



U.S. OFFICE OF SPECIAL COUNSEL  
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**POLICY STATEMENT**  
**ON**  
**DISCLOSURE OF INFORMATION FROM**  
**OSC PROGRAM FILES<sup>1</sup>**

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**Introduction**

The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. Its primary mission is to safeguard the merit system in federal employment by protecting federal employees, former federal employees, and applicants for federal employment from prohibited personnel practices (PPPs), especially reprisal for whistleblowing.<sup>2</sup>

OSC also has jurisdiction under the Hatch Act to provide advice and enforce restrictions on political activity by government employees. In addition, OSC reviews disclosures of wrongdoing in the federal government by operating a secure channel for such reports by whistleblowers. Finally, upon referral of a case for further action by the U.S. Department of Labor, OSC is authorized to represent federal employees whose rights under the Uniformed Services Employment and Reemployment Rights Act have been violated.<sup>3</sup>

Given the nature of OSC's enforcement mission, its complaint, political activity, and disclosure files ("program files") often contain personal or sensitive information – including information from or about filers of complaints, disclosures, and requests for Hatch Act advisory opinions, and other information made or received by OSC during its processing of such matters.<sup>4</sup> This statement outlines OSC policy on disclosure of information in its program files.

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<sup>1</sup> This policy statement is intended only to provide general guidance to the public about the circumstances under which OSC may disclose and use information in its files. It is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against OSC or any other individual or entity.

<sup>2</sup> PPPs are listed in the United States Code (U.S.C.) at 5 U.S.C. § 2302(b).

<sup>3</sup> OSC is authorized to carry out the functions described in this paragraph under the following provisions of the U.S. Code: 5 U.S.C. §§ 1212(f) and 1216(a)-(b) (Hatch Act advice and enforcement); 5 U.S.C. § 1213 (whistleblower disclosures); and 38 U.S.C. § 4301, *et seq.* (Uniformed Services Employment and Reemployment Rights Act).

<sup>4</sup> This policy statement supplements another issuance entitled, "Policy Statement on Disclosure of Information about Prohibited Personnel Practice Complaints," available on OSC's Web site (at [www.osc.gov](http://www.osc.gov), in the "E-Library" section, under "Policies and Procedures"), or by request from OSC.

### The Privacy Act

Because an OSC program file is generally retrieved by the name of, or case number assigned to, a filer or requester, it is a "record" in a "system of records" covered by the Privacy Act.<sup>5</sup> The act defines conditions under which agencies may disclose information from records retrieved by a person's name or other personal identifier. As a general rule, OSC may not disclose a record about such a person, except upon a written request by, or with the prior written consent of, that individual.

Complainants in PPP matters are required by OSC to designate the level of consent that they authorize for disclosures of information by OSC in connection with its processing of their complaints. Filers of whistleblower disclosures are asked if they consent to the disclosure of their name outside OSC if it becomes necessary in taking further action on the matter.

Under certain specific conditions, however, the Privacy Act authorizes disclosure of information in a record, whether or not the person to whom the information relates has requested or consented to disclosure. Those conditions are outlined below.

Government-wide. Under the Privacy Act, there are 12 exceptions to the general rule that federal agencies may not disclose a record without a written request by, or the written consent of, the person to whom the record pertains. None of these 12 exceptions *require* the disclosure of information in a record – they merely *permit* disclosure, when deemed appropriate or necessary. Eight exceptions are the most pertinent to OSC program records. Under these exceptions, authorized OSC personnel may disclose a record in program files when disclosure would be:

1. to those OSC officers and employees who have a need for the record in the performance of their duties;
2. when disclosure is required under the Freedom of Information Act;
3. to federal law enforcement agencies for a civil or criminal law enforcement activity;
4. to a congressional committee or subcommittee with jurisdiction over the matter covered in the program file;
5. required pursuant to a court order;
6. to the General Accounting Office or the National Archives and Records Administration, for the performance of their duties;
7. to anyone showing compelling circumstances affecting an individual's health or safety;
8. for certain statistical purposes (in a form that is not individually identifiable); and

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<sup>5</sup> 5 U.S.C. § 552a.

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9. for a routine use published by OSC in the *Federal Register* (discussed further in the next paragraph), describing how OSC routinely uses information in its program files.

*Routine Uses.* To carry out their statutory responsibilities, agencies often need to disclose information in Privacy Act records for purposes other than those listed in items (a)-(i) above. The act, therefore, authorizes agencies to make such disclosures, once they publish a description of what are called the "routine uses" of information in their records.

OSC has published 18 "routine uses" of information in its program files.<sup>6</sup> Publication of routine uses by OSC does not *require* it to disclose information in a record – it merely *permits* OSC to disclose information when deemed appropriate or necessary by OSC. OSC's policy is to carefully exercise investigative and prosecutorial discretion in deciding whether a disclosure of information permitted by a routine use is appropriate or necessary, based on the totality of the circumstances.

The routine uses under which OSC discloses, or considers disclosing, information in program files most often are the following:

1. To disclose the fact that an allegation of a PPP or other prohibited activity has been filed.

*For example, OSC may respond to a request from the Merit Systems Protection Board (MSPB, or the Board) for confirmation that a whistleblower reprisal complaint was filed with OSC, to help establish MSPB's jurisdiction over a complainant's Individual Right of Action filed with the Board, involving the same allegation(s) reviewed by OSC.*

2. To disclose information needed by the Office of Personnel Management (OPM) in connection with inquiries involving civil service laws, rules or regulations, or to obtain an advisory opinion about the application or effect of civil service laws, rules, regulations or OPM guidelines in particular situations.

