



**INSPECTOR GENERAL OF THE INTELLIGENCE COMMUNITY
INSTRUCTION 2020.001**

**SUBJECT: EXTERNAL REVIEW PANEL PROCEDURES
PURSUANT TO 50 U.S.C. § 3236 AND PRESIDENTIAL POLICY
DIRECTIVE/PPD-19**

1. AUTHORITIES: The National Security Act of 1947, as amended (50 U.S.C. § 3001, *et seq.*); the Inspector General Act of 1978, as amended (5 U.S.C. App.); the Intelligence Community Whistleblower Protection Act of 1998, as amended (50 U.S.C. § 3033 and 5 U.S.C. App. § 8H) (“ICWPA”); the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. § 3341); Executive Order 10865, as amended; Executive Order 12333, as amended; Presidential Policy Directive/PPD-19, *Protecting Whistleblowers with Access to Classified Information* (October 10, 2012) (“PPD-19”); and other applicable provisions of law and regulation.

2. REFERENCES: 50 U.S.C. §§ 3234, 3236 & 3341; Intelligence Community Directive 120: *Intelligence Community Whistleblower Protection*, as amended (April 29, 2016).

3. PURPOSE: These procedures establish the authorized process and standards to administer, assess, and decide requests for external review pursuant to Section 1106 of the National Security Act of 1947, 50 U.S.C. § 3236. These procedures replace the External Review Panel Procedures adopted by the Intelligence Community Inspector General (IC IG) in 2013. The IC IG, in consultation with the Intelligence Community Inspectors General Forum, updated these procedures to reflect changes in the law since 2013 and to provide additional transparency regarding the submission, assessment, and processing External Review Panel (“ERP”) requests.

4. APPLICABILITY: These procedures apply to individuals covered under 50 U.S.C. §§ 3234 or 3341 who have alleged reprisal for a Protected Disclosure and have exhausted the applicable review procedures as required by 50 U.S.C. § 3236(b)(1)(B) or (b)(2)(B). This instruction also applies to individuals covered under PPD-19 who have alleged reprisal for a Protected Disclosure and have exhausted the applicable review procedures under Section A or B of PPD-19.

5. DEFINITIONS: The following definitions from § 3234 and PPD-19 are incorporated here:

- A. “Covered Agency” is defined as an executive department or independent establishment, as defined under sections 101 and 104 of Title 5, United States Code, that contains or

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constitutes an Intelligence Community Element, except the Federal Bureau of Investigation.

- B. “Covered Intelligence Community Element” is defined as any executive agency or unit thereof determined by the President under section 2302(a)(2)(C)(ii) of Title 5, United States Code, to have as its principal function the conduct of foreign intelligence or counterintelligence activities, including but not limited to the Office of the Director of National Intelligence (“ODNI”), the Central Intelligence Agency, the National Security Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, and the National Reconnaissance Office. For purposes of these procedures, the term “Covered Intelligence Community Element” does not include the Federal Bureau of Investigation.
- C. “Personnel Action” is defined as, with respect to an employee in a position in a Covered Intelligence Community Element (other than a position excepted from the competitive service due to its confidential, policy-determining, policy-making, or policy-advocating character) or a contractor employee—
 - (1) an appointment;
 - (2) a promotion;
 - (3) a disciplinary or corrective action;
 - (4) a detail, transfer, or reassignment;
 - (5) a demotion, suspension, or termination;
 - (6) a reinstatement or restoration;
 - (7) a performance evaluation;
 - (8) a decision concerning pay, benefits, or awards;
 - (9) a decision concerning education or training if such education or training may reasonably be expected to lead to an appointment, promotion, or performance evaluation; or
 - (10) any other significant change in duties, responsibilities, or working conditions.
- D. “Contractor Employee” is defined as an employee of a contractor, subcontractor, grantee, subgrantee, or personal services contractor, of a Covered Intelligence Community Element.
- E. “Exhaustion of the Applicable Review Process” is defined as the requirement to use the government agency’s administrative processes, either for personnel actions or security

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clearance actions, and obtain a final decision by the government agency prior to filing a request for an ERP as required by 50 U.S.C. § 3236(b)(1)(B) or (b)(2)(B); or PPD-19, Part C.

