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Via Email

October 22, 2020

Mr. Chad F. Wolf
Acting Secretary of Homeland Security
Washington, DC 20528

Randolph D. Alles
Deputy Under Secretary for Management
U.S. Department of Homeland Security
Washington, D.C. 20016

Re: **Unlawful Gag Order**

Dear Mr. Wolf and Mr. Alles,

We are writing to seek your reconsideration of a recent directive that illegally stifles guaranteed whistleblower rights of its employees.¹ (Exhibit A). This action is a crude violation of the Whistleblower Protection Act and appropriations provisions that shield DHS employees' free speech rights and must be remedied immediately.

DHS Management Directorate Issued Illegal Gag Order to DHS Personnel

On October 13, 2020, purportedly in response to a recent "unauthorized" disclosure, you issued a management communication on handling "all classified, controlled unclassified and draft information." You warned that disclosure to unauthorized "external entities" could be in violation

¹ @kenklippenstein, "Today @DHSgov sent out an email threatening consequences for employees who leak internal documents. Here's that email, which one of their employees promptly leaked to me," Twitter (Oct. 13, 2020), available at: <https://twitter.com/kenklippenstein/status/1316128078138142728/>; Hamed Aleaziz, "Department Of Homeland Security Employees Have Been Told To Report Colleagues Suspected Of Leaking Information," BuzzFeed News (Oct. 13, 2020), available at <https://www.buzzfeednews.com/article/hamedaleaziz/dhs-memo-leaks>

of agency policy or federal law. Employees were even directed to report co-workers suspected of sharing this information.

This communication mirrors past attempts by DHS and other federal departments to chill the exercise of employees' whistleblower rights.² In November 2019, Mr. Mark Koumans, Acting Director of DHS's U.S. Citizenship and Immigration Services, warned USCIS workers that they would be disciplined, up to termination, for the unauthorized disclosure of non-public information.³ This communication constituted an unlawful gag order, as we wrote to Mr. Ken Cuccinelli on November 26, 2019.⁴ Similarly, the October 13 communication violates both federal appropriations laws and whistleblower laws for the reasons outlined below.

The ramifications of this violation should not be trivialized as merely semantical omissions. Employees reading this DHS communication may not understand that their right to make protected whistleblower disclosures supersedes restrictions your directive places on this right. Even employees who know their rights may be intimidated from speaking out of fear of being accused of violating agency policy or being reported by their colleagues.⁵

Gag Order Violates the Whistleblower Protection Enhancement Act and Appropriations Laws

Both the Whistleblower Protection Enhancement Act (WPEA) and Congressional Appropriations Acts contain language prohibiting Congress from funding agencies that "implement or enforce" any "non-disclosure policy, form, or agreement if such policy, form, or agreement does not contain" provisions reaffirming that employee whistleblower rights are controlling, despite any nondisclosure restrictions.⁶ The "anti-gag" provision of the Whistleblower Protection Enhancement Act (5 U.S.C. § 2302(b)(13)) specifically states that employees with authority to take personnel actions cannot implement or enforce any non-disclosure policy—the October 13 communication, for instance—unless the policy statement contains the explicit language guaranteeing whistleblower rights as set forth in the footnote, below.⁷

² Irvin McCullough and Addison Rodriguez, "The Trump Administration loves gag orders. But they're often illegal," Washington Post (Oct. 13, 2020), available at <https://www.washingtonpost.com/outlook/2020/10/13/trump-gag-orders-illegal/>

³ Hamed Aleaziz, "A Top US Immigration Official Threatened To Fire Employees For Leaking to the Media," BuzzFeed News (Nov. 21, 2019), available at <https://www.buzzfeednews.com/article/hamedaleaziz/us-immigration-officials-threatened-media-leaks>

⁴ Hamed Aleaziz, "A Top US Immigration Official's Threat To Fire Workers Who Leak Info Was Meant To Intimidate Whistleblowers, Union Says," BuzzFeed News (last updated Dec. 2, 2019), available at <https://www.buzzfeednews.com/article/hamedaleaziz/us-immigration-union-letter-leaks-threat>

⁵ Irvin McCullough and Zack Kopplin, "Gag Orders at Federal Agencies Are Violating Whistleblower Laws," Washington Post, (June 8, 2018), available at <https://www.washingtonpost.com/news/posteverything/wp/2018/06/08/gag-orders-at-federal-agencies-are-violating-whistleblower-laws/>

⁶ 5 USC §2302(b)(13); §§713 and 743, Consolidated Appropriations Act, 2020.

