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Report to the Chairman, Committee on
Post Office and Civil Service
House of Representatives

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WHISTLEBLOWER PROTECTION

Agencies' Implementation of the Whistleblower Statutes Has Been Mixed



148812



General Government Division

B-249139

March 5, 1993

The Honorable William L. Clay
Chairman, Committee on Post Office
and Civil Service
House of Representatives

Dear Mr. Chairman:

This report discusses how 19 federal agencies have implemented the whistleblower statutes, employee coverage under the statutes, and agencies' views on the effectiveness of the Whistleblower Protection Act of 1989. The report is a partial response to a request by the former Chairman of the Subcommittee on the Civil Service, House Committee on Post Office and Civil Service, that we review the federal government's processing of whistleblower reprisal complaints and the Office of Special Counsel's (OSC) effectiveness in protecting whistleblowers from reprisal. Appendix I gives the details on our objective, scope, and methodology.

Results in Brief

There were wide disparities in how the 19 agencies we reviewed have implemented the whistleblower statutes. Some agencies had informed employees about their whistleblower protection rights, but most agencies had neither informed their employees nor developed policies and procedures for implementing the Whistleblower Protection Act of 1989.

We also found that not all federal employees were protected against reprisal by the whistleblower statutes. Moreover, the 19 agencies we surveyed had mixed views on the effectiveness of the act.

Background

Congress first provided statutory protection for whistleblowers in the Civil Service Reform Act of 1978 (P.L. 95-454). The act was designed to encourage disclosures of fraud, waste, or abuse by providing protection from reprisal to employees, former employees, or applicants who made such disclosures.

In the years following passage of the act, Congress found that the law had little impact on encouraging federal employees to blow the whistle and did not protect employees from reprisals. As a result, Congress enacted the Whistleblower Protection Act of 1989 (P.L. 101-12) to strengthen and improve whistleblower protection. The 1989 act, among other things, separated OSC from the Merit Systems Protection Board and established

OSC as an independent agency responsible for protecting federal employees, especially whistleblowers, from prohibited personnel actions. OSC is responsible for investigating employee complaints of whistleblower reprisal and, when reprisal is found, initiating corrective and disciplinary actions.

Other changes by the Whistleblower Protection Act of 1989 to help whistleblowers included

- easing the employee's burden of proof that reprisal for whistleblowing had occurred,
- allowing employees to file appeals with the Merit Systems Protection Board if they did not obtain relief through OSC, and
- expanding the definition of a whistleblower-related prohibited personnel practice to include a threat to take or fail to take a personnel action.

Under 5 U.S.C. 2302(c), the head of each department and agency is responsible for the prevention of prohibited personnel practices, including whistleblower reprisal. However, no legal requirement exists in the whistleblower statute (5 U.S.C. 1201 et seq.) for agencies to inform employees about their right to protection from reprisal for whistleblowing.

OSC has attempted to spread the word about employees' rights to be protected from reprisal. It participates in federally sponsored seminars and workshops, even though the law does not require OSC to do so. However, OSC officials acknowledged that they have had limited success in eliciting agency support for informing employees about their rights under the law and how to go about exercising them.

In addition to this report, we have reported to the former Chairman of the Subcommittee on the Civil Service on (1) federal employees' awareness of whistleblower protection and willingness to report government misconduct and (2) the effectiveness of the Whistleblower Protection Act of 1989 in strengthening and improving protection for whistleblowing.¹ In the future, we will also be reporting on our survey of federal employees who have sought whistleblower protection from OSC.

¹The two previous reports were Whistleblower Protection: Survey of Federal Employees on Misconduct and Protection from Reprisal (GAO/GGD-92-120FS, July 14, 1992) and Whistleblower Protection: Determining Whether Reprisal Occurred Remains Difficult (GAO/GGD-93-3, Oct. 27, 1992).

