INTELLIGENCE COMMUNITY DIRECTIVE

120

20 March 2014

Intelligence Community Whistleblower Protection

A. AUTHORITY: The National Security Act of 1947, as amended; Executive Order (EO) 12333, as amended; EO 13467, as amended; the Inspector General Act of 1978, as amended; the Intelligence Community Whistleblower Protection Act of 1998, as amended; Presidential Policy Directive/PPD-19, *Protecting Whistleblowers with Access to Classified Information*; and other applicable provisions of law.

B. PURPOSE: As required by PPD-19, Section D, this Intelligence Community Directive (ICD) establishes policy to:

1. Ensure that all personnel serving in the Intelligence Community (IC) are aware of the protections and review processes available to individuals who make Protected Disclosures;

2. Provide guidance on what constitutes a Protected Disclosure and the appropriate handling of such disclosures; and

3. Provide information regarding the review processes required by PPD-19.

C. APPLICABILITY

1. With respect to matters related to prohibited personnel actions, this ICD applies to Covered Agencies and IC elements as defined in PPD-19 and restated in Sections E.1.c and E.1.d, below.

2. With respect to matters affecting eligibility for access to classified information, this ICD applies to IC elements as defined by the National Security Act of 1947, as amended; and such elements of any other department or agency as may be designated an element of the IC by the President, or jointly by the Director of National Intelligence (DNI) and the head of the department or agency concerned.

D. POLICY

1. The IC is committed to providing its personnel the means to report violations of law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety through Protected Disclosures.

a. IC elements have a responsibility to ensure, through workforce communications and training, that their personnel are aware of the process for making Protected Disclosures, and are aware of the protections and review processes available to individuals who make Protected Disclosures, as set forth in PPD-19.

b. Personnel serving in the IC have a responsibility to report such violations through Protected Disclosures. The protections under PPD-19 are not available absent a Protected Disclosure.

2. The term "Protected Disclosure" is defined by PPD-19, Section F.(5) as:

a. A disclosure of information by an employee to a supervisor in the employee's direct chain of command up to and including the head of the employing agency, to the Inspector General (IG) of the employing agency or employing IC element, to the DNI, to the Inspector General of the IC (IC IG), or to an employee designated by any of the above officials for the purpose of receiving such disclosures, that the employee reasonably believes evidences a violation of any law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

b. Any communication described by and that complies with subsection (a)(1), (d), or (h) of Section 8H of the Inspector General Act of 1978 (5 USC App.); subsection (d)(5)(a) of Section 17 of the Central Intelligence Agency Act of 1949 (50 USC 403q); or subsection (k)(5)(A), (D), or (G), of Section 103H of the National Security Act of 1947 (50 USC 403-3h); or

c. The following actions, if they do not result in a disclosure of classified information or other information contrary to law:

(1) The exercise of any appeal, complaint, or grievance with regard to the violation of Section A or B of PPD-19;

(2) Lawfully participating in an investigation or proceeding regarding a violation of Section A or B of PPD-19; or

(3) Cooperating with or disclosing information to an IG, in accordance with applicable provisions of law in connection with an audit, inspection, or investigation conducted by the IG.

E. PROTECTIONS UNDER PPD-19, SECTION A, PROHIBITION ON RETALIATION IN THE INTELLIGENCE COMMUNITY

1. Any officer or employee of a Covered Agency who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take, or threaten to take or fail to take, a personnel action, as defined in PPD-19, with respect to any employee serving in an IC element as a reprisal for a Protected Disclosure.

a. Each IC element is required to have a process for employees to seek review of personnel actions alleged to be in violation of Section A of PPD-19. A review by the agency IG is to be part of this process. Such review process is to be consistent, to the fullest extent possible, with the policies, procedures, and standards used to adjudicate alleged violations of 5 USC 2302(b)(8), and must provide for the protection of national security information and intelligence sources and methods.

b. "Personnel Action" is defined in PPD-19, Section F.(4) as an appointment, promotion, detail, transfer, reassignment, demotion, suspension, termination, reinstatement, restoration, reemployment, or performance evaluation; a decision concerning pay, benefits, or awards; a decision concerning education or training if the education or training may reasonably

be expected to lead to an appointment, reassignment, promotion, or performance evaluation; a decision to order psychiatric testing or examination; and any other significant change in duties, responsibilities, or working conditions. PPD-19, Section F.(4) further provides that "Personnel Action":

(1) does not include the termination of an employee pursuant to Section 1609 of Title 10, United States Code;

(2) does not include the termination of an employee pursuant to Sections 102A(m) and 104A(e) of the National Security Act of 1947, or Section 7532 of Title 5, United States Code, so long as the official authorized by those provisions to terminate the employee (and not his or her delegee) (1) determines that the alternative legal procedures to terminate the employee cannot be invoked in a manner consistent with the national security and (2) promptly notifies the IG of the employing agency;

(3) does not include actions taken with respect to a position that the agency head has designated, prior to the action, as being of a confidential, policy determining, policymaking, or policy advocating character;

(4) does not include actions taken with respect to a member of the Armed Forces, as used in Section 1034 of Title 10, United States Code; and

