

OSC ACCESS ACT

JULY 28, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOWDY, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

[To accompany H.R. 2195]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 2195) to amend title 5, United States Code, to provide for access of the Special Counsel to certain information, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

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The amendments are as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “OSC Access Act”.

SEC. 2. ADEQUATE ACCESS OF SPECIAL COUNSEL TO INFORMATION.

Section 1212(b) of title 5, United States Code, is amended by adding at the end the following:

“(5)(A) Except as provided in subparagraph (B), the Special Counsel, in carrying out this subchapter, is authorized to—

“(i) have timely access to all records, data, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable agency that relate to an investigation, review, or inquiry conducted under—

“(I) section 1213, 1214, 1215, or 1216 of this title; or

“(II) section 4324(a) of title 38;

“(ii) request from any agency the information or assistance that may be necessary for the Special Counsel to carry out the duties and responsibilities of the Special Counsel under this subchapter; and

“(iii) require, during an investigation, review, or inquiry of an agency, the agency to provide to the Special Counsel any record or other information that relates to an investigation, review, or inquiry conducted under—

“(I) section 1213, 1214, 1215, or 1216 of this title; or

“(II) section 4324(a) of title 38.

“(B)(i) The authorization of the Special Counsel under subparagraph (A) shall not apply with respect to any entity listed in section 2302(a)(2)(C)(ii) or (iii) unless the Special Counsel is investigating, or otherwise carrying out activities relating to the enforcement of, an action under subchapter III of chapter 73.

“(ii) The Attorney General or an Inspector General may withhold from the Special Counsel material described in subparagraph (A) if—

“(I) disclosing the material could reasonably be expected to interfere with a criminal investigation or prosecution that is ongoing as of the date on which the Special Counsel submits a request for the material, or the material may not be disclosed pursuant to court order or has been filed under seal pursuant to section 3730 of title 31; and

“(II) the Attorney General or the Inspector General, as applicable, submits to the Special Counsel a written report that describes—

“(aa) the material being withheld; and

“(bb) the reason that the material is being withheld.

“(C)(i) A claim of common law privilege by an agency, or an officer or employee of an agency, shall not prevent the Special Counsel from obtaining any material described in subparagraph (A) with respect to the agency.

“(ii) The submission of material described in subparagraph (A) by an agency to the Special Counsel may not be deemed to waive any assertion of privilege by the agency against a non-Federal entity or against an individual in any other proceeding.

“(iii) With respect to any record or other information made available to the Special Counsel by an agency under subparagraph (A), the Special Counsel may only disclose the record or information for a purpose that is in furtherance of any authority provided to the Special Counsel in this subchapter.

“(6) The Special Counsel shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate, the Committee on Oversight and Government Reform of the House of Representatives, and each committee of Congress with jurisdiction over the applicable agency a report regarding any case of contumacy or failure to comply with a request submitted by the Special Counsel under paragraph (5)(A).”.

Amend the title so as to read:

A bill to amend title 5, United States Code, to provide for access of the Special Counsel to certain information, and for other purposes.

COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

H.R. 2195, the OSC Access Act, clarifies Congress’s longstanding intent that the U.S. Office of Special Counsel (OSC) have access to all materials necessary for its investigations and that granting such access does not waive common law privileges in other contexts.

BACKGROUND AND NEED FOR LEGISLATION

In May 1977, President Jimmy Carter established the Federal Personnel Management Project to fulfill his campaign promise of federal personnel reform in the post-Watergate era.¹ As a result of the Project's work, on March 2, 1978, President Carter transmitted to Congress a "comprehensive program to reform the Federal Civil Service system." The President's message to Congress accompanying the transmittal stated:

I . . . propose to create a Special Counsel to the [Merit Systems Protection] Board, appointed by the President and confirmed by the Senate, who will investigate and prosecute political abuses and merit system violations. This will help safeguard the rights of Federal employees who "blow the whistle" on violations of laws or regulations by other employees, including their supervisors.²

Congress moved swiftly to consider the President's proposal, which was introduced in the House and the Senate as the Civil Service Reform Act of 1978.³

Two months later, on May 23, 1978, the President submitted to Congress "Reorganization Plan No. 2 of 1978."⁴ Under the then-established procedures for Executive Branch reorganization, the plan would take effect if neither the House nor the Senate disapproved the plan after 60 days.⁵ The plan established within the Executive Branch the Merit Systems Protection Board (MSPB) and the Special Counsel.⁶ It delegated to the Special Counsel the President's authority to investigate merit system abuses, stating: "The Special Counsel may investigate, pursuant to 5 U.S.C. 1303, allegations of personnel practices which are prohibited by law or regulation."⁷

The Civil Service Reform Act of 1978 codified Congress's support for the broad responsibility the President conferred upon the Special Counsel to determine whether prohibited personnel practices occurred. The new law retained the findings of the initial proposal transmitted by the President to Congress, which stated: "It is the policy of the United States that . . . the authority and power of the Special Counsel should be increased so that the Special Counsel may investigate allegations involving prohibited personnel practices and reprisals against Federal employees for the lawful disclosure of certain information. . . ."⁸ As the Senate Governmental Affairs Committee's report accompanying the bill stated: "For the first time, and by statute, the Federal Government is given the mandate—through the Special Counsel of the Merit Systems Pro-

¹ See *Civ. Serv. Reform: Hearing before the H. Comm. on Post Office & Civ. Serv.*, 95th Cong. (1978) (statement of Alan K. Campbell, Chairman, U.S. Civ. Serv. Comm'n).

