Testimony of Special Counsel Carolyn N. Lerner
U.S. Office of Special Counsel

U.S. House of Representatives
Committee on Oversight and Government Reform

"Transparency at TSA"

March 2, 2017, 10:00 AM

Chairman Chaffetz, Ranking Member Cummings, and Members of the Committee:

Thank you for the opportunity to testify today about the U.S. Office of Special Counsel (OSC), and our efforts to investigate allegations of whistleblower retaliation at the Transportation Security Administration. I greatly appreciate the Committee's commitment to oversight and to strengthening OSC's ability to carry out our good government mission. Let me also take this opportunity to thank the Committee, and in particular Representatives Blum, Meadows, Cummings, and Connolly for your leadership in passing the Thoroughly Investigating Retaliation Against Whistleblowers Act (H.R. 69) during the opening week of this Congress. Making whistleblowers a first-week issue highlights their critical importance to effective oversight. We look forward to continuing to work with you and your Senate counterparts as the legislation moves forward. The clarified authority in that legislation will assist OSC in our efforts to conduct timely and complete investigations on behalf of whistleblowers at TSA and other federal agencies.

I. OSC's Critical Mission

OSC is an independent investigative and prosecutorial federal agency that promotes accountability, integrity, and fairness in the federal workplace. We provide a safe and secure channel for government whistleblowers to report waste, fraud, abuse, and threats to public health and safety. And we protect federal employees from prohibited personnel practices, most notably whistleblower retaliation. OSC also protects veterans and service members from job discrimination under the Uniformed Services Employment and Reemployment Rights Act (USERRA). And finally, we enforce the Hatch Act, which keeps partisan political activity out of the federal workplace. In all of these areas, OSC prioritizes outreach and education to federal employees and managers to prevent potential violations before they occur.

Although OSC has limited resources, we are fulfilling our critical mission more effectively now than ever before. Through our whistleblower disclosure process, we have worked with whistleblowers to improve care for veterans across the country, put a stop to millions of dollars of waste in government overtime programs, and identified and corrected significant threats to aviation security. These are significant victories for employees who risked their careers to promote more honest, accountable, safe and efficient government.

As noted, a critical part of OSC's mission is to protect those whistleblowers. In fiscal year 2016 alone, we secured 276 favorable actions for whistleblowers and other victims of prohibited personnel practices. These actions include reinstatement or relief for whistleblowers who have been fired, demoted, or reassigned, as well as back pay and other remedies. In appropriate cases, we also seek disciplinary action against the agency officials who engaged in the wrongdoing. The number of victories on behalf of whistleblowers and other employees reflects a 233 percent increase since my tenure began in FY 2011.

II. To Fulfill its Mandate, OSC Needs Broad Access to Agency Information

Congress has given OSC a broad mandate to investigate potentially unlawful personnel practices, including whistleblower retaliation. OSC's authorizing statutes empower OSC to issue subpoenas, administer oaths, examine witnesses, take depositions, and receive evidence. 5 U.S.C. §§ 1212(b)(1), 1214(a)(1)(A), 1214(a)(5), 1216(a), 1303. Moreover, Office of Personnel Management (OPM) regulation 5 C.F.R § 5.4, specifically directs agencies to comply with OSC requests, stating: "agencies shall make available . . . employees to testify in regard to matters inquired of . . . [and] shall give . . . OSC . . . all information, testimony, documents, and material . . . the disclosure of which is not otherwise prohibited by law or regulation."

OSC uses its investigatory authority extensively. In particular, OSC investigations depend on the routine issuance of document requests and the ability to interview witnesses. Although agencies generally work with OSC to fulfill OSC's document requests, some agencies do not provide timely and complete responses. The failure to provide such responses can significantly delay and impede OSC's investigation. In addition, agencies sometimes withhold documents and other information responsive to OSC requests by asserting the attorney-client privilege. In these cases, OSC often 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 whistleblower laws, wastes precious resources, and prolongs OSC investigations.

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 held that the attorney-client privilege can be asserted during intra-governmental administrative investigations. The purpose of the 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." *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). But invoking the privilege in the context of an OSC investigation is inconsistent with this historical understanding of the privilege for several reasons.

First, Congress has made clear that there is a strong public interest in exposing government wrongdoing and upholding merit system principles. To uphold this public interest, OSC must review communications between management officials and agency counsel to determine whether an agency acted with a legitimate or unlawful basis in taking action against a whistleblower. Federal agencies have no legitimate basis to use privileges to conceal evidence of prohibited practices from the agency that Congress charged with investigating them. *See In re Lindsey,*

158 F.3d 1263, 1266-67 (D.C. Cir. 1998) (citing the "obligation of a government lawyer to uphold the public trust" in rejecting the assertion of attorney-client privilege for White House lawyers in Whitewater litigation). It simply makes no sense to create an intra-executive branch investigative process to determine if prohibited conduct occurred, and then allow agencies to frustrate that process by withholding information.

Second, review by OSC does not deter frank and candid communications between government managers and lawyers. In fact, agencies routinely provide OSC with these communications to demonstrate that a personnel action against an employee was lawful and motivated by non-retaliatory, valid performance or misconduct-based reasons. When management engages in this type of communication with government lawyers, and provides evidence of these consultations to OSC, it facilitates prompt review by OSC and benefits the government as an employer.

