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Description of document: US Office of Special Counsel (OSC) reports to Congress not published on the OSC website, 2004-2011

Requested date: 10-November-2009

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Source of document: FOIA Officer  
U.S. Office of Special Counsel  
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**U.S. OFFICE OF SPECIAL COUNSEL**

1730 M Street, N.W., Suite 218  
Washington, D.C. 20036-4505  
(202) 254-3600

September 28, 2012

RE: Freedom of Information Act Request (Ref. # FO-10-0430)

I am writing in response to your letter, dated November 10, 2009, in which you asked the U.S. Office of Special Counsel (OSC) to provide you with certain records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. I regret the substantial delay in processing your request.

You requested a copy of each report OSC produced for Congress during the past three years<sup>1</sup> that is not posted on OSC's website. OSC conducted a search for documents, which resulted in 18 responsive records, for a total of 242 pages. Of these documents, 16 are released in full and two contain small redactions under FOIA Exemption 6<sup>2</sup> in order to preserve personal privacy. As you requested, the documents are being transmitted to you electronically on the disk that is enclosed with this letter. Please note that some of the reports were scanned together such that the 12 items on the disk include all 18 reports.

You have the right to appeal this determination under the FOIA. Any such appeal must be sent in writing to OSC's Office of General Counsel at the address shown at the top of this letter. The appeal must be received by the Office of General Counsel within 45 days of the date of this letter.

Sincerely,

/s/

Pamela J. Stone  
Attorney Advisor  
Office of General Counsel

Enclosure

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<sup>1</sup> In accordance with decisions of the Court of Appeals for the District of Columbia recommending a "cut-off date" based on the date of the search, *see, e.g., McGehee v. CIA*, 697 F.2d 1095, 1104 (D.C. Cir. 1983), vacated on other grounds on panel reh'g & reh'g en banc denied, 711 F.2d 1076 (D.C. Cir. 1983); *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 644 (D.C. Cir. 2002). OSC used a cut-off date of March 30, 2010, the day on which a search for relevant documents commenced. Accordingly, and since the request specified the past three years, the responsive time period is March 31, 2007 to March 30, 2010. OSC's records indicate that the enclosed documents were sent to Congress during the responsive time period, regardless of the date on the document.

<sup>2</sup> FOIA Exemption 6 allows OSC to withhold information because disclosure of that information would constitute a clearly unwarranted invasion of personal privacy. § 552(b)(6).

Table 1-A. FY05 Demonstration Project (DP) Case Results (through 10/24/07)<sup>1</sup>

	No. (%)	Notes
Total Received	111 (100.0)	USERRA cases received from 10/1/04-9/30/05; Demonstration Project began in Feb. '05
“Odd”	92 (82.9)	USERRA allegations only
“Mixed”	19 (17.1)	USERRA & PPP allegations
Pending	2 (1.8)	Pending as of 10/24/07
Closed	109 (98.2)	Closed as of 10/24/07
Closed w/CA	29 (26.6)	CA = corrective action
Closed w/out CA	80 (73.4)	
Withdrawn	6 (5.5)	Claimant withdrew complaint during investigation
Insuff. Evid.	70 (64.2)	OSC found insufficient evidence of a violation in its investigation
Not Eligible	3 (2.8)	OSC determined it lacked jurisdiction, no corrective action was available, etc.
Non-Coop.	1 (0.9)	Claimant failed to respond to multiple OSC requests for information or assistance
Third Party	n/a	Such cases are captured by the “withdrawn” category above

Comments:

- 1) No FY05 DP cases have been litigated before the MSPB because the involved agencies agreed to OSC’s requests for corrective action
- 2) OSC does not have a formal “mediation” program for its USERRA cases; however, USERRA Unit staff informally mediate cases to obtain corrective action

<sup>1</sup> Under the Demonstration Project, OSC receives: 1) all federal-sector USERRA complaints where claimant’s Social Security Number (SSN) ends in an odd digit (“Odd” cases) and 2) all federal-sector USERRA complaints (regardless of SSN) where claimant also alleges a Prohibited Personnel Practice, or PPP (“Mixed” cases). DOL VETS receives only even-numbered USERRA cases (no “Mixed” cases).

Table 1-B. FY05 Demonstration Project (DP) Case Processing Times (in days)<sup>2</sup>

	All Cases	“Odd” Cases	Mixed” Cases
Average	156	152	171
Median	132	113	158
No. Closed Within:	[109 total]		
30 days (%)	17 (15.6)		
31-60 days	17 (15.6)		
61-90 days	8 (7.3)		
91-120 days	12 (11.0)		
121+ days	55 (50.5)		

<sup>2</sup> Includes all FY05 DP cases closed as of 10/24/07 (109 cases; see Table 1-A); processing time is calculated from date case was received (opened) to date that claimant was notified in writing of outcome (e.g., corrective action obtained, insufficient evidence found, etc.).

Table 2-A. FY06 Demonstration Project (DP) Case Results (through 10/24/07)<sup>1</sup>

	No. (%)	Notes
Total Received	168 (100.0)	USERRA cases received from 10/1/05-9/30/06
“Odd”	100 (59.5)	USERRA allegations only
“Mixed”	43 (25.6)	USERRA & PPP allegations
“Butterbaugh”	25 (14.9)	See explanation in “Comments” below
Sub-total	143 (100.0)	Excludes 25 “Butterbaugh” cases
Pending	16 (11.2)	Pending as of 10/24/07
Closed	129 (90.2) <sup>2</sup>	Closed as of 10/24/07
Closed w/CA	28 (21.7)	CA = corrective action
Closed w/out CA	99 (76.7)	
Withdrawn	8 (8.1)	Claimant withdrew complaint during investigation
Insuff. Evid.	83 (83.8)	OSC found insufficient evidence of a violation in its investigation
Not Eligible	8 (8.1)	OSC determined it lacked jurisdiction, no corrective action was available, etc.
Non-Coop.	0 (0.0)	Claimant failed to respond to multiple OSC requests for information or assistance
Third Party	n/a	Such cases are captured by the “withdrawn” category above

Comments:

- 1) “Butterbaugh” claims involve allegations that military leave was charged to employees for non-workdays (e.g., weekends, holidays). In FY06, OSC received 25 such claims, all from the same DOD entity. At the time, OSC gathered

<sup>1</sup> Under the Demonstration Project, OSC receives: 1) all federal-sector USERRA complaints where claimant’s Social Security Number (SSN) ends in an odd digit (“Odd” cases) and 2) all federal-sector USERRA complaints (regardless of SSN) where claimant also alleges a Prohibited Personnel Practice, or PPP (“Mixed” cases). DOL VETS receives only even-numbered USERRA cases (no “Mixed” cases).

<sup>2</sup> The totals below add up to 127, not 129; as of the time of this report, OSC was unable to reconcile this two-case discrepancy.

relevant information and submitted the appropriate leave adjustment requests to the Defense Finance & Accounting Service (DFAS) for review and resolution. Once DFAS responds to the request, OSC notifies the claimant and closes the case; however, DFAS often takes several months (or longer- several cases are still pending) to respond. Thus, OSC has limited if any control over how quickly these cases are resolved, and they are not representative of OSC's performance under the Demonstration Project. Accordingly, these cases are excluded from several of the data categories for FY06 DP cases. Subsequently, OSC has changed its policy (to be consistent with current DOD policy) such that claimants are first required to submit their "Butterbaugh" claims to DFAS and may file a complaint with OSC if DFAS fails to provide the relief sought.

- 2) No FY06 DP cases have been litigated before the MSPB because the involved agencies agreed to OSC's requests for corrective action
- 3) OSC does not have a formal "mediation" program for its USERRA cases; however, USERRA Unit staff informally mediate cases to obtain corrective action

Table 2-B. FY06 Demonstration Project (DP) Case Processing Times (in days)<sup>3</sup>

	All Cases	“Odd” Cases	Mixed” Cases
Average	147	130	186
Median	119	112	143
No. Closed Within:	[129 total]		
30 days (%)	15 (11.6)		
31-60 days	15 (11.6)		
61-90 days	16 (12.4)		
91-120 days	22 (17.1)		
121+ days	61 (47.3)		

<sup>3</sup> Includes all FY06 DP cases closed as of 10/24/07 with the exception of 25 “Butterbaugh” cases (129 cases; see Table 2-A and “Comments” above); processing time is calculated from date case was received (opened) to date that claimant was notified in writing of outcome (e.g., corrective action obtained, insufficient evidence found, etc.).

Table 3-A. FY07 Demonstration Project (DP) Case Results (through 10/24/07)<sup>1</sup>

	No. (%)	Notes
Total Received	142 (100.0)	USERRA cases received from 10/1/06-9/30/07
“Odd”	112 (78.9)	USERRA allegations only
“Mixed”	29 (20.4)	USERRA & PPP allegations
“Butterbaugh”	1 (0.7)	Military leave claims
Pending	71 (50.0)	Pending as of 10/24/07
Closed	71 (50.0)	Closed as of 10/24/07
Closed w/CA	22 (31.0)	CA = corrective action
Closed w/out CA	49 (69.0)	
Withdrawn	4 (8.2)	Claimant withdrew complaint during investigation
Insuff. Evid.	41 (83.7)	OSC found insufficient evidence of a violation in its investigation
Not Eligible	1 (2.0)	OSC determined it lacked jurisdiction, no corrective action was available, etc.
Non-Coop.	3 (6.1)	Claimant failed to respond to multiple OSC requests for information or assistance
Third Party	n/a	Such cases are captured by the “withdrawn” category above

Comments:

- 1) No FY07 DP cases have been litigated before the MSPB because the involved agencies agreed to OSC’s requests for corrective action; however, several cases are currently being considered for litigation before the MSPB because the involved agencies have not yet agreed to OSC’s requests
- 2) OSC does not have a formal “mediation” program for its USERRA cases; however, USERRA Unit staff informally mediate cases to obtain corrective action

<sup>1</sup> Under the Demonstration Project, OSC receives: 1) all federal-sector USERRA complaints where claimant’s Social Security Number (SSN) ends in an odd digit (“Odd” cases) and 2) all federal-sector USERRA complaints (regardless of SSN) where claimant also alleges a Prohibited Personnel Practice, or PPP (“Mixed” cases). DOL VETS receives only even-numbered USERRA cases (no “Mixed” cases).



Table 3-B. FY07 Demonstration Project (DP) Case Processing Times (in days)<sup>2</sup>

	All Cases	“Odd” Cases	Mixed” Cases
Average	131	122	175
Median	122	101	151
No. Closed Within:	[70 total]		
30 days (%)	5 (7.1)		
31-60 days	5 (7.1)		
61-90 days	15 (21.4)		
91-120 days	10 (14.3)		
121+ days	35 (50.0)		

<sup>2</sup> Includes 70 of 71 FY07 DP cases closed as of 10/24/07 (see Table 2-A; as of the time of this report, OSC was unable to reconcile this one-case discrepancy); processing time is calculated from date case was received (opened) to date that claimant was notified in writing of outcome (e.g., corrective action obtained, insufficient evidence found, etc.).

Table 4-A. FY04 Referral (RE) Case Results (through 10/24/07)<sup>1</sup>

	No.	Notes
Total Received	14	USERRA cases received by OSC from DOL-VETS between 10/1/03-9/30/04 pursuant to 38 U.S.C. § 4324
Pending	0	Pending as of 10/24/07
Closed	14	Closed as of 10/24/07
Closed – Prosecution Initiated	1 <sup>2</sup>	Petition for Corrective Action filed with MSPB (OSC represents claimant)
Closed w/CA	1	CA = corrective action; obtained w/out necessity of MSPB litigation
Closed w/out CA	12	
Withdrawn	0	Claimant withdrew complaint during OSC review
Insuff. Evid.	12	OSC found insufficient evidence to support prosecution before the MSPB and declined to represent claimant
Not Eligible	0	OSC determined it lacked jurisdiction, no corrective action was available, etc.
Non-Coop.	0	Claimant failed to respond to multiple OSC requests for information or assistance
Third Party	n/a	Such cases are captured by the “withdrawn” category above

Comments:

- 1) OSC established a USERRA Unit in January 2005 in preparation for the Demonstration Project. Since that time, all Attorneys and Investigators assigned to the Unit exclusively spend their time investigating, analyzing, and resolving USERRA cases.

<sup>1</sup> These are USERRA cases referred from DOL-VETS to OSC after DOL-VETS investigates and is unable to resolve the claim and the claimant requests that DOL-VETS refer the case to OSC for possible prosecution before the MSPB pursuant to 38 U.S.C. § 4324. These cases are distinct from cases received by OSC under the Demonstration Project (DP).

<sup>2</sup> This case is still pending before the MSPB and may be appealed to the U.S. Court of Appeals for the Federal Circuit (depending on the outcome before the MSPB).

Table 4-B. FY04 Referral (RE) Case Processing Times<sup>3</sup>

Average (Days)	209
Median (Days)	200
No. Closed Within:	[14 total]
30 days	0
31-60 days	1
61-90 days	0
91-120 days	2
121+ days	11

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<sup>3</sup> Includes all FY04 RE cases closed as of 10/24/07 (14 cases; see Table 4-A); processing time is calculated from date case was received from DOL-VETS (opened) to date that OSC: 1) declined representation, 2) obtained corrective action without litigation before the MSPB, or 3) initiated prosecution before the MSPB.

Table 5-A. FY05 Referral (RE) Case Results (through 10/24/07)<sup>1</sup>

	No.	Notes
Total Received	30	USERRA cases received by OSC from DOL-VETS between 10/1/04-9/30/05 pursuant to 38 U.S.C. § 4324
Pending	1	Pending as of 10/24/07
Closed	29	Closed as of 10/24/07
Closed – Prosecution Initiated	1 <sup>2</sup>	Petition for Corrective Action filed with MSPB (OSC represents claimant)
Closed w/CA	5	CA = corrective action; obtained w/out necessity of MSPB litigation
Closed w/out CA	23	
Withdrawn	0	Claimant withdrew complaint during OSC review
Insuff. Evid.	23	OSC found insufficient evidence to support prosecution before the MSPB and declined to represent claimant
Not Eligible	0	OSC determined it lacked jurisdiction, no corrective action was available, etc.
Non-Coop.	0	Claimant failed to respond to multiple OSC requests for information or assistance
Third Party	n/a	Such cases are captured by the “withdrawn” category above

Comments:

- 1) OSC established a USERRA Unit in January 2005 in preparation for the Demonstration Project. Since that time, all Attorneys and Investigators assigned to the Unit exclusively spend their time investigating, analyzing, and resolving USERRA cases.

<sup>1</sup> These are USERRA cases referred from DOL-VETS to OSC after DOL-VETS investigates and is unable to resolve the claim and the claimant requests that DOL-VETS refer the case to OSC for possible prosecution before the MSPB pursuant to 38 U.S.C. § 4324. These cases are distinct from cases received by OSC under the Demonstration Project (DP).

<sup>2</sup> This case was settled with full corrective action for the claimant during the litigation process before the MSPB.

Table 5-B. FY05 Referral (RE) Case Processing Times<sup>3</sup>

Average (Days)	130
Median (Days)	66
No. Closed Within:	[29 total]
30 days	1
31-60 days	13
61-90 days	4
91-120 days	2
121+ days	9

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<sup>3</sup> Includes all FY05 RE cases closed as of 10/24/07 (29 cases; see Table 5-A); processing time is calculated from date case was received from DOL-VETS (opened) to date that OSC: 1) declined representation, 2) obtained corrective action without litigation before the MSPB, or 3) initiated prosecution before the MSPB.

Table 6-A. FY06 Referral (RE) Case Results (through 10/24/07)<sup>1</sup>

	No.	Notes
Total Received	11	USERRA cases received by OSC from DOL-VETS between 10/1/05-9/30/06 pursuant to 38 U.S.C. § 4324
Pending	1	Pending as of 10/24/07
Closed	10	Closed as of 10/24/07
Closed – Prosecution Initiated	0	Petition for Corrective Action filed with MSPB (OSC represents claimant)
Closed w/CA	0	CA = corrective action; obtained w/out necessity of MSPB litigation
Closed w/out CA	10	
Withdrawn	0	Claimant withdrew complaint during OSC review
Insuff. Evid.	10	OSC found insufficient evidence to support prosecution before the MSPB and declined to represent claimant
Not Eligible	0	OSC determined it lacked jurisdiction, no corrective action was available, etc.
Non-Coop.	0	Claimant failed to respond to multiple OSC requests for information or assistance
Third Party	n/a	Such cases are captured by the “withdrawn” category above

Comments:

- 1) OSC established a USERRA Unit in January 2005 in preparation for the Demonstration Project. Since that time, all Attorneys and Investigators assigned to the Unit exclusively spend their time investigating, analyzing, and resolving USERRA cases.

<sup>1</sup> These are USERRA cases referred from DOL-VETS to OSC after DOL-VETS investigates and is unable to resolve the claim and the claimant requests that DOL-VETS refer the case to OSC for possible prosecution before the MSPB pursuant to 38 U.S.C. § 4324. These cases are distinct from cases received by OSC under the Demonstration Project (DP).

Table 6-B. FY06 Referral (RE) Case Processing Times<sup>2</sup>

Average (Days)	71
Median (Days)	73
No. Closed Within:	[10 total]
30 days	1
31-60 days	3
61-90 days	4
91-120 days	1
121+ days	1

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<sup>2</sup> Includes all FY06 RE cases closed as of 10/24/07 (10 cases; see Table 6-A); processing time is calculated from date case was received from DOL-VETS (opened) to date that OSC: 1) declined representation, 2) obtained corrective action without litigation before the MSPB, or 3) initiated prosecution before the MSPB.

Table 7-A. FY07 Referral (RE) Case Results (through 10/24/07)<sup>1</sup>

	No.	Notes
Total Received	4	USERRA cases received by OSC from DOL-VETS between 10/1/06-9/30/07 pursuant to 38 U.S.C. § 4324
Pending	1	Pending as of 10/24/07
Closed	3	Closed as of 10/24/07
Closed – Prosecution Initiated	0	Petition for Corrective Action filed with MSPB (OSC represents claimant)
Closed w/CA	0	CA = corrective action; obtained w/out necessity of MSPB litigation
Closed w/out CA	3	
Withdrawn	0	Claimant withdrew complaint during OSC review
Insuff. Evid.	3	OSC found insufficient evidence to support prosecution before the MSPB and declined to represent claimant
Not Eligible	0	OSC determined it lacked jurisdiction, no corrective action was available, etc.
Non-Coop.	0	Claimant failed to respond to multiple OSC requests for information or assistance
Third Party	n/a	Such cases are captured by the “withdrawn” category above

Comments:

- 1) OSC established a USERRA Unit in January 2005 in preparation for the Demonstration Project. Since that time, all Attorneys and Investigators assigned to the Unit exclusively spend their time investigating, analyzing, and resolving USERRA cases.

<sup>1</sup> These are USERRA cases referred from DOL-VETS to OSC after DOL-VETS investigates and is unable to resolve the claim and the claimant requests that DOL-VETS refer the case to OSC for possible prosecution before the MSPB pursuant to 38 U.S.C. § 4324. These cases are distinct from cases received by OSC under the Demonstration Project (DP).



Table 7-B. FY07 Referral (RE) Case Processing Times<sup>2</sup>

Average (Days)	33
Median (Days)	34
No. Closed Within:	[3 total]
30 days	1
31-60 days	2
61-90 days	0
91-120 days	0
121+ days	0

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<sup>2</sup> Includes all FY07 RE cases closed as of 10/24/07 (3 cases; see Table 7-A); processing time is calculated from date case was received from DOL-VETS (opened) to date that OSC: 1) declined representation, 2) obtained corrective action without litigation before the MSPB, or 3) initiated prosecution before the MSPB.



## Submission Under the Federal Vacancies Reform Act

### Addressees

- ☒ President of the United States Senate      ☒ Speaker of the U.S. House of Representatives      ☒ Comptroller General of the United States

### This Report Provides Notification of:

- ☒ Vacancy      ☐ Designation of acting officer      ☐ Nomination      ☐ Action on nomination  
☐ Change in previously submitted reported information      ☒ Discontinuation of service in acting role  
(date: 05/20/09)

Name of Department or Agency and Any Suborganization

U.S. Office of Special Counsel

Vacancy Title Special Counsel		Date Vacancy Began 05/21/09
Name of Acting Officer None	Date Service Began	Authority for Acting Designation if Other Than Vacancies Act
Name of Nominee for Position None		Date Nomination Submitted
Action on Nomination: <input type="radio"/> Confirmed <input type="radio"/> Rejected, withdrawn, returned		Date of Action

### Agency Contact

Name and Title Kristin L. Ellis, Litigation Counsel, Legal Counsel and Policy Division	
Contact's Address 1730 M Street N.W., Suite 218, Washington, DC 20036	
Contact's Phone Number (202) 254- (b)(6)	Contact's E-Mail Address kellis@osc.gov

### Submitted By

Name and Title Erin McDonnell, Associate Special Counsel for Legal Counsel and Policy	Telephone Number (202) 254- (b)(6)
Signature [ (b)(6) ]	Date 6/4/09

### For Congressional Use Only

Committee of Jurisdiction
Date Received

### For GAO Use Only

GAO Control Number
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**NARRATIVE STATEMENT:  
U.S. OFFICE OF SPECIAL COUNSEL PRIVACY ACT SYSTEMS OF RECORDS**

This statement is submitted pursuant to OMB Circular A-130, App. I, § 4.c.

OSC-2 – Personnel Security Files

Purpose for System of Records; Authority for Maintenance of System of Records

See Privacy Act System of Records Notice published in the Federal Register, enclosed.

Evaluation of Probable or Potential Effect on Privacy of Individuals

Implementation of the system of records described in the enclosed notice will likely have some effect on the privacy of individuals given the nature of the information in the records and the purposes for which it is collected. (See "Categories of Records in the System," in the enclosed notice). Nevertheless, the system is needed if OSC is to administer personnel security and suitability responsibilities imposed on federal agencies by law, rule, and implementing directives and policies (including Homeland Security Presidential Directive 12).<sup>1</sup>

Steps Taken to Minimize Risk of Unauthorized Access to System of Records

Safeguards to protect the information against unauthorized access to the system are as described in the enclosed notice.

How Routine Uses Satisfy Compatibility Requirement of Subsection (a)(7) of Act

The routine uses described in the enclosed notice are preceded by a proviso that OSC determines that disclosure of a record is a use of information in the record compatible with the purpose for which the record was collected.

Information Collection Requests Contained in System of Records and Approved by OMB under Paperwork Reduction Act

There are no OSC collections of information in this system of records that require clearance under the Paperwork Reduction Act. The following forms cleared under the PRA by the Office of Personnel Management (OPM) may be included: SF 85 (Questionnaire for Non-Sensitive Positions); SF 85P (Questionnaire for Public Trust Positions); SF 86

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<sup>1</sup> The system has been described in accordance with sample privacy documents furnished for agency guidance by the Office of Management and Budget (OMB). See OMB Memorandum M-06-6, "Sample Privacy Documents for Agency Implementation of Homeland Security Presidential Directive (HSPD) 12."

(Questionnaire for National Security Positions); SF 86A (Continuation Sheet for Questionnaires SF 86, SF 85P, and SF 85); SF 86C (Standard Form 86 Certification). These forms are under OPM Control No. 3206-0005 and expire on 10/31/08. OPM's form SF 87 (Fingerprint Chart) may be included; this form is OMB Control No. 3206-0150 and expires 4/30/2008. The Federal Bureau of Investigation's Applicant Fingerprint Card (Form FD-258) may also be included. This form did not appear in the "Inventory of Approved Information Collections" on the web site of the Office of Management and Budget.

#### Supporting Documentation

See Privacy Act System of Records Notice published in the Federal Register, enclosed.

#### OSC-3 – Pay Management Records

##### Purpose for System of Records; Authority for Maintenance of System of Records

See Privacy Act System of Records Notice published in the Federal Register, enclosed.

##### Evaluation of Probable or Potential Effect on Privacy of Individuals

Implementation of the system of records described in the enclosed notice will likely have some effect on the privacy of individuals given the nature of the information in the records and the purposes for which it is collected. (See "Categories of Records in the System," in the enclosed notice). Nevertheless, the system is needed for OSC to administer pay-related responsibilities.

##### Steps Taken to Minimize Risk of Unauthorized Access to System of Records

Safeguards to protect the information against unauthorized access to the system are as described in the enclosed notice.

##### How Proposed Routine Use Satisfies Compatibility Requirement of Subsection (a)(7) of Act

The routine uses described in the enclosed notice are preceded by a proviso that OSC determines that disclosure of a record is a use of information in the record compatible with the purpose for which the record was collected.

##### Information Collection Requests Contained in System of Records and Approved by OMB under Paperwork Reduction Act

There are no OSC collections of information in this system of records that require clearance under the Paperwork Reduction Act (PRA). Forms cleared under the PRA by

other agencies may be contained in the system, including, but not necessarily limited to: (1) Employee's Withholding Allowance Certificate, Form W-4 (2007), OMB No. 1545-0074, expiration 12/31/07 (Department of Treasury, Internal Revenue Service); (2) Health Benefits Election Form, OMB. No. 3206-0160, expiration 8/31/07 (Office of Personnel Management); and (3) Life Insurance Election, OMB No. 3206-0230, expiration 12/31/08 (Office of Personnel Management).

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Supporting Documentation

See Privacy Act System of Records Notice published in the Federal Register, enclosed.

Enclosure





# U.S. OFFICE OF SPECIAL COUNSEL

## Object Class and Program/Project/Activity Table of FY 2008 Budget Authority

Prepared in Response to Sec. 610 of the  
Consolidated Appropriation Act, 2008, P.L. 110-161

**Appropriation Title:** Salaries and Expenses, Office of Special Counsel, 2008

dollars in thousands

Description		FY 2008 President's Budget	Congressional Action	FY 2006 Rescission	FY 2008 Enacted Level
<b>OBJECT CLASS</b>					
11.0	Personnel compensation	10,775			10,775
12.0	Personnel benefits	2,857			2,857
13.0	Benefits to former personnel	15			15
21.0	Travel	222			222
22.0	Transportation of Things	15			15
23.1	Rental payments to GSA	1,260			1,260
23.2	Rental payments to others	0			0
23.3	Communications, Utilities, Misc.	151			151
24.0	Printing	16			16
25.0	Other Services	816	1,100		1,916
26.0	Supplies	93			93
31.0	Equipment	148			148
<b>Object Class Total</b>		<b>\$16,368</b>	<b>\$1,100</b>	<b>\$0</b>	<b>\$17,468</b>
<b>PROGRAM/PROJECT/ACTIVITY - PRESIDENT'S BUDGET APPENDIX <sup>1</sup></b>					
Protection of the Merit System in Federal Employment, through investigation and prosecution of Prohibited Personnel Practices, enforcement of the Hatch Act, investigation and prosecution of USERRA violations, and functioning as a channel for Whistleblower Disclosures <sup>2</sup>		16,368	1,100	0	17,468
<b>Program/Project/Activity Total</b>		<b>\$16,368</b>	<b>\$1,100</b>	<b>\$0</b>	<b>\$17,468</b>
<b>PROGRAM/PROJECT/ACTIVITY - CONGRESSIONAL INTEREST <sup>3</sup></b>					
Normal enforcement operations		16,368			16,368
Special Task Force, computer forensic investigations			1,100		1,100
<b>Program/Project/Activity Total</b>		<b>\$16,368</b>	<b>\$1,100</b>	<b>\$0</b>	<b>\$17,468</b>

1/ Program/Project/Activity based on the FY 2008 President's Budget Appendix.

2/ Authorities provided by the Civil Service Reform Act of 1978 (Public Law 95-454), the Whistleblower Protection Act of 1989 (Public Law 101-12), Public Law 107-304, and the Uniformed Services Employment and Reemployment Act of 1994 (Public Law 103-353), including services as authorized by 5 U.S.C. 3109.

3/ Program/Project/Activity based on the committee report language of P.L. 110-161.

# U.S. OFFICE OF SPECIAL COUNSEL

## Object Class and Program/Project/Activity Table of FY 2009 Budget Authority

Prepared in Response to Sec. 608 of the  
Omnibus Appropriations Act, 2009, P.L. 111-8

**Appropriation Title:** Salaries and Expenses, Office of Special Counsel, 2009

dollars in thousands

Description		FY 2009 President's Budget	Congressional Action	FY 2009 Rescission	FY 2009 Enacted Level
<b>OBJECT CLASS</b>					
11.0	Personnel compensation	10,926			10,926
12.0	Personnel benefits	3,135			3,135
13.0	Benefits to former personnel	15			15
21.0	Travel	233			233
22.0	Transportation of Things	21			21
23.1	Rental payments to GSA	1,238			1,238
23.2	Rental payments to others	0			0
23.3	Communications, Utilities, Misc.	105			105
24.0	Printing	21			21
25.0	Other Services	1,508			1,508
26.0	Supplies	106			106
31.0	Equipment	160			160
<b>Object Class Total</b>		<b>\$17,468</b>	<b>\$0</b>	<b>\$0</b>	<b>\$17,468</b>
<b>PROGRAM/PROJECT/ACTIVITY - PRESIDENT'S BUDGET APPENDIX</b>					
Protection of the Merit System in Federal Employment, through investigation and prosecution of Prohibited Personnel Practices, enforcement of the Hatch Act, investigation and prosecution of USERRA violations, and functioning as a channel for Whistleblower Disclosures <sup>2</sup>		17,468		0	17,468
<b>Program/Project/Activity Total</b>		<b>\$17,468</b>	<b>\$0</b>	<b>\$0</b>	<b>\$17,468</b>
<b>PROGRAM/PROJECT/ACTIVITY - CONGRESSIONAL INTEREST</b>					
Normal enforcement operations		17,468			17,468
<b>Program/Project/Activity Total</b>		<b>\$17,468</b>	<b>\$0</b>	<b>\$0</b>	<b>\$17,468</b>

1/ Program/Project/Activity based on the FY 2009 President's Budget Appendix.

2/ Authorities provided by the Civil Service Reform Act of 1978 (Public Law 95-454), the Whistleblower Protection Act of 1989 (Public Law 101-12), Public Law 107-304, and the Uniformed Services Employment and Reemployment Act of 1994 (Public Law 103-353), including services as authorized by 5 U.S.C. 3109.

# U.S. OFFICE OF SPECIAL COUNSEL

## Object Class and Program/Project/Activity Table of FY 2010 Budget Authority

Prepared in Response to Sec. 608 of the  
Consolidated Appropriations Act, 2010, P.L. 111-117

**Appropriation Title:** Salaries and Expenses, Office of Special Counsel, 2010

dollars in thousands

Description		FY 2010 President's Budget	Congressional Action	FY 2010 Rescission	FY 2010 Enacted Level
<b>OBJECT CLASS</b>					
11.0	Personnel compensation	11,875			11,875
12.0	Personnel benefits	3,201			3,201
13.0	Benefits to former personnel	24			24
21.0	Travel	225			225
22.0	Transportation of Things	21			21
23.1	Rental payments to GSA	1,587			1,587
23.2	Rental payments to others	0			0
23.3	Communications, Utilities, Misc.	120			120
24.0	Printing	20			20
25.0	Other Services	1,160			1,160
26.0	Supplies	111			111
31.0	Equipment	151			151
<b>Object Class Total</b>		<b>\$18,495</b>	<b>\$0</b>	<b>\$0</b>	<b>\$18,495</b>
<b>PROGRAM/PROJECT/ACTIVITY - PRESIDENT'S BUDGET APPENDIX</b>					
Protection of the Merit System in Federal Employment, through investigation and prosecution of Prohibited Personnel Practices, enforcement of the Hatch Act, investigation and prosecution of USERRA violations, and functioning as a channel for Whistleblower Disclosures <sup>2</sup>		18,495		0	18,495
<b>Program/Project/Activity Total</b>		<b>\$18,495</b>	<b>\$0</b>	<b>\$0</b>	<b>\$18,495</b>
<b>PROGRAM/PROJECT/ACTIVITY - CONGRESSIONAL INTEREST</b>					
Normal enforcement operations		18,495			18,495
<b>Program/Project/Activity Total</b>		<b>\$18,495</b>	<b>\$0</b>	<b>\$0</b>	<b>\$18,495</b>

1/ Program/Project/Activity based on the FY 2010 President's Budget Appendix.

2/ Authorities provided by the Civil Service Reform Act of 1978 (Public Law 95-454), the Whistleblower Protection Act of 1989 (Public Law 101-12), Public Law 107-304, and the Uniformed Services Employment and Reemployment Act of 1994 (Public Law 103-353), including services as authorized by 5 U.S.C. 3109.



**U.S. Office of Special Counsel  
USERRA Quarterly Report to Congress  
First Quarter of Fiscal Year 2009**

**Background:** The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA, 38 U.S.C. §§ 4301 – 4335) is intended to ensure that those who serve in our armed forces: (1) are not disadvantaged in their civilian careers because of their military service; (2) are promptly reemployed in their civilian jobs upon their return from duty; and (3) are not discriminated against in employment based on past, present, or future military service. The federal government is to be a “model employer” under USERRA. See 38 U.S.C. §§ 4301, 4311.

The U.S. Office of Special Counsel (OSC) serves as the federal-sector prosecutor of USERRA claims.<sup>1</sup> OSC receives USERRA complaints referred by the U.S. Department of Labor, Veterans’ Employment and Training Service (DOL-VETS), from employees of (and applicants to) federal executive agencies seeking representation before the U.S. Merit Systems Protection Board (MSPB).

For a USERRA complaint to reach OSC, a federal executive branch employee or applicant must first file a USERRA complaint with DOL-VETS, which investigates and attempts to resolve the complaint. See 38 U.S.C. § 4322. If DOL-VETS is unable to resolve the complaint, the USERRA claimant may request referral to OSC for possible legal representation before the MSPB. See 38 U.S.C. § 4324. If, after reviewing the complaint and investigative file, OSC is reasonably satisfied that the claimant is entitled to relief under USERRA, OSC may act as attorney for the claimant and initiate an action before the MSPB. Id. If OSC declines representation, the claimant may still file an appeal with the MSPB. Id.

USERRA was amended by the Veterans’ Benefits Improvement Act of 2008 (P.L. 110-389), which was signed into law on October 10, 2008. As amended, USERRA now requires that OSC make a decision whether to represent a claimant before the MSPB, and notify the claimant in writing of that decision, within 60 days of receiving the case from DOL-VETS, unless the claimant agrees to an extension of time. The law further requires OSC to report to Congress, within 30 days after the end of each fiscal quarter, the number of USERRA cases for which OSC failed to meet the 60-day deadline for making and notifying the claimant of its representation decision. This is the first such report.

This report provides information about OSC’s compliance with the 60-day deadline for USERRA cases received by OSC from DOL-VETS from October 10, 2008 (the effective date of P.L. 110-389), through December 31, 2008. Because the statute permits OSC, with the claimant’s consent, to obtain extensions beyond the 60-day deadline, this report differentiates between cases where the claimant agreed to an extension of time and those where he or she did not.

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<sup>1</sup> The U.S. Department of Justice (DOJ) serves as the prosecutor of USERRA claims involving state and local governments and private employers. See 38 U.S.C. § 4323.

**U.S. Office of Special Counsel  
USERRA Quarterly Report to Congress  
First Quarter of Fiscal Year 2009**

**Summary Table: USERRA cases received by OSC on or after October 10, 2008, where 60-day deadline was either met or exceeded:<sup>1</sup>**

60-Day Deadline Met	60-Day Deadline Exceeded		
Referrals Completed Within Deadline	With Consent	Without Consent	Total
3	n/a	n/a	0

- Between October 10, 2008, when the new USERRA amendments became effective, and December 31, 2008, the end of the first quarter of fiscal year 2009, OSC received twelve USERRA cases from DOL-VETS.
- Of the twelve USERRA cases received by OSC during the relevant time period, the 60-day deadline occurred during the quarter in three cases.
- OSC met the deadline in all three cases, preventing the need for OSC to request consent for an extension beyond 60 days from any claimants.

**Disposition of Previously Reported Cases:**

- Because this is our first quarterly report, there are no cases to report in this category.

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<sup>1</sup> This table is provided to ensure compliance with the requirement that the information contained in the quarterly reports by OSC, DOL-VETS, and DOJ "is categorized in a uniform way" (P.L. 110-389, Sec. 312(d)). A more detailed table and narrative explanation are provided on pages 3 and 4, below.

**U.S. Office of Special Counsel  
USERRA Quarterly Report to Congress  
First Quarter of Fiscal Year 2009**

**Detail Table:**     OSC compliance with 60-day USERRA case processing deadline during first quarter of fiscal year 2009

USERRA CASES RECEIVED DURING 1Q FY09 <sup>1</sup>	12
USERRA CASES CARRIED OVER FROM PREVIOUS QUARTERS <sup>2</sup>	n/a
<u>CASES WHERE 60-DAY DEADLINE OCCURRED DURING QUARTER</u> <sup>3</sup>	3
- CASES WHERE DEADLINE MET	3
- CASES WHERE DEADLINE NOT MET	0
-- CASES WHERE CLAIMANT CONSENTED TO EXTENSION	n/a
-- CASES WHERE CLAIMANT DID NOT CONSENT TO EXTENSION	n/a
- CASES PENDING AT END OF QUARTER	0
<u>CASES WHERE 60-DAY DEADLINE DID NOT OCCUR DURING QUARTER</u>	9
- CASES WHERE DETERMINATION MADE PRIOR TO END OF QUARTER	0
- CASES PENDING AT END OF QUARTER	9

<sup>1</sup> Because P.L. 110-389 became effective on October 10, 2008, after the beginning of the fiscal quarter, this report covers only cases received on or after that date through December 31, 2008 (i.e., not the full quarter). Future reports will cover the entire quarter.

<sup>2</sup> Only cases subject to the 60-day deadline (i.e., those received by OSC beginning on October 10, 2008) are included. Accordingly, there are no "carryover" cases from previous quarters included in this report. Future reports, however, may contain such cases.

<sup>3</sup> This includes cases carried over from previous quarters, as applicable.

**U.S. Office of Special Counsel  
USERRA Quarterly Report to Congress  
First Quarter of Fiscal Year 2009**

**Narrative Explanation:** Between October 10, 2008, when the new USERRA amendments became effective, and December 31, 2008, the end of the first quarter of fiscal year 2009, OSC received twelve USERRA cases from DOL-VETS (no "carryover" cases are reported because any such cases were received prior to October 10).

Of those twelve cases, the 60-day deadline occurred during the quarter in three cases. OSC met the deadline in all three cases, preventing the need to request any extensions from the claimants, and resulting in no such cases pending at the end of the quarter.

Of those twelve cases, the 60-day deadline did not occur during the quarter in nine cases. OSC did not make a determination (representation decision) in any of those cases prior to the end of the quarter, resulting in nine cases pending at the end of the quarter (all nine cases will be reported as "carryover" cases in the next report).



**U.S. Office of Special Counsel  
USERRA Quarterly Report to Congress  
Second Quarter of Fiscal Year 2009**

**Background:** The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA, 38 U.S.C. §§ 4301 – 4335) is intended to ensure that those who serve in our armed forces: (1) are not disadvantaged in their civilian careers because of their military service; (2) are promptly reemployed in their civilian jobs upon their return from duty; and (3) are not discriminated against in employment based on past, present, or future military service. The federal government is to be a “model employer” under USERRA. See 38 U.S.C. §§ 4301, 4311.

