

Calendar No. 264

113TH CONGRESS }
1st Session }

SENATE

{ REPORT
113-128

GOVERNMENT ACCOUNTABILITY OFFICE
IMPROVEMENT ACT

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

H.R. 1162

TO AMEND TITLE 31, UNITED STATES CODE, TO MAKE
IMPROVEMENTS IN THE GOVERNMENT ACCOUNTABILITY OFFICE



DECEMBER 17, 2013.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

39-010

WASHINGTON : 2013

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Mr. CARPER, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany H.R. 1162]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (H.R. 1162) to amend title 31, United States Code, to make improvements in the Government Accountability Office, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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I. PURPOSE AND SUMMARY

H.R. 1162, the Government Accountability Office Improvement Act, responds to efforts by the executive branch to restrict the ability of the Government Accountability Office (GAO) to aid Congress in performing its oversight functions. GAO is a legislative branch agency that helps Congress by, among other things, investigating federal agencies' implementation of federal programs. The bill both confirms and enhances GAO's investigative powers by putting a statutory stop to several steps taken by the executive branch to curtail GAO's authority.

Specifically, it makes clear that the Comptroller General (the head of GAO) has standing to pursue litigation to compel access to

federal agency information; GAO has the right to make and retain copies of agency records; GAO can administer oaths to witnesses when conducting certain types of investigations; and GAO has the authority to access specific categories of records that have been denied to GAO by the Department of Health and Human Services and the Food and Drug Administration. H.R. 1162 also confirms GAO's responsibility to protect sensitive information and requires GAO to prescribe the policies necessary to protect proprietary or trade secret information from public disclosure.

II. BACKGROUND AND NEED FOR THE LEGISLATION

In order to carry out its constitutional responsibilities, Congress must have information sufficient to determine the need for future federal legislation, as well as information about how current federal programs are working. Congress often relies on GAO to help seek, process and analyze that information. GAO evaluates federal programs and activities, and it informs Congress, executive agencies, and the public whether the government and those involved in implementing federal programs are doing their jobs well or are instead running federal programs in a manner that makes them vulnerable to waste, fraud, abuse, and mismanagement. GAO's audits, evaluations and reports provide reliable assessments as to whether the taxpayers are receiving full value from important government programs.

To carry out this role, Congress long ago gave GAO a statutory right of access to information and records in the possession of federal agencies.¹ Although GAO has faced sporadic executive branch resistance throughout its history, several recent efforts by the executive branch have more significantly jeopardized GAO's ability to give Congress the information it needs to legislate effectively, conduct meaningful oversight, and audit the use of appropriated funds. Because existing law provides sufficient authorization for GAO to obtain executive branch information, this denial of information is unjustified. H.R. 1162 is intended to increase the effectiveness of GAO by ensuring that GAO is not unreasonably restricted in its efforts to secure necessary information in the course of performing its auditing and investigative functions for Congress.

STANDING TO BRING CIVIL ACTION TO COMPEL PRODUCTION OF MATERIAL

To begin with, H.R. 1162 responds to a judicial decision that threw into doubt GAO's authority to compel production of material from the executive branch.² In 1980, Congress passed legislation authorizing the Comptroller General to "bring a civil action in the district court of the United States for the District of Columbia to require the head of the agency to produce a record[.]"³ In February 2002, GAO sought to use that authority after then-Vice President Cheney's energy task force refused to give GAO records it requested. The U.S. District Court for the District of Columbia dismissed GAO's suit.⁴

¹ 31 U.S.C. § 716.

² *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002).

³ Pub. L. No. 96-226, codified at 31 U.S.C. 716(b)(2).

⁴ *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002).