⁷ 5 U.S.C. § 2302(b)(13) reads as follows:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

This DHS communication is illegal because it fails to include statutorily required language informing employees that their whistleblower rights supersede any non-disclosure policies.

The Office of Special Counsel (OSC) repeatedly has instructed that agencies cannot implement or enforce nondisclosure policies, forms or agreements (NDAs), including management communications, that restrict federal employees' speech without including that a statutorily-required exemption for speech that constitutes protected whistleblowing activity. As OSC recognized:

Nondisclosure agreements and policies can chill would-be whistleblowers from coming forward. These orders must clearly state that federal employees have a right to make disclosures of wrongdoing.⁸

The OSC broadly interprets the anti-gag statutes to cover all authoritative management communications and has ordered corrective actions to federal agencies that have issued unlawful gag orders. Those agencies include the Department of Homeland Security.⁹ Therefore, contrary to DHS directives, information labeled as sensitive, unclassified or Controlled Unclassified Information such as "For Official Use Only" are still subject to the provisions of the Whistleblower Protection Enhancement Act and warrant lawful public disclosure when they indicate wrongdoing.¹⁰

Gag Order Also Violates DHS Workforces' Constitutional Rights

The DHS directive to have employee communications reviewed by OPSEC prior to being released externally is also a prior restraint that violates the Constitution. The Supreme Court long has held unequivocally that prior restraint is incompatible with the First Amendment.¹¹ Also, forcing citizens

(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: "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 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.

⁸ OSC Press Release, *OSC's Enforcement of the Anti-Gag Order Provision in Whistleblower Law* (Jan. 25, 2017), available at <https://www.scribd.com/document/337635299/OSC-s-Enforcement-of-the-Anti-Gag-Order-Provision-in-Whistleblower-Law>.

⁹ See McCullough and Kopplin Washington Post Op-Ed, n. 4.

¹⁰ In the context of whistleblowing, only classified or otherwise statutorily prohibited information (such as information protected by the Trade Secrets Act or the Privacy Act) is barred from public disclosure. Indeed, Executive Order 13556, specifically exempts disclosure statutes from its controls. In *Department of Homeland Security v. MacLean*, 135 S. Ct. 913 (2015), the Supreme Court overwhelmingly reversed the termination of a Department of Homeland Security whistleblower for publicly disclosing Sensitive Security Information. Thus, documents marked as "sensitive," "for official use only," or "internal use only" are not barred from public disclosure when they evidence wrongdoing protected by whistleblower laws.

¹¹ *Nebraska Press Association v. Stewart*, 427 U.S. 539 (1976).

to disclose whom they communicate with long has violated First Amendment freedom of association rights.¹²

DHS Must Rescind and Reissue its Unlawful Gag Order, Reminding the Workforce of their Whistleblower Protections as Required by Law

DHS must immediately reissue a corrective communication to department employees with modified language that conforms with the statutory mandate of 5 USC §2302(b)(13), as discussed above. Any language that directs employees to report their coworkers, and thus chills their speech, should also be removed. Finally, if any DHS employees have been disciplined for “unauthorized disclosures” under this or similarly faulty non-disclosure directions, those personnel actions should be immediately reversed.

When an agency unlawfully gags its employees, it threatens Congress’s ability to engage in oversight; hampers citizens’ right to know about serious misconduct and threats to public safety; and undermines policy-making that depends on the information of whistleblowers. In protecting the Department, the American people, and the Homeland, it is paramount that we also protect future the whistleblowers.