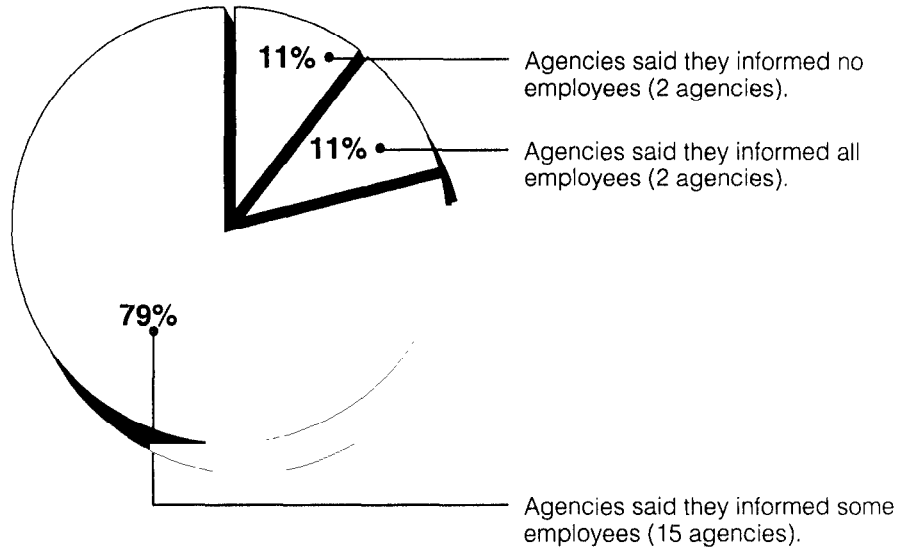
There Is Wide Disparity in How Agencies Inform Employees of Their Whistleblower Rights

Most of the 19 agencies we reviewed were not informing all employees about their whistleblower rights. Two agencies (77,272 employees) said that they informed all employees about the whistleblower statutes. Fifteen agencies (963,869 employees) said that they informed certain groups of employees, such as new employees or legal staff, or made information available to their employees upon request. Two agencies (1,102,438 employees) said that they did not inform their employees about the statutes. Figure 1 summarizes agency responses on their employee educational efforts.

The two agencies that informed all employees about their whistleblower rights did so through poster displays or bulletins addressed to all employees. For example, one agency said it sent an annual reminder to all employees about its policy prohibiting reprisal for whistleblowing.

Rather than giving whistleblower information to all employees, 15 agencies provided information to certain groups of employees, such as legal staff, new employees, or those in labor unions. For example, one agency said it made employees aware of their whistleblower rights by including whistleblower information in bargaining agreements and ad hoc briefings to legal staff. Another agency said that its educational efforts about employee whistleblower rights consisted of an all-day exhibit to inform employees about hotlines, including the whistleblower hotline. A third agency said that whistleblower information was provided in agency handbooks distributed to new employees or to any employee upon request. However, we noted that the latest edition of the handbook was dated 1988—before the Whistleblower Protection Act of 1989.

Figure 1: Agencies' Efforts to Inform Employees About the Whistleblower Statutes Were Mixed



Note: Total does not equal 100 percent because of rounding.

The information we obtained from these agencies is consistent with the information we obtained from employees in a governmentwide survey. In July 1992, we reported that about 76 percent of federal employees had not or did not know if they had received information from their agency about their right to protection from whistleblower reprisal.² Further, about 73 percent said that they had “some” to “little or no” knowledge about how the Whistleblower Protection Act of 1989 protected them against reprisal.

Federal agencies are not required by the whistleblower statutes to inform employees of where to report government wrongdoing or their rights to protection from whistleblower reprisal. We believe that employees should be informed about their whistleblower rights. The whistleblower statute was aimed at encouraging employees to report cases of wrongdoing without reprisal. In our October 27, 1992, report, on the basis of preliminary results of our work at 14 of the 19 agencies, we suggested that Congress consider amending the statute to require agencies to provide employees with information about the statute and where to report wrongdoing.

²GAO/GGD-92-120FS.

Few Federal Agencies Have Issued Policies and Procedures to Prevent Reprisals Under the Whistleblower Protection Act of 1989

Although the whistleblower statutes place the responsibility on agency heads to prevent whistleblower reprisal, as of September 1992, 14 of the 19 agencies had not issued policies or procedures to implement the provisions of the 1989 act. Officials at 6 of the 14 agencies told us that they had never issued policies or procedures that cover whistleblower protection, officials at 7 agencies said that policies or procedures implemented before the 1989 act were adequate, and an official at 1 agency said that the agency began revising its policy and procedures during our review.

One agency informed us that a regulation on standards of conduct, issued in 1981, was considered adequate to implement the 1989 act. The regulation requires employees to report reprisal to the Inspector General for review and investigation. However, unlike the whistleblower act, it does not identify OSC or the Merit Systems Protection Board as an avenue for addressing allegations of reprisal.

