

Review of Protected Disclosure Provisions in NSF's Agreements with Federal Employees





At a Glance

Review of Protected Disclosure Provisions in NSF's Agreements with Federal Employees

OIG 24-6-002 | August 23, 2024

WHY WE DID THIS REVIEW

We conducted this review to determine to what extent the U.S. National Science Foundation's nondisclosure policies, forms, agreements, and related documents informed federal employees of their rights under the law to report wrongdoing. This review responds to a request from Ranking Member Grassley of the U.S. Senate Committee on the Budget.

WHAT WE FOUND

We found that NSF consistently included statements informing federal employees of their rights to report wrongdoing in applicable nondisclosure policies, forms, and associated agreements, as required by the *Whistleblower Protection Enhancement Act of 2012*. Although we did not identify any instances of noncompliance, we identified other documents in which NSF could include more information to further improve employees' awareness of their right to report wrongdoing when signing non-disclosure agreements.

WHAT WE RECOMMEND

We made one recommendation aimed at increasing NSF employees' awareness of their rights under the law to report wrongdoing when signing non-disclosure agreements.

AGENCY RESPONSE

NSF agreed with our recommendation to consider including the full statement from 5 USC § 2302(b)(13) in NSF Form 1230P and the *NSF Personnel Manual*. We have included NSF's response in its entirety in Appendix B.

CONTACT US

For congressional, media, and general inquiries, email OIGPublicAffairs@nsf.gov.



U.S. NATIONAL SCIENCE FOUNDATION
Office of Inspector General

MEMORANDUM

DATE: August 23, 2024

TO: Angel Williams
General Counsel
Office of the General Counsel
National Science Foundation

Wonzie Gardner
Office Head
Office of Information and Resource Management
National Science Foundation

FROM: Theresa S. Hull
Assistant Inspector General
Office of Audits, Inspections, and Evaluations

SUBJECT: Final Report No. 24-6-002, *Review of Protected Disclosure Provisions in NSF's Agreements with Federal Employees*

Attached is the final report on the subject review. We have included NSF's response to the draft report as an appendix. NSF concurred with our one recommendation. In accordance with Office of Management and Budget Circular A-50, please provide a written corrective action plan to address the report recommendations. The plan should detail specific actions and associated milestone dates. Please provide the plan within 60 calendar days.

We appreciate the courtesies and assistance NSF staff provided during the review. If you have any questions, please contact Ken Lish, Director of Inspections, Evaluations, and Agile Products at 703-292-7100 or OIGPublicAffairs@nsf.gov.

CC: Darío Gil, Victor McCrary, Wanda Ward, Scott Stanley, John Veysey, Ann Bushmiller, Micah Cheatham, Judy Hayden, Christina Sarris, Francisco Ruben, Sherrie Abramowitz, Bill Malyszka, Gabriel Gonzalez

Table of Contents

Background.....	1
Results of Review	2
NSF Incorporated the Protected Disclosure Provision in Agreements with Federal Employees as Required.....	2
NSF Could Include the Protected Disclosure Provision in Other Documents.....	3
Recommendation.....	4
OIG Evaluation of Agency Response	4
Appendix A: Objective, Scope, and Methodology	5
Appendix B: Agency Response	6
Appendix C: Request from the U.S. Senate Committee on the Budget.....	7
National Defense Authorization Act General Notification	9

Abbreviations

FY	Fiscal Year
HRM	Division of Human Resources Management
NSF	U.S. National Science Foundation
OIG	Office of Inspector General
PER	NSF Personnel Manual
SF	Standard Form
U.S.C.	United States Code

Background

The U.S. National Science Foundation is an independent federal agency created by Congress in 1950 “[t]o promote the progress of science; to advance the national health, prosperity, and welfare; to secure the national defense; and for other purposes.” With a budget of about \$9.06 billion for fiscal year 2024, NSF is the funding source for about 25 percent of all federally supported basic research conducted by America’s colleges and universities. Each year, NSF supports about 318,000 scientists, engineers, educators, and students at universities, laboratories, and field sites. In FY 2023, NSF’s workforce included 1,540 federal employees, or 87 percent of its total workforce.