² Message from the President (Mar. 2, 1978), included in H. COMM. ON POST OFFICE & CIV. SERV., 96TH CONG., LEGISLATIVE HISTORY OF THE CIVIL SERVICE REFORM ACT OF 1978 735 (Comm. Print 1979).

³ H.R. 11280, 95th Cong. (1978); S. 2640, 95th Cong. (1978).

⁴ Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36037, 92 Stat. 3783 (1978).

⁵ See S. COMM. ON GOVERNMENTAL AFFAIRS, CIVIL SERVICE REFORM ACT OF 1978 2 n.1, 95th Cong. (1978) (S. Rep. No. 95-969).

⁶ Reorganization Plan No. 2 of 1978 Pt. II, 43 Fed. Reg. 36037, 92 Stat. 3783, 3784 (1978).

⁷ Reorganization Plan No. 2 of 1978 § 204(c), 43 Fed. Reg. 36037, 92 Stat. 3783, 3785 (1978).

⁸ Pub. L. No. 95-454 § 3(4), 92 Stat. 1111, 1112 (1978); c.f. H.R. 11280, 95th Cong. § 3(3) (1978).

tection Board—to protect whistleblowers from improper reprisals.”⁹ In the Act, Congress further ensured the protection of whistleblowers by strengthening the underlying law on prohibited personnel practices.

Consistent with the responsibility to determine on behalf of the Executive Branch whether federal government supervisors acted illegally, the Act also included the President’s proposal to give the Special Counsel authority to “issue subpoenas [sic] requiring the attendance and testimony of witnesses and the production of documentary or other evidence. . . .”¹⁰ Similarly, it proposed giving the Special Counsel authority to “administer oaths, take or order the taking of depositions, order responses to written interrogatories, examine witnesses, and receive evidence.”¹¹

The Civil Service Reform Act of 1978, which adopted the same structure the President established in the Reorganization Plan No. 2 of 1978, codified the broad access the President requested for the Special Counsel. The Whistleblower Protection Act of 1989 separated the Office of Special Counsel (OSC) from the MSPB, but it did not change the fundamental role or authority of the office of Special Counsel established by the President in 1978.¹²

OSC Access Challenges

On December 28, 1978, the President issued Executive Order 12107, establishing the Office of Special Counsel effective January 1, 1979.¹³ The Executive Order also amended the Civil Service Rules, adding a new “Rule V—Regulations, Investigation, Evaluation, and Enforcement.” The rule, which remains in effect today in Office of Personnel Management (OPM) regulations, states in Section 5.4:

When required by . . . the Merit Systems Protection Board, or the Special Counsel of the Merit Systems Protection Board, or by authorized representatives of these bodies, agencies shall make available to them, or to their authorized representatives, employees to testify in regard to matters inquired of under the civil service laws, rules, and regulations, and records pertinent to these matters. All such employees, and all applicants or eligibles for positions covered by these rules, shall give to the Office, the Merit Systems Protection Board, the Special Counsel, or to their authorized representatives, all information, testimony, documents, and material in regard to the above matters, the disclosure of which is not otherwise prohibited by law or regulation.¹⁴

Since OSC’s creation, it has used its investigatory authority extensively. OSC investigations depend on the routine issuance of

⁹S. COMM. ON GOVERNMENTAL AFFAIRS, CIVIL SERVICE REFORM ACT OF 1978, 95th Cong. (1978) (S. Rep. No. 95-969).

¹⁰Pub. L. No. 95-454 § 202(a), 92 Stat. 1111, 1123 (1978); c.f. H.R. 11280, 95th Cong. § 202(a) (1978).

¹¹*Id.*

¹²Whistleblower Prot. Act of 1989, Pub. L. No. 101-12 § 3, 103 Stat. 16, 19 (1989). OSC had functionally separated from the MSPB several years earlier.

¹³Exec. Order No. 12107, 44 Fed. Reg. 1,055 (Jan. 3, 1979).

¹⁴Civ. Serv. Rule 5.4, 5 C.F.R. § 5.4 (1979).

document requests and the ability to interview witnesses.¹⁵ As OSC exercises these functions, agencies (including the Department of Justice) routinely disclose to OSC information that common law privileges might protect in litigation.