In dismissing GAO's lawsuit, the Court did not rule on the merits of GAO's statutory authority to conduct this particular audit or to obtain access to the records in question. Rather, the Court held that the Comptroller General did not have standing to file the lawsuit, finding that the Comptroller General did not suffer an "injury in fact." The Court found that the Comptroller General suffered no institutional injury because the Comptroller General, acting as an agent of Congress, could suffer only the same injury as Congress and that Congress's injury was too "vague and amorphous" to confer standing.⁵

The decision in *Walker v. Cheney* is inconsistent with Congress's intended role for the Comptroller General as embodied in GAO's authorizing statute. The decision undermines GAO's ability to successfully carry out the investigative responsibilities delegated to it by Congress, as well as Congress's constitutional prerogatives to determine how best to carry out its oversight responsibilities. Both GAO and Congress face cognizable injury when the Comptroller General is denied access to agency records sought to fulfill his statutory mission to inform Congress. This "informational" injury is sufficient to satisfy the constitutional requirement of a justiciable "case or controversy" to enable the Comptroller General to pursue a civil action to enforce GAO's statutory right to access agency records to fulfill its reporting responsibilities to Congress. H.R. 1162 reaffirms and makes explicit the authorization that Congress gave to the Comptroller General to redress the injury-in-fact sustained when agencies improperly withhold material from GAO by initiating a lawsuit without the need for additional approval.

It is this Committee's expectation that before pursuing such litigation the Comptroller General will, as he did prior to filing *Walker v. Cheney*, first exhaust other avenues that are available to obtain the necessary information. Should such attempts fail, however, it is the intention of Congress to allow the Comptroller General to seek a judicial remedy to enforce GAO's right to information under the law.

STATUTORY RIGHT TO MAKE AND RETAIN COPIES OF AGENCY RECORDS

H.R. 1162 also reaffirms that GAO has the statutory right not only to inspect agency records,⁶ but also to make and retain copies of agency records. A number of court precedents have established that the statutory right to inspect a record implies the right to inspect them in an effective manner, which would include the copying of documents.⁷ In order for GAO to effectively carry out its statutory responsibilities, it is necessary for GAO to make and retain copies of such records. At times, however, GAO has found its audit, evaluation, and investigative efforts frustrated and delayed by agencies that insist that GAO review records only on site without making copies, even in situations that do not involve sensitive information or any other practical justifications for denying GAO the ability to copy necessary records. Accordingly, H.R. 1162 specifies that GAO has a right to make and retain copies of records.

⁵Id. at 67.

⁶31 U.S.C. § 716(a).

⁷See *Westside Ford, Inc. v. United States*, 206 F.2d 627, 634 (9th Cir. 1953); *Riley v. McGarry*, 248 F. Supp. 545 (D. Mass. 1966).

EXPANDING GAO'S AUTHORITY TO ADMINISTER OATHS

H.R. 1162 further strengthens GAO's investigative powers by expanding the Comptroller General's authority to administer oaths. Presently, the Comptroller General may administer oaths only "when auditing and settling accounts."⁸ When GAO was established in 1921 as the General Accounting Office, its principal focus was auditing accounts, but that is no longer the case. Congress has since called upon the Comptroller General to perform many other audit, investigative, and evaluative roles. These roles periodically entail situations involving potential fraud or attempts to defraud the United States or irregularities or misconduct of an employee or agent of the United States. The government has a critical interest in obtaining truthful and complete testimony from those with whom GAO speaks in the course of such investigations. Authorizing GAO to administer oaths in such cases will ensure that those talking to GAO fully understand the importance of truthful testimony as well as the potential consequences to themselves if they do not truthfully testify. When investigating such matters, the ability to administer oaths can be an important tool for the Comptroller General to accomplish GAO's work for Congress.

GAO ACCESS TO SPECIFIC AGENCY RECORDS

Finally, H.R. 1162 addresses longstanding problems GAO has faced with certain federal agencies that have resisted GAO scrutiny. The Department of Health and Human Services (HHS) and its component agency, the Food and Drug Administration (FDA), in particular have asserted that the failure of their authorizing statutes specifically to identify GAO as an approved recipient of documents acts as an implicit exception to the broad authorization GAO's governing statute gives it to obtain agency material. The bill adds a new section 721 to title 31 of the U.S. Code that makes clear that GAO's governing statute trumps the agency-specific ones, affirming GAO's existing right to access information at the HHS and the FDA.

