain records from the government.

Not only does the FBI unlawfully censor its employees' speech, it unlawfully delays their speech indefinitely. Court precedent requires prepublication review to be completed in thirty days,[18] and DOJ requires a similar deadline.[19] In an earlier policy, the FBI followed that 30-day requirement citing the court case by name.[20] In 2015, though, the FBI removed the reference to court precedent and essentially relieved itself of having any deadlines at all by stating in the new policy, "[w]hen a submission contains operational or intelligence matters, it is unrealistic to assume the proposed disclosure will be reviewed within 30 business days."

In another perverse twist on DOJ's regulations, the FBI actually makes it harder for employees to release unclassified material than classified material. DOJ regulations allow FBI employees to appeal decisions "concerning the deletion of *classified* information" to the FBI Director and to the Deputy Attorney General.[21] However, FBI policy specifically excludes the deletion of *unclassified* information from DOJ's appeal process, most likely because DOJ does not allow censorship of unclassified material at all. Under FBI policy, the FBI Assistant Director's

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[14] *Wright v. Federal Bureau of Investigation*, 613 F. Supp. 2d 13, 15 (D.D.C. 2009).
[15] *Id.* at 26.
[16] FBI, *Prepublication Review Policy Guide 0792PG* (June 4, 2015) at 8 *available at* https://accountabilityfbi.org/index.php/2023/02/18/fbi-prepublication-review-policy-2015/ (last visited May 30, 2023) (the FBI has released a more recent version of its prepublication review policy guide but there were no changes relevant to this letter. *See* FBI, *Prepublication Review Policy Guide 1065PG* (Jan. 8, 2020) *available at* https://vault.fbi.gov/prepublication-review-policy-guide-1065pg/prepublication-review-policy-guide-1065pg-part-01-of-01/view (last visited May 30, 2023).
[17] *McGehee*, 718 F.2d at 1141.
[18] *Marchetti*, 466 F. 2d at 1317.
[19] 28 CFR § 17.18(i).
[20] FBI, *Procedures for Review of Nonofficial Publications by Employees, Former Employees, and Contractor Personnel* (undated, provided to employee in 2016) *available at* https://accountabilityfbi.org/index.php/2023/05/30/earlier-version-of-fbi-prepublication-review-policy-provided-to-fbi-employee-in-2016-but-was-not-current-policy-then/ (last visited May 30, 2023).
[21] 28 C.F.R. 17.18(j)(3) (emphasis added).

decision is final, "with the exception of decisions relating to the deletion of *classified* information, which may be appealed to the deputy Attorney General pursuant to 28 CFR § 17.18."[22]

This distinction is significant because an FBI employee who seeks authority to release unclassified information, such as violations of a defendant's rights or mishandling of a sex abuse case, then has to file suit in federal court to seek authority to release the information. Meanwhile, an FBI employee seeking release of classified material only has to notify DOJ of their intention to release the information in thirty days and allow DOJ to file suit.[23] The Supreme Court has made it clear that the burden of filing suit to stop speech is supposed to be on the censor, not the speaker. *See Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975).

The Attorney General should simply make an agency under his supervision, the most significant law enforcement agency in the country, to follow his Department's regulations and stop violating its employees' First Amendment rights.

Thank you again for the opportunity to provide these comments. Accountability FBI hopes you will consider the above recommendations as you seek to improve your whistleblower protection program and hopes for continued discussions on these matters.

If you have any questions or wish to discuss these matters, please contact me at mzummer@accountabilityfbi.org or (504) 717-5913.

Sincerely,

Michael S. Zummer
President

[22] *FBI Policy Guide 0792PG* at 10 (emphasis added).
[23] 28 C.F.R. 17.18(i).