Nevertheless, OSC has occasionally run into access issues. For example, on June 19, 2014, both Special Counsel Carolyn Lerner and Environmental Protection Agency Inspector General Arthur Elkins testified before the Committee on Oversight and Government Reform that the U.S. Chemical Safety Board (CSB) was withholding materials from OSC and the Inspector General based on an assertion of attorney-client privilege.¹⁶ Then-Chairman Darrell Issa told the head of the CSB:

The claim of attorney-client privilege from a Government agency is extremely limited, extremely limited, and Government or Government-related documents that in fact are generated under the work of the Federal Government, paid for during time or with resources of the Federal Government, are not, in the ordinary course, allowed to become attorney-client privilege[d].¹⁷

Lerner expanded:

It is very rare for an agency to assert attorney-client privilege to protect documents from the Office of Special Counsel, another Federal agency. And for context I can tell you that it is also very rare for OSC to have to subpoena a subject official in order to secure testimony. In the three years that I have been head of the Office of Special Counsel, this is the first time.

* * * * *

If an agency can assert attorney-client privilege to protect the basis, for example, of removing someone, we are not able to get a full picture and determine if there was animus for whistleblowing, what the true factors really were for taking an action against an employee. If we ask why a decision was made and the answer is I can't tell you because I asked my lawyer or outside counsel about it, then that is just not very helpful to us.¹⁸

At a December 16, 2015 hearing of the Committee's Subcommittee on Government Operations, Special Counsel Carolyn Lerner noted: "While agencies typically comply with our . . . requests, we have had some difficulty in our investigations where agencies do not provide timely or complete responses or claim common law privileges as a basis for withholding documents."¹⁹ Ms. Lerner further explained:

¹⁵ *Merit Sys. Prot. Bd., Office of Gov't Ethics, & Office of Spec. Counsel Reauthorization: Hearing before the H. Subcomm. on Gov't Operations*, 114th Cong. (2015) (statement of Carolyn N. Lerner, Spec. Counsel).

¹⁶ *Whistleblower Reprisal and Mgmt. Failures at the U.S. Chem. Safety Bd.: Hearing before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. 12–13, 22 (2014).

¹⁷ *Id.* at 37 (statement of Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform).

¹⁸ *Id.* at 55 (statement of Carolyn N. Lerner, Spec. Counsel).

¹⁹ *Merit Sys. Prot. Bd., Office of Gov't Ethics, & Office of Spec. Counsel Reauthorization: Hearing before the H. Subcomm. on Gov't Operations*, 114th Cong. (2015) (statement of Carolyn N. Lerner, Spec. Counsel).

Congress has tasked OSC with determining the legality of personnel actions taken against whistleblowers. Our investigations typically assess whether an agency acted for legitimate, non-retaliatory reasons, or whether agency justifications are really a pretext for retaliating against an employee. To make these assessments, it is often necessary to review communications between management officials and agency counsel. In fact, these communications can demonstrate that management officials acted responsibly, sought legal advice, and had a legitimate basis for disciplining a purported whistleblower.²⁰

Lerner noted that when agencies withhold such information from OSC, asserting the information is privileged, “OSC must engage in prolonged disputes over access to information or attempt to complete our investigation without the benefit of highly relevant communications. This undermines the effectiveness of the whistleblower law and prolongs OSC investigations.”²¹

Some agencies have justified their obstruction by abusing the phrase in OPM Civil Service Rule 5.4, “the disclosure of which is not otherwise prohibited by law or regulation.”²² However, Congress has passed no law authorizing the withholding of information from OSC, nor is the Committee aware of any regulation that purports to do so.

Accordingly, when Representative Rod Blum (R-IA) introduced a bill, H.R. 4639, on February 26, 2016, to reauthorize OSC, it included a section clarifying OSC’s access rights. The Committee considered the legislation on March 1, 2016, and ordered it favorably reported. The Committee report stated:

Notwithstanding the unambiguous language of both provisions, OSC has historically faced a range of obstacles from agencies, including nonresponses, incomplete responses, untimely responses, and refusals to comply. In particular, refusals to comply have arisen from agencies stretching the interpretation of “not otherwise prohibited by law or regulation” to justify invoking common law privileges, such as attorney-client privilege, to prevent OSC from obtaining access to information. For example, the Committee on Oversight and Government Reform has heard concerns from the current Special Counsel regarding blanket assertions of attorney-client privilege by the Chemical Safety Board.

While the Committee does not believe that legislative clarification should be necessary to make clear that OSC’s access to information overrides internal agency regulations and common law privileges, this bill is intended to settle once and for all that in carrying out its work, OSC is authorized to have access to any information from agencies under its jurisdiction. H.R. 4639 makes clear that OSC is authorized to have access to any record or other information of any agency under its jurisdiction in investigating

²⁰ *Id.*

²¹ *Id.*

²² Civ. Serv. Rule 5.4, 5 C.F.R. § 5.4 (1979).

allegations of prohibited personnel practices or Hatch Act violations.²³

The House of Representatives passed H.R. 4639 on June 21, 2016.