As an example of the problems GAO has encountered, HHS has construed the Social Security Act as precluding GAO access to the National Directory of New Hires, a database of employment information critical to investigations of fraud in certain Social Security Act programs, because GAO is not expressly listed as an authorized recipient of the data. Subsection (a) of the new section 721 would prohibit HHS from denying or limiting GAO's access to any material merely because governing statutes do not expressly identify GAO as a recipient of information or provide for its access to information, thereby confirming GAO's existing statutory right of access in these types of cases.

Similarly, the FDA has construed a provision of the Federal Food, Drug, and Cosmetic Act to authorize it to disclose trade secrets information to GAO only for studies requested by a chair of a committee or subcommittee of jurisdiction, and only when the requests specifically refer to GAO's need for trade secrets information. FDA does not separate trade secrets information from other information on regulated entities that is needed for audits and in-

⁸ 31 U.S.C. § 711(4).

vestigations and, thus, according to GAO, FDA's view has adversely affected GAO's access to a wide range of information beyond trade secrets. Gaining access to needed information has involved time-consuming procedural steps, including the redaction of trade secrets information, and substantial delays in GAO's work. The new subsection 721(b) would remove any doubt as to GAO's authority to obtain trade secrets information from the FDA, regardless of who initiated the project for which GAO seeks the information.

The Committee recognizes GAO's exemplary record of protecting the most sensitive information it routinely obtains from agencies across government—ranging from highly classified national security documents to taxpayer return information—and the Committee is confident that GAO will rigorously maintain the confidentiality of information obtained under this new section.

APPLICATION OF GAO AUTHORITIES TO JUDICIAL BRANCH

H.R. 1162 responds primarily to long-standing problems GAO has faced in its efforts to obtain information and material from executive branch agencies. During the Committee's consideration of the bill in this and previous sessions of Congress, the Judicial Conference of the United States expressed concerns about how these authorities would apply to it. It shared its view that the judicial branch has a unique role, structure, operations, and mission different from that of the executive branch. It believes that questions remain regarding the appropriate process and procedures under which GAO accesses and obtains certain information from the judicial branch. Those questions are outside the immediate scope of this bill. The Committee expects GAO, in consultation with the Administrative Office of the U.S. Courts (AOUSC) and other appropriate entities, to develop GAO protocols outlining the procedures it will follow in future reviews relating to the judicial branch. GAO and the AOUSC should inform this and other relevant Committees when they have completed this effort and whether they believe additional legislative action is warranted.

III. LEGISLATIVE HISTORY

Representatives Darrell Issa and Elijah Cummings introduced H.R. 1162 in the House on March 14, 2013. On April 15, 2013, the bill was agreed to in the House by a vote of 408–0. H.R. 1162 was then received in the Senate, read twice and referred to the Senate Committee on Homeland Security and Governmental Affairs. H.R. 1162 is similar to S.237, which was favorably reported by the Committee in the 112th Congress.⁹

The Committee considered H.R. 1162 on July 31, 2013. By voice vote, the Committee ordered that the bill be favorably reported without amendment. Members present for the vote were Senators Carper, Levin, McCaskill, Tester, Begich, Baldwin, Coburn, Johnson, Ayotte, and Chiesa.

⁹The primary difference between H.R. 1162 and S. 237, is that H.R. 1162 strikes language referencing pre-merger filing information submitted with the Federal Trade Commission and the Department of Justice under the Hart-Scott-Rodino Act.

IV. SECTION-BY-SECTION SUMMARY OF THE BILL

Section 1: Short title

The short title of the bill is the “Government Accountability Office Improvement Act.”