The U.S. Office of Special Counsel (OSC) serves as the federal-sector prosecutor of USERRA claims. The U.S. Department of Labor, Veterans’ Employment and Training Service (DOL-VETS), refers USERRA complaints involving federal executive agencies to OSC for possible representation before the U.S. Merit Systems Protection Board (MSPB).<sup>1</sup>

For a USERRA complaint to reach OSC, persons who believe a federal executive agency violated their USERRA rights must first file a complaint with DOL-VETS, which investigates and attempts to resolve the complaint. See 38 U.S.C. § 4322. If DOL-VETS is unable to resolve the complaint, the USERRA claimant may request referral to OSC for possible legal representation before the MSPB. See 38 U.S.C. § 4324. If, after reviewing the complaint and investigative file, OSC is reasonably satisfied that the claimant is entitled to relief under USERRA, OSC may act as attorney for the claimant and initiate an action before the MSPB. Id. If OSC declines representation, the claimant may still file an appeal with the MSPB. Id.

USERRA was amended by the Veterans’ Benefits Improvement Act of 2008 (P.L. 110-389), which was signed into law on October 10, 2008. As amended, USERRA now requires that OSC make a decision whether to offer a claimant representation before the MSPB, and notify the claimant in writing of that decision, within 60 days of receiving the case from DOL-VETS, unless the claimant agrees to an extension of time. The law further requires OSC to report to Congress, within 30 days after the end of each fiscal quarter, the number of USERRA cases for which OSC failed to meet the 60-day deadline for making and notifying the claimant of its representation decision.

This report provides information about OSC’s compliance with the 60-day deadline during the second quarter of fiscal year 2009 (from January 1 through March 31, 2009). Because the statute permits OSC, with the claimant’s consent, to obtain extensions beyond the 60-day deadline, this report differentiates between cases where the claimant agreed to an extension of time and those where he or she did not.

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<sup>1</sup> The U.S. Department of Justice (DOJ) serves as the prosecutor of USERRA claims involving state and local governments and private employers. See 38 U.S.C. § 4323.

**U.S. Office of Special Counsel  
USERRA Quarterly Report to Congress  
Second Quarter of Fiscal Year 2009**

**Summary Table: USERRA cases received by OSC on or after October 10, 2008, where 60-day deadline was either met or exceeded:<sup>1</sup>**

60-Day Deadline Met	60-Day Deadline Exceeded		
Representation Decision Made Within Deadline	With Consent	Without Consent	Total
10	3	1	4

- During the second quarter of fiscal year 2009, OSC received eleven USERRA cases from DOL-VETS. In addition, nine cases OSC received during the first quarter remained pending at the beginning of the second quarter.
- Of the twenty total cases, the 60-day deadline occurred during the second quarter in thirteen cases.
- OSC met the deadline in nine of the thirteen cases, plus one additional case where the deadline did not occur until after the end of the quarter (for a total of ten cases where OSC met the 60-day deadline during the quarter).
- In the four cases where OSC exceeded the deadline, OSC sought and received an extension to make its determination in three cases (all of which remained pending at the end of the quarter and still within the agreed-upon extension period). The single case in which OSC did not request an extension was closed on the 61<sup>st</sup> day (one day beyond the deadline), making such a request impractical.

**Disposition of Previously Reported Cases:**

- As reflected in OSC's previous Quarterly Report (for the first quarter of fiscal year 2009), no USERRA cases received on or after October 10, 2008 (when the new deadlines became effective) exceeded the 60-day deadline during the first quarter. Therefore, there are no cases to report in this category.

<sup>1</sup> This table is provided to ensure compliance with the requirement that the information contained in the quarterly reports by OSC, DOL-VETS, and DOJ "is categorized in a uniform way" (P.L. 110-389, Sec. 312(d)). A more detailed table and narrative explanation are provided on pages 3 and 4, below.

**U.S. Office of Special Counsel  
USERRA Quarterly Report to Congress  
Second Quarter of Fiscal Year 2009**

**Detail Table:**      **OSC compliance with 60-day USERRA case processing deadline during second quarter of fiscal year 2009 (2Q FY09)**

<b>USERRA CASES RECEIVED DURING 2Q FY09</b>	<b>11</b>
<b>USERRA CASES CARRIED OVER FROM PREVIOUS QUARTERS <sup>1</sup></b>	<b>9</b>
<b><u>CASES WHERE 60-DAY DEADLINE OCCURRED DURING QUARTER <sup>2</sup></u></b>	<b>13</b>
<b>- CASES WHERE DEADLINE MET</b>	<b>9</b>
<b>- CASES WHERE DEADLINE NOT MET</b>	<b>4</b>
<b>-- CASES WHERE CLAIMANT CONSENTED TO EXTENSION</b>	<b>3</b>
<b>-- CASES WHERE CLAIMANT DID NOT CONSENT TO EXTENSION</b>	<b>1</b>
<b>- CASES PENDING AT END OF QUARTER</b>	<b>3</b>
<b><u>CASES WHERE 60-DAY DEADLINE DID NOT OCCUR DURING QUARTER</u></b>	<b>7</b>
<b>- CASES WHERE DETERMINATION MADE PRIOR TO END OF QUARTER</b>	<b>1</b>
<b>- CASES PENDING AT END OF QUARTER</b>	<b>6</b>

<sup>1</sup> The Veterans' Benefits Improvement Act of 2008 (P.L. 110-389), which amended USERRA to impose the 60-day deadline, became effective on October 10, 2008. Therefore, only cases received by OSC on or after that date are included.

<sup>2</sup> This includes cases carried over from previous quarters, as applicable.

**U.S. Office of Special Counsel  
USERRA Quarterly Report to Congress  
Second Quarter of Fiscal Year 2009**

**Narrative Explanation:** During the second quarter of fiscal year 2009 (from January 1 through March 31, 2009), OSC received eleven USERRA cases from DOL-VETS. In addition, nine cases OSC received during the first quarter remained pending at the beginning of the second quarter. Of the twenty total cases, the 60-day deadline occurred during the second quarter in thirteen cases.

Of the thirteen cases where the 60-day deadline occurred during the quarter, OSC met the deadline in nine cases. In the four cases where OSC exceeded the deadline, OSC sought and received an extension to make its determination in three cases. The single case in which OSC did not request an extension was closed on the 61<sup>st</sup> day (one day beyond the deadline), making such a request impractical. All three of the cases in which OSC sought and received an extension remained pending at the end of the quarter, all still within the agreed-upon extension period (these will be reported as “carryover” cases in the next report).

Of the seven cases where the 60-day deadline did not occur during quarter, OSC made its determination in one case prior to the end of the quarter, resulting in six cases pending at the end of the quarter (these will be reported as “carryover” cases in the next report).

**U.S. Office of Special Counsel**  
**USERRA Quarterly Report to Congress**  
**Second Quarter of Fiscal Year 2009 (AMENDED)**

**Background:** The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA, 38 U.S.C. §§ 4301 – 4335) is intended to ensure that those who serve in our armed forces: (1) are not disadvantaged in their civilian careers because of their military service; (2) are promptly reemployed in their civilian jobs upon their return from duty; and (3) are not discriminated against in employment based on past, present, or future military service. The federal government is to be a “model employer” under USERRA. See 38 U.S.C. §§ 4301, 4311.

The U.S. Office of Special Counsel (OSC) serves as the federal-sector prosecutor of USERRA claims. The U.S. Department of Labor, Veterans’ Employment and Training Service (DOL-VETS), refers USERRA complaints involving federal executive agencies to OSC for possible representation before the U.S. Merit Systems Protection Board (MSPB).<sup>1</sup>

For a USERRA complaint to reach OSC, persons who believe a federal executive agency violated their USERRA rights must first file a complaint with DOL-VETS, which investigates and attempts to resolve the complaint. See 38 U.S.C. § 4322. If DOL-VETS is unable to resolve the complaint, the USERRA claimant may request referral to OSC for possible legal representation before the MSPB. See 38 U.S.C. § 4324. If, after reviewing the complaint and investigative file, OSC is reasonably satisfied that the claimant is entitled to relief under USERRA, OSC may act as attorney for the claimant and initiate an action before the MSPB. Id. If OSC declines representation, the claimant may still file an appeal with the MSPB. Id.

USERRA was amended by the Veterans’ Benefits Improvement Act of 2008 (P.L. 110-389), which was signed into law on October 10, 2008. As amended, USERRA now requires that OSC make a decision whether to offer a claimant representation before the MSPB, and notify the claimant in writing of that decision, within 60 days of receiving the case from DOL-VETS, unless the claimant agrees to an extension of time. The law further requires OSC to report to Congress, within 30 days after the end of each fiscal quarter, the number of USERRA cases for which OSC failed to meet the 60-day deadline for making and notifying the claimant of its representation decision.

This report provides information about OSC’s compliance with the 60-day deadline during the second quarter of fiscal year 2009 (from January 1 through March 31, 2009).<sup>2</sup> Because the statute permits OSC, with the claimant’s consent, to obtain extensions beyond the 60-day deadline, this report differentiates between cases where the claimant agreed to an extension of time and those where he or she did not.

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<sup>1</sup> The U.S. Department of Justice (DOJ) serves as the prosecutor of USERRA claims involving state and local governments and private employers. See 38 U.S.C. § 4323.

<sup>2</sup> OSC is providing this amended report to correct errors in the original report.

**U.S. Office of Special Counsel  
USERRA Quarterly Report to Congress  
Second Quarter of Fiscal Year 2009 (AMENDED)**

**Summary Table: USERRA cases received by OSC on or after October 10, 2008, where 60-day deadline was either met or exceeded:<sup>1</sup>**

60-Day Deadline Met	60-Day Deadline Exceeded		
Representation Decision Made Within Deadline	With Consent	Without Consent	Total
9	3	1	4

- During the second quarter of fiscal year 2009, OSC received twelve USERRA cases from DOL-VETS. In addition, nine cases OSC received during the first quarter remained pending at the beginning of the second quarter.
- Of the twenty-one total cases, the 60-day deadline occurred during the second quarter in twelve cases.
- OSC met the deadline in eight of the twelve cases, plus one additional case where the deadline did not occur until after the end of the quarter (for a total of nine cases where OSC met the 60-day deadline during the quarter).
- In the four cases where OSC exceeded the deadline, OSC sought and received an extension to make its determination in three cases (all of which remained pending at the end of the quarter and still within the agreed-upon extension period). In the single case in which OSC did not request an extension, OSC made its determination on the 61<sup>st</sup> day (one day beyond the deadline), making such a request impractical.

**Disposition of Previously Reported Cases:**

- As reflected in OSC's previous Quarterly Report (for the first quarter of fiscal year 2009), no USERRA cases received on or after October 10, 2008 (when the new deadlines became effective) exceeded the 60-day deadline during the first quarter. Therefore, there are no cases to report in this category.

<sup>1</sup> This table is provided to ensure compliance with the requirement that the information contained in the quarterly reports by OSC, DOL-VETS, and DOJ "is categorized in a uniform way" (P.L. 110-389, Sec. 312(d)). A more detailed table is provided on page 3 below.

**U.S. Office of Special Counsel  
USERRA Quarterly Report to Congress  
Second Quarter of Fiscal Year 2009 (AMENDED)**

**Detail Table:**     **OSC compliance with 60-day USERRA case processing deadline during second quarter of fiscal year 2009 (2Q FY09)**

<b>USERRA CASES RECEIVED DURING 2Q FY09</b>	<b>12</b>
<b>USERRA CASES CARRIED OVER FROM PREVIOUS QUARTERS <sup>1</sup></b>	<b>9</b>
<b><u>CASES WHERE 60-DAY DEADLINE OCCURRED DURING QUARTER <sup>2</sup></u></b>	<b>12</b>
<b>- CASES WHERE DEADLINE MET</b>	<b>8</b>
<b>- CASES WHERE DEADLINE NOT MET</b>	<b>4</b>
<b>-- CASES WHERE CLAIMANT CONSENTED TO EXTENSION</b>	<b>3</b>
<b>-- CASES WHERE CLAIMANT DID NOT CONSENT TO EXTENSION</b>	<b>1</b>
<b>- CASES PENDING AT END OF QUARTER</b>	<b>3</b>
<b><u>CASES WHERE 60-DAY DEADLINE DID NOT OCCUR DURING QUARTER</u></b>	<b>9</b>
<b>- CASES WHERE DETERMINATION MADE PRIOR TO END OF QUARTER</b>	<b>1</b>
<b>- CASES PENDING AT END OF QUARTER</b>	<b>8</b>

<sup>1</sup> The Veterans' Benefits Improvement Act of 2008 (P.L. 110-389), which amended USERRA to impose the 60-day deadline, became effective on October 10, 2008. Therefore, only cases received by OSC on or after that date are included.

<sup>2</sup> This includes cases carried over from previous quarters, as applicable.

**U.S. Office of Special Counsel**  
**USERRA Quarterly Report to Congress**  
**Third Quarter of Fiscal Year 2009**

**Background:** The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA, 38 U.S.C. §§ 4301 – 4335) is intended to ensure that those who serve in our armed forces: (1) are not disadvantaged in their civilian careers because of their military service; (2) are promptly reemployed in their civilian jobs upon their return from duty; and (3) are not discriminated against in employment based on past, present, or future military service. The federal government is to be a “model employer” under USERRA. See 38 U.S.C. §§ 4301, 4311.

The U.S. Office of Special Counsel (OSC) serves as the federal-sector prosecutor of USERRA claims. The U.S. Department of Labor, Veterans’ Employment and Training Service (DOL-VETS), refers USERRA complaints involving federal executive agencies to OSC for possible representation before the U.S. Merit Systems Protection Board (MSPB).<sup>1</sup>

For a USERRA complaint to reach OSC, persons who believe a federal executive agency violated their USERRA rights must first file a complaint with DOL-VETS, which investigates and attempts to resolve the complaint. See 38 U.S.C. § 4322. If DOL-VETS is unable to resolve the complaint, the USERRA claimant may request referral to OSC for possible legal representation before the MSPB. See 38 U.S.C. § 4324. If, after reviewing the complaint and investigative file, OSC is reasonably satisfied that the claimant is entitled to relief under USERRA, OSC may act as attorney for the claimant and initiate an action before the MSPB. Id. If OSC declines representation, the claimant may still file an appeal with the MSPB. Id.

USERRA was amended by the Veterans’ Benefits Improvement Act of 2008 (P.L. 110-389), which was signed into law on October 10, 2008. As amended, USERRA now requires that OSC make a decision whether to offer a claimant representation before the MSPB, and notify the claimant in writing of that decision, within 60 days of receiving the case from DOL-VETS, unless the claimant agrees to an extension of time. The law further requires OSC to report to Congress, within 30 days after the end of each fiscal quarter, the number of USERRA cases for which OSC failed to meet the 60-day deadline for making and notifying the claimant of its representation decision.

This report provides information about OSC’s compliance with the 60-day deadline during the third quarter of fiscal year 2009 (from April 1 through June 30, 2009). Because the statute permits OSC, with the claimant’s consent, to obtain extensions beyond the 60-day deadline, this report differentiates between cases where the claimant agreed to an extension of time and those where he or she did not.

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<sup>1</sup> The U.S. Department of Justice (DOJ) serves as the prosecutor of USERRA claims involving state and local governments and private employers. See 38 U.S.C. § 4323.



**U.S. Office of Special Counsel  
USERRA Quarterly Report to Congress  
Third Quarter of Fiscal Year 2009**

**Summary Table: USERRA cases received by OSC on or after October 10, 2008, where 60-day deadline was either met or exceeded:<sup>1</sup>**

60-Day Deadline Met	60-Day Deadline Exceeded		
Representation Decision Made Within Deadline	With Consent	Without Consent	Total
14	1	1	2

- During the third quarter of fiscal year 2009, OSC received eight USERRA cases from DOL-VETS. In addition, eleven cases OSC received during previous quarters remained pending at the beginning of the third quarter.
- Of the nineteen total cases, the 60-day deadline occurred during the second quarter in ten cases.
- OSC met the deadline in eight of the ten cases, plus six additional cases where the deadline did not occur until after the end of the quarter (for a total of fourteen cases where OSC met the 60-day deadline during the quarter).
- In the two cases where OSC exceeded the deadline, OSC sought and received an extension to make its determination in one case (which remained pending at the end of the quarter and still within the agreed-upon extension period). The single case in which OSC did not request an extension was under review but not properly entered in OSC's database; once the error was discovered, OSC completed its review at the claimant's request and made its determination prior to the end of the quarter.

**Disposition of Previously Reported Cases:**

- In its previous Quarterly Report (for the second quarter of fiscal year 2009), OSC reported three cases that exceeded the 60-day deadline (with consent) and remained pending at the end of the quarter. OSC made its determination in two of the three cases during the third quarter (one within the extended deadline, one after an additional extension). Thus, one such case remained pending at the end of the third quarter (still within an agreed-upon extension period).

<sup>1</sup> This table is provided to ensure compliance with the requirement that the information contained in the quarterly reports by OSC, DOL-VETS, and DOJ "is categorized in a uniform way" (P.L. 110-389, Sec. 312(d)). A more detailed table is provided on page 3 below.

**U.S. Office of Special Counsel  
USERRA Quarterly Report to Congress  
Third Quarter of Fiscal Year 2009**

**Detail Table:**     **OSC compliance with 60-day USERRA case processing deadline during third quarter of fiscal year 2009 (3Q FY09)**

<b>USERRA CASES RECEIVED DURING 3Q FY09</b>	<b>8</b>
<b>USERRA CASES CARRIED OVER FROM PREVIOUS QUARTERS <sup>1</sup></b>	<b>11</b>
<b><u>CASES WHERE 60-DAY DEADLINE OCCURRED DURING QUARTER <sup>2</sup></u></b>	<b>10</b>
<b>- CASES WHERE DEADLINE MET</b>	<b>8</b>
<b>- CASES WHERE DEADLINE NOT MET</b>	<b>2</b>
<b>-- CASES WHERE CLAIMANT CONSENTED TO EXTENSION</b>	<b>1</b>
<b>-- CASES WHERE CLAIMANT DID NOT CONSENT TO EXTENSION</b>	<b>1</b>
<b>- CASES PENDING AT END OF QUARTER</b>	<b>1</b>
<b><u>CASES WHERE 60-DAY DEADLINE DID NOT OCCUR DURING QUARTER</u></b>	<b>6</b>
<b>- CASES WHERE DETERMINATION MADE PRIOR TO END OF QUARTER</b>	<b>6</b>
<b>- CASES PENDING AT END OF QUARTER</b>	<b>0</b>
<b><u>CARRYOVER CASES WHERE EXTENSION RECEIVED DURING PREVIOUS QUARTERS</u></b>	<b>3</b>
<b>- CASES WHERE DETERMINATION MADE PRIOR TO END OF QUARTER</b>	<b>2</b>
<b>- CASES PENDING AT END OF QUARTER</b>	<b>1</b>

<sup>1</sup> The Veterans' Benefits Improvement Act of 2008 (P.L. 110-389), which amended USERRA to impose the 60-day deadline, became effective on October 10, 2008. Therefore, only cases received by OSC on or after that date are included.

<sup>2</sup> This includes cases carried over from previous quarters, as applicable.

**U.S. Office of Special Counsel  
USERRA Quarterly Report to Congress  
Fourth Quarter of Fiscal Year 2009**

**Background:** The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA, 38 U.S.C. §§ 4301 – 4335) is intended to ensure that those who serve in our armed forces: (1) are not disadvantaged in their civilian careers because of their military service; (2) are promptly reemployed in their civilian jobs upon their return from duty; and (3) are not discriminated against in employment based on past, present, or future military service. The federal government is to be a “model employer” under USERRA. See 38 U.S.C. §§ 4301, 4311.

The U.S. Office of Special Counsel (OSC) serves as the federal-sector prosecutor of USERRA claims. The U.S. Department of Labor, Veterans’ Employment and Training Service (DOL-VETS), refers USERRA complaints involving federal executive agencies to OSC for possible representation before the U.S. Merit Systems Protection Board (MSPB).<sup>1</sup>

For a USERRA complaint to reach OSC, persons who believe a federal executive agency violated their USERRA rights must first file a complaint with DOL-VETS, which investigates and attempts to resolve the complaint. See 38 U.S.C. § 4322. If DOL-VETS is unable to resolve the complaint, the USERRA claimant may request referral to OSC for possible legal representation before the MSPB. See 38 U.S.C. § 4324. If, after reviewing the complaint and investigative file, OSC is reasonably satisfied that the claimant is entitled to relief under USERRA, OSC may act as attorney for the claimant and initiate an action before the MSPB. Id. If OSC declines representation, the claimant may still file an appeal with the MSPB. Id.

USERRA was amended by the Veterans’ Benefits Improvement Act of 2008 (P.L. 110-389), which was signed into law on October 10, 2008. As amended, USERRA now requires that OSC make a decision whether to offer a claimant representation before the MSPB, and notify the claimant in writing of that decision, within 60 days of receiving the case from DOL-VETS, unless the claimant agrees to an extension of time. The law further requires OSC to report to Congress, within 30 days after the end of each fiscal quarter, the number of USERRA cases for which OSC failed to meet the 60-day deadline for making and notifying the claimant of its representation decision.

This report provides information about OSC’s compliance with the 60-day deadline during the fourth quarter of fiscal year 2009 (from July 1 through September 30, 2009), as well as an end of fiscal year summary. Because the statute permits OSC, with the claimant’s consent, to obtain extensions beyond the 60-day deadline, this report differentiates between cases where the claimant agreed to an extension of time and those where he or she did not.

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<sup>1</sup> The U.S. Department of Justice (DOJ) serves as the prosecutor of USERRA claims involving state and local governments and private employers. See 38 U.S.C. § 4323.

**U.S. Office of Special Counsel  
USERRA Quarterly Report to Congress  
Fourth Quarter of Fiscal Year 2009**

**Summary Table:** USERRA cases received by OSC on or after October 10, 2008, where 60-day deadline was either met or exceeded during the fourth quarter of fiscal year 2009:<sup>1</sup>

60-Day Deadline Met	60-Day Deadline Exceeded		
Representation Decision Made Within Deadline	With Consent	Without Consent	Total
2	0	0	0

- During the fourth quarter of fiscal year 2009, OSC received eight USERRA cases from DOL-VETS. In addition, two cases OSC received during previous quarters remained pending at the beginning of the fourth quarter.
- Of the ten total cases, the 60-day deadline occurred during the quarter in two cases. OSC met the deadline in both cases.
- In the eight other cases, OSC made its determination in two cases, with six cases pending at the end of the quarter (all still within the 60-day deadline period).

**Disposition of Previously Reported Cases:**

- In its previous Quarterly Report (for the third quarter of fiscal year 2009), OSC reported one case that exceeded the 60-day deadline (with consent) and remained pending at the end of the quarter. OSC made its determination in that case during the fourth quarter within the agreed-upon extension period.
- In one additional "carryover" case that remained pending at the end of the third quarter, OSC made its determination during the fourth quarter within the agreed-upon extension period.

**End of Fiscal Year Summary:**

- Please see pages 4-5 below.

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<sup>1</sup> This table is provided to ensure compliance with the requirement that the information contained in the quarterly reports by OSC, DOL-VETS, and DOJ "is categorized in a uniform way" (P.L. 110-389, Sec. 312(d)). A more detailed table is provided on page 3 below.

**U.S. Office of Special Counsel  
USERRA Quarterly Report to Congress  
Fourth Quarter of Fiscal Year 2009**

**Detail Table:**      **OSC compliance with 60-day USERRA case processing deadline during the fourth quarter of fiscal year 2009 (4Q FY09)**

<b>USERRA CASES RECEIVED DURING 4Q FY09</b>	<b>8</b>
<b>USERRA CASES CARRIED OVER FROM PREVIOUS QUARTERS <sup>1</sup></b>	<b>2</b>
<b><u>CASES WHERE 60-DAY DEADLINE OCCURRED DURING QUARTER <sup>2</sup></u></b>	<b>2</b>
<b>- CASES WHERE DEADLINE MET</b>	<b>2</b>
<b>- CASES WHERE DEADLINE NOT MET</b>	<b>0</b>
<b>-- CASES WHERE CLAIMANT CONSENTED TO EXTENSION</b>	<b>n/a</b>
<b>-- CASES WHERE CLAIMANT DID NOT CONSENT TO EXTENSION</b>	<b>n/a</b>
<b>- CASES PENDING AT END OF QUARTER</b>	<b>0</b>
<b><u>CASES WHERE 60-DAY DEADLINE DID NOT OCCUR DURING QUARTER</u></b>	<b>6</b>
<b>- CASES WHERE DETERMINATION MADE PRIOR TO END OF QUARTER</b>	<b>0</b>
<b>- CASES PENDING AT END OF QUARTER</b>	<b>6</b>
<b><u>CARRYOVER CASES WHERE EXTENSION RECEIVED DURING PREVIOUS QUARTERS</u></b>	<b>2</b>
<b>- CASES WHERE DETERMINATION MADE PRIOR TO END OF QUARTER</b>	<b>2</b>
<b>- CASES PENDING AT END OF QUARTER</b>	<b>0</b>

<sup>1</sup> The Veterans' Benefits Improvement Act of 2008 (P.L. 110-389), which amended USERRA to impose the 60-day deadline, became effective on October 10, 2008. Therefore, only cases received by OSC on or after that date are included.

<sup>2</sup> This includes cases carried over from previous quarters, as applicable.

**U.S. Office of Special Counsel  
USERRA Quarterly Report to Congress  
Fourth Quarter of Fiscal Year 2009**

**End of Fiscal Year Summary:<sup>1</sup>**

60-Day Deadline Met	60-Day Deadline Exceeded		
Representation Decision Made Within Deadline	With Consent	Without Consent <sup>2</sup>	Total
28	4	2	6

- From October 10, 2008, when the 60-day deadline went into effect, through September 30, 2009, the end of fiscal year 2009, OSC received forty USERRA cases from DOL-VETS.
- Of those cases, the 60-day deadline occurred during the fiscal year in thirty-four cases. OSC met the deadline in twenty-eight cases (82%).
- By the end of the fiscal year, OSC made its determination in the six cases in which it exceeded the 60-day deadline.
- At the end of the fiscal year, OSC's determination was pending in six cases, all of which were still within the initial 60-day deadline period.

<sup>1</sup> A more detailed table is provided on page 5 below.

<sup>2</sup> In one case in which OSC did not receive consent for an extension, OSC made its determination on the 61<sup>st</sup> day (one day after the deadline), making such a request impractical. In the other case in which OSC did not receive consent for an extension, the case was under review but not properly entered in OSC's database; once the error was discovered, OSC completed its review and made its determination at the claimant's request.

**U.S. Office of Special Counsel  
USERRA Quarterly Report to Congress  
Fourth Quarter of Fiscal Year 2009**

**Detail Table:**      **OSC compliance with 60-day USERRA case processing deadline during fiscal year 2009 (FY09)**

<b>USERRA CASES RECEIVED DURING FY09<sup>1</sup></b>	<b>40</b>
<b><u>CASES WHERE 60-DAY DEADLINE OCCURRED DURING FISCAL YEAR</u></b>	<b>34</b>
- CASES WHERE DEADLINE MET	28
- CASES WHERE DEADLINE NOT MET	6
-- CASES WHERE CLAIMANT CONSENTED TO EXTENSION	4
-- CASES WHERE CLAIMANT DID NOT CONSENT TO EXTENSION <sup>2</sup>	2
- CASES PENDING AT END OF FISCAL YEAR	0
<b><u>CASES WHERE 60-DAY DEADLINE DID NOT OCCUR DURING FISCAL YEAR</u></b>	<b>6</b>
- CASES WHERE DETERMINATION MADE PRIOR TO END OF FISCAL YEAR	0
- CASES PENDING AT END OF FISCAL YEAR	6

<sup>1</sup> Because the 60-day deadline became effective on October 10, 2008, shortly after the beginning of the fiscal year, this table includes only cases received on or after that date through September 30, 2009.

<sup>2</sup> In one case in which OSC did not receive consent for an extension, OSC made its determination on the 61<sup>st</sup> day (one day after the deadline), making such a request impractical. In the other case in which OSC did not receive consent for an extension, the case was under review but not properly entered in OSC's database; once the error was discovered, OSC completed its review and made its determination at the claimant's request.

**U.S. Office of Special Counsel  
USERRA Quarterly Report to Congress  
First Quarter of Fiscal Year 2010**

**Background:** The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA, 38 U.S.C. §§ 4301 – 4335) is intended to ensure that those who serve in our armed forces: (1) are not disadvantaged in their civilian careers because of their military service; (2) are promptly reemployed in their civilian jobs upon their return from duty; and (3) are not discriminated against in employment based on past, present, or future military service. The federal government is to be a “model employer” under USERRA. See 38 U.S.C. §§ 4301, 4311.

The U.S. Office of Special Counsel (OSC) serves as the federal-sector prosecutor of USERRA claims. The U.S. Department of Labor, Veterans’ Employment and Training Service (DOL-VETS), refers USERRA complaints involving federal executive agencies to OSC for possible representation before the U.S. Merit Systems Protection Board (MSPB).<sup>1</sup>

For a USERRA complaint to reach OSC, persons who believe a federal executive agency violated their USERRA rights must first file a complaint with DOL-VETS, which investigates and attempts to resolve the complaint. See 38 U.S.C. § 4322. If DOL-VETS is unable to resolve the complaint, the USERRA claimant may request referral to OSC for possible legal representation before the MSPB. See 38 U.S.C. § 4324. If, after reviewing the complaint and investigative file, OSC is reasonably satisfied that the claimant is entitled to relief under USERRA, OSC may act as attorney for the claimant and initiate an action before the MSPB. Id. If OSC declines representation, the claimant may still file an appeal with the MSPB. Id.

USERRA requires that OSC make a decision whether to offer a claimant representation before the MSPB, and notify the claimant in writing of that decision, within 60 days of receiving the case from DOL-VETS, unless the claimant agrees to an extension of time. See 38 U.S.C. §§ 4324(a)(2)(B), 4327(a)(2). The law further requires OSC to report to Congress, within 30 days after the end of each fiscal quarter, the number of USERRA cases for which OSC failed to meet the 60-day deadline for making and notifying the claimant of its representation decision. See 38 U.S.C. § 4332(b)(3).

This report provides information about OSC’s compliance with the 60-day deadline during the first quarter of fiscal year 2010 (from October 1 through December 31, 2009). Because the statute permits OSC, with the claimant’s consent, to obtain extensions beyond the 60-day deadline, this report differentiates between cases where the claimant agreed to an extension of time and those where he or she did not.

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<sup>1</sup> The U.S. Department of Justice (DOJ) serves as the prosecutor of USERRA claims involving state and local governments and private employers. See 38 U.S.C. § 4323.



**U.S. Office of Special Counsel  
USERRA Quarterly Report to Congress  
First Quarter of Fiscal Year 2010**

**Summary Table: USERRA cases received by OSC where 60-day deadline was either met or exceeded during the first quarter of fiscal year 2010:<sup>1</sup>**

60-Day Deadline Met	60-Day Deadline Exceeded		
Representation Decision Made Within Deadline	With Consent	Without Consent	Total
9	0	0	0

- During the first quarter of fiscal year 2010, OSC received five USERRA cases from DOL-VETS. In addition, six cases OSC received during the previous quarter remained pending at the beginning of the first quarter.
- Of the eleven total cases, the 60-day deadline occurred during the quarter in nine cases. OSC met the deadline in all nine cases.
- The other two cases remained pending at the end of the quarter (both still within the 60-day deadline period).

**Disposition of Previously Reported Cases:**

- No cases to report.

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<sup>1</sup> This table is provided to ensure compliance with the requirement that the information contained in the quarterly reports by OSC, DOL-VETS, and DOJ "is categorized in a uniform way." See 38 U.S.C. § 4332(c)(1). A more detailed table is provided on page 3 below.

**U.S. Office of Special Counsel  
USERRA Quarterly Report to Congress  
First Quarter of Fiscal Year 2010**

**Detail Table:      OSC compliance with 60-day USERRA case processing deadline during the first quarter of fiscal year 2010 (1Q FY10)**

USERRA CASES RECEIVED DURING 1Q FY10	5
USERRA CASES CARRIED OVER FROM PREVIOUS QUARTERS	6
<u>CASES WHERE 60-DAY DEADLINE OCCURRED DURING QUARTER <sup>1</sup></u>	9
- CASES WHERE DEADLINE MET	9
- CASES WHERE DEADLINE NOT MET	0
-- CASES WHERE CLAIMANT CONSENTED TO EXTENSION	0
-- CASES WHERE CLAIMANT DID NOT CONSENT TO EXTENSION	0
- CASES PENDING AT END OF QUARTER	0
<u>CASES WHERE 60-DAY DEADLINE DID NOT OCCUR DURING QUARTER</u>	2
- CASES WHERE DETERMINATION MADE PRIOR TO END OF QUARTER	0
- CASES PENDING AT END OF QUARTER	2
<u>CARRYOVER CASES WHERE EXTENSION RECEIVED DURING PREVIOUS QUARTERS</u>	0
- CASES WHERE DETERMINATION MADE PRIOR TO END OF QUARTER	0
- CASES PENDING AT END OF QUARTER	0

<sup>1</sup> This includes cases carried over from previous quarters, as applicable.





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## NO FEAR ACT ANNUAL REPORT FOR FISCAL YEAR 2008

**1. The Number Of Cases In Federal Court Pending or Resolved in the Fiscal Year Arising Under Each of the Federal Antidiscrimination Laws and Whistleblower Protection Laws Defined in 5 C.F.R. § 724.201.**

**A. Cases Pending In Federal Court**

During FY 2008, there was one lawsuit against the Office of Special Counsel (OSC) pending in U.S. District Court involving alleged violations of Title VII, 42 U.S.C. § 2000e-16, the Rehabilitation Act, 29 U.S.C. § 791, and/or the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8). There were no lawsuits against OSC pending in Federal court during FY 2008 involving alleged violations of the Fair Labor Standards Act, 29 U.S.C. § 206(d), the Age Discrimination in Employment Act, 29 U.S.C. §§ 631 and 633a, or the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(9).

**B. Cases Resolved in Federal Court**

No lawsuits involving any of the antidiscrimination and whistleblower protection laws defined in 5 C.F.R. § 724.201 were resolved during FY 2008.

**2. For the Cases Identified in #1 Above, the Status or Disposition; the Amount of Money Required to Be Reimbursed to the Judgment Fund By the Agency; and the Amount of Such Reimbursement for Attorneys' Fees Where Such Fees Have Been Separately Designated.**

The case identified in response to question 1 is still pending in U.S. District Court. Discovery is slated for the summer of 2009. No reimbursement to the Judgment Fund is required and no attorney fees have been claimed or awarded.

**3. For Cases Identified in #1 Above, the Total Number of Employees in Each Fiscal Year Disciplined For Discrimination.**

The case identified in response to question 1 is still pending and there has been no finding of liability or wrongdoing on the part of the agency or any agency official. That case combines two administrative EEO complaints. OSC's administrative investigations of those complaints did not reveal any liability or wrongdoing on the part of the agency or any agency

official. Therefore, there has been no basis to discipline any agency official for discrimination, and no agency official has been so disciplined.

**4. Fiscal Year-End Data About Discrimination Complaints for Each Fiscal Year That Was Posted In Accordance with Equal Employment Opportunity Regulations Implementing Section 301(c)(1)(B) of the No FEAR Act.**

A printed copy of this information for FYs 2003 – 2008 accompanies this report. This information is also posted on OSC's web site – [www.osc.gov](http://www.osc.gov).

**5. Whether or Not In Connection with Cases In Federal Court, the Number of Employees In Each Fiscal Year Disciplined for Discrimination.**

See OSC's response to question 3. No EEO complaints were filed against OSC in FY 2008 and the only EEO case involving OSC that is currently pending is the case identified in response to question 1. As noted above, the lawsuit currently pending in U.S. District Court involves two administrative EEO complaints. There was no finding of discrimination at the administrative level with respect to those two complaints, and as the lawsuit is still pending before the court, there has been no finding of discrimination by the court.

Since FY 2003, when OSC started maintaining this data pursuant to the No FEAR Act, there have been four other EEO complaints filed against the agency. One of those complaints was resolved through a settlement agreement with no finding of discrimination. The other three complaints (two of which were filed by the same individual) were resolved in OSC's favor by the Equal Employment Opportunity Commission (EEOC). Accordingly, there has been no basis to discipline any agency official for discrimination, and no agency official has been so disciplined.

**6. The Agency's Policy for Taking Disciplinary Action Against Federal Employees for Violating Antidiscrimination or Whistleblower Protection Laws or for Prohibited Personnel Practices.**

The Office of Special Counsel's Personnel Management Manual, Chapters 751 and 752, establishes the agency's disciplinary action policy for all misconduct, including discrimination and other prohibited personnel practices. We will promptly submit a copy of that material should you so request. Any disciplinary action is taken after a full investigation of the charge, an opportunity to rebut, and a consideration of the Douglas factors.

**7. An Analysis of #1 – #6, Including an Examination of Trends; Causal Analysis; Practical Knowledge Gained Through Experience; and Any Actions Planned or Taken to Improve Complaint or Civil Rights Programs at the Office of Special Counsel.**

Only six EEO complaints (filed by four individuals) have been filed against OSC since FY 2003. Given the dearth of complaint activity over the past six fiscal years, there is insufficient data to conduct any trend or causal analysis. We believe that we do not have, and have not had, more complaints of discrimination or reprisal because of our efforts to promote fair employment practices and equal employment opportunity. OSC employees are particularly well informed about prohibited personnel practices, reprisal actions against employees, and equal employment opportunity because of OSC's mission to: (1) educate agencies and employees about prohibited personnel practices, including reprisal; and (2) investigate and prosecute prohibited personnel practices and discrimination. Additionally, the Acting Special Counsel issued an EEO policy statement emphasizing OSC's commitment to EEO principles; that statement was e-mailed to all employees and was posted on OSC's website – [www.osc.gov](http://www.osc.gov). Furthermore, the agency's EEO program is regularly monitored to ensure compliance and to identify ways to improve the program.

**8. For Each Fiscal Year, Any Adjustment Needed or Made to the Budget of the Agency to Comply With Its Judgment Fund Reimbursement Obligations.**

N/A

**9. The Agency's Written Plan Developed Under § 724.203(a) to Train Its Employees**

OSC has developed a PowerPoint presentation, which is published on our website – [www.osc.gov](http://www.osc.gov) – to train employees about the equal employment opportunity and anti-retaliation laws that protect them. This on-line training was first provided in FY 2007; all employees were required to complete it, and certify that they had done so, by December 17, 2006. Follow-up training was conducted in February 2009 and all employees were required to certify that they had completed the training. Additionally, new employees are given the agency's No FEAR Act Notice in their orientation packets and are instructed to complete the PowerPoint training program. In compliance with 5 C.F.R. §724.203, OSC will be conducting follow-up training again in FY 2011.



