

**Calendar No. 638**

114TH CONGRESS }  
2d Session }

SENATE

{ REPORT  
114-356 }

GAO ACCESS AND OVERSIGHT ACT OF 2016

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R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE

TO ACCOMPANY

S. 2849

TO ENSURE THE GOVERNMENT ACCOUNTABILITY OFFICE HAS  
ADEQUATE ACCESS TO INFORMATION



SEPTEMBER 21, 2016.—Ordered to be printed

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

### R E P O R T

[To accompany S. 2849]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 2849) to ensure the Government Accountability Office has adequate access to information, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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#### I. PURPOSE AND SUMMARY

S. 2849, the GAO Access and Oversight Act of 2016, seeks to affirm the Government Accountability Office's (GAO) authority under current law to access Federal records by clarifying that GAO may access the National Directory of New Hires (NDNH). S. 2849 also strengthens GAO's ability to bring a civil action in court when it is refused the information GAO needs to fulfill its oversight and investigation duties.

#### II. BACKGROUND AND THE NEED FOR LEGISLATION

Congress relies on GAO to provide information and analysis through its audits, evaluations, and reports on the efficiency and

effectiveness of the Federal Government.<sup>1</sup> These reports help Congress and taxpayers determine if tax dollars are being spent efficiently and effectively or are subject to waste, fraud, and mismanagement. To execute the duties required of the agency, Congress in 1921 granted GAO statutory authority to access all Federal records required by the agency to complete its audits, evaluations, and reports.<sup>2</sup> Further, to ensure GAO can obtain records from Federal agencies, Congress provided the Comptroller General the authority to bring a civil action against the head of an agency if he or she fails to produce the required documents.<sup>3</sup>

Due to differing interpretations of GAO's authority, S. 2849 reaffirms Congress' intention to provide GAO with the authority to access Federal records required to complete the Comptroller General's duties and bring a civil action if needed.

#### *Access to certain information*

S. 2849 addresses a recent issue GAO has had with the U.S. Department of Health and Human Services (HHS) regarding access to certain information.<sup>4</sup> From the start, it was Congress' intent to invest GAO with robust investigative powers. Although the law currently provides that GAO has access to “. . . information the Comptroller General requires about the duties, powers, activities, organization and financial transactions of the agency”<sup>5</sup> HHS has declined to provide GAO access to the NDNH.<sup>6</sup> The NDNH is a database that was created to “assist state child support agencies locate non-custodial parents, putative fathers, and custodial parents to establish paternity and child support obligations, as well as to enforce and modify orders for child support, custody, and visitation” by collecting information on new hires, quarterly wages, and unemployment insurance claims.<sup>7</sup>

Congress has authorized certain state and Federal agencies to access the NDNH for other purposes, including to improve the administration of several Federal means-tested programs including the Supplemental Nutrition Assistance Program (SNAP) benefits, unemployment compensation programs, and housing assistance programs.<sup>8</sup> HHS maintains that since the NDNH authorizing statute does not explicitly list GAO as an authorized recipient of NDNH information, HHS is not obligated to permit GAO access.<sup>9</sup>

To address this conflict, S. 2849 creates a new section in GAO's authorizing statute that specifies that no section in the Social Security Act, including section 453(l) of that Act, shall be construed to deny or limit GAO's authority to access information under the bill. While the new section explicitly addresses access to the NDNH, it

<sup>1</sup> 31 U.S.C. § 717 (1982).

<sup>2</sup> 31 U.S.C. § 716(a) (1980).

<sup>3</sup> *Id.* at § 716(b)(2).

<sup>4</sup> Memorandum Opinion for the Acting General Counsel Department of Health and Human Services, *Whether the Department of Health and Human Services May Provide the Government Accountability Office Access to Information in the National Directory of New Hires 1*, available at <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2016/03/18/2011-08-23-gao-access-ndnh.pdf> [hereinafter HHS Memorandum].

<sup>5</sup> 31 U.S.C. § 716(a).

<sup>6</sup> HHS Memorandum, *supra* note 4.

<sup>7</sup> Federal Parent Locator Service, *A guide to the National Directory of New Hires 1*, available at [https://www.acf.hhs.gov/sites/default/files/programs/css/a\\_guide\\_to\\_the\\_national\\_directory\\_of\\_new\\_hires.pdf](https://www.acf.hhs.gov/sites/default/files/programs/css/a_guide_to_the_national_directory_of_new_hires.pdf).

<sup>8</sup> 42 U.S.C. § 653 (j)(7), (8), and (10).

<sup>9</sup> HHS Memorandum, *supra* note 4.

notes the singling out of access to the NDNH should not affect GAO's access to other information not explicitly mentioned.

