



AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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Scott Kupor, Director
Office of Personnel Management
1900 E Street NW
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Subject: AFGE and AFSCME Comments to OPM Draft Confidential Government Information Nondisclosure Agreement, 91 Fed. Reg. 31478 (May 27, 2026), (Docket No. OPM-2026-0100)

Dear Director Kupor:

The American Federation of Government Employees, AFL-CIO (“AFGE”) and the American Federation of State, County and Municipal Employees, AFL-CIO (“AFSCME”) (collectively the “Unions”) strongly oppose the Office of Personnel Management’s (“OPM”) notice of a proposed governmentwide nondisclosure agreement (“Notice”). AFGE and AFSCME represent hundreds of thousands of federal employees and have a substantial interest in stopping this harmful and unlawful effort that is contrary to public policy.

OPM’s Notice proposes to institute a standardized nondisclosure agreement (“Proposed NDA”) that federal agencies could require employees to sign as a condition of their employment. OPM claims that the Proposed NDA does not impose any additional legal obligations on federal employees, and is instead merely an attempt to promote consistency across government and to inform employees of their obligations regarding confidential information. But if this were genuinely the case, there would be no need for the Proposed NDA at all. It would be unnecessary because federal employees are already routinely informed of their obligations regarding confidential information. In truth, the Proposed NDA goes far beyond existing legal requirements and seems plainly designed to intimidate federal employees and chill their lawful and legally protected speech, including speech about personnel matters and matters of public concern that is a vital part of the Unions’ work.

AFGE and AFSCME urge OPM to abandon its misguided and unlawful attempt to implement the Proposed NDA. It is problematic and unlawful on multiple fronts, and, if finalized, will directly harm AFGE, AFSCME, and their members.

First, the Proposed NDA directly interferes with AFGE’s and AFSCME’s ability to represent their members. It undermines Congress’s policy determinations that the speech of federal employees should be protected and that “labor organizations and collective bargaining in the civil service are in the public interest.” 5 U.S.C. § 7101(a). Union representatives must be able to



communicate openly with employees they represent to carry out a whole host of representational activities. But the Proposed NDA would stifle that communication—both by prohibiting federal employees from sharing relevant, otherwise disclosable information and by creating a culture of fear in which members are loathe to share it—thereby undermining AFGE’s and AFSCME’s ability to perform their work.

Second, the Proposed NDA violates the First Amendment rights of AFGE’s and AFSCME’s members. The First Amendment problems of the Proposed NDA are manifold: it is an unconstitutional prior restraint on speech; it is unconstitutionally overbroad; it violates constitutional principles prohibiting vagueness and viewpoint discrimination; it conditions a public benefit based on a waiver of a constitutional right; and it restricts members’ right to associate for expressive purposes. For example, by broadly restraining the content of the communications made between the Unions and their members—and also communications made between the Unions’ members in connection with their union—on matters relating to those members’ conditions of employment, the Proposed NDA impedes one of the Unions’ core functions and infringes their and their members’ associational rights. And because federal employees’ conditions of employment more often than not involve matters of public concern, the Proposed NDA likewise acts as a vague and overbroad prior restraint on protected speech.

Third, the Proposed NDA is contrary to and would undermine federal whistleblower protection laws. Congress has made clear that the public interest is advanced when federal employees disclose government wrongdoing, but the Proposed NDA would create a culture of fear, confusion, and intimidation in which employees are uncertain about what is allowed and would therefore refrain from making even lawful disclosures.

Finally, OPM has failed to justify why the Proposed NDA is needed, nor explained how it would achieve its intended goals. This alone requires OPM to withdraw its proposal.

I. The Proposed NDA Interferes with the Unions’ Ability to Represent Their Members and Undermines the Public Interest

A. Federal Collective Bargaining Advances the Public Interest

For more than 60 years, the federal government has recognized that collective bargaining between federal employees and their employing agencies strengthens the public interest. In 1962, President Kennedy issued Executive Order 10988, *Employee-Management Cooperation in the Federal Sector*, which established a system where employee organizations could be recognized as exclusive representatives of bargaining units and made clear that “the efficient administration of the Government...requires that orderly and constructive relationships be maintained between employee organizations and management officials.” Exec. Order 10988, 27 Fed. Reg. 551 (Jan. 17, 1962). Subsequent Presidents built on this collective bargaining framework through Executive Orders of their own. *See, e.g.*, Exec. Order 11491, 34 Fed. Reg. 17605 (Oct. 28, 1969); Exec. Order 11838, 40 Fed. Reg. 5743 (Feb. 7, 1975).