Section 2(a): Authority to obtain information

Section 2(a)(1) amends 31 U.S.C. § 716(a) to explicitly reaffirm that Congress has authorized GAO to pursue civil actions if federal agencies withhold records from GAO.

Section 2(a)(2) also amends 31 U.S.C. § 716(a) to make clear that the Comptroller General has the right not only to inspect agency records, but also to make and retain copies of such records.

Section 2(b): Administering oaths

Section 2(b) amends 31 U.S.C. § 711 to modernize the Comptroller General’s authority, subject to appropriate safeguards, to administer oaths to witnesses in specific types of GAO investigations. Section 2(b) amends GAO’s existing authority to allow the Comptroller General to administer oaths to witnesses when investigating fraud, attempts to defraud the United States, or irregularities or misconduct by a federal employee or agent.

Section 2(c): Access to certain information

Section 2(c) adds a new statutory section, 31 U.S.C. § 721, which makes clear that the Social Security Act and the Federal Food, Drug, and Cosmetic Act do not limit GAO’s right of access to information.

New subsection 721(a) confirms GAO’s existing authority to review information at the Department of Health and Human Services, including the National Directory of New Hires.

New subsection 721(b) confirms GAO’s existing authority to review trade secret information held by the Food and Drug Administration.

New subsection 721(c), in recognition of the sensitivity of the information that agencies may provide to GAO, requires GAO to prescribe policies and procedures necessary to protect proprietary or trade secrets information from public disclosure. It also makes clear that section 721 does not modify 18 U.S.C. § 1905, which prohibits the disclosure of trade secrets and other sensitive information, or affect the applicability of 31 U.S.C. § 716(e), which requires GAO to safeguard the confidentiality of information and also protects against unauthorized disclosure.

New subsection 721(d) makes clear that the references to specific statutory provisions in section 721 are not intended to affect GAO’s access to information under existing statutes that are not specifically identified in section 721. The Committee expects that agencies will treat situations covered by the new section 721 and analogous situations not expressly addressed in a similar manner, thus giving full effect to GAO’s existing right of access and facilitating rather than impeding congressional oversight.

Section 2(d): Agency reports

This section amends 31 U.S.C. § 720(b) to give agencies more flexibility in reporting to Congress on their responses to GAO rec-

ommendations. Currently, agencies must report two months after issuance of a GAO report on “action taken.” This provision allows agencies to report on actions “planned” or taken in response to a GAO recommendation. In addition, the section expands the list of recipients of agencies’ reports to include GAO and the congressional committees of jurisdiction over the agency program or activity that is the subject of the recommendation.

V. REGULATORY IMPACT AND EVALUATION

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill. The Committee agrees with the Congressional Budget Office that the bill contains no intergovernmental or private sector mandates as defined in the Unfunded Mandate Reform Act and would not affect the budgets of state, local, or tribal governments. The enactment of this legislation will not have significant regulatory impact.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

AUGUST 2, 2013.

Hon. THOMAS R. CARPER,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1162, the Government Accountability Office Improvement Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 1162—Government Accountability Office Improvement Act

H.R. 1162 would provide additional authorities to the Government Accountability Office (GAO), including the ability to obtain certain records and information and to administer oaths. The legislation also would require GAO to establish procedures to protect certain proprietary information.

CBO estimates that implementing the legislation would have no significant impact on the federal budget because it would not significantly add to GAO’s administrative costs. Enacting H.R. 1162 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 1162 would impose an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) by requiring the District of Columbia to report information to Congressional committees and GAO. CBO estimates that the cost to comply with the mandate would be minimal and would not exceed the threshold established in UMRA for intergovernmental mandates (\$75 million in 2013, adjusted annually for inflation).

H.R. 1162 contains no private-sector mandates as defined in UMRA.