Whistleblower Protections

Federal employee whistleblowers — individuals who report allegations of wrongdoing such as a violation of law, abuse of authority, or gross mismanagement — may help safeguard the government from fraud, waste, and abuse. Their willingness to come forward may also help improve government operations. However, federal employees may risk reprisals from their agencies for their disclosures, and federal laws are in place to help protect them from workplace retaliation for whistleblowing. The *Whistleblower Protection Act of 1989* (Pub. L. No. 101-12), the *Whistleblower Protection Enhancement Act of 2012* (Pub. L. No. 112-199), and the *Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017* (Pub. L. No. 115-73), among other laws, provide the right for all covered federal employees¹ to make whistleblower disclosures and ensure that employees are protected from whistleblower retaliation.

The *Whistleblower Protection Enhancement Act* also requires nondisclosure agreements or policies to contain language informing employees that their statutory right to disclose wrongdoing supersedes the terms and conditions of the agreement or policy. Specifically, the following statement from *Prohibited Personnel Practices*, 5 U.S. Code § 2302(b)(13), must be included in any non-disclosure policy, form, or agreement:

These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General or the Office of Special Counsel of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.

¹ Most executive branch employees, former employees, and applicants fall within *Whistleblower Protection Act’s* protections. Employees who are not covered include political appointees and noncareer Senior Executive Service employees, among others.

The above statement² (the “protected disclosure provision,” or “provision”) was codified in the *Whistleblower Protection Enhancement Act of 2012* (Pub. L. No. 112-119, the Act), which amended 5 U.S.C. § 2302(b)(13) to clarify the disclosures of information protected from prohibited personnel practices. According to 5 U.S.C. § 2302(b)(13), “Any employee who has the authority to take, direct others to take, recommend, or approve any such personnel action, shall not ... implement or enforce any nondisclosure policy, form, or agreement, if such policy form, or agreement does not contain the [...] statement.” In addition, the FY 2023 consolidated appropriations act (Pub. L. No. 117-328) prohibits the use of government funds to enforce these agreements if they do not include the provision.

Review Objective

The objective of our review was to determine to what extent NSF included the protected disclosure provision codified in the *Whistleblower Protection Enhancement Act* in its nondisclosure policies, forms, agreements, and related documents between March 20, 2023, and March 20, 2024³. This review responds to a request from Ranking Member Grassley of the U.S. Senate Committee on the Budget, dated March 11, 2024. The request is included in its entirety in Appendix C.

Results of Review

We found that NSF incorporated the protected disclosure provision codified in the *Whistleblower Protection Enhancement Act* in applicable nondisclosure policies, forms, and associated agreements with federal employees, as required. We also identified two documents in which NSF could include the provision, although it is not required, to ensure employees fully understand their rights to report wrongdoing when signing non-disclosure agreements.

NSF Incorporated the Protected Disclosure Provision in Agreements with Federal Employees as Required

We did not identify any instances of noncompliance related to the required provision in applicable nondisclosure policies, forms, and associated agreements. NSF generally enters into two types of agreements with federal employees that include nondisclosure clauses and are required to include the provision: (1) *Classified Information Nondisclosure Agreements* and (2) Settlement Agreements.

The *Classified Information Nondisclosure Agreement*, Standard Form (SF-312), is a nondisclosure

² This provision is also known colloquially as the “anti-gag” provision.

³ We considered expanding our scope to a 3-year period; however, we determined that the expanded scope would yield only one additional settlement agreement and would require the review of policies and procedures that were no longer in use. As this expanded scope would not provide a material benefit for the content of our review, we determined a 1-year scope was sufficient to address the review’s objective effectively.

agreement between the federal government and its employees, contractors, licensees, or grantees. The execution of this form is required before the federal government may grant an employee access to classified information. NSF's Personnel Security Office within the Division of Administrative Services is responsible for entering into SF-312 agreements with employees who require access to classified information. We found that NSF entered into 18 SF-312 agreements with its employees during our period of review, and that the standard form contains the required provision.

NSF's Office of General Counsel (OGC) enters into settlement agreements with applicants, employees, and former employees to resolve personnel complaints between NSF and the complainant. Settlement agreements generally originate from personnel matters, such as former employees filing a complaint through the U.S. Equal Employment Opportunity Commission. NSF uses prior settlement agreements as guides for generating new agreements, and the inclusion of the provision is part of NSF OGC's standard practice. We found that NSF entered into three settlement agreements during the period of our review, and that each agreement contained the provision.