*Authority to bring civil action*

S. 2849 also addresses *Walker v. Cheney*, a judicial decision that clouded GAO's authority to compel Executive Branch agencies to produce required information.<sup>10</sup> In 2002, then-Comptroller General David M. Walker sought to use the authority given to GAO by Congress to compel then-Vice President Richard Cheney to release documents relating to meetings of the National Energy Policy Development Group (NEPDG), a task force the Vice President chaired.<sup>11</sup> While the U.S. District Court for the District of Columbia did not rule on GAO's statutory authority to conduct its study regarding the NEPDG or to obtain the records it was seeking, the court dismissed GAO's case stating the Comptroller General does not have standing to file the suit because there was no "personal, concrete, and particularized injury."<sup>12</sup> Further, the court found that the statutory right and institutional injury claimed by the Comptroller General was insufficient because the Comptroller General acts as an agent of Congress, and as such, can only suffer the same injury as Congress.<sup>13</sup> The court found Congress's injury to be "too vague and amorphous to confer standing."<sup>14</sup>

The decision in *Walker v. Cheney* undermines both GAO's authority to fulfill the oversight and investigative duties delegated to the agency by Congress, and Congress's constitutional authority to conduct and delegate oversight responsibilities as it sees fit. S. 2849 seeks to reaffirm and make explicit the Comptroller General's authority to bring a civil action without explicit Congressional approval to obtain agency records needed in the pursuit of GAO's oversight and investigation duties.

It is this Committee's expectation that before pursuing such litigation, Comptroller Generals will—as Comptroller General Walker did prior to filing *Walker v. Cheney*—first exhaust other avenues that are available to obtain the information he or she is seeking. Should such attempts fail, however, this bill reaffirms the Comptroller General's ability to seek a judicial remedy to enforce GAO's right to information under the law.

### III. LEGISLATIVE HISTORY

The GAO Access and Oversight Act of 2016, S. 2849, was introduced April 25, 2016, by Senator Ben Sasse (R-NE) and Senator Jon Tester (D-MT). The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 2849 at a business meeting on May 25, 2016. No amendments were offered. The Committee ordered the bill reported favorably *en bloc* by voice vote on May 25, 2016. Senators present for the vote on the bill were Senators Johnson, Portman, Paul, Lankford, Ayotte, Ernst, Sasse, Carper, McCaskill, Tester, Baldwin, Heitkamp, Booker, and Peters.

<sup>10</sup> *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002).

<sup>11</sup> *Id.* at 52.

<sup>12</sup> *Id.* at 53.

<sup>13</sup> *Id.* at 67.

<sup>14</sup> *Id.*

#### IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

##### *Section 1. Short title*

This section establishes the short title of the bill as the “GAO Access and Oversight Act of 2016.”

##### *Section 2. Access to certain information*

Subsection (a) clarifies GAO’s authority to access Federal records, specifically noting that section 453(l) of the Social Security Act does not supersede this authority.

Subsection (b) updates the requirement of agencies to notify Congress of action taken in response to recommendations from a GAO report, and clarifies which committees shall receive the written statement.

Subsection (c) authorizes the GAO to obtain Federal records through the filing of a civil action in court.

Subsection (d) makes a technical and conforming amendment.

#### V. EVALUATION OF REGULATORY IMPACT

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 and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office’s statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

#### VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

JUNE 24, 2016.

Hon. RON JOHNSON,  
*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 S. 2849, the GAO Access and Oversight Act of 2016.

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.

Enclosure.

##### *S. 2849—GAO Access and Oversight Act of 2016*

CBO estimates that enacting S. 2849 would have no significant effect on the federal budget. The legislation would amend federal law to clarify that the Government Accountability Office (GAO) has the authority to obtain certain records and information.

Enacting the bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting S. 2849 would not increase direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

S. 2849 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of 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.

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 2849 as reported are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

**UNITED STATES CODE**

\* \* \* \* \*

**TITLE 31—BANKS AND BANKING**

\* \* \* \* \*

**Subtitle I—General**

\* \* \* \* \*

**CHAPTER 7—GOVERNMENT ACCOUNTABILITY OFFICE**

\* \* \* \* \*

**Subchapter II—General Duties and Powers**

\* \* \* \* \*

**SEC. 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 the duties of the Comptroller General (including audit, evaluation, and investigative duties), including through the bringing of civil actions under this section. In reviewing a civil action under 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 an agency record to get the information. This subsection does not apply to expenditures made under section 3524 or 3526(e) of this title.

\* \* \* \* \*

**SEC. 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 Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives before the 61st day after the date of the report; and】 *(1) the Committee on Homeland Security and Governmental Affairs of the Senate, the Committee on 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.

**SEC. 721 ACCESS TO CERTAIN INFORMATION**

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

*(b) The specific reference to a statute in subsection (a) shall not be construed to affect access by the Government Accountability Office to information under statutes that are not so referenced.*