June 26, 2026

Joe Knouff
Suitability Director
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1900 E St. NW
Washington, DC 20415

Via Federal eRulemaking Portal, https://www.regulations.gov

RE: Docket No. OPM-2026-0100, Confidential Government Information Nondisclosure Agreement, 91 Fed. Reg. 31478 (May 27, 2026)

Dear Mr. Knouff:

As the chief law-enforcement officers of governments that investigate crimes, collect taxes, operate child-welfare services, and perform numerous other sensitive functions, we share a strong interest in safeguarding sensitive information. At the same time, we are also mindful that in our system, government employees retain First Amendment rights to discuss matters of public importance, so long as they speak as citizens and do not impede the functioning of their workplace. And in our experience as prosecutors, we have seen how public employee speech can play an important role in revealing and redressing official misconduct and breaches of the public trust.

The Office of Personnel Management's (OPM) proposed government-wide nondisclosure agreement[1] (NDA) goes well beyond what is necessary to protect sensitive information. We anticipate that this NDA would deter federal employees from exercising their constitutional rights, including their right to provide testimony in court. The NDA's broad language can be construed to prohibit federal employees from discussing matters of public concern, even when employees do not disclose sensitive information, and even when their speech does nothing to impede the operations of government.

The adoption and implementation of this proposed NDA would directly affect our States. Our States regularly work with federal agency employees on matters ranging from public health to disaster preparedness. The NDA will discourage federal employees from continuing to provide States with the information we need to carry out our duties and protect the public. And as officers of States that are increasingly subject to unlawful conduct by the federal government, we have a strong interest in ensuring that federal employees may exercise their constitutional right to speak and testify about such public matters.

We urge OPM to revisit its draft NDA and examine more targeted means of deterring unlawful disclosures that appropriately balance the need to protect genuinely sensitive

[1] *See* Confidential Government Information Nondisclosure Agreement, 91 Fed. Reg. 31478 (May 27, 2026); Off. of Pers. Mgmt., Draft Non-Disclosure Agreement (May 26, 2026), https://www.regulations.gov/document/OPM-2026-0100-0003.

information against employees' constitutional right to discuss and testify on matters of public concern.

I. The NDA's expansive language and severe penalty provisions will chill federal employee speech on matters of public concern.

The First Amendment protects public employees' right to speak as citizens on matters of public concern, so long as employee speech does not impede the functions of the workplace. This protection can extend to speech about employment-related matters. As the Supreme Court has explained, "speech by public employees on subject matter related to their employment holds special value *precisely because* those employees gain knowledge of matters of public concern through their employment," *Lane v. Franks*, 573 U.S. 228, 240 (2014) (emphasis added) (applying the test first articulated in *Pickering v. Board of Education*, 391 U.S. 563 (1968)), and the importance of such speech is "especially evident" when the employee is privy to government wrongdoing, such as "public corruption" or other significant "matter[s] of public concern," *id.* at 240–41.

OPM's NDA includes broad confidentiality language that does not acknowledge the careful balancing of interests that the First Amendment requires when public employees speak as citizens on matters of public concern. As a result, many federal employees will understand the NDA's language to prohibit a wide swath of speech, from testimony in court to cooperation with law enforcement, and including disclosures protected by the Constitution or by statute. The specific language of the NDA furthers this misunderstanding in at least three ways.

First, the NDA broadly prohibits the unauthorized disclosure of all "Confidential Government Information," however acquired and whether or not marked as confidential. NDA p.1. And it defines "Confidential Government Information" in lengthy and confusing terms that leave employees with little meaningful guidance about what is prohibited and what is not. The NDA defines "Confidential Government Information" as including:

> non-public, confidential, or proprietary information, whether or not marked as such, which may include, but not be limited to, information relating to internal agency operations, personnel matters, personally identifiable information (PII), personal health information (PHI), procurement processes, or any sensitive, pre-decisional or deliberative material that is not currently publicly available and should not be disclosed under applicable law, Federal regulation, or government-wide policy . . . .

Id.

The final clause—"should not be disclosed under applicable law, Federal regulation, or government-wide policy"—comes at the very end of the definition and could be read to modify only "sensitive, pre-decisional or deliberative information that is not currently publicly available." *See, e.g.*, *Lockhart v. United States*, 577 U.S. 347, 351 (2016) (describing the "rule of the last antecedent"). This syntax suggests that the other categories of information, like "internal agency operations" and "personnel matters," may be considered confidential regardless of whether law or regulation allow for disclosure. The same clause also says that information may be subject to the NDA if it "should not be disclosed under . . . government-wide policy," but there is no explanation of what such policies are, where they can be found, or who may issue

them. Indeed, this language suggests that the federal government may render information subject to the NDA simply by adopting a "policy" against disclosure—a blanket authorization to conceal information that goes beyond what is authorized by current law. The use of "should not" adds even more confusion, since in common parlance "should not" implies a recommended practice rather than an obligation. And finally, the term "pre-decisional and deliberative material" is a term of art corresponding to a legal privilege whose scope even "[c]ourts have struggled to precisely delineate," *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1227 (10th Cir. 2007), making it difficult for employees to understand what is prohibited and what is not.