NSF Could Include the Protected Disclosure Provision in Other Documents

We identified two documents in which NSF could include the protected disclosure provision to ensure employees fully understand their rights to report wrongdoing when signing non-disclosure agreements: (1) *Conflict-of-Interests and Confidentiality Statement for NSF Panelists* which are part of NSF's merit review process for proposals, and (2) the *NSF Personnel Manual*.

Conflict-of-Interests and Confidentiality Statements

NSF evaluates award proposals through its merit review process to ensure proposals are reviewed in a fair, competitive, transparent, and in-depth matter. As part of this process, NSF convenes a panel of experts from the science and engineering community to review the proposals. At the beginning of the review process, NSF panelists and ad hoc reviewers are required to sign NSF Form 1230P, *Conflict-of-Interests and Confidentiality Statement for NSF Panelists*. Although most panelists and ad hoc reviewers are from academia, some panelists and ad hoc reviewers are federal employees.

Form 1230P includes a confidentiality clause stating unauthorized disclosure of confidential information could subject the signee to sanctions; however, participation on a panel does not constitute an official personnel appointment and is not likely subject to a personnel action. As such, NSF is not required to include the protected disclosure provision in Form 1230P. Although not required, including the specific statement may help ensure employees fully understand the extent of their whistleblower protections when they sign the form.

We identified another federal agency that incorporates the protected disclosure provision into the form its panelists sign. Specifically, individuals participating in U.S. Department of Energy panels must submit a *Conflict-of-Interest and Non-Disclosure Acknowledgement* form,⁴ which includes the protected disclosure provision, prior to their participation in the merit review process.

NSF Personnel Manual

NSF's Division of Human Resources Management (HRM) provides consultation and guidance to NSF regarding employee relations and employment actions. Within that role, HRM maintains the *NSF Personnel Manual* (PER), which is a collection of NSF policies for all employees at NSF. PER Chapter 1.100 describes the prohibited personnel practice of prohibiting employees who have the authority to take, recommend, or approve personnel actions, or to direct others to do so, from implementing or enforcing any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the statement outlined in 5 USC § 2302(b)(13). Although the PER references the provision, it does not contain the explicit quote. Because the PER describes requirements NSF must follow during individual actions with employees, inclusion of the quote could help ensure HRM employees and other NSF employees are fully aware of employees' rights to report wrongdoing when signing non-disclosure agreements.

Recommendation

We recommend that the General Counsel, U.S. National Science Foundation, in coordination with the Office Head, Office of Information and Resource Management, assess whether NSF should include the full statement from 5 USC § 2302(b)(13) in NSF Form 1230P and the *NSF Personnel Manual*.

OIG Evaluation of Agency Response

NSF agreed with our recommendation to consider including the full statement from 5 USC § 2302(b)(13) in NSF Form 1230P and the *NSF Personnel Manual*. We have included NSF's response to this report in its entirety in Appendix B.

⁴ U.S. Department of Energy, Attachment 2, *Conflict-of-Interest and Non-Disclosure Acknowledgement*, accessed May 29, 2024 via [website](#).

Appendix A: Objective, Scope, and Methodology

Objective

The objective of this review was to determine to what extent NSF's nondisclosure policies, forms, agreements, and related documents contain a required provision notifying federal employees of their rights under the law to report wrongdoing. The provision was codified in the *Whistleblower Protection Enhancement Act of 2012* (Pub. L. No. 112-119), which amended *Prohibited Personnel Practices* (5 U.S. Code § 2302(b)(13)) to clarify the disclosures of information protected from prohibited personnel practices. This review responds to a request from Ranking Member Grassley of the U.S. Senate Committee on the Budget.

Scope and Methodology

We conducted this review with integrity, objectivity, and independence as required by the *Quality Standards for Federal Offices of Inspector General* issued by the Council of the Inspectors General on Integrity and Efficiency (CIGIE). Those standards set forth the overall quality framework for managing, operating, and conducting the work of Offices of Inspector General. The review adhered to the professional standards of objectivity, independence, due professional care, and quality assurance and followed procedures to ensure accuracy of the information presented.

To accomplish our objectives, we interviewed NSF subject matter experts within the NSF Office of General Counsel, Division of Human Resource Management, and other NSF offices. We obtained and analyzed various NSF policies, forms, and agreements that discussed confidentiality and disclosure of information. Specifically, we analyzed NSF nondisclosure, settlement, and confidentiality policies, forms, and agreements in effect from March 20, 2023, through March 20, 2024.