Third, there is no precedent to support agency concerns that disclosure to OSC would constitute a waiver of the privilege in another forum or in third party litigation. OSC's information requests are not akin to discovery requests made by a third party in litigation. OSC is an internal investigator for the U.S. Government, and our requests are made to other U.S. Government entities, not third parties. If Congress wished to allow agencies to shield information within this process, it would have crafted a limitation on OSC's investigatory mandate and authority. For example, the exceptions included in the Freedom of Information Act pertaining to public release of privileged documents show that Congress does so when it chooses.

Although we believe Congress has already expressed its intent in this area, to provide additional clarity, OSC recommends that Congress establish explicit statutory authority for the Special Counsel to obtain information, similar to section 3 of the House-passed Thoroughly Investigating Retaliation Against Whistleblowers Act (H.R. 69). We urge Congress to amend this provision prior to final passage to expressly clarify OSC's existing right to request and receive information that assertions of common-law privileges may protect in other contexts. This statutory provision would be similar to the authorities Congress has provided to Inspectors General, and clarified recently by the Inspector General Empowerment Act of 2016, and to the Government Accountability Office.

A statutory provision clarifying OSC's access to information in whistleblower investigations should be broad enough to make clear that it applies to all OSC investigations, including whistleblower disclosure, Hatch Act, and USERRA cases. This will help OSC fulfill its statutory mandates and avoid unnecessary and duplicative investigations. Clear statutory authority to access agency information will help us resolve disputes over documents more quickly, resulting in faster case resolutions and better enabling OSC to respond to the increased demand and case levels.

III. OSC's Challenges in Obtaining Information from TSA

I will now turn to OSC's investigations of whistleblower retaliation complaints at TSA. In December 2012, Congress extended statutory whistleblower protections to TSA employees through the Whistleblower Protection Enhancement Act. Since then, OSC has received more

than 350 whistleblower retaliation cases from TSA employees (under 5 U.S.C. § 2302(b)(8) and (b)(9)).

To illustrate for the Committee the challenges OSC has faced in acquiring the information needed from TSA to complete our investigations, I will focus on two pairs of companion cases. The complainants in these cases are TSA officials who experienced involuntary geographical reassignments, a demotion, and a removal, all of which were allegedly in retaliation for protected whistleblower disclosures.

In these four cases, TSA withheld information from its document productions, asserting claims of attorney-client privilege. OSC asked TSA to withdraw the claims of privilege, and it elevated this request to TSA's parent agency, the Department of Homeland Security (DHS). Both TSA and DHS rejected OSC's requests, and refused to release the documents.

Several critical problems exist with TSA's assertions of privilege. As discussed above, shielding information from OSC through privilege is inconsistent with OSC's statutory mandate and regulatory authority to investigate the legality of certain personnel practices. 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 relevant 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.

The attached exhibit provides a particularly striking example (OSC Exhibit, March 2, 2017). TSA redacted every word of the document, including the date, author, and recipient. Based on our review of other information and testimony, OSC believes this exhibit may reflect a key witness's factual summary of a pivotal meeting about the personnel actions at issue in the relevant investigation. We understand that no attorneys were present at the meeting and it does not appear legal advice was discussed. It is not clear why the summary was determined to be privileged, and we cannot assess or challenge any improper privilege determinations, because TSA will not provide the information that would be necessary to do so.

TSA similarly redacted the names of email attachments, and other portions of documents with no apparent connection to an attorney or to any legal advice. Extensive redaction hinders OSC's ability to properly investigate, identify witnesses, and prepare for interviews.

Moreover, TSA's attorney-client privilege review causes significant delays in these investigations. OSC requested that TSA produce documents in the first two companion cases

within 30 days, which is consistent with the discovery deadline under the Federal Rules of Civil Procedure. It 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. OSC attorneys and investigators have spent considerable time negotiating about the document production that could have been spent advancing the investigation.

Despite the challenges created by TSA's attorney-client privilege claims, OSC continues investigate these and other TSA cases as expeditiously as possible. OSC has reviewed hundreds of documents in connection to these matters and interviewed approximately 18 witnesses. OSC is committed to completing a thorough investigation of these cases and protecting TSA whistleblowers where appropriate.

We appreciate the Committee's interest in the challenges we are facing, and we hope that your engagement might facilitate some progress in addressing them. I thank you for the opportunity to testify today, and I look forward to answering your questions.

* * * * *

Special Counsel Carolyn N. Lerner

The Honorable Carolyn N. Lerner heads the United States Office of Special Counsel. Her term began in June 2011. Prior to her appointment as Special Counsel, Ms. Lerner was a partner in the Washington, D.C., civil rights and employment law firm Heller, Huron, Chertkof, Lerner, Simon & Salzman, where she represented individuals in discrimination and employment matters, as well as non-profit organizations on a wide variety of issues. She previously served as the federal court appointed monitor of the consent decree in *Neal v. D.C. Department of Corrections*, a sexual harassment and retaliation class action.

Prior to becoming Special Counsel, Ms. Lerner taught mediation as an adjunct professor at George Washington University School of Law, and was mediator for the United States District Court for the District of Columbia and the D.C. Office of Human Rights.

Ms. Lerner earned her undergraduate degree from the Honors College at the University of Michigan, where she was selected to be a Truman Scholar, and her law degree from New York University (NYU) School of Law, where she was a Root-Tilden-Snow public interest scholar. After law school, she served two years as a law clerk to the Honorable Julian Abele Cook, Jr., Chief U.S. District Court Judge for the Eastern District of Michigan.

[redacted]