Five agencies had developed policies and procedures to implement the 1989 act. For example, one agency issued an annual employee letter stating its policy about prohibited personnel practices, including whistleblower reprisal, and employee responsibilities and conduct. Another agency published an employee handbook in 1990 that noted that reprisal for whistleblowing was prohibited and provided information about how to report incidents of reprisal.

All Employees Are Not Covered by the Whistleblower Statutes

All federal employees are not covered by the whistleblower statutes. For example, Congress specifically excluded certain agencies and employees from specific civil service provisions of Title 5 of the U.S. Code with the passage of the Civil Service Reform Act of 1978. One of the specific exclusions was protection against prohibited personnel practices, including whistleblower reprisal. Additionally, some agencies' enabling legislation has been interpreted to exclude all or some of their employees from the civil service provisions of Title 5; hence, they are not covered under the whistleblower statutes.

Within the executive branch, for example, the whistleblower statutes generally cover employees in executive branch agencies and the Government Printing Office.³ However, 5 U.S.C. 2302(a)(2)(B) specifically excludes employees in policymaking or confidential positions (such as

³Military personnel are separately covered under the Military Whistleblower Protection Act (10 U.S.C. 1034). See *Whistleblower Protection: Impediments to the Protection of Military Members* (GAO/NSIAD-92-125, May 27, 1992).

noncareer Senior Executive Service and Schedule C employees) and positions that the President determines are "necessary and warranted by conditions of good administration." Another provision of section 2302 also excludes the U.S. Postal Service and specific executive agencies relating to intelligence activities and government corporations. Intelligence agencies include the Federal Bureau of Investigation and the Central Intelligence Agency. Government corporations include the Federal Deposit Insurance Corporation and the Resolution Trust Corporation.

In addition to those positions and executive agencies specifically excluded in the whistleblower statutes, employees in some other agencies are not covered for various other reasons, including the agency's enabling legislation.

Because we knew that the whistleblower statutes did not cover employees governmentwide, we attempted to obtain information on the total number of employees not covered and found that such information was not available. Accordingly, we requested this information from each of the 19 agencies in our review. These agencies identified over 220,000 employees in positions not covered by the whistleblower statutes, including about 2,460 employees in policymaking positions. Five agencies identified about 218,000 employees who were hired under provisions other than the civil service provisions of Title 5 of the U.S. Code; hence, they were not covered under the whistleblower provisions of Title 5. One agency, the Department of Defense, had over 134,500 employees who were not covered under the whistleblower statutes because they were employed with nonappropriated funds.

Another agency, the Department of Veterans Affairs, had about 76,400 medical employees not covered under the whistleblower statutes because they were hired under Title 38 rather than Title 5 of the U.S. Code. The Merit Systems Protection Board, in two cases,⁴ said that medical employees hired under Title 38 were subject to the internal disciplinary rules of the Department of Medicine and Surgery. In one of the cases, the Board said that medical employees were specifically afforded less protection than that provided under the Civil Service Reform Act of 1978 from which whistleblower protection emanates. The Board concluded that the Whistleblower Protection Act of 1989 contained no provision altering the rule that medical employees lacked the protection afforded most civil service employees, including whistleblower protection. Appendix II

⁴Gladys Davis v. Department of Veterans Affairs, Docket No. SF122191W0119, August 28, 1991, and William Alvarez v. Department of Veterans Affairs, Docket No. SF122191W0074, August 28, 1991.

provides a listing of the number of positions identified by the 19 agencies as not being covered by the whistleblower statutes.

In addition to the financial regulatory corporations mentioned earlier (the Federal Deposit Insurance Corporation and the Resolution Trust Corporation), which are exempted by the whistleblower statutes, employees of the Federal Reserve Board of Governors are exempted by the Federal Reserve Act. Employees at these three agencies receive some whistleblower protection under the Federal Deposit Insurance Corporation Improvement Act of 1991 (P.L. 102-242). It protects employees from reprisal if they report a violation of any regulation by the depository institutions or any director, officer, or employee of the institutions to the regulating agency or the Attorney General. However, this act provides less protection than the whistleblower statutes in several ways: (1) it does not give employees any avenues for appeal to OSC or the Merit Systems Protection Board of agency rulings in cases of reprisal, (2) it does not cover applicants and, except for the Resolution Trust Corporation, former employees, and (3) the definition of whistleblower reprisal does not include employers who threaten to take or not take a personnel action against employees.