Meanwhile, on May 23, 2016, Senate Homeland Security and Governmental Affairs Committee (HSGAC) Chairman Ron Johnson (R-WI) introduced a Senate bill, S. 2968, to reauthorize OSC. The Senate bill also included language clarifying that “a Federal agency cannot withhold any information from the OSC, an independent Federal agency, on the basis of common law privilege and providing such information does not waive any assertion of privilege by the Federal agency in any other proceeding.”²⁴ On May 25, 2016, the Senate Committee ordered the legislation favorably reported. The next day, Chairman Johnson introduced a legislation package, S. 3011, which included the language from S. 2968.²⁵ However, given the limited legislative calendar in 2016, the Senate did not take up S. 2968, S. 3011, or H.R. 4639.

Almost immediately at the commencement of the 115th Congress, Representative Blum reintroduced and the House passed H.R. 69, reauthorizing OSC. The bill once again contained language clarifying Congress’s longstanding intent regarding OSC’s right of access. Nevertheless, OSC reported to the Committee that agency attorneys at one agency pointed to the introduction of OSC access language in legislation as evidence that OSC did not currently have the authority to access privileged materials. OSC further reported that those attorneys had apparently drawn a negative inference from the Senate’s failure to pass the access provision, concluding Congress did not in fact support OSC having such authority.

This interpretation of congressional intent is wholly inaccurate. In fact, the opposite is true—the Committee believes OSC already has the legal authority to access this information under existing law, regardless of the enactment of this bill, H.R. 69 (115th), H.R. 4639 (114th), S. 2968 (114th), S. 3011 (114th), or similar laws. The proposed legislation provides what the Committee views as a superfluous clarification necessitated by some agencies’ bizarre interpretation of OSC’s access under current law. Indeed, the only reasonable interpretation of a plain reading of the existing law is that OSC is entitled to access notwithstanding common law privileges that might apply in other circumstances.

The Committee expressly rejects any agency position that the introduction of a bill clarifying congressional intent gives rise to a negative inference regarding the meaning of the statute to be amended. Such an interpretation would lead to the absurd result that an agency could invalidate a clear and unambiguous statute by imputing ambiguity to it, waiting for a Member of Congress to introduce a bill to clarify congressional intent, and then pointing to the introduction of the bill as vindication of the agency’s position until it is enacted. Such an interpretation ignores the equally likely

²³ H. COMM. ON OVERSIGHT & GOV’T REFORM, THOROUGHLY INVESTIGATING RETALIATION AGAINST WHISTLEBLOWERS ACT 5, 114th Cong. (2016) (H. Rep. No. 114–521).

²⁴ S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, OFFICE OF SPECIAL COUNSEL RE-AUTHORIZATION ACT 9, 114th Cong. (2016) (S. Rep. No. 114–360).

²⁵ Bolster Accountability to Drive Government Efficiency and Reform Washington Act of 2016, S. 3011, 114th Cong. (2016).

possibility that Congress did not enact the law because the clarification was not necessary—that Congress determined existing law was sufficiently clear on its face.

OSC Access Challenges Continue: Transportation Security Administration Denies Access

The Transportation Security Administration (TSA) is one agency that has resisted providing full access to OSC. The Whistleblower Protection Enhancement Act of 2012 extended statutory whistleblower protections to all TSA employees.²⁶ In the following four years, OSC received more than 350 whistleblower retaliation cases from TSA.²⁷ Meanwhile, on January 21, 2015, the Supreme Court held in the whistleblower case of Federal Air Marshal Robert MacLean that the statute authorizing TSA’s designation of Sensitive Security Information did not prohibit disclosure of such information, and that agency regulations prohibiting such disclosure thus did not override the Whistleblower Protection Act of 1989.²⁸

In the fall of 2015, the Committee began an extensive investigation of allegations that TSA protected senior agency officials from discipline while allowing a culture of retaliation against whistleblowers to fester.²⁹ TSA’s Office of Chief Counsel was central to the alleged double standard. Whistleblowers alleged TSA’s approach was typified by a December 2014 communication Assistant Chief Counsel Steven Colon sent others within the Office of Chief Counsel indicating he was “done being conciliatory with OSC” and declaring: “They want war, they got one.”³⁰

On April 27, 2016, the Committee held a public hearing with three TSA whistleblowers.³¹ They described a “crisis of leadership” which fostered “low morale, a lack of trust, and field leaders who

²⁶ Whistleblower Prot. Enhancement Act of 2012, Pub. L. No. 112–199 § 109, 126 Stat. 1465, 1470 (2012).

²⁷ *Transparency at TSA: Hearing before the H. Comm. on Oversight & Gov’t Reform*, 115th Cong. (2017) (statement of Carolyn N. Lerner, Spec. Counsel).

