

Calendar No. 646

114TH CONGRESS }
2d Session }

SENATE

{ REPORT
{ 114-360

OFFICE OF SPECIAL COUNSEL
REAUTHORIZATION ACT OF 2016

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 2968

TO REAUTHORIZE THE OFFICE OF SPECIAL COUNSEL, AND FOR
OTHER PURPOSES



SEPTEMBER 27, 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. 2968]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 2968) to reauthorize the Office of Special Counsel, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

The purpose of S. 2968, the Office of Special Counsel Reauthorization Act of 2016, is to reauthorize the Office of Special Counsel (OSC) through fiscal year 2021 and provide updated authorities to the OSC. The bill will enhance the OSC's authority to investigate allegations of prohibited personnel practices and to seek corrective actions from Federal agencies, as well as provide additional protections for Federal employees who make disclosures of waste, fraud, abuse or misconduct in the Federal government.

II. BACKGROUND AND THE NEED FOR LEGISLATION

Congress first created the position of Special Counsel in the Civil Service Reform Act of 1978.¹ The Special Counsel was originally created as a position within the Merit Systems Protection Board (Board) to investigate disclosures of violations of law and waste, fraud, and abuse in the Federal Government, to investigate allegations of prohibited personnel practices and whistleblower retaliation, and to file complaints against agency officials and Federal employees who engage in these actions.² Congress removed the Special Counsel from the Board when it established the OSC in the Whistleblower Protection Act of 1989 (WPA).³ The WPA authorized the OSC through fiscal year 1992.⁴ Congress reauthorized the OSC from 1993 to 1997⁵ and from 2002 to 2007.⁶ Since 2008, however, the OSC has received funding and continued operating without additional authorizing legislation.

The OSC is responsible for receiving whistleblower disclosures of waste, fraud, and abuse and for receiving and investigating allegations of prohibited personnel practices,⁷ including whistleblower retaliation.⁸ In the case of whistleblower disclosures, the OSC reviews the allegation and determines whether there is a substantial likelihood that the disclosure evidences waste; abuse; violations of laws, rules or regulations; gross mismanagement, or a danger to public health and safety.⁹ The OSC provides the disclosure to the appropriate agency head and requires the agency head to investigate the disclosure and report its findings to the OSC, which will be transmitted to the President and Congress.¹⁰ For alleged prohibited personnel practices, the OSC investigates the allegation and, if it determines that a prohibited personnel practice occurred, seeks corrective action either from the agency or from the Board.¹¹

Special Counsel Carolyn Lerner told the Committee at a January 12, 2016, hearing that “[OSC] is engaged in the most productive period in its history.”¹² The number of complaints filed with and reviewed by the OSC has steadily increased over the past few years. In fiscal year 2015, 6,141 new cases were filed with the OSC, representing 1,000 more than the number of cases filed in fiscal year 2014 and 37 percent more than in fiscal year 2013.¹³ Fiscal year 2015 was the first time in the history of the OSC that it received more than 6,000 new cases.¹⁴

¹ Civil Service Reform Act of 1978, Pub. L. No. 95–454, 92 Stat. 1111, 1122–31 (1978).

² *Id.* at 1122, 1125.

³ Whistleblower Protection Act of 1989, Pub. L. No. 101–12, 103 Stat. 16, 19–29 (1989).

⁴ *Id.* at 34.

⁵ Pub. L. No. 103–424, 108 Stat. 4361 (to reauthorize the Office of Special Counsel, and for other purposes).

⁶ Pub. L. No. 107–304, § 2, 116 Stat. 2363, 2364 (to amend title 5, United States Code, to allow certain catch-up contributions to the Thrift Savings Plan to be made by participants age 50 or over; to reauthorize the Merit Systems Protection Board and the Office of Special Counsel; and for other purposes).

⁷ 5 U.S.C. § 2302(b).

⁸ 5 U.S.C. § 1212(a).

⁹ 5 U.S.C. §§ 1213(a), (b).

¹⁰ 5 U.S.C. §§ 1213(c)–(e).

¹¹ 5 U.S.C. § 1214.

¹² *Nomination of Michael J. Missal to be Inspector General, U.S. Department of Veterans Affairs, and the Honorable Carolyn N. Lerner to be Special Counsel, Office of Special Counsel: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2016) (statement of Carolyn N. Lerner, Special Counsel, Office of Special Counsel).

¹³ Office of Special Counsel, Performance and Accountability Report for Fiscal Year 2015, 4, 10 (2015), available at <https://osc.gov/Resources/FY%202015%20PAR-16Nov2015%20Final.pdf>.

