

114TH CONGRESS
2D SESSION

S. 2968

To reauthorize the Office of Special Counsel, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 23, 2016

Mr. JOHNSON (for himself and Mr. GRASSLEY) introduced the following bill;
which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

To reauthorize the Office of Special Counsel, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Office of Special Coun-
5 sel Reauthorization Act of 2016”.

6 **SEC. 2. ADEQUATE ACCESS OF SPECIAL COUNSEL TO IN-**
7 **FORMATION.**

8 Section 1212(b) of title 5, United States Code, is
9 amended by adding at the end the following:

1 “(5)(A) The Special Counsel, in carrying out this
2 subchapter—

3 “(i) shall have timely access to all records, data,
4 reports, audits, reviews, documents, papers, rec-
5 ommendations, or other material available to the ap-
6 plicable agency which relate to a matter within the
7 jurisdiction or authority of the Special Counsel;

8 “(ii) may request from any agency the informa-
9 tion or assistance that may be necessary for the Spe-
10 cial Counsel to carry out the duties and responsibil-
11 ities of the Special Counsel under this subchapter;
12 and

13 “(iii) may require, during an investigation, re-
14 view, or inquiry of an agency, any employee of the
15 agency to provide to the Special Counsel any record
16 or other information that relates to a matter within
17 the jurisdiction or authority of the Special Counsel.

18 “(B)(i) A claim of common law privilege by an agen-
19 cy, or an officer or employee of an agency, shall not pre-
20 vent the Special Counsel from obtaining any material de-
21 scribed in subparagraph (A)(i) with respect to the agency.

22 “(ii) The submission of material described in sub-
23 paragraph (A)(i) by an agency to the Special Counsel may
24 not be deemed to waive any assertion of privilege by the

1 agency against a non-Federal entity or against an indi-
2 vidual in any other proceeding.

3 “(iii) With respect to any record or other information
4 made available to the Special Counsel by an agency under
5 subparagraph (A), the Special Counsel may only disclose
6 the record or information for a purpose that is in further-
7 ance of any authority provided to the Special Counsel in
8 this subchapter.

9 “(6) The Special Counsel shall submit to the Com-
10 mittee on Homeland Security and Governmental Affairs
11 of the Senate, the Committee on Oversight and Govern-
12 ment Reform of the House of Representatives, and each
13 committee of Congress with jurisdiction over the applica-
14 ble agency a report regarding any case of contumacy or
15 failure to comply with a request submitted by the Special
16 Counsel under paragraph (5)(A).”.

17 **SEC. 3. PROHIBITED PERSONNEL PRACTICES; INFORMA-**
18 **TION ON WHISTLEBLOWER PROTECTIONS.**

19 Section 2302 of title 5, United States Code, is
20 amended—

21 (1) in subsection (a)(2)(A)—

22 (A) in clause (xi), by striking “and” at the
23 end;

24 (B) by redesignating clause (xii) as clause
25 (xiii); and

1 (C) by inserting after clause (xi) the fol-
2 lowing:

3 “(xii) for the purposes of paragraph (8) or
4 (9) of subsection (b), the accessing of a medical
5 record of the employee or applicant for employ-
6 ment; and”;

7 (2) in subsection (b)(9)(D), by inserting “, rule,
8 or regulation” after “order”; and

9 (3) by striking subsection (c) and inserting the
10 following:

11 “(c)(1) In this subsection—

12 “(A) the term ‘new employee’ means an indi-
13 vidual—

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

18 “(ii) who has not previously served as an
19 employee; and

20 “(B) the term ‘whistleblower protections’ means
21 the protections against and remedies for a prohibited
22 personnel practice described in paragraph (8) or
23 subparagraph (A)(i), (B), (C), or (D) of paragraph
24 (9) of subsection (b).

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

3 “(A) preventing prohibited personnel practices;

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

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

12 “(i) information with respect to whistle-
13 blower protections available to new employees
14 during a probationary period;

15 “(ii) the role of the Office of Special Coun-
16 sel and the Merit Systems Protection Board
17 with respect to whistleblower protections; and

18 “(iii) the means by which, with respect to
19 information that is otherwise required by law or
20 Executive order to be kept classified in the in-
21 terest of national defense or the conduct of for-
22 eign affairs, an employee may make a lawful
23 disclosure of the information to—

24 “(I) the Special Counsel;

1 “(II) the Inspector General of an
2 agency;

3 “(III) Congress; or

4 “(IV) another employee of the agency
5 who is designated to receive such a disclo-
6 sure.

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

11 “(4) The head of each agency shall make available
12 information regarding whistleblower protections applicable
13 to employees of the agency on the public website of the
14 agency and on any online portal that is made available
15 only to employees of the agency, if such portal exists.