*For example, OSC may respond to a request by OPM for information about problems identified by OSC in an agency's personnel operations, or may ask for an opinion about the application of an OPM regulation to a personnel action being investigated by OSC.*

3. To disclose information about allegations or complaints of discrimination to agencies or offices concerned with the enforcement of anti-discrimination laws.

*For example, OSC may provide information needed by the Equal Employment Opportunity Commission to pursue a complaint deferred by OSC pursuant to its EEO deferral policy (at 5 C.F.R. § 1810.1).*

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<sup>6</sup> These are described in *Federal Register* notices at 66 F.R. 36613 (July 12, 2001), as corrected, 66 F.R. 51095 (October 5, 2001). The full text of the notices is available at the *Federal Register* Web site ([www.gpoaccess.gov/fr/browse.html](http://www.gpoaccess.gov/fr/browse.html)), or on request from OSC.

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4. To the MSPB upon filing a complaint, or to the President upon referring a matter, seeking disciplinary action.

*OSC may disclose information when exercising its statutory authority to seek disciplinary action against an individual for having violated a law, rule, or regulation within OSC's investigative jurisdiction.*

5. To the agency involved, the MSPB, OPM, or the President, when there are reasonable grounds to believe that a PPP occurred, exists or is to be taken.

*For example, OSC may disclose information when exercising its statutory authority to report that an OSC investigation has established reasonable grounds to believe that a PPP has occurred, exists, or is to be taken; to report its findings and determinations; and to seek appropriate corrective action.*

6. To disclose information to Congress in connection with OSC's annual report.

7. To disclose information to third parties as needed to conduct an investigation; to obtain an agency investigation and report on information disclosed through OSC's whistleblower disclosure channel; or to give notice of the status or outcome of the investigation.

*For example, this routine use enables OSC to conduct investigations into complaints alleging a PPP. It also enables OSC to provide pertinent information to an agency when referring a whistleblower disclosure for an investigation and report back to OSC, pursuant to 5 U.S.C. § 1213. This routine use also authorizes OSC, in appropriate cases (e.g., when an agency is aware that a complaint has been filed and that OSC has investigated the matter), to inform an agency that an investigation has been completed.*

8. To provide information from a person's record to a congressional office acting in response to that person's request.

9. To provide information needed by the Department of Justice (DOJ) for certain litigation purposes.

*For example, if OSC is named as a defendant in litigation arising out of one of its case files, then DOJ, as counsel for OSC, may have access to the file.*

10. To provide information needed by courts or adjudicative bodies for certain litigation purposes.

*This would occur, for example, during litigation filed by OSC with the MSPB, pursuant to a finding by OSC after investigation that an agency or employee has committed a violation of law, rule, or regulation within OSC's jurisdiction.*

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11. For coordination with an agency's Office of Inspector General (OIG) or comparable entity, to facilitate the coordination and conduct of investigations and review of allegations.

*For example, OSC may share information with an agency OIG in joint or parallel investigations of related matters, or to avoid duplication of effort by OSC and the OIG.*

12. To disclose information to the news media or the public when a matter has become public knowledge, or when the Special Counsel decides that disclosure is needed to preserve public confidence, or when the Special Counsel decides that there is a public interest, if the Special Counsel concludes that disclosure would not be an unwarranted invasion of privacy.

*For example, if a complainant's representative announces that a complaint has been filed, OSC may confirm that fact in response to inquiries from the media. The routine use would also permit OSC to issue a press release announcing that an apparent violation of law has been resolved with corrective or disciplinary action.*

13. To disclose information to the U.S. Department of Labor (DOL) and others as needed in connection with OSC's referral, receipt, or litigation of matters under the Veterans' Employment Opportunities Act of 1998 (VEOA), or the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), including information on the status or disposition of such matters.

*For example, OSC may notify DOL that it has referred individuals alleging veterans' preference violations to the department for further action under the VEOA, or apprise DOL and others of the status or disposition of matters referred to OSC for disciplinary action or other litigation.*

If OSC believes that disclosure of information protected by the Privacy Act is appropriate or necessary in a situation not covered by a routine use, or by any other exception to the act's general prohibition on disclosure, OSC will seek written consent for the disclosure from the person to whom the record pertains.

### **Other Statutory Provisions**

Without the consent of a complainant who has filed an allegation of a PPP, OSC is prohibited by law from responding to an inquiry about an evaluation of the work performance, ability, aptitude, general qualifications, character, loyalty, or suitability of the complainant for any personnel action. So, for example, if an investigator acting on behalf of OPM, the Federal Bureau of Investigation, or anyone else asks OSC to evaluate the work performance or suitability of the complainant for any personnel action, OSC will not respond without a signed authorization by the complainant. By law, the only exception to this rule would be if an agency informed OSC that it required an evaluation to make a determination about an individual's

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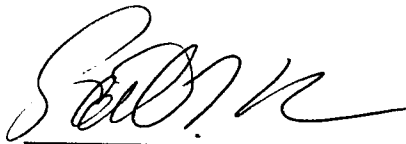
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access to information, the unauthorized disclosure of which could cause exceptionally grave damage to national security.<sup>7</sup>

### **Conclusion**

This policy statement replaces and supersedes the previous edition, dated September 9, 2002, and is available on OSC's Web site (at [www.osc.gov](http://www.osc.gov), in the "E-Library" section, under "Policies and Procedures"). If you have any questions or comments about this statement, please contact the OSC employee assigned to your case. You can also contact OSC's Legal Counsel and Policy Division, at (202) 254-3690.

January 16, 2004



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<sup>7</sup> 5 U.S.C. § 1212(g)(2)(B).