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## NO FEAR ACT ANNUAL REPORT FOR FISCAL YEAR 2008 EQUAL EMPLOYMENT OPPORTUNITY DATA

### COMPLAINTS PENDING FROM PREVIOUS FISCAL YEARS

	FY 2008	FY 2007	FY 2006	FY 2005	FY 2004	FY 2003
Number Filed Prior to Start of Fiscal Year	0	3	1	1	4	1
Number of Individuals Who Filed Complaints in Previous Years	0	2	1	1	3	1
Number of Complaints Pending at Investigation Stage	0	0	1	0	0	1
Number of Complaints Pending at Hearing Stage	0	1	1	1	1	0
Number of Complaints Pending Final Agency Action	0	1	0	0	0	0
Number of Complaints Pending Appeal	0	1	0	0	0	0

### NEW COMPLAINTS FILED

	FY 2008	FY 2007	FY 2006	FY 2005	FY 2004	FY 2003
Number of EEO Complaints Filed	0	1	2	0	0	3
Number of Individuals Filing EEO Complaints	n/a	1	1	n/a	n/a	2
Number of Individuals Filing More than One EEO Complaint	n/a	0	1	n/a	n/a	1

### COMPLAINTS DISMISSED BY OSC PURSUANT TO 29 C.F.R. § 1614.107(a)

	FY 2008	FY 2007	FY 2006	FY 2005	FY 2004	FY 2003
Number Dismissed	0	0	0	0	0	0
Average Days Pending Before Dismissal	n/a	n/a	n/a	n/a	n/a	0

**NUMBER OF COMPLAINANTS ALLEGING DISCRIMINATION BASED ON:**

	<b>FY 2008</b>	<b>FY 2007</b>	<b>FY 2006</b>	<b>FY 2005</b>	<b>FY 2004</b>	<b>FY 2003</b>
Race	0	1	1	0	0	1
Color	0	0	0	0	0	0
Sex (including Equal Pay Act claims)	0	1	1	0	0	1
Religion	0	0	1	0	0	0
National Origin	0	0	0	0	0	0
Age	0	0	0	0	0	1
Disability	0	1	1	0	0	1
Retaliation for EEO Participation	0	1	1	0	0	1
Non-EEO Basis	0	1	0	0	0	0

**NUMBER OF EEO COMPLAINTS RAISING ISSUES RELATED TO:**

	<b>FY 2008</b>	<b>FY 2007</b>	<b>FY 2006</b>	<b>FY 2005</b>	<b>FY 2004</b>	<b>FY 2003</b>
Appointment/Hire	0	0	0	0	0	0
Assignment of Duties	0	0	0	0	0	0
Awards	0	0	0	0	0	0
Conversion to Full Time	0	0	0	0	0	0
Disciplinary Action	Total	0	1	0	0	0
	(i) Demotion	0	0	0	0	0
	(ii) Reprimand	0	0	0	0	0
	(iii) Suspension	0	0	0	0	0
	(iv) Removal	0	1	0	0	0
Duty Hours	0	0	1	0	0	0
Evaluation/Appraisal	0	0	0	0	0	2
Examination/Test	0	0	0	0	0	0
Non-Sexual Harassment	0	1	1	0	0	0
Sexual Harassment	0	1	0	0	0	0
Medical Examination	0	0	0	0	0	0
Pay (including Overtime)	0	0	1	0	0	1
Promotion/Non-Selection	0	0	0	0	0	0
Reassignment/Denied	0	0	0	0	0	0
Reassignment/Directed	0	0	0	0	0	0
Reasonable Accommodation	0	1	0	0	0	1
Reinstatement	0	0	0	0	0	0
Retirement	0	0	0	0	0	0
Termination	0	0	0	0	0	1
Terms/Conditions of Employment	0	0	0	0	0	2
Time and Attendance	0	1	1	0	0	0
Other	0	0	0	0	0	0



**AVERAGE LENGTH OF TIME (IN DAYS) TAKEN TO:**

	<b>FY 2008</b>	<b>FY 2007</b>	<b>FY 2006</b>	<b>FY 2005</b>	<b>FY 2004</b>	<b>FY 2003</b>
Fully Investigate a Formal Complaint	n/a	90	180	266	n/a	125
Issue a Final Decision	n/a	30	n/a	n/a	n/a	n/a
Fully Investigate When No EEOC Hearing is Requested	n/a	90	180	n/a	n/a	82.5
Issue a Final Decision When No EEOC Hearing is Requested	n/a	30	n/a	n/a	n/a	n/a
Fully Investigate When an EEOC Hearing is Requested	n/a	n/a	n/a	266	n/a	210
Issue a Final Decision When an EEOC Hearing is Requested	n/a	n/a	n/a	n/a	n/a	n/a

**NUMBER OF PENDING COMPLAINTS IN WHICH INVESTIGATION EXTENDED BEYOND TIME SPECIFIED IN 29 C.F.R. § 1614.106(e) & 1614.108(e)**

	<b>FY 2008</b>	<b>FY 2007</b>	<b>FY 2006</b>	<b>FY 2005</b>	<b>FY 2004</b>	<b>FY 2003</b>
Total Number	0	0	0	0	0	1

**NUMBER OF FINAL ACTIONS FINDING DISCRIMINATION**

	<b>FY 2008</b>	<b>FY 2007</b>	<b>FY 2006</b>	<b>FY 2005</b>	<b>FY 2004</b>	<b>FY 2003</b>
Number Rendered Without a Hearing Before an EEOC AJ	0	0	0	0	0	0
Number Rendered After a Hearing Before an EEOC AJ	0	0	0	0	0	0

**NUMBER OF FINAL ACTIONS RENDERED WITHOUT A HEARING FINDING DISCRIMINATION BASED ON:**

	<b>FY 2008</b>	<b>FY 2007</b>	<b>FY 2006</b>	<b>FY 2005</b>	<b>FY 2004</b>	<b>FY 2003</b>
Race	0	0	0	0	0	0
Color	0	0	0	0	0	0
Sex (including Equal Pay Act claims)	0	0	0	0	0	0
Religion	0	0	0	0	0	0
National Origin	0	0	0	0	0	0
Age	0	0	0	0	0	0
Disability	0	0	0	0	0	0
Retaliation for EEO Participation	0	0	0	0	0	0
Non-EEO Basis	0	0	0	0	0	0

**NUMBER OF FINAL ACTIONS RENDERED AFTER A HEARING FINDING  
DISCRIMINATION BASED ON:**

	<b>FY 2008</b>	<b>FY 2007</b>	<b>FY 2006</b>	<b>FY 2005</b>	<b>FY 2004</b>	<b>FY 2003</b>
Race	0	0	0	0	0	0
Color	0	0	0	0	0	0
Sex (including Equal Pay Act claims)	0	0	0	0	0	0
Religion	0	0	0	0	0	0
National Origin	0	0	0	0	0	0
Age	0	0	0	0	0	0
Disability	0	0	0	0	0	0
Retaliation for EEO Participation	0	0	0	0	0	0
Non-EEO Basis	0	0	0	0	0	0

**TOTAL NUMBER OF FINAL ACTIONS RENDERED WITHOUT A HEARING  
INVOLVING A FINDING OF DISCRIMINATION IN RELATION TO:**

	<b>FY 2008</b>	<b>FY 2007</b>	<b>FY 2006</b>	<b>FY 2005</b>	<b>FY 2004</b>	<b>FY 2003</b>
Appointment/Hire	0	0	0	0	0	0
Assignment of Duties	0	0	0	0	0	0
Awards	0	0	0	0	0	0
Conversion to Full Time	0	0	0	0	0	0
Disciplinary Action	0	0	0	0	0	0
Total	0	0	0	0	0	0
(i) Demotion	0	0	0	0	0	0
(ii) Reprimand	0	0	0	0	0	0
(iii) Suspension	0	0	0	0	0	0
(iv) Removal	0	0	0	0	0	0
Duty Hours	0	0	0	0	0	0
Evaluation/Appraisal	0	0	0	0	0	0
Examination/Test	0	0	0	0	0	0
Non-Sexual Harassment	0	0	0	0	0	0
Sexual Harassment	0	0	0	0	0	0
Medical Examination	0	0	0	0	0	0
Pay (including Overtime)	0	0	0	0	0	0
Promotion/Non-Selection	0	0	0	0	0	0
Reassignment/Denied	0	0	0	0	0	0
Reassignment/Directed	0	0	0	0	0	0
Reasonable Accommodation	0	0	0	0	0	0
Reinstatement	0	0	0	0	0	0
Retirement	0	0	0	0	0	0
Termination	0	0	0	0	0	0
Terms/Conditions of Employment	0	0	0	0	0	0
Time and Attendance	0	0	0	0	0	0
Other	0	0	0	0	0	0

**TOTAL NUMBER OF FINAL ACTIONS RENDERED AFTER A HEARING  
INVOLVING A FINDING OF DISCRIMINATION IN RELATION TO:**

		<b>FY 2008</b>	<b>FY 2007</b>	<b>FY 2006</b>	<b>FY 2005</b>	<b>FY 2004</b>	<b>FY 2003</b>
Appointment/Hire		0	0	0	0	0	0
Assignment of Duties		0	0	0	0	0	0
Awards		0	0	0	0	0	0
Conversion to Full Time		0	0	0	0	0	0
Disciplinary Action	Total	0	0	0	0	0	0
	(i) Demotion	0	0	0	0	0	0
	(ii) Reprimand	0	0	0	0	0	0
	(iii) Suspension	0	0	0	0	0	0
	(iv) Removal	0	0	0	0	0	0
Duty Hours		0	0	0	0	0	0
Evaluation/Appraisal		0	0	0	0	0	0
Examination/Test		0	0	0	0	0	0
Non-Sexual Harassment		0	0	0	0	0	0
Sexual Harassment		0	0	0	0	0	0
Medical Examination		0	0	0	0	0	0
Pay (including Overtime)		0	0	0	0	0	0
Promotion/Non-Selection		0	0	0	0	0	0
Reassignment/Denied		0	0	0	0	0	0
Reassignment/Directed		0	0	0	0	0	0
Reasonable Accommodation		0	0	0	0	0	0
Reinstatement		0	0	0	0	0	0
Retirement		0	0	0	0	0	0
Termination		0	0	0	0	0	0
Terms/Conditions of Employment		0	0	0	0	0	0
Time and Attendance		0	0	0	0	0	0
Other		0	0	0	0	0	0





**U.S. OFFICE OF SPECIAL COUNSEL**

1730 M Street, N.W., Suite 218  
Washington, D.C. 20036-4505  
202-254-3600

**U.S. OFFICE OF SPECIAL COUNSEL**

**FY 2007 NO FEAR ACT ANNUAL REPORT PURSUANT TO 5 C.F.R. § 724.302(a)**

**1. The Number Of Cases In Federal Court Pending or Resolved in the Fiscal Year Arising Under Each of the Federal Antidiscrimination Laws and Whistleblower Protection Laws Defined in 5 C.F.R. § 724.201.**

In FY 2007, one lawsuit was filed against the Office of Special Counsel in U.S. District Court, claiming violations of Title VII, the Rehabilitation Act, and the Whistleblower Protection Act.

<i>Number of Cases Pending or Resolved in Federal Court Arising Under The Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8) or (b)(9)</i>	1
<i>Number of Cases Pending or Resolved in Federal Court Arising Under Title VII, 42 U.S.C. § 2000e-16</i>	1
<i>Number of Cases Pending or Resolved in Federal Court Arising Under The Fair Labor Standards Act, 29 U.S.C. § 206(d)</i>	0
<i>Number of Cases Pending or Resolved in Federal Court Arising Under The Age Discrimination In Employment Act, 29 U.S.C. § 631, 633a</i>	0
<i>Number of Cases Pending or Resolved in Federal Court Arising Under The Rehabilitation Act, 29 U.S.C. § 791</i>	1

**FILE COPY**

2. **For the Cases Identified in #1 Above, the Status or Disposition; the Amount of Money Required to Be Reimbursed to the Judgment Fund By the Agency; and the Amount of Such Reimbursement for Attorneys' Fees Where Such Fees Have Been Separately Designated.**

<i>Status or Disposition</i>	Pending Adjudication
<i>Amount Required to Reimbursed to the Judgment Fund</i>	N/A
<i>Amount of Such Reimbursement to the Judgment Fund Attributable to Attorney Fees Where Fees Have Been Separately Designated</i>	N/A

3. **For Cases Identified in #1 Above, the Total Number of Employees in Each Fiscal Year Disciplined For Discrimination.**

As noted above, one lawsuit against the Office of Special Counsel was filed in U.S. District Court in FY 2007. That lawsuit is still pending and there has been no finding of liability or wrongdoing on the part of the agency or any agency official. Moreover, the agency's administrative investigation of that matter did not reveal any liability or wrongdoing on the part of the agency or any agency official. Therefore, there has been no basis to discipline any agency official for discrimination, and no agency official has been so disciplined.

4. **Fiscal Year-End Data About Discrimination Complaints for Each Fiscal Year That Was Posted In Accordance with Equal Employment Opportunity Regulations Implementing Section 301(c)(1)(B) of the No FEAR Act.**

A printed copy of this information for FYs 2003, 2004, 2005, 2006, and 2007 is enclosed with this report. This information is also posted on OSC's web site – [www.osc.gov](http://www.osc.gov).

5. **Whether or Not In Connection with Cases In Federal Court, the Number of Employees In Each Fiscal Year Disciplined for Discrimination.**

See response to #3. Only one EEO complaint was filed against the Office of Special Counsel during FY 2007; the appeal of that complaint is the case currently pending in U.S. District Court. There was no finding of discrimination at the administrative level in

that case, and as it is still pending before the court, there has been no finding of discrimination by the court. Therefore, there has been no basis to discipline any agency official for discrimination, and no agency official has been so disciplined.

**6. The Agency's Policy for Taking Disciplinary Action Against Federal Employees for Violating Antidiscrimination or Whistleblower Protection Laws or for Prohibited Personnel Practices.**

The Office of Special Counsel's Personnel Management Manual, Chapters 751 and 752, establishes the disciplinary action policy for all misconduct, including discrimination and other prohibited personnel practices. We will promptly submit a copy of that material should you so request. Any disciplinary action is taken after a full investigation of the charge, an opportunity to rebut, and a consideration of the Douglas factors.

**7. An Analysis of #1 – #6, Including an Examination of Trends; Causal Analysis; Practical Knowledge Gained Through Experience; and Any Actions Planned or Taken to Improve Complaint or Civil Rights Programs at the Office of Special Counsel.**

In FY 2007, there was only one EEO complaint filed against OSC. That complaint was investigated by the agency within the statutory timeframe, and a final agency decision finding no discrimination was issued, also within the statutory timeframe. Thereafter, the complainant appealed to U.S. District Court. The case is currently pending adjudication. Given the dearth of complaint activity in FY 2007 (or in preceding years), there is insufficient data to conduct any trend or causal analysis. We believe that we do not have, and have not had, more complaints of discrimination because of our efforts to promote fair employment practices and equal employment opportunity. OSC employees are particularly well informed about prohibited personnel practices, reprisal actions against employees, and equal employment opportunity because of OSC's mission to: (1) educate agencies and employees about prohibited personnel practices, including reprisal; and (2) investigate and prosecute such prohibited personnel practices and discrimination. The Special Counsel has posted an EEO Policy Statement addressed to all OSC personnel and applicants which emphasizes OSC's commitment to EEO principles. Furthermore, the agency's EEO program is regularly monitored to ensure compliance and to identify ways to improve the program.

**8. For Each Fiscal Year, Any Adjustment Needed or Made to the Budget of the Agency to Comply With Its Judgment Fund Reimbursement Obligations.**

N/A

**9. The Agency's Written Plan Developed Under § 724.203(a) to Train Its Employees**

The agency is working to develop a formal written plan to train employees. To date, a PowerPoint presentation has been created and is published on OSC's website – [www.osc.gov](http://www.osc.gov) – and OSC met the initial milestone of training employees by December 17, 2006. Additionally, new employees are given the agency's No FEAR Act Notice in their orientation packets and are instructed to complete the PowerPoint training program. The agency intends to conduct follow-up training in December 2008.





U.S. OFFICE OF SPECIAL COUNSEL

**NO FEAR ACT  
EQUAL EMPLOYMENT OPPORTUNITY DATA  
Fiscal Year 2007**

	FY07	FY06	FY05	FY04	FY03
Number of EEO Complaints Filed During the Fiscal Year	1	2	0	0	3
Number of Individuals Filing EEO Complaints	1	1	0	0	2
Number of Individuals Filing More than One EEO Complaint	0	1	0	0	1

**NUMBER OF COMPLAINANTS ALLEGING DISCRIMINATION  
ON THE BASIS OF:**

	FY07	FY06	FY05	FY04	FY03
Race	1	1	0	0	1
Color	0	0	0	0	0
Sex (including Equal Pay claims)	1	1	0	0	1
Religion	0	1	0	0	0
National Origin	0	0	0	0	0

Age	0	0	0	0	1
Disability	1	1	0	0	1
Retaliation for EEO Participation	1	1	0	0	1
Non-EEO Basis	1	0	0	0	0

**NUMBER OF EEO COMPLAINTS RAISING ISSUES OF:**

	FY07	FY06	FY05	FY04	FY03
Appointment/Hire	0	0	0	0	0
Assignment of Duties	0	0	0	0	0
Awards	0	0	0	0	0
Conversion to Full Time	0	0	0	0	0
Disciplinary Action (i) Demotion (ii) Reprimand (iii) Suspension (iv) Removal	1 x	0	0	0	0
Duty Hours	0	1	0	0	0
Evaluation/Appraisal	0	0	0	0	2
Examination/Test	0	0	0	0	0

Harassment (i) Non-Sexual (ii) Sexual	1 x x	1 x	0	0	0
Medical Examination	0	0	0	0	0
Pay (including overtime)	0	1	0	0	1
Promotion/Non-Selection	0	0	0	0	0
Reassignment (i) Directed (ii) Denied	0	0	0	0	0
Reasonable Accommodation	1	0	0	0	1
Reinstatement	0	0	0	0	0
Retirement	0	0	0	0	0
Termination	0	0	0	0	1
Terms/Conditions of Employment	0	1	0	0	2
Time and Attendance	1	1	0	0	0
Other	0	0	0	0	0

**AVERAGE LENGTH OF TIME (IN DAYS) TAKEN TO:**

	FY07	FY06	FY05	FY04	FY03
Fully Investigate a Formal Complaint	90	180	266	0	125
Issue a Final Decision	30	N/A	N/A	0	N/A
Fully Investigate When No EEOC Hearing is Requested	90	180	N/A	0	82.5
Issue a Final Decision When No EEOC Hearing is Requested	30	N/A	N/A	0	N/A
Fully Investigate When an EEOC Hearing is Requested	N/A	N/A	266	0	210
Issue a Final Decision When an EEOC Hearing is Requested	N/A	N/A	N/A	0	N/A

**COMPLAINTS DISMISSED BY OSC PURSUANT TO  
29 C.F.R. § 1614.107(a)**

	FY07	FY06	FY05	FY04	FY03
Number Dismissed	0	0	0	0	0
Average Days Pending Prior to Dismissal	N/A	N/A	N/A	N/A	N/A

**NUMBER OF FINAL OSC ACTIONS INVOLVING A FINDING OF  
DISCRIMINATION**

	FY07	FY06	FY05	FY04	FY03
Number Rendered Without a Hearing Before an EEOC AJ	0	0	0	0	0
Number Rendered After a Hearing Before an EEOC AJ	0	0	0	0	0

**NUMBER OF FINAL OSC ACTIONS FINDING DISCRIMINATION  
BASED ON:**

	FY07	FY06	FY05	FY04	FY03
Race (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Color (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Sex (including Equal Pay Act claims) (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Religion (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
National Origin (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0

Age (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Disability (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Retaliation for EEO Participation (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Non-EEO Basis (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0

**TOTAL NUMBER OF FINAL OSC ACTIONS INVOLVING A  
FINDING OF INAPPROPRIATE:**

	FY07	FY06	FY05	FY04	FY03
Appointment/Hire (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Assignment of Duties (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Awards (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0

Conversion to Full Time (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Disciplinary Action (total including demotions, reprimands, suspensions and removals) (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Demotion (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Reprimand (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Suspension (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Removal (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Duty Hours (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Evaluation/Appraisal (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0

Examination/Test (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Harassment (including both sexual and non-sexual) (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Non-Sexual Harassment (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Sexual Harassment (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Medical Examination (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Pay (including Overtime) (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Promotion/Non-Selection (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Reassignment (both denials and directed) (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0



Reassignment Denied (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Reassignment Directed (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Reasonable Accommodation (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Reinstatement (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Retirement (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Termination (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Terms/Conditions of Employment (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Time and Attendance (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0
Training (i) Rendered Without a Hearing (ii) Rendered After a Hearing	0	0	0	0	0

Other	0	0	0	0	0
(i) Rendered Without a Hearing					
(ii) Rendered After a Hearing					

### COMPLAINTS PENDING FROM PREVIOUS FISCAL YEARS

	FY07	FY06	FY05	FY04	FY03
Number Filed Prior to Start of FY	3	1	1	4	1
Number of Individuals Who Filed Complaints in Earlier Years	2	1	1	3	1
Number Pending at Investigation Stage	0	1	0	0	1
Number Pending at Hearing Stage	1	1	1	1	0
Number Pending Final Agency Action	1	0	0	0	0
Number Pending Appeal	1	0	0	0	0

### NUMBER OF PENDING COMPLAINTS IN WHICH INVESTIGATION EXTENDED BEYOND TIME IN 29 C.F.R. § 1614.106(e) & 1614.108(e)

	FY07	FY06	FY05	FY04	FY03
Total Number	0	0	0	0	1



# Submission of Federal Rules Under the Congressional Review Act

☐ President of the Senate ☒ Speaker of the House of Representatives ☐ GAO

Please fill the circles electronically or with black pen or #2 pencil.

1. Name of Department or Agency

2. Subdivision or Office

U.S. Office of Special Counsel

3. Rule Title

Freedom of Information Act Requests; Production of Records or Testimony

4. Rule Identification Number (RIN) or Other Unique Identifier (if applicable)

5. Major Rule ☐ Non-major Rule ☒

6. Final Rule ☒ Other ☐ \_\_\_\_\_

7. With respect to this rule, did your agency solicit public comments? Yes ☒ No ☐ N/A ☐

8. Priority of Regulation (fill in one)

☒ Economically Significant; or  
Significant; or  
Substantive, Nonsignificant

☐ Routine and Frequent or  
Informational/Administrative/Other  
(Do not complete the other side  
of this form if filled in above.)

9. Effective Date (if applicable) estimated to be on or about August 20, 2007

10. Is a concise Summary of the Rule provided? Yes ☒ No ☐

Submitted:

Name: Ekin M. McDonnell

Title: Associate Special Counsel for Legal Counsel

For Congressional Use Only:

Date Received: \_\_\_\_\_

Committee of Jurisdiction: \_\_\_\_\_

Yes No N/A

- A. With respect to this rule, did your agency prepare an analysis of costs and benefits? ☐ Yes ☐ No ☒ N/A
- B. With respect to this rule, at the final rulemaking stage, did your agency
1. certify that the rule would not have a significant economic impact on a substantial number of small entities under 5 U.S.C. § 605(b)? ☒ Yes ☐ No ☐ N/A
2. prepare a final Regulatory Flexibility Analysis under 5 U.S.C. § 604(a)? ☐ Yes ☐ No ☒ N/A
- C. With respect to this rule, did your agency prepare a written statement under § 202 of the Unfunded Mandates Reform Act of 1995? ☐ Yes ☐ No ☒ N/A
- D. With respect to this rule, did your agency prepare an Environmental Assessment or an Environmental Impact Statement under the National Environmental Policy Act (NEPA)? ☐ Yes ☐ No ☒ N/A
- E. Does this rule contain a collection of information requiring OMB approval under the Paperwork Reduction Act of 1995? ☐ Yes ☒ No ☐ N/A
- F. Did you discuss any of the following in the preamble to the rule?
- E.O. 13132, Federalism ☒ Yes ☐ No ☐ N/A
- E.O. 12630, Government Actions and Interference with Constitutionally Protected Property Rights ☐ Yes ☐ No ☒ N/A
- E.O. 12866, Regulatory Planning and Review ☒ Yes ☐ No ☐ N/A
- E.O. 12988, Civil Justice Reform ☒ Yes ☐ No ☐ N/A
- E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks ☐ Yes ☐ No ☒ N/A
- Other statutes or executive orders discussed in the preamble concerning the rulemaking process (please specify)



U.S. OFFICE OF SPECIAL COUNSEL  
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**SUBMISSION UNDER CONGRESSIONAL REVIEW ACT (CRA)**

**FINAL RULE: REVISION OF FREEDOM OF INFORMATION ACT  
REGULATIONS OF THE  
U.S. OFFICE OF SPECIAL COUNSEL  
(5 C.F.R. PART 1820)**

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I. REPORT: 5 U.S.C. § 801(a)(1)(A)

A. Copy of the Rule – Final Rule: Freedom of Information Act Regulations at  
5 C.F.R. Part 1820

**PART 1820 – FREEDOM OF INFORMATION ACT REQUESTS;  
PRODUCTION OF RECORDS OR TESTIMONY**

Sec.

- 1820.1 General provisions.
- 1820.2 Requirements for making FOIA requests.
- 1820.3 Consultations and referrals.
- 1820.4 Timing of responses to requests.
- 1820.5 Responses to requests.
- 1820.6 Appeals.
- 1820.7 Fees.
- 1820.8 Business information.
- 1820.9 Other rights and services.
- 1820.10 Production of official records or testimony in legal proceedings.

Authority: 5 U.S.C. 552 and 1212(e); Executive Order No. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235.

Sec. 1820.1 General provisions.

This part contains rules and procedures followed by the Office of Special Counsel (OSC) in processing requests for records under the Freedom of Information Act (FOIA), as amended, at 5 U.S.C. 552. These rules and procedures should be read together with the FOIA, which provides additional information about access to agency records. Further information about the FOIA and access to OSC records is available on the FOIA page of OSC's web site (<http://www.osc.gov/foia.htm>). Information routinely provided to the public as part of a regular OSC activity - for example, forms, press releases issued by the public affairs officer, records published on the agency's web site (<http://www.osc.gov>), or public lists maintained at OSC headquarters offices pursuant to 5 U.S.C. 1219 - may be requested and provided to the public without following this part. This part also addresses responses to demands by a court or other authority to an employee for production of official records or testimony in legal proceedings.

Sec. 1820.2 Requirements for making FOIA requests.

(a) *How made and addressed.* A request for OSC records under the FOIA should be made by writing to the agency. The request should be sent by regular mail addressed

to: FOIA Officer, U.S. Office of Special Counsel, 1730 M Street, N.W. (Suite 218), Washington, DC 20036-4505.

Such requests may also be faxed to the FOIA Officer at the number provided on the FOIA page of OSC's web site (see section 1820.1). For the quickest handling, both the request letter and envelope or any fax cover sheet should be clearly marked "FOIA Request." Whether sent by mail or by fax, a FOIA request will not be considered to have been received by OSC until it reaches the FOIA Officer.

(b) *Description of records sought.* Requesters must describe the records sought in enough detail for them to be located with a reasonable amount of effort. When requesting records about an OSC case file, the case file number, name, and type (for example, prohibited personnel practice, Hatch Act, USERRA or other complaint; Hatch Act advisory opinion; or whistleblower disclosure) should be provided, if known. Whenever possible, requests should describe any particular record sought, such as the date, title or name, author, recipient, and subject matter.

(c) *Agreement to pay fees.* Making a FOIA request shall be considered an agreement by the requester to pay all applicable fees chargeable under section 1820.7, up to and including the amount of \$25.00, unless the requester asks for a waiver of fees. When making a request, a requester may specify a willingness to pay a greater or lesser amount.

#### Sec. 1820.3 Consultations and referrals.

When OSC receives a FOIA request for a record in the agency's possession, it may determine that another Federal agency is better able to decide whether or not the record is exempt from disclosure under the FOIA. If so, OSC will either: (1) respond to the request for the record after consulting with the other agency and with any other agency that has a substantial interest in the record; or (2) refer the responsibility for responding to the request to the other agency deemed better able to determine whether to disclose it. Consultations and referrals will be handled according to the date that the FOIA request was initially received by the first agency.

#### Sec. 1820.4 Timing of responses to requests.

(a) *In general.* OSC ordinarily will respond to FOIA requests according to their order of receipt. In determining which records are responsive to a request, OSC ordinarily will include only records in its possession as of the date on which it begins its search for them. If any other date is used, OSC will inform the requester of that date.

(b) *Multitrack processing.* (1) OSC may use two or more processing tracks by distinguishing between simple and more complex requests based on the amount of work and/or time needed to process the request.

(2) When using multitrack processing, OSC may provide requesters in its slower track(s) with an opportunity to limit the scope of their requests in order to qualify for faster processing within the specified limits of the faster track(s).



(c) *Expedited processing.* (1) Requests and appeals will be taken out of order and given expedited treatment whenever OSC has established to its satisfaction that: (i) failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; (ii) with respect to a request made by a person primarily engaged in disseminating information, an urgency exists to inform the public about an actual or alleged federal government activity; or (iii) records requested relate to an appeal that is pending before, or that the requester faces an imminent deadline for filing with, the Merit Systems Protection Board or other administrative tribunal or a court of law, seeking personal relief pursuant to a complaint filed by the requester with OSC, or referred to OSC pursuant to title 38 of the U.S. Code.

(2) A request for expedited processing must be made in writing and sent to OSC's FOIA Officer. Such a request will not be considered to have been received until it reaches the FOIA Officer.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing. For example, a requester within the category described in paragraph (c)(1)(ii) of this section, if not a full-time member of the news media, must establish that he or she is a person whose main professional activity or occupation is information dissemination, though it need not be his or her sole occupation. The formality of certification may be waived as a matter of OSC's administrative discretion.

(4) OSC shall decide whether to grant a request for expedited processing and notify the requester of its decision within 10 calendar days of the FOIA Officer's receipt of the request. If the request for expedited processing is granted, the request for records shall be processed as soon as practicable. If a request for expedited processing is denied, any administrative appeal of that decision shall be acted on expeditiously.

(d) *Aggregated requests.* OSC may aggregate multiple requests by the same requester, or by a group of requesters acting in concert, if it reasonably believes that such requests actually constitute a single request involving unusual circumstances, as defined by the FOIA, supporting an extension of time to respond, and the requests involve clearly related matters.

#### Sec. 1820.5 Responses to requests.

(a) *General.* Ordinarily, OSC shall have 20 business days from when a request is received to determine whether to grant or deny the request. Once OSC makes a determination to grant a FOIA request for records, or makes an adverse determination denying a request in any respect, it will notify the requester in writing. Adverse determinations, or denials of requests, consist of: a determination to withhold any requested record in whole or in part; a determination that a requested record does not exist or cannot be located; a determination that a record is not readily reproducible in the form or format sought by the requester; a determination that what

has been requested is not a record subject to the FOIA; a determination on any disputed fee matter, including a denial of a request for a fee waiver; and a denial of a request for expedited treatment.

(b) *Adverse determinations.* A notification to a requester of an adverse determination on a request shall include: (1) a brief statement of the reason(s) for the denial of the request, including any FOIA exemption applied by OSC in denying the request; and (2) a statement that the denial may be appealed under section 1820.6(a), with a description of the requirements of that subsection.

#### Sec. 1820.6 Appeals.

(a) *Appeals of adverse determinations.* A requester may appeal an adverse determination denying a FOIA request in any respect to the Legal Counsel and Policy Division, U.S. Office of Special Counsel, 1730 M Street, N.W. (Suite 218), Washington, DC 20036-4505. The appeal must be in writing, and sent by regular mail or by fax. The appeal must be received by the Legal Counsel and Policy Division within 45 days of the date of the letter denying the request. For the quickest possible handling, the appeal letter and envelope or any fax cover sheet should be clearly marked "FOIA Appeal." The appeal letter may include as much or as little related information as the requester wishes, as long as it clearly identifies the OSC determination (including the assigned FOIA request number, if known) being appealed. An appeal ordinarily will not be acted on if the request becomes a matter of FOIA litigation.

(b) *Responses to appeals.* The agency decision on an appeal will be made in writing. A decision affirming an adverse determination in whole or in part shall inform the requester of the provisions for judicial review of that decision. If the adverse determination is reversed or modified on appeal, in whole or in part, the requester will be notified in a written decision and the request will be reprocessed in accordance with that appeal decision.

#### Sec. 1820.7 Fees.

(a) *In general.* OSC shall charge for processing requests under the FOIA in accordance with paragraph (c) of this section, except where fees are limited under paragraph (d) of this section or where a waiver or reduction of fees is granted under paragraph (k) of this section. OSC may collect all applicable fees before sending copies of requested records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States.

(b) *Definitions.* For purposes of this section:

(1) " 'Commercial use' request" means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation. OSC shall determine, whenever reasonably possible, the use to which a requester will put

the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because OSC has reasonable cause to doubt a requester's stated use, OSC shall provide the requester with a reasonable opportunity to submit further clarification.

(2) "Direct costs" means those expenses that OSC incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating equipment. Direct costs do not include overhead expenses such as the costs of space, and heating or lighting the facility in which the records are kept.

(3) "Duplication" means the process of making of a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, microform, audiovisual materials, or electronic records (for example, on digital data storage discs), among others.

(4) "Educational institution" means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

(5) "Non-commercial scientific institution" means an institution that is not operated on a "commercial" basis, as that term is referenced in paragraph (b)(1) of this section, and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research.

(6) "Representative of the news media" or "news media requester" means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. For "freelance" journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract would be the clearest proof, but OSC may also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for a commercial use. However, a request for records supporting

the news-dissemination function of the requester shall not be considered to be for a commercial use.

(7) "Review" means the process of examining a record located in response to a request in order to determine whether any portion of the record is exempt from disclosure. It includes processing any record for disclosure - for example, doing all that is necessary to redact it and otherwise prepare it for disclosure. Review time also includes time spent obtaining and considering any formal objection to disclosure made by a business submitter under section 1820.8(f). It does not include time spent resolving general legal or policy issues about the application of exemptions. Review costs are properly charged in connection with commercial use requests even if a record ultimately is not disclosed.

(8) "Search" means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records when undertaken, and reasonable efforts to locate and retrieve information from records maintained in electronic form or format, to the extent that such efforts would not significantly interfere with the operation of an automatic information system.

(c) *Fees.* In responding to FOIA requests, OSC shall charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section:

(1) *Search.* (i) Search fees will be charged for all requests - other than requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media - subject to the limitations of paragraph (d) of this section. OSC may charge for time spent searching even if it fails to locate responsive records, or records located after a search are determined to be exempt from disclosure.

(ii) For each quarter hour spent by clerical personnel in searching for and retrieving a requested record, the fee will be \$5.50. Where a search and retrieval cannot be performed entirely by clerical personnel - for example, where the identification of records within the scope of a request requires the use of professional personnel - the fee will be \$9.00 for each quarter hour of search time spent by professional personnel. Where the time of managerial personnel is required, the fee will be \$17.50 for each quarter hour of time spent by those personnel.

(iii) For electronic searches of records, requesters will be charged the direct costs of conducting the search, including the costs of operator/programmer staff time apportionable to the search.

(iv) For requests requiring the retrieval of records from any Federal Records Center, additional costs may be charged in accordance with the applicable billing schedule established by the National Archives and Records Administration.

(2) *Duplication.* Duplication fees will be charged to all requesters, subject to the limitations of paragraph (d) of this section. For a standard paper photocopy of a record (no more than one copy of which need be supplied), the fee will be 25 cents per page. For copies produced by computer, such as discs or printouts, OSC will charge the direct costs, including staff time, of producing the copy. For other forms of duplication, OSC will charge the direct costs of that duplication.

(3) *Review.* Review fees will be charged to requesters who make a commercial use request. Review fees will be charged for only initial record review - in other words, the review done when OSC analyzes whether an exemption applies to a particular record or record portion at the initial request level. No charge will be made for review at the administrative appeal level for an exemption already applied. However, records or record portions withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies; the costs of that review are chargeable where it is made necessary by such a change of circumstances. Review fees will be charged at the same rates as those charged for a search under paragraph (c)(1)(ii) of this section.

(d) *Limitations on charging fees.* (1) No search fee will be charged for requests by educational institutions, noncommercial scientific institutions, or representatives of the news media.

(2) No search fee or review fee will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(3) Except for requesters seeking records for a commercial use, OSC will provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent); and

(ii) The first two hours of search (or the cost equivalent).

(4) Whenever a total fee calculated under paragraph (c) of this section is \$20.00 or less for any request, no fee will be charged.

(5) The provisions of paragraphs (d)(3) and (d)(4) of this section work together. This means that for requesters other than those seeking records for a commercial use, no fee will be charged unless the cost of search in excess of two hours plus the cost of duplication in excess of 100 pages totals more than \$20.00.

(e) *Notice of anticipated fees in excess of \$25.00.* When OSC determines or estimates that the fees to be charged under this section will amount to more than \$25.00, OSC shall notify the requester of the actual or estimated amount of the fees, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, OSC will advise the requester that the estimated fee may be only a portion of the total fee. In cases in which a requester has been notified that actual or estimated fees amount to more than \$25.00, the request shall not be considered received and further work will not be done on it until the requester agrees to pay the anticipated total fee. A notice under this paragraph will offer the requester an opportunity to discuss the matter with OSC in order to reformulate the request to meet the requester's needs at a lower cost.

(f) *Charges for other services.* Apart from the other provisions of this section, when OSC chooses as a matter of administrative discretion to provide a special service- such as sending records by other than ordinary mail-the direct costs of providing the service ordinarily will be charged.

(g) *Charging interest.* OSC may charge interest on any unpaid fee starting on the 31st day after the date of on which the billing was sent to the requester. Interest

charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the date of billing until payment is received by OSC. OSC will follow the provisions of the Debt Collection Act of 1982 (Public Law 97-365, 96 Stat. 1749), as amended by the Debt Collection Act of 1996 (Public Law 104-134, 110 Stat. 1321-358), and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(h) *Aggregating requests.* Where OSC reasonably believes that a requester or a group of requesters acting together is attempting to divide a request into a series of requests that otherwise could have been submitted as a single request, for the purpose of avoiding fees, OSC may aggregate those requests and charge accordingly. OSC may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. Where requests are separated by a longer period, OSC will aggregate them only where a reasonable basis exists for determining that aggregation is warranted under all of the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

(i) *Advance payments.* (1) For requests other than those described in paragraphs (i)(2) and (i)(3) of this section, OSC will not require the requester to make an advance payment before work is begun or continued on a request. Payment owed for work already completed (that is, pre-payment after processing a request but before copies are sent to the requester) is not an advance payment.

(2) Where OSC determines or estimates that a total fee to be charged under this section will be more than \$250.00, it may require the requester to make an advance payment of an amount up to the amount of the entire anticipated fee before beginning to process the request, except where it receives a satisfactory assurance of full payment from a requester who has a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee to any agency within 30 days of the date of billing, OSC may require the requester to pay the full amount due, plus any applicable interest, and to make an advance payment of the full amount of any anticipated fee, before OSC begins to process a new request or continues to process a pending request from that requester.

(4) In cases in which OSC requires advance payment or payment due under paragraph (i)(2) or (3) of this section, the request shall not be considered received and further work will not be done on the request until the required payment is received.

(j) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for particular types of records. Where records responsive to requests are maintained for distribution by agencies operating such statutorily based fee schedule programs, OSC will provide contact information for use by requesters in obtaining records from those sources.

(k) *Requirements for waiver or reduction of fees.* (1) Records responsive to a request shall be furnished without charge or at a charge reduced below that established under

paragraph (c) of this section where OSC determines, based on all available information, that the requester has demonstrated that:

(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

(2) To determine whether the first fee waiver requirement is met, OSC will consider the following factors:

(i) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government." The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.

(ii) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public's understanding.

(iii) The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding." The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media satisfies this consideration.

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. OSC shall not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is "important" enough to be made public.

(3) To determine whether the second fee waiver requirement is met, OSC will consider the following factors:

(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure. OSC shall consider any commercial interest of the requester (with reference to the definition of "commercial use" in paragraph (b)(1) of this section), or of any person on whose

behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity to provide explanatory information about this consideration.

