



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

May 26, 2016

The Honorable Ron Johnson
Chairman
Committee on Homeland Security and Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Office of Special Counsel Comments on Government Reform Legislation

Dear Chairman Johnson:

Thank you for requesting the U.S. Office of Special Counsel's (OSC) views on the Bolster Accountability to Drive Government Efficiency and Reform Washington Act (the Act). We strongly support the Committee's decision to include the Office of Special Counsel Reauthorization Act in your government reform legislative package. In addition to the OSC Reauthorization Act, I highlight two additional titles within the Act that will promote stronger whistleblower protections and help to curb government waste, fraud, and abuse.

The OSC Reauthorization Act strengthens OSC's authorities, providing us with additional tools to protect whistleblowers and save taxpayer dollars. Importantly, the legislation clarifies OSC's authority to request and receive all agency information. 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.

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. While agencies typically comply with OSC requests for this highly relevant material, 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

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these important communications. This undermines the effectiveness of the whistleblower law and prolongs OSC investigations.

In clarifying OSC's authority to request and receive this information, we note that the legislation also states that the production of privileged material to OSC will not constitute a waiver of the privilege by the agency in any other context or forum. This is an appropriate resolution that protects the interests of agencies, while also promoting merit system principles and protecting employees from retaliation.

In addition to clarifying OSC's authority to access agency information, the OSC Reauthorization Act:

- Prohibits retaliatory searches of employee medical records, a necessary reform that will better protect whistleblowers from the Department of Veterans Affairs;
- Strengthens OSC's authority to protect employees from other forms of retaliatory investigations;
- Restores OSC and Merit Systems Protection Board jurisdiction to review claims of whistleblower retaliation by employees in sensitive positions;
- Requires agencies to incorporate whistleblower protection principles into the performance plans for managers and supervisors;
- Requires agencies to complete OSC's whistleblower certification program;
- Promotes efficiency in OSC investigations and allows us to focus limited resources on meritorious cases;
- Protects OSC employees by codifying a requirement for OSC to enter into an agreement for services with an Inspector General, consistent with OSC's current agreement with the National Science Foundation OIG;
- Reauthorizes OSC's programs through 2021.

Each of these important reforms will strengthen OSC's ability to carry out our good government mission on behalf of federal workers and the taxpayers.

In addition to the OSC Reauthorization Act, the Committee's government reform legislation incorporates the Inspector General Empowerment Act, which will also help to curb government waste and prevent retaliation in the federal workplace. OSC works closely with Inspectors General to root out waste, fraud, and abuse after OSC receives whistleblower disclosures from government workers. Providing the Inspectors General with additional tools to obtain information, including testimony from former employees, contractors, or grantees, will enhance these efforts.

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The government reform package also incorporates the Administrative Leave Act of 2016, which promotes accountability in government personnel decisions. Too often, government agencies have improperly used administrative leave, either to delay appropriate accountability actions or to inappropriately idle and isolate whistleblowers. Both scenarios result in significant waste of taxpayer dollars.

The Committee's government reform legislation, which includes these and other important measures, will have a positive impact on good government. Thank you for considering these views.

Respectfully,

A handwritten signature in blue ink that reads "Carolyn Lerner". The signature is written in a cursive, flowing style.

Carolyn N. Lerner

cc: The Honorable Thomas R. Carper, Ranking Member