16 “(5) Any employee to whom the head of an agency
17 delegates authority for any aspect of personnel manage-
18 ment shall, within the limits of the scope of the delegation,
19 be responsible for the activities described in paragraph
20 (2).”.

21 **SEC. 4. ADDITIONAL WHISTLEBLOWER PROVISIONS.**

22 (a) EXPLANATIONS FOR FAILURE TO TAKE AC-
23 TION.—Section 1213 of title 5, United States Code, is
24 amended—

1 (1) in subsection (b), by striking “15 days” and
2 inserting “45 days”;

3 (2) in subsection (e)—

4 (A) in paragraph (1), by striking “Any
5 such report” and inserting “Any report re-
6 quired under subsection (c) or paragraph (5) of
7 this subsection”;

8 (B) by striking paragraph (2) and insert-
9 ing the following:

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

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

16 “(B) if the Special Counsel requires
17 the head of the agency to submit a supple-
18 mental report under paragraph (5), the re-
19 ports submitted by the head of the agency
20 collectively contain the information re-
21 quired under subsection (d).”;

22 (C) in paragraph (3), by striking “agency
23 report received pursuant to subsection (c) of
24 this section” and inserting “report submitted to
25 the Special Counsel by the head of an agency

1 under subsection (c) or paragraph (5) of this
2 subsection”; and

3 (D) by adding at the end the following:

4 “(5) If, after conducting a review of a report under
5 paragraph (2), the Special Counsel concludes that the
6 Special Counsel requires additional information or docu-
7 mentation to determine whether the report submitted by
8 the head of an agency is reasonable and sufficient, the
9 Special Counsel may request that the head of the agency
10 submit a supplemental report—

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

13 “(B) which the head of the agency shall submit
14 to the Special Counsel within a period of time speci-
15 fied by the Special Counsel.”; and

16 (3) by striking subsection (h) and inserting the
17 following:

18 “(h) The Special Counsel may not respond to any in-
19 quiry or disclose any information about any person who
20 makes a disclosure under this section except in accordance
21 with section 552a or as required by any other provision
22 of Federal law.”.

23 (b) RETALIATORY INVESTIGATIONS.—Section 1214
24 of title 5, United States Code, is amended by adding at
25 the end the following:

1 “(i) The Special Counsel may petition the Board to
2 order corrective action, including fees, costs, or damages
3 reasonably incurred by an employee due to an investiga-
4 tion of the employee by an agency, if the investigation by
5 an agency was commenced, expanded, or extended in retal-
6 iation for a disclosure or protected activity described
7 under section 2302(b)(8) or section 2302(b)(9) (A)(i),
8 (B), (C), or (D), even if no personnel action, as defined
9 under section 2302(a), is taken or not taken.”.

10 (c) SENSITIVE POSITIONS.—Section 7701 of title 5,
11 United States Code, is amended—

12 (1) by redesignating subsection (k) as sub-
13 section (l); and

14 (2) by inserting after subsection (j) the fol-
15 lowing:

16 “(k)(1) The Board has authority to review on the
17 merits an appeal by an employee or applicant for employ-
18 ment of an action arising from a determination that the
19 employee or applicant for employment is ineligible for a
20 sensitive position if—

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

24 “(B) such action is otherwise appealable.

1 “(2) In this subsection, the term ‘sensitive position’
 2 means a position designated as a sensitive position under
 3 Executive Order 10450 (5 U.S.C. 7311 note), or any suc-
 4 cessor thereto.”.

5 (d) PROTECTION OF WHISTLEBLOWERS AS CRITERIA
 6 IN PERFORMANCE APPRAISALS.—

7 (1) ESTABLISHMENT OF SYSTEMS.—Section
 8 4302 of title 5, United States Code, is amended—

9 (A) by redesignating subsections (b) and
 10 (c) as subsections (c) and (d), respectively; and

11 (B) by inserting after subsection (a) the
 12 following:

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

16 “(A) the head of the agency shall use as a crit-
 17 ical element for establishing the job requirements of
 18 a supervisory employee; and

19 “(B) promote the protection of whistleblowers.

20 “(2) The criteria required under paragraph (1) shall
 21 include principles for the protection of whistleblowers,
 22 such as the degree to which supervisory employees—

23 “(A) respond constructively when employees of
 24 the agency make disclosures described in subpara-
 25 graph (A) or (B) of section 2302(b)(8);

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

3 “(C) foster an environment in which employees
4 of the agency feel comfortable making such disclo-
5 sures to supervisory employees or other appropriate
6 authorities.

