



SECURITY EXECUTIVE AGENT DIRECTIVE 9

WHISTLEBLOWER PROTECTION:

APPELLATE REVIEW OF RETALIATION REGARDING SECURITY CLEARANCES AND ACCESS DETERMINATIONS

(EFFECTIVE: 28 MAY 2022)

- A. AUTHORITY:** The National Security Act of 1947, as amended (including 50 U.S.C. §§3162a and 3341); The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), as amended; Title VI of the Intelligence Authorization Act for Fiscal Year 2014 (P.L.113-126); Executive Order (EO) 12968, *Access to Classified Information*, as amended; EO 13467, *Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information*, as amended; and other applicable provisions of law.
- B. PURPOSE:** This Security Executive Agent (SecEA) Directive establishes policy for the Director of National Intelligence's (DNI) appellate review process for employees who seek to appeal an adverse final agency determination with respect to alleged retaliatory action(s) taken by an employing agency affecting the employee's security clearance or access determination as a result of protected disclosures. For the purposes of this Directive, the terms "retaliatory action" and "reprisal" are interchangeable. This Directive has been developed in consultation with the Attorney General (AG) and the Secretary of Defense (SecDef).
- C. APPLICABILITY:** This Directive applies to any executive branch agency as defined below.
- D. DEFINITIONS:** As used in this Directive, the following terms have the meanings set forth below:
1. "Access determination." A determination regarding whether an employee is eligible for access to classified information, in accordance with EO 12968 or EO 10865, as amended, and that the employee possesses a need to know the information that is in accordance with EO 12968 or EO 10865, as amended.
 2. "Agency." An executive agency, a military department, or an element of the Intelligence Community; and any other entity within the executive branch that comes into possession of classified information.
 3. "Classified national security information," or "classified information." Information that has been determined, pursuant to EO 13526, or any successor orders, or the Atomic Energy Act of 1954, as amended, to require protection against unauthorized disclosure.

4. "Employee." A person, other than the President and Vice President, employed by, detailed to, or assigned to an agency, including members of the Armed Forces; an expert or consultant to an agency; a 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 head of an agency.
5. "Protected Disclosure."
 - a. Any lawful disclosure of information to the DNI (or an employee designated by the DNI for such purpose), a supervisor in the employee's direct chain of command, or a supervisor of the employing agency with responsibility for the subject matter of the disclosure, up to and including the head of the employing agency (or employee designated by the head of that agency for such purpose), the Inspector General (IG) of an agency, or another employee designated by the head of the agency to receive such disclosures by an employee that the employee reasonably believes evidences:
 - (1) A violation of any Federal law, rule, or regulation; or
 - (2) Mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.
 - b. Or any other lawful disclosure in accordance with 50 U.S.C. § 3341(j).
6. "Security Clearance." An administrative determination that an individual is eligible, from a security point of view, for access to classified information of the same or lower category as the level of the personnel clearance being granted.
7. "Whistleblower." An employee, as defined in Paragraph D.4., who makes a protected disclosure, as defined in Paragraph D.5.

E. POLICY:

1. Agency personnel with authority to take, direct others to take, recommend, or approve security clearance or access determinations shall not take or fail to take, or threaten to take or fail to take, any action with respect to any employee's security clearance or access determination in retaliation for a whistleblower's protected disclosure.
2. In accordance with P.L.113-126, 50 U.S.C. § 3341(j)(4), and Presidential Policy Directive-19 (PPD-19), *Protecting Whistleblowers with Access to Classified Information*, each agency is required to have an agency appeal process for whistleblowers that permits employees or former employees alleging reprisals, described in Paragraph E.1., to appeal the decision affecting their security clearance or access determination within their agency.¹ This agency appeal process must

¹ Note that 50 U.S.C. § 3341(b)(7)(B) contains an exception to the availability of an appeal within the agency of the employee or former employee: "...there shall be no appeal of an agency's suspension of a security clearance or access determination for purposes of conducting an investigation, if that suspension lasts no longer than 1 year or the head of the agency or a designee of the head of the agency certifies that a longer suspension is needed before a final decision on denial or revocation to prevent imminent harm to the national security."

provide for the IG of the Intelligence Community or the IG of the employing agency to conduct fact-finding. Additionally, as per Section 602(a)(2) of the Intelligence Authorization Act for Fiscal Year 2014 (P.L.113-126), to the fullest extent possible, such fact-finding shall include an opportunity for the employee to present relevant evidence such as witness testimony. The investigating IG will submit a report back to the head of the agency, or their designee, within 180 days unless the employee and the agency agree to an extension or the investigating IG determines in writing that a greater period is required. PPD-19 further requires to the fullest extent possible that this agency process be consistent with and integrated into the policy and procedures used to review security clearance determinations under Section 5.2 of EO 12968.

