GOVERNMENT ACCOUNTABILITY PROJECT

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The Honorable Alex M. Azar II
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

December 21, 2020

Dear Secretary Azar,

Government Accountability Project, a nonprofit organization that represents whistleblowers and develops whistleblower policy, joined by American Oversight, Protect Democracy, and Public Citizen, writes to request that you inform the Department of Health and Human Services' (HHS) workforce of the whistleblower rights they enjoy under federal law. During this transition period, it is critical to remind employees to report wrongdoing they witness in the workplace, and that their rights supersede any non-disclosure policies or restrictions.

Recent reporting about efforts to block and chill communications between career civil servants and incoming President-elect transition teams in several government agencies,[1] combined with specific examples involving HHS, lead us to conclude your agency may be in violation of federal whistleblower and appropriation provisions which require that any directives barring employee communications include explicit language noting that their whistleblowing rights supersede the gag on their speech.[2] For example, HHS impeded the Biden-Harris transition team from accessing critical information concerning the COVID-19 pandemic, the denial of which would constitute abuse of authority and a substantial and specific danger to public health and safety, all categories of protected whistleblowing disclosures. Moreover, a November 18, 2020 press report paraphrases an administration official saying, "HHS staffers have been informed that if anyone from Biden's team contacts them, they are not to communicate with them and should instead alert the deputy surgeon general of the communication."[3]

These speech restrictions are compounded by reported efforts on the part of the Trump administration to suppress information concerning the COVID-19 pandemic, which would constitute scientific censorship threatening public health and safety, another category that would enjoy whistleblower protection if disclosed by an employee.[4] This backdrop of chilled speech, combined with President Trump's recent Executive Order directing agencies to reclassify employees who are in policy-related positions into "Schedule F" workers, which would effectively strip employees of their civil service protections—including their whistleblower protection rights—sends a message to those workers who

[1] Lisa Friedman, "Trump appointees are participating in some transition meetings, chilling the flow of some information." New York Times. December 9, 2020. https://www.nytimes.com/live/2020/12/09/us/joe-biden-donald-trump/trump-appointees-are-participating-in-some-transition-meetings-chilling-the-flow-of-some-information
[2] Irvin McCullough and Addison Rodriguez, "The Trump administration loves gag orders. But they're often illegal." Washington Post. October 13, 2020. https://www.washingtonpost.com/outlook/2020/10/13/trump-gag-orders-illegal/.
[3] Kristen Holmes and Devan Cole, "HHS secretary says department won't work with Biden's team until federal agency determines he won," CNN. November 18, 2020. https://www.cnn.com/2020/11/18/politics/health-and-human-services-staffers-transition-biden/index.html
[4] Dan Diamond, "Trump officials interfered with CDC reports on COVID-19," POLITICO. September 11, 2020. https://www.politico.com/news/2020/09/11/exclusive-trump-officials-interfered-with-cdc-reports-on-covid-19-412809.

are in the most likely positions of discovering high-level, serious misconduct that reporting wrongdoing will leave them most vulnerable to future reprisal without a remedy.[5]

Directives that fail to assure employees that their whistleblower rights supersede gag orders have the dangerous effect of chilling employees from reporting serious wrongdoing they witness in the workplace. Whistleblower rights exist to encourage employees, who are in the best position to identify problems, to serve the public by reporting violations of laws, rules, and regulations, gross mismanagement, gross waste of funds, abuses of authority, and substantial and specific dangers to public health and safety. During a global pandemic and a volatile transition between administrations, civil servants, federal contractors and grantees are the first line of defense to prevent, mitigate or address abuses that violate the public trust.

