

Intelligence Community

If you are a federal or contractor employee working in one of the 17 “elements” of the Intelligence Community (IC), you are excluded from protection under the Whistleblower Protection Act. However, depending on your position within the IC and what, exactly, you’re disclosing, you can claim protection from retaliation under a patchwork of laws and directives.⁷³

Importantly, IC whistleblower protections under this patchwork only apply to disclosures made to very specific audiences. So, unlike non-IC federal whistleblowers, IC whistleblowers can’t make disclosures to the press or advocacy groups and claim retaliation protection under the law.⁷⁴

Moreover, while many of the laws covering the IC create rights against retaliation, enforcement of those rights is usually left to the IC’s opaque internal review processes rather than to an independent adjudicator like the MSPB. As a result, while you might have rights on paper that protect you from retaliation, those rights are only enforced sporadically in practice—and implementation of the enforcement mechanisms vary widely across the IC.

Congress has passed several laws over the years making it illegal to retaliate against IC whistleblowers. Specifically, the Intelligence Authorization Acts of Fiscal Year 2010 and 2014 were significant leaps forward, creating an inspector general for the intelligence community and making it unlawful to retaliate against IC employees for making protected whistleblowing disclosures, respectively.⁷⁵ Under the overarching law prohibiting whistleblower retaliation, it is illegal to retaliate against a covered IC employee by taking or failing to take certain personnel actions against the employee as reprisal for their lawful whistleblowing disclosures.⁷⁶

Covered disclosures under law are those made to:

- The Director of National Intelligence
- The Inspector General of the Intelligence Community
- The head of the employing agency
- The inspector general of the employing agency
- A Congressional intelligence committee, or a Member of a Congressional intelligence committee

The employee must make their disclosure with a reasonable belief that the information they’re providing evidences a violation of any federal law, rule, or regulation; mismanagement;⁷⁷ a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.⁷⁸

Unfortunately, the law doesn’t provide actual mechanisms to enforce these rights. This means that until Congress modifies that law to provide for enforcement within the statute, IC whistleblowers must rely on agency policies and presidential directives for enforcement of their rights.

The main mechanism for enforcing your rights as an IC whistleblower is Presidential Policy Directive-19 (PPD-19). Created by President Obama in 2012, PPD-19 lays out general enforcement mechanisms protecting IC employees from retaliation for making protected disclosures and requires each IC element to create a more specific process within their own agency.⁷⁹

PPD-19 is broken into several sections. Section A prohibits retaliation against covered employees for making protected disclosures and provides a method of enforcement through review by an inspector General. Section B outlines protections for retaliatory clearance revocation, and Section C creates a three-inspector-general panel to hear appeals from those covered under Sections A and B.

Section A of PPD-19 prohibits retaliation against whistleblowing disclosures and establishes a review process but excludes certain IC employees. It won’t protect you if you are an FBI employee, and it does not mention protections for you if you are a contractor employee or a member of the armed services working for an IC element.⁸⁰

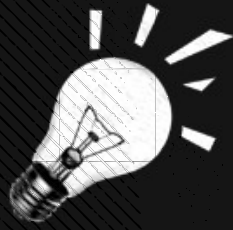
The review process created in Section A requires your corresponding agency inspector general to investigate and to make a recommendation of corrective action to your agency head, who can choose whether or not to follow the inspector general’s recommendation. The Intelligence Community Inspector General can also conduct the initial investigation, but typically delegates that authority to the corresponding agency’s IG.

If you don’t agree with the decision reached by the inspector general’s initial review, PPD-19 Section C allows you to file a request for review with the Intelligence Community Inspector General. The Intelligence Community Inspector General can choose to set up an external review panel made up of the Intelligence Community Inspector General and two other federal inspectors general to review the agency head’s decision. The review panel must complete their review within 180 days. Once the review panel reaches

WHEN THE LEGAL PROCESS LACKS TEETH

In 2016, George Ellard, the inspector general for the National Security Agency (NSA), was found to have retaliated against one of his own employees for blowing the whistle, according to a decision by a group of other inspectors general called the External Review Panel. The Panel was created by Presidential Policy Directive 19 (PPD-19), a set of whistleblower protections for Intelligence Community employees. Following the Panel's finding, the NSA's director proposed Ellard's termination.⁸¹

But decisions by the External Review Panel in Intelligence Community retaliation cases are not binding on agencies, unlike decisions by the Merit Systems Protection Board or by courts. Ellard appealed to a higher authority: the NSA's parent agency, the Department of Defense. On appeal, the Office of the Assistant Secretary of Defense overruled the External Review Panel and the director of the NSA, and Ellard was allowed to stay employed with the federal government.⁸² No details have been reported on what happened to the whistleblower or what they blew the whistle on.



a decision and recommends corrective action, it sends its recommendation back to the agency head. Implementation of the panel's recommendation is never guaranteed, however, and is left to the agency head's discretion.

It isn't clear how well the PPD-19 program is working for IC whistleblowers. It's possible that Section C's secondary review by the panel of three federal IGs could effectively put more pressure on an agency head to take the retaliation claim seriously. Nevertheless, the absence of a more independent review process renders it deficient.

Importantly, because PPD-19 and the agency policies created under its mandate are not laws passed by Congress, they could be revoked by any sitting president at any time without approval by Congress.

Also, Section A of PPD-19 does not expressly protect IC contractor, sub-contractor, grantee, subgrantee, or personal services contractor employees, although the Obama Administration interpreted Section B to cover retaliatory security clearance actions against them (security clearance protections will be discussed later in the chapter). This means that if you are a covered IC contractor employee who blows the whistle, while you are technically

protected from retaliation under the law, you are not explicitly entitled to enforcement under PPD-19 as of this writing. The effect of this, we fear, is that IC contractor whistleblowers may feel empowered to come forward but won't get a fair review of their claim if they are retaliated against. Be wary of this and other "Trojan horse" whistleblower protection laws that outlaw retaliation but offer no process for recourse.

Of course, it's possible that individual agencies could choose to extend IC whistleblower protections to contractors under their own policies. But unless PPD-19 is amended to explicitly include contractors, there is no IC-wide mechanism to enforce your statutory protection against retaliation.

The takeaway as an intelligence community whistleblower should be that while there are protections you can point to in law, the main enforcement mechanism, PPD-19 Section A, only covers certain employees and isn't a law created by Congress. Proceed with great caution, and consult with your attorney, if you have one, at every step.⁸³

For further reading, the Intelligence Community Inspector General maintains a helpful guide on IC whistleblowing on its website.⁸⁴

FBI Employees

FBI whistleblowers have protections, but despite recent improvements, they are still much weaker than the protections for most of the rest of the federal civilian workforce. When Congress passed the Civil Service Reform Act of 1978, the FBI convinced Members to omit statutory rights in favor of requiring the Bureau to issue regulations creating equivalent protections for its employees.⁸⁵ But the FBI failed to issue any until 1998.⁸⁶

In December 2016, Congress passed into law improvements to FBI whistleblower protections.⁸⁷ The law expanded the number of protected channels FBI employees can make their disclosures to after the Government Accountability Office found that nearly a third of retaliation complaints it examined were dismissed because FBI employees made disclosures to someone in their chain of command not designated to receive the disclosure.⁸⁸

The protected audiences now include supervisors in an employee's "direct chain of command" up to the FBI director and the attorney general, Congress, the Justice Department's Office Inspector General and Office of Professional Responsibility, the FBI's Office of Professional Responsibility, the FBI Inspection Division, the Office of Special Counsel, and anyone