During the review we gained a limited understanding of the internal controls related to the various NSF policies, forms, and agreements analyzed during the engagement. We considered expanding our scope to a 3-year period; however, we determined that the expanded scope would yield only one additional settlement agreement and would require the review of policies and procedures that were no longer in use. As this expanded scope would not provide a material benefit for the content of our review, we determined a 1-year scope was sufficient to address the review's objective effectively.

Appendix B: Agency Response



U.S. National Science Foundation

MEMORANDUM

DATE: August 13, 2024

TO: Allison Lerner, Inspector General [REDACTED]

FROM: Angel R. Williams, General Counsel [REDACTED]
Wonzie L. Gardner, Head, Office of Information & Resource Management [REDACTED]

SUBJECT: NSF's Response to the OIG's Official Draft Report, *"Review of Protected Disclosure Provisions in NSF's Agreements with Federal Employees"*

NSF appreciates that the OIG found that NSF has consistently included statements informing Federal employees of their rights to report wrongdoing in applicable nondisclosure policies, forms, and associated agreements, as required by the Whistleblower Protection Enhancement Act of 2012 ("the Act"). This finding aligns with NSF's commitment to its obligations under the Act. While the OIG's sole recommendation does not relate to the Act's requirements, NSF agrees to conduct the assessments identified therein.

We extend our appreciation for the OIG's diligent review. If there are any questions, please contact Ms. Williams at 703-292-8060 or Mr. Gardner at 703-292-8100.

2415 Eisenhower Avenue | Alexandria, VA 22314

Appendix C: Request from the U.S. Senate Committee on the Budget



March 11, 2024

VIA ELECTRONIC TRANSMISSION

Ms. Allison Lerner
Inspector General
National Science Foundation

Dear Inspector General Lerner:

Whistleblowers are patriots and the government's most powerful tool in rooting out waste, fraud, abuse, and misconduct. Nevertheless, federal agencies continue to implement nondisclosure policies and similar agreements without the inclusion of the "anti-gag" provision as required by law.¹ This failure has a chilling effect that discourages whistleblowers from reporting allegations of misconduct to Congress, Inspectors General (IG), and the Office of Special Counsel (OSC). The "anti-gag" provision has been included in almost every appropriations bill since 1988 and was codified in the Whistleblower Protection Enhancement Act.²

The anti-gag law requires all federal agency nondisclosure policies, forms, or agreements to include the following explicit statement notifying the employee of their rights to report wrongdoing:

These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General or the Office of Special Counsel of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.³

Appropriation law prohibits the use of government funds to enforce these agreements if they fail to contain the anti-gag provision.⁴

¹ 5 USC § 2302(b)(13); Pub. L. No. 117-328

² *Id.*

³ 5 USC § 2302(b)(13).

⁴ Pub. L. No. 117-328.

Even though Congress made it abundantly clear that employees are required to be informed of their rights to make legally protected disclosures, there's a growing trend among federal agencies to use nondisclosure policies and similar agreements without the inclusion of the anti-gag provision in violation of the law.⁵ This is unacceptable.

The importance of whistleblowers knowing their rights under the law cannot be stated enough, and federal agencies should encourage their employees to disclose allegations of waste, fraud, and abuse. Federal agencies cannot be allowed to conceal their wrongdoing behind illegal nondisclosure policies and related actions. Accordingly, I request that you review all nondisclosure policies, forms, agreements, and related documents specific to your agency to ensure the anti-gag provision is included as required by law.

Thank you for your prompt review and response. If you have any questions, please contact Brian Randolph on my Committee staff at (202) 224-0642.