(ii) The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester." A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. OSC ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

(4) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted for those records.

(5) Requests for the waiver or reduction of fees should address the factors listed in paragraphs (k)(2) and (3) of this section, insofar as they apply to each request. OSC will exercise its discretion to consider the cost-effectiveness of its investment of administrative resources in this decision making process, however, in deciding to grant waivers or reductions of fees.

#### Sec. 1820.8 Business information.

(a) *In general.* Business information obtained by OSC from a submitter will be disclosed under the FOIA only under this section.

(b) *Definitions.* For purposes of this section:

(1) "Business information" means commercial or financial information obtained by OSC from a submitter that may be protected from disclosure under exemption 4 of the FOIA.

(2) "Submitter" means any person or entity from whom the OSC obtains business information, directly or indirectly. The term includes corporations, and state, local, tribal and foreign governments.

(c) *Designation of business information.* A submitter of business information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portion of its submission that it considers to be protected from disclosure under exemption 4. These designations will expire 10 years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period.

(d) *Notice to submitters.* OSC shall provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks its business information wherever required under paragraph (e) of this section, except as provided in paragraph (h) of this section, in order to give the submitter an opportunity to object to disclosure of any specified portion of that information under paragraph (f) of this section. The



notice shall either describe the business information requested or include copies of the requested records or record portions containing the information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish it.

(e) *When notice is required.* Notice shall be given to a submitter wherever:

- (1) The information has been designated in good faith by the submitter as information considered protected from disclosure under exemption 4; or
- (2) OSC has reason to believe that the information may be protected from disclosure under exemption 4.

(f) *Opportunity to object to disclosure.* OSC will allow a submitter a reasonable time to respond to the notice described in paragraph (d) of this section and will specify that time period within the notice. If a submitter has any objection to disclosure, it is required to submit a detailed written statement. The statement must specify all grounds for withholding any portion of the information under any exemption of the FOIA and, in the case of exemption 4, it must show why the information is a trade secret or commercial or financial information that is privileged or confidential. If a submitter fails to respond to the notice within the time specified in it, the submitter will be considered to have no objection to disclosure of the information. Information provided by the submitter that is not received by OSC until after its disclosure decision has been made shall not be considered by OSC. Information provided by a submitter under this paragraph may itself be subject to disclosure under the FOIA.

(g) *Notice of intent to disclose.* OSC shall consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose business information. Whenever OSC decides to disclose business information over the objection of a submitter, OSC shall give the submitter written notice, which shall include:

- (1) A statement of the reason(s) why each of the submitter's disclosure objections was not sustained;
- (2) A description of the business information to be disclosed; and
- (3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

(h) *Exceptions to notice requirements.* The notice requirements of paragraphs (d) and (g) of this section shall not apply if:

- (1) OSC determines that the information should not be disclosed;
- (2) The information lawfully has been published or has been officially made available to the public;
- (3) Disclosure of the information is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600; or
- (4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous - except that, in such a case, OSC shall, within a reasonable time prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.

(i) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of business information, OSC shall promptly notify the submitter.

(j) *Corresponding notice to requesters.* Whenever OSC provides a submitter with notice and an opportunity to object to disclosure under paragraph (d) of this section, OSC shall also notify the requester(s). Whenever OSC notifies a submitter of its intent to disclose requested information under paragraph (g) of this section, OSC shall also notify the requester(s). Whenever a submitter files a lawsuit seeking to prevent the disclosure of business information, OSC shall notify the requester(s).

#### Sec. 1820.9 Other rights and services.

Nothing in this part shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

#### Sec. 1820.10 Production of official records or testimony in legal proceedings.

No employee or former employee of the Office of Special Counsel shall, in response to a demand of a court or other authority, produce or disclose any information or records acquired as part of the performance of his official duties or because of his official status without the prior approval of the Special Counsel or the Special Counsel's duly authorized designee.

#### B. Concise General Statement Relating to the Rule, Including Whether It Is a Major Rule

The Office of Special Counsel (OSC) is revising its regulations governing implementation of the Freedom of Information Act (FOIA). The regulation, as revised, will implement provisions of the FOIA as amended, update information in the current regulation, and contain new and expanded information about the agency's processing of FOIA requests and appeals. Included in the revised regulation are provisions containing updated, revised, or new information about: publicly available records and information; requirements for making FOIA requests, including updated contact information; consultations with and referrals to other agencies; responses to requests, including information about multitrack and expedited processing; requirements for appealing initial decisions on requests, including updated contact information; fees, including new and revised cost information; and business information. Finally, the regulation will address responses to demands by courts or other authorities to an OSC employee for production of official records or testimony in legal proceedings. These revisions are intended to improve implementation of the FOIA at OSC.

These revisions are not major rules, as defined in 5 U.S.C. § 804(2). The rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices for consumers, individual industries, Federal, state or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

- C. Proposed Effective Date of the Rule. The final rule is estimated to be effective on or about July 20, 2007.

## II. ADDITIONAL INFORMATION – 5 U.S.C. § 801(a)(1)(B)

- A. Complete Copy of Cost-Benefit Analysis of the Rule, If Any. No cost-benefit analysis was required for this revision.
- B. Agency Actions Relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607 and 609. The Federal Register notice of the proposed rule, published on April 12, 2007 (at 72 Fed. Reg. 18406) included a certification by the Special Counsel that this regulation will not have a significant economic impact on a substantial number of small entities. Notification of the certification will be sent to the Office of Advocacy at the Small Business Administration.
- C. Agency Actions Relevant to the Unfunded Mandates Reform Act, 2 U.S.C. §§ 1532-1535. This final rule does not impose a Federal mandate that may result in total annual expenditure by State, local & tribal governments and the private sector of more than \$100,000,000.
- D. Other Relevant Information or Requirements under Other Acts and Relevant Executive Orders

1. Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.*

In accordance with the Administrative Procedure Act, at 5 U.S.C. 553, notice of the proposed rule was published on April 12, 2007 and the public was invited to comment for a period of thirty days. One comment was received and has been responded to (see attached notice of final rule sent to the Federal Register for publication). Notice of this final rule will be published for thirty days and then the rule will be final.

2. Statutory Authorization for the Rule

The final rule is issued under the authority of 5 U.S.C. §§ 552 (the Freedom of Information Act) and the Special Counsel's authority, at 5 U.S.C. 1212(e), to publish regulations in the Federal Register.





U.S. OFFICE OF SPECIAL COUNSEL  
1730 M Street, N.W., Suite 218  
Washington, D.C. 20036-4505

**SUBMISSION UNDER CONGRESSIONAL REVIEW ACT (CRA)**

**FINAL RULE: REVISION OF PRIVACY ACT REGULATIONS OF THE  
U.S. OFFICE OF SPECIAL COUNSEL  
(5 C.F.R. PART 1830)**

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September 28, 2007

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### **I. REPORT: 5 U.S.C. § 801(a)(1)(A)**

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#### **PART 1830 – PRIVACY**

#### **PART 1830--PRIVACY**

##### **Sec.**

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1830.2 Requirements for making Privacy Act requests.

1830.3 Medical records.

1830.4 Requirements for requesting amendment of records.

1830.5 Appeals.

1830.6 Exemptions.

1830.7 Fees.

1830.8 Other rights and services.

Authority: 5 U.S.C. 552a(f), 1212(e).

##### **Sec. 1830.1 General provisions.**

This part contains rules and procedures followed by the Office of Special Counsel (OSC) in processing requests for records under the Privacy Act (PA), at 5 U.S.C. 552a. Further information about access to OSC records generally is available on the agency's web site (<http://www.osc.gov/foia.htm>).

##### **Sec. 1830.2 Requirements for making Privacy Act requests.**

(a) How made and addressed. A request for OSC records under the Privacy Act should be made by writing to the agency. The request should be sent by regular mail addressed to: Privacy Act Officer, U.S. Office of Special Counsel, 1730 M Street, N.W. (Suite 218), Washington, DC 20036-4505. Such requests may also be faxed to the Privacy Act Officer at the number provided on the FOIA/PA page of OSC's web site (see 1830.1). For the quickest handling, both the request letter and envelope or any fax cover sheet should be clearly marked "Privacy Act Request." A Privacy Act request may also be delivered in person at OSC's headquarters office in Washington, DC. Whether sent by mail or by fax, or delivered in person, a Privacy Act request will not be considered to have been received by OSC until it reaches the Privacy Act Officer.

(b) Description of records sought. Requesters must describe the records sought in enough detail for them to be located with a reasonable amount of effort. Whenever

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possible, requests should describe any particular record sought, such as the date, title or name, author, recipient, and subject matter.

(c) Proof of identity. Requests received by mail, fax, or personal delivery should contain sufficient information to enable OSC to determine that the requester and the subject of the record are one and the same. To assist in this process, an individual should submit his or her name and home address, business title and address, and any other known identifying information such as an agency file number or identification number, a description of the circumstances under which the records were compiled, and any other information deemed necessary by OSC to properly process the request. An individual delivering a request in person may be required to present proof of identity, preferably a government-issued document bearing the individual's photograph.

(d) Freedom of Information Act processing. OSC also processes all Privacy Act requests for access to records under the Freedom of Information Act, 5 U.S.C. 552, following the rules contained in part 1820 of this chapter, which gives requesters the benefit of both statutes.

### **Sec. 1830.3 Medical records.**

When a request for access involves medical records that are not otherwise exempt from disclosure, the requesting individual may be advised, if it is deemed necessary by OSC, that the records will be provided only to a physician designated in writing by the individual. Upon receipt of the designation, the physician will be permitted to review the records or to receive copies by mail upon proper verification of identity.

### **Sec. 1830.4 Requirements for requesting amendment of records.**

(a) How made and addressed. Individuals may request amendment of records pertaining to them that are subject to amendment under the Privacy Act and this part. The request should be sent by regular mail addressed to: Privacy Act Officer, U.S. Office of Special Counsel, 1730 M Street, N.W. (Suite 218), Washington, DC 20036-4505. Such requests may also be faxed to the Privacy Act Officer at the number provided on the FOIA/PA page of OSC's web site (see 1830.1). For the quickest handling, both the request letter and envelope or any fax cover sheet should be clearly marked "Privacy Act Amendment Request." Whether sent by mail or by fax, a Privacy Act amendment request will not be considered to have been received by OSC until it reaches the Privacy Act Officer. A Privacy Act amendment request may also be delivered by person at OSC's headquarters office in Washington, DC.

(b) Description of amendment sought. Requests for amendment should include identification of records together with a statement of the basis for the requested amendment and all available supporting documents and materials. Requesters must describe the amendment sought in enough detail for the request to be evaluated.



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(c) Proof of identity. Rules and procedures set forth in 1830.2(c) apply to requests made under this section.

(d) Acknowledgement and response. Requests for amendment shall be acknowledged by OSC not later than 10 days (excluding Saturdays, Sundays, and legal holidays) after receipt by the Privacy Act Officer and a determination on the request shall be made promptly.

### **Sec. 1830.5 Appeals.**

(a) Appeals of adverse determinations. A requester may appeal a denial of a Privacy Act request for access to or amendment of records to the Legal Counsel and Policy Division, U.S. Office of Special Counsel, 1730 M Street, N.W. (Suite 218), Washington, DC 20036-4505. The appeal must be in writing, and sent by regular mail or by fax. The appeal must be received by the Legal Counsel and Policy Division within 45 days of the date of the letter denying the request. For the quickest possible handling, the appeal letter and envelope or any fax cover sheet should be clearly marked "Privacy Act Appeal." An appeal will not be considered to have been received by OSC until it reaches the Legal Counsel and Policy Division. The appeal letter may include as much or as little related information as the requester wishes, as long as it clearly identifies the OSC determination (including the assigned request number, if known) being appealed. An appeal ordinarily will not be acted on if the request becomes a matter of litigation.

(b) Responses to appeals. The agency decision on an appeal will be made in writing. A final determination will be issued within 30 days (excluding Saturdays, Sundays, and legal holidays), unless, for good cause shown, OSC extends the 30-day period.

### **Sec. 1830.6 Exemptions.**

OSC will claim exemptions from the provisions of the Privacy Act at subsections (c)(3) and (d) as permitted by subsection (k) for records subject to the act that fall within the category of investigatory material described in paragraphs (2) and (5) and testing or examination material described in paragraph (6) of that subsection. The exemptions for investigatory material are necessary to prevent frustration of inquiries into allegations in prohibited personnel practice, unlawful political activity, whistleblower disclosure, Uniformed Services Employment and Reemployment Rights Act, and other matters under OSC's jurisdiction, and to protect identities of confidential sources of information, including in background investigations of OSC employees, contractors, and other individuals conducted by or for OSC. The exemption for testing or examination material is necessary to prevent the disclosure of information which would potentially give an individual an unfair competitive advantage or diminish the utility of established examination procedures. OSC also reserves the right to assert exemptions for records received from another agency that

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could be properly claimed by that agency in responding to a request. OSC may also refuse access to any information compiled in reasonable anticipation of a civil action or proceeding.

### Sec. 1830.7 Fees.

Requests for copies of records shall be subject to duplication fees set forth in part 1820 of this chapter.

### Sec. 1830.8 Other rights and services.

Nothing in this part shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the Privacy Act.

#### B. Concise General Statement Relating to the Rule, Including Whether It Is a Major Rule

The Office of Special Counsel (OSC) is revising its regulations governing implementation of the Privacy Act (PA). The regulation, as revised: (1) modifies and updates contact information for requests and appeals to OSC, adding fax delivery as a means by which they may be sent, and specifies the OSC point of receipt for such matters; (2) modifies the description of information needed for effective processing of requests and appeals; (3) revises the description of proof of identity information needed by OSC (including by deletion of the requirement that all requests must include a date and place of birth and a Social Security number, while retaining the option for OSC to request some or all of that data if needed to confirm a requester's identity); (4) clarifies that Privacy Act requests for records may also be processed under the Freedom of Information Act; (5) extends the appeal period for requests and revises the description of the response time for appeals; (6) clarifies that exempt material in OSC case files includes all matters within OSC's jurisdiction (including alleged violations of the Uniformed Services Employment and Reemployment Rights Act) and information included in background investigations conducted for OSC employees and others; (7) adds two new sections (on general provisions and other rights and services), moves updated information about fees to a new section, and revises section headings throughout the regulation. These revisions are intended to improve implementation of the PA at OSC.

These revisions are not major rules, as defined in 5 U.S.C. § 804(2). The rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices for consumers, individual industries, Federal, state or local government agencies, or geographic regions; or significant adverse effects on

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competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

- C. Proposed Effective Date of the Rule. The final rule is estimated to be effective on or about October 2, 2007.

## II. ADDITIONAL INFORMATION – 5 U.S.C. § 801(a)(1)(B)

- A. Complete Copy of Cost-Benefit Analysis of the Rule, If Any. No cost-benefit analysis was required for this revision.
- B. Agency Actions Relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607 and 609. The Federal Register notice of the proposed rule, published on August 14, 2007 (at 72 Fed. Reg. 45388) included a certification by OSC that this regulation will not have a significant economic impact on a substantial number of small entities. Notification of the certification will be sent to the Office of Advocacy at the Small Business Administration.
- C. Agency Actions Relevant to the Unfunded Mandates Reform Act, 2 U.S.C. §§ 1532-1535. This final rule does not impose a Federal mandate that may result in total annual expenditure by State, local & tribal governments and the private sector of more than \$100,000,000.
- D. Other Relevant Information or Requirements under Other Acts and Relevant Executive Orders

1. Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*

In accordance with the Administrative Procedure Act, at 5 U.S.C. 553, notice of the proposed rule was published on August 14, 2007 and the public was invited to comment for a period of 30 days. No comment was received and the rule will be final upon publication in the Federal Register.

2. Statutory Authorization for the Rule

The final rule is issued under the authority of 5 U.S.C. § 552a (the Privacy Act) and the Special Counsel's authority, at 5 U.S.C. § 1212(e), to publish regulations in the Federal Register.



FISCAL YEAR 2009  
CONGRESSIONAL BUDGET JUSTIFICATION  
AND PERFORMANCE BUDGET GOALS



**U.S. OFFICE OF SPECIAL COUNSEL**

1730 M Street, N.W. (Suite 218)  
Washington, DC 20036-4505

[www.osc.gov](http://www.osc.gov)

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## **Part 1 - Executive Summary**

### **Summary of Request**

OSC is requesting \$17,468,000 in FY 2009, which is the same amount as the agency's FY 2008 appropriation of \$17,468,000, which included \$1,100,000 for computer forensics associated with the investigations of its Special Task Force. The \$17,468,000 includes funding for at least one additional FTE, as well as funding to cover the salary increase of January 2008 and the projected increase of January 2009.

### **OSC's Mission**

The U.S. Office of Special Counsel's primary mission is to safeguard the merit system in federal employment by protecting employees and applicants from prohibited personnel practices (PPPs), especially reprisal for whistleblowing. In addition, the agency operates as a secure channel for federal whistleblower disclosures of violations of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; and substantial and specific danger to public health and safety. OSC also has jurisdiction under the Hatch Act to enforce restrictions on political activity by government employees. Finally, OSC enforces federal employment rights secured by the Uniformed Services Employment and Reemployment Rights Act (USERRA).

On matters ranging from protecting passengers in the nation's air travel, protecting our borders, identifying waste in federal contracting and grants to save taxpayers money, assuring safety in customs inspections to provide safety to the public, creating greater efficiency in the military for safety, correcting discrimination against service members returning from duty so that our all-volunteer military continues to attract quality persons, to disciplining high level officials for whistleblower retaliation and use of official authority to affect elections -- the U.S. Office of Special Counsel has fulfilled its role as an independent prosecutorial and investigative agency charged with bringing greater integrity and efficiency to the merit system. New challenges have arisen at the Office of Special Counsel, including highly visible investigations into the nation's air traffic control system, investigations into the adequacy of the pumps installed in New Orleans to relieve the city from flooding during hurricanes, and an investigation into possible violations of the Hatch Act throughout the agencies of the federal executive branch of government. Granting this budget request will instill increased public trust in government by sending the message that independent agencies are discovering and counteracting fraud, waste and abuse of authority; that we honor, not punish, those individuals who bring these matters to light.

### **Graphical Highlights of OSC's Successes**

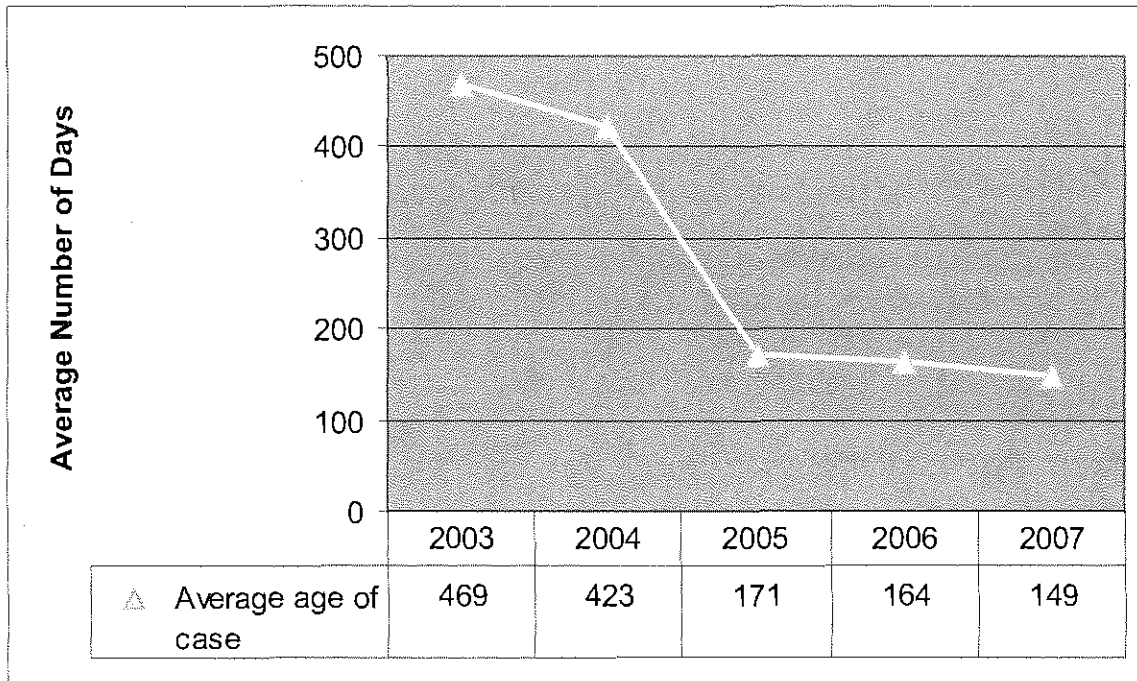
When the new Special Counsel took office in January 2004, two major problems confronted OSC: a serious backlog of cases in all of the units and a cumbersome structure of three separate Investigation and Prosecution Divisions (IPDs). The Government Accountability Office (GAO) issued a report in March 2004 (GAO 04-36) that was critical of OSC's chronic backlog problem in the Complaints Examining Unit and Disclosure Unit. That same month, Special Counsel Bloch created a Special Projects Unit (SPU) to begin immediately investigating the problem of the backlog of cases and to find solutions.

The next step in solving the difficulties was a reorganization of the agency in January 2005. The Special Counsel further directed that each operating unit establish standard operating procedures that would establish consistency in case processing, and with that consistency, faster processing times. These improvements have lead to further reductions in backlogs and enabled the agency to reach the meritorious cases faster, enabling OSC to seek settlements or initiate prosecutions before evidence became stale and witnesses' memories faded. Decisions are now reached faster, bringing swifter justice to those Federal employees served by the Office of Special Counsel.

The next seven pages graphically tell the story of the successes of the last four years at OSC, especially the decreased case processing times and the elimination of the backlogs, including those backlogs mentioned by GAO in 2004. These successes were achieved despite increasing caseloads in several units and newly added responsibilities for the agency.

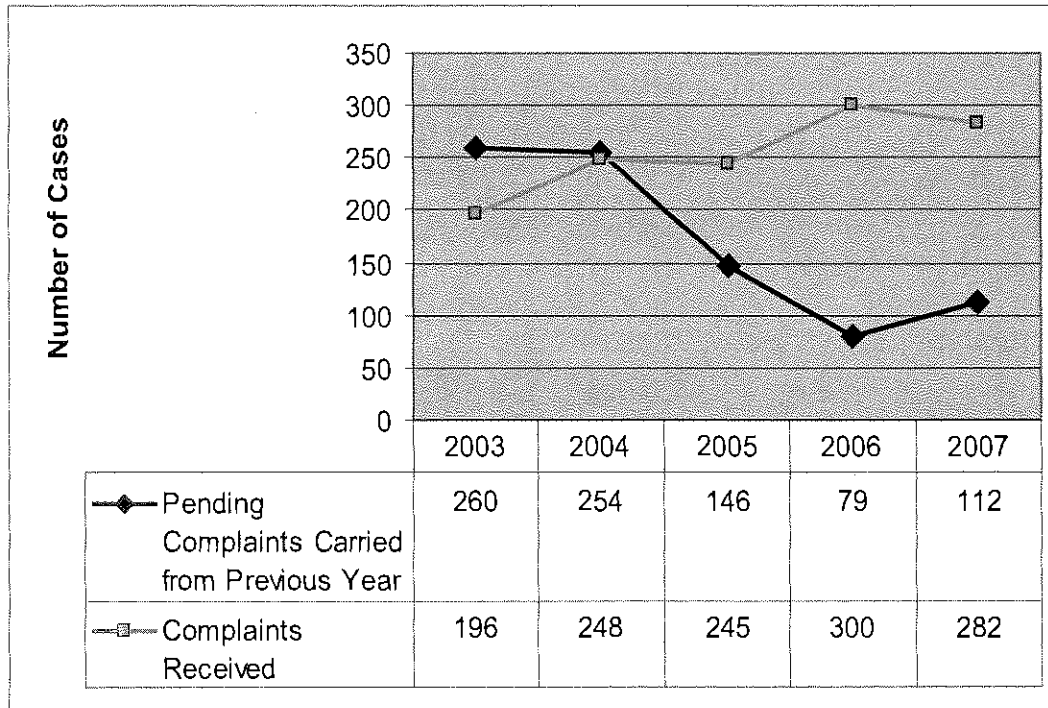


### Hatch Act Unit - Average Processing Time per Complaint



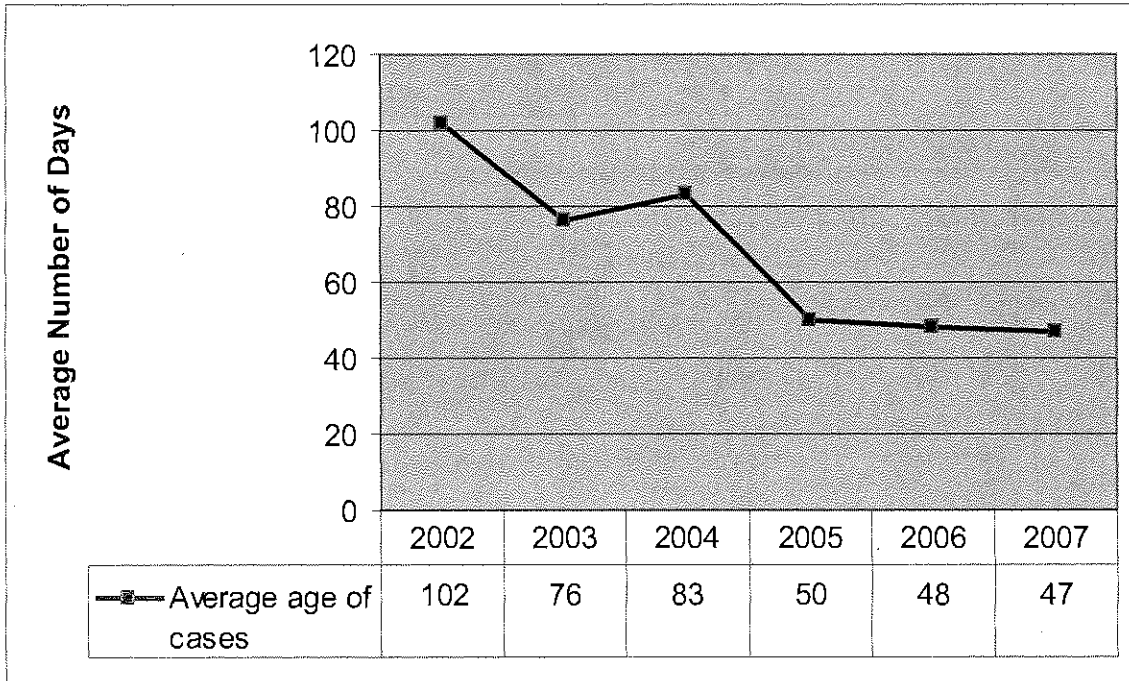
OSC's Hatch Act Unit reduced its case processing time dramatically during the period from FY 2003 to FY 2007. The average number of days to process the case in FY 2007 is less than one third of what it was in FY 2003.

## Hatch Act Complaints



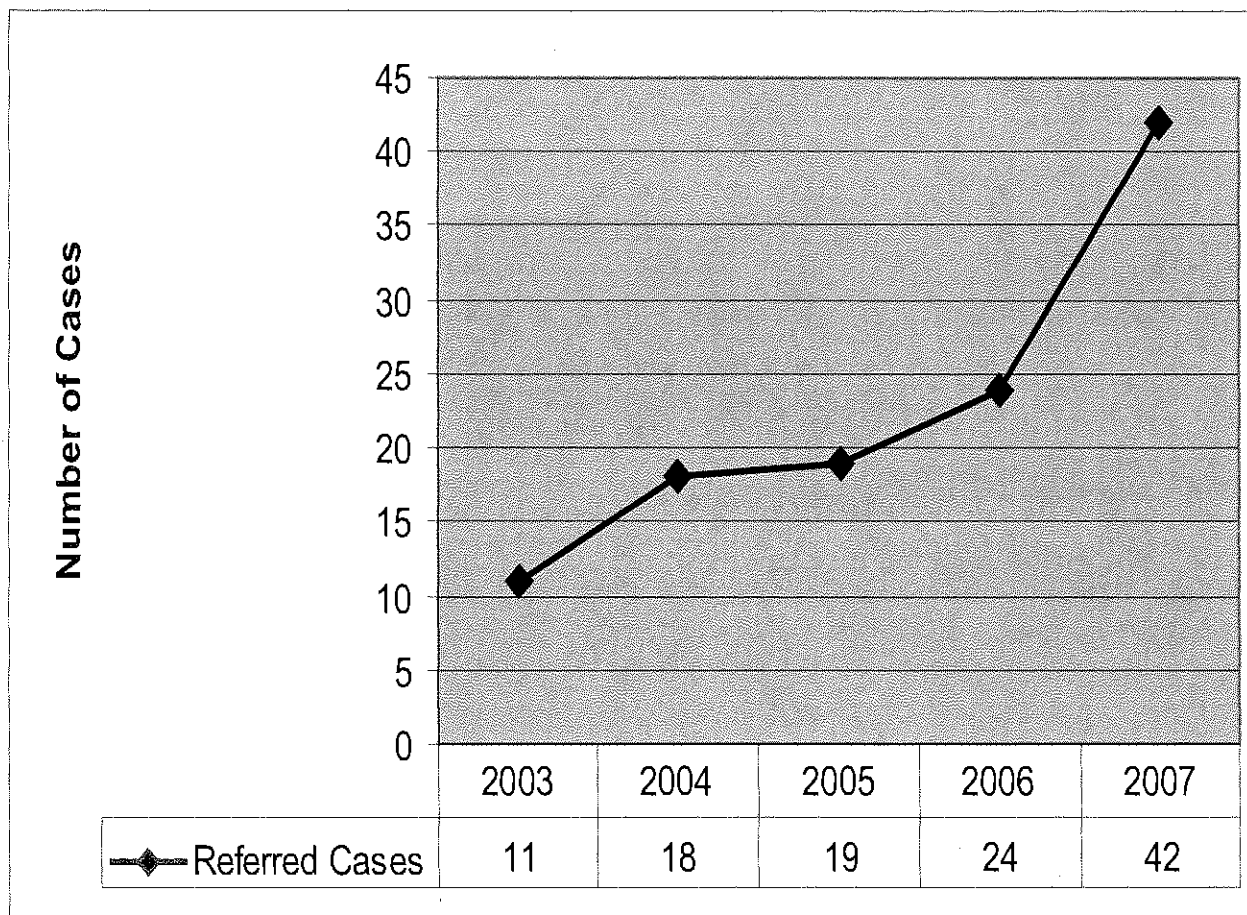
Starting in FY 2005, as OSC reduced its processing time for Hatch Act complaints, the number of pending complaints carried forward from the previous fiscal year sharply declined. From FY 2003 to FY 2007, the overall decline was 57%. During the same period, the number of complaints received increased by 44%. In just three years, the Hatch Act Unit has become much more efficient.

## Complaints Examining Unit - Average Processing of PPP Cases in the Unit



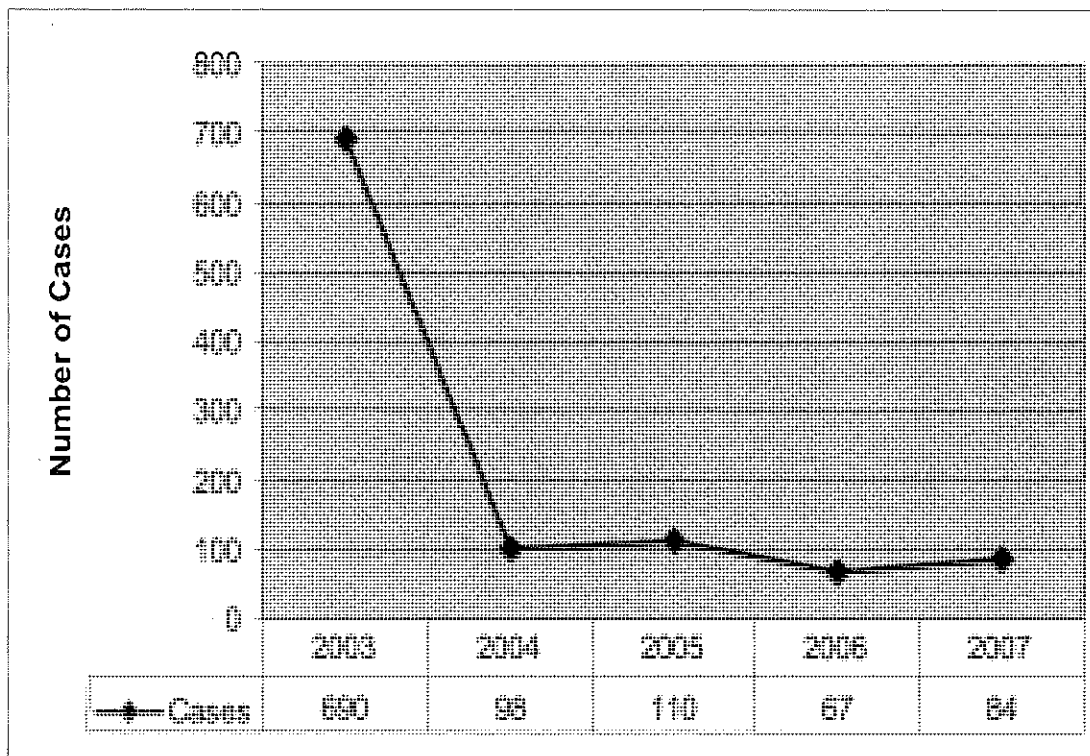
This chart shows the average number of days that a Prohibited Personnel Practice case remained in OSC's Complaints Examining Unit, before the case was either closed or referred to OSC's Investigation and Prosecution Division for further investigation.

### Disclosure Referrals to Agency Heads



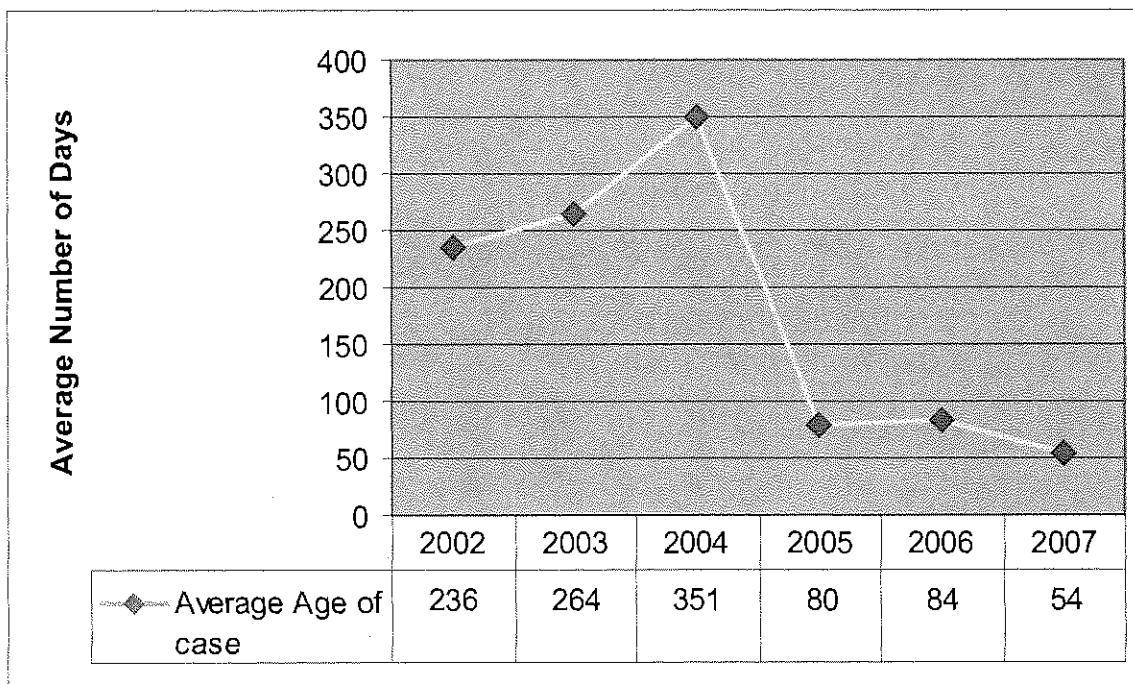
When the Special Counsel analyzes a whistleblower disclosure and determines there is substantial likelihood of wrongdoing, he refers the matter to the head of the appropriate agency, who is then required to internally investigate the matter and report the results to OSC, the Congress, and the President.

### Disclosure Unit Cases Pending at End of Year



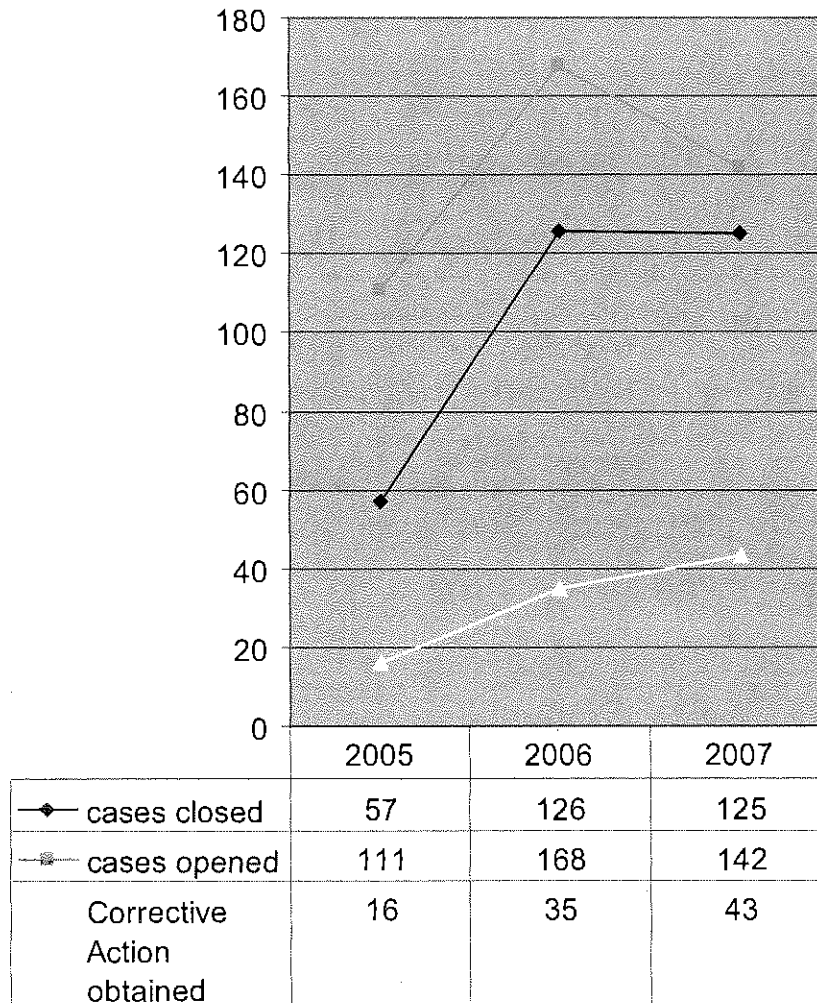
In FY 2003, the Disclosure Unit had a backlog of whistleblower disclosures. OSC reduced the backlog by FY 2004, and has prevented a backlog resurgence in FY 2005, FY 2006 and FY 2007.

### Disclosure Unit - Average Processing Time per Disclosure



This chart shows the improvement in processing time in OSC's Disclosure Unit. The average processing time for disclosures in FY 2007 was 54 days. This was an 85% reduction from the high of FY 2004 (an average of 351 days).