Because of specific exclusions detailed in the whistleblower statutes dating to the 1978 Civil Service Reform Act and agency legislation that may have been interpreted to exclude employees from protection, a number of federal employees are not covered by the whistleblower statutes. Therefore, we believe an assessment is needed as to whether employees not afforded whistleblower protection have rights similar to employees who can seek assistance under the whistleblower statutes and, if not, whether such protection should be granted. The lack of comprehensive information on positions not covered under the whistleblower statutes precludes such an assessment from being made.

Agencies Have Mixed Views About the Effectiveness of the 1989 Act

Most of the 19 agencies believed to varying degrees that the Whistleblower Protection Act of 1989 strengthened and improved employee protection. However, at least 13 of the 19 agencies also said that they had no basis on which to judge whether the 1989 act had prevented reprisal or eliminated wrongdoing. Table 1 summarizes the agencies' views on the effectiveness of the 1989 act.

Table 1: Agencies' Views on the Effectiveness of the Whistleblower Protection Act of 1989

Purpose of the act	Little or no extent	Some extent	Moderate extent	Great extent	No basis to judge
Strengthened employee rights	1	2	4	6	6
Improved employee rights	2	2	4	5	6
Prevented reprisal against employees who blew the whistle	3	2	1	0	13
Eliminated wrongdoing	3	1	1	0	14

We also asked the 19 agencies what problems, if any, the 1989 act had created concerning the efficient execution of their management functions. Nine agencies said that the act has had, or could have, negative effects on their ability to manage operations. They cited problems such as the statute preventing them from taking legitimate adverse personnel actions, which could lead to frivolous claims of reprisal for whistleblowing and increase administrative costs for defending against those claims. One agency stated that the act had been used as a shield by employees with conduct and performance problems and on occasion may have promoted inefficiency and wrongdoing by making it more difficult for managers to deal effectively with problem employees.

When asked if, and if so what, statutory changes were needed to further improve protection while maintaining the agency's ability to manage, two agencies recommended legislative changes to improve their ability to deal with legitimate personnel problems while still protecting employees against reprisal. These agencies would like the statute amended to limit the time an employee has to file a whistleblower complaint and to require that the employee raise all claims concerning a single incident in one appeal process.

Conclusions

Agencies' implementation of the whistleblower statutes has been mixed. Some agencies in our review had informed all of their employees, while others had yet to inform any. Further, most agencies had not developed policies and procedures to implement the whistleblower statutes. We believe that if employees had adequate knowledge about the whistleblower statutes and understood the federal government's policy toward whistleblowing, they might be more willing to report cases of fraud, waste, and abuse.

On the basis of our work at the 19 agencies, we believe the recommendation we made in our October 27, 1992, report remains

valid—to amend the whistleblower statutes (5 U.S.C. 1201 et seq.) to require agencies, with osc’s guidance, to inform employees periodically on their rights to protection from reprisal and where to report misconduct. We also believe that the development of agency policies and procedures for preventing whistleblower reprisal goes hand in hand with providing such information to employees. Employees need to know that their agency heads will support those individuals who report fraud, waste, and abuse and how they will be protected from adverse actions when speaking out.

Whistleblower protection through osc is afforded to most employees in the executive branch; however, certain agencies and employees are not covered by either the whistleblower statutes or other statutes. Because osc does not have comprehensive information on positions not covered by the whistleblower statutes, we believe the various agencies that employ such individuals should provide this information to osc. This step is necessary in order to make an assessment as to whether whistleblower protection afforded under the whistleblower statutes should also be provided to these excluded federal employees.

osc already has primary responsibility for protecting employees under the whistleblower statutes and recommending to Congress any changes it considers appropriate (5 U.S.C. 1218). Therefore, we believe osc is the logical choice to take the lead in assessing the adequacy of employee coverage.

Recommendation to the Committee

We recommend that the Committee amend the whistleblower statutes (5 U.S.C. 1201 et seq.) to require agencies, with osc’s guidance, to develop policies and procedures for carrying out the provisions of the whistleblower statutes.

Recommendation to the Special Counsel

We recommend that the Special Counsel, with agencies’ assistance, assess whether whistleblower protection coverage needs to be extended to those positions currently not covered by the whistleblower statutes and recommend any coverage changes to Congress.

OSC’s Comments and Our Evaluation

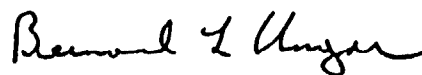
We discussed the information in this report with osc officials, and they generally agreed with our findings. The officials cited osc’s past efforts to inform employees of their rights, and we have made changes in the report to reflect such efforts.