Then, in 1978, Congress enacted the Civil Service Reform Act (CSRA), of which the Federal Service Labor-Management Relations Statute (FSL-MRS) was a part. The FSL-MRS, codified in

Chapter 71 of title 5, “established a comprehensive framework governing labor-management relations in federal agencies.” *Ohio Adjutant Gen. Dep’t v. FLRA*, 598 U.S. 449, 452 (2023). In passing the CSRA, “Congress unquestionably intended to strengthen the position of federal unions and to make the collective-bargaining process a more effective instrument of the public interest.” *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 107 (1983). Congress recognized that collective bargaining “safeguards the public interest, contributes to the effective conduct of public business, and facilitates and encourages the amicable settlements of disputes,” and that therefore “labor organizations and collective bargaining in the civil service are in the public interest.” 5 U.S.C. § 7101(a).

To further that public interest, the CSRA guaranteed employees “the right to form, join, or assist any labor organization, or to refrain from any such activity” and to “engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.” 5 U.S.C. § 7102. As part of that bargaining framework, agencies are required to grant exclusive recognition to labor organizations that are selected by the majority of employees in a particular bargaining unit. *Id.* § 7111(a). If a labor organization is so certified, Congress places certain obligations on its conduct: among other things, it must act for “all employees in the unit” and is required to represent their interests “without discrimination and without regard to labor organization membership.” *Id.* § 7114(a).

Unions like AFGE and AFSCME represent members’ interests in multiple ways: they publicly advocate for their members on important issues, they negotiate binding collective bargaining agreements with agencies, which provide federal employees with critical workplace protections; they represent members during workplace investigations and disciplinary proceedings; they bring grievances and arbitrations on members’ behalf to enforce their contractual and statutory rights; and they assert unfair labor practices claims to protect members from unlawful agency conduct. And even when the Unions are not certified as an exclusive representative, they provide advocacy and representation for federal employees in numerous forums. In short, unions represent their members in critically important matters—and this representation is codified in statute and advances the public interest.

B. The Proposed NDA Will Make It Harder for Unions to Represent Their Members

The Proposed NDA directly undermines this representation. It prohibits federal employees from disclosing “Confidential Government Information,” which it defines broadly to mean “all non-public, confidential, or proprietary information.” This definition, which OPM apparently developed only for purposes of this Proposed NDA, includes—but shall “not be limited to”—“information relating to internal agency operations, personnel matters, [or] procurement processes,” and it also includes a catch-all category of “any sensitive, pre-decisional or deliberative material that is not currently publicly available and should not be disclosed under applicable law.”

This enormously expansive definition threatens to prohibit federal employees from sharing information that is important for their unions to adequately represent them. It is especially galling that the NDA would restrict “information relating to . . . personnel matters” since the union’s duty is to represent its members with respect to personnel matters in particular. For

example, removals under 5 U.S.C. Ch. 43 for unacceptable performance tend to be extremely fact dependent. Union representatives frequently need access to internal agency standard operating procedures, guidance documents, and personnel records, in order to weigh the strength of an agency's claim of unacceptable performance and prepare a defense, yet the Proposed NDA purports to prohibit union members from sharing this information.

Moreover, a union's ability to enforce its members' rights, including the rights the union has negotiated as part of a collective bargaining agreement, depends on its members' ability to alert the union to violations. Without a free flow of relevant information between unions and their members, unions will not learn of any number of violations, ranging from complaints that the agency has forced employees to work in unsafe or unhealthy conditions, to complaints that management is assigning bargaining-unit work to employees outside the bargaining unit.

Still further, federal employees who are represented by a union have a right to union representation during any meeting between the employee and management that may result in discipline. *See* 5 U.S.C. § 7114(a)(2)(B). But if an employee is fearful that disclosing the circumstances of a potential infraction could run afoul of the NDA, that employee will be chilled from invoking their right to representation. In short, without open communication between members and the union, unions are stymied in the performance of their statutory representation obligations and their members are left under a cloud of uncertainty as to what information they may share without risking their livelihoods.