¹⁴ *Id.*

With the significant increase in its caseload, there are several challenges the OSC faces that can be addressed through reauthorization legislation. The OSC recommended to Congress changes to help the agency be more productive in light of the increasing workload, to improve its access to agency information, and to improve agency accountability for actions ordered by the OSC.¹⁵

Lack of statutory authority to access documents

On occasion, an obstacle in OSC investigations is the lack of statutory authority by the OSC to request information from agencies. Currently, authority to request information from agencies only exists in regulation.¹⁶ The OSC informed Congress that “[w]hile agencies typically comply with [OSC information] 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.”¹⁷ Special Counsel Lerner provided testimony asserting that “[i]t is inconsistent with the historical intent of the attorney-client and deliberative process privileges to assert them in the course of an intra-Executive branch investigation. This is particularly true where OSC must step into the shoes of the agency to determine whether the agency allowed illegal conduct to occur.”¹⁸ The OSC wrote to the Committee:

The public interest in a transparent and accountable government is best served by ensuring OSC’s authority to access all information, including certain privileged information. Agencies should not be able to shield managers from accountability or hide retaliatory conduct by withholding information from OSC. . . . While agencies typically comply with OSC requests for [communications between management officials and agency counsel], some agencies assert that these types of communications are privileged and withhold this information from OSC. In such cases, OSC must engage in prolonged disputes over access to information or attempt to complete our investigation without the benefit of these important communications. This undermines the effectiveness of the whistleblower law and prolongs OSC investigations.¹⁹

For whistleblower disclosure cases, the OSC referred almost 200 disclosures to agencies for further investigation over the last three fiscal years.²⁰ Approximately 90 percent of these disclosures were wholly or partially substantiated by the agencies.²¹ However, some of the corrective action plans submitted to the OSC in response to the identified misconduct are “insufficient or incomplete.”²² For this, the OSC recommended to Congress that agencies be required “to provide an explanation if they fail to take action, including dis-

¹⁵ *Reauthorization of the U.S. Office of Special Counsel: Hearing Before the Subcomm. on Gov’t Operations of the H. Comm. on Oversight & Gov’t Reform*, 114th Cong. (2015) (statement of Carolyn N. Lerner, Special Counsel, Office of Special Counsel) [hereinafter “House Hearing”].

¹⁶ *Id.* See also 5 C.F.R. § 5.4 (2016).

¹⁷ House Hearing, *supra* note 15.

¹⁸ *Id.*

¹⁹ Letter from Carolyn N. Lerner, Special Counsel, Office of Special Counsel, to Senator Ron Johnson, Chairman, S. Comm. on Homeland Sec. & Governmental Affairs (May 26, 2016).

²⁰ House Hearing, *supra* note 15.

²¹ *Id.*

²² *Id.*

ciplinary action, in the case of substantiated misconduct. And . . . OSC should have the statutory authority to request and receive detailed follow-up information.”²³

Sensitive jobs loophole

In addition to updating the OSC’s authorities, the Committee considered other ways to enhance legal protections for Federal whistleblowers. According to the Government Accountability Project, “since the WPEA was passed, creative tactics are circumventing its mandate.”²⁴

Whistleblower protection organizations consider retaliatory investigations to be “the first step and most common form of harassment against whistleblowers.”²⁵ OSC reported that “retaliatory investigations can take many forms, such as unwarranted referrals for criminal or civil investigations or overly scrutinized reviews of time and attendance records.”²⁶ In a seminal case, where an employee challenged a proposed personnel action based under WPA, the Board held:

When, as here, an investigation is so closely related to the *personnel action* that it could have been a pretext for gathering evidence to retaliate, and the agency does not show by clear and convincing evidence that the evidence would have been gathered absent the protected disclosure, then the appellant [employee] will prevail on his affirmative defense of retaliation for whistleblowing.²⁷

When the Committee passed the Whistleblower Protection Enhancement Act of 2012 (WPEA), it acknowledged that:

Because retaliatory investigations are not explicitly referenced as a “personnel action” that may be prohibited under the WPA, a whistleblower might be able to demonstrate that an investigation was undertaken in retaliation for a protected disclosure, but nevertheless have no remedy under the WPA if the investigation did not result in a significant change in job duties, responsibilities, or working conditions.²⁸

However, the Obama Administration expressed concerns that adding retaliatory investigations as a prohibited personnel practice could inhibit legitimate and necessary agency inquiries, such as background investigations for employment, inspector general investigations, and security clearance eligibility determination investigations.²⁹ To address the issue of retaliatory investigations in a manner that would not hamper legitimate agency activities, WPEA au-

²³ *Id.*

²⁴ *Blowing the Whistle on Retaliation: Accounts of Current and Former Federal Agency Whistleblowers: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2015) (testimony of Tom Devine, Legal Director, Government Accountability Project).

²⁵ Letter from ACORN 8 et al., to Senator Ron Johnson, Chairman, S. Comm. on Homeland Sec. & Governmental Affairs, and Charles Grassley, Chairman, S. Comm. on the Judiciary (Jun. 7, 2016).

²⁶ Office of Special Counsel, *The U.S. Office of Special Counsel’s Role in Protecting Whistleblowers and Serving as a Safe Channel for Government Employees to Disclose Wrongdoing*, (2014), *available at* [https://osc.gov/Resources/OSC's%20Role%20in%20Protecting%20Whistleblowers%20\(5-19-14\).pdf](https://osc.gov/Resources/OSC's%20Role%20in%20Protecting%20Whistleblowers%20(5-19-14).pdf).

²⁷ *Russell v. Dep’t of Justice*, 76 M.S.P.R. 317, 324 (1997) (emphasis added).

²⁸ S. Rep. No. 112–155, at 21 (2012).