3. An employee or former employee who claims that they have been subjected to a reprisal prohibited in Paragraph E.1., appeals this claim through the agency appeal process as described in Paragraph E.2., and receives an adverse final agency determination on that appeal, thereby exhausting the applicable agency appeal process for such claims, may:
 - a. Request a DNI appellate review for whistleblowers, which is detailed in Paragraph E.4., within 60 calendar days after receiving notice of the final agency determination pursuant to 50 U.S.C. § 3341(j); and/or
 - b. Submit a request to the IC IG for a review by an External Review Panel (ERP) pursuant to 50 U.S.C. § 3236.²
4. DNI Appellate Review:
 - a. An “appellate review panel” (ARP) shall be convened if an appellate review is requested.
 - b. The ARP shall be chaired by the Principal Deputy Director of National Intelligence (PDDNI), or their designee, and composed of two additional members selected by the AG and the SecDef, or their designees, respectively.
 - c. The PDDNI, the AG, and the SecDef shall select ARP panelists within 14 calendar days of the Office of the Director of National Intelligence’s receipt of the written request to leverage the appellate review process.
 - d. Panel Recusal Obligations:
 - (1) The PDDNI, the AG, the SecDef, or a selected panelist shall recuse themselves from selecting a panel member, or participating as a panel member, for a proceeding under 50 U.S.C. § 3341(j)(5) when:
 - (a) The proceeding concerns an adverse final agency determination from the panel member’s home agency, an agency under their command or authority, or the agency they currently serve; or

² For further information regarding the ERP process, see 50 U.S.C. §3236, or contact the IC IG.

- (b) The panel member has a separate and distinct conflict of interest with the matter at hand, in alignment with 5 CFR § 2635.502.
 - (2) Following a recusal affecting the composition of the panel, the remaining panelists shall agree upon the selection of a replacement member from an agency having a security clearance appeals process with no prior involvement in the matter at hand. The replacement panelist is also subject to the recusal obligations as put forth in Paragraph E.4.d.(1).
 - (3) Should the PDDNI, or their designee, be the recused party, then the three-member panel selected in accordance with Paragraph E.4.d.(2) shall select from amongst the panel a member to serve as “acting” chairperson for the specific proceeding from which the PDDNI, or their designee, is recused.
 - (4) Any party declining participation in the appellate process due to a recusal obligation as outlined in Paragraph E.4.d.(1) shall notify the panel chairperson and the DNI in writing within seven business days of the request for their participation.
- e. Upon receipt of a written request for a DNI appellate review of an adverse final agency determination pursuant to Paragraph E.3.a., the ARP has the discretion to request fact-finding assistance from an IG, as described below, if the panel members deem it beneficial to their review.
- (1) The ARP shall request assistance with the conduct of fact-finding from the Department of Justice, Office of the Inspector General (DoJ IG).
 - (2) The DoJ IG should decline the ARP’s request for assistance if the DoJ panel member is recused from participation in a specific proceeding consistent with Paragraph E.4.d.(1), or if the DoJ IG has a separate and distinct conflict of interest involving the matter at hand. Should the DoJ IG decline the ARP’s request for assistance with fact-finding, the ARP shall make the request of fact-finding assistance to the Department of Defense, Office of Inspector General (DoD IG).
 - (3) The DoD IG should decline the ARP’s request for assistance if the DoD panel member is recused from participation in a specific proceeding consistent with Paragraph E.4.d.(1), or if the DoD IG has a separate and distinct conflict of interest involving the matter at hand. Should the DoD IG decline the ARP’s request for assistance with fact-finding, the ARP shall request assistance from the IG office of an agency having a security clearance appeals process with no prior involvement in the matter at hand.

- (4) Any IG declining participation in the appellate review process due to a recusal obligation as outlined in Paragraph E.4.e.(2)-(3) should notify the panel chairperson and the DNI in writing within seven business days of the request for their participation.
- f. Should a panelist or IG personnel participating in the DNI appellate review process become aware of a conflict of interest involving another participant in the appellate review process who has not recused themselves;
 - (1) Panelists shall report the information through their chain of command to the head of their Department or Agency, who in turn, shall notify the DNI of the information for a decision regarding the potential selection of an alternative panel member or IG.
 - (2) IG Personnel should report the information through their chain of command to the head of their Department or Agency, who in turn, shall notify the DNI of the information for a decision regarding the potential selection of an alternative panel member or IG.
- g. Within 30 calendar days of the selection of the panelists the ARP shall:
 - (1) Review the employee's submitted request for a DNI appellate review;
 - (2) Determine the necessity of fact-finding;
 - (3) As necessary, request assistance of the appropriate IG as determined in Paragraph E.4.e(3); and
 - (4) Notify the involved parties of the panel's decision regarding the necessity of fact-finding. At a minimum, the involved parties are described as the employee or former employee, the head of the agency that rendered the adverse final agency determination, and the DNI.
- h. If IG assistance is requested, the IG should provide the results of the fact-finding to the ARP within 90 calendar days of the request from the ARP for fact-finding assistance. Should the IG require additional time, they should notify the ARP of the delay with justification and continually update the ARP regarding any additional delays in 30 calendar day increments. The ARP shall notify the DNI and the involved parties of any delays.
 - (1) Should the IG discover previously unknown information during the course of their fact-finding, they should notify the ARP of the new information.
 - (2) Should the ARP receive previously unknown information from the IG, the panel members may, at their discretion, provide opportunity for the employee and/or the agency to respond to the information.
- i. The ARP shall deliver to the DNI a majority opinion as to whether the agency's action regarding the employee's security clearance or access determination is, or is not, in violation of Paragraph E.1.