This risk of members' self-censorship is especially great in light of both the mandatory and inherently coercive nature of the Proposed NDA as well as the serious consequences that federal employees face if they are deemed to have violated it. As to the former, OPM claims that the Proposed NDA is voluntary, but the Proposed NDA itself warns that failure to sign may result in removal from federal service and potential debarment from future federal employment or from being a federal contractor, making clear that the Proposed NDA is "voluntary" in name only. That is, requiring employees to choose between relinquishing their speech rights or their ability to pursue their chosen profession is no choice at all. Indeed, OPM says that failure to comply with the NDA will be cause for OPM to take a suitability action against an allegedly offending employee, meaning that OPM will deem the employee unfit for service, resulting in removal and debarment, i.e., disqualification from future federal employment. Or, worse, a violation of the NDA could result in civil or criminal punishment.

Compounding the harm, employees against whom a suitability action is proposed have no reason to think that such an action will be fair and impartial or that they will have any recourse against it. Indeed, earlier this year, OPM proposed to strip employees' right to challenge suitability actions at the Merit Systems Protection Board and instead direct any challenges to OPM itself. *See Suitability Action Appeals*, 91 Fed. Reg. 5352. In other words, under OPM's proposals, the same agency (OPM) that is establishing the NDA will be the agency that adjudicates the enforceability of the NDA. This combination of OPM functions leads to a plausible inference of the "probability of actual bias on the part of the . . . decisionmaker [that] is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Needless to say, federal employees will operate in an environment of fear and intimidation under these circumstances.

In such an environment, federal employees will very likely limit what they share with their unions. They will withhold disclosable and relevant information, e.g., crucial health and safety information, fearful that disclosing such information could subject them to removal and debarment. As a result, unions will be hindered in carrying out their mission, fulfilling their representational responsibilities, and helping advance the public's interest in strong and effective federal collective bargaining.¹

II. The Proposed NDA Violates Federal Employees' First Amendment Rights

The Proposed NDA would not only interfere with unions' ability to represent their members, but it would also violate the First Amendment rights of those members and of other federal employees. And it would do so in multiple, independent ways.

Unconstitutional Prior Restraint. The Proposed NDA makes clear to federal employees that they risk their livelihoods and potentially severe legal consequences if they speak about workplace matters to their unions or publicly. Just as in *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454 (1995), in which the Supreme Court struck down a ban on federal employees accepting honoraria for making speeches and writing articles, the Proposed NDA “chills potential speech before it happens,” *id.* at 465. This is plainly an unconstitutional restraint on protected speech, and “prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

Overbreadth and Chilled Speech. “Overbroad laws may deter or chill constitutionally protected speech.” *United States v. Hansen*, 599 U.S. 762, 769–70 (2023) (quotation marks omitted). As such, government restrictions on speech must be narrowly drawn. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 611–12 (1973). The Proposed NDA is the opposite: its expansive, *sui generis* definition of “confidential government information” covers speech that extends far beyond any speech that the government has a legitimate interest in restricting. As explained, that breadth will deter the Unions' members from exercising their First Amendment rights. The Proposed NDA is further overbroad because it would extend for five years after an employee leaves federal service. The lengthy post-employment restriction further weakens any justification that the proposal is narrowly tailored to its operational needs.

Vagueness and Viewpoint Discrimination. The vagueness doctrine requires “parties [to] know what is required of them so they act accordingly” and “precision and guidance...so that those enforcing the law do not act in an arbitrary or discriminatory way.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). A speech restriction is unconstitutionally vague when it fails to “give the person of ordinary intelligence a reasonable opportunity to know what is

¹ OPM should abandon the Proposed NDA in its entirety. To the extent it moves forward with it, OPM should, at minimum, include language in the NDA that makes clear that the NDA does not limit what federal employees can share with their union: “Nothing in this Non-Disclosure Agreement shall limit the information that federal employees may share with any labor or membership organization in connection with any matter in which the labor or membership organization may act on the employee's behalf.”

prohibited.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). And a restriction that “is so standardless that it authorizes or encourages seriously discriminatory enforcement” is unquestionably unconstitutional. *United States v. Williams*, 553 U.S. 285, 304 (2008). This is the very definition of the Proposed NDA: “confidential government information” is defined so vaguely that no employee can have clarity as to what speech is restricted, and government officials have unchecked authority to enforce it in a discriminatory and standardless manner. In fact, the Proposed NDA purports to encompass proprietary information “whether or not marked as such,” undermining employees’ ability to anticipate *ex ante* whether particular speech they intend to take is restricted. In other words, the Proposed NDA fails to provide employees with reasonable notice of precisely which speech will be deemed prohibited.

