Unauthorized Disclosures About Prosecutorial Decision-Making and the Whistleblower Protection Act

Unauthorized disclosures about lawful prosecutorial decision-making are not likely to be protected by the Whistleblower Protection Act, because they generally will not reveal any of the categories of governmental wrongdoing that the statute identifies.

December 23, 2020

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

You have asked whether the Whistleblower Protection Act ("WPA"), 5 U.S.C. § 2302(b)(8)(A), would prohibit the Department of Justice from taking any adverse employment action against an attorney or other employee who leaks to the press confidential information concerning prosecutorial decision-making. Your question arose in connection with a leak in a particular criminal investigation. Because such leaks are a recurring problem, you have asked for more general guidance concerning the applicability of the WPA in connection with adverse employment action for leaking this kind of confidential information to the press.

The general answer is that the WPA does not protect a Department attorney or other employee who leaks confidential information about a pending criminal matter. Except when the employee reasonably believes that the disclosure reveals a violation of laws or rules, or exposes serious wrongdoing (as defined by the statute), an attorney may not invoke the WPA to avoid the consequences of publicly disclosing such information in violation of Department policies.[1] The fact that an attorney strongly disagrees with a Department decision or believes the decision to be contrary to the public interest would not itself justify protection. This conclusion is not only consistent with the plain language and judicial interpretation of the statute. It is also reinforced by the fact that prosecutorial deliberations implicate core executive functions and executive privilege. Separation of powers concerns thus militate against any interpretation of

[1] A Department attorney may have a separate ethical duty under the rules of professional responsibility to protect the disclosure of confidential information relating to the attorney's work for the Department. *See, e.g.*, D.C. Bar, Rules of Professional Conduct, Rule 1.6 (Confidentiality of Information). We do not address the bar discipline to which attorneys may be exposed if they violate this duty of confidentiality.

the WPA that would deprive the accountable Executive Branch officials of control over this information.

I.

Section 2302(b)(8)(A), as relevant here, prohibits the taking of, or threatening to take, any "personnel action" against a Department employee because of "any disclosure of information" which the employee "reasonably believes evidences (i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety," except where such disclosure is "specifically prohibited by law" or where the information is classified. 5 U.S.C. § 2302(b)(8)(A); *see also id.* § 2302(a)(2)(A) (defining personnel action). A similar provision, section 2302(b)(8)(B), governs disclosures to inspectors general and other agency officials designated to receive disclosures, and to the Office of Special Counsel.[2] In both instances, the statute makes clear that a protected "disclosure" excludes any "communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences" the kind of unlawful conduct or other wrongdoing identified in the statute. 5 U.S.C. § 2302(a)(2)(D).

The issue of leaks within the Department (and elsewhere in the federal government) is a recurring one. Department policies require employees to protect non-public, sensitive information concerning a pending investigation. *See, e.g.*, *Confidentiality and Media Contacts Policy*, Justice Manual §§ 1-7.000–.900. The Department's policies balance the competing interests in securing the right of a person under investigation to fair process and privacy, the government's ability to administer justice and to promote public safety, and the public interest in information about the Department's work. *See id.* § 1-7.001. The policies require that any disclosures to the media concerning a pending investigation be approved in advance by the appropriate United States Attorney or Assistant Attorney General.

[2] The only difference is that section 2302(b)(8)(B) does not protect a disclosure of a violation of section 2302 itself. Section 2302(b)(8)(C), on the other hand, protects disclosures to Congress using significantly different language and raises distinct issues that we do not discuss in this opinion.

See id. § 1-7.400. The policies, however, while binding on employees as an administrative matter, do not trump the WPA or satisfy its exception for disclosures "specifically prohibited by law." *See Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 384 (2015) (holding that "specifically prohibited by law" excludes disclosures prohibited by agency rules and regulations).