(5) does not include any actions taken prior to the issuance of PPD-19.

c. "Covered Agency," as defined in PPD-19, Section F.(1), is an executive department or independent establishment, as defined under Sections 101 and 104 of Title 5, United States Code, that contains or constitutes an IC element, as defined in Section E.1.d below.

d. "IC element," as defined in PPD-19, Section F.(3) and for the purpose of compliance with Section A of PPD-19, is any executive agency or unit thereof determined by the President under Section 2302(a)(2)(C)(ii) of Title 5, United States Code, to have as its principal function the conduct of foreign intelligence or counterintelligence activities, including but not limited to the Office of the DNI, the Central Intelligence Agency (CIA), the National Security Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, and the National Reconnaissance Office. For the purpose of compliance with Section A of PPD-19, the term "IC element" does not include the Federal Bureau of Investigation.

F. PROTECTIONS UNDER PPD-19, SECTION B, PROHIBITION ON RETALIATION BY AFFECTING ELIGIBILITY FOR ACCESS TO CLASSIFIED INFORMATION

1. Any officer or employee of an executive branch department or agency (hereafter, "agency") who has authority to take, direct others to take, recommend, or approve any action affecting an employee's eligibility for access to classified information, as defined in PPD-19, shall not, with respect to such authority, take or fail to take, or threaten to take or fail to take, any action affecting an employee's eligibility for access to classified information as a reprisal for a Protected Disclosure.

a. Each agency is required to have a review process that permits any employee to appeal actions affecting eligibility for access to classified information alleged to be violations of Section B of PPD-19. A review by the agency IG is to be part of this process. Such review process is to be, to the fullest extent possible, consistent with and integrated into the policies, procedures, and

standards used to review security clearance determinations under Section 5.2 of Executive Order 12968, and must provide for the protection of national security information and intelligence sources and methods.

b. "Eligibility for Access to Classified Information" is defined in PPD-19, Section F.(2) as the result of the determination whether an employee (a) is eligible for access to classified information in accordance with Executive Order 12968, *Access to Classified Information*, or any successor thereto, and Executive Order 10865, as amended, *Safeguarding Classified Information Within Industry*, or any successor thereto; and (b) possesses a need to know under such orders.

(1) For the purposes of Section F and implementation of Section F of this ICD, "employee" is defined according to EO 12968 as a person, other than the President and Vice President, employed by, detailed or assigned to: an agency, including members of the Armed Forces; an expert or consultant to an agency; an industrial or commercial contractor, licensee, certificate holder, or grantee of an agency, including all subcontractors; a personal services contractor; or any other category of person who acts for or on behalf of an agency as determined by the appropriate agency head.

G. IMPLEMENTATION

1. An employee alleging a reprisal who has exhausted the applicable review process required by Section A or B of PPD-19 may, in accordance with Section C of PPD-19, request an external review by a three-member panel chaired by the IC IG, on behalf of the DNI in his role as Security Executive Agent.

a. If such a request is made, the IC IG shall decide, in his or her discretion, whether to convene an External Review Panel (ERP) or to defer to the findings of the applicable agency review process.

b. If an ERP is convened, the IC IG will designate two other panel members from the IGs of the following agencies: Departments of State, the Treasury, Defense, Justice, Energy, and Homeland Security, and the CIA. The IG from the agency that completed the initial review shall not be a member of the ERP. If the complaint is from within the ODNI, the IC IG will designate another IG to lead the review.

c. The ERP shall complete a review of the claim within 180 days. If appropriate, reviews of the claim may consist of a file review.

2. In accordance with PPD-19, Section C, the head of an IC element or executive branch agency will carefully consider the recommendation for corrective action, if any, of an ERP. Within ninety (90) calendar days the head of the IC element or executive branch agency will inform the ERP and the DNI of what action was taken regarding the ERP's recommendation. If the head of the IC element or executive branch agency fails to inform the DNI, then the DNI will notify the President.

3. If the Office of the DNI receives a Protected Disclosure that is not related to national intelligence, the DNI will refer the Protected Disclosure in writing to the appropriate agency officials outside the IC.

4. If the Office of the IC IG receives a Protected Disclosure that is not related to national intelligence, the IC IG will refer the Protected Disclosure to appropriate IG officials outside the IC in accordance with statutory referral mechanisms.

H. ROLES AND RESPONSIBILITIES

1. The IC IG shall establish procedures for external reviews that are consistent with Section C of PPD-19 and ensure that IC elements and their employees are aware of these procedures.

2. The National Counterintelligence Executive shall ensure that Form 4414, the Sensitive Compartmented Information Nondisclosure Agreement, and any successor document, reflects the protections under PPD-19.

3. The heads of IC elements shall ensure, through workforce communications upon entry on duty and annually thereafter, that their employees are aware of all applicable protections and review processes available to individuals who make Protected Disclosures. The heads of IC elements shall also make this information easily and readily available to their employees.

I. EFFECTIVE DATE: This Directive becomes effective on the date of signature.

James R. Clapper

Director of National Intelligence

20 MAR 2014

Date