Public benefit conditioned on waiver of constitutional right. The Supreme Court “has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights.” *Lane v. Franks*, 573 U.S. 228, 236 (2014). The Proposed NDA runs afoul of this long-established prohibition. The Proposed NDA itself notes that failure to sign may result in removal and debarment, making clear that federal employees can acquire or maintain their employment only if they relinquish their First Amendment rights. And for current employees, such a retroactive change to the terms of their employment is doubly impermissible.

Freedom of Association. The Supreme Court “has ‘long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others.’” *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609 (1984)). “[The Court’s] recognition of this right encompasses the combination of individual workers together in order better to assert their lawful rights.” *Lyng v. Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW*, 485 U.S. 360, 366 (1988). Federal union members have a clearly established constitutional right to associate, and “[g]overnment actions that may constitutionally infringe upon this freedom can take a number of forms,” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984), including actions that prevent union members “from associating together or burden their ability to do so in any significant matter,” *Lyng*, 485 U.S. at 366. That is precisely what the Proposed NDA would do: by preventing and discouraging union members from effectively communicating with their unions and with one another in connection therewith, the Proposed NDA significantly burdens their freedom of association and trenches on some of the very subjects for which they choose to associate.

Public employers, including the federal government, may have an interest in regulating the governmental speech of their employees to the extent that such regulation promotes the efficiency of public services. See *Pickering v. Bd. of Ed. of Twp. High Sch.*, 391 U.S. 563, 568 (1968). But as the Supreme Court has emphasized time and again, federal employees do not relinquish their First Amendment rights when speaking on matters of public concern, and certainly not when engaging with or through their unions. See *Nat’l Treasury Emps. Union*, 513 U.S. at 465 (citing *Pickering*, 391 U.S. at 568). The Proposed NDA violates those rights in multiple ways, and it should be abandoned.

III. The Proposed NDA Would Undermine Federal Whistleblower Laws and Create Significant Confusion Among Federal Employees

For decades, Congress has passed and strengthened whistleblower protection statutes. These statutes advance the public's interest in rooting out government waste, fraud, abuse, and corruption. But the Proposed NDA would undermine this interest, disregard the purpose of these laws, chill protected disclosures, confuse federal employees, and impose an unlawful legal standard.

For starters, the Proposed NDA is inconsistent with the Whistleblower Protection Act (WPA). The WPA prohibits retaliatory personnel actions against covered employees who make qualifying disclosures that evidence "any violation of any law, rule, or regulation" or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety," so long as the disclosure "is not specifically prohibited by law." 5 U.S.C. § 2302(8)(A). The Proposed NDA, however, would punish federal employees for any disclosures that are not *affirmatively* authorized. *See, e.g.*, Section 1(d) of the Proposed NDA ("The Employee understands and agrees to the following...(d) To use or disclose any Confidential Government Information created or obtained during the course of Employee's employment with the Agency only as authorized by law, rule, regulation, and applicable Agency policies and procedures."); Section 2 ("Upon leaving employment with the Agency, the Employee agrees not to disclose any Confidential Government Information absent written permission from an authorized agency official."). The Proposed NDA therefore turns the applicable legal standard on its head: the law defaults to protecting a disclosure if no law specifically prohibits it, whereas the Proposed NDA defaults to prohibiting disclosure if no law affirmatively authorizes it.