That said, certain aspects of prosecutorial deliberations are categorically unprotected by the WPA. The WPA does not protect a disclosure of grand-jury information, because Federal Rule of Criminal Procedure 6(e) was adopted by statute and, therefore, disclosure of such information is "specifically prohibited by law." *See* Pub. L. No. 95-78, § 2, 91 Stat. 319, 319–20 (1977); *see also Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1113 (D.C. Cir. 2007) (holding that Rule 6(e) counts as a "statute" for purposes of exemption 3 of the Freedom of Information Act because "it has been positively enacted by Congress"). In addition, as noted, the WPA does not protect disclosures involving classified information. *See* 5 U.S.C. § 2302(b)(8)(A) (exempting from protection information "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs").

II.

Apart from these categorically unprotected disclosures, whether the WPA protects a disclosure of prosecutorial deliberations will depend upon whether the employee could reasonably believe that the disclosure reflects certain kinds of unlawful or egregious conduct.

The Federal Circuit, in reviewing the administrative decisions of the Merit Systems Protection Board, has recognized that whether an individual has "a reasonable belief" that a disclosure is protected "is determined by an objective test: whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee would reasonably conclude that the actions of the government evidence wrongdoing as defined in the Whistleblower Protection Act." *Young v. MSPB*, 961 F.3d 1323, 1328 (Fed. Cir. 2020) (citing *Giove v. Dep't of Transp.*, 230 F.3d 1333, 1338 (Fed. Cir. 2000)). In most cases, including the one prompting your question, the disclosures of prosecutorial deliberations will not plausibly evidence a "violation of any law, rule, or regulation." 5 U.S.C. § 2302(b)(8)(A)(i). In such a case, the disclosure

would be protected only if the employee had a reasonable belief that it evinced "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." *Id.* § 2302(b)(8)(A)(ii).

We think that, under this standard, disclosures concerning prosecutorial deliberations and the conduct of Department investigations will usually not qualify as protected disclosures. The statute expressly does not protect "policy decisions that lawfully exercise discretionary authority" and do not evidence the wrongdoing covered by the statute. 5 U.S.C. § 2302(a)(2)(D). The decision whether to prosecute is a quintessential exercise of discretionary authority. Even if an attorney believes that the Department has brought, or has failed to bring, a prosecution against a person for a reason contrary to the public interest, such a decision will not rise to the kind of wrongdoing the disclosure of which would be protected by this portion of the statute unless the wrongdoing is so clear and significant as not to be subject to reasonable debate.

A.

A disagreement over prosecutorial decision-making or the conduct of an investigation generally does not evidence "gross mismanagement" or a "gross waste of funds." "Gross mismanagement" requires "a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission." *Embree v. Dep't of the Treasury*, 70 M.S.P.R. 79, 85 (1996). Mere "debatable differences of opinion concerning policy matters are not protected disclosures." *White v. Dep't of the Air Force*, 391 F.3d 1377, 1382 (Fed. Cir. 2004). "Rather, for a lawful agency policy to constitute 'gross mismanagement,' an employee must disclose such serious errors by the agency that a conclusion the agency erred is not debatable among reasonable people." *Id.* Even when disagreements are not debatable, they will not invariably rise to the level of importance required for protection. "The matter must also be significant." *Id.*; *see also Daniels v. MSPB*, 832 F.3d 1049, 1056 (9th Cir. 2016) (agency directive "represents a policy decision," such that communications concerning that directive "do not qualify as disclosures under the plain text of the WPA").

As with "gross mismanagement," the Merit Systems Protection Board has viewed a "gross waste of funds" to require misconduct that is "a more

than debatable" discretionary decision. *Fisher v. EPA*, 108 M.S.P.R. 296, 303 (2008). The expenditure must be "significantly out of proportion to the benefit reasonably expected to accrue to the government" and will typically reveal "blatant wrongdoing or negligence." *See id.*; *see also, e.g.*, *Ward v. MSPB*, 981 F.2d 521, 527 (Fed. Cir. 1992) (holding unprotected a disclosure about a decision to send employees to a conference abroad because "the decision whether to send" the employees "was a matter within the discretion" of agency officials).