HHS should correct any previous unlawful communication by informing employees of the whistleblower rights they enjoy under federal law. Your workforce should know that:

- Under the Whistleblower Protection Act of 1989 (WPA), most federal employees may lawfully disclose, free from retaliation, information an employee reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, a substantial and specific danger to public health or safety, or censorship of research, analysis or technical information that would result in such forms of misconduct.[6]
- They can disclose information related to any of the foregoing forms of misconduct to a variety of audiences—the Office of Special Counsel (OSC), the Inspector General, the Congress, the press, or even the President-elect's transition team—so long as the disclosed information is not barred from release by statute or Executive Order.[7]
- Federal contractors and grantees enjoy similar rights to make disclosures under 41 U.S.C. § 4712.[8]
- Appropriations acts prohibit 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, the inclusion of which is mandated by the Whistleblower Protection Enhancement Act. [9]
- Employees have the right to seek legal counsel for guidance about their confidentiality obligations and whistleblower rights.[10]

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[5] Erich Wagner, "'Stunning' Executive Order Would Politicize Civil Service," Government Executive. October 22, 2020. https://www.govexec.com/management/2020/10/stunning-executive-order-would-politicize-civil-service/169479/

[6] 5 U.S.C. § 2302(b)(8)(A).

[7] 5 U.S.C. § 2302(b)(8). If such information is barred from release by statute or Executive Order (i.e., classified information), lawful mechanisms exist to facilitate its disclosure within the federal government. 5 U.S.C. § 1213(a)(2); 5 U.S.C. 2302(b)(8)(B-C); 10 U.S.C. § 1034; 50 U.S.C. §§ 3234, 3341(j)

[8] 41 U.S.C. § 4712 protects federal non-intelligence contractors and grantees who disclose information they reasonably believe violates a law, rule, or regulation, gross mismanagement of a federal contract or grant, a gross waste of federal funds, an abuse of authority, or a substantial and specific danger to public health or safety. Employees of contractors and grantees may make disclosures to Congress, an Inspector General, the Government Accountability Office (GAO), the Department of Justice (DOJ) or other law enforcement agency, a federal employee responsible for contract oversight at the relevant agency, or a management official of the contractor with responsibility to investigate or address misconduct.

[9] 5 U.S.C. § 2302; 5 USC §2302(b)(13); §§713 and 743, Consolidated Appropriations Act, 2020; Irvin McCullough and Tom Devine, "Congress could cut pay of Trump aides who try to enforce nondisclosure agreements," Washington Post. February 25, 2019. https://www.washingtonpost.com/outlook/2019/02/25/congress-could-cut-pay-trump-aides-who-try-enforce-ndas/

[10] See, e.g., *Denius v. Dunlap*, 209 F.3d 944, 953 (7th Cir. 2000) ("The right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech, association and petition.")

Employees who exercise their whistleblower rights perform an essential public service. A recent example includes Dr. Rick Bright, the former head of the Biomedical Advanced Research and Development Authority, who publicly disclosed his reasonable belief about the failures of the federal government to respond to the pandemic as a substantial and specific danger to public health.[11] Likewise, federal employees may soon be witness to, and choose to disclose, evidence of misconduct such as federal records destruction, politicized censorship of science or intelligence data, gross misuse of funds, gross mismanagement or abuses related to vaccine production or distribution, or fraud related to COVID-19 relief spending. Your workforce should not be prohibited or chilled from, or retaliated against for, legally reporting evidence of such wrongdoing. Rather, they should be encouraged to do so.

Evident in the oath to "support and defend the Constitution of the United States," federal employees at HHS are entrusted to preserve the integrity of our civil institutions and the foundations of our democracy. The need to empower a civil service to work for the American people is most important during a transition of power, ensuring the continuity of government is stable, uninterrupted, and free from interference for our nation's safety and security. The work of the federal employees must continue unfettered.

Please inform your workers of their whistleblower rights and protections and ensure they understand their rights are not superseded by any restriction placed on their speech.

Very truly yours,

Louis Clark
Executive Director and Chief Executive Officer
Government Accountability Project

Austin Evers
Executive Director
American Oversight

John Langford
Counsel
Protect Democracy

Robert Weissman
President
Public Citizen

Cc: The Honorable Eric D. Hargan, Deputy Secretary

[11] Rick Bright's full whistleblower disclosure to the Office of Special Counsel. May 5, 2020. https://www.cnn.com/2020/05/05/politics/rick-bright-full-complaint/index.html