The Proposed NDA is even more problematic with respect to the portion of the WPA that concerns disclosures to the Office of Special Counsel, agency Inspectors General, and Congress. 5 U.S.C. §§ 2302(8)(B), (C). Such disclosures are protected even when they would otherwise be "specifically prohibited by law." *Id.*; *see also* 5 U.S.C. § 7211. So the Proposed NDA—which, again, requires that disclosures be affirmatively authorized—runs counter to Congress's mandate. The Proposed NDA attempts to resolve this conflict by including statutorily required language stating that the NDA does not conflict with employees exercising their rights under the WPA or any other applicable law that permits disclosure. But such pro forma language hardly solves the problem. It does nothing to explain to federal employees how the Proposed NDA is consistent with employees' whistleblower rights. It does nothing to provide clarity as to what type of information employees can lawfully disclose. And it does nothing to calm federal employees' reasonable fear that they will be punished when they disclose any information learned through their employment, even when such disclosures are fully lawful and fully protected, or to alleviate the coercive nature of the Proposed NDA.

In short, the Proposed NDA will, at minimum, create enormous confusion among federal employees as to what they can or cannot lawfully disclose. And when faced with that confusion and with the significant consequences for unlawful disclosures, it seems clear that federal employees will err on the side of nondisclosure. There is no indication that OPM considered this

aspect of the problem, nor did it take into account the reliance interests of federal employees and the general public in relying on previously understood and robust whistleblower protection laws.

Congress has consistently determined that federal employees should be protected for disclosing information related to government wrongdoing, and that such disclosures advance the public interest. The Proposed NDA undermines that interest. It would create a culture of fear and uncertainty, chilling employees from reporting wrongdoing and harming the public's interest in transparency and good government.

IV. OPM Has Not Justified the Proposed NDA

Each of these harms necessitates abandoning the Proposed NDA. But even without them, OPM should still withdraw the Proposed NDA because it has failed to explain why it is needed or how it would advance any legitimate government interest. Indeed, OPM's justification makes clear that the stated rationales of the Proposed NDA are purely pretextual, and the fact that OPM failed to consider less extreme alternatives (or any alternatives) proves that this effort is plainly designed to intimidate federal workers and chill their speech.

OPM purports to justify the Proposed NDA by relying on a small handful of anecdotes related to federal employees leaking confidential information. OPM cites to news articles related to: reporters receiving drafts of OPM regulations; a "DHS whistleblower" allegedly sharing information about ICE agents; former DHS Secretary Noem's accusation that FBI agents leaked information about planned ICE raids; news outlets refraining from publishing information they received about planned attacks on Venezuela; and the leak of a draft Supreme Court opinion.

These examples do not come close to supporting the imposition of a sweeping, overly broad NDA on career civil servants across the entire federal government—and certainly not one targeting disclosure of personnel information, as none of the above examples concern such information. Further, not a single one of the examples establish that a career civil servant leaked the information, so the entire premise of the Proposed NDA—that career civil servants need to be reminded of their legal obligations—is faulty.

Moreover, as OPM acknowledges in the Notice, some NDAs exist already, and nothing about OPM's proffered examples remotely suggests that there is somehow a need for a governmentwide, standardized NDA. Nor does OPM explain how the Proposed NDA would have stopped these leaks were it in place at the time. For instance, with respect to information related to the government's raid in Venezuela, even assuming a federal employee leaked that information (which the relevant news media deny), that employee almost certainly would already have been covered by the government's NDA related to classified information. It is utterly fanciful to suggest that the additional layer of the Proposed NDA would have somehow stopped this (alleged) leak or had any discernible effect whatsoever. And the Supreme Court example is entirely irrelevant, as the Proposed NDA would not even apply to employees of the Judiciary Branch.

Finally, and most fundamentally, these limited examples of leaks (even if they did in fact occur) in no way suggest that the federal government faces a significant or widespread problem of

federal employees improperly sharing controlled information. They do not and cannot justify such an unprecedented effort that seems plainly designed to intimidate federal employees and chill their speech—a harm that injures not only federal employees, but the nation as a whole.

AFGE and AFSCME appreciate the opportunity to submit this comment and urge OPM to withdraw its Proposed NDA.² It is unlawful, unnecessary, and would impose significant harm on federal employees and the American people.

Respectfully submitted,

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² AFGE and AFSCME note that by submitting these comments, they do not waive any arguments, claims, challenges, or rights, that they may have, now or in the future, concerning any aspect of OPM’s proposal, “*Confidential Government Information Nondisclosure Agreement*,” 91 Fed. Reg. 31478 (May 27, 2026).