## USERRA Demonstration Project



The USERRA Demonstration Project began in February of FY 2005. OSC has achieved improvement every year in the number of corrective actions obtained on behalf of members of the armed forces.

## Statutory Background

OSC was first established on January 1, 1979.<sup>1</sup> From then until 1989, it operated as an autonomous investigative and prosecutorial arm of the Merit Systems Protection Board (“the Board”). By law, OSC received and investigated complaints from current and former federal employees, and applicants for federal employment, alleging prohibited personnel practices by federal agencies; provided advice on restrictions imposed by the Hatch Act on political activity by covered federal, state, and local government employees; and received disclosures from federal whistleblowers (current and former employees, and applicants for employment) about wrongdoing in government agencies. The office also enforced restrictions against prohibited personnel practices and political activity by filing, where appropriate, petitions for corrective and/or disciplinary action with the Board.

In 1989, Congress enacted the Whistleblower Protection Act. The law made OSC an independent agency within the Executive Branch, with continued responsibility for the functions described above. It also enhanced protections against reprisal for employees who disclose wrongdoing in the federal government, and strengthened OSC’s ability to enforce those protections.<sup>2</sup>

The Congress passed legislation in 1993 that significantly amended Hatch Act provisions applicable to federal and District of Columbia (D.C.) government employees, and enforced by OSC.<sup>3</sup> Provisions of the act enforced by OSC with respect to certain state and local government employees were unaffected by the 1993 amendments.

In 1994, the Uniformed Services Employment and Reemployment Rights Act became law. It defined employment-related rights of persons in connection with military service, prohibited discrimination against them because of that service, and gave OSC new authority to pursue remedies for violations by federal agencies.<sup>4</sup>

OSC’s 1994 reauthorization act expanded protections for federal employees, and defined new responsibilities for OSC and other federal agencies. It provided that within 240 days after receiving a prohibited personnel practice complaint, OSC should determine whether there are reasonable grounds to believe that such a violation occurred, exists, or is to be taken. The act extended the protections of certain legal provisions enforced by OSC to approximately 60,000 employees of what was then known as the Veterans Administration (now the Department of Veterans Affairs), and to employees of certain government corporations. It also broadened the scope of personnel actions covered under these provisions. Finally, the act made federal agencies responsible for informing their employees of available rights and remedies under the Whistleblower Protection Act, and directed agencies to consult with OSC in that process.<sup>5</sup>

In November of 2001, Congress enacted the Aviation and Transportation Security Act,<sup>6</sup> which created the Transportation Security Administration (TSA). Under the act, non-security screener employees of TSA could file allegations of reprisal for whistleblowing with OSC and the MSPB. The approximately 45,000 security screeners in TSA, however, could not pursue such complaints at OSC or the MSPB. OSC efforts led to the signing of a memorandum of understanding (MOU) with TSA in May 2002, under which OSC would review whistleblower retaliation complaints from security screeners, and recommend corrective or disciplinary action to TSA when warranted. The MOU did not (and could not), however, provide for OSC enforcement action before the MSPB, or for individual right of action (IRA) appeals by security screeners to the MSPB.



## Strategic Objectives

OSC has four strategic objectives (see table below), each of which is supported by a series of operational goals. These operational goals are described in Part 2, in the appropriate section for each budget program.

Strategic Objectives of the Agency	
U.S. Office of Special Counsel	
Strategic Objective 1	OSC will protect the Merit System and promote justice in the Federal workforce through investigation and prosecution of the Prohibited Personnel Practices.
Strategic Objective 2	OSC will protect the Merit System and promote justice in the Federal workforce by enforcing the Hatch Act.
Strategic Objective 3	OSC will promote justice, public safety, and efficiency through acting as a channel for whistleblowers in the Federal workforce to disclose information.
Strategic Objective 4	OSC will protect veterans in the Federal workforce through enforcement of the Uniformed Services Employment and Reemployment Rights Act.

## Internal Organization

OSC maintains its headquarters office in Washington, D.C. Four field offices are located in Dallas, Oakland, Detroit, and Washington, D.C. Agency components during FY2007 include the Immediate Office of the Special Counsel (IOSC), five operating units/divisions and several supporting offices explained in detail below.

**Immediate Office of the Special Counsel.** The Special Counsel and staff in IOSC are responsible for policymaking and overall management of OSC. They also manage the agency's congressional liaison and public affairs activities, and its outreach program, which includes promotion of compliance by other federal agencies with the employee information requirement at 5 U.S.C. § 2302(c).

**Complaints Examining Unit.** This unit is the intake point for all complaints alleging prohibited personnel practices and other violations of civil service law, rule, or regulation within OSC's jurisdiction.<sup>7</sup> This unit is responsible for screening approximately 1,700 prohibited personnel practice cases per year. Attorneys and personnel management specialists conduct an initial review of complaints to determine if they are within OSC's jurisdiction, and if so, whether further investigation is warranted. The unit refers all matters stating a potentially valid claim to the Investigation and Prosecution Division for further investigation.<sup>8</sup>

**Disclosure Unit.** This unit is responsible for receiving and reviewing disclosures received from federal whistleblowers. It advises the Special Counsel on the appropriate disposition of the information disclosed (including possible referral to the head of the agency involved for an investigation and report to OSC; referral to an agency Inspector General; or closure). The unit also reviews agency reports of investigation, to determine whether they appear to be reasonable and in compliance with statutory requirements before the Special Counsel sends them to the President and appropriate congressional oversight committees.

**Investigation and Prosecution Division.** The Investigation and Prosecution Division (IPD) is comprised of four field offices. The IPD conducts field investigations of matters referred after preliminary inquiry by the Complaints Examining Unit. Division attorneys conduct a legal analysis after investigations are completed to determine whether the evidence is sufficient to establish that a prohibited personnel practice (or other violation within OSC's jurisdiction) has occurred. Investigators work with attorneys in evaluating whether a matter warrants corrective action, disciplinary action, or both.

If meritorious cases cannot be resolved through negotiation with the agency involved, division attorneys represent the Special Counsel in litigation before the Merit Systems Protection Board. They also represent the Special Counsel when OSC intervenes, or otherwise participates, in other proceedings before the Board. Finally, division investigators and attorneys also sometimes investigate alleged violations of the Hatch Act and the Uniformed Services Employment and Reemployment Rights Act, though most Hatch Act and USERRA work is handled by the Hatch Act Unit and the USERRA Unit, respectively.

**Hatch Act Unit.** This unit issues advisory opinions to individuals seeking information about Hatch Act restrictions on political activity by federal, and certain state and local, government employees. The unit is also responsible for enforcing the act. It reviews complaints alleging a Hatch Act violation and, when warranted, investigates and prosecutes the matter (or refers the matter to the Investigation and Prosecution Division for further action). It also oversees Hatch Act matters delegated to the IPD.

**USERRA Unit.** This unit handles USERRA cases that are referred to OSC for prosecution by the Department of Labor. In addition, this unit handles the new special project assigned by P.L. 108-454 that requires OSC to investigate the re-employment rights of military service members under USERRA, which has involved new functions, increased case load, and new personnel.

#### **SUPPORTING UNITS:**

**Alternative Dispute Resolution Program.** In selected cases referred by the Complaints Examining Unit for further investigation, the agency contacts the complainant and the agency involved, and invites them to participate in OSC's voluntary Mediation Program. If mediation resolves the complaint, the parties execute a written and binding settlement agreement; if not, the complaint is referred for further investigation.

The mediation program for Alternative Dispute Resolution has been reorganized. Rather than have a single ADR specialist under the leadership of an SES employee, the agency has expanded the program through cross-training multiple individuals from each of OSC's operating units. As a result the agency now has a broad pool of trained mediators with different legal areas of expertise.

**Legal Counsel and Policy Division.** This division provides general counsel and policy services to OSC, including legal advice and support on management and administrative matters; legal defense of OSC in litigation filed against the agency; policy planning and development; and management of the agency ethics program.

**Management and Budget Division.** This division provides administrative and management support services to OSC, in furtherance of program, human capital, and budget decisions. This division also includes the Information Technology Branch, Human Resources Branch, Document Control Branch and Budget and Procurement branch. The purpose of this division is to put the administrative support functions under one authority.

**Training Office.** A training office has been created to train all new employees, cross train existing employees, and develop specialized training in areas such as litigation skills. Specifically, the Training Office will cross train attorneys and investigators to enable them to traverse organizational boundaries within the agency. They will develop sufficient expertise in several areas of the law, giving management the ability to detail employees to address any potential backlogs that could form in the various units.

## Budget by Program

FY 2009 Budget by Program					
(in thousands of dollars)					
Program	FY 2008 Estimate		FY 2009 Estimate		Increase/Decrease
	\$	FTE	\$	FTE	
Investigation and Prosecution of Prohibited Personnel Practices	\$7,480	52	\$7,679	52	\$199 -
Hatch Act Enforcement (including Special Task Force)	\$1,712	11.5	\$1,910	12.5	\$198 1
Whistleblower Disclosure Unit	\$1,116	7.5	\$1,146	7.5	\$30 -
USERRA Enforcement and Prosecution	\$1,185	8	\$1,217	8	\$32 -
Office of the Special Counsel	\$1,197	7	\$1,229	7	\$32 -
Office of the Agency General Counsel	\$897	5	\$921	5	\$24 -
Management / Information Technology / Budget / Human Resources / Procurement / Document Control / Planning / Outsourced Computing Svcs	\$3,881	19	\$3,366	19	-\$515 -
<b>totals</b>	<b>\$17,468</b>	<b>110</b>	<b>\$17,468</b>	<b>111</b>	<b>\$0 1</b>

## PART 2 - BUDGET PROGRAMS AND PERFORMANCE PLAN

### A. Investigation and Prosecution of Prohibited Personnel Practices

Unlike many other investigative entities or agencies, OSC must, as a general rule, conduct an inquiry after receipt of complaints alleging the commission of a prohibited personnel practice.<sup>8</sup> The nature of the inquiry ranges from the CEU screening process to the IPD field investigations, but one must be conducted after a complaint is filed. Complaints received by OSC can and often do involve multiple allegations, some of which can involve different prohibited personnel practices. In all such matters, an OSC inquiry requires the review of, and a legal determination about, each allegation and prohibited personnel practice.

After a complaint is received by OSC, CEU attorneys and personnel management specialists conduct an initial review to determine whether it is within OSC's jurisdiction, and whether further investigation is warranted. CEU refers all matters stating a potentially valid claim to the IPD for further investigation. All such matters are reviewed first by the ADR Unit.<sup>9</sup>

In selected cases that have been referred for further investigation, a trained OSC ADR specialist contacts the complainant and the employing agency to invite them to participate in the agency's voluntary ADR Program. If both parties agree, OSC conducts a mediation session, led by OSC trained mediators who have experience in federal personnel law. When mediation resolves the complaint, the parties execute a binding written settlement agreement. If mediation does not resolve the complaint, it is referred for further investigation, as it would have been had the parties not attempted mediation.

The IPD conducts investigations to review pertinent records and to interview complainants and witnesses with knowledge of the matters alleged. Matters undergo legal review and analysis to determine whether the matter warrants corrective action, disciplinary action, or both.

If OSC believes a prohibited personnel practice has been committed and initiates discussions with an agency, the matter is often resolved through negotiation. Before OSC may initiate an enforcement proceeding seeking corrective action (relief intended to make an aggrieved employee whole) at the MSPB, the Special Counsel must make a formal request to the agency involved, reporting on its findings and recommendations. Only when the agency has had a reasonable period of time to take corrective action and fails to do so, may OSC proceed to petition the MSPB for corrective action.<sup>10</sup> When an agency refuses to grant appropriate corrective action, OSC generally proceeds immediately to file a complaint with the MSPB. If OSC determines that disciplinary action (the imposition of discipline on an employee who has committed a violation) is warranted, it can file a complaint directly with the MSPB.<sup>11</sup> Should the agency agree to take appropriate disciplinary action on its own initiative, then the matter can be settled without resort to an MSPB proceeding.

In addition to rectifying the matter at issue, OSC litigation before the MSPB – whether by enforcement actions seeking to obtain corrective and/or disciplinary action, or by intervention or other participation in matters filed by others – often has the additional benefit of clarifying and expanding existing law. It also brings greater public attention to OSC's mission and work, a factor likely to increase the deterrent effect of its efforts. OSC's Complaints Examining Unit (CEU), as discussed above, is the intake unit for all prohibited personnel practice complaints.

For FY 2007 OSC received 2,880 new matters, including PPP, Hatch Act, and Disclosure matters (See Table 1).

## Resource Estimates

During FY2008 the Investigation and Prosecution of Prohibited Personnel Practices will use approximately 52 FTE at a cost of approximately \$7,480,000. During FY 2009, we estimate the cost of the program will be at a cost of approximately \$7,679,000 with no increase in FTE.

TABLE 1

<b>Breakdown of Matters<sup>a</sup> Pending and Completed FY2003 to FY2007</b>					
	<b>FY2003</b>	<b>FY2004</b>	<b>FY2005<sup>b</sup></b>	<b>FY2006</b>	<b>FY2007</b>
<b>Matters pending at beginning of fiscal year</b>	1,415	1,605	778	777	667
<b>New matters received</b>	2,530	2,798	2,684	2,718	2,880
<b>Matters closed</b>	2,344	3,612	2,685	2,814	2,842
<b>Matters pending at end of fiscal year</b>	1,601	791	777	681	698

<sup>a</sup> The term "matters" in this table includes prohibited personnel practice complaints (including Transportation Security Administration matters); Hatch Act complaints, whistleblower disclosures (DU matters); USERRA referrals from the MSPB pursuant to 5 U.S.C. x 1221(f)(3).

<sup>b</sup> Includes USERRA Demonstration Project matters.

The majority of OSC's staff resources were devoted to the processing of PPP complaints. Of the total 2,880 new matters OSC received during FY 2007, 1,927 or 67% were new PPP complaints. (See Table 2).

**TABLE 2**

<b>Summary of Prohibited Personnel Practice (PPP) Complaints Activity – Receipts and Processing<sup>a</sup></b>						
		<b>FY 2003</b>	<b>FY2004</b>	<b>FY 2005</b>	<b>FY2006</b>	<b>FY2007</b>
Pending complaints carried over from previous fiscal year		594	653	524	521	387
New complaints received (Intake Unit)		1,791	1,964	1,771	1,805	1,927
<i>Total complaints:</i>		2,385	2,617	2,295	2,326	1,967
Complaints referred for field investigation		162	244	198	143	125
Complaints processed and closed		1,732	2,093	1,774	1,930	1,953
Processing times	< 240 days	1,471	1,799	1,198	1,693	1,832
	> 240 days	261	294	576	237	121
Percentage processed in under 240 days		85%	86%	67.5%	88%	94%

<sup>a</sup>This figure is higher than reported in the President's FY 2006 Budget because it includes several closed cases that were reopened.

In FY 2007, there was an increase in stays obtained from the Merit Systems Protection Board and an increase in disciplinary actions negotiated with agencies. (see Table 3).

TABLE 3

Summary of Prohibited Practice Complaints Activity – Favorable Actions		FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Total favorable actions obtained <sup>a</sup> (all prohibited personnel practices)	# of actions	115	80	45	52	29
	# of matters	83	65	45	48	29
Favorable actions obtained (reprisal for whistleblowing)	# of actions	75	57	37	40	21
	# of matters	75	49	37	37	21
Stays negotiated with agencies <sup>b</sup>		6	11	3	8	4
Stays obtained from Merit Systems Protection Board		1	1	1	1	3
Disciplinary actions negotiated with agencies		12	11	3	4	5
Corrective action complaints filed with the Board		0	1	1	1	1
Disciplinary actions obtained from the Board		1	0	1	0	0

<sup>a</sup> The purpose of this breakout is to show the number of favorable actions obtained, and the number of matters involved. A matter (case) can have more than one action (favorable outcome).

<sup>b</sup> Stays and disciplinary actions listed in this table (except for disciplinary actions obtained by OSC from the Board) are included in the totals shown in the first two rows above, but are broken out here for further information.



## Alternative Dispute Resolution

Among the factors that determine “mediation-appropriate” cases are the complexity of the issues, the nature of the personnel action, and the relief sought by the Complainant. Once a case has been identified as mediation-appropriate, the OSC ADR Specialist contacts the parties to discuss the ADR Program. “Pre-mediation” discussions are designed to help the parties form realistic expectations and well-defined objectives regarding the mediation process.

During fiscal year 2007, the number of agencies which accepted initial mediation remained at 59% and there were ten successfully mediated resolutions. (See Table 4).

**TABLE 4**

Summary of Prohibited Personnel Practice Complaints Activity – Mediation Program						
		FY2003	FY2004	FY2005	FY2006	FY2007
Matters identified before investigation as mediation-appropriate		43	82	22	52	38
Initial acceptance rates by parties	<i>Complainants</i>	82%	68%	27%	83%	71%
	<i>Agencies</i>	69%	64%	22%	59%	59%
Mediated and other resolutions <sup>a</sup>		23	18	5	11	10
Resolution rate – OSC mediation program		92%	86%	100%	55%	50%

<sup>a</sup> This category includes complaints settled through mediation by OSC (including “reverse-referrals”- i.e., cases referred back to the Alternative Dispute Resolution Unit by an Investigation and Prosecution Division due to the apparent potential for a mediated resolution). Also included in this category are complaints that entered the initial OSC mediation process, and were then resolved through withdrawal of the complaint, or through mediation by an agency other than OSC.

Mediation settlement outcomes in OSC’s Mediation Program vary, depending on the interests of the parties. Monetary recovery includes retroactive promotions, attorney fees, and lump sum payments. In addition to monetary recovery, the benefits received by complainants in ADR include revised performance appraisals, reinstatement of employment, and transfers to better working environments.

## Goals and Results - Prohibited Personnel Practices

OSC's Strategic Objective 1 is to protect the Merit System and promote justice in the Federal workforce through investigation and prosecution of the Prohibited Personnel Practices. The tables below describe the three operational goals supporting this strategic objective.

<b>Goal 1: TO PROTECT THE MERIT SYSTEM THROUGH TIMELY CASE PROCESSING</b>	
<b>PPP Enforcement Mission</b>	<b>PROHIBITED PERSONNEL PRACTICES CASES</b>
<b>PERFORMANCE INDICATOR</b>	<b>Indicator A: Percentage of cases processed in less than 240 days.</b>
<b>FY 2006 TARGET</b>	85%
<b>FY 2006 RESULTS</b>	89%
<b>FY 2007 TARGET</b>	92%
<b>FY 2007 RESULTS</b>	94%
<b>FY 2008 TARGET</b>	92%
<b>FY 2008 RESULTS</b>	
<b>FY 2009 TARGET</b>	92%
<b>FY 2009 RESULTS</b>	

### Comments for Goal #1:

#### 1. Indicator A: PPP Cases.

This timeliness indicator measures the combined effectiveness of both OSC's Complaints Examining Unit (CEU) and OSC's Investigation and Prosecution Division (IPD).

OSC receives complaints of Prohibited Personnel Practices into the CEU. If, after initial screening, investigation, and legal analysis, a complaint meets the requirements for merit, it is internally referred to the IPD for further investigation. If the IPD investigates and determines the case does indeed have merit, the IPD either seeks relief for the claimant through mediation, settlement, or prosecution.

The reason the target is less than 100% is because in some cases the settlement process can take a considerable amount of time. In cases involving litigation, the timeframe for events is no longer driven by the speed of work of OSC attorneys and investigators. To strive for 100% would carry the implicit assumption that OSC would not litigate any cases. The 92% target reflects the reality that 8-10% of the PPP cases call for full investigations. To set a target higher than 92% would imply that the agency should artificially try to limit the number of cases receiving full investigations. The agency will never do that. Therefore the appropriate target is 92%.

Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS	
PPP Enforcement Mission	Prohibited Personnel Practices Cases
PERFORMANCE INDICATOR	Indicator A: % favorable outcomes in cases determined by OSC to be meritorious = (# successful mediations + # of settlements achieved + # of successful litigations) / (# meritorious cases)
FY 2006 TARGET	99%
FY 2006 RESULTS	100%
FY 2007 TARGET	99%
FY 2007 RESULTS	100%
FY 2008 TARGET	100%
FY 2008 RESULTS	
FY 2009 TARGET	100%
FY 2009 RESULTS	

#### Comments for Goal #2

##### 1. Performance Indicator A

A meritorious case is one in which the Office of Special Counsel is satisfied that claimant is entitled to relief. In certain meritorious cases, OSC may endeavor to use mediation to secure relief for the claimant. If mediation was not appropriate or did not succeed, OSC may exercise its prosecutorial authority and file for corrective or disciplinary action before the MSPB. As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or via litigation.

Typically, OSC will prosecute cases it believes are meritorious but where the involved agency is unwilling to resolve them voluntarily. OSC is confident of its ability to successfully prosecute cases warranting corrective action.

OSC maintained the same high standard of achieving favorable outcomes in 100% of meritorious PPP cases.

<b>Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES</b>	
<b>PPP Enforcement Mission</b>	<b>PROHIBITED PERSONNEL PRACTICES CASES</b>
<b>PERFORMANCE INDICATOR</b>	<b>Indicator A: # of new Federal agencies certified in the 2302 (c) Program by OSC.</b>
<b>FY 2006 TARGET</b>	5
<b>FY 2006 RESULTS</b>	6
<b>FY 2007 TARGET</b>	5
<b>FY 2007 RESULTS</b>	3
<b>FY 2008 TARGET</b>	5
<b>FY 2008 RESULTS</b>	
<b>FY 2009 TARGET</b>	5
<b>FY 2009 RESULTS</b>	

#### Comments for Goal #3

OSC has statutory authority to administer the 2302(c) Program, which recognizes the federal sector's need for awareness of Prohibited Personnel Practices and training in avoidance of committing them. However, OSC cannot force any agency to apply for certification. There are no statutory penalties for not being certified. This annual numeric target is not overly aggressive because 1) OSC cannot force compliance, and 2) the number of Federal agencies that may seek certification is limited by the number of agencies in existence. OSC already has 32 certified agencies, including most of the major ones.

Other outreach activities:

Additionally, members of the Investigation and Prosecution Division and the Complaints Examining Unit regularly accept invitations to provide outreach services designed to educate Federal personnel on these issues so that agencies comply with the law. Employees from OSC were able to educate employees of many agencies during a presentation at the Federal Dispute Resolution Conference (FDR).

- OSC maintains a telephonic hotline for answering PPP-related questions from members of the Federal workforce.
- OSC's website provides a wealth of information regarding PPPs and is a valuable and constantly improving resource for educating the Federal workforce on this subject. Every year the website statistics for user sessions increase, with an average increase in activity of 15% over the previous year.

The results for the number of certifications fell below the target of five agencies to be certified during FY 2007, but we anticipate reaching our target for FY 2008.

## **Hatch Act Enforcement Program**

OSC is also responsible for enforcing the Hatch Act, including investigating and prosecuting complaints alleging violations of the Act, and providing advisory opinions on the Act's requirements. The Hatch Act Unit, staffed by a Chief and five staff attorneys, is responsible for a nationwide program that provides legal advice on the Hatch Act to federal, state and local employees and the public at large. Specifically, the Hatch Act Unit has the unique responsibility of providing Hatch Act information and legal advice to White House staff, Congressional staff, the national press, senior management officials throughout the federal government, and state and local government officials. The Hatch Act Unit provides all of OSC's advisory opinions. When provided to individuals, the advisory opinions enable them to determine whether they are covered or not by the Act, and whether their contemplated activities are permitted under the Act or not.

The Hatch Act Unit also enforces compliance with the Act by receiving complaints alleging Hatch Act violations, conducting preliminary inquiries into complaint allegations and, (where warranted) further investigating allegations or referring the complaints to OSC's IPD (for further investigation). Depending on the severity of the violation, the Hatch Act Unit will either issue a warning letter to the employee, attempt to informally resolve the violation, prosecute the case before the MSPB or send it to the IPD to prosecute before the MSPB.

A string of Hatch Act cases involving high-profile employees over the last three years has resulted in significant national press coverage. There is now a very heightened awareness of the Hatch Act among Federal employees. The number of Hatch Act complaints received in FY 2006 exceeded the number received previously in any year. Hatch Act complaints in FY 2008 are projected to be the highest number yet, due to the upcoming presidential election.

### **Resource estimates:**

During FY 2008, the Hatch Enforcement Program (including the Special Task Force) will use approximately 11.5 FTE at a cost of approximately \$1,712,000. This does not include an additional \$1,100,000 for forensic computing services. During FY 2009, we estimate the cost of this program to be \$1,910,000 for 12.5 FTE.

In FY 2007, OSC had double the number of withdrawals from partisan races as in FY 2006. (See Table 5).

**TABLE 5**

<b>Summary of Hatch Act Advisory Opinion and Complaint Activity</b>						
		<b>FY2003</b>	<b>FY2004</b>	<b>FY2005</b>	<b>FY2006</b>	<b>FY2007</b>
Advisory opinions issued		3,284	3,913 <sup>a</sup>	2,558	3,004	2,598
New advisory requests received (written)		159	176	191	237	194
New complaints received		196	248	245	299	282
Warning letters issued		43	93	87	76	68
Complaints processed and closed in fiscal year		201	357	310	266	252
Corrective actions taken by recipients of cure letters:	Withdrawal from partisan races	18	17	4	9	18
	Resignation from covered employment	7	8	10	22	6
	Other	0	6	3	2	1
	Total:	25	31	17	33	25
Disciplinary action complaints filed with the Merit Systems Protection Board		4	7 <sup>b</sup>	11	6	1
Disciplinary actions obtained (through negotiation or ordered by the Board)		4	2	8	8	0
Complaints pending at end of FY		254	146	79	112	142

<sup>a</sup> This number is lower than reported in the President's FY 2006 Budget (Other Independent Agencies, Appendix, p. 1209) because of a duplication error.

<sup>b</sup> This number is higher than reported in the President's FY 2006 Budget because of system entries made after that publication.

To further its advisory role, the Hatch Act Unit is very active in OSC's outreach program; the unit conducted approximately 20 outreach presentations in FY2007 to various federal agencies and employee groups concerning federal employees rights and responsibilities under the Act. Many of these programs involved high-level agency officials. Also, the unit attempted to informally resolve as many ongoing Hatch Act violations as possible without resorting to litigation. Advisories concerning partisan activity surrounding upcoming state and local elections have accounted for a fair amount of OSC's work this fiscal year.

### **Task Force Investigations**

In the spring of 2007, the Special Counsel created a new task force to investigate numerous allegations that high level agency officials may have violated the Hatch Act or other civil service laws. Specifically, the task force is investigating numerous allegations that certain agency officials may have encouraged or allowed partisan political forces to improperly influence government decisions. Among those allegations that the task force is currently investigating is the circumstances surrounding the firing of the United States Attorneys and the legality of the political briefing given by the White House Office of Political Affairs to political appointees throughout the federal government. Due to the highly sensitive and potentially explosive nature of the task force's investigations, the Special Counsel is unable to publicly acknowledge the numerous other allegations that the task force is currently investigating.

## Goals and Results - Hatch Act Program

OSC's Strategic Objective 2 is to protect the Merit System and promote justice in the Federal workforce by enforcing the Hatch Act. The tables below describe the three operational goals supporting this strategic objective.

<b>Goal 1: TO DEFEND THE MERIT SYSTEM BY ENFORCING THE HATCH ACT – THROUGH TIMELY CASE PROCESSING</b>			
<b>HATCH ACT MISSION</b>	<b>HATCH ACT WRITTEN ADVISORY OPINIONS See comment 1.</b>	<b>HATCH ACT ORAL &amp; EMAIL ADVISORY OPINIONS See comment 2</b>	<b>HATCH ACT COMPLAINTS</b>
<b>PERFORMANCE INDICATORS</b>	<b>Indicator A: Percentage of formal written advisory opinions issued in less than 120 days.</b>	<b>Indicator B: Percentage of oral and e-mail advisory opinions issued in less than five days</b>	<b>Indicator C: Percentage of matters resolved in less than 365 days.</b>
<b>FY 2006 TARGET</b>	75%	99%	60%
<b>FY 2006 RESULTS</b>	93%	100%	84%
<b>FY 2007 TARGET</b>	80%	99%	70%
<b>FY 2007 RESULTS</b>	91%	99%	92%
<b>FY 2008 TARGET</b>	85%	99%	80%
<b>FY 2008 RESULTS</b>			
<b>FY 2009 TARGET</b>	90%	99%	85%
<b>FY 2009 RESULTS</b>			

### 1. Performance Indicator A: written advisory opinions

These are the requests for an advisory opinion that come in to OSC's Hatch Act Unit that are very complex and require significant analysis before answering.

### 2. Performance Indicator B: oral or e-mail advisory opinions

If an oral or e-mail advisory opinion were to take longer than five days, generally it would be treated as a formal written advisory request and be captured by Indicator A.

The Hatch Act Unit exceeded two of its three timeliness targets for FY 2007, and met its third timeliness target.

The FY 2008 timeliness targets for Indicator A and Indicator C have been revised upwards, in order to be more aggressive. However, these timeliness targets reflect the reality that each member of the unit will spend more time on the phone doing oral advisories during the presidential election year.



<b>Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS</b>	
<b>HATCH ACT MISSION</b>	<b>HATCH ACT CASES</b> See comment 1.
<b>PERFORMANCE INDICATOR</b>	<b>Indicator A: % favorable outcomes in meritorious cases</b>
<b>FY 2006 TARGET</b>	90%
<b>FY 2006 RESULTS</b>	97%
<b>FY 2007 TARGET</b>	90%
<b>FY 2007 RESULTS</b>	97%
<b>FY 2008 TARGET</b>	97%
<b>FY 2008 RESULTS</b>	
<b>FY 2009 TARGET</b>	97%
<b>FY 2009 RESULTS</b>	

#### Comments for Goal #2

##### 1. Meritorious cases

A meritorious Hatch Act case is a case in which OSC finds a violation of the Hatch Act. A favorable outcome in a Hatch Act case is either (1) successful litigation of the case; (2) successful settlement of the case; or (3) successful corrective action (individual corrected his violation after receiving notice from OSC, for example, by withdrawing his candidacy or resigning from his employment).

The results achieved by the Hatch Act Unit for Goal 2 exceeded the target by 7% for FY 2007.

The targets for FY 2008 and FY 2009 have been substantially revised upwards from 90% to 97%.

The target is not set at 100% for several reasons:

- A client may decide not to settle for personal reasons.
- Despite judicious selecting of cases to be brought to trial and good preparation, a judge may disagree with OSC's position.
- Each year, OSC's Hatch Act Unit tackles a few cases which break new ground. For example, in new areas such as the use of blogs while on duty, there are Hatch Act implications. OSC will at times seek judicial clarification of the Hatch Act through litigation in areas such as this. By nature, OSC will not win every one of these.

<b>Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES</b>		
<b>HATCH ACT MISSION</b>	<b>HATCH ACT OUTREACH VISITS</b>	<b>HATCH ACT SECTION OF OSC WEBSITE</b>
<b>PERFORMANCE INDICATORS</b>	<b>Indicator A: (# of HA trainings and outreaches given) / (# of invitations to provide HA training or outreach, where the inviter sponsors OSC)</b>	<b>Indicator B: Number of new advisory complex opinions added every month to the website.</b>
<b>FY 2006 TARGET</b>	90%	One
<b>FY 2006 RESULTS</b>	96%	One
<b>FY 2007 TARGET</b>	90%	One
<b>FY 2007 RESULTS</b>	100%	One
<b>FY 2008 TARGET</b>	95%	One
<b>FY 2008 RESULTS</b>		
<b>FY 2009 TARGET</b>	95%	One
<b>FY 2009 RESULTS</b>		

### Comments for Goal #3

#### 1. Results:

Indicator A: The outreach results for FY 2007 exceeded the set target by 10%. The FY 2008 and FY 2009 targets have been revised upwards to 95%. The targets are not set at 100% because OSC needs the flexibility to be able to decline one or two outreaches each year, due to trials, elections, investigations, and heavily booked outreach schedules.

Indicator B: One opinion per month has been posted. This averages to one opinion per month since these goals were established in February 2006. The target for FY 2008 and FY 2009 remains at one complex opinion per month. The opinions online are not a massive database to reflect every possible facet of each type of case. Rather, the Hatch Act Unit looks for unique issues that will be generally useful to many people because they address a new issue or explain a general principle of how the Hatch Act will be enforced.

#### 2. Outreach DVD

In addition to the performance of outreach visits and the website enhancement described above, OSC has produced both a Federal Hatch Act DVD and a State & Local Hatch Act DVD that explains the basics of the Hatch Act. OSC is now able to mail the appropriate DVD to certain requestors who require a basic tutorial overview of the Hatch Act.

## Whistleblower Disclosure Unit Program

In addition to its investigative and prosecutorial mission, the OSC provides a safe channel through which federal employees, former federal employees, or applicants for federal employment may, under 5 U.S.C. § 1213(a), disclose information they reasonably believe evidences a violation of law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. At present, the Disclosure Unit staff is comprised of the Chief, six attorneys, and one paralegal. The Disclosure Unit is responsible for reviewing the information submitted by whistleblowers, and advising the Special Counsel whether it shows that there is a substantial likelihood that the type of wrongdoing described in § 1213(a) has occurred or is occurring. Where a substantial likelihood determination is made, the Special Counsel must transmit the disclosure to the head of the relevant agency for further action. The agency is required to conduct an investigation and submit a report to OSC describing the results of the investigation and the steps taken in response to the investigative findings. Under § 1213(e), the whistleblower is also provided with a copy of the report for comment. The Special Counsel is then required to review the report in order to determine whether it meets the requirements of the statute and its findings appear reasonable. Finally, the report is forwarded to the President and appropriate Congressional oversight committees.

In recent years, OSC has had a large number of high-profile whistleblower cases, leading to increased national press coverage of OSC. FY 2007 accelerated this trend. OSC continues to investigate whistleblower retaliation complaints from Transportation Security Agency (TSA) security screeners under OSC's Memorandum of Understanding (MOU) with TSA. This MOU remains viable despite the Merit System Protection Board's decision that the Board does not have jurisdiction to adjudicate these matters.

### Resource Estimates:

During FY 2008, the Whistleblower Disclosure Unit will use approximately 7.5 FTE at a cost of \$1,116,400. During FY 2009, we estimate the cost of the program will be \$1,146,000 with no increase in FTE.

In the Disclosure Unit, 482 new matters were received in FY 2007, an 11% increase from the previous fiscal year. During FY 2007, the Unit referred 42 matters for investigation under § 1213(c), a 43% increase from the previous fiscal year. (See Table 6).

TABLE 6

Summary of Whistleblower Disclosure Activity – Receipts and Dispositions <sup>a</sup>						
		FY2003	FY2004	FY2005	FY2006	FY2007
Pending disclosures carried over from previous fiscal year		556	690	98	110	69
New disclosures received		535	572	485	435	482
Total disclosures		1,091	1,262	583	545	551
Disclosures referred to agency heads for investigation and report		11	18	19	24	42
Referrals to Agency IGs		3	8	14	10	?
Agency head reports sent to President and Congress		23	8	16	24	20
Results of agency investigations and reports	Disclosures substantiated in whole or in part	13	8	16	21	19
	<i>Disclosures unsubstantiated</i>	10	0	0	3	1
Disclosures processed	<i>In more than 15 days</i>	290	1,019 <sup>b</sup>	237	275	130
	<i>In less than 15 days</i>	111	135	236	203	285
Percentage of disclosures processed in less than 15 days		28%	12%	50%	42%	61%
Disclosure matters processed and closed		401	1,154 <sup>c</sup>	473	478	467

<sup>a</sup> It should be noted that many disclosures contain more than one type of allegation. This table, however, records all allegation received in a whistleblower disclosure as a single matter.

<sup>b</sup> This number is large due to the backlog reduction effort.

<sup>c</sup> This number is large due to the backlog reduction effort, and includes approximately 500 cases that had been reviewed in prior years and determined to be low priority and probable closures.

The Disclosure Unit's caseload remains high due to growing public awareness of the Unit's work. In recent years, it has handled several high profile cases that have received widespread national press attention. In addition, after the terrorist attacks of September 11, 2001, more federal whistleblowers came to OSC with national security allegations and concerns. Many cases handled by the Disclosure Unit involve complex issues; some involve classified material and must be handled according to federal requirements.

The Disclosure Unit's more complex cases are very labor-intensive and often require the attention of more than one attorney. These cases can take more than a year to complete for a number of reasons—agencies routinely request additional time to conduct the investigation and write the report, whistleblowers request additional time to prepare their comments, and Disclosure Unit attorneys and the Special Counsel must review the report to determine whether it contains the information required by statute, its findings appear reasonable, and to prepare any comments the Special Counsel may have on the report.

This year, for the sake of brevity, we are not including a representative sample of cases that have been referred by the Special Counsel to the heads of the agencies pursuant to 5 U.S.C. § 1213(c) and closed after receipt and review of the agency report. We are also not including summaries of cases that are presently under investigation by agency heads, though all of these summaries are available. In many cases, OSC's efforts have resulted in significant media coverage and reform efforts.

## Goals and Results - Whistleblower Disclosure

OSC's strategic objective 3 is to promote justice, public safety, and efficiency through acting as a channel for whistleblowers in the Federal workforce to disclose information. The tables below describe the two operational goals supporting this strategic objective.

Goal 1: TO RECEIVE AND RESOLVE WHISTLEBLOWER DISCLOSURES WITH TIMELY PROCESSING	
WHISTLEBLOWER DISCLOSURE MISSION	DISCLOSURES See comment 1.
PERFORMANCE INDICATORS	Indicator A: Percentage of disclosures resolved within the statutory 15 day time frame
FY 2006 TARGET	50%
FY 2006 RESULTS	42%
FY 2007 TARGET	50%
FY 2007 RESULTS	61%
FY 2008 TARGET	50%
FY 2008 RESULTS	
FY 2009 TARGET	50%
FY 2009 RESULTS	

### Comments for Goal #1:

#### 1. Performance Indicator A: Timely Disclosure Processing

Pursuant to § 1213(b), when the Special Counsel receives any disclosure of information by a federal employee, former federal employee or applicant for federal employment which the [employee] reasonably believes evidences: a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, the Special Counsel must review the information within 15 days and determine whether there is a substantial likelihood that the information discloses one or more of the above categories of wrongdoing.

OSC handles these whistleblower disclosures under 5 U.S.C. § 1213 in one of three ways. If the Special Counsel makes a positive determination, he must transmit the information to the appropriate agency head, and require the agency head to conduct an investigation and submit a written report on the findings of the investigation. These referrals under § 1213 represent a small percentage (approximately 10% for FY 2007) of the total number of disclosures resolved by OSC in any fiscal year.

If the Special Counsel does not make a positive determination, the matter is closed. These closures make up the vast majority (90% for FY 2007) of the total number of cases resolved by OSC in any fiscal year.

If the Special Counsel is unable to make the substantial likelihood determination on the basis of the information supplied by the whistleblower, the matter may be informally referred to the Inspector

General (IG) for the agency involved, with a request that the IG assist OSC in making a substantial likelihood determination.

OSC's Disclosure Unit exceeded its timeliness target by 11% for FY 2007. The FY 2007 statistics were aided by the presence of a series of companion cases that were all similar in nature, and could all be handled relatively quickly. This is not normally the case. Therefore, the target will remain the same, at 50% for FY 2008 and FY 2009.