²⁸ *Dept’t of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 921 (2015).

²⁹ See, e.g., letter from the Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov’t Reform, to the Hon. Peter V. Neffenger, Adm’r, Transp. Sec. Admin. (Nov. 10, 2015); letter from the Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov’t Reform, to the Hon. Peter V. Neffenger, Adm’r, Transp. Sec. Admin. (Dec. 3, 2015); letter from the Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov’t Reform, to the Hon. Peter V. Neffenger, Adm’r, Transp. Sec. Admin. (Jan. 7, 2016); letter from the Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov’t Reform, to the Hon. Peter V. Neffenger, Adm’r, Transp. Sec. Admin. (Feb. 2, 2016); letter from the Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov’t Reform, to the Hon. Peter V. Neffenger, Adm’r, Transp. Sec. Admin. (Feb. 19, 2016); letter from the Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov’t Reform, the Hon. Elijah E. Cummings, Ranking Mem., H. Comm. on Oversight & Gov’t Reform, the Hon. John L. Mica, Chairman, H. Subcomm. on Transp. & Public Assets, and the Hon. Tammy Duckworth, Ranking Mem., H. Subcomm. on Transp. & Public Assets, to the Hon. Peter V. Neffenger, Adm’r, Transp. Sec. Admin. (Mar. 15, 2016); letter from the Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov’t Reform, and the Hon. Elijah E. Cummings, Ranking Mem., H. Comm. on Oversight & Gov’t Reform, to the Hon. Peter V. Neffenger, Adm’r, Transp. Sec. Admin. (Apr. 26, 2016); letter from the Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov’t Reform, and the Hon. Elijah E. Cummings, Ranking Mem., H. Comm. on Oversight & Gov’t Reform, to the Hon. Peter V. Neffenger, Adm’r, Transp. Sec. Admin. (May 12, 2016); letter from the Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov’t Reform, the Hon. Elijah E. Cummings, Ranking Mem., H. Comm. on Oversight & Gov’t Reform, the Hon. John L. Mica, Chairman, H. Subcomm. on Transp. & Public Assets, the Hon. Tammy Duckworth, Ranking Mem., H. Subcomm. on Transp. & Public Assets, the Hon. Mark Meadows, Chairman, H. Subcomm. on Gov’t Operations, the Hon. Gerald E. Connolly, Ranking Mem., H. Subcomm. on Gov’t Operations, and the Hon. Charles E. Grassley, Chairman, S. Comm. on the Judiciary, to the Hon. Peter V. Neffenger, Adm’r, Transp. Sec. Admin. (Aug. 12, 2016).

³⁰ Meeting invitation from Steven Colon to Steven Lewengrub, Paula Billingsley, and Jeffrey Velasco, Transp. Sec. Admin. (Dec. 15, 2014 meeting).

³¹ *Examining Management Practices and Misconduct at TSA: Part I: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 114th Cong. (Apr. 27, 2016).

are fearful to speak out, and for good reason.”³² According to one witness, the problems resulted in “a culture of misconduct, retaliation, lack of trust, cover-ups, and the refusal to hold senior leaders accountable for poor judgment and malfeasance.”³³ Another witness concluded: “In your role as an oversight committee for TSA, you should be gravely alarmed and concerned with these issues because TSA employees are less likely to report operational security or threat-relevant issues out of fear of retaliation.”³⁴

Two weeks later, on May 12, 2016, TSA Administrator Peter Neffenger testified before the Committee on the issues raised by the whistleblowers.³⁵ He stated of one of the whistleblowers at the April 27 hearing, “We’re supporting [him] in his complaint, which stands before the Office of Special Counsel right now,” while indicating another whistleblower’s case was “still undergoing review” with OSC.³⁶ He acknowledged the importance of OSC’s review of TSA’s management practices, stating: “I will await the Office of Special Counsel’s review. I think it’s important that we look for an independent review of that to determine whether or not there was improper use there.”³⁷ When Representative Elijah Cummings (D-MD), the ranking minority member of the Committee, subsequently asked Administrator Neffenger how TSA dealt with retaliation, Neffenger testified: “I’m very interested in the results of the Office of Special Counsel investigation. . . . Depending upon those findings, I will take immediate action against that.”³⁸

Yet after claiming it would rely on OSC’s role as an objective independent entity and make disciplinary decisions based on OSC’s findings, TSA has prevented OSC from making an objective determination regarding whistleblower retaliation in particular cases. TSA withheld relevant information, claiming it was protected by attorney-client privilege from disclosure to OSC. When the Committee held a hearing on this issue on March 2, 2017—nearly a year after the Committee’s hearing with TSA whistleblowers—access issues had prevented OSC from concluding any of its investigations of alleged retaliation at TSA.³⁹ At that hearing, Special Counsel Lerner testified that in one set of cases, “[i]t took TSA nearly five months after the requested deadline to complete its production of documents. TSA has stated that its privilege review accounts for much of the delay.”⁴⁰

Lerner continued:

TSA appears to be withholding information directly related to the decision-making process for the personnel actions it took against the complainants. Understanding the motivation behind these actions is essential to OSC’s investigation. OSC requires access to all information rel-

³²*Id.* at 15–16 (statement of Jason Brainard, Fed. Sec. Dir., Kansas, Office of Sec. Operations, Transp. Sec. Admin.).