7 “(3) In this subsection—

8 “(A) the term ‘agency’ means any entity the
9 employees of which are covered by paragraphs (8)
10 and (9) of section 2302(b), without regard to wheth-
11 er any other provision of this section is applicable to
12 the entity;

13 “(B) the term ‘supervisory employee’ means an
14 employee who would be a supervisor, as defined in
15 section 7103(a), if the agency employing the em-
16 ployee was an agency for purposes of chapter 71;
17 and

18 “(C) the term ‘whistleblower’ means an em-
19 ployee who makes a disclosure described in section
20 2302(b)(8).”.

21 (2) CRITERIA FOR PERFORMANCE APPRAIS-
22 ALS.—Section 4313 of title 5, United States Code,
23 is amended—

24 (A) in paragraph (4), by striking “and” at
25 the end;

1 (B) in paragraph (5), by striking the pe-
2 riod at the end and inserting “; and”; and

3 (C) by adding at the end the following:

4 “(6) protecting whistleblowers, as described in
5 section 4302(b)(2).”.

6 (e) ANNUAL REPORT TO CONGRESS ON UNACCEPT-
7 ABLE PERFORMANCE IN WHISTLEBLOWER PROTEC-
8 TION.—

9 (1) DEFINITIONS.—In this subsection, the
10 terms “agency” and “whistleblower” have the mean-
11 ings given the terms in section 4302(b)(3) of title 5,
12 United States Code, as amended by subsection (d).

13 (2) REPORT.—Each agency shall annually sub-
14 mit to the Committee on Homeland Security and
15 Governmental Affairs of the Senate, the Committee
16 on Oversight and Government Reform of the House
17 of Representatives, and each committee of Congress
18 with jurisdiction over the agency a report that de-
19 tails—

20 (A) the number of performance appraisals,
21 for the year covered by the report, that deter-
22 mined that an employee of the agency failed to
23 meet the standards for protecting whistle-
24 blowers that were established under section

1 4302(b) of title 5, United States Code, as
2 amended by subsection (d);

3 (B) the reasons for the determinations de-
4 scribed in subparagraph (A); and

5 (C) each disciplinary or corrective action
6 taken by the agency in response to a determina-
7 tion under subparagraph (A).

8 (f) **TECHNICAL AND CONFORMING AMENDMENT.**—
9 Section 4301 of title 5, United States Code, is amended,
10 in the matter preceding paragraph (1), by striking “For
11 the purpose of” and inserting “Except as otherwise ex-
12 pressly provided, for the purpose of”.

13 **SEC. 5. TERMINATION OF CERTAIN INVESTIGATIONS BY**
14 **THE OFFICE OF SPECIAL COUNSEL.**

15 Section 1214(a) of title 5, United States Code, is
16 amended—

17 (1) in paragraph (1)(D), in the first sentence,
18 by inserting “other than a termination of an inves-
19 tigation described in paragraph (6)(A)” after “inves-
20 tigation of a prohibited personnel practice”; and

21 (2) by adding at the end the following:

22 “(6)(A) Not later than 30 days after receiving an al-
23 legation of a prohibited personnel practice under para-
24 graph (1), the Special Counsel may terminate an inves-
25 tigation of the allegation without further inquiry or an op-

1 opportunity for the individual who submitted the allegation
 2 to respond if the Special Counsel determines that—

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

5 “(I)(aa) made by the individual; and

6 “(bb) investigated by the Special Counsel;

7 or

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

10 “(ii) the Special Counsel does not have jurisdic-
 11 tion to investigate the allegation; or

12 “(iii) the individual knew or should have known
 13 of the alleged prohibited personnel practice on or be-
 14 fore the date that is 3 years before the date on
 15 which the Special Counsel received the allegation.

16 “(B) Not later than 30 days after the date on which
 17 the Special Counsel terminates an investigation under sub-
 18 paragraph (A), the Special Counsel shall provide a written
 19 notification to the individual who submitted the allegation
 20 of a prohibited personnel practice that states the basis of
 21 the Special Counsel for terminating the investigation.”.

22 **SEC. 6. ALLEGATIONS OF WRONGDOING WITHIN THE OF-**
 23 **FICE OF SPECIAL COUNSEL.**

24 Section 1212 of title 5, United States Code, is
 25 amended by adding at the end the following:

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

4 “(1) the Inspector General shall—

5 “(A) receive, review, and investigate allega-
6 tions of prohibited personnel practices or
7 wrongdoing filed by employees of the Office of
8 Special Counsel; and

9 “(B) develop a method for an employee of
10 the Office of Special Counsel to directly com-
11 municate with the Inspector General; and

12 “(2) the Special Counsel—

13 “(A) may not require an employee of the
14 Office of Special Counsel to seek authorization
15 or approval before directly contacting the In-
16 spector General in accordance with the agree-
17 ment; and

18 “(B) may reimburse the Inspector General
19 for services provided under the agreement.”.