Goal 2: TO PROMOTE JUSTICE AND PROTECT THE MERIT SYSTEM THROUGH THE QUALITY OF DETERMINATIONS AND REFERRALS	
WHISTLEBLOWER DISCLOSURE MISSION	DISCLOSURES
	See comment 1.
PERFORMANCE INDICATORS	Indicator A: % Percentage of disclosures referred to agency head, pursuant to 5 U.S.C. § 1213, or under the informal IG referral process.
FY 2006 TARGET	7%
FY 2006 RESULTS	8%
FY 2007 TARGET	7%
FY 2007 RESULTS	10%
FY 2008 TARGET	7%
FY 2008 RESULTS	
FY 2009 TARGET	7%
FY 2009 RESULTS	

#### Comments to Goal #2

##### 1. Indicator A: Whistleblower referrals:

The U.S. Office of Special Counsel does not have investigative or enforcement authority under 5U.S.C. § 1213. As such, the Indicator for Goal #2 reflects a quality measure based on the number of cases referred under §1213, regardless of the outcome of the referral. The percentage of cases referred out of the total number of cases received in a fiscal year is a relatively low number historically, and as such, the FY 2006 and FY 2007 targets are low. Because OSC's Disclosure Unit processes nearly 500 disclosures annually, this percentage can be seen as an indicator of the average relative height of the "substantial likelihood" bar in a given year.

The Indicator for Goal #2 reflects only one way of measuring quality as defined in Goal #2, to "promote justice and protect the merit system." **Because the statutory mandate of §1213 contemplates that OSC make a determination whether there is a substantial likelihood that the information discloses wrongdoing, a negative determination under the statute, resulting in a closure, is as quality driven as a positive determination resulting in a referral.** OSC's analysis of a whistleblower disclosure may result in a determination not to burden an agency with an inappropriate referral, thus promoting justice and protecting the merit system. Notwithstanding this difficulty in identifying a measure of quality, the individual whistleblower who initiates the disclosure, thus accessing the statutory protections, is more inclined to measure quality by whether or not his or her disclosure is referred. As such, the Indicator for Goal #2 for now reflects this single measurement.

## **USERRA Enforcement and Prosecution Program**

### **Background:**

With the passage of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Congress expanded OSC's role as protector of the federal merit system. USERRA is the law that protects the reemployment rights of persons who are absent from their respective civilian employment due to the performance of military duties. USERRA also makes it illegal for an employer to deny any benefit of employment on the basis of past, current, or future performance of military service.

As special prosecutor, OSC objectively reviews the facts and laws applicable to each complaint. Where the Special Counsel is satisfied that claimant is entitled to relief, then it may exercise its prosecutorial authority and represent the claimant before the MSPB and, if required, the U.S. Court of Appeals for the Federal Circuit.

In early 2005, OSC's role in enforcing USERRA again expanded. The Veterans Benefits Improvement Act of 2004 (VBIA), set up a Demonstration Project giving OSC, rather than the Department of Labor's Veterans Employment and Training Service (VETS), the exclusive authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit. Under the project, OSC also receives and investigates all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction regardless of the person's social security number. The original team of the three-year demonstration project ended on September 30, 2007, but Congress extended the program through the series of continuing resolutions. Eventually, Congress will determine whether OSC will continue to have investigative responsibility over federal sector USERRA claims.

OSC's USERRA Unit has attained exemplary results in the demonstration project cases through its aggressive and objective enforcement of service members' employment and reemployment rights. GAO was tasked with comparing the performance of OSC and DOL under the demonstration project, but focused on the two agencies' case tracking systems. OSC has an excellent case tracking system, but much more importantly for the veterans with claims, OSC achieved an outstanding rate of corrective action on behalf of veterans. If there were any doubts about the veracity of the corrective action totals, the number of corrective actions could have been verified with a few dozen calls by GAO to the veterans who received corrective action due to OSC's efforts.

### **Corrective Action Results:**

In FY 2007, OSC's USERRA Unit once again achieved impressive results on behalf of military service members, obtaining corrective action in a remarkable 35%, or over one-third, of the USERRA cases it closed during FY2007 (see **Table 8**). Moreover, the Unit anticipates filing several additional cases with the MSPB in the near future should the involved agencies not agree to resolve them voluntarily.

### **Resource Estimates:**

During FY 2008, the USERRA Unit will use approximately 8 FTE at a cost of \$1,185,000. Projecting the same number of FTE into FY 2009 would require approximately \$1,217,000.

### **Outreach:**

In addition to investigating and favorably resolving service members' USERRA claims, and litigating important cases, OSC has been very active in providing USERRA outreach and training. In FY 2007, the USERRA Unit



conducted eight trainings for federal agencies, two presentations for a federal employment sector professional association, and two federal personnel law briefings for its USERRA partner: the U.S. Department of Labor's Veterans' Employment and Training Service. Moreover, the Special Counsel was the keynote speaker at a USERRA conference sponsored by the Reserve Officers Association. The Unit's outreach even extended to the international level as its chief met with representatives of the Australian Defence Department's Office of Reserve Service Protection to discuss common issues and exchange ideas concerning service members' employment and reemployment rights.

**TABLE 7**

<b>Summary of USERRA Referral Activity</b>					
	<b>FY2003</b>	<b>FY2004</b>	<b>FY2005</b>	<b>FY2006</b>	<b>FY2007</b>
Pending referrals carried over from previous fiscal year	8	4	12	6	3
Referrals received from DOL during fiscal year	7	14	30	11	4
Pending Referrals closed	8	6	36	14	4
Pending referrals at the end of the fiscal year	4	12	6	3	3
Closed cases where corrective action was obtained (including corrective actions obtained in matters referred to litigation)	n/a	n/a	5	3	0
Closed cases where no corrective action was obtained	n/a	n/a	25	11	4

Litigation closed; no corrective action obtained	n/a	n/a	n/a	n/a	4
Litigation closed; corrective action obtained	n/a	n/a	3	1	0
Matters referred for litigation pending	n/a	n/a	2	1	2
Pending litigation matters carried over from prior FY	n/a	n/a	n/a	2	1

TABLE 8

Summary of USERRA Demonstration Project Activity <sup>a</sup>				
	FY2004	FY2005	FY2006	FY2007
Pending referrals carried over from previous fiscal year		0	54	95
Cases opened		111	168	142
<i>Cases closed</i>		57	126	123
Cases pending at the end of the fiscal year		54	96	114
Closed cases where corrective action was obtained		16	35	43
Closed cases where no corrective action was obtained		38	91	80
Closed cases referred for litigation		0	n/a	0

<sup>a</sup>Under VIBA, P.L. 108-454; OSC started receiving cases in Feb. 05.

### Educating the Federal Sector and Preventing Future Violations

In addition to the individualized corrective action that OSC secured on behalf of many service members, OSC endeavors to improve the federal merit system by obtaining systemic corrective action wherever appropriate. Systemic corrective action (i.e., a change in an agency's practice or policy) is warranted wherever a federal employer's practice or policy deviates from USERRA's requirements. In Fiscal Year 2007, OSC identified two common USERRA violations. The first involved the manner in which federal employers reemployed injured service members. For example, many federal employers are unaware of their obligation to seek placement assistance from U.S. Office of Personnel Management upon determining that they are unable to reemploy an injured service member. The second concerned the kinds of documentation that federal employers demanded where a service member requested a leave of absence due to military service. In response to those common violations, OSC prepared training documents that clearly identify and fully explain federal employers' obligations. Now, whenever either of those issues are identified during the course of an OSC USERRA investigation (regardless if the issue was one that the service member raised), the training document is sent to the involved agency with the request that the agency disseminate it to managers and human resources staff. In those cases where such documents were sent, the agencies were receptive to OSC's guidance.

## Goals and Results – USERRA Enforcement and Prosecution Program

OSC's Strategic Objective 4 is to protect veterans in the Federal workforce through enforcement of the Uniformed Services Employment and Reemployment Rights Act. The tables below describe the three operational goals supporting this strategic objective. But first, a note of explanation follows on each of the four types of USERRA cases that OSC receives - RE, DP-OD, DP-MX, and DP-TSA:

**1. RE Cases:** Under USERRA, certain federal sector claims are investigated by U.S. Department of Labor, Veterans' Employment and Training Service (VETS). In the event that VETS is unable to resolve such a claim, a claimant has a right to have his or her claim referred to OSC for a determination on whether OSC will represent the claimant before the U.S. Merit Systems Protection Board (MSPB). Such cases are identified by OSC as "RE cases."

RE cases have already been investigated by VETS and reviewed by a DOL Office of Regional Solicitor (RSOL). The USERRA Unit receives the VETS investigative file and a legal memorandum from RSOL indicating whether RSOL recommends that OSC represent the claimant. OSC's USERRA Unit reviews the information and makes a "de novo" determination.

It is to be noted that while RE cases have already been investigated by VETS, OSC has found that: further investigation is often warranted, e.g., key witnesses need interviewing; important documents need to be obtained; too much time lapsed between alleged initial violations and their referral to OSC. In such cases, the USERRA Unit will always contact the agency and relevant witnesses to obtain the information necessary to allow it to make a well-reasoned determination regarding the prosecutorial merit of a given claim.

The need and extent of any supplemental investigation affects the processing time of RE cases and is reflected in the performance indicator.

**2. DP-OD cases:** Pursuant to the demonstration project established by the Veterans Benefits Improvement Act of 2004 (VBIA), OSC was given the exclusive authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit. DP-OD cases are federal sector USERRA claims filed by persons having an odd-numbered social security number. DP-OD cases come from two sources: 1) from VETS, and 2) directly from the claimant.

The USERRA Unit conducts an investigation of DP-OD cases and determines whether OSC will represent the claimant in an USERRA action before the MSPB. The performance indicator reflects the time reasonably expected to investigate such cases.

**3. DP-MX cases:** Under the demonstration project, OSC also investigates all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction regardless of the person's social security number. These are also known as "mixed claims".

The USERRA Unit conducts an investigation of DP-MX cases and determines whether OSC will represent the claimant in a USERRA or prohibited personnel practice action before the MSPB.

The processing time of DP-MX cases is affected by 1) additional complexity of such cases and 2) the USERRA Unit's adoption of OSC's practice in prohibited personnel practice cases of granting a claimant 13 days to respond to OSC's preliminary determination regarding prohibited personnel practice allegations. The performance indicator incorporates those factors.

**4. DP-TSA cases:**

On June 9, 2005, the MSPB held in *Spain v. Department of Homeland Security* that USERRA does not apply to Transportation Security Administration (TSA) Security Screeners or TSA Supervisory Security Screeners and, therefore, the MSPB does not recognize jurisdiction over such cases. Consequently, OSC is unable to prosecute USERRA actions involving TSA Security Screeners or TSA Supervisory Security Screeners.

Notwithstanding the *Spain* decision, TSA voluntarily permits OSC to investigate USERRA claims and reports its findings and recommendations for corrective action to TSA management officials.

The performance indicator for these types of cases reflects the MSPB's decision in the *Spain* case.

<b>Goal 1: TO ENFORCE THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT THROUGH TIMELY CASE PROCESSING</b>				
<b>USERRA MISSION</b>	<b>USERRA A: RE Cases</b>	<b>USERRA B: DP-OD Cases</b>	<b>USERRA C: DP-MX Cases</b>	<b>USERRA D: DP-TSA Cases</b>
<b>PERFORMANCE INDICATORS</b>	<b>Indicator A:</b> Average number of days in which the case is settled, closed or a decision to litigate is made.	<b>Indicator A:</b> Average number of days in which the case is settled, closed or a decision to litigate is made.	<b>Indicator A:</b> Average number of days in which the case is settled, closed or a decision to litigate is made.	<b>Indicator A:</b> Average number of days in which a "no merit" determination is made or a request for voluntary corrective action is sent to TSA.
<b>FY 2006 TARGET</b>	90%	80%	80%	80%
<b>FY 2006 RESULTS</b>	50%	62%	74%	33%
<b>FY 2007 TARGET</b>	75 days	160 days	160 days	160 days
<b>FY 2007 RESULTS</b>	33 days	107 days	171 days	90 days
<b>FY 2008 TARGET</b>	75 days	140 days	160 days	140 days
<b>FY 2008 RESULTS</b>				
<b>FY 2009 TARGET</b>	75 days	NA	NA	NA
<b>FY 2009 RESULTS</b>				

Comments for Goal #1:

1. For RE cases in FY 2007, OSC achieved resolution in an average of 33 days, which was an improvement over the FY 2006 result. There are few RE cases each year, and they are often very complex. For these cases, OSC normally has to reinvestigate the case to determine the facts and the situation. 75 days is aggressive, because OSC never knows the complexity of these referred cases, nor whether any of the work performed by DOL is usable.

2. For the Demonstration Project cases, OSC has lowered the FY 2008 target from 160 days to 140 days for DP-OD cases, and from 160 days to 140 days for DP-TSA cases. Baseline data in FY 2006 was 115 days for DP-OD cases and 161 days for DP-TSA cases. The USERRA unit is down to 8 employees from its high of 10 employees and OSC will likely not staff it back up to 10 employees unless and until Congress definitely decides to entrust OSC with the investigations of all Federal Sector USERRA claims. Therefore the target of 140 days for these two types of Demonstration project cases is aggressive.

3. For DP-MX cases, the average number of days to resolve the cases was 171, so the USERRA Unit failed to meet the FY 2007 target. DP-MX cases contain both USERRA and Prohibited Personnel Practice (PPP) allegations (whereas DP-OD cases contain only USERRA allegations). Therefore, because DP-MX cases contain more allegations and are more complex, they generally take longer to investigate than DP-OD cases. Accordingly, in FY 2008, OSC will set the target for DP-MX cases at 160 days.

Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS		
USERRA MISSION	USERRA CASES	
PERFORMANCE INDICATORS	Indicator A: % favorable outcomes in cases determined by OSC to be meritorious = (# successful meditations + # of settlements achieved + # of successful litigations) / (# meritorious cases)	Indicator B: # of "test cases" filed
FY 2006 TARGET	90%	Inappropriate to set a specific target
FY 2006 RESULTS	100%	0
FY 2007 TARGET	90%	Inappropriate to set a specific target
FY 2007 RESULTS	100%	1
FY 2008 TARGET	95%	Inappropriate to set a specific target
FY 2008 RESULTS		
FY 2009 TARGET	99%	Inappropriate to set a specific target
FY 2009 RESULTS		

#### Comments for Goal #2

##### 1. Performance Indicator A

Where the Office of Special Counsel is satisfied that claimant is entitled to relief, then it may exercise its prosecutorial authority and represent the claimant before the MSPB and, in certain circumstances, the U.S. Court of Appeals for the Federal Circuit. See 38 U.S.C. §§ 4324(a)(2)(A) and (d)(2). As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or via litigation.

Typically, OSC will prosecute cases it believes are meritorious but where the involved agency is unwilling to resolve them voluntarily. OSC is confident of its ability to prosecute successfully cases warranting corrective action. "Meritorious cases" under this performance indicator are to be distinguished from the "test cases" found under Performance Indicator B.

## 2. Performance Indicator B

It is foreseeable that OSC will desire to file cases where the law is not clear (e.g., novel legal issues requiring “test cases” to define the bounds of the law) but will establish legal precedent benefiting all service members, if the litigation is successful. The outcomes of these types of cases do not depend on OSC’s skill in weighing of the evidence, applying of law, and trying the case. Instead, the cases involve questions of law.

It is difficult to define a performance goal that accurately reflects “success” or “failure” of OSC’s identification of cases that are fertile for expanding the law. The mere fact of filing test litigation with an eye toward expanding the law, however, seems appropriate. Performance Indicator B captures this concept. OSC will track how often it files this type of case. However, a target can not be identified because OSC cannot determine how often appropriate “test cases” will come into the agency from claimants.

<b>Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES</b>		
<b>USERRA MISSION</b>	<b>USERRA CASES</b>	
<b>PERFORMANCE INDICATORS</b>	<b>Indicator A: (# of USERRA trainings and outreaches given) / (# of invitations to provide USERRA training or outreach visits {where inviting agency sponsors OSC})</b>	<b>Indicator B: (# of USERRA trainings and outreaches given) / (# of invitations to provide USERRA training or outreach visits {where OSC pays expenses})</b>
<b>FY 2006 TARGET</b>	90%	50%
<b>FY 2006 RESULTS</b>	NA	100%
<b>FY 2007 TARGET</b>	90%	50%
<b>FY 2007 RESULTS</b>	100%	100%
<b>FY 2008 TARGET</b>	90%	75%
<b>FY 2008 RESULTS</b>		
<b>FY 2009 TARGET</b>	90%	75%
<b>FY 2009 RESULTS</b>		

### Comments for Goal #3

OSC recognizes the federal sector’s need for USERRA training although it has no statutory obligation to provide it. Thus, the USERRA Unit regularly accepts invitations to provide outreach services designed to educate federal personnel on USERRA issues so that agencies comply with the law, including presentations conducted at national events such as the Federal Dispute Resolution conference. In individual USERRA cases where OSC believes an agency would benefit from such training, OSC requests that the agency sponsor OSC-conducted USERRA training at agency expense. Additionally, the USERRA unit maintains telephonic and e-mail “hot lines” for answering USERRA-related questions from the public and private sectors.



The target for Indicator A is not set at 100% because OSC needs the flexibility to decline one or two outreaches each year, due to trials, investigations and booked schedules.

Usually there are two to four outreaches each year that fall under Indicator B, for which OSC will bear the expense. The target will go up to 75% in FY 2008 and FY 2009, but OSC needs the flexibility to decline one unreimbursed outreach each year, due to trials, investigations, and booked schedules.

## OSC and the Future of USERRA Enforcements

The original term of the 32-month Demonstration Project created by the Veterans Benefits Improvement Act of 2004 ended at the close of FY 2007. Congress has extended the program during the four continuing resolutions of FY 2008 but has not yet decided to entrust the entire federal sector USERRA responsibility to OSC.

There are several different scenarios in which OSC could be called upon to perform investigatory USERRA responsibilities on a permanent basis for the benefit of the members of the United States armed forces. Each of the scenarios would have a different cost structure for OSC. Rather than present various scenarios and their associated costs here, we will simply make four points:

**1. Technical Expertise.** The agency currently has substantial technical USERRA expertise, and has a training unit in place to train new employees. This expertise has already resulted in increased correction action rates and quick processing times for those members of the military for which OSC has responsibility under the Demonstration Project. The OSC Investigation and Prosecution Division also has expert investigative and prosecutorial firepower that could be brought to bear on any expanded USERRA responsibility.

**2. Management expertise.** No matter what the requirements would be of an expanded USERRA role for the U.S. Office of Special Counsel, the agency has the experienced management in place to develop a plan, implement it, and achieve highly efficient results for the veterans and members of the military that have rights under USERRA. The current head of the USERRA investigations at OSC is an SES attorney with 27 years of investigation, analysis, and litigation experience. The unit has several experts in USERRA federal sector law and regulations.

**3. Priority.** Protecting the nation's veterans, guardsmen, and reservists has always been one of the highest of all priorities for Special Counsel Bloch at OSC. Taking on an expanded role in providing expeditious enforcement for these brave Americans through USERRA would be an honor for the agency.

**4. Cost models.** OSC is able to provide further information regarding current cost structure or any other USERRA related information.

## Outreach Program

The Outreach Program assists agencies in meeting the statutory mandate of 5 U.S.C. § 2302(c). This provision requires that federal agencies inform their workforces about the rights and remedies available to them under the whistleblower protection and prohibited personnel practice provisions of the Whistleblower Protection Act, in consultation with the OSC.

In an effort to assist agencies in meeting the statutory requirement, in FY 2002, OSC designed and created a five step educational program, the 2302(c) Certification Program. This program gives guidance to agencies and provides easy-to-use methods and training resources to assist agencies in fulfilling their statutory obligation. Agencies that complete the program receive a certificate of compliance from OSC.

The 2302(c) Certification Program was piloted by the Office of Personnel Management (OPM) in the spring of 2002 and OPM received the first-ever certificate of compliance in May of that year. Shortly thereafter, OSC began working with ten large agencies on participation in the program and offered the program government-wide in October of 2002. Through FY 2007, 57 agencies have been registered in the program and are working towards certification, and 32 agencies have been certified.

During FY 2007, OSC continued to certify more agencies through its outreach program. As agencies implement the certification process, agency employees who might previously have been unaware of their rights and remedies through OSC are becoming informed. In addition to OSC's certification program, OSC continues to provide outreach programs to agencies requesting them, or as part of OSC settlements in particular matters.

Finally, OSC has continued its policy of issuing press releases when OSC files a significant litigation petition, or achieves significant corrective or disciplinary action through settlement. Most of these generate considerable press coverage. This contributes to employee and manager awareness of the merit system protections enforced by OSC.

### **PART 3 - FY 2009 BUDGET REQUEST - ADDITIONAL INFORMATION**

OSC is requesting \$17,468,000. This is the same amount as the agency's FY 2008 appropriation, which included \$1,100,000 for computer forensics associated with the investigations of its Special Task Force. The \$17,468,000 includes funding for at least one additional FTE for Special Task Force work, as well as funding to cover the FY 2008 and projected FY 2009 salary increases.

This one additional FTE will bring the agency to 111 employees during FY 2009. This number of FTE is necessary to manage and process the agency's elevated workload (since FY 2000) of prohibited personnel practice complaints, whistleblower disclosures, Hatch Act complaints, Hatch Act cases, Hatch Act advisory opinions, special task force investigations, and USERRA cases in a manner that precludes the formation of case backlogs.

#### **BUDGETARY FACTORS**

##### **Increased Expenses:**

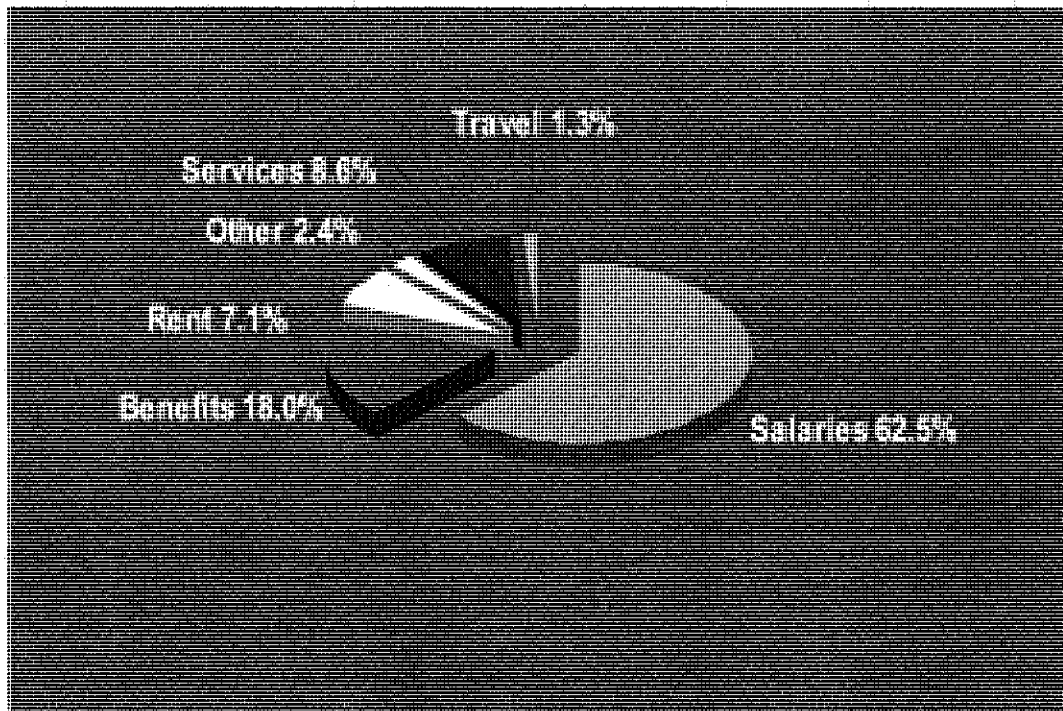
Notable increased expenses for OSC include the higher cost of OSC's existing headquarters rented space and field office rented spaces, the cost of accounting outsourced activities (which has increased 130% since FY 2005), the higher cost of legal information services (12% increase), and the higher cost of mandatory security charges payable to DHS (35% increase). An additional \$32,000 will also be needed for Microsoft Enterprise Software Licenses. OSC's transit subsidy costs are also increasing. As the agency operates with more employees than it has in the past, a marginal increase in expenditures for supplies, travel, equipment, and other services can be expected. The agency's outsourced E-travel expenses have also increased.

##### **Information Technology Necessities:**

1. OSC needs to update its outdated computers and convert its case tracking system to a web-based platform. OSC will accomplish as much as possible towards these information technology needs without jeopardizing its ability to pay the salary and benefits of 111 FTE during FY 2009.
2. The OMB-mandated conversion of the agency's infrastructure (network backbone) to Internet Protocol Version 6 (IPv6) will receive as much funding as possible in order to meet the deadline without sacrificing funding needed for salaries, benefits, or rent. All agency networks are supposed to interface with this infrastructure by June 2008.

## Components of Budget Request:

The following chart estimates how the FY 2009 request will be distributed on a percentage basis:



Field office expenditures are almost entirely driven by the number of employees in the field offices. Below is a list of ranges by field office. Staffing levels may be slightly adjusted during the year within these ranges in order to properly meet the management needs of the agency, and its individual units.

Headquarters	70-83 employees
Midwest Field Office	5-8 employees
Dallas Field office	7-11 employees
Oakland Field Office	7-10 employees
Washington DC Field Office	7-11 employees

**Table - Budget Object Classification of Obligations**

<b>Budget Object Classification of Obligations: FY2008-FY2009</b>			
<i>(in thousands of dollars)</i>			
<b>Budget Object Classification of Obligations</b>	<b>FY2007 Actual</b>	<b>FY2008 (projected)</b>	<b>FY2009 (projected)</b>
11.0 Personnel compensation	9,747	10,556	10,926
12.0 Civilian personnel benefits	2,811	2,980	3,135
13.0 Benefits to former personnel	0	15	15
21.0 Travel and transportation of persons	130	230	233
22.0 Transportation of things	15	20	21
23.1 Rental payments to GSA	1,189	1,214	1,238
23.3 Communications, utilities and misc. charges	95	100	105
24.0 Printing and reproduction	20	21	21
25.0 Other services	932	2,078	1,508
26.0 Supplies and materials	174	104	106
31.0 Equipment	140	150	160
32.0 Land & Structures	0	0	0
42.0 Tort Claims	0	0	0
<b>99.9 Total</b>	<b>15,252</b>	<b>17,468</b>	<b>17,468</b>

Detailed notes concerning the object classes in the table:

Object Class 21.0: Historically, the agency usually expends \$200,000 to \$300,000 for travel. The unique budget factors present in FY 2007 required the agency to restrict travel to a lower level. The agency's video teleconferencing system does now fortunately provide the ability to conduct certain investigations without travel. But face-to-face is extremely important for certain types of investigations. Considering these factors, in FY 2009, OSC projects requirements of \$233,000.

Object Class 23.1: Rental Payments to GSA in FY 2009 will rise approximately 2% over FY 2008 levels.

Object Class 25.0: In the Other Services category, over 40% of this amount is required to cover OSC's Interagency Agreement with the National Business Center for accounting services, travel services, and procurement system services. Also included here are the following items: approximately \$75,000 for Westlaw fees, (an 8% increase), \$50,000 for training, \$37,000 for the FY 2009 financial auditors, \$92,000 for the agency's conversion to a web-based case tracking system, \$40,000 for program support for the document management system, \$60,000 in DHS reimbursement charges for facility security related services (a 10% increase), \$33,000 for Microsoft Enterprise Licenses, \$47,000 for annual maintenance contracts, \$34,000 for Oracle upgrades, \$33,000 for the agency's HSPD-12 program and fees, \$44,000 for the required conversion to Internet Protocol v6, and \$13,000 for payroll services from the National Finance Center.

Object Class 26.0: The \$106,000 projected for this object class represents subscriptions, journals, materials and supplies of all types, including paper and toner for the headquarters and all field offices.

Object Class 31.0: In order to operate at its overall agency wide FY 2009 budget justification funding level, OSC plans to keep expenditures low in this category. However, the agency is behind in replacing certain aspects of its aging hardware, notably the laptops used by employees of the agency to do their day-to-day work, as well as several servers. Therefore, certain hardware and software purchases must be made during FY 2009 in this area.

**Table - Analysis of Resources**

<b>Analysis of Resources: FY2007-FY2009</b> <i>(in thousands of dollars)</i>			
<b>Description</b>	<b>FY2007 (Actual)</b>	<b>FY2008 (projected)</b>	<b>FY2009 (projected)</b>
Budget authority	15,524	17,468	17,468
Outlays	14,147	15,918	15,918
Approximate full-time equivalent employment (FTE) work years	104	110	111

## **PART 4 - PERFORMANCE UNDER THE PRESIDENT'S MANAGEMENT AGENDA**

OSC has developed a results-oriented management agenda that includes many of the core criteria in the President's Management Agenda.

### **Strategic Management of Human Capital**

OSC's human capital strategy is aligned with its mission, goals, and organizational objectives, as it is: 1) integrated into Budget and Strategic Plans; 2) consistent with OPM's human capital balanced scorecard and OMB's plan for strategic management of human capital; and 3) complies with standards for internal accountability systems to ensure effective merit-based human resource management as described below.

OSC uses existing personnel flexibilities and tools, including leave flexibilities, alternative work schedules, and a fairly extensive telework program. In FY 2006, OSC also drafted and implemented a successful student loan repayment / employee retention program in which approximately 20 employees have participated. In FY 2007, OSC finalized a fitness program for its employees. OSC's performance management systems allow managers to differentiate between high and low performers through the use of appropriate incentives and consequences.

The agency is addressing gaps in human resources competencies talent in its program areas through internal development, upward mobility positions, legal internships, in-house mission-specific training, and hiring additional personnel. OSC also has a highly developed cross training program that enables employees to learn new skills and participate in the work of several units. OSC also captures valuable information and ideas of departing employees through extensive exit interviews. This information is used by senior managers to refine and improve work processes.

In FY 2007, OSC continued its strategic management initiatives by further refining the reorganization of 2005, in which a Midwest field office, USERRA Unit, Training Unit, and a Document Control Branch were created. OSC now has set agency and division goals for the age of cases under review by the agency. Performance plans are in place for SES members and managers that link to the agency's mission and to strategic goals that are in place for the individual divisions. OSC also now has measurable finite performance goals in place for each individual employee.

### **Competitive Sourcing**

OSC is a small agency, with a highly specialized inherently government mission. 84% of its FTE perform inherently governmental work, and 16% of its FTE are considered commercial in nature. According to OMB Circular A-76 and supplemental guidance issued by OMB, government performance of commercial functions is permitted when, as is the case at OSC, the position activity total is 10 FTE or less.

However, while OSC is small enough that this guidance may exempt a large proportion of OSC's commercial administrative functions, OSC is dedicated to the intent of the principles of outsourcing cost-effective performance whenever appropriate. Therefore, personnel resources used to perform any functions considered commercial at OSC are regularly assessed to determine whether they might be more effectively performed by a contractor. OSC looked in depth at this issue in a management assessment it commissioned in the summer of 2004.



## **Improved Financial Performance**

OSC's switch to using NBC for outsourced accounting services has provided a unique opportunity to participate in the design of the processes used for its accounting, and to design specific reports that reflect the information most helpful to OSC in managing its funds. Contracting these functions out has provided OSC with more specialized expertise at a lower cost than could be accomplished internally. NBC provides OSC with a detailed financial review every quarter. NBC will also provide up-to-date financial information on day-to-day operations for payroll, procurement and travel, as needed by OSC.

As a small agency without an Inspector General, OSC generally submits a combined Inspector General (IG) Act and Federal Manager's Financial Integrity Act report each October. OSC normally reports that it relies on audits and other reviews of NBC's operations by the OIG and Office of the Chief Financial Officer (OCFO) at the Department in the Interior as well as information received directly from NBC, for information about any significant issues relating to the services provided to OSC.

Historically, OSC received a waiver from OMB for the requirement to have an audit of the agency's financial statements. Since FY 2004, however, OSC has not received an audit waiver. An audit firm spent time at OSC headquarters and with the National Business Center personnel who currently perform the accounting functions for OSC. This audit was completed in November of 2007. The auditor gave OSC an unqualified audit opinion on our annual financial statements, finding no material weaknesses. The results were similar to FY 2004, FY 2005 and FY 2006 audits.

## **Expanded Electronic Government**

OSC provides one-stop service for those who wish to file a complaint or disclosure, or request a Hatch Act advisory opinion. A person can file a Prohibited Personnel Practices complaint on-line. Most of our PPP complaints come into the agency via this channel. A person can also make a complete Whistleblower Disclosure on-line and a Hatch Act advisory opinion may be solicited through the web site.

Those who wish to communicate with a knowledgeable OSC staffer through one of the agency's telephone hot lines will find the relevant information on the web site. OSC's web site is linked to FirstGov, as well as other agency web sites, such as those for the Office of Personnel Management, the Equal Employment Opportunity Commission, and the Office of Government Ethics, among many others. OSC's Information Technology Branch (ITB) staff are continually improving OSC's web site. User sessions on OSC's web site have continued to grow: FY 2007 total number of user sessions was 951,725. This is a 13% increase over the FY 2006 total number of user sessions.

## Endnotes

1 Public Law No. 103-94 (1993), codified in scattered sections of 5 U.S.C. and 12 U.S.C.

2 Public Law No. 103-353 (1994), codified at 38 U.S.C. § 4301, et seq. The Veterans' Employment Opportunities Act of 1998 (Public Law No. 103-424) also expanded OSC's role in protecting veterans. The act made it a prohibited personnel practice to knowingly take, recommend, or approve (or fail to take, recommend, or approve) any personnel action, if taking (or failing to take) such action would violate a veterans' preference requirement. See 5 U.S.C. § 2302(b)(11). (The former § 2302(b)(11) was re-designated as § 2302(b)(12).).

3 Public Law No. 103-424 (1994), codified in various sections of title 5 of the U.S. Code. The provision making federal agencies responsible, in consultation with OSC, for informing their employees of rights and remedies under the Whistleblower Protection Act appears at 5 U.S.C. § 2302(c).

4 Public Law 107-71 (2001).

5 Unless noted otherwise, all references after this to prohibited personnel practice complaints include complaints alleging other violations of civil service law, rule, or regulation listed at 5 U.S.C. § 1216, except for alleged violations of the Hatch Act.

6 When the Complaints Examining Unit makes a preliminary determination to close a complaint without further investigation, it must by law provide complainants with a written statement of reasons, to which they may respond. On the basis of the response, if any, the unit decides whether to close the matter, or refer it to the Investigation and Prosecution Division.

7 Compare, for example, 5 U.S.C. § 1214(a)(1)(A) ("The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.") with 5 U.S.C. app. 3, §10(a) ("[E]ach Inspector General ... is authorized— ... (2) to make such investigations and reports relating to the administration of the programs and operations of the [agency] as are, in the judgment of the Inspector General, necessary or desirable[.]") and § 7(a) ("The Inspector General may receive and investigate complaints or information from an employee of the [agency] concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety."). OSC cannot, however, investigate complaints over which it has no jurisdiction, with the result that some complaints are closed without further action after receipt and review. During FY2004, for example, OSC lacked jurisdiction in 617 (or 31.4%) of the complaints received, leaving 1,347 complaints (69%) in which OSC was required by statute to conduct an inquiry. In addition, discrimination based on race, color, religion, sex, or national origin, age, or handicapping condition is illegal under laws enforced by the Equal Employment Opportunity Commission (EEOC), and is also a prohibited personnel practice under 5 U.S.C. § 2302(b)(1). However, since procedures for investigating discrimination complaints have already been established in the agencies and the EEOC, the Special Counsel will normally avoid duplicating those procedures and will defer to those procedures rather than initiate an independent investigation. 5 C.F.R. § 1810.1. When a matter is not referred for further investigation, CEU must by law provide complainants with a written statement of reasons, to which they may respond. 5 U.S.C. § 1214(a)(1)(D). On the basis of the response, if any, CEU decides whether to finalize its preliminary determination to close the matter, or to refer the matter to an Investigation and Prosecution Division. 11 5 U.S.C. § 1214(b)(2)(C). 11 Corrective action seeks a remedy for any injury to the individual complaining employee, such as back pay or reinstatement, while disciplinary action seeks to impose discipline on the perpetrator of the PPP.

8 Corrective action seeks a remedy for any injury to the individual complaining employee, such as back pay or reinstatement, while disciplinary action seeks to impose discipline on the perpetrator of the PPP.

9 Several factors are believed to account for or contribute to this workload increase. They include: publicity about an increased number of high-profile cases handled by OSC, including whistleblower disclosures, and four Public Servant Awards issued to whistleblowers by OSC; increased public interest in elections since the 2000 presidential election, the public interest generated by the 2004 campaigns; OSC's 2302(c) Certification Program; significant improvements in OSC's web site, increasing awareness by government employees and others of OSC and its functions.

10 [http://www.osc.gov/documents/osc\\_lst3.pdf](http://www.osc.gov/documents/osc_lst3.pdf)



**FISCAL YEAR 2010  
CONGRESSIONAL BUDGET JUSTIFICATION  
AND PERFORMANCE BUDGET GOALS**



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## **PART 1 – EXECUTIVE SUMMARY**

The following budget justification shows that on matters ranging from protecting passengers in the nation's air travel, protecting our borders, rooting out corruption, identifying waste in federal contracting and grants to save taxpayers money, correcting discrimination against service members returning from duty, to disciplining high level officials for whistleblower retaliation and use of official authority to affect elections - the U.S. Office of Special Counsel has fulfilled its role as an independent prosecutorial and investigative agency charged with bringing greater integrity and efficiency to the merit system. Granting this budget request will assist this agency in sending the message that independent agencies that discover fraud, waste, and abuse of authority are important to the healthy functioning of the United States; that we honor those who bring these matters to light.

In last year's budget justification, OSC reported how the agency had continued to enhance its protection of the merit system and to provide even more responsive assistance to aggrieved federal employees. Also reported was the fact that through hard work and diligence, the chronic problem of backlogged Prohibited Personnel Practice cases, Hatch Act cases and Disclosure Unit cases did not return. In FY2008, however, the incoming caseloads increased again, in some units very dramatically. OSC's streamlined processes continue to contribute to the agency's ability to handle the cases, but it is crucial that OSC receive enough funding to enable it to operate at the level of 111 FTE for the entire FY 2010.

### **Summary of Request**

OSC is requesting \$18,495,000 in FY 2010. This amount includes funding for the salaries and benefits of the agency's 111 FTE, including the salary increase of January 2009 and the projected increase of January 2010. It also includes funds to cover the agency's rent increase.