²⁹ *Id.*

thorized the OSC to investigate allegations that a personnel action against an employee was undertaken as a result of a retaliatory investigation.³⁰ Under WPEA, such an employee can obtain financial relief from the agency for those costs or damages incurred as a result of the retaliatory investigation.³¹

Despite this provision, retaliatory investigations continue to occur, and, as some have claimed, have intensified to criminal investigations in order to silence whistleblowers. On June 11, 2016, the Committee heard testimony from Federal employees who alleged they had been subject to retaliatory investigations after making disclosures of waste, fraud, abuse, and mismanagement.³² Tom Devine, Legal Director of The Government Accountability Project (GAP) informed the Committee that a recent development is the use of criminal investigations by agencies, rather than administrative investigations, to force whistleblowers to resign or possibly face a prosecutorial referral.³³ He also testified that, for whistleblowers, “the chilling effect of facing jail time is much more severe than the chilling effect from possible loss of your job.”³⁴

Of these creative tactics for whistleblower retaliation, GAP noted that “the most all-encompassing is the sensitive jobs loophole . . . a national security loophole that would subsume the entire civil service rule of law. . . .”³⁵ According to GAP, the Office of Personnel Management (OPM) issued a final rule under which:

[T]he government has uncontrolled power to designate almost any position as national security sensitive. Once that happens, sensitive employees no longer have the right to defend themselves in any kind of hearing. They do not even necessarily have the right to know what they were charged with doing wrong in order to lose their designation to work for the Federal Government. . . . Every whistleblower will lose a case who has a sensitive job.³⁶

In tandem with the OPM rule on the designation of national security positions, a 2013 decision by the United States Court Appeals for the Federal Circuit held that an agency determination of an individual’s eligibility to occupy a sensitive position is not reviewable by the Board, even if the position does not involve access to classified information.³⁷ Whistleblower rights groups consider this removal of due process appeals to be a “potentially all-encompassing national security loophole [that] has been the most severe threat both to the merit system and [WPA].”³⁸

Unauthorized access of medical records

The recent disclosures of fraud, misconduct, and mismanagement within the Department of Veterans Affairs (VA) uncovered another form of whistleblower retaliation. OSC Special Counsel Lerner tes-

³⁰*Id.* See also Whistleblower Protection Enhancement Act § 104(c), 5 U.S.C. § 1214(h) (2012).

³¹*Id.*

³²*Blowing the Whistle on Retaliation: Accounts of Current and Former Federal Agency Whistleblowers: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2015).

³³*Id.* (Testimony of Tom Devine, Legal Director, Government Accountability Project).

³⁴*Id.*

³⁵*Id.*

³⁶*Id.* See also Designation of National Security Positions in the Competitive Service, and Related Matters, 80 Fed. Reg. 108, 32243 (July 6, 2015).

³⁷*Id.* See also *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013).

³⁸Letter from ACORN 8 et al., *supra* note 26.

tified before the House Committee on Veterans Affairs Subcommittee on Oversight and Investigations that:

A[n] . . . ongoing concern is the unlawful accessing of employee medical records in order to discredit whistleblowers. In many instances, VA employees are themselves veterans and receive care at VA hospitals. In several cases, the medical record of whistleblowers have been accessed and information in those records has apparently been used to attempt to discredit the whistleblowers.³⁹

This Committee also heard testimony on September 22, 2015, from Brandon Coleman, a medical professional of the Phoenix, Arizona VA health care system, who alleged that his own medical treatment records were repeatedly accessed by some of his co-workers after he disclosed concerns that the VA was mishandling suicidal veterans.⁴⁰ According to Mr. Coleman, the VA then attempted to terminate his employment using information from those improperly-accessed medical records.⁴¹ A co-founder of the VA Truth Tellers, an organization of whistleblowers who have experienced retaliation since disclosing misconduct in the VA, testified that he has talked with more than 50 whistleblowers across the country who have had their medical records accessed.⁴²

Onerous requirements to close cases

In light of the “skyrocketing caseloads” whistleblower complaints from the VA and other agencies, the OSC requested that Congress consider revising the procedural requirements that the OSC must undertake for each and every complaint it receives.⁴³ Under current law, the OSC is required to send several documents to complainants, regardless of whether the complaint is repetitive, adjudicated by the Board, or filed several years after the matter of the complaint occurred.⁴⁴ According to the OSC, “these requirements require us to devote significant resources to closing non-meritorious complaints, instead of focusing on prosecuting and resolving meritorious cases.”⁴⁵

Protecting the OSC’s own employees

While OSC is charged with protecting Federal whistleblowers, last year’s results from an annual survey of Federal employees, including employees at OSC, suggests the agency may benefit from additional oversight and enhanced whistleblower protections for its own employees. This year’s results evidence OSC’s commitment to safeguarding employee protections and improving employee engagement and satisfaction. Each year, OPM conducts the Federal Employee Viewpoint Survey (FEVS), which provides employees an

³⁹*Addressing Continued Whistleblower Retaliation Within the VA: Hearing Before the H. Subcomm. on Oversight and Investigations of the Comm. on Veterans Affairs, 114th Cong.* (2015) (statement of Carolyn Lerner, Special Counsel, Office of Special Counsel).

⁴⁰*Improving VA Accountability: Examining Firsthand Accounts of Department of Veterans Affairs Whistleblowers: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs, 114th Cong.* (2015) (statement of Brandon Coleman, Sr., Ph.D., Addiction Therapist, Phoenix Veterans Affairs Health Care System.)

⁴¹*Id.*
⁴²*Id.* (testimony of Shea Wilkes, Licensed Clinical Social Worker, Overton VA Medical Center).

⁴³*Id.* (statement of Carolyn Lerner, Special Counsel, Office of Special Counsel).

⁴⁴5 U.S.C. § 1214.