OSC officials also generally agreed with the recommendation to amend the whistleblower statutes but expressed concern with our recommendation to OSC that it would have to determine who is not covered under the whistleblower statutes. We agreed with the OSC officials that the agencies should take an active role in identifying employees not covered, and we have modified our recommendation accordingly. The OSC officials (1) believed that agencies should be involved in identifying their employees not covered under the whistleblower statutes and (2) rightfully noted that OSC does not have the final say on who is not covered. The officials pointed out that the Merit Systems Protection Board or the U.S. Court of Appeals for the Federal Circuit could reverse any coverage determinations made by the agencies or OSC.

As agreed with the Committee, we plan no further distribution of the report until 30 days after its issue date, unless you publicly announce its contents earlier. At that time, we will send copies to OSC, the departments and agencies that participated in the survey, and other interested parties. We will also make copies available to others upon request.

The major contributors to this report are listed in appendix III. If you have any questions about this report, please contact me on (202) 512-5074.

Sincerely yours,



Bernard L. Ungar
Director, Federal Human Resource
Management Issues

Objective, Scope, and Methodology

In response to a request from the former Chairman of the Subcommittee on the Civil Service, House Committee on Post Office and Civil Service, our objective was to determine how the federal government was implementing the whistleblower statutes. To do this, we sent a questionnaire to all departments and those agencies with 6,000 or more employees covered by the statutes to determine

- whether federal agencies informed employees about the statutes and the protection it provides,
- whether agencies had adopted policies and procedures to implement the statutes,
- the extent to which all employees were covered, and
- agency views about the Whistleblower Protection Act of 1989.

We requested and reviewed the same information from all 19 of the agencies and requested a consolidated response from each agency covering all its various components. We did not verify the data provided by the agencies.

To assess whether certain agencies not covered by the whistleblower statutes offered whistleblower protection, we reviewed pertinent legislation and interviewed officials from three federal financial agencies: the Federal Reserve Board of Governors, Resolution Trust Corporation, and Federal Deposit Insurance Corporation.

The findings in this review apply only to the agencies surveyed and cannot be projected governmentwide. The 19 agencies we reviewed employed about 2.1 million employees (70 percent of the civilian workforce) in the executive branch. Table I.1 lists the agencies and number of employees as of May 1992. Our work was done between March and September 1992 in accordance with generally accepted government auditing standards.

Appendix I
Objective, Scope, and Methodology

Table I.1: Number of Civilian Employees at 19 Federal Departments and Agencies, May 1992

Agency	Number of employees
Department of Agriculture	124,855
Department of Commerce	37,485
Department of Defense	1,006,730
Department of Education	5,083
Department of Energy	20,800
Department of Health and Human Services	132,301
Department of Housing and Urban Development	13,910
Department of Justice	95,708
Department of Labor	17,966
Department of State	26,164
Department of the Interior	83,533
Department of the Treasury	168,970
Department of Transportation	70,400
Department of Veterans Affairs	259,472
Environmental Protection Agency	18,298
General Services Administration	21,105
National Aeronautics and Space Administration	25,638
Office of Personnel Management	6,872
U.S. Information Agency	8,289
Total	2,143,579

Source: The Office of Personnel Management's Federal Civilian Workforce Statistics, Employment and Trends as of May 1992.

Employees Identified by 19 Agencies as Not Covered by the Whistleblower Statutes

Agency	Number of employees
Department of Agriculture	284
Department of Commerce	613 ^a
Department of Defense	134,670 ^b
Department of Education	168
Department of Energy	123
Department of Health and Human Services	6,748 ^c
Department of Housing and Urban Development	107
Department of Justice	351 ^d
Department of Labor	106
Department of State	299
Department of the Interior	117
Department of the Treasury	94
Department of Transportation	95
Department of Veterans Affairs	76,395 ^e
Environmental Protection Agency	60
General Services Administration	54
National Aeronautics and Space Administration	9
Office of Personnel Management	18
U.S. Information Agency	51
Total	220,362

^aIn addition to the 207 employees specifically excluded by the statutes, the Commerce Department identified 406 Uniformed Service Officers exempted by 5 U.S.C. 5102 (c)(8).

^bIn addition to the 153 employees specifically excluded by the statutes, the Department of Defense identified 134,517 nonappropriated fund employees exempted by 5 U.S.C. 5102 (c)(14).

