

## COMMUNICATIONS LAW

### Disciplinary Action for Release of Non-Public Information

The question has been raised on what disciplinary action may be taken against a civilian employee who releases marked FOUO information to the media.

Federal employees have a duty to protect Controlled Unclassified Information (CUI) from unauthorized release. CUI is defined in DoD Manual 5200.01, Volume 4: *DoD Information Security Program: Controlled Unclassified Information (CUI)* as information that is not releasable under the Freedom of Information Act (FOIA), 5 USC §552. FOIA requires that the government publically release requested information or information likely to be requested unless it is protected by one of the nine exemptions.

Information may only be released by an official with the authority to release information and all information, even when released outside of FOIA process, must be released while adhering to the principles of FOIA<sup>1</sup>. FOIA requires a line by line review of all documents to determine what exemptions may be applied regardless of any current or prior markings. While the general FOIA rules is that a document that has been released may not be later withheld, an exemption applies for documents or information that was leaked by an unauthorized government official.<sup>2</sup>

Employees who releases non-public information or CUI without authorization or employees who use non-public information for financial gain can be subjected to disciplinary action for violation of the Federal ethics regulations at 5 CFR §2635.703 - Use of nonpublic information. 5 CFR §2635.703 defines non- public information as:

For purposes of this section, *nonpublic information* is information that the employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public. It includes information that he knows or reasonably should know:

- (1) Is routinely exempt from disclosure under [5 U.S.C. 552](#) or otherwise protected from disclosure by statute, Executive order or regulation;
- (2) Is designated as confidential by an agency; or
- (3) Has not actually been disseminated to the general public and is not authorized to be made available to the public on request.

AFI 36-704 and the Uniform Code of Military Justice allow for the following types of disciplinary action for the release of non-public information for military, civilian, and contractor employees:

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<sup>1</sup> See *DOD5400.7-R\_AFMAN 33-302* for the policies and procedures for releasing information.

<sup>2</sup> See *Favish v NARA*, 124 S. Ct. 1570 (2004)

**Consequences:**

<b>Personnel Type</b>	<b>Authority</b>	<b>Consequences</b>
Military	Punitive Provision in AFI 33-332 (PII) and 5 CFR 2635.703	UCMJ violation of Article 92
Civilian	5 CFR 2635.703, AFI 36-704 <sup>3</sup> has the Table and Penalties	<p>Violation of security regulations when the breach does not result in release of security information to unauthorized sources and there is no evidence of a compromise of classified information.</p> <p><i>1<sup>st</sup> Offense</i> –Reprimand  <i>2<sup>nd</sup> Offense</i> - Reprimand to 30-Day Suspension  <i>3<sup>rd</sup> Offense</i> -10-Day Suspension to Removal</p> <p>If violation is intentional or results in unauthorized release or compromise of security information.</p> <p><i>1<sup>st</sup> Offense</i> -Reprimand to Removal  <i>2<sup>nd</sup> Offense</i> - 14-Day Suspension to Removal  <i>3<sup>rd</sup> Offense</i> - 30-Day Suspension to Removal</p>
Contractor	<p>Contract – Non-Disclosure Agreements</p> <p>Contractor employees who have routine access to CUI data should be required to sign a non-disclosure agreement as part of the contract.</p>	<p>Removal from contract            Civil litigation</p>

Prior to initiating disciplinary action an analysis must to be conducted to determine if the release of the information was a protected disclosure under the Whistleblower Protection Act for civilian and contractor employees and the Military Whistleblower Protection Act for service members. A

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<sup>3</sup> This is the penalties for the charges of releasing non-public information. The process to discipline a Federal employee still applies.

protected disclosure is a disclosure to an individual or organization who can remedy the situation (including the media, unless there are other statutory protections) when the employee reasonably believes he is reporting fraud, waste, abuse, a specific danger to public health or safety, or any other violation of law or regulation.<sup>4</sup> Any disciplinary taken in response to a protected disclosure would be considered to be a prohibited personnel action per 5 CFR§ 2302.

Under the Military Whistleblower Protection Act, a disclosure made by a service member is only protected if it is reported to an appropriate reporting authority and not the media. Contractor employees may also make protected disclosures under the Whistleblower Enhancement Act of 2011. As such, any non-disclosure agreement entered into with a contractor employee must include an exception to the agreement for protected disclosures.

Therefore, an employee who makes an unauthorized release of CUI data that is not a protected disclosure under the Whistleblower Protection Act or the Military Whistleblower Protection Act can be subject to disciplinary action IAW with the UCMJ or AFI 36-704.

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<sup>4</sup> See 5 CFR §2302