⁴⁵*Improving VA Accountability, supra* note 39 (statement of Carolyn Lerner).

opportunity to “candidly share their perceptions of their work experiences, their agencies, and their leaders.”⁴⁶ A significant concern raised by the Partnership for Public Service report on the 2015 FEVS survey is that only 41.5 percent of OSC employees responded positively to the questions “Arbitrary actions, personal favoritism, and coercion for partisan political purposes are not tolerated,” and “I can disclose a suspected violation of any law, rule, or regulation without fear of reprisal.”⁴⁷ Recent survey results indicate OSC is making progress to address the 2015 survey results. For the 2016 FEVS, OSC employees reported substantial improvements to these questions, as well as for the question “Prohibited personnel practices . . . are not tolerated.”⁴⁸ As the agency charged with investigating and redressing prohibited personnel practice violations in other Federal agencies, it is important for OSC to lead by example by continuing to earn positive reporting and lowering negative reporting from its own employees to these FEVS questions.

The poor results for the OSC in the 2015 employee survey moved Chairman Johnson to request a programmatic review of OSC by the Government Accountability Office (GAO).⁴⁹ As a part of its review, Chairman Johnson requested that GAO assess “whether there are adequate safeguards in place for proper oversight of OSC.”⁵⁰ These safeguards include the procedure for OSC employee reporting of disclosures or prohibited personnel practices, the adequacy of the agreement between the OSC and the National Science Foundation Inspector General for such reporting, and the adequacy of the mechanisms to prevent a conflict of interest of the Special Counsel or Deputy Special Counsel in the event of an investigation of OSC by the Integrity Committee of the Council of the Inspectors General on Integrity and Efficiency.⁵¹

OSC also responded to these employee survey results with an internal performance review that merits application government-wide. In 2016, OSC began evaluating its managers on adherence to whistleblower protection laws and policies as a critical element in their performance plans.⁵² In addition to existing criteria for performance reviews, “managers will be required to foster an environment that promotes disclosures and prevents retaliation.”⁵³ This performance requirement on whistleblower protection for OSC employees is unique from other Federal agencies, as Federal law does not require agencies’ performance appraisal systems to consider employee adherence to whistleblower protection laws.⁵⁴

⁴⁶ Office of Personnel Management, Federal Employee Viewpoint Survey Results: Gov’t Mgmt Report, 2 (2015), available at https://www.fedview.opm.gov/2015FILES/2015_FEVS_Gwide_Final_Report.PDF.

⁴⁷ Partnership for Pub. Serv., *The Best Places to Work in the Fed. Gov’t, Effective Leadership: Fairness* (2015), available at http://bestplacestowork.org/BPTW/rankings/categories/small/leadership_sub_fairness_15.

⁴⁸ Office of Personnel Management, Federal Employee Viewpoint Survey Results: Gov’t Mgmt Report (2016), available at <https://osc.gov/Resources/fevs-2012-2016-comparison.pdf>.

⁴⁹ Letter from Senator Ron Johnson, Chairman, S. Comm. on Homeland Sec. and Governmental Affairs, to Gene Dodaro, Comptroller General, Gov’t Accountability Off. (Apr. 25, 2016).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Charles S. Clark, *Whistleblower Protection Agency Looks to Clean Up Its Own Backyard*, Government Executive (Apr. 1, 2016), <http://www.govexec.com/oversight/2016/04/whistleblower-protection-agency-looks-clean-its-own-backyard/127189/>.

⁵³ *Id.*

⁵⁴ 5 U.S.C. § 4302.

Conclusion

Special Counsel Lerner told the Committee that “reauthorization provides Congress with an opportunity to evaluate OSC’s authorities and responsibilities and make any necessary adjustments.”⁵⁵ A reauthorization of OSC that provides OSC with statutory authority to access information, an enhanced ability to oversee agency implementation of corrective actions, and streamlined procedures for reviewing allegations, along with additional whistleblower protections, will help ensure that Federal employees have an avenue for recourse should they be faced with retaliatory personnel actions after disclosing waste, fraud, and abuse in the federal government.

III. LEGISLATIVE HISTORY

S. 2968, the Office of Special Counsel Reauthorization Act, was introduced on May 23, 2016, by Chairman Ron Johnson and Senator Charles Grassley. Senator Claire McCaskill joined as a cosponsor on June 10, 2016. The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 2968 at a business meeting on May 25, 2016. The legislation was passed by voice vote with Senators Johnson, Portman, Paul, Lankford, Ayotte, Ernst, Sasse, Carper, McCaskill, Tester, Baldwin, Heitkamp, Booker, and Peters present.

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 “Office of Special Counsel Reauthorization Act of 2016.”

Section 2. Adequate access of Special Counsel to information

This section authorizes the OSC to have timely access to all documents or other information that relate to a matter within the jurisdiction or authority of the OSC that are in the possession of a Federal agency. This section also clarifies 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. If an agency does withhold or fail to comply with information requested by the OSC, the OSC is required to report this to Congress.

Section 3. Prohibited personnel practices; Information on whistleblower protections

This section delineates the responsibilities of Federal agency heads for preventing prohibited personnel practices, enforcing Federal whistleblower protection laws, and training Federal employees on their rights to make disclosures and their remedies should they be subject to prohibited personnel practices. This section also makes accessing a Federal employee’s medical record a prohibited personnel action.