³³*Id.* at 30–31 (statement of Andrew J. Rhoades, Asst. Fed. Sec. Dir. for Mission Support, Minneapolis-St. Paul Int’l Airport, Office of Sec. Operations, Transp. Sec. Admin.).

³⁴*Id.* at 27 (statement of Mark Livingston, Program Manager, Office of the Chief Risk Officer, Trans. Sec. Admin.).

³⁵*Examining Management Practices and Misconduct at TSA: Part II: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 114th Cong. (May 12, 2016).

³⁶*Id.* at 59, 128 (statement of Peter V. Neffenger, Adm’r, Transp. Sec. Admin.).

³⁷*Id.* at 59 (statement of Peter V. Neffenger, Adm’r, Transp. Sec. Admin.).

³⁸*Id.* at 67 (statement of Peter V. Neffenger, Adm’r, Transp. Sec. Admin.).

³⁹*Transparency at TSA: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 115th Cong. (Mar. 2, 2017).

⁴⁰*Id.* (statement of Carolyn N. Lerner, Spec. Counsel).

evant to potentially unlawful personnel practices, even if that information might be privileged in other contexts. When TSA refuses to disclose why it takes an action, it is impossible for OSC to investigate whether there was retaliation.

Additionally, in the two cases for which TSA has completed its document production, TSA stated it was unable to provide a privilege log describing the information withheld. The lack of a privilege log is particularly problematic because OSC has concerns that TSA may be withholding information more extensively than even a robust attorney-client privilege would allow. Without documentation of the information withheld—a basic requirement whenever the attorney-client privilege is asserted—it is difficult to evaluate the extent to which this is true.⁴¹

Need for Clarifying Legislation on OSC Access

The purpose of the attorney-client privilege is to encourage “full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.”⁴² The privilege has significantly different application in a government context, when the client is not a private individual. Federal circuits have recognized the need for “particularized rules . . . where one agency of government claims the privilege in resisting a demand for information by another”⁴³ and that some “‘considerations’ counsel against ‘expansion of the privilege to all governmental entities’ in all cases.”⁴⁴ This is particularly the case where a governmental agency is investigating potential wrongdoing.

Here, as Special Counsel Lerner noted:

Neither OSC’s governing statutes nor applicable OPM regulations authorize an agency to withhold information from OSC based on an assertion of attorney-client privilege by a government attorney acting on behalf of a government agency. And no court has ever ruled that the attorney-client privilege can be asserted during intra-governmental administrative investigations.⁴⁵

Similarly, no MSPB or federal circuit case has ever held that disclosure to OSC in the context of its investigative function constitutes a waiver of attorney-client privileged material. The Committee finds that it is inconsistent with OSC’s broad investigatory authority (as established by the President and Congress in 1978)

⁴¹*Id.*

⁴²*Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

⁴³*In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 916 (8th Cir. 1997) (quoting Restatement (Third) of the Law Governing Lawyers § 124 cmt. b).

⁴⁴*In re Lindsey (Grand Jury Testimony)*, 158 F.3d 1263, 1272 (D.C. Cir. 1998) (quoting 24 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5475, at 125 (1986)). Indeed, in the criminal context federal circuits have denied government attorneys use of the attorney-client privilege to withhold information from other government entities conducting investigations. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), cert. denied sub. nom. *Office of the President v. Office of the Independent Counsel*, 521 U.S. 1105 (1997), 158 F.3d 1263 (D.C. Cir. 1998), cert. denied 525 U.S. 996 (1998), aff’g *In re Grand Jury Proceedings*, 5 F.Supp.2d 21, 39 (D.D.C. 1998).

⁴⁵*Transparency at TSA: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 115th Cong. (Mar. 2, 2017) (statement of Carolyn N. Lerner, Spec. Counsel).

for agencies to assert the governmental attorney-client privilege against OSC.

The Committee has advanced this legislation to clarify this access issue. Nevertheless, the Committee also believes OSC's access without establishing an agency waiver should be sufficiently clear from the existing record, regardless of whether this or any other legislation is passed to clarify the issue.

LEGISLATIVE HISTORY

On April 27, 2017, Representative Rod Blum (R-IA) introduced H.R. 2195, the OSC Access Act, with then-Chairman Jason Chaffetz (R-UT), Ranking Member Elijah Cummings (D-MD), and Representatives Mike Coffman (R-CO), Kathleen Rice (D-NY), and Jackie Speier (D-CA). H.R. 2195 was referred to the Committee on Oversight and Government Reform. The Committee considered H.R. 2195 at a business meeting on May 2, 2017 and ordered the bill favorably reported, with an amendment in the nature of a substitute, by voice vote.