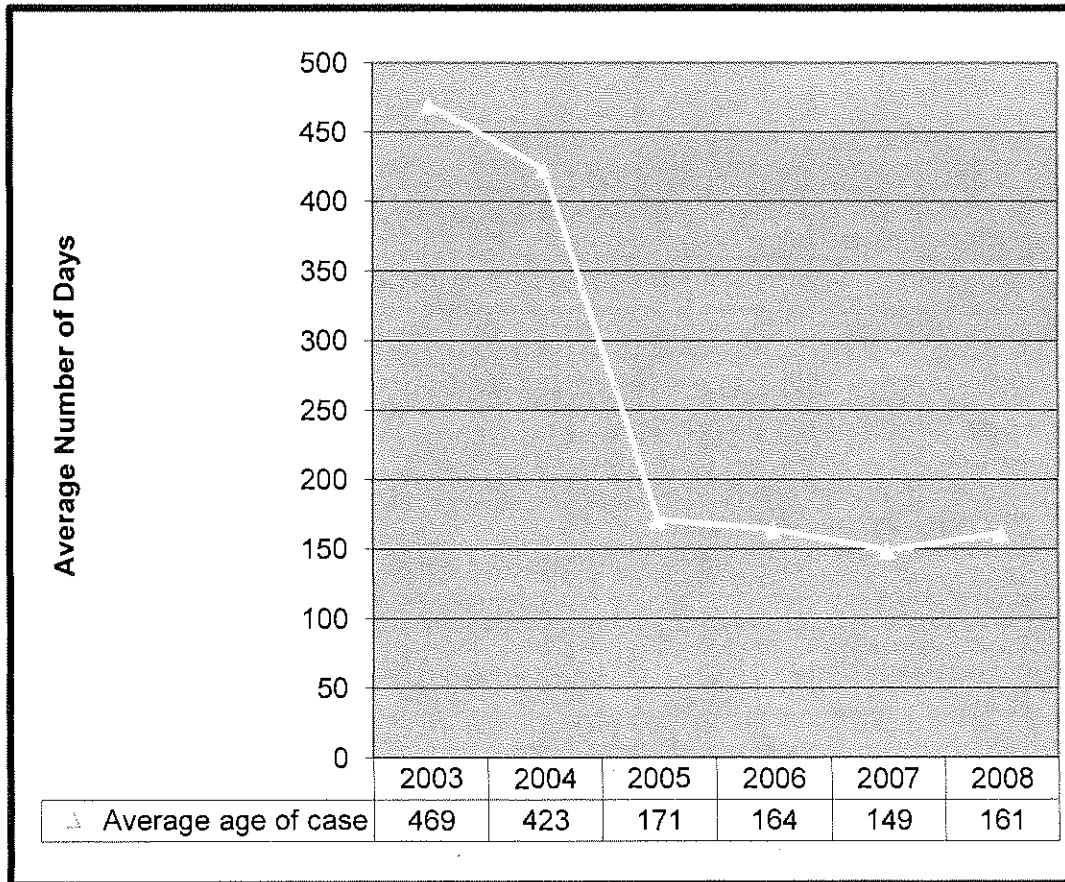
### **OSC's Mission**

The U.S. Office of Special Counsel's primary mission is to safeguard the merit system in federal employment by protecting employees and applicants from prohibited personnel practices (PPPs), especially reprisal for whistleblowing. In addition, the agency operates a secure channel for federal whistleblower disclosures of violations of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; and substantial and specific danger to public health and safety. OSC also has jurisdiction under the Hatch Act to enforce restrictions on political activity by government employees. Finally, OSC enforces federal employment rights secured by the Uniformed Services Employment and Reemployment Rights Act (USERRA).

### **Graphical Highlights of OSC's Successes**

Over the last four years, OSC has made progress on several fronts. For example, a reorganization of the agency has borne fruit in terms of a streamlined structure and more efficient standard operating procedures in the Investigation and Prosecution Division. OSC now reaches the meritorious cases faster, seeking settlements or initiating prosecutions before evidence becomes stale and witnesses' memories fade, which brings swifter justice to those Federal employees served by the Office of Special Counsel. Also, increased staffing in the Hatch Act and Disclosure Units have led to more efficiency and greater output in those components.

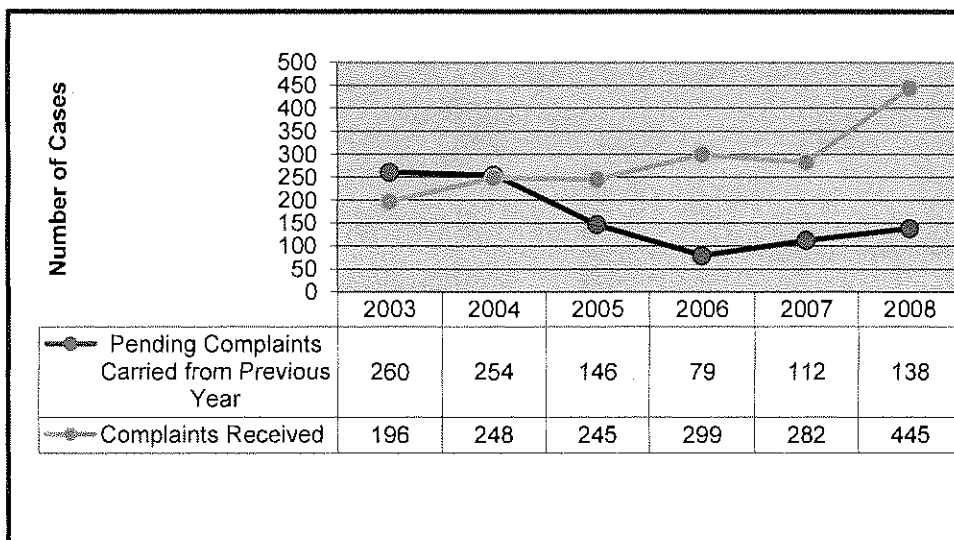
### Hatch Act Unit- Average Processing Time per Complaint



OSC's Hatch Act Unit has reduced its case processing time dramatically since FY 2003. The average number of days to process a case now is approximately one third of what it was in FY 2003.

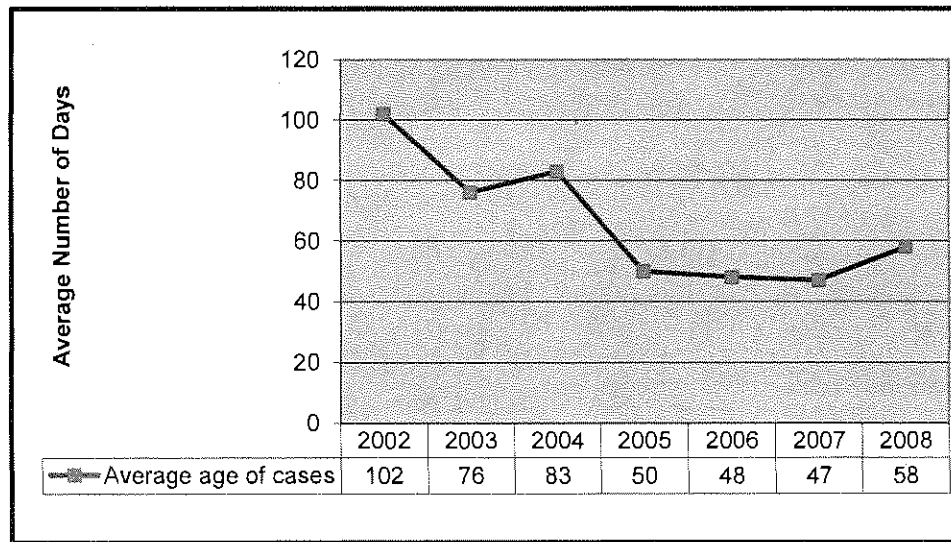


## Hatch Act Complaints



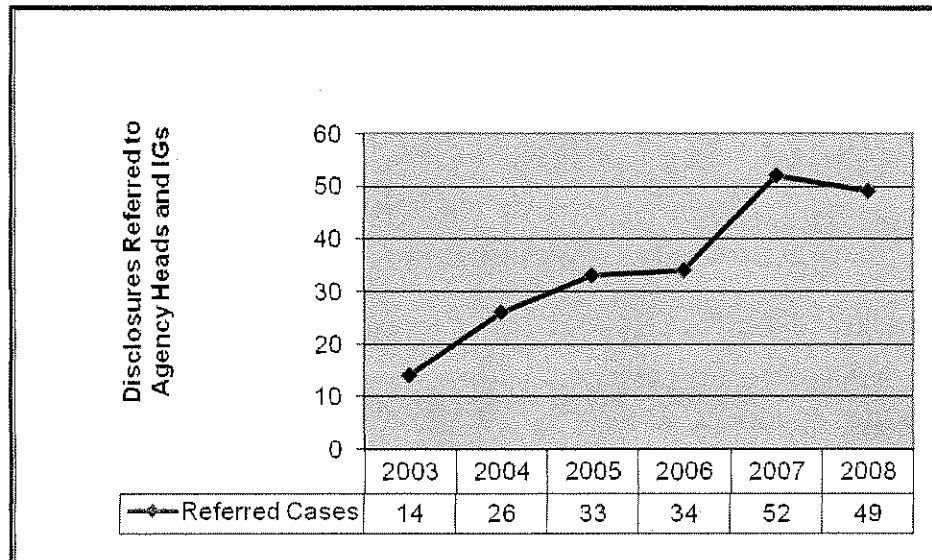
Starting in FY 2005, as OSC reduced its processing time for Hatch Act complaints, the number of pending complaints carried forward from the previous fiscal year sharply declined. From FY 2003 to FY 2006, the overall decline in processing time was 70%. But now in FY 2008, given that the number of complaints received has increased by 128% since FY 2003, the number of complaints pending at the end of the year is beginning to rise. Though OSC's Hatch Act Unit has become much more efficient, the workload has become nearly overwhelming.

## Complaints Examining Unit - Average Processing of PPP Cases in the Unit



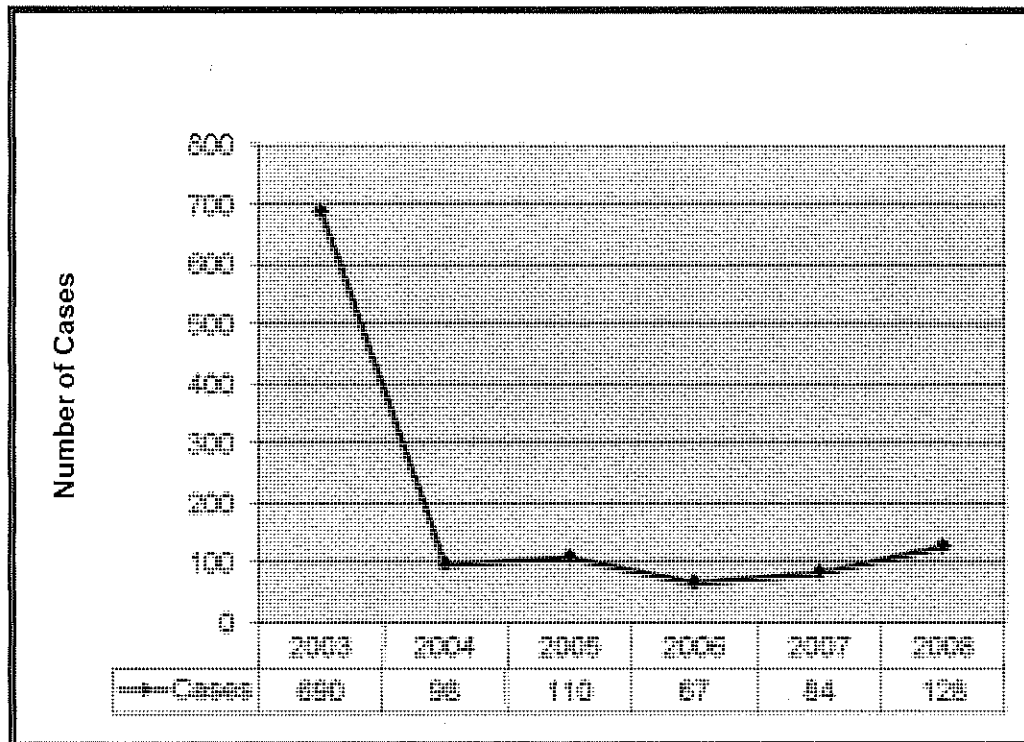
This chart shows the average number of days that a Prohibited Personnel Practice case remained in OSC's Complaints Examining Unit, before the case was either closed or referred to OSC's Investigation and Prosecution Division for further investigation. Though the processing times are below where they used to be years ago, they are inching back upwards as OSC faces increasing caseloads.

## Disclosure Referrals to Agency Heads



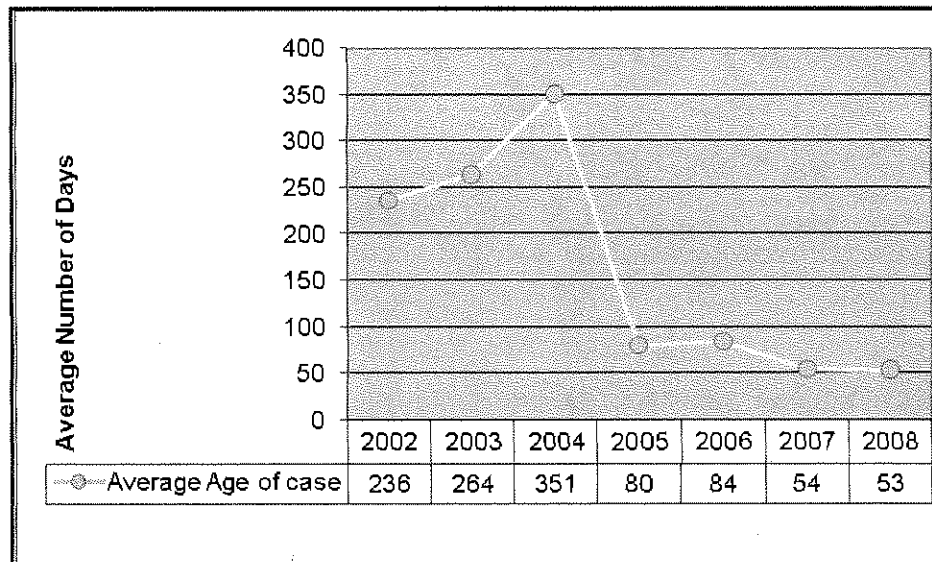
When the Special Counsel analyzes a whistleblower disclosure and determines there is substantial likelihood of wrongdoing, he refers the matter to the head of the appropriate agency, who is then required to internally investigate the matter and report the results to OSC, the Congress, and the President. Even though caseloads in the Disclosure Unit are continuing to rise, OSC's Disclosure Unit continues to very carefully sift through each of them, in order to find the ones that warrant referral to the appropriate agency head.

## Disclosure Unit Cases Pending at End of Year



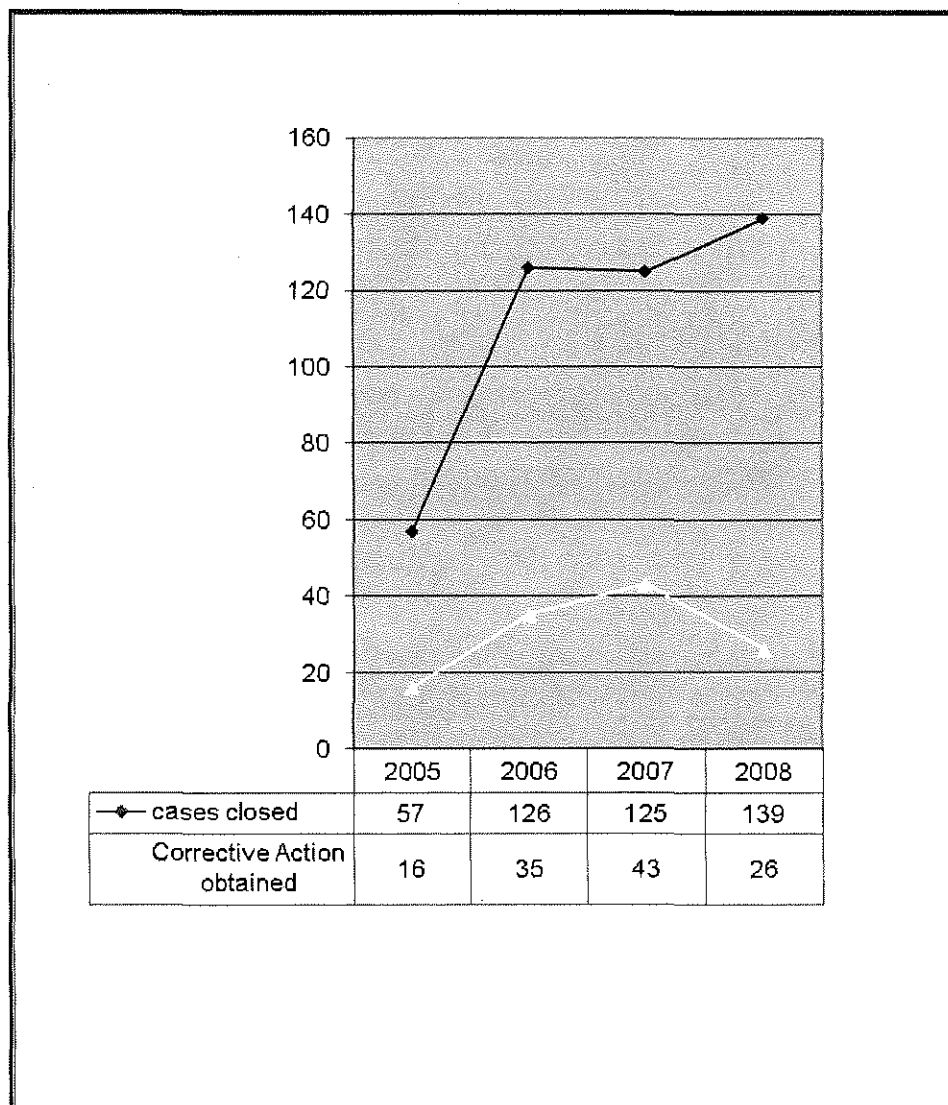
In FY 2003, the Disclosure Unit had a backlog of whistleblower disclosures. OSC reduced the backlog by FY 2004, and has prevented a resurgence of backlog since then. However, the increased volume of disclosures received in FY 2008 resulted in a higher number of pending disclosures at the end of FY 2008.

### Disclosure Unit - Average Processing Time per Disclosure



This chart shows the improvement in processing time in OSC's Disclosure Unit. The average processing time for disclosures in FY 2008 was 51 days. This was an 85% reduction from the high of FY 2004 (an average of 351 days).

## USERRA Demonstration Project



The USERRA Demonstration Project began in February of FY 2005. Since then, OSC achieved very high rates of corrective actions on behalf of members of the armed forces. The project ended at the end of 2007, and OSC's USERRA Unit worked very hard during FY 2008 towards finishing off the cases received under the project.

From the preceding graphs it is clear that OSC's incoming caseloads continue to rise. There are a number of factors which contribute to these increases. For example, a string of Hatch Act cases involving high-profile employees over the last three years has resulted in significant national press coverage. There is now a very heightened awareness of the Hatch Act among Federal employees. OSC received 445 Hatch Act complaints in FY 2008, an increase of 58% over FY 2007. One might be tempted to think that this large increase is due to the presidential election year and that the number of complaints will then decline. But history does not support that explanation. In the last presidential election year, FY 2004, OSC received 248 complaints, an increase of 27% over FY 2003. But then in FY 2005, the complaints stayed constant with FY 2004, and the number received jumped upwards by 21% during FY 2006, the non-presidential election year. We expect there to be approximately 500 Hatch Act complaints to OSC during upcoming non-presidential election year FY 2010.

### OSC'S SUCCESSES IN FY 2008

- 1) **FAA Safety.** OSC recently oversaw the completion of investigations into the FAA resulting in much needed oversight and changes for passengers and increased airline safety compliance.
- 2) **OSC's FAA Task Force.** This internal task force continues to receive and address numerous safety-related issues from concerned whistleblowers and is working collaboratively with the FAA and Congressional oversight committees to ensure safety concerns are being addressed.
- 3) **New Orleans Pumps.** OSC's work on the possibly defective New Orleans levee pumps prompted a new independent investigation to ensure proper safeguards are in place to avoid another Katrina disaster.
- 4) **High profile Hatch Act results.** Over the last year, OSC has investigated hundreds of potential Hatch Act violations and has worked expediently to prosecute egregious cases of politicization and coercion. For example, a recent high profile OSC investigation of an Ohio Prosecutor who solicited subordinate employees for political contributions resulted in an admission of guilt and an agreement not to seek employment with a locality or government agency for a period of 18 months.
- 5) **More Hatch Act results.** Another prominent investigation by the OSC resulted in a 180-day suspension for a NASA employee for using his government email account to send partisan political e-mails. The employee was also found to have solicited political contributions.
- 6) **OSC Special Task Force continues review of possible violations.** OSC is conducting several high-level investigations related to the Hatch Act and to possible violations of certain Prohibited Personnel Practices.
- 7) **OSC's willingness to prosecute federal agencies for violations of the USERRA law.** OSC set precedent in the last four years by filing a number of USERRA cases with the Merit Systems Protection Board, and receiving full corrective action in nearly all of them, including one in which the U.S. Department of Labor told the claimant that his case had no merit. Several of these cases stem from the demonstration project created by the Veterans Benefits Improvement Act of 2004, under which OSC had responsibility to investigate and resolve certain federal sector USERRA cases. This willingness to prosecute USERRA violations also contributes to more corrective action settlements prior to litigation. OSC achieved another 26 USERRA corrective actions in Demonstration Project cases during FY 2008, bringing its total for the three year project to 120, which represents a corrective action rate for the project of approximately 27%.

- 8) **Specific USERRA Results.** An Air National Guardsman, who lost his federal job while on active military duty, waited more than seven years to get relief under USERRA. Only months after the Government agency where his case had languished for seven years referred it to OSC, a settlement was reached providing him with full back pay and restored benefits.
- 9) **More Specific USERRA Results.** In many instances, OSC investigates complex USERRA claims where investigators work to remedy personal hardships caused by employer's misunderstanding of the law. For example, one of this year's cases involved a claimant who alleged that an agency mischarged his leave and imposed a debt on him as a result of his service in the Air Force Reserve. At the USERRA unit's request, the agency took the series of actions that were necessary to fully correct the situation, including restoring the employee's annual leave, cancelling the debt, and reimbursing him for lost pay.
- 10) **OSC continues to enhance its resources for conducting mediations.** Instead of having one full time mediator, seven people from different parts of the agency have received training in conducting mediations. OSC now has a cadre of professionals with varied skills and legal expertise in multiple areas from which to draw.

### Strategic Objectives

OSC has four strategic objectives (see table below), each of which is supported by a series of operational goals. These operational goals are described in Part 2, in the appropriate section for each budget program.

Strategic Objectives of the Agency	
U.S. Office of Special Counsel	
<b>Strategic Objective 1</b>	OSC will protect the Merit System and promote justice in the Federal workforce through investigation and prosecution of the Prohibited Personnel Practices.
<b>Strategic Objective 2</b>	OSC will protect the Merit System and promote justice in the Federal workforce by enforcing the Hatch Act.
<b>Strategic Objective 3</b>	OSC will promote public safety, and efficiency through acting as a channel for whistleblowers in the Federal workforce to disclose information.
<b>Strategic Objective 4</b>	OSC will protect veterans in the Federal workforce through enforcement of the Uniformed Services Employment and Reemployment Rights Act.



## Internal Organization

OSC maintains its headquarters office in Washington, D.C. Four field offices are located in Washington, D.C., Dallas, Oakland, and Detroit. Agency components during FY2008 include the Immediate Office of the Special Counsel (IOSC), five operating units/divisions and several supporting offices explained in detail below.

**Immediate Office of the Special Counsel.** The Special Counsel and staff in IOSC are responsible for policy-making and overall management of OSC. They also manage the agency's congressional liaison and public affairs activities, and its outreach program, which includes promotion of compliance by other federal agencies with the employee information requirement at 5 U.S.C. § 2302(c).

**Complaints Examining Unit.** This unit is the intake point for all complaints alleging prohibited personnel practices and other violations of civil service law, rule, or regulation within OSC's jurisdiction.<sup>1</sup> This unit is responsible for screening approximately 2,000 prohibited personnel practice cases per year. Attorneys and personnel management specialists conduct an initial review of complaints to determine if they are within OSC's jurisdiction, and if so, whether further investigation is warranted. The unit refers all matters stating a potentially valid claim to the Investigation and Prosecution Division for further investigation.

**Disclosure Unit.** This unit is responsible for receiving and reviewing disclosures received from federal whistleblowers. It advises the Special Counsel on the appropriate disposition of the information disclosed (including possible referral to the head of the agency involved for an investigation and report to OSC; referral to an agency Inspector General; or closure). The unit also reviews agency reports of investigation to determine whether they appear to be reasonable and in compliance with statutory requirements before the Special Counsel sends them to the President and appropriate congressional oversight committees.

**Investigation and Prosecution Division.** The Investigation and Prosecution Division (IPD) is comprised of four field offices. The IPD conducts field investigations of matters referred after preliminary inquiry by the Complaints Examining Unit. Division attorneys conduct a legal analysis after investigations are completed to determine whether the evidence is sufficient to establish that a prohibited personnel practice (or other violation within OSC's jurisdiction) has occurred. Investigators work with attorneys in evaluating whether a matter warrants corrective action, disciplinary action, or both.

If meritorious cases cannot be resolved through negotiation with the agency involved, division attorneys represent the Special Counsel in litigation before the Merit Systems Protection Board (MSPB). They also represent the Special Counsel when OSC intervenes, or otherwise participates, in other proceedings before the Board. Finally, division investigators and attorneys at times assist with investigations of alleged violations of the Hatch Act and the Uniformed Services Employment and Reemployment Rights Act, though most Hatch Act and USERRA work is handled by the Hatch Act Unit and the USERRA Unit, respectively.

**Hatch Act Unit.** This unit issues advisory opinions to individuals seeking information about Hatch Act restrictions on political activity by federal, and certain state and local, government employees. The unit is also responsible for enforcing the act. It reviews complaints alleging a Hatch Act violation and, when warranted, investigates and prosecutes the matter (or refers the matter to the Investigation and Prosecution Division for further action). It also oversees Hatch Act matters delegated to the IPD.

**USERRA Unit.** This unit handles USERRA cases that are referred to OSC for prosecution by the Department of Labor. Often these cases must be re-investigated by OSC. In addition, this unit investigated cases referred to OSC under the special project assigned by P.L. 108-454. This law required OSC to investigate the re-employment rights of approximately half of the USERRA cases involving federal employees who are also

members of one of the military services. These cases were transferred to OSC by the Department of Labor during a three year period which ended during FY 2008.

## **Supporting Units**

**Alternative Dispute Resolution Program.** In selected cases referred by the Complaints Examining Unit for further investigation, the agency contacts the complainant and the agency involved, and invites them to participate in OSC's voluntary Mediation Program. If mediation resolves the complaint, the parties execute a written and binding settlement agreement; if not, the complaint is referred for further investigation.

The mediation program for Alternative Dispute Resolution has been reorganized. Rather than have a single ADR specialist under the leadership of an SES employee, the agency has expanded the program through cross-training multiple individuals from OSC's operating units. As a result the agency now has a broad pool of trained mediators with different legal areas of expertise.

**Legal Counsel and Policy Division.** This division provides general counsel and policy services to OSC, including legal advice and support on management and administrative matters; legal defense of OSC in litigation filed against the agency; policy planning and development; and management of the agency ethics program.

**Office of the Chief Financial Officer.** This office provides administrative and management support services to OSC, in furtherance of program, human capital, technology, and budget decisions. This division also includes the Information Technology Branch, Human Resources Branch, Document Control Branch, Procurement Branch, and Budget and Analysis Branch. The purpose of this division is to put the administrative support functions under one authority.

**Training Office.** A training office has been created to train all new employees, cross train existing employees, and develop specialized training in areas such as litigation skills. Specifically, the Training Office facilitates cross training of attorneys and investigators to enable them to traverse organizational boundaries within the agency. They develop sufficient expertise in several areas of the law, giving management more ability to detail employees to address any potential backlogs that form in the various units.

## Budget by Program

The following table provides an estimate of the FTE and budgetary resources for each program of the agency.

FY 2010 Budget by Program						
(in thousands of dollars)						
Program	FY 2009 Estimate		FY 2010 Estimate		Increase/Decrease	
	\$	FTE	\$	FTE	\$	FTE
Investigation and Prosecution of Prohibited Personnel Practices <sup>1</sup>	\$8,530	55	\$9,375	57	\$846	2
Hatch Act Enforcement (including Special Task Force)	\$1,938	12.5	\$1,891	11.5	-\$46	-1
Whistleblower Disclosure Unit	\$1,626	10.5	\$1,727	10.5	\$101	0
USERRA Enforcement and Prosecution	\$309	2	\$329	2	\$20	0
Office of the Special Counsel	\$1,097	6	\$988	5	-\$109	-1
Office of the Agency General Counsel	\$927	5	\$971	5	\$44	0
Management / Information Technology / Budget / Human Resources / Procurement / Document Control / Planning / Outsourced Computing, Statistics, and Document Management Svcs	\$3,041	20	\$3,214	20	\$173	0
<b>totals</b>	<b>\$17,468</b>	<b>111</b>	<b>\$18,495</b>	<b>111</b>	<b>\$1,027</b>	<b>0</b>

Note 1: The sizeable increase in funding in FY 2010 for the Investigation and Prosecution Division is from a) the fact that FTE are returning from details to the Special Task Force, b) the projected pay raise of FY 2010, and c) a higher overhead assigned to each FTE, due to OSC's higher rental expenses in F 2010.

Note 2: The FY 2010 decrease for the Hatch Act Unit is due to Special Task Force detailees returning to their units. However, the Hatch Act Unit is receiving additional resources to handle its very high caseload levels. These additional resources nearly offset the loss of the detailed employees.

## **PART 2 - FY 2010 BUDGET REQUEST - ADDITIONAL INFORMATION**

OSC is requesting \$18,495,000. This includes funding for OSC's current staff of 111 FTE, and funding to cover the FY 2009 and projected FY 2010 salary increases. This number of FTE is necessary to manage and process the agency's elevated workload of prohibited personnel practice complaints, whistleblower disclosures, Hatch Act complaints, Hatch Act cases, Hatch Act advisory opinions, special task force investigations, and USERRA cases in a manner that precludes the formation of case backlogs. The workload has steadily increased since 2000, and steeply increased during the last two years.

### **Budgetary Factors**

Over 90% of OSC's budget goes toward salary, benefits, and office space rent. When salary, benefits, and rent all rise, the agency needs additional funds. There are two main drivers of the FY 2010 increase.

1. **Increased costs for salaries and benefits.** For the first time in several years, OSC will have a full political staff of approximately five employees during FY2010. Given the continued rapid increase in caseloads and the fact that five of OSC's 111 FTE will be used for political staff, it is imperative that OSC operate with 106 career employees during all of FY 2010. In sum, OSC will need sufficient funding to support its full approved staffing level of 111 FTE, including the pay raise of FY 2009, and the projected raise of FY 2010.
2. **New GSA lease for OSC's headquarters.** OSC's ten year lease for its headquarters space expires in October, 2009. The best estimate from GSA is that rent for OSC's headquarters and three field offices will rise by \$644,000 during FY 2010. This rent increase is an unavoidable expense.

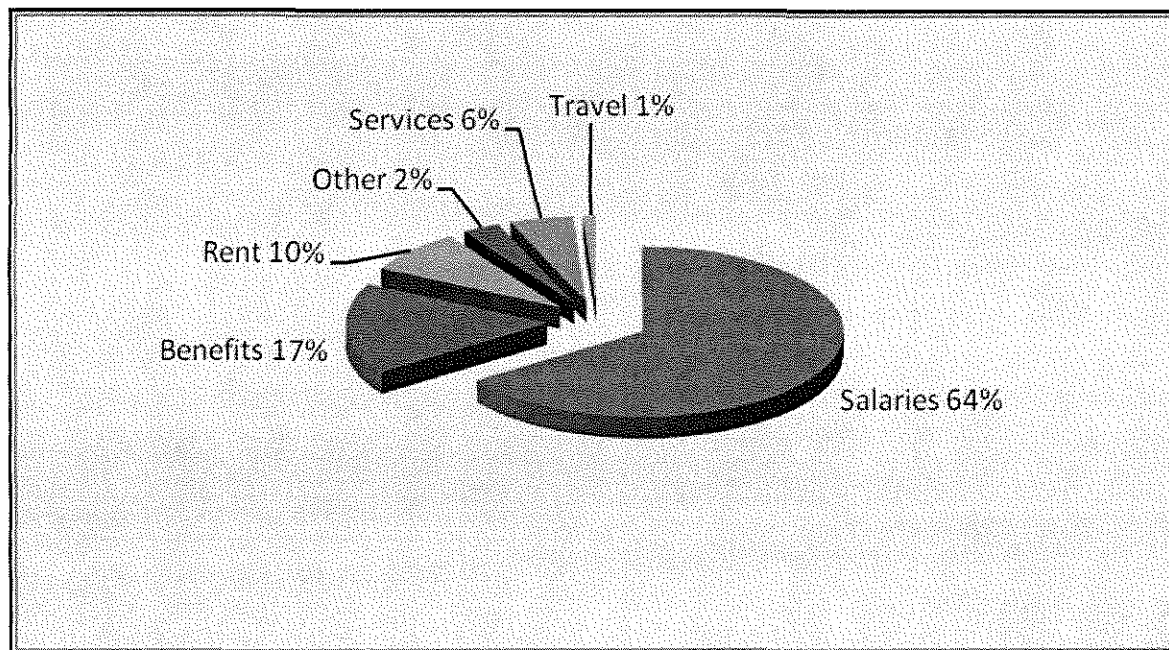
Other notable increased expenses for OSC include the higher cost of legal information services (projected 10% increase), the higher cost of mandatory security charges payable to DHS (projected 25% increase), and the higher cost of transit subsidies (projected 42% increase). As the agency operates with more employees than it has in the past, a marginal increase in expenditures for supplies, travel, equipment, and other services can be expected. The agency's outsourced E-travel expenses have also increased.

### **Information Technology Necessity:**

OSC needs to convert its ten-year old case tracking system to a web-based platform. OSC will work to accomplish as much as possible towards this goal, recognizing that salary, benefits and rent expenses for 111 FTE during FY 2010 are the highest priority.

### Components of Budget Request:

The following chart estimates how the FY 2010 request will be distributed on a percentage basis:



Field office expenditures are almost entirely driven by the number of employees in the field offices. Below is a list of approximate staffing levels by field office. Staffing levels vary during the year due to hires, departures, and the management needs of the agency.

Headquarters	approximately 75-78 employees
Midwest Field Office	approximately 7 employees
Dallas Field office	approximately 8-9 employees
Oakland Field Office	approximately 9-10 employees
Washington DC Field Office	approximately 10-12 employees

### FY 2010 Budget Request by Budget Object Class:

For a detailed projection of the expenditures that will be required in each Budget Object Class (BOC) during FY 2010, see Table 8 below.

Table 9

U.S. Office of Special Counsel			
Budget Object Classification of Obligations: FY2008-FY2010 (in thousands of dollars)			
Budget Object Classification of Obligations	FY2008 Actual	FY2009 (projected)	FY2010 (projected)
11.0 Personnel compensation	10,826	11,225	11,840
12.0 Civilian personnel benefits	2,924	3,160	3,173
13.0 Benefits to former personnel	0	15	0
21.0 Travel and transportation of persons	230	233	135
22.0 Transportation of things	20	21	21
23.1 Rental payments to GSA	1,135	1,228	1,872
23.3 Communications, utilities and misc. charges	112	112	110
24.0 Printing and reproduction	20	21	20
25.0 Other services	1,588	1,150	1,076
26.0 Supplies and materials	122	111	108
31.0 Equipment	379	192	140
32.0 Land & Structures	76	0	0
42.0 Tort Claims	0	0	0
99.9 Total	17,433	17,468	18,495

Notes concerning detailed BOC line items:

Object Class 12.0 Civilian Personnel Benefits: This category normally includes the agency's expanded Student Loan Repayment / Employee Retention Program, as well as transit subsidies. But in FY 2010, funds for this program have been redirected towards salaries of the agency's 111 FTE.

Object Class 23.1 Rental Payments to GSA: The increase in this category reflects the expiration of the agency's lease in October of 2009. Due to higher rental prices for new leases in the DC area, GSA estimates that total agency rent will be approximately 1.872M for FY2010. If OSC relocates to another office space in DC due to the results of the space competition, an additional \$1M-1.5M will likely be required for the move and the build-out.

Object Class 25.0 Other Services: Costs in this BOC are expected to reduce during FY2010. While costs of outsourced accounting services, financial systems, payroll services, Westlaw legal information services, Federal Protective Services, travel services, and software services will increase, it is likely that there will be no Special Task Force for high level Hatch Act investigations in existence.

Table 10

Analysis of Resources: FY2008 - FY2010 (in thousands of dollars)			
Description	FY2008 (Actual)	FY2009 (projected)	FY2010 (projected)
Budget authority	17,468	17,468	18,495
Outlays	15,881	16,516	17,487
Approximate full-time equivalent employment (FTE) work years	107	111	111

## **PART 3 - BUDGET PROGRAMS AND PERFORMANCE PLAN**

### **Investigation and Prosecution of Prohibited Personnel Practices**

Unlike many other investigative entities or agencies, OSC must, as a general rule, conduct an inquiry after receipt of complaints alleging the commission of a prohibited personnel practice.<sup>2</sup> The nature of the inquiry ranges from a screening analysis by the CEU to an IPD field investigation. Complaints received by OSC can and often do involve multiple allegations, some of which can involve different prohibited personnel practices. In all such matters, an OSC inquiry requires the review of, and a legal determination about, each allegation and prohibited personnel practice.

After a complaint is received by OSC, CEU attorneys and personnel management specialists conduct an initial review to determine whether it is within OSC's jurisdiction, and whether further investigation is warranted. CEU refers all matters stating a potentially valid claim to the IPD for further investigation. All such matters are reviewed first by the ADR Unit.

In selected cases that have been referred for further investigation, a trained OSC ADR specialist contacts the complainant and the employing agency to invite them to participate in the agency's voluntary ADR Program. If both parties agree, OSC conducts a mediation session, led by OSC trained mediators who have experience in federal personnel law. When mediation resolves the complaint, the parties execute a binding written settlement agreement. If mediation does not resolve the complaint, it is referred for further investigation, which would have been the normal course of action had the parties not attempted mediation.

The IPD conducts investigations to review pertinent records and to interview complainants and witnesses with knowledge of the matters alleged. Matters undergo legal review and analysis to determine whether the matter warrants corrective action, disciplinary action, or both.

If OSC believes a prohibited personnel practice has been committed and initiates discussions with an agency, the matter is often resolved through negotiation. Before OSC may initiate an enforcement proceeding seeking corrective action (relief intended to make an aggrieved employee whole) at the MSPB, the Special Counsel must make a formal request to the agency involved, reporting on its findings and recommendations. Only when the agency has had a reasonable period of time to take corrective action and fails to do so, may OSC proceed to petition the MSPB for corrective action. When an agency refuses to grant appropriate corrective action, OSC generally proceeds immediately to file a complaint with the MSPB. If OSC determines that disciplinary action (the imposition of discipline on an employee who has committed a violation) is warranted, it can file a complaint directly with the MSPB. Should the agency agree to take appropriate disciplinary action on its own initiative, then the matter can be settled without resort to an MSPB proceeding.

In addition to rectifying the matter at issue, OSC litigation before the MSPB – whether by enforcement actions seeking to obtain corrective and/or disciplinary action, or by intervention or other participation in matters filed by others – often has the additional benefit of clarifying and expanding existing law. It also brings greater public attention to OSC's mission and work, a factor likely to increase the deterrent effect of its efforts.

For FY 2008 OSC received 3,116 new matters, including PPP, Hatch Act, and Disclosure matters (see Table 1).



## Resource Estimates

During FY2009 the Investigation and Prosecution of Prohibited Personnel Practices will use approximately 55 FTE at a cost of approximately \$8,530,000. During FY 2010, we estimate the cost of the program will be approximately \$9,375,000 with 57 FTE.