⁵⁵ Improving VA Accountability: Examining First-Hand Accounts of Department of Veterans Affairs Whistleblowers: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs, 114th Cong. (2015) (statement of Carolyn N. Lerner, Special Counsel, Office of Special Counsel).

Section 4. Additional whistleblower provisions

This section provides additional tools for the OSC, the Board, and Federal agencies to prevent, investigate, or correct whistleblower retaliation in the Federal workplace.

Subsection (a) allows the OSC to request additional information from a Federal agency in its response to a finding by the OSC of a prohibited personnel practice. This subsection also extends the amount of time for the OSC to review a complaint for a substantial likelihood that the complainant discloses information warranting further investigation.

Subsection (b) allows the OSC to seek corrective action for a Federal agency investigation of an employee that was started, expanded, or extended in retaliation for a disclosure or protected activity by the employee, regardless of whether the agency investigation resulted in a personnel action against the employee.

Subsection (c) allows the Board to review an appeal of an action filed by an employee that arises from a determination that the employee is ineligible for a sensitive position that does not require a security clearance or access to classified information.

Subsection (d) requires Federal agencies to develop criteria by which whistleblower protection is evaluated in the performance appraisals for supervisory employees.

Subsection (e) requires Federal agencies to submit an annual report to Congress detailing the number of performance appraisals in which supervisory employees were determined to have unacceptable performance under the whistleblower protection criteria.

Section 5. Termination of certain investigations by the Office of Special Counsel

This section allows the OSC to terminate an investigation without an opportunity for the complainant to respond. The OSC can terminate an investigation under this section if it determines the complaint is not in the jurisdiction of the OSC, if it alleges the same facts and circumstances as a previous complaint investigated by the OSC or filed with the Board, or if the complaint is not timely based on when the complainant knew or should have known of the prohibited personnel practice.

Section 6. Allegations of wrongdoing within the Office of Special Counsel

Under this section, the OSC is required to enter into at least one agreement with a Federal agency inspector general for the purposes of receiving, reviewing, and investigating complaints from OSC employees. This section requires the OSC to provide a direct line of communication between its employees and such Inspectors General and does not allow the OSC to require any internal approval before an OSC employee can file a complaint with the inspector general.

Section 7. Reporting requirements

This section revises the information required in the annual report submitted to Congress by the OSC.

Section 8. Establishment of Survey Pilot Program

This section suspends the annual survey of complainants to the OSC and creates a pilot program that surveys individuals during fiscal year 2018 who filed a complaint or disclosure with the OSC. This survey will be designed to collect information on the individual's treatment at different stages of review by the OSC, not just the disposition of the individual's case as currently required in statute. The results of the survey will be published in the annual report by the OSC.

Section 9. Authorization of appropriations

This section authorizes appropriations of sums necessary for the OSC to carry out the provisions of this title through fiscal year 2021.

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

JULY 26, 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. 2968, the Office of Special Counsel Reauthorization 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. 2968—Office of Special Counsel Reauthorization Act of 2016

Summary: S. 2968 would authorize appropriations for the Office of Special Counsel (OSC) for fiscal years 2016 through 2021. The bill also would amend several of the laws governing the OSC and would extend new legal protections to federal employees (known as whistleblowers) who report abuse, fraud, and waste related to government activities.

CBO estimates that implementing this legislation would cost \$145 million over the 2017–2021 period, assuming appropriation of the necessary amounts. Enacting S. 2968 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting S. 2968 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

S. 2968 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary effects of S. 2968 are shown in the following table. The costs of this legislation fall within budget function 800 (general government).

	By fiscal year, in millions of dollars—					
	2017	2018	2019	2020	2021	2017–2021
INCREASES IN SPENDING SUBJECT TO APPROPRIATION						
Office of Special Counsel:						
Estimated Authorization Level	25	26	27	28	29	135
Estimated Outlays	23	26	27	28	29	133
Other Provisions:						
Estimated Authorization Level	2	2	2	2	2	10
Estimated Outlays	2	2	2	2	2	10
Total Increases:						
Estimated Authorization Level	27	28	29	30	31	145
Estimated Outlays	25	28	29	30	31	143

Basis of estimate: For this estimate, CBO assumes that S. 2968 will be enacted near the end of fiscal year 2016, that the necessary amounts will be appropriated each year, and that spending will follow historical spending patterns for the agency.

Under current law, the OSC investigates complaints regarding reprisals against federal employees who inform authorities of fraud or other improprieties in the operation of federal programs. The OSC can order corrective action (such as job restoration, back pay, and reimbursement of attorneys’ fees and medical costs) for valid complaints. If agencies fail to take corrective actions, the OSC or the employee can pursue a case through the Merit Systems Protection Board (MSPB) for resolution.

Reauthorization of OSC

Section 9 of the bill would authorize the annual appropriation, through 2021, of such sums as may be necessary for OSC operations. In 2016, the OSC received an appropriation of \$24 million; CBO estimates that continuing its activities at that level and adjusting for anticipated inflation would cost \$133 million over the 2017–2021 period.

Other provisions

Under current law, when settling employment disputes between the federal government and employees over prohibited personnel practices, federal agencies are required to pay for an employee’s attorney, any retroactive salary payments, and any travel or medical costs associated with the claim. S. 2968 would expand legal protections for whistleblowers and would allow the OSC to seek corrective action for federal employees who suffered retaliation by their agency.