We think that a disclosure about prosecutorial decision-making is not likely to satisfy these standards. As the Supreme Court has observed, a decision to prosecute or not "often involves a complicated balancing of a number of factors which are particularly within" the Department's expertise. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). No objective standards are readily apparent to judge any such decision to have been indisputably and egregiously incorrect. In most cases, reasonable people will be able to debate the merits of proceeding with that particular criminal prosecution, including what charges, if any, to bring; whether to continue investigating, or continue investigating other targets; whether to pursue civil or administrative actions instead of criminal charges; and so forth. It would require misconduct or a waste of resources that is serious before such a disclosure could be characterized as evidencing "gross mismanagement" or a "gross waste of funds." *Cf. Coons v. Sec'y of the Treasury*, 383 F.3d 879, 890 (9th Cir. 2004) (holding protected a disclosure that the Internal Revenue Service "processed a large, fraudulent refund for a wealthy taxpayer" under "highly irregular circumstances"). If the question may be reasonably debated by a disinterested observer with knowledge of the essential facts—as will typically be the case in the context of leaks about particular criminal matters—the disclosure of such deliberations would not be protected on these grounds.

B.

We similarly do not believe that disclosures about prosecutorial decision-making and the law enforcement investigations that precede them will generally evince an "abuse of authority" within the meaning of 5 U.S.C. § 2302(b)(8)(A)(ii). An "abuse of authority" is "an arbitrary or capricious exercise of power by a Federal official or employee that ad-

versely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." *Sanders v. Dep't of Justice*, 65 M.S.P.R. 595, 600 (1994), *aff'd,* 73 F.3d 380 (table) (Fed. Cir. 1995). Prosecutorial deliberations are neither likely to involve a Department official or employee obtaining any "personal gain or advantage" from the decision, nor to evidence an "exercise of power adversely affecting [the] rights" of someone other than the target of the investigation. *Doyle v. Dep't of Veterans Affairs*, 273 F. App'x 961, 964 n.2 (Fed. Cir. 2008). A decision not to prosecute may incidentally result in an advantage to "preferred other persons," but such a decision should generally be viewed as evidence of an *exercise* of prosecutorial authority, rather than an *abuse* of that authority. *See Hansen v. MSPB*, 746 F. App'x 976, 979, 982 (Fed. Cir. 2018) (disagreement with supervisor's personnel decisions was a "policy dispute" rather than an abuse of authority, and "[a] communication concerning policy decisions that lawfully exercise discretionary authority is not a protected whistleblower disclosure" (citation omitted)). The Department's lawful exercise of discretionary authority is not "arbitrary and capricious" simply because a person involved in the deliberations thinks the decision mistaken. The wrongdoing must not be susceptible of reasonable debate to be the kind of extraordinary misconduct the disclosure of which the WPA protects.

C.

Finally, we believe that disclosures of prosecutorial deliberations are unlikely, in most cases, to concern a "substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8)(A)(ii). For a disclosure to be protected on this ground, it must evidence a "harm" that is "likely to occur in the immediate or near future"—not a "speculative or improbable" harm that is "likely to manifest only in the distant future." *Chambers v. Dep't of the Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008). The potential consequences of any such harm must be both "substantial and specific." *Id.* A serious harm that is quite unlikely to occur, or unlikely to occur at any discernible time, is not the sort of harm that meets this standard. *See, e.g.*, *Standley v. MSPB*, 715 F. App'x 998, 1003 (Fed. Cir. 2017) (disclosures about the Department of Defense's "degradation in capability to detect nuclear blasts in space could affect public health and safety," but putative whistleblower "had not alleged quantifiable potential harm . . . to

show that such an occurrence is more than a possibility occurring at an undefined point in the future" (internal quotation marks and citation omitted)). And a harm, even if serious and imminent, that is not traceable to the action or inaction evidenced in the disclosure also would not suffice. *See, e.g.*, *Auston v. MSPB*, 371 F. App'x 96, 102 (Fed. Cir. 2010) (affirming MSPB finding that disclosure was not protected as a result of employee's "failure to make specific allegations that the alleged understaffing in the [sterile processing department of a VA hospital] was resulting in unhygienic equipment" that would pose a substantial and specific threat to public health).