Sincerely,



Charles E. Grassley
Ranking Member
Committee on the Budget

⁵ See Letter from Senators Grassley and Johnson to Inspector General Horowitz (Apr. 19, 2023) https://www.grassley.senate.gov/imo/media/doc/grassley_johnson_to_justice_deptinspectorgeneralfbiantigagprovision.pdf; Letter from Senators Grassley and Johnson to Inspectors General Horowitz and George (Jun 6, 2023) https://www.grassley.senate.gov/imo/media/doc/grassley_johnson_to_dojogig_tigta_-_whistleblower_retaliation.pdf; Letter from Senators Grassley and Johnson to Internal Revenue Service Commissioner Werfel (Jun. 6, 2023) https://www.grassley.senate.gov/imo/media/doc/grassley_johnson_to_irs_-_protected_whistleblower_disclosure.pdf; Letter from Senator Grassley, Senator Johnson, Representative Smith, and Representative Comer to Special Counsel Kerner (Jul. 5, 2023) https://www.grassley.senate.gov/imo/media/doc/grassley_johnson_comer_jordan_smith_to_osc_-_whistleblower_retaliation.pdf; Letter from Senator Grassley to Health and Human Services Secretary Becerra, Administration for Children and Families Acting Assistant Secretary Hild, and Office of Refugee Resettlement Director Marcos (Nov. 21, 2023) https://www.grassley.senate.gov/imo/media/doc/grassley_to_hhs_acf_and_orr_-_whistleblower_protections.pdf; Letter from Senator Grassley to Acting Special Counsel Gorman (Nov. 21, 2023) https://www.grassley.senate.gov/imo/media/doc/grassley_to_osc_-_hhs_whistleblower_protections.pdf; Letter from Senator Grassley to DOJ-OIG Horowitz (Feb. 12, 2024) https://www.grassley.senate.gov/imo/media/doc/grassley_to_doj_oig_-_protected_whistleblower_disclosures.pdf; Letter from Senator Grassley to Bureau of Alcohol, Tobacco, Firearms, and Explosives Director Dettelbach (Feb. 12, 2024) https://www.grassley.senate.gov/imo/media/doc/grassley_to_aft_-_protected_whistleblower_disclosures.pdf; Letter from Senator Grassley to Inspector General Horowitz (Mar. 8, 2024) https://www.grassley.senate.gov/imo/media/doc/grassley_to_doj_inspector_general_-_eoir_disclosures_to_congress.pdf; Letter from Senator Grassley to Attorney General Garland (Mar. 8, 2024) https://www.grassley.senate.gov/imo/media/doc/grassley_to_doj_-_eoir_disclosures_to_congress.pdf; Letter from Senator Grassley to Executive Office for Immigration Review Director David Neal (Mar. 8, 2024) https://www.grassley.senate.gov/imo/media/doc/grassley_to_executive_office_for_immigration_review_-_eoir_disclosures_to_congress.pdf.

National Defense Authorization Act General Notification

Pursuant to Pub. L. No. 117-263 § 5274, business entities and non-governmental organizations specifically identified in this report have 30 days from the date of report publication to review this report and submit a written response to NSF OIG that clarifies or provides additional context for each instance within the report in which the business entity or non-governmental organizations is specifically identified. Responses that conform to the requirements set forth in the statute will be attached to the final, published report.

If you find your business entity or non-governmental organization was specifically identified in this report and wish to submit comments under the above-referenced statute, please send your response within 30 days of the publication date of this report to OIGPL117-263@nsf.gov, no later than September 26, 2024. We request that comments be in .pdf format, be free from any proprietary or otherwise sensitive information, and not exceed two pages. Please note, a response that does not satisfy the purpose set forth by the statute will not be attached to the final report.

About Us

NSF OIG was established in 1989, in compliance with the *Inspector General Act of 1978* (5 USC 401-24). Our mission is to provide independent oversight of NSF to improve the effectiveness, efficiency, and economy of its programs and operations and to prevent and detect fraud, waste, and abuse.

Contact Us

Address:

U.S. National Science Foundation Office of Inspector General
2415 Eisenhower Avenue
Alexandria, VA 22314

Phone: 703-292-7100

Website: oig.nsf.gov

Follow us on X (formerly Twitter): twitter.com/nsfoig

Congressional, media, and general inquiries: OIGPublicAffairs@nsf.gov

Freedom of Information Act inquiries: FOIAOIG@nsf.gov

Report Fraud, Waste, or Abuse

Report violations of laws, rules, or regulations; mismanagement; and research misconduct involving NSF operations or programs via our Hotline:

- File online report: oig.nsf.gov/contact/hotline
- Anonymous Hotline: 1-800-428-2189
- Mail: 2415 Eisenhower Avenue, Alexandria, VA 22314 ATTN: OIG HOTLINE

Have a question about reporting fraud, waste, or abuse? Email OIG@nsf.gov.

Whistleblower Retaliation Information

All NSF employees, contractors, subcontractors, awardees, and subawardees are protected from retaliation for making a protected disclosure. If you believe you have been subject to retaliation for protected whistleblowing, or for additional information on whistleblower protections, please visit oig.nsf.gov/whistleblower.