Second, the NDA's penalties—termination, permanent debarment from federal employment, and civil and criminal penalties, *see* NDA p.2—all but ensure that the broad and confusing language of the NDA will deter employees from speaking even when their speech is protected by the First Amendment. Faced with the prospect of financial hardship and unknown civil and criminal liability if their interpretation of the NDA differs from the government's, employees will inevitably self-censor, impeding our shared desire for transparent, accountable government. As the Supreme Court has recognized, "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." *Pickering*, 391 U.S. at 574. And even where employees do not self-censor, the agreement's authorization in Section 4 ("Remedies") of "equitable relief," up to and including court orders "prohibiting disclosure of information," NDA p.3, would enable the federal government to obtain prior restraints against speech, which constitute "the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

Third, the NDA's reference in Section 3 ("Exclusions") to whistleblower protections is inadequate to cure these defects. While the NDA provides a lengthy definition of "Confidential Government Information," it only glancingly references 5 U.S.C. § 2302(b), without providing any further detail. From the text of the agreement, the typical employee (or applicant) will not know that Section 2302(b)(8)(A) protects certain disclosures to parties other than Congress or Inspectors General. Nor will they know, for example, that a statutory note added by the Whistleblower Protection Enhancement Act of 2012 protects certain disclosures of censorship related to research, analysis, or technical information. *See* Pub. L. No. 112-199, tit. I, §110(b), 126 Stat. 1465, 1471 (2012).

Nor does the NDA, in Section 3 or elsewhere, in any way acknowledge or suggest that employees' speech about matters of public concern can receive constitutional protection even when that speech is not channeled through official whistleblower procedures, such as when employees testify in court, file a lawsuit, or report their concerns to other government offices. *See, e.g.*, *Lane*, 573 U.S. at 238; *Flora v. County of Luzerne*, 776 F.3d 169, 180 (3d Cir. 2024); *Mayhew v. Town of Smyrna*, 856 F.3d 456, 468–69 (6th Cir. 2017).

Considering the NDA's expansive definition of confidential information, threats of grave consequences for violations, and lack of any language regarding disclosures permitted by the First Amendment, we expect the agreement will discourage employees from lawfully exercising their rights to speak on matters of public concern, even where the disclosure in question does not reveal sensitive information, is not proscribed by any statute or regulation, and is protected by the First Amendment.

II. The NDA's chilling effect will impact the States.

We anticipate that the NDA's chilling effect will disrupt the flow of communication between federal agencies and State agencies that is fundamental to the functioning of State-operated programs and the provision of public services to our residents.

Our States depend on the ability of federal employees to communicate freely with State agency staff about matters of shared concern. Our agencies work closely with federal partners to administer a wide range of programs upon which the public depends, including Medicaid, the Supplemental Nutrition Assistance Program, environmental programs, housing and education programs, public health monitoring initiatives, and programs related to public safety and disaster response. States administering many of these programs require data or technical expertise from federal agency staff, and State agencies regularly rely on open lines of communication with their federal counterparts to ensure smooth delivery of services and to address any potential funding or other disruptions in a timely manner.

During this Administration, however, States have often experienced disruptions to information from federal agencies on matters ranging from public data to funding plans for federal-State joint programs. *See, e.g.*, Lena H. Sun et al., *Trump Officials Pause Health Agencies' Communications, Citing Review*, Wash. Post Online (Jan. 21, 2025) (describing communications halt that "includes scientific reports issued by the CDC, . . . advisories sent out to clinicians . . . about public health incidents," and "public health data releases"); Brianna Sacks & Kevin Crowe, *Some States Denied Fire Prevention Money*, Wash. Post, May 9, 2026, at A2 (discussing consequences of abrupt halt to federal funding for State-tribal fire-hazard mitigation project). Such disruptions have interfered with State functions and have left State agencies with the difficult task of operating with incomplete data or significant operational uncertainty.

We expect the NDA to exacerbate these problems, as federal employees will feel constrained in their ability to release data to the public or respond to questions from State colleagues, lest they convey information that their employer might later deem as covered by the NDA. Although the NDA contemplates that employees may disclose information to State governments, it sharply restricts such disclosures to only those situations where doing so is "*necessary* to effectuate the duties of the Employee's position," and where "consistent with applicable law, regulations, or Agency policy." NDA p.2 (emphasis added). Employees will inevitably face uncertainty about when sharing information is "necessary" to effectuate their duties and will likely refrain from many of the routine disclosures on which State agencies rely if the employees believe a misjudgment as to the necessity of a disclosure could subject them to disciplinary action, termination, or worse. And this language places no constraint on the "polic[ies]" an agency may adopt to restrict disclosures to States, potentially creating an open-ended authorization for agencies to prohibit such disclosures at will. *Id.* at 1.