Table 1

<b>Breakdown of Matters<sup>a</sup> Pending and Completed FY 2005 to FY 2008</b>				
	<b>FY 2005</b>	<b>FY 2006</b>	<b>FY 2007</b>	<b>FY 2008</b>
Matters pending at beginning of fiscal year	778	777	667	698
New matters received	2,684	2,718	2,880	3,116
Matters closed	2,685	2,814	2,842	2,875
Matters pending at end of fiscal year	777	681	698	937

<sup>a</sup> The term "matters" in this table includes Prohibited Personnel Practice complaints (including Transportation Security Administration matters), Hatch Act complaints, whistleblower disclosures, and USERRA cases.

OSC's largest program is devoted to the processing of PPP complaints. Of the total 3,116 new matters OSC received during FY 2008, 2,089 or 67% were new PPP complaints (see Table 2).

Table 2

<b>Summary of Prohibited Personnel Practice (PPP) Complaints Activity – Receipts and Processing</b>				
	<b>FY 2005</b>	<b>FY 2006</b>	<b>FY 2007</b>	<b>FY 2008</b>
Pending complaints carried over from previous fiscal year	524	521	387	358
New complaints received (Intake Unit)	1,771	1,805	1,927	2,089
Total complaints:	2,295	2,326	1,967	2,447
Complaints referred for field investigation	198	143	125	135
Complaints processed and closed	1,774	1,930	1,953	1,971
Processing Times	< 240 days	1,198	1,693	1,832
	> 240 days	576	237	121
Percentage processed in under 240 days	67.5%	88%	94%	95%

Table 3 below provides information regarding the numbers of corrective actions obtained in Prohibited Personnel Practice cases.

**Table 3**

<b>Summary of Prohibited Personnel Practice Matters Activity – Favorable Actions</b>		<b>FY 2005</b>	<b>FY 2006</b>	<b>FY 2007</b>	<b>FY 2008</b>
Total favorable actions obtained <sup>a</sup> (all prohibited personnel practices)	# of actions	45	52	29	62
	# of matters	45	48	29	33
Favorable actions obtained (reprisal for whistleblowing)	# of actions	37	40	21	44
	# of matters	37	37	21	20
Stays negotiated with agencies <sup>b</sup>		3	8	4	2
Stays obtained from Merit Systems Protection Board		1	1	3	0
Disciplinary actions negotiated with agencies		3	4	5	8
Corrective action complaints filed with the Board		1	1	1	1
Disciplinary actions obtained from the Board		1	0	0	0

<sup>a</sup> The purpose of this breakout is to show the number of favorable actions obtained, and the number of matters involved. It is possible for a matter (case) to have more than one action (favorable outcome).

<sup>b</sup> Stays and disciplinary actions listed in this table (except for disciplinary actions obtained by OSC from the Board) are included in the totals shown in the first two rows above, but are broken out here for further information.

### **Alternative Dispute Resolution**

Among the factors that determine “mediation-appropriate” cases are the complexity of the issues, the nature of the personnel action, and the relief sought by the Complainant. Once a case has been identified as mediation appropriate, OSC Alternative Dispute Resolution Specialist contacts the parties to discuss the ADR Program. “Pre-mediation” discussions are designed to help the parties form realistic expectations and well-defined objectives regarding the mediation process.

During fiscal year 2008, the number of agencies which accepted initial mediation increased to 94% and there were eight successfully mediated resolutions (see Table 4).

Table 4

Summary of Prohibited Personnel Practice Complaints Activity – Mediation Program					
		FY 2005	FY 2006	FY 2007	FY 2008
Matters identified before investigation as mediation-appropriate		22	52	38	31
Initial acceptance rates by parties	Complainants	27%	83%	71%	54%
	Agencies	22%	59%	59%	94%
Mediated and other resolutions <sup>a</sup>		5	11	10	8
Resolution rate – OSC mediation program		100%	55%	50%	50%

<sup>a</sup> Included in this category are complaints that entered the initial OSC mediation process, and were then resolved through withdrawal of the complaint, or through mediation by an agency other than OSC.

Mediation settlement outcomes in OSC's Mediation Program vary, depending on the interests of the parties. Monetary recovery includes retroactive promotions, attorney fees, and lump sum payments. In addition to monetary recovery, the benefits received by complainants in ADR include revised performance appraisals, reinstatement of employment, and transfers to better working environments.

#### Goals and Results - Prohibited Personnel Practices

OSC's Strategic Objective 1 is to protect the Merit System and promote justice in the Federal workforce through investigation and prosecution of the Prohibited Personnel Practices. The following tables describe the three operational goals supporting this strategic objective.

<b>Goal 1: TO PROTECT THE MERIT SYSTEM THROUGH TIMELY CASE PROCESSING</b>	
<b>PPP Enforcement Mission</b>	<b>PROHIBITED PERSONNEL PRACTICES CASES</b>
<b>PERFORMANCE INDICATOR</b>	<b>Indicator A: Percentage of cases processed in less than 240 days.</b>
<b>FY 2006 TARGET</b>	85%
<b>FY 2006 RESULTS</b>	89%
<b>FY 2007 TARGET</b>	92%
<b>FY 2007 RESULTS</b>	94%
<b>FY 2008 TARGET</b>	92%
<b>FY 2008 RESULTS</b>	95%
<b>FY 2009 TARGET</b>	92%
<b>FY 2009 RESULTS</b>	
<b>FY 2010 TARGET</b>	94%
<b>FY 2010 RESULTS</b>	

OSC achieved its timeliness target in FY 2008. Therefore, for FY 2010 we are again raising the target even though many investigations take longer than 240 days due to factors outside of OSC's control, such as extensions of time requested by the agency under investigation, and the timeframes associated with litigation. To set the target at or close to 100% would carry an implicit assumption that OSC should not litigate cases and should try to limit the number of cases receiving full investigations. Accepting either assumption would undercut the agency's mission to investigate and prosecute occurrences of Prohibited Personnel Practices.

<b>Goal 2: TO PROMOTE THE MERIT SYSTEM THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS</b>	
<b>PPP Enforcement Mission</b>	<b>Prohibited Personnel Practices Cases</b>
<b>PERFORMANCE INDICATOR</b>	<b>Indicator A: % favorable outcomes in cases determined by OSC to be meritorious = (# successful mediations + # of settlements achieved + # of successful litigations) / (# meritorious cases)</b>
<b>FY 2006 TARGET</b>	99%
<b>FY 2006 RESULTS</b>	100%
<b>FY 2007 TARGET</b>	99%
<b>FY 2007 RESULTS</b>	100%
<b>FY 2008 TARGET</b>	100%
<b>FY 2008 RESULTS</b>	100%
<b>FY 2009 TARGET</b>	100%
<b>FY 2009 RESULTS</b>	
<b>FY 2010 TARGET</b>	100%
<b>FY 2010 RESULTS</b>	

During FY 2008, OSC did not lose any cases this year in PPP litigation before the board. Most meritorious cases do not reach the litigation stage, because an agency will normally settle the matter when OSC outlines the nature of the prohibited personnel practices that have been committed.

<b>Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES</b>	
<b>PPP Enforcement Mission</b>	<b>PROHIBITED PERSONNEL PRACTICES CASES</b>
<b>PERFORMANCE INDICATOR</b>	<b>Indicator A: # of new Federal agencies certified in the 2302 (c) Program by OSC.</b>
<b>FY 2006 TARGET</b>	5
<b>FY 2006 RESULTS</b>	6
<b>FY 2007 TARGET</b>	5
<b>FY 2007 RESULTS</b>	3
<b>FY 2008 TARGET</b>	5
<b>FY 2008 RESULTS</b>	5
<b>FY 2009 TARGET</b>	5
<b>FY 2009 RESULTS</b>	
<b>FY 2010 TARGET</b>	5
<b>FY 2010 RESULTS</b>	

## **Hatch Act Enforcement Program**

OSC is also responsible for enforcing the Hatch Act, including investigating and prosecuting complaints alleging violations of the Act, and providing advisory opinions on the Act's requirements. The Hatch Act Unit is responsible for a nationwide program that provides legal advice on the Hatch Act to federal, state and local employees and the public at large. Specifically, the Hatch Act Unit has the unique responsibility of providing Hatch Act information and legal advice to White House staff, Congressional staff, the national press, senior management officials throughout the federal government, and state and local government officials. The Hatch Act Unit provides all of OSC's advisory opinions. When provided to individuals, the advisory opinions enable them to determine whether they are covered by the Act, and whether their contemplated activities are permitted under the Act.

The Hatch Act Unit also enforces compliance with the Act by receiving complaints alleging Hatch Act violations, conducting preliminary inquiries into complaint allegations and, (where warranted) further investigating allegations or referring the complaints to OSC's IPD (for further investigation). Depending on the severity of the violation, the Hatch Act Unit will either issue a warning letter to the employee, attempt to informally resolve the violation, prosecute the case before the MSPB or send it to the IPD to prosecute before the MSPB.

A string of Hatch Act cases involving high-profile employees over the last three years has resulted in significant national press coverage. There is now a very heightened awareness of the Hatch Act among Federal employees. In FY 2008, the unit received an all time high of 445 complaints, an increase of 58% over FY 2007. In FY 2008, OSC's Hatch Act Unit achieved 32 corrective actions, including 13 withdrawals from partisan races and 17 resignations from covered employment (see Table 5).

To further its advisory role, the Hatch Act Unit is very active in OSC's outreach program; the unit conducted approximately 60 outreach presentations in FY2008 to various federal agencies and employee groups concerning federal employees rights and responsibilities under the Act. Many of these programs involved high-level agency officials. Also, the unit attempted to informally resolve as many ongoing Hatch Act violations as possible without resorting to litigation. Advisories concerning partisan activity surrounding upcoming state and local elections have accounted for a fair amount of OSC's work this fiscal year.

### **Resource estimates:**

During FY 2009, the Hatch Enforcement Program (including the Special Task Force) will use approximately 12.5 FTE at a cost of approximately \$1,938,000. During FY 2010, we estimate the cost of this program to be \$1,891,000 for 11.5 FTE. The cost is projected to be lower in FY 2010 because the work of the Special Task Force will be complete and the detailed FTEs will have returned to their original units. However, due to the extremely high level of Hatch Act cases, OSC is placing more permanent resources into the Hatch Act Unit, increasing it almost to the same size as when the Special Task Force existed.

Table 5

Summary of Hatch Act Advisory Opinion and Complaint Activity					
		FY 2005	FY 2006	FY 2007	FY 2008
Advisory opinions issued		2,558	3,004	2,598	3,991
New advisory requests received (written)		191	237	194	292
New complaints received		245	299	282	445
Warning letters issued		87	76	68	70
Complaints processed and closed in fiscal year		310	266	252	264
Corrective actions taken by recipients of cure letters:	Withdrawal from partisan races	4	9	18	13
	Resignation from covered employment	10	22	6	17
	Other:	3	2	1	2
	Total:	17	33	25	32
Disciplinary action complaints filed with the Merit Systems Protection Board		11	6	1	3
Disciplinary actions obtained (through negotiation or ordered by the Board)		8	8	0	3
Complaints pending at end of fiscal year		79	112	142	320

### Task Force Investigations

In the spring of 2007, the Special Counsel created a new task force to investigate numerous allegations that high level agency officials may have violated the Hatch Act or other civil service laws. Specifically, the task force is investigating numerous allegations that certain agency officials may have encouraged or allowed partisan political forces to improperly influence government decisions. Among the allegations that the task force is currently investigating are those regarding certain political briefings given by the White House Office of Political Affairs to political appointees throughout the federal government and various hiring practices at the Justice Department. This task force is working diligently to finish its investigations during the summer of FY 2009.



## Goals and Results - Hatch Act Program

OSC's Strategic Objective 2 is to protect the Merit System and promote justice in the Federal workforce by enforcing the Hatch Act. The tables below describe the three operational goals supporting this strategic objective.

<b>Goal 1: TO DEFEND THE MERIT SYSTEM BY ENFORCING THE HATCH ACT – THROUGH TIMELY CASE PROCESSING</b>			
<b>HATCH ACT MISSION</b>	<b>HATCH ACT WRITTEN ADVISORY OPINIONS</b>	<b>HATCH ACT ORAL &amp; EMAIL ADVISORY OPINIONS</b>	<b>HATCH ACT COMPLAINTS</b>
<b>PERFORMANCE INDICATORS</b>	<b>Indicator A: Percentage of formal written advisory opinions issued in less than 120 days.</b>	<b>Indicator B: Percentage of oral and e-mail advisory opinions issued in less than five business days</b>	<b>Indicator C: Percentage of matters resolved in less than 365 days.</b>
<b>FY 2006 TARGET</b>	75%	99%	60%
<b>FY 2006 RESULTS</b>	93%	100%	84%
<b>FY 2007 TARGET</b>	80%	99%	70%
<b>FY 2007 RESULTS</b>	91%	99%	92%
<b>FY 2008 TARGET</b>	85%	99%	80%
<b>FY 2008 RESULTS</b>	83%	100% Oral	88%
		95% Email	
<b>FY 2009 TARGET</b>	90%	99% Oral	85%
		95% Email	
<b>FY 2009 RESULTS</b>			
<b>FY 2010 TARGET</b>	90%	99% Oral	85%
		95% Email	
<b>FY 2010 RESULTS</b>			

Indicator A: OSC came close to meeting its timeliness goal for formal advisory opinions during FY 2008. The election year increases in Hatch Act complaints received, oral and email advisories requested, and written advisories requested were even larger than anticipated. These increases made it nearly impossible to meet the various timeliness targets, despite tremendous effort to do so.

Indicator B: OSC always issued oral advisory opinions within five business days. Due to the volume of work and resource allocations, there were times when employees were unable to issue every email advisory within five business days.

Indicator C: OSC met its target for percent of Hatch matters resolved in less than 365 days. This is remarkable, given the size of the election year spike. 445 complaints were received, 146 more than the previous high during any fiscal year.

<b>Goal 2: TO PROMOTE THE MERIT SYSTEM THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS</b>	
<b>HATCH ACT MISSION</b>	<b>HATCH ACT CASES</b>
<b>PERFORMANCE INDICATOR</b>	<b>Indicator A: % favorable outcomes in meritorious cases</b>
<b>FY 2006 TARGET</b>	90%
<b>FY 2006 RESULTS</b>	97%
<b>FY 2007 TARGET</b>	90%
<b>FY 2007 RESULTS</b>	97%
<b>FY 2008 TARGET</b>	97%
<b>FY 2008 RESULTS</b>	96%
<b>FY 2009 TARGET</b>	97%
<b>FY 2009 RESULTS</b>	
<b>FY 2010 TARGET</b>	97%
<b>FY 2010 RESULTS</b>	

OSC's Hatch Act Unit was very close to its target of 97% favorable outcomes. There were two cases in which the unit was not successful.

<b>Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES</b>		
<b>HATCH ACT MISSION</b>	<b>HATCH ACT OUTREACH VISITS</b>	<b>HATCH ACT SECTION OF OSC WEBSITE</b>
<b>PERFORMANCE INDICATORS</b>	<b>Indicator A: (# of HA trainings and outreaches given) / (# of invitations to provide HA training or outreach, where the inviter sponsors OSC)</b>	<b>Indicator B: Number of new advisory complex opinions added every month to the website.</b>
<b>FY 2006 TARGET</b>	90%	One
<b>FY 2006 RESULTS</b>	96%	One
<b>FY 2007 TARGET</b>	90%	One
<b>FY 2007 RESULTS</b>	100%	One
<b>FY 2008 TARGET</b>	95%	One
<b>FY 2008 RESULTS</b>	98%	One
<b>FY 2009 TARGET</b>	95%	One
<b>FY 2009 RESULTS</b>		
<b>FY 2010 TARGET</b>	95%	One
<b>FY 2010 RESULTS</b>		

Indicator A: OSC's Hatch Act Unit only declined one request for outreach this fiscal year, despite the tremendous increase in workload.

## Whistleblower Disclosure Channel Program

In addition to its investigative and prosecutorial mission, the OSC provides a safe channel through which federal employees, former federal employees, or applicants for federal employment may, under 5 U.S.C. § 1213(a), disclose information they reasonably believe evidences a violation of law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. At present, the Disclosure Unit staff is comprised of the Chief, nine attorneys and one paralegal. The Disclosure Unit is responsible for reviewing the information submitted by whistleblowers, and advising the Special Counsel whether it shows that there is a substantial likelihood that the type of wrongdoing described in § 1213(a) has occurred or is occurring. Where a substantial likelihood determination is made, the Special Counsel must transmit the disclosure to the head of the relevant agency for action. The agency is required to conduct an investigation and submit a report to OSC describing the results of the investigation and the steps taken in response to the investigative findings. Under § 1213(e), the whistleblower is also provided with a copy of the report for comment. The Special Counsel is then required to review the report in order to determine whether it meets the requirements of the statute and its findings appear reasonable. The report is then forwarded to the President and appropriate Congressional oversight committees.

In the Disclosure Unit, 530 new matters were received in FY 2008, a 10% increase over the previous fiscal year. During FY 2008, the unit referred 40 matters to agency heads for investigation under § 1213(c). (See Table 6).

The Disclosure Unit's more complex cases are very labor-intensive and often require the attention of more than one attorney. These cases can take more than a year to fully complete for a number of reasons—agencies routinely request additional time to conduct the investigation and write the report, whistleblowers request additional time to prepare their comments, and Disclosure Unit attorneys and the Special Counsel must review the report to determine whether it contains the information required by statute, its findings appear reasonable, and to prepare any comments the Special Counsel may have on the report.

This year, for the sake of brevity, we are not including a representative sample of cases that have been referred by the Special Counsel to the heads of the agencies pursuant to 5 U.S.C. § 1213(c) and closed after receipt and review of the agency report. We are also not including summaries of cases that are presently under investigation by agency heads, though all of these summaries are available. In many cases, OSC's efforts have resulted in significant media coverage and reform efforts.

Table 6

Summary of Whistleblower Disclosure Activity – Receipts and Dispositions <sup>a</sup>					
		FY 2005	FY 2006	FY 2007	FY 2008
Pending disclosures carried over from previous fiscal year		98	110	69	84
New disclosures received		485	435	482	530
Total disclosures		583	545	599	614
Disclosures referred to agency heads for investigation and report		19	24	42	40
Referrals to Agency IGs		14	10	11	9
Agency head reports sent to President and Congress		16	24	20	25
Results of agency investigations and reports	Disclosures substantiated in whole or in part	16	21	19	22
	Disclosures unsubstantiated	0	3	1	3
Disclosures processed	In more than 15 days	237	275	182	232
	In less than 15 days	236	203	285	256
Percentage of disclosures processed in less than 15 days		50%	42%	61%	52%
Disclosures processed and closed		473	478	467	488

<sup>a</sup> It should be noted that many disclosures contain more than one type of allegation. This table, however, records all allegations received in a whistleblower disclosure as a single matter.

#### Resource Estimates:

During FY 2009, the Whistleblower Disclosure Unit will use approximately 10.5 FTE at a cost of \$1,626,000. During FY 2010, we estimate the cost of the program will be \$1,727,000 with no increase in FTE.

#### Goals and Results - Whistleblower Disclosure

OSC's Strategic Objective 3 is to promote public safety and efficiency through acting as a channel for whistleblowers in the Federal workforce to disclose information. The following tables below describe the two operational goals supporting this strategic objective.

<b>Goal 1: TO RECEIVE AND RESOLVE WHISTLEBLOWER DISCLOSURES WITH TIMELY PROCESSING</b>	
<b>WHISTLEBLOWER DISCLOSURE MISSION</b>	<b>DISCLOSURES</b>
<b>PERFORMANCE INDICATORS</b>	<b>Indicator A: Percentage of disclosures resolved within the statutory 15 day time frame</b>
<b>FY 2006 TARGET</b>	50%
<b>FY 2006 RESULTS</b>	42%
<b>FY 2007 TARGET</b>	50%
<b>FY 2007 RESULTS</b>	61%
<b>FY 2008 TARGET</b>	50%
<b>FY 2008 RESULTS</b>	52%
<b>FY 2009 TARGET</b>	50%
<b>FY 2009 RESULTS</b>	
<b>FY 2010 TARGET</b>	50%
<b>FY 2010 RESULTS</b>	

Through tremendous effort, OSC's Disclosure Unit achieved its target of 50% during FY 2008.

<b>Goal 2: TO PROMOTE THE PUBLIC GOOD THROUGH THE QUALITY OF DETERMINATIONS AND REFERRALS</b>	
<b>WHISTLEBLOWER DISCLOSURE MISSION</b>	<b>DISCLOSURES</b>
<b>PERFORMANCE INDICATORS</b>	<b>Indicator A: % Percentage of disclosures referred to agency head, pursuant to 5 U.S.C. § 1213, or under the informal IG referral process.</b>
<b>FY 2006 TARGET</b>	7%
<b>FY 2006 RESULTS</b>	8%
<b>FY 2007 TARGET</b>	7%
<b>FY 2007 RESULTS</b>	10%
<b>FY 2008 TARGET</b>	7%
<b>FY 2008 RESULTS</b>	6%
<b>FY 2009 TARGET</b>	7%
<b>FY 2009 RESULTS</b>	
<b>FY 2010 TARGET</b>	7%
<b>FY 2010 RESULTS</b>	

During FY 2008, the overall number of disclosures received by the agency rose to 530 from 482 in FY 2007. The number of referrals to agency heads and IGs dropped slightly. Therefore the percentage of disclosures referred dropped to 6%. However, it is important to note that the quality of the incoming disclosures is the major driver of the percent referred to agency heads, and always will be.

## USERRA Enforcement and Prosecution Program

With the passage of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Congress expanded OSC's role as protector of the federal merit system. USERRA is the law that protects the reemployment rights of persons who are absent from their civilian employment due to the performance of military duties. USERRA also makes it illegal for an employer to deny any benefit of employment on the basis of past, current, or future performance of military service.

As special prosecutor, OSC objectively reviews the facts and laws applicable to each complaint. Where the OSC is satisfied that the claimant is entitled to relief, it may exercise its prosecutorial authority and represent the claimant before the MSPB and, if required, the U.S. Court of Appeals for the Federal Circuit.

Table 7

Summary of USERRA Referral Activity				
	FY 2005	FY 2006	FY 2007	FY 2008
Pending referrals carried over from previous fiscal year	12	6	3	3
Referrals received from DOL during fiscal year	30	11	4	15
Pending referrals closed	36	14	4	13
Pending referrals at the end of the fiscal year	6	3	3	5
Closed cases where corrective action was obtained	6	3	0	2
Closed cases where no corrective action was obtained	25	11	4	11
Closed cases referred for litigation	n/a	n/a	4	0
Litigation closed; no corrective action obtained	2	1	0	1
Litigation closed; corrective action obtained	3	1	2	0
Litigation pending	n/a	2	1	1

## USERRA Demonstration Project

In early 2005, OSC's role in enforcing USERRA expanded. The Veterans Benefits Improvement Act of 2004 (VBIA), set up a Demonstration Project giving OSC, rather than the Department of Labor's Veterans Employment and Training Service (VETS), the exclusive authority to investigate federal sector USERRA claims brought by persons whose social security number ended in an odd-numbered digit. Under the project, OSC also received and investigated all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC had jurisdiction regardless of the person's social security number. The original term of the three-year demonstration project ended on September 30, 2007, but Congress extended the program through the continuing resolutions until Dec 31, 2007.

OSC's USERRA Unit attained exemplary results in the demonstration project cases through its aggressive enforcement of service members' employment and reemployment rights. GAO was tasked with comparing the performance of OSC and DOL under the demonstration project, but instead focused on the two agencies' case tracking systems. OSC has an excellent case tracking system, but much more importantly for the veterans with claims, OSC achieved an outstanding rate of corrective action on behalf of veterans.



Table 8

Summary of USERRA Demonstration Project Activity				
	FY2005	FY 2006	FY2007	FY2008
Pending cases carried over from previous fiscal year	0	54	95	115
Cases opened	111	168	142	37
Cases closed	57	126	123	139
Cases pending at the end of the fiscal year	54	96	114	13
Closed cases where corrective action was obtained	16	35	43	26
Closed cases where no corrective action was obtained	38	91	80	113
Closed cases referred for litigation	0	n/a	0	1

#### Corrective Action Results:

In FY 2008, OSC's USERRA Unit once again achieved impressive results on behalf of military service members. OSC's overall corrective action rate for the Demonstration Project is a remarkable 27% of the USERRA cases it investigated from FY 2005 to FY 2008 (see Table 8).

#### Resource Estimates:

During FY 2009, because the demonstration project has ended and the only new cases coming into the USERRA Unit are the referrals from DOL (whereby OSC uses its prosecutorial authority to represent the claimant before the MSPB and, if required, the U.S. Court of Appeals for the Federal Circuit), the unit will use only two FTE at a cost of \$309,000. Projecting the same number of FTE into FY 2010 requires approximately \$329,000.

#### Educating the Federal Sector and Preventing Future Violations

In FY2008, in addition to investigating and favorably resolving service members' USERRA claims, and litigating important cases, OSC also worked to ensure that the federal government is a "model employer" under USERRA by educating federal agencies about USERRA's requirements and obtaining "systemic" relief for service members, i.e., changes in agency policies, practices, and procedures that help prevent future violations.

For example, as a direct result of OSC's efforts, the Office of Personnel Management (OPM) changed a government-wide leave policy for federal civilian employees returning from Reserve and National Guard duty in Iraq and Afghanistan. OPM had previously interpreted an executive order authorizing an additional five days of uncharged leave (excused absence) as applying only to the service member's first deployment. After a National Guard member brought this policy to OSC's attention, the Special Counsel wrote a letter to the OPM Administrator requesting a change in policy to allow service members to use the additional five days of leave each time they return from a deployment (not just the first time), given the disruption to their lives and those of their families and the increased incidence of psychological problems, such as post-traumatic stress disorder, associated with multiple deployments. OPM responded favorably and issued new guidance to all federal executive departments and agencies, adopting OSC's recommendation that the leave be available after each deployment, and also permitting employees who already returned to work to use the additional leave if they have not already done so.

After OSC's inquiry into in a case where an employee was improperly denied leave to perform military service, the subject federal agency reminded its personnel that employees are to be allowed to depart for military duty without exception. The agency also issued a memorandum regarding USERRA and military leave and posted it at all facilities in the employee's region. The employee indicated that, following OSC's involvement, he noticed greater efforts by the agency to recognize and support veterans.

In a similar case involving a different federal agency, after OSC brought the matter to the agency's attention, the agency endeavored to educate its managers about USERRA and military leave, including that supervisors, not employees, are responsible for finding replacement workers when making shift changes due to an employee's military duty. Also, copies of a USERRA informational poster were posted in prominent locations throughout the facility where the employee works.

During the course of another investigation, OSC discovered that an agency had published a regulation permitting an employee's performance rating to be lowered if absent for an extended period of time (i.e., a "default" rating provision). The agency relied on such ratings to determine employee bonuses. While not objectionable in many circumstances, the regulation is inconsistent with USERRA, which requires that employees who perform military service be treated as if they had never left their civilian jobs, and are not to be disadvantaged in such jobs by virtue of their military duty. At OSC's request, the agency sent an e-mail to all employees stating its commitment to USERRA and attaching a copy of the USERRA informational poster. It also agreed that in instances where its internal regulations conflict with USERRA, it will make necessary exceptions to ensure compliance with USERRA. Last, the agency worked to identify all employees who might have been adversely affected by the regulation in question and to take any necessary corrective action.

In FY 2008, OSC continued its education and outreach efforts by conducting USERRA seminars at two national labor and employment conferences and USERRA training for several federal agencies. OSC also maintained e-mail and telephonic hotlines to provide technical assistance to employees and employers with USERRA questions.

### **Goals and Results – USERRA Enforcement and Prosecution Program**

OSC's Strategic Objective 4 is to protect veterans in the Federal workforce through enforcement of the Uniformed Services Employment and Reemployment Rights Act. The tables below describe the three operational goals supporting this strategic objective. But first, a note of explanation follows on each of the four types of USERRA cases that OSC receives - RE, DP-OD, DP-MX, and DP-TSA:

1. RE Cases: Under USERRA, certain federal sector claims are investigated by U.S. Department of Labor, Veterans' Employment and Training Service (VETS). In the event that VETS is unable to resolve such a claim, a claimant has a right to have his or her claim referred to OSC for a determination on whether OSC will represent the claimant before the MSPB. Such cases are identified by OSC as "RE cases." RE cases have already been investigated by VETS and reviewed by the DOL Office of Regional Solicitor (RSOL). The USERRA Unit receives the VETS investigative file and a legal memorandum from RSOL indicating whether RSOL recommends that OSC represent the claimant. OSC's USERRA Unit reviews the information and makes a "de novo" determination.

It is to be noted that while RE cases have already been investigated by VETS, OSC has found that: further investigation is often warranted, e.g., key witnesses need interviewing; important documents need to be obtained; too much time lapses between alleged initial violations and their referral to OSC. In such cases, the

USERRA Unit will always contact the agency and relevant witnesses to obtain the information necessary to allow it to make a well-reasoned determination regarding the prosecutorial merit of a given claim.

The need and extent of any supplemental investigation affects the processing time of RE cases and is reflected in the performance indicator.

2. DP-OD cases: Pursuant to the demonstration project established by the Veterans Benefits Improvement Act of 2004 (VBIA), OSC was given the exclusive authority to investigate federal sector USERRA claims brought by persons whose social security number ended in an odd-numbered digit. DP-OD cases are federal sector USERRA claims filed by persons having an odd-numbered social security number. DP-OD cases came from two sources: 1) from VETS, and 2) directly from the claimant. The USERRA Unit conducted an investigation of DP-OD cases and determined whether OSC will represent the claimant in a USERRA action before the MSPB. The performance indicator reflects the time reasonably expected to investigate such cases.

3. DP-MX cases: Under the demonstration project, OSC also investigated all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction regardless of the person's social security number. These are known as "mixed claims." The USERRA Unit conducted an investigation of DP-MX cases and determined whether OSC will represent the claimant in a USERRA or prohibited personnel practice action before the MSPB.

The processing time of DP-MX cases is affected by 1) additional complexity of such cases and 2) the USERRA Unit's adoption of OSC's practice in prohibited personnel practice cases of granting a claimant 13 days to respond to OSC's preliminary determination regarding prohibited personnel practice allegations. The performance indicator incorporates those factors.

4. DP-TSA cases: On June 9, 2005, the MSPB held in *Spain v. Department of Homeland Security* that USERRA does not apply to Transportation Security Administration (TSA) Security Screeners or TSA Supervisory Security Screeners and, therefore, the MSPB does not recognize jurisdiction over such cases. Consequently, OSC is unable to prosecute USERRA actions involving TSA Security Screeners or TSA Supervisory Security Screeners.

Notwithstanding the *Spain* decision, TSA voluntarily permits OSC to investigate USERRA claims and report its findings and recommendations for corrective action to TSA management officials.

The performance indicator for these types of cases reflects the MSPB's decision in the *Spain* case.

<b>Goal 1: TO ENFORCE THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT THROUGH TIMELY CASE PROCESSING</b>				
<b>USERRA MISSION</b>	<b>USERRA A: RE Cases</b>	<b>USERRA B: DP-OD Cases</b>	<b>USERRA C: DP-MX Cases</b>	<b>USERRA D: DP-TSA Cases</b>
<b>PERFORMANCE INDICATORS</b>	<b>Indicator A:</b> Average number of days in which the case is settled, closed or a decision to litigate is made.	<b>Indicator A:</b> Average number of days in which the case is settled, closed or a decision to litigate is made.	<b>Indicator A:</b> Average number of days in which the case is settled, closed or a decision to litigate is made.	<b>Indicator A:</b> Average number of days in which a "no merit" determination is made or a request for voluntary corrective action is sent to TSA.
<b>FY 2007 TARGET</b>	75 days	160 days	160 days	160 days
<b>FY 2007 RESULTS</b>	33 days	107 days	171 days	90 days
<b>FY 2008 TARGET</b>	75 days	140 days	160 days	140 days
<b>FY 2008 RESULTS</b>	110 days	204 days	192 days	NA
<b>FY 2009 TARGET</b>	80% in 60 days	NA	NA	NA
<b>FY 2009 RESULTS</b>				
<b>FY 2010 TARGET</b>	80% in 60 days	NA	NA	NA
<b>FY 2010 RESULTS</b>				

Indicator A: Two cases were excluded from this calculation because they do not accurately represent OSC's average processing times in these matters, and inordinately skew the average if included:

In one case, DOL did not fully investigate or analyze the claimant's original allegations, and the claimant raised numerous new allegations after his complaint was referred to OSC. Therefore, it was necessary for OSC to do extensive follow-up investigation and analysis to make a determination on the complaint. In theory, DOL investigates all allegations and OSC reviews DOL's investigative file to make a representation decision. In this matter, OSC also had to conduct its own follow-up investigation, substantially increasing the processing time.

Similarly, in another case, OSC and DOL agreed that DOL would immediately refer this highly complex matter to OSC without investigating it, primarily because the claimant's USERRA allegations were related to several Prohibited Personnel Practice (PPP) allegations, over which OSC has exclusive jurisdiction. Thus, OSC conducted its own investigation and analysis of all allegations together (USERRA & PPP), significantly adding to the processing time.

In most cases, the division between investigative (DOL) and prosecutorial (OSC) responsibilities is clearer, but the two cases described above presented unusual circumstances that justify their exclusion from this calculation.

Beginning in FY 2009, we have changed the target for Indicator A to be “80% in 60 days” for RE cases, due to the new statutory requirement for these types of cases.

Indicators B & C: OSC’s USERRA Unit missed its aggressive FY 2008 targets for DP-OD and DP-MX cases. The Demonstration Project finished at the end of 2007, but OSC closed a number of the most complex cases in FY 2008. These were very complex cases from previous fiscal years and therefore raised the overall average number of days.

<b>Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS</b>		
<b>USERRA MISSION</b>	<b>USERRA CASES</b>	
<b>PERFORMANCE INDICATORS</b>	<b>Indicator A: % favorable outcomes in cases determined by OSC to be meritorious = (# successful mediations + # of settlements achieved + # of successful litigations) / (# meritorious cases)</b>	<b>Indicator B: # of “test cases” filed</b>
<b>FY 2006 TARGET</b>	90%	Inappropriate to set a specific target
<b>FY 2006 RESULTS</b>	100%	0
<b>FY 2007 TARGET</b>	90%	Inappropriate to set a specific target
<b>FY 2007 RESULTS</b>	100%	1
<b>FY 2008 TARGET</b>	95%	Inappropriate to set a specific target
<b>FY 2008 RESULTS</b>	97%	1
<b>FY 2009 TARGET</b>	99%	Inappropriate to set a specific target
<b>FY 2009 RESULTS</b>		
<b>FY 2010 TARGET</b>	90%	Inappropriate to set a specific target
<b>FY 2010 RESULTS</b>		

Indicator A: OSC was successful in 28 out of 29 meritorious USERRA cases during FY 2008, which is 96.6%.

Indicator B: There was one test case filed that falls in this category.

<b>Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES</b>		
<b>USERRA MISSION</b>	<b>USERRA CASES</b>	
<b>PERFORMANCE INDICATORS</b>	<b>Indicator A: (# of USERRA trainings and outreaches given) / (# of invitations to provide USERRA training or outreach visits {where inviting agency sponsors OSC})</b>	<b>Indicator B: (# of USERRA trainings and outreaches given) / (# of invitations to provide USERRA training or outreach visits {where OSC pays expenses})</b>
<b>FY 2006 TARGET</b>	90%	50%
<b>FY 2006 RESULTS</b>	NA	100%
<b>FY 2007 TARGET</b>	90%	50%
<b>FY 2007 RESULTS</b>	100%	100%
<b>FY 2008 TARGET</b>	90%	75%
<b>FY 2008 RESULTS</b>	100%	NA
<b>FY 2009 TARGET</b>	90%	75%
<b>FY 2009 RESULTS</b>		
<b>FY 2010 TARGET</b>	100%	75%
<b>FY 2010 RESULTS</b>		

Five outreaches were requested. All five were accomplished by the USERRA Unit.

## OSC and the Future of USERRA Enforcement

The 35-month Demonstration Project created by the Veterans Benefits Improvement Act of 2004 terminated at the end of 2007. There are several different scenarios in which OSC could be called upon to perform investigatory USERRA responsibilities on a permanent basis for the benefit of those who serve, or have served, the United States Armed Forces. Each of the scenarios would have a different cost structure for OSC. Rather than present various scenarios and their associated costs here, we will simply make four points:

1. **Technical Expertise:** OSC has substantial in-house technical USERRA expertise from its longstanding role as federal sector USERRA prosecutor and its administration of the Demonstration Project. This expertise resulted in high corrective action rates and quick processing times in those cases for which OSC had responsibility under the Project. Much of the staff that comprised the USERRA Unit during the Demonstration Project remains at OSC and could be quickly called upon to re-join the Unit if necessary. OSC also has a training program in place to train new employees to investigate, analyze, and resolve USERRA cases. Last, other OSC personnel also have extensive investigative and prosecutorial experience that could be brought to bear on any expanded USERRA responsibility.
2. **Management Expertise:** No matter what the requirements would be of an expanded USERRA role for OSC, the agency has the experienced management in place to develop a plan, implement it, and efficiently achieve highly positive results for military service members seeking to enforce their USERRA rights. For example, a career Senior Executive with over 25 years of experience currently oversees the USERRA program. Thus, OSC already has the leadership on staff to effectively manage and administer a larger USERRA program.
3. **Specialized Focus:** OSC's staff specializes in federal personnel law, of which USERRA is a part, and its primary mission and focus is protecting the merit system of federal employment. As under the Demonstration Project, OSC's USERRA Unit would be centralized in one location, with an experienced, specialized group of attorneys and investigators working closely and collaboratively on a daily basis to investigate and resolve USERRA claims. All investigations and determinations would receive legal and supervisory review throughout the process and be reviewed by the USERRA Unit Chief before being finalized, ensuring consistency, quality, and, most importantly, correctness under the law.
4. **Cost Models:** Upon request, OSC can provide further information regarding current or projected future cost structures for any expanded role under USERRA.

## **OSC's Outreach Program**

The Outreach Program assists agencies in meeting the statutory mandate of 5 U.S.C. § 2302(c). This provision requires that federal agencies inform their workforces in consultation with the OSC about the rights and remedies available to them under the whistleblower protection and prohibited personnel practice provisions of the Whistleblower Protection Act.

In an effort to assist agencies in meeting the statutory requirement, in FY 2002, OSC designed and created a five step educational program, the 2302(c) Certification Program. This program gives guidance to agencies and provides easy-to-use methods and training resources to assist agencies in fulfilling their statutory obligation. Agencies that complete the program receive a certificate of compliance from OSC.

In an effort to promote OSC's mission and programs, OSC provides formal and informal outreach sessions, including making materials available on the agency web site. During FY 2008, OSC employees spoke at approximately 60 events nationwide, including American Bar Association events, agency training sessions, conferences and meetings. Several OSC employees presented at the Government Ethics Conference this year. Additionally, OSC's Director of Communications was a keynote speaker at the Federal Dispute Resolution Conference in August of 2008.

Finally, OSC has continued its policy of issuing press releases when OSC files a significant litigation petition, or achieves significant corrective or disciplinary action through settlement. Many of these cases generate considerable press coverage, which contributes to federal employees' and managers' awareness about the merit system protections enforced by OSC.



## **PART 4 – MANAGEMENT PERFORMANCE**

### **Strategic Management of Human