Typically, a disclosure about prosecutorial decision-making will not be one that poses a "substantial and specific danger to public health or safety." As the Federal Circuit has observed:

> Law enforcement activities generally serve to increase public safety. The budget provided for law enforcement, however, limits the extent of protection. Allocating the budget to different aspects of law enforcement necessarily balances the risks and benefits affected; this balancing represents a quintessential management decision. Any such policy decision related to the allocation or distribution of law enforcement funding, therefore, could potentially be said to create a risk to public safety.

Chambers, 515 F.3d at 1368. But since Congress "did not intend . . . to categorically classify any danger arising from law enforcement" as a substantial and specific threat to public safety, additional "parameters" are needed to "define disclosure of a danger to public health or safety." *Id.*; *see also id.* ("[G]eneral criticism by an employee of the Environmental Protection Agency that the agency is not doing enough to protect the environment would not be protected under this subsection. However, an allegation by a Nuclear Regulatory Commission engineer that the cooling system of a nuclear reactor is inadequate would fall within the whistle blower protections." (quoting S. Rep. No. 95-969, at 21 (1978))). Because criminal investigations are backward-looking—focused upon whether a person has committed a criminal offense that prosecutors can establish in a criminal proceeding—prosecutorial deliberations will rarely evidence a "substantial and specific danger to public health or safety" likely to occur in the future.

III.

We therefore conclude that, under the prevailing precedent, the WPA does not protect disclosures about prosecutorial decision-making that do not involve clear evidence of wrongdoing. In addition, such disclosures implicate two constitutional considerations: the principle of unreviewable prosecutorial discretion and the separation of powers concerns arising from disclosures of information protected by executive privilege. Both concerns strongly support interpreting the WPA in a manner that would preserve the Department's ability to prevent the disclosure of prosecutorial deliberations that do not evidence serious misconduct.

A.

We have previously recognized the need to construe whistleblower statutes to avoid intruding into the realm of prosecutorial discretion, which is "a special province of the Executive," *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999). In 2005, we concluded that this principle militates against applying environmental whistleblower statutes to Department attorneys, where an Assistant United States Attorney ("AUSA") "alleges adverse employment actions arising from the [Department's] disagreement with the AUSA's recommendations concerning prosecution of environmental law violations." Memorandum for Peter D. Keisler, Assistant Attorney General, Civil Division, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of Environmental Whistleblower Statutes to Department of Justice Attorneys* at 11 (Jan. 27, 2005) ("*Environmental Statutes*"). In reaching that conclusion, we explained that "[a] whistleblower complaint arising out of a disagreement between" a prosecutor and a Department official "during a prosecutorial decisionmaking process . . . involves prosecutorial activity that lies within the exclusive province of the Executive Branch . . . . A whistleblower complaint based upon prosecutorial activities would necessarily entail review of those prosecutorial activities, and it seems inevitable that in adjudicating such a complaint the Labor Department and the courts would ultimately review the underlying prosecutorial decisionmaking process itself." *Id.* at 10.

A similar conclusion is warranted here. If the WPA generally protected disclosures about prosecutorial decision-making, it would "threaten[] to

chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Wayte v. United States*, 470 U.S. 598, 608 (1985). For this reason, courts typically "have refrained from reviewing, and have provided immunity for, prosecutorial decisions," in order to "ensure that the Executive Branch is not burdened in the performance of one of its core constitutional functions." *Environmental Statutes* at 12. Accordingly, absent any "clear statement" of congressional intent to intrude upon "traditionally sensitive areas" implicating the separation of powers, we would construe section 2302(b)(8)(A) not to reach the disclosures about prosecutorial decision-making. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (internal quotation marks and citation omitted); *Environmental Statutes* at 14.[3]

B.