The NDA will also deter federal employees from providing the public with important information regarding unlawful acts, policies, and practices of the federal government on matters that affect our States and the public at large. As one example, federal employees have provided important non-confidential information in court that has helped the States understand and stop the Administration's unlawful efforts to dismantle federal agencies and strip protections from the federal workforce. *See Rhode Island v. Trump*, 781 F. Supp. 3d 25, 44 (D.R.I. 2025). The draft

NDA would deter many federal employees from providing such testimony, even though the Supreme Court has recognized that this type of speech is protected under the First Amendment. *See Lane*, 573 U.S. at 240. The ability of federal employees to testify freely regarding nonconfidential agency operations will continue to play a key role in keeping the courts and the public informed of the Administration's unlawful efforts, including ongoing efforts to undermine federal agencies. A governmentwide NDA should not be used to muzzle such speech, which helps to protect services upon which our States and residents rely.

III. States have been able to deter and address unlawful disclosures without using broadly worded, government-wide nondisclosure agreements.

As the Attorneys General of our States, we are mindful of the need to protect sensitive information. However, our States have been able to protect such information without resorting to expansive and broadly worded government-wide nondisclosure agreements like OPM's proposed NDA.

Like the federal government, many of our States have adopted appropriate, tailored protections to prevent the disclosure of personal information and other specific categories of sensitive information. Laws and policies such as New York's Personal Privacy Protection Law, California's Information Practices Act, and Minnesota's Government Data Practices Act serve analogous functions to the federal Privacy Act and limit the disclosure of personal information. *See* N.Y. Pub. Off. Law § 96; Cal. Civ. Code § 1798.24; Minn. Stat. § 13.05. States have also enacted tailored regulatory regimes to protect other categories of sensitive information like taxpayer data, law enforcement records, trade secrets, and other information for which there is a strong public interest against disclosure. *See, e.g.*, Cal. Rev. & Tax. Code § 19542; N.Y. Tax Law §§ 1146, 1825.

States have a variety of tools to enforce these controls on sensitive information. Such tools range from civil actions to criminal prosecution—depending upon the severity of the disclosure—and are generally enforced through public laws and policies. *See, e.g.*, Cal. Rev. & Tax. Code § 19542; N.Y. Penal Law § 195.00; N.Y. Civil Rights Law §§ 50-b, 50-c. And of course, State employers—like their federal counterparts—always have discretion to take appropriate disciplinary measures, from warnings up to termination, when an employee's public disclosures violate workplace rules and impede the work of government. *See, e.g.*, N.Y. Pub. Off. Law § 74(3)(c). In such circumstances, States must apply the *Pickering* test discussed above, which balances a public employer's interest in providing effective and efficient services against an employee's First Amendment right to free speech.

Thus, through public laws, regulations, and administrative discipline, States are able to accomplish the important goal of protecting sensitive information without having to resort to broadly worded government-wide NDAs. Indeed, some States have enacted laws or adopted policies that affirmatively restrict the use of NDAs by public entities. Colorado law, for example, prohibits State agencies from making a non-disclosure agreement a condition of employment except where necessary to prevent disclosure of one of fourteen well-defined categories of sensitive information. *See* Colo. Rev. Stat. § 24-50.5-105.5. Other States have adopted laws or policies restricting NDAs that prohibit disclosures that would be subject to state public records laws. New York's Committee on Open Government has opined that agencies may

not designate records confidential through a contract or agreement, unless those records are exempt from disclosure under the State's open records law.[2] Similarly, Massachusetts generally prohibits the use of NDAs in settlement agreements involving State agencies or employees out of the concern for "transparency requirements of the public records law."[3]

In sum, it is possible for the federal government to operate effectively and to protect sensitive information without subjecting all employees to a broad government-wide NDA, as it has long done and as many States routinely do. And there are alternative means of strengthening protection of sensitive information, such as improving employees' awareness of their obligations under statutes like the Privacy Act, or adopting narrower agreements limited to employees who have access to specific and clearly defined categories of sensitive information like taxpayer data. The widespread adoption of the type of sweeping and punitive NDA that OPM proposes would chill constitutionally protected speech across the federal government and stem the flow of information on which States depend to carry out their work and vindicate their legal interests. We urge OPM to reconsider its proposal.

Sincerely,

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[2] N.Y. Dep't of State, Comm. on Open Gov't, Adv. Op. No. FOIL-AO-17328 (Aug. 26, 2008), https://docsopengovernment.dos.ny.gov/coog/ftext/f17328.html.
[3] Office of Gov. of Mass., Memorandum to Executive Branch Offices and Agencies re: Executive Department Settlement Policy 2 (Jan. 27, 2025), https://www.mass.gov/doc/executive-department-settlement-policy/download.

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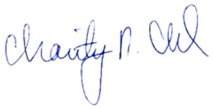

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