SECTION-BY-SECTION

Section 1. Short title

This section names the bill the "OSC Access Act."

Section 2. Adequate access of Special Counsel to information

The bill amends section 1212(b) of title 5, United States Code, by adding a section (5) regarding access to documents and materials.

The new section (5)(A) includes language restating provisions of existing law that afford the Office of Special Counsel (OSC) timely access to all documents and materials that relate to its investigations.

The new section (5)(B) creates an exception for the Attorney General or an Inspector General to withhold material if disclosure could reasonably be expected to interfere with an ongoing criminal investigation or prosecution. In such circumstances, the Attorney General or an Inspector General must submit a written report to OSC of the material and the reason for withholding the material.

The new section (5)(C) makes the superfluous clarification that a claim of common law privilege shall not prevent OSC from obtaining any material, and production to OSC does not waive any assertion of privilege against a non-federal entity or individual in any other proceeding.

The bill also adds a section (6) to section 1212(b) of title 5, United States Code, requiring that in cases of agencies failing to comply, OSC shall submit a report to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and each committee with jurisdiction over the applicable agency.

EXPLANATION OF AMENDMENTS

During Full Committee consideration of the bill, Representative Blum offered an amendment in the nature of a substitute which added a clause to section (5)(B) allowing the Attorney General or an Inspector General to also withhold material if it may not be disclosed pursuant to court order or has been filed under seal pursu-

ant to the False Claims Act. The Blum amendment was adopted by voice vote.

COMMITTEE CONSIDERATION

On May 2, 2017, the Committee met in open session and ordered reported favorably the bill, H.R. 2195, as amended, by voice vote, a quorum being present.

ROLL CALL VOTES

No roll call votes were requested or conducted during Full Committee consideration of H.R. 2195.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill clarifies the authorities of OSC. As such, this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goal or objective of this bill is to clarify the authorities of OSC.

DUPLICATION OF FEDERAL PROGRAMS

No provision of this bill establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting this bill does not direct the completion of any specific rule makings within the meaning of section 551 or title 5, United States Code.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of Section 5(b) of the appendix to title 5, United States Code.

UNFUNDED MANDATES STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement as to whether the provisions of the reported include unfunded mandates. In compliance with this requirement, the Committee has included below a letter received from the Congressional Budget Office.

EARMARK IDENTIFICATION

This bill does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974, which the Committee has included below.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 22, 2017.

Hon. JASON CHAFFETZ,
*Chairman, Committee on Oversight and Government Reform,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2195, the OSC Access Act.

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

Sincerely,

KEITH HALL, *Director.*

Enclosure.

H.R. 2195—OSC Access Act

CBO estimates that enacting H.R. 2195 would have no effect on the federal budget. The legislation would amend federal law to clarify that the Office of Special Counsel (OSC) has the authority

to obtain all of the documents it needs for an investigation, including those involving alleged retaliation against whistleblowers. According to OSC, this legislation would codify existing agency policy. The primary mission of OSC is to safeguard federal employees from prohibited personnel practices.

Enacting the bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting H.R. 2195 would not increase direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 2195 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

* * * * *

PART II—CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

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CHAPTER 12—MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

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SUBCHAPTER II—OFFICE OF SPECIAL COUNSEL

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§ 1212. Powers and functions of the Office of Special Counsel

- (a) The Office of Special Counsel shall—
 - (1) in accordance with section 1214(a) and other applicable provisions of this subchapter, protect employees, former employees, and applicants for employment from prohibited personnel practices;
 - (2) receive and investigate allegations of prohibited personnel practices, and, where appropriate—
 - (A) bring petitions for stays, and petitions for corrective action, under section 1214; and
 - (B) file a complaint or make recommendations for disciplinary action under section 1215;

(3) receive, review, and, where appropriate, forward to the Attorney General or an agency head under section 1213, disclosures of violations of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(4) review rules and regulations issued by the Director of the Office of Personnel Management in carrying out functions under section 1103 and, where the Special Counsel finds that any such rule or regulation would, on its face or as implemented, require the commission of a prohibited personnel practice, file a written complaint with the Board; and

(5) investigate and, where appropriate, bring actions concerning allegations of violations of other laws within the jurisdiction of the Office of Special Counsel (as referred to in section 1216).

(b)(1) The Special Counsel and any employee of the Office of Special Counsel designated by the Special Counsel may administer oaths, examine witnesses, take depositions, and receive evidence.

(2) The Special Counsel may—

(A) issue subpoenas; and

(B) order the taking of depositions and order responses to written interrogatories;

in the same manner as provided under section 1204.