On April 1, 2013, CBO transmitted a cost estimate for H.R. 1162, as ordered reported by the House Committee on Oversight and

Government Reform. The two versions of the legislation are similar, and the CBO cost estimates are the same.

The CBO staff contacts for this estimate are Matthew Pickford (for federal costs) and Elizabeth Cove Delisle (for the impact on state and local governments). The estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the following changes in existing law made by H.R. 1162, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman).

TITLE 31—MONEY AND FINANCE

Subtitle I—General

CHAPTER 7—GOVERNMENT ACCOUNTABILITY OFFICE

Subchapter I—Definitions and General Organization

	*	*	*	*	*	*	*
Section							
701. Definitions							
	*	*	*	*	*	*	*
721. <i>Access to certain information.</i>							
	*	*	*	*	*	*	*

SECTION 711. GENERAL AUTHORITY.

The Comptroller General may

(1) * * *

* * * * *

(4) administer oaths to witnesses when auditing and settling accounts[.] *and, with the prior express approval of the Comptroller General, when investigating fraud or attempts to defraud the United States, or irregularity or misconduct of an employee or agent of the United States.*

* * * * *

TITLE 31—MONEY AND FINANCE

Subtitle I—General

CHAPTER 7—GOVERNMENT ACCOUNTABILITY OFFICE

Subchapter II—General Duties and Powers

SECTION 716. AVAILABILITY OF INFORMATION AND INSPECTION OF RECORDS.

(a)(1) *The Comptroller General is authorized to obtain such agency records as the Comptroller General requires to discharge his duties (including audit, evaluation, and investigative duties), includ-*

ing through the bringing of civil actions under this section. In reviewing a civil action in this section, the court shall recognize the continuing force and effect of the authorization in the preceding sentence until such time as the authorization is repealed pursuant to law.

[(a)](2) Each agency shall give the Comptroller General information the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency. The Comptroller General may inspect, *and make and retain copies of*, an agency record to get the information. This subsection does not apply to expenditures made under section 3524 or 3526(e) of this title.

* * * * *

SECTION 720. AGENCY REPORTS.

(a) * * *

(b) When the Comptroller General makes a report that includes a recommendation to the head of an agency, the head of the agency shall submit a written statement on action taken *or planned* on the recommendation by the head of the agency. The statement shall be submitted to—

(1) the Committee on *Homeland Security and Governmental Affairs* of the Senate, **[and]** the Committee on **[Government Operations]** *Oversight and Government Reform of the House of Representatives, the congressional committees with jurisdiction over the agency program or activity that is the subject of the recommendation, and the Government Accountability Office* before the 61st day after the date of the report; and

(2) the Committees on Appropriations of both Houses of Congress in the first request for appropriations submitted more than 60 days after the date of the report.

* * * * *

SECTION 721. ACCESS TO CERTAIN INFORMATION.

(a) *No provision of the Social Security Act, including section 453(1) of that Act (42 U.S.C. 653(1)), shall be construed to limit, amend or supersede the authority of the Comptroller General to obtain any information or to inspect or copy any record under section 716 of this title.*

(b) *No provision of the Federal Food, Drug and Cosmetic Act, including section 301(j) of that Act (21 U.S.C. 331(j)), shall be construed to limit, amend, or supersede the authority of the Comptroller General to obtain any information or to inspect or copy any record under section 716 of this title.*

(c)(1) *The Comptroller General shall prescribe such policies and procedures as are necessary to protect from public disclosure proprietary or trade secret information obtained consistent with this section.*

(2) *Nothing in this section shall be construed—*

(A) *to alter or amend the prohibitions against the disclosure of trade secret or other sensitive information prohibited by section 1905 of title 18 and other applicable laws; or*

(B) *to affect the applicability of section 716(e) of this title, including the protections against unauthorized disclosure con-*

tained in that section, to information obtained consistent with this section.

(d) Specific references to statutes in this section shall not be construed to affect access by the Government Accountability Office to information under statutes that are not so referenced.