F. “Protected Disclosure” is defined as:

- (1) a disclosure that is covered under section 1104 of the National Security Act of 1947 (50 U.S.C. § 3234) or Section 3001(j)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. § 3341(j));
- (2) the exercise of any appeal, complaint, or grievance with regard to the violation of 50 U.S.C. §§ 3234 or 3341 or Section A or B of PPD-19;
- (3) lawfully participating in an investigation or proceeding regarding a violation of 50 U.S.C. §§ 3234 or 3341 or Section A or B of PPD-19; or
- (4) cooperating with or disclosing information to an Inspector General, in accordance with applicable provisions of law in connection with an audit, inspection, or investigation conducted by the Inspector General.

Such disclosures will be protected if the action does not result in the employee making an unauthorized disclosure of classified information or disclosing other information contrary to law.

6. POLICY: 50 U.S.C. §§ 3234 and 3341, and PPD-19, ensure that employees (1) serving in the Intelligence Community, or (2) who are eligible for access to classified information, can effectively report waste, fraud, and abuse while protecting classified national security information. It prohibits reprisal for reporting waste, fraud, and abuse. Specifically, the laws require:

- A. Any officer, employee, or contractor employee of a Covered Agency who has authority to take, direct others to take, recommend, or approve any Personnel Action, shall not, with respect to such authority, take or fail to take a Personnel Action with respect to any employee serving in a Covered Intelligence Community Element as a reprisal for a Protected Disclosure (50 U.S.C. § 3234); and
- B. Personnel with authority over personnel 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 or contractor employee’s security clearance or access determination in reprisal for a Protected Disclosure. (50 U.S.C. § 3341(j))

As part of this policy, § 3236 provides that an individual with a claim under §§ 3234 or 3341 who has exhausted the applicable review process (“eligible person”), may request an external review by a three-member Inspector General panel of the §§ 3234 and/or 3341 determinations. PPD-19 provides similar protections and, in most cases, the statutes will govern the relevant claims.

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However, when applicable, Section C of PPD-19 provides the option to request an ERP once an individual has exhausted the applicable review process for their PPD-19 Section A or B claims.

7. REQUEST PROCEDURES: Pursuant to 50 U.S.C. § 3236 or Section C of PPD-19, an employee or eligible person (“Requestor”) alleging a reprisal who has exhausted the applicable review process may request an external review by a three-member Inspector General panel.

A. Requestor Submission: A Requestor seeking an external review must provide a formal written request for such a review directly to the IC IG within sixty (60) calendar days of receiving a final written disposition on his/her alleged reprisal complaint (the “Request”).¹ The Request must include the following:

- (1) Requestor’s Full Name.
- (2) Federal Employing Agency.
- (3) Reprisal Complaint, which must include a summary of the following:
 - (a) Alleged Protected Disclosure(s);
 - (b) Alleged personnel actions and/or actions taken with respect to their security clearance or access determination;
 - (c) Reprisal allegation(s);
 - (d) Statement that there has been an exhaustion of the applicable review process required in Section A and/or B of PPD-19 and/or §§ 3234 or 3341; and
 - (e) The final decision on the reprisal allegations by the Inspector General from the agency that completed the initial review under Section A and/or B of PPD-19 and/or §§ 3234 or 3341 (hereinafter, the “Local IG”).
- (4) A truthful statement of non-frivolous allegations that identifies with reasonable specificity the legal or factual basis for requesting an external review, including but not limited to alleged legal, factual, or procedural errors committed by the Federal Employing Agency and/or the Local IG. The statement must also indicate with reasonable specificity the resulting harm from such error(s).
- (5) Requests that contain new evidence must include an explanation of why the evidence was not presented or available before the Local IG review was concluded.
- (6) Any additional supporting documentation.

¹ In its discretion, the Administering IG may consider an untimely Request. The Administering IG may require that the Requestor show good cause for the delay.

B. Request Intake Process: Once the IC IG receives a complete external review request package from a Requestor, the following steps must be taken:

- (1) The IC IG must notify the Requestor that his or her Request for an ERP has been received and is under initial assessment.
- (2) The IC IG must determine the Office of Inspector General that will administer the request for the purpose of the initial assessment (hereinafter, the “Administering IG”). If the IC IG does not have a conflict of interest in fact or appearance in administering the request, the IC IG must serve as the Administering IG. If the IC IG determines that it has a conflict of interest in fact or appearance, the IC IG will select through a random selection process an Inspector General from the Departments of State, Treasury, Defense, Justice, Energy, Homeland Security, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Reconnaissance Office, or the National Security Agency to be the Administering IG. The random selection process must be made by a computer program. A randomly selected Administering IG may opt out of administering a request if that IG (a) determines that it has a conflict of interest in fact or appearance, or (b) has served on an ERP within the prior twelve (12) months. An Inspector General of an agency may not be selected as Administering IG to review any matter relating to a decision made by that Inspector General’s agency.
- (3) The Administering IG must request the documents or information it determines are necessary to perform the Initial Assessment from the Local IG, including but not limited to reports of investigation, memoranda, dismissals, or case closeouts together with all available supporting documentation or written explanation. The Local IG must provide all requested materials within thirty (30) calendar days from the date of the Administering IG’s request. If necessary for its Initial Assessment, the Administering IG may request additional documents from the affected department or agency head (hereinafter, the “relevant agency”) through the Local IG.

