



U.S. OFFICE OF SPECIAL COUNSEL
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The Special Counsel

July 19, 2023

VIA ELECTRONIC TRANSMISSION

The Honorable Charles E. Grassley
Ranking Member
U.S. Senate Committee on the Budget

The Honorable Jason Smith
Chairman
U.S. House Committee on Ways and Means

The Honorable Ron Johnson
Ranking Member
U.S. Senate Permanent Subcommittee on
Investigations

The Honorable Jim Jordan
Chairman
U.S. House Committee on the Judiciary

The Honorable James Comer
Chairman
U.S. House Committee on Oversight and
Accountability

Dear Ranking Members Grassley and Johnson, and Chairmen Smith, Jordan, and Comer:

I am writing in response to your July 5, 2023 letter regarding allegations of whistleblower retaliation against veteran federal employees. You asked that OSC investigate publicly reported allegations of retaliation by the Department of Justice (DOJ) and Internal Revenue Service (IRS), and allegations related to IRS's failure to include the 5 U.S.C. § 2302(b)(13) anti-gag provision in communications to its employees. You also asked that OSC seek discipline against anyone who engaged in unlawful conduct with respect to the federal employees. In lieu of a briefing at this time, OSC respectfully submits my written response on these matters.

OSC became aware that IRS officials sent out communications to their employees, which lacked the language required by 5 U.S.C. § 2302(b)(13), shortly after they were transmitted in May 2023. We acted promptly, and OSC's efforts were well underway before we received your July correspondence. In May and early June, we reached out to IRS officials to inform them of the section (b)(13) anti-gag requirements and press them to correct the errant communications. Agencies must uphold the rights and protections of federal employees by providing them clear and accurate instructions, and agencies should not convey information in a way that could have a chilling effect on lawful whistleblowing and communications with Congress. After OSC's intervention, IRS issued new guidance that included the section (b)(13) anti-gag language and, by its own statements, superseded its prior correspondence.

In addition to our early action on the section 2302(b)(13) concerns, my office immediately began conducting a civil law enforcement investigation into serious allegations of retaliation against federal employee whistleblowers. We established a team of experienced OSC investigators to evaluate the allegations with dispatch and to begin our well-established process to investigate the allegations. We have communicated with the agencies involved, including to set conduct expectations during the course of our investigation, to preserve documents that may be relevant to our inquiry, and to issue notice, as appropriate, to preserve OSC's ability to pursue discipline if our findings support it.¹ We have also begun gathering documents. We are swiftly navigating potential investigative challenges related to the disclosure of taxpayer information protected by 26 U.S.C. § 6103 and the disclosure of grand jury information protected by section 6(e) of the *Federal Rules of Criminal Procedure*. Throughout our investigation, we are mindful of the need to work expeditiously, especially in a complex and important matter such as this one.

As for your question about holding officials accountable for prohibited personnel practices, our statute sets out a range of actions we can take to address unlawful activity—including pursuing corrective action (which includes *status quo ante* relief and/or damages) and disciplinary action (which includes removal, debarment, and/or civil fines).² Beyond our usual authorities to investigate and prosecute prohibited personnel practices, the Special Counsel may also refer to the Attorney General or relevant agency head disclosures of violations of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or danger to public health or safety.³ And if in the course of a prohibited personnel practice investigation OSC has reasonable cause to believe that any violation of law, rule, or regulation has occurred, we will likewise report it to the relevant agency head.⁴

In all matters, OSC acts as a neutral investigator to determine whether we can establish the elements laid out in our statute and in applicable case law. Once we've established the elements, we determine which remedies may be appropriate. In an open matter such as this, we do not reach conclusions or make findings until we've completed our investigation, including gathering all documents and testimony from relevant agencies, which here may include DOJ and IRS. We also may informally intervene to make quick course corrections where we see potential ongoing retaliation or take precautions such as requesting notice before an agency takes additional personnel actions with respect to an employee. We continually assess further measures to ensure witnesses and whistleblowers are protected and the integrity of our investigation is not compromised.

Accordingly, while we appreciate the significant congressional and public interest in this matter, given the early stage of the investigation, there are no current findings or conclusions to

¹ See 5 U.S.C. § 1214(f).

² See *id.* §§ 1214, 1215, and 1216.

³ *Id.* § 1212(a)(3).

⁴ *Id.* § 1214(e).

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share. Under my authority, OSC staff will continue to conduct the investigation thoroughly and expeditiously.

I hope that this letter addresses your interest in our handling of the case and wish to assure the Committees and Senators that we take the allegations here seriously and appreciate the time-sensitivity of this matter. Please do not hesitate to reach out to my legislative affairs liaison, Travis Millsaps at TMillsaps@osc.gov, should you have any additional questions.

Best wishes,

A handwritten signature in black ink, appearing to read "Henry J. Kerner". The signature is fluid and cursive, with a large initial "H" and a stylized "K".

Henry J. Kerner
Special Counsel
U.S. Office of Special Counsel