According to the MSPB and the OSC, these new legal protections would affect a small number of cases and would usually have settlement amounts of about \$20,000. Based on information about the probable number of such complaints and the cost of similar corrective actions provided by those agencies, CBO estimates that these new legal protections would increase awards and administrative costs by about \$80,000 for each of the 26 major federal agencies each year.

Pay-As-You-Go considerations: None.

Increase in long-term direct spending and deficits: CBO estimates that enacting S. 2968 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

Intergovernmental and private-sector impact: S. 2968 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Previous CBO estimate: On April 11, 2016, CBO transmitted a cost estimate for H.R. 4639, the Thoroughly Investigating Retaliation Against Whistleblowers Act, as ordered reported by the House Committee on Oversight and Government Reform on March 1, 2016. Both pieces of legislation would reauthorize the OSC, but S. 2968 would authorize the office through 2021 and has additional provisions that would increase awards and administrative costs to agencies. Those differences are reflected in the estimated costs for each bill.

Estimate prepared by: Federal costs: Matthew Pickford; Impact on state, local, and tribal governments: Jon Sperl; Impact on the private-sector: Paige Piper/Bach.

Estimate 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 the bill, 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 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

* * * * *

PART II—CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

* * * * *

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

* * * * *

Subchapter II—Office of Special Counsel

* * * * *

**SEC. 1212. POWERS AND FUNCTIONS OF THE OFFICE OF SPECIAL
COUNSEL**

(a) * * *

(b) * * *

(1) * * *

* * * * *

(5)

(A) *The Special Counsel, in carrying out this subchapter—*

(i) shall have timely access to all records, data, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable agency which relate to a matter within the jurisdiction or authority of the Special Counsel;

(ii) may 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) may require, during an investigation, review, or inquiry of an agency, any employee of the agency to provide to the Special Counsel any record or other information that relates to a matter within the jurisdiction or authority of the Special Counsel.

(B)

(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)(i) with respect to the agency.

(ii) The submission of material described in subparagraph (A)(i) 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).

* * * * *

(i) The Special Counsel shall enter into at least 1 agreement with the Inspector General of an agency under which—

(1) the Inspector General shall—

(A) receive, review, and investigate allegations of prohibited personnel practices or wrongdoing filed by employees of the Office of Special Counsel; and

(B) develop a method for an employee of the Office of Special Counsel to directly communicate with the Inspector General; and

(2) the Special Counsel—

(A) may not require an employee of the Office of Special Counsel to seek authorization or approval before directly contacting the Inspector General in accordance with the agreement; and

(B) may reimburse the Inspector General for services provided under the agreement.

SEC. 1213. PROVISIONS RELATING TO DISCLOSURES OF VIOLATIONS OF LAW, GROSS MISMANAGEMENT, AND CERTAIN OTHER MATTERS.

(a) * * *

(b) Whenever the Special Counsel receives information of a type described in subsection (a) of this section, the Special Counsel shall review such information and, within **[15 days]** **[45 days]** after receiving the information, determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety.

(c) * * *

(d) * * *

(e)

(1) [Any such report] *Any report required under subsection (c) or paragraph (5) of this subsection shall be submitted to the Special Counsel, and the Special Counsel shall transmit a copy to the complainant, except as provided under subsection (f) of this section. The complainant may submit comments to the Special Counsel on the agency report within 15 days of having received a copy of the report.*

(2) Upon receipt of any report of the head of an agency required under subsection (c) of this section, the Special Counsel shall review the report and determine whether—

[(A)] the findings of the head of the agency appear reasonable; and

[(B)] the report of the agency under subsection (c)(1) of this section contains the information required under subsection (d) of this section.]

(2) Upon receipt of any report that the head of an agency is required to submit under subsection (c), the Special Counsel shall review the report and determine whether—

(A) the findings of the head of the agency appear reasonable; and

(B) if the special Counsel requires the head of the agency to submit a supplemental report under paragraph (5), the reports submitted by the head of the agency collectively contain the information required under subsection (d).

(3) The Special Counsel shall transmit any [agency report received pursuant to subsection (c) of this section] report submitted to the Special Counsel by the head of an agency under subsection (c) or paragraph (5) of this subsection, any comments provided by the complainant pursuant to subsection (e)(1), and any appropriate comments or recommendations by the Special Counsel to the President and the congressional committees with jurisdiction over the agency which the disclosure involves.

(4) * * *

(5) *If after conducting a review of a report under paragraph (2), the Special counsel concludes that the Special Counsel requires additional information or documentation to determine whether the report submitted by the head of an agency is reasonable and sufficient, the Special Counsel may request that the head of the agency submit a supplemental report—*

(A) containing the additional information or documentation identified by the Special Counsel; and

(B) which the head of the agency shall submit to the Special Counsel within a period of time specified by the Special Counsel.

(f) * * *

(g) * * *

[(h) The identity of any individual who makes a disclosure described in subsection (a) may not be disclosed by the Special Counsel without such individual's consent unless the Special Counsel determines that the disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.]

(h) The Special Counsel may not respond to any inquiry or disclose any information about any person who makes a disclosure under this section except in accordance with section 552a or as required by any other provision of Federal law.

* * * * *

SEC. 1214. INVESTIGATION OF PROHIBITED PERSONNEL PRACTICES; CORRECTIVE ACTION.