^cIn addition to the 152 employees specifically excluded by the statutes, the Department of Health and Human Services identified 6,596 Health Corps employees exempted by 42 U.S.C. 204.

^dIn addition to the 334 employees specifically excluded by the statutes, the Department of Justice identified 17 U.S. Trustees whose status under the statute is currently in litigation.

^eIn addition to the 26 employees specifically excluded by the statutes, the Department of Veterans Affairs identified 76,369 medical personnel exempted because they were hired under 38 U.S.C. 7401.

Source: Agencies cited.

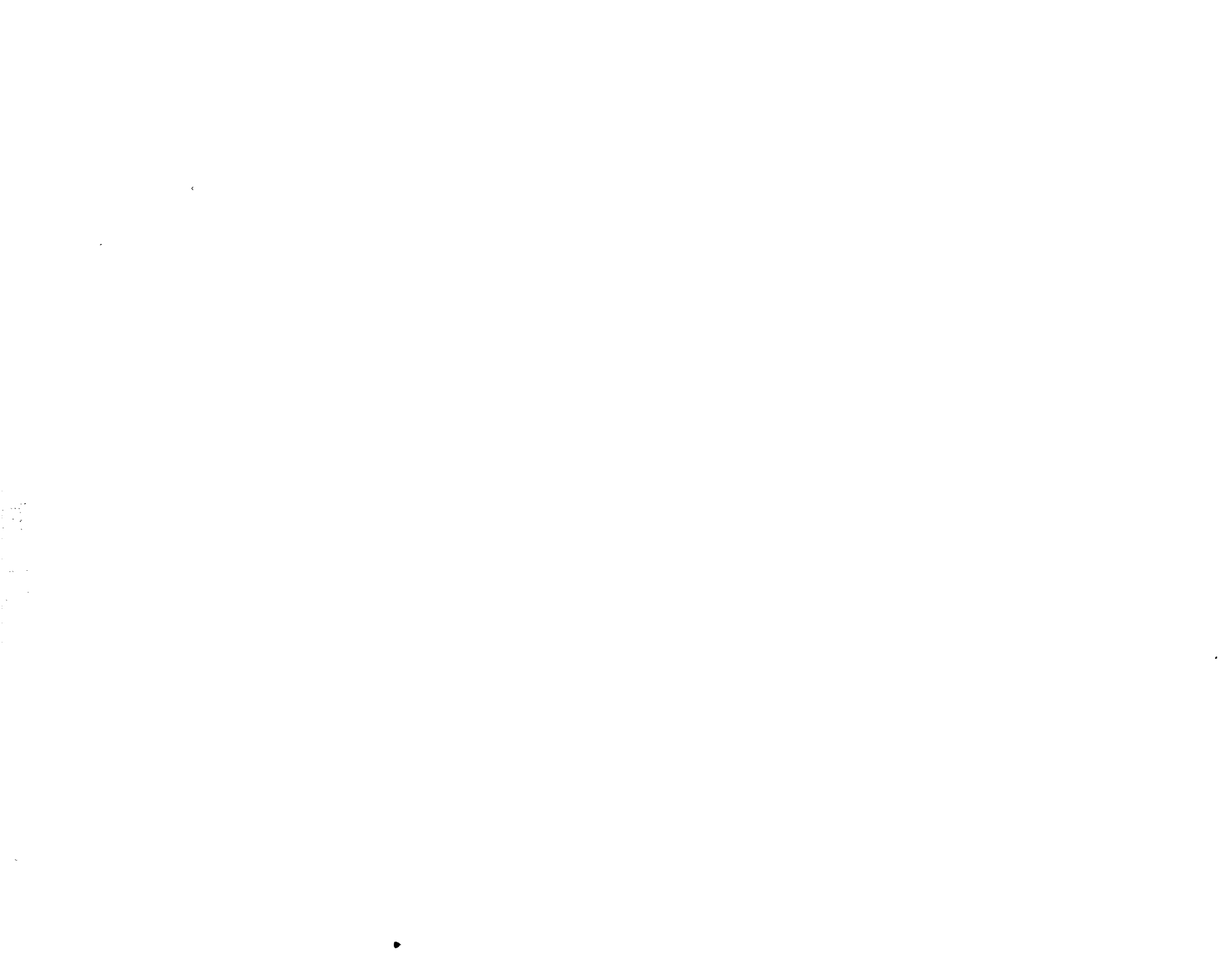
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