- (1) If the ARP requests assistance from an IG for fact-finding, the ARP's opinion is due to the DNI within 60 calendar days of receiving the fact-finding results from the IG.
 - (2) If the ARP does not request assistance from an IG for fact-finding, the ARP's opinion is due to the DNI within 60 calendar days of the determination not to conduct fact-finding.
 - (3) The majority opinion shall, at a minimum, contain the following information:
 - (a) A summary of the steps taken by the ARP in the course of their review;
 - (b) The rationale for requesting or not requesting the assistance of an IG for fact-finding;
 - (c) The rationale behind the ARP's majority opinion; and
 - (d) Any dissenting opinion of a panel member with the rationale for the dissent.
- j. The DNI shall review the ARP's majority opinion, make a final appellate decision, and issue a final appellate order within 30 calendar days of receiving the ARP's opinion. At a minimum, the order shall contain the DNI's appellate decision as to whether the agency's action regarding the employee's security clearance or access determination is, or is not, in violation of Paragraph E.1., the rationale for this decision, and recommendations for corrective actions, as appropriate.
- k. The DNI shall notify the following entities of the final appellate order:
- (1) The appealing employee or former employee;
 - (2) The employing agency head; and
 - (3) Congressional intelligence committees.

F. ROLES AND RESPONSIBILITIES:

1. The DNI shall:
 - a. As the SecEA, ensure implementation of this Directive in accordance with all applicable laws, Presidential Directives, Executive Orders, and applicable policies;
 - b. As the SecEA, issue guidelines and instructions to the heads of executive branch agencies to ensure appropriate uniformity, centralization, efficiency, effectiveness, timeliness and security in processes relating to determinations by such agencies of eligibility for access to classified information or eligibility to hold a sensitive position, including such matters as investigations, polygraphs, adjudications, and reciprocity;

- c. As the SecEA, if notified that a panel member or IG participating in the ARP process has a conflict of interest, but has not recused themselves, determine whether an alternative panel member or IG shall be selected; and
 - d. As the DNI, in accordance with Paragraphs E.4.j.-k., review the ARP's majority opinion, make a final appellate decision, issue a written order regarding the final appellate decision, and notify the appropriate entities.
2. The PDDNI shall:
 - a. In accordance with Paragraph E.4., chair the ARP and implement the DNI appellate review process; and
 - b. Determine and inform departments and agencies of the DNI appellate review process, including but not limited to, procedures regarding:
 - (1) The procedures an employee should follow to begin the appellate review process;
 - (2) All filing or response deadlines; and
 - (3) Documentation required in the DNI appellate review process.
3. The AG shall, in accordance with Paragraphs E.4.b.-d., appoint a member to the ARP.
4. The SecDef shall, in accordance with Paragraphs E.4.b.-d., appoint a member to the ARP.
5. The ARP shall:
 - a. Review reprisal claims in accordance with Paragraph E.4.g.;
 - b. If applicable, request assistance of an IG for the conduct of fact-finding as per Paragraph E.4.e.; and
 - c. Provide a written majority opinion to the DNI in accordance with Paragraph E.4.i.
6. The IGs should:
 - a. In accordance with Paragraph E.4.e., conduct appropriate fact-finding, if requested by the ARP; and
 - b. Inform the ARP of their findings.
7. Heads of Departments and Agencies shall:
 - a. Ensure policies and procedures governing the implementation of this directive are in accordance with all applicable laws, Presidential Directives, Executive Orders, and relevant policies, and include appropriate protections for privacy and civil liberties (e.g., System of Records Notices required by the Privacy Act, or Privacy Impact Assessments when required by the E-Government Act);

- b. Ensure the DNI is informed of information regarding a conflict of interest involving a panel member or an IG who has not recused themselves in accordance with E.4.f., that they received from representatives of their department or agency participating in the appellate review process;
- c. Provide training to all Department and Agency employees to ensure awareness of the DNI appellate review process for whistleblowers during employee indoctrination and in annual refresher training;
- d. In accordance with Paragraph E.4.j., fully consider any corrective actions listed in the DNI's final appellate order; and
- e. Cooperate fully with the ARP process including, but not limited to, providing relevant documentation upon request.

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



Avril D. Haines
Director of National Intelligence
Security Executive Agent

May 28, 2022
Date