8. INITIAL ASSESSMENT: The Administering IG must review all relevant materials submitted by the Requestor, the relevant agency, and the Local IG.

- A. Jurisdiction:** The Administering IG must confirm that the Requestor has exhausted the applicable review process. If the Administering IG determines that the Requestor has not exhausted the applicable review process, the Administering IG will close the matter and notify, in writing, the Requestor, the relevant agency, and the Local IG.
- B. Initial Assessment Standard:** Once jurisdiction is established, the Administering IG must conduct an initial assessment to determine whether to grant the Request to convene an ERP. As guidance, the Administering IG will assess the record for *prima facie* evidence of the following:

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- (1) Erroneous findings of material fact. Any alleged factual error that is material, meaning that the alleged factual error is of sufficient weight to warrant a potentially different outcome from that of the initial decision under review.
- (2) Erroneous interpretation or application of law or change in law. Any alleged legal error or change in law that is material, meaning the alleged legal error or change in law is of sufficient weight to warrant a potentially different outcome from that of the initial decision under review.
- (3) Newly discovered evidence. In general, the Administering IG will rely on the information contained in the record. The Administering IG, however, may consider new evidence that was not otherwise available when the agency or Local IG review was completed. To constitute new evidence, the information presented must have been unavailable to the Requestor when the review was completed. The new evidence must be material, meaning that the evidence is of sufficient weight to warrant a potentially different outcome from that of the initial decision under review.
- (4) Fundamental fairness. The Administering IG has the discretion to convene an ERP to address an issue in the interests of fundamental fairness.

C. **Written Explanation:** The Administering IG may request additional written explanations from the Local IG to address specific legal issues, factual determinations, or procedural questions. The Local IG must provide any written materials within thirty (30) calendar days from the date of the Administering IG's request.

D. **Remand of Matters:** With the Local IG's consent, the Administering IG may remand a Request so that the Local IG may revisit the matter to address a change in law, newly discovered evidence, or other material issue.

E. **Time Limit:** The record will be deemed complete once the Administering IG has received all the documents requested of the relevant agency and the Local IG, including any additional written explanations requested from the Local IG. The Administering IG must notify the Requestor that it has received a complete record in writing within fourteen (14) calendar days from the date that the record was deemed complete.

The Administering IG must complete the initial assessment within ninety (90) calendar days from the date that the record was deemed complete. Upon completion of the initial assessment the Administering IG must, within fourteen (14) calendar days, notify the Requestor, the head of the relevant agency, and the Local IG in writing of his or her determination whether to convene an ERP. If the Administering IG decides not to convene an ERP, the Administering IG will close the matter after notifying the Requestor, the relevant agency, and the Local IG.

9. EXTERNAL REVIEW PANEL PROCESS:

- A. Selection of Panel:** If the Administering IG determines to convene an ERP, the Administering IG will serve as the Chair of the ERP and must select, through a random selection process, two (2) other IGs from the Departments of State, Treasury, Defense, Justice, Energy, Homeland Security, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Reconnaissance Office, or the National Security Agency to serve on the ERP. The random selection process will be by a computer software program. A randomly selected IG may opt out of being an ERP member if that IG (a) determines that it has a conflict of interest in fact or appearance, or (b) has served on an ERP within the prior twelve (12) months. An Inspector General of an agency may not be selected to sit on a panel to review any matter relating to a decision made by that Inspector General's agency.
- B. ERP Authority:** The ERP must conduct a review of the Request. The review may consist of a file review. The ERP may, but is not required to, request and receive additional evidence (either documentary or testimonial) to the extent permitted by law. In its discretion, the ERP may choose to examine issues not presented by the Requestor or investigated by the Local OIG. All agencies must cooperate with their respective agency IGs, the IC IG, and ERP, and must provide such information and assistance to the extent permitted by law.
- C. Whistleblower Reprisal Investigation Guidance:** To the fullest extent possible, the ERP must review the Request consistent with the policies and procedures used to adjudicate or review alleged violations of section 2302(b)(8) of Title 5, United States Code, and section 3341(j)(4)(C) of Title 50, United States Code, or section 3234 of Title 50, United States Code, as applicable. The review process must provide for the protection of classified information and intelligence sources and methods. These policies and procedures include, but are not limited to, review of the Request using the following criteria:
 - (1) Section 3234 or Section A of PPD-19 – Personnel Actions.
 - (a) Did the Requestor make a Protected Disclosure, as defined in § 3234 or PPD-19, as applicable?
 - (b) Did the agency take or fail to take, or threaten to take or fail to take, a Personnel Action with respect to the Requestor, as defined in § 3234 or PPD-19, as applicable?
 - (c) Was the Requestor's Protected Disclosure a contributing factor in the agency's decision to take or fail to take, or threaten to take or fail to take, in the case of PPD-19, the personnel action?

