Unequal treatment for data breach culprits puts info at risk

There is no question now that the federal government is struggling to keep sensitive personal information under wraps. A recent Government Accountability Office study found that in fiscal year 2012, federal agencies reported over 22,100 data breaches involving personally identifiable information (PII) – up 111 percent from three years earlier. While the GAO identified several sources of data breaches, ranging from the inadvertent loss of paper documents or portable electronic devices to cyber attacks waged by hackers or foreign nations, I remember hearing cases at the Merit Systems Protection Board (MSPB) about another type of source: federal employees who use other employees' confidential personnel records to support Equal Employment Opportunity (EEO) complaints.Agencies that selectively impose discipline on employees who cause data breaches, whether accidentally or intentionally, should be especially worried about this last type of source. Due to a 2012 MSPB decision, federal employees who use or remove official government documents to support EEO complaints may be able to evade discipline. This PII pickle stems from the fact that an agency's attempt to discipline an employee who uses confidential personnel records during the EEO process can be perceived as unlawful retaliation. That was the main issue in Smith v. Department of Transportation (2007).Smith involved a Federal Aviation Administration management and program analyst who claimed the agency discriminated against him because of his race in violation of Title VII of the Civil Rights Act when it did not select him for a supervisory program analyst position. While the complaint was being investigated, the complainant claimed he received an anonymously sent envelope containing information pertaining to the selected candidate's EEO files. The selected candidate had claimed he was Native American to get the supervisory position, but he had identified himself as white in an EEO complaint he filed while in another position. The complainant provided this information to the EEO investigator and his attorney and later destroyed the anonymous letter.During the disposition process, the selected candidate began to suspect his EEO complaints had been compromised. At his request, the agency conducted an internal investigation. It resulted in a 30-day suspension for the complainant based on the charges of 1. "unauthorized use of official government information"; 2. "unauthorized use of official government documents obtained through government employment"; 3. "unauthorized removal and possession of a personal government document"; and 4. "misstating information for another's government claim." He appealed this adverse action to the MSPB.The appellant claimed this suspension was a retaliatory act for his prior EEO contact. An MSPB administrative judge did not sustain any of the charges and found the suspension to be retaliatory. However, the Board – while I was chairman – reversed the administrative judge's refusal to sustain the three unauthorized use and removal charges. It found the suspension was not retaliatory, noting that "this is not a situation where the appellant innocently came across information which supported his discrimination claim" and "[t]he appellant cannot rely upon the anti-retaliation provisions as an

insurance policy or a license to flaunt agency rules.” In a concurring decision, I said, “Nothing in Title VII of the Civil Rights Act, and nothing in the rules governing federal-sector EEO complaints, indicates that an employee who works in the human resources field should have an advantage when he files his own EEO complaint because he has access to the confidential personnel records of other employees.”Following the MSPB’s decision, the appellant filed a petition for review with the EEOC, where he raised a disparate treatment claim. While the agency provided examples of two employees who were disciplined for disclosing information in violation of the standards of conduct while prosecuting their EEO complaints, evidence emerged that it had not disciplined another employee who had engaged in similar misconduct but who had not engaged in prior protected EEO activity. The agency said it had disciplined employees for similar violations that occurred outside of the EEO process, but it provided no further information to support that claim.The EEOC in 2012 found the agency’s refusal to comply with an order to provide comparative treatment information was enough to establish pretext for a retaliation claim. Disagreeing with the MSPB’s decision, the Commission referred the case back to the Board. Concurring with and adopting the EEOC’s decision, the Board ordered the agency to cancel the appellant’s suspension and provide him with back pay and benefits.I maintain, as I did in 2007, that an employee does not have a right to “disclose confidential records that did not pertain directly to him and that were not available to employees outside the human resources office.” The challenge for agencies lies in finding a “happy” medium for disciplining employees who improperly disclose government information while in the EEO process and others who are outside of that process. A failure to do so may encourage EEO complainants to skirt standards of conduct, putting other employees’ confidential records at risk.Neil McPhie is the Director of Legal Services for Tully Rinckey PLLC and the former chairman of the U.S. Merit Systems Protection Board. He concentrates his practice in federal sector employment and labor law and can be reached at info@fedattorney.com.