(3)(A) In the case of contumacy or failure to obey a subpoena issued under paragraph (2)(A), the Special Counsel may apply to the Merit Systems Protection Board to enforce the subpoena in court pursuant to section 1204(c).

(B) A subpoena under paragraph (2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in the manner referred to in subsection (d) of section 1204, and the United States District Court for the District of Columbia may, with respect to any such individual, compel compliance in accordance with such subsection.

(4) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

(5)(A) *Except as provided in subparagraph (B), the Special Counsel, in carrying out this subchapter, is authorized to—*

(i) have timely access to all records, data, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable agency that relate to an investigation, review, or inquiry conducted under—

(I) section 1213, 1214, 1215, or 1216 of this title; or

(II) section 4324(a) of title 38;

(ii) request from any agency the information or assistance that may be necessary for the Special Counsel to carry out the duties and responsibilities of the Special Counsel under this subchapter; and

(iii) require, during an investigation, review, or inquiry of an agency, the agency to provide to the Special Counsel any record or other information that relates to an investigation, review, or inquiry conducted under—

(I) section 1213, 1214, 1215, or 1216 of this title; or

(II) section 4324(a) of title 38.

(B)(i) The authorization of the Special Counsel under subparagraph (A) shall not apply with respect to any entity listed in section 2302(a)(2)(C)(ii) or (iii) unless the Special Counsel is investigating, or otherwise carrying out activities relating to the enforcement of, an action under subchapter III of chapter 73.

(ii) The Attorney General or an Inspector General may withhold from the Special Counsel material described in subparagraph (A) if—

(I) disclosing the material could reasonably be expected to interfere with a criminal investigation or prosecution that is ongoing as of the date on which the Special Counsel submits a request for the material, or the material may not be disclosed pursuant to court order or has been filed under seal pursuant to section 3730 of title 31; and

(II) the Attorney General or the Inspector General, as applicable, submits to the Special Counsel a written report that describes—

(aa) the material being withheld; and

(bb) the reason that the material is being withheld.

(C)(i) A claim of common law privilege by an agency, or an officer or employee of an agency, shall not prevent the Special Counsel from obtaining any material described in subparagraph (A) with respect to the agency.

(ii) The submission of material described in subparagraph (A) by an agency to the Special Counsel may not be deemed to waive any assertion of privilege by the agency against a non-Federal entity or against an individual in any other proceeding.

(iii) With respect to any record or other information made available to the Special Counsel by an agency under subparagraph (A), the Special Counsel may only disclose the record or information for a purpose that is in furtherance of any authority provided to the Special Counsel in this subchapter.

(6) The Special Counsel shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate, the Committee on Oversight and Government Reform of the House of Representatives, and each committee of Congress with jurisdiction over the applicable agency a report regarding any case of contumacy or failure to comply with a request submitted by the Special Counsel under paragraph (5)(A).

(c)(1) Except as provided in paragraph (2), the Special Counsel may as a matter of right intervene or otherwise participate in any proceeding before the Merit Systems Protection Board, except that the Special Counsel shall comply with the rules of the Board.

(2) The Special Counsel may not intervene in an action brought by an individual under section 1221, or in an appeal brought by an individual under section 7701, without the consent of such individual.

(d)(1) The Special Counsel may appoint the legal, administrative, and support personnel necessary to perform the functions of the Special Counsel.

(2) Any appointment made under this subsection shall be made in accordance with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the

President (other than approval required under section 3324 or subchapter VIII of chapter 33).

(e) The Special Counsel may prescribe such regulations as may be necessary to perform the functions of the Special Counsel. Such regulations shall be published in the Federal Register.

(f) The Special Counsel may not issue any advisory opinion concerning any law, rule, or regulation (other than an advisory opinion concerning chapter 15 or subchapter III of chapter 73).

(g)(1) The Special Counsel may not respond to any inquiry or disclose any information from or about any person making an allegation under section 1214(a), except in accordance with the provisions of section 552a of title 5, United States Code, or as required by any other applicable Federal law.

(2) Notwithstanding the exception under paragraph (1), the Special Counsel may not respond to any inquiry concerning an evaluation of the work performance, ability, aptitude, general qualifications, character, loyalty, or suitability for any personnel action of any person described in paragraph (1)—

(A) unless the consent of the individual as to whom the information pertains is obtained in advance; or

(B) except upon request of an agency which requires such information in order to make a determination concerning an individual's having access to the information unauthorized disclosure of which could be expected to cause exceptionally grave damage to the national security.

(h)(1) The Special Counsel is authorized to appear as amicus curiae in any action brought in a court of the United States related to section 2302(b) (8) or (9), or as otherwise authorized by law. In any such action, the Special Counsel is authorized to present the views of the Special Counsel with respect to compliance with section 2302(b) (8) or (9) and the impact court decisions would have on the enforcement of such provisions of law.

(2) A court of the United States shall grant the application of the Special Counsel to appear in any such action for the purposes described under subsection (a).

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