(a) * * *

(1) * * *

(A) * * *

* * * * *

(D) No later than 10 days before the Special Counsel terminates any investigation of a prohibited personnel practice other than a termination of an investigation described in paragraph (6)(A), the Special Counsel shall provide a written status report to the person who made the allegation of the proposed findings of fact and legal conclusions. The person may submit written comments about the report to the Special Counsel. The Special Counsel shall not be required to provide a subsequent written status report

under this subparagraph after the submission of such written comments.

* * * * *
(6)

(A) Not later than 30 days after receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel may terminate an investigation of the allegation without further inquiry or an opportunity for the individual who submitted the allegation to respond if the Special Counsel determines that—

(i) the same allegation, based on the same set of facts and circumstances had previously been—

(I)

(aa) made by the individual; and

(bb) investigated by the Special Counsel; or

(II) filed by the individual with the Merit Systems Protection Board;

(ii) the Special Counsel does not have jurisdiction to investigate the allegation; or

(iii) the individual knew or should have known of the alleged prohibited personnel practice on or before the date that is 3 years before the date on which the Special Counsel received the allegation.

(B) Not later than 30 days after the date on which the Special Counsel terminates an investigation under subparagraph (A), the Special Counsel shall provide a written notification to the individual who submitted the allegation of a prohibited personnel practice that states the basis of the Special Counsel for terminating the investigation.

* * * * *
(i) The Special Counsel may petition the Board to order corrective action, including fees, costs, or damages reasonably incurred by an employee due to an investigation of the employee by an agency, if the investigation by an agency was commenced, expanded, or extended in retaliation for a disclosure or protected activity described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), even if no personnel action, as defined under section 2302(a), is taken or not taken.

* * * * *
SEC. 1218. ANNUAL REPORT.

【The Special Counsel shall submit an annual report to the Congress on the activities of the Special Counsel, including the number, types, and disposition of allegations of prohibited personnel practices filed with it, investigations conducted by it, cases in which it did not make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken within the 240-day period specified in section 1214(b)(2)(A)(i), and actions initiated by it before the Merit Systems Protection Board, as well as a description of the recommendations and reports made by it to other agencies pursuant to this subchapter, and the actions taken by the agencies as a result of the reports or recommendations. The report required by this section shall include whatever recommendations for legislation or

other action by Congress the Special Counsel may consider appropriate.】 *The Special Counsel shall submit to Congress, on an annual basis, a report on the activities of the Special Counsel, which shall include, for the year preceding the submission of the report—*

(1) the number, types, and disposition of allegations of prohibited personnel practices filed with the Special Counsel and the costs of resolving such allegations;

(2) the number of investigations conducted by the Special Counsel;

(3) the number of stays or disciplinary actions negotiated with agencies by the Special Counsel;

(4) the number of subpoenas issued by the Special Counsel;

(5) the number of instances in which the Special Counsel reopened an investigation after the Special Counsel had made an initial determination with respect to the investigation;

(6) the actions that resulted from reopening investigations as described in paragraph (5);

(7) the number of instances in which the Special Counsel did not make a determination before the end of the 240-day period described in section 1214(b)(2)(A)(i) regarding whether there were reasonable grounds to believe that a prohibited personnel practice had occurred, existed, or was to be taken;

(8) a description of the recommendations and reports made by the Special Counsel to other agencies under this subchapter and the actions taken by the agencies as a result of the recommendations or reports;

(9) the number of—

(A) actions initiated before the Merit Systems Protection Board, including the number of corrective action petitions and disciplinary complaints initiated; and

(B) stays and extensions of stays obtained from the Merit Systems Protection Board;

(10) the number of prohibited personnel practice complaints that resulted in—

(A) a favorable action for the complainant, organized by actions in—

(i) complaints dealing with reprisals against whistleblowers; and

(ii) all other complaints; and

(B) a favorable outcome for the complainant, organized by outcomes in—

(i) complaints dealing with reprisals against whistleblowers; and

(ii) all other complaints;

(11) the number of corrective actions that the Special Counsel required an agency to take after a finding by the Special Counsel of a prohibited personnel practices, as defined in section 2302(b); and

(12) the results for the Office of Special Counsel of any employee viewpoint survey conducted by the Office of Personnel Management or any other agency.

SEC. 1219. PUBLIC INFORMATION.

(a)

(1) [a list of noncriminal matters referred to heads of agencies under subsection (c) of section 1213, together with reports

from heads of agencies under subsection (c)(1)(B) of such section relating to such matters; **】** a list of any noncriminal matters referred to the head of an agency under section 1213(c), together with—

(A) a copy of the information transmitted to the head of the agency under section 1213(c)(1);

(B) any report from the agency under section 1213(c)(1)(B) relating to the matter;

(C) if appropriate, not otherwise prohibited by law, and consented to by the complainant, any comments from the complainant under section 1213(e)(1) relating to the matter; and

(D) the comments or recommendations of the Special Counsel under paragraph (3) or (4) of section 1213(e).

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PART III—EMPLOYEES

* * * * *

Subpart A—General Provisions

* * * * *

CHAPTER 23—MERIT SYSTEMS PRINCIPLES

* * * * *

SEC. 2302. PROHIBITED PERSONNEL PRACTICES.