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(d) If the Protected Disclosure was a contributing factor, did the agency prove by clear and convincing evidence that it would have taken or failed to take the personnel action absent the Protected Disclosure?

(2) Section 3341 or Section B of PPD-19 – Security Clearance Actions.

(a) Did the Requestor make a Protected Disclosure, as defined in § 3341 or PPD-19, as applicable?

(b) Did the agency take or fail to take, or threaten to take or fail to take, any action with respect to the Requestor’s security clearance or access determination?

(c) Was the Requestor’s Protected Disclosure a contributing factor in the agency’s decision to take or fail to take, or threaten to take or fail to take, the security clearance action?

(d) If the Protected Disclosure was a contributing factor, did the agency prove by a preponderance of the evidence that it would have taken the same action in the absence of such disclosure, giving the utmost deference to the agency’s assessment of the particular threat to the national security interests of the United States in the instant matter?

D. Standard of Review: After the ERP has fully reviewed the matter, the ERP will uphold the Local IG’s decision, unless the ERP determines:

(1) The decision was based on an erroneous finding of material fact(s) of sufficient weight to warrant a different outcome or was not supported by “substantial evidence” in the record considered as a whole;²

(2) There is newly discovered material evidence of sufficient weight to warrant a different outcome;

(3) The decision was not in accordance with law, was based on an erroneous interpretation or application of law, or there was a change in law that is of sufficient weight to warrant a different outcome; or

(4) The decision should be overturned to remedy a fundamental unfairness or other injustice.

² These procedures adopt the definition of substantial evidence as set forth in 5 C.F.R. § 1201.4: “Substantial evidence is that degree of evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree.”

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- E. **Time Limit:** The ERP will complete its review within 270 calendar days of the date that it was convened. The ERP must issue a written report of its findings and recommendations (if any), which will be signed by all ERP members. The ERP Chair will notify the Requestor, the head of the employing agency, and the Local IG of its decision.
- F. **Corrective Action:** If a majority of the ERP members finds a violation of § 3234 or § 3341(j) or PPD-19, it may make recommendations for corrective action to the head of the agency or department.
 - (1) Personnel actions. The ERP may recommend that the agency take specific corrective action to return the Requestor, as nearly as practicable and reasonable, to the position such Requestor would have held had the reprisal not occurred.
 - (2) Security Clearance Actions. The ERP may recommend that the agency reconsider the Requestor's eligibility for access to classified information, consistent with national security and Executive Order 12968, and recommend that the agency take other corrective action to return the Requestor, as nearly as practicable and reasonable, and in accordance with § 3341(j)(4)(B), to the position such Requestor would have held had the reprisal not occurred.

10. DEPARTMENT OR AGENCY HEAD ACTION: The department or agency head must give full consideration to such recommendations for corrective action, if any, by the ERP. Within ninety (90) calendar days, the department or agency head must inform the ERP and the DNI of what action he or she has taken with respect to the ERP's recommendation. If the department or agency head fails to inform the DNI, the DNI must notify the President.

11. IC IG ANNUAL REPORT: On an annual basis, the IC IG must, subject to limitations that the IC IG considers necessary to protect an individual's privacy rights, report the ERP determinations, recommendations, and department and agency head responses to such recommendations to the DNI and to the congressional intelligence committees.

12. EFFECTIVE DATE: This Instruction is effective upon signature.

By : Thomas A. Monheim
Acting Inspector General of the Intelligence Community

12/17/2020
Date