We have also long viewed whistleblower provisions that inhibit the Executive Branch's power to control the confidentiality of information as raising separation of powers concerns. *See, e.g.*, *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 100 (1998). The Executive's confidentiality interest is "not limited to classified information, but extend[s] to all deliberative process or other information protected by executive privilege." *Authority of Agency Officials to Prohibit Employees from Providing Information to Congress*, 28 Op. O.L.C. 79, 80 (2004). Two aspects of such information are implicated by the disclosures at issue here.

First, disclosures about prosecutorial decision-making implicate the deliberative process component of executive privilege. That component "extends to all Executive Branch deliberations." *Assertion of Executive Privilege Concerning the Special Counsel's Interviews of the Vice President and Senior White House Staff*, 32 Op. O.L.C. 7, 9 (2008); *see also United States v. Nixon*, 418 U.S. 683, 705 (1974). It applies to "delibera-

[3] In the *Environmental Statutes* opinion, we reserved the question whether the more general WPA protections would apply to disclosures about prosecutorial decision-making. *Environmental Statutes* at 10 n.9. We do not conclude here that such disclosures are categorically unprotected, but we believe that considerations similar to those discussed in that opinion warrant construing the WPA's categories of protected disclosures narrowly to avoid trenching on executive prerogatives.

tive memoranda . . . containing advice and recommendations concerning whether or not . . . particular prosecutions should be brought," because "[t]he need for confidentiality is particularly compelling in regard to the highly sensitive prosecutorial decision of whether to bring criminal charges." *Assertion of Executive Privilege with Respect to Prosecutorial Documents*, 25 Op. O.L.C. 1, 1 (2001). The disclosure of information revealing the deliberations preceding prosecutorial or investigative decisions would impede the ability of the Attorney General and other Department decision-makers to enforce the law, by chilling "candid and confidential advice and recommendations in making investigative and prosecutorial decisions." *Id*.

Second, such disclosures are protected by the law enforcement component of executive privilege, which applies to information concerning Executive Branch investigations. *See Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 75–78 (1986). "[T]he Executive's ability to enforce the law would be seriously impaired, and the impermissible involvement of other branches in the execution and enforcement of the law would be intolerably expanded, if the Executive were forced to disclose sensitive information on case investigations and strategy from open enforcement files." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 118 (1984).[4] Unrestrained disclosures of information in law enforcement files by Department attorneys would raise these same concerns.

We thus construe section 2302(b)(8)(A) not to reach disclosures revealing either information protected by the law enforcement privilege or

[4] The deliberative process and law enforcement components of executive privilege are not absolute, but absent affirmative wrongdoing, the confidentiality interests are not likely to be overcome when they involve sensitive information about specific prosecutions. *See* Memorandum for Victor Kramer, Counselor to the Attorney General, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Amendment to 28 C.F.R. § 50.2 on Unauthorized Disclosures of Information Acquired During a Criminal Investigation* at 6 n.8 (Feb. 29, 1980) ("A Department of Justice employee may have access to information about criminal investigations, and his statements are likely to be credited by outsiders; indeed, such statements can be almost as damaging to potential defendants as an official announcement by the Department with the same content. For this reason, the Department has a substantial interest in restricting statements made by its employees about criminal investigations.").

information reflecting prosecutorial deliberations protected by the deliberative component of executive privilege. These constitutional considerations strengthen our conclusion that the protections of section 2302(b)(8)(A) will not, in most cases, reach disclosures of lawful prosecutorial decision-making that do not reveal unarguable wrongdoing within the Department.

IV.

We conclude that disclosures about lawful prosecutorial decision-making are not likely to be protected by the WPA, because they generally will not reveal any of the categories of governmental wrongdoing that the statute identifies. *See* 5 U.S.C. § 2302(b)(8)(A)(i)–(ii).

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