20 **SEC. 7. REPORTING REQUIREMENTS.**

21 (a) ANNUAL REPORT.—Section 1218 of title 5,
22 United States Code, is amended to read as follows:

23 **“§ 1218. Annual report**

24 “The Special Counsel shall submit to Congress, on
25 an annual basis, a report on the activities of the Special

1 Counsel, which shall include, for the year preceding the
2 submission of the report—

3 “(1) the number, types, and disposition of alle-
4 gations of prohibited personnel practices filed with
5 the Special Counsel and the costs of resolving such
6 allegations;

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

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

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

13 “(5) the number of instances in which the Spe-
14 cial Counsel reopened an investigation after the Spe-
15 cial Counsel had made an initial determination with
16 respect to the investigation;

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

19 “(7) the number of instances in which the Spe-
20 cial Counsel did not make a determination before
21 the end of the 240-day period described in section
22 1214(b)(2)(A)(i) regarding whether there were rea-
23 sonable grounds to believe that a prohibited per-
24 sonnel practice had occurred, existed, or was to be
25 taken;

1 “(8) a description of the recommendations and
2 reports made by the Special Counsel to other agen-
3 cies under this subchapter and the actions taken by
4 the agencies as a result of the recommendations or
5 reports;

6 “(9) the number of—

7 “(A) actions initiated before the Merit Sys-
8 tems Protection Board, including the number of
9 corrective action petitions and disciplinary ac-
10 tion complaints initiated;

11 “(B) stays and extensions of stays ob-
12 tained from the Merit Systems Protection
13 Board; and

14 “(C) requests for enforcement of sub-
15 poenas or requests for enforcement by the Merit
16 Systems Protection Board described in section
17 1212(b)(6);

18 “(10) the number of prohibited personnel prac-
19 tice complaints that resulted in—

20 “(A) a favorable action for the complain-
21 ant, organized by actions in—

22 “(i) complaints dealing with reprisals
23 against whistleblowers; and

24 “(ii) all other complaints; and

1 “(B) a favorable outcome for the complain-
2 ant, organized by outcomes in—

3 “(i) complaints dealing with reprisals
4 against whistleblowers; and

5 “(ii) all other complaints;

6 “(11) the number of corrective actions that the
7 Special Counsel required an agency to take after a
8 finding by the Special Counsel of a prohibited per-
9 sonnel practice, as defined in section 2302(b); and

10 “(12) the results for the Office of Special Coun-
11 sel of any employee viewpoint survey conducted by
12 the Office of Personnel Management or any other
13 agency.”.

14 (b) PUBLIC INFORMATION.—Section 1219(a)(1) of
15 title 5, United States Code, is amended to read as follows:

16 “(1) a list of any noncriminal matters referred
17 to the head of an agency under section 1213(c), to-
18 gether with—

19 “(A) a copy of the information transmitted
20 to the head of the agency under section
21 1213(c)(1);

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

24 “(C) if appropriate, not otherwise prohib-
25 ited by law, and consented to by the complain-

1 ant, any comments from the complainant under
2 section 1213(e)(1) relating to the matter; and

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

6 **SEC. 8. ESTABLISHMENT OF SURVEY PILOT PROGRAM.**

7 (a) IN GENERAL.—The Office of Special Counsel
8 shall design and establish a pilot program under which
9 the Office shall conduct, during the period beginning on
10 October 1, 2017 and ending on September 30, 2018, a
11 survey of individuals who have filed a complaint or disclo-
12 sure with the Office.

13 (b) PURPOSE.—The survey under subsection (a) shall
14 be designed for the purpose of collecting information and
15 improving service at various stages of a review or inves-
16 tigation by the Office of Special Counsel.

17 (c) RESULTS.—The results of the survey under sub-
18 section (a) shall be published in the annual report of the
19 Office of Special Counsel.

20 (d) SUSPENSION OF OTHER SURVEYS.—During the
21 period beginning on October 1, 2017 and ending on Sep-
22 tember 30, 2018, section 13 of the Act entitled “An Act
23 to reauthorize the Office of Special Counsel, and for other
24 purposes”, approved October 29, 1994 (5 U.S.C. 1212
25 note), shall have no force or effect.

1 **SEC. 9. AUTHORIZATION OF APPROPRIATIONS.**

2 (a) IN GENERAL.—Section 8(a)(2) of the Whistle-
3 blower Protection Act of 1989 (5 U.S.C. 5509 note) is
4 amended by striking “2003, 2004, 2005, 2006, and 2007”
5 and inserting “2016 through 2021”.

6 (b) EFFECTIVE DATE.—The amendment made by
7 subsection (a) shall take effect as though enacted on Sep-
8 tember 30, 2015.

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