(a) * * *

(1) * * *

(2) * * *

(A) * * *

(i) * * *

* * * * *

(xi) the implementation or enforcement of any non-disclosure policy, form, or agreement; **【and】**

(xii) for the purposes of paragraph (8) or (9) of subsection (b), the accessing of a medical record of the employee or applicant for employment; and

【xii】 (xiii) * * *

* * * * *

(b) * * *

(1) * * *

* * * * *

(9) * * *

(A) * * *

(B) * * *

(C) * * *

(D) for refusing to obey an order that would require the individual to violate a law, rule, or regulation;

* * * * *

【(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations,

and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title, including how to make a lawful disclosure of information that is specifically required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs to the Special Counsel, the Inspector General of an agency, Congress, or other agency employee designated to receive such disclosures. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.】

(c)

(1) *In this subsection—*

(A) *the term “new employee” means an individual—*

(i) *appointed to a position as an employee on or after the date of enactment of the Office of Special Counsel Reauthorization Act of 2016; and*

(ii) *who has not previously served as an employee; and*

(B) *the term “whistleblower protections” means the protections against and remedies for a prohibited personnel practice described in paragraph (8) or subparagraph (A)(i), (B), (C), or (D) of paragraph (9) of subsection (b).*

(2) *The head of each agency shall be responsible for—*

(A) *preventing prohibited personnel practices;*

(B) *complying with and enforcing applicable civil service laws, rules, and regulations, and other aspects of personnel management; and*

(C) *ensuring, in consultation with the Special Counsel and the Inspector General of the agency, that employees of the agency are informed of the rights and remedies available to the employees under this chapter and chapter 12, including—*

(i) *information with respect to whistleblower protections available to new employees during a probationary period;*

(ii) *the role of the Office of Special Counsel and the Merit Systems Protection Board with respect to whistleblower protections; and*

(iii) *the means by which, with respect to information that is otherwise required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs, an employee may make a lawful disclosure of the information to—*

(I) *the Special Counsel;*

(II) *the Inspector General of an agency;*

(III) *Congress; or*

(IV) *another employee of the agency who is designated to receive such a disclosure.*

(3) *The head of each agency shall ensure that the information described in paragraph (2) is provided to each new employee of the agency not later than 180 days after the date on which the new employee is appointed.*

(4) *The head of each agency shall make available information regarding whistleblower protections applicable to employees of the agency on the public website of the agency and on any on-line portal that is made available only to employees of the agency, if such portal exists.*

(5) *Any employee to whom the head of an agency delegates authority for any aspect of personnel management shall, within the limits of the scope of the delegation, be responsible for the activities described in paragraph (2).*

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Subpart C—Employee Performance

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CHAPTER 43—PERFORMANCE APPRAISAL

* * * * *

Subchapter I—General Provisions

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SEC. 4301. DEFINITIONS.

[For the purpose of] *Except as otherwise expressly provided, for the purpose of this subchapter—*

* * * * *

SEC. 4302. ESTABLISHMENT OF PERFORMANCE APPRAISAL SYSTEMS.

(a) * * *

(b)

(1) *The head of each agency, in consultation with the Director of the Office of Personnel Management and the Special Counsel, shall develop criteria that—*

(A) the head of the agency shall use as a critical element for establishing the job requirements of a supervisory employee; and

(B) promote the protection of whistleblowers.

(2) *The criteria required under paragraph (1) shall include principles for the protection of whistleblowers, such as the degrees to which supervisory employees—*

(A) respond constructively when employees of the agency make disclosures described in subparagraph (A) or (B) of section 2302(b)(8);

(B) take responsible actions to resolve such disclosures; and

(C) foster an environment in which employees of the agency feel comfortable making such disclosures to supervisory employees or other appropriate authorities.

(3) *In this subsection—*

(A) the term “agency” means any entity the employees of which are covered by paragraphs (8) and (9) of section 2302(b), without regard to whether any other provision of this section is applicable to the entity;

(B) the term “supervisory employee” means an employee who would be a supervisor, as defined in section 7103(a),

*if the agency employing the employee was an agency for purposes of chapter 71; and
(C) the term “whistleblower” means an employee who makes a disclosure described in section 2302(b)(8).*

[b] (c) * * *
[c] (d) * * *

* * * * *

Subchapter II—Performance Appraisal in the Senior Executive Service

* * * * *

SEC. 4313. CRITERIA FOR PERFORMANCE APPRAISALS.

(1) * * *

* * * * *

(4) other indications of the effectiveness, productivity, and performance quality of the employees for whom the senior executive is responsible; **[and]**

(5) meeting affirmative action goals, achievement of equal employment opportunity requirements, and compliance with the merit systems principles set forth under section 2301 of this title~~].~~; *and*

(6) *protecting whistleblowers, as described in section 4302(b)(2).*

* * * * *

Subpart F—Labor-Management and Employee Relations

* * * * *

CHAPTER 77—APPEALS

* * * * *

SEC. 7701. APPELLATE PROCEDURES.

(a) * * *

* * * * *

(k)

(1) *The Board has authority to review on the merits an appeal by an employee or applicant for employment of an action arising from a determination that the employee or applicant for employment is ineligible for a sensitive position if—*

(A) the sensitive position does not require a security clearance or access to classified information; and

(B) such action is otherwise appealable.

(2) *In this subsection, the term “sensitive position” means a position designated as a sensitive position under Executive Order 10450 (5 U.S.C. 7311 note), or any successor thereto.*

[k](l) * * *

* * * * *