Very truly yours,

/s/

Tom Devine
Legal Director, Government Accountability Project

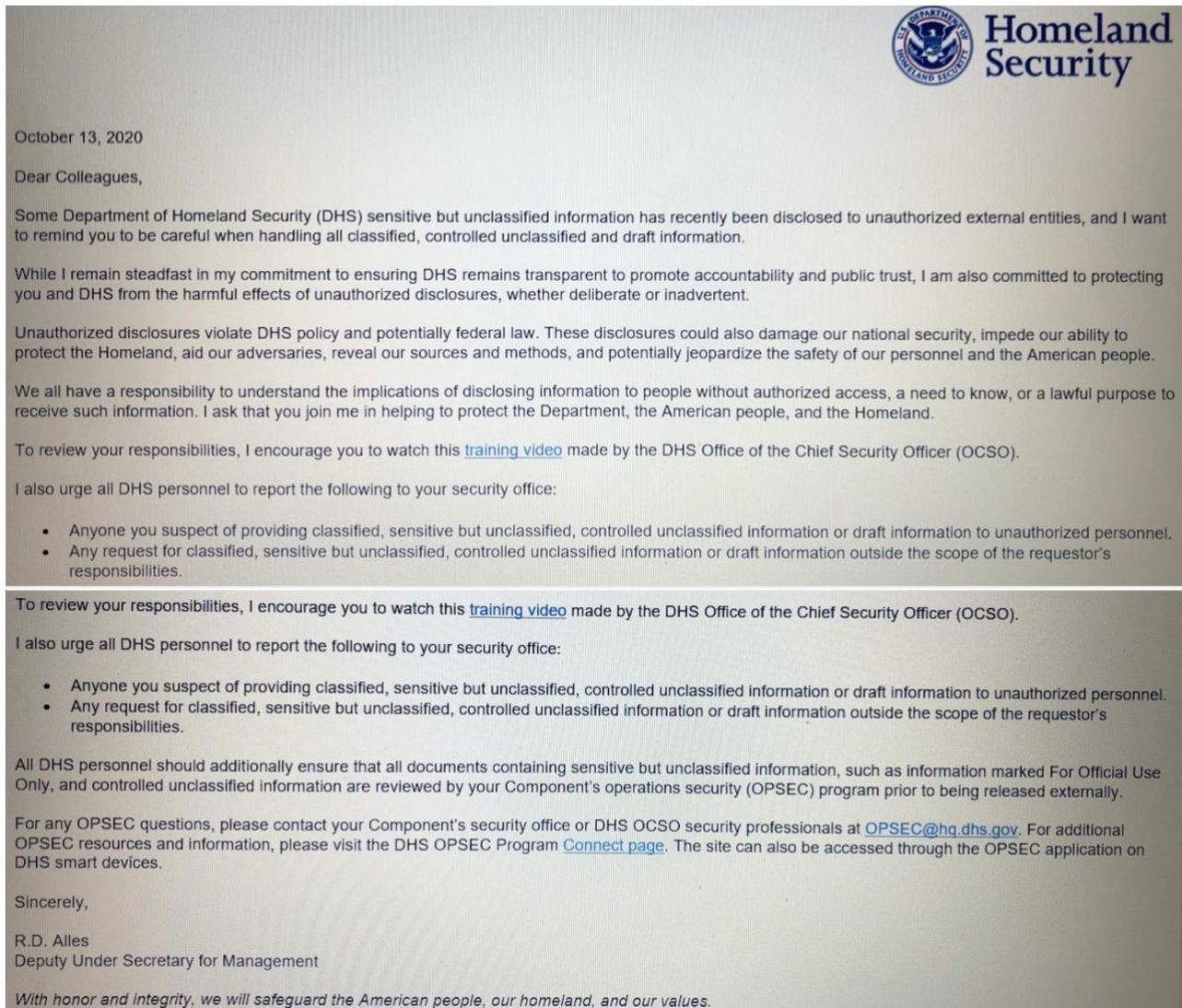
/s/

Danielle Spooner
President, AFGE Council 119

Cc: Dana Gold, Senior Counsel & Director of Education, Government Accountability Project
David Z. Seide, Senior Counsel, Government Accountability Project
J. Ward Morrow, Assistant General Counsel, AFGE

¹² NAACP v. Buttons, 371 U.S. 415 (1963), United States v. Garde, 848 F.2d 1307 (D.C. Cir. 1988).

Exhibit A



DHS Directive (October 13, 2020)

@kenklippenstein, "Today @DHSgov sent out an email threatening consequences for employees who leak internal documents. Here's that email, which one of their employees promptly leaked to me," Twitter (Oct. 13, 2020), available at:

<https://twitter.com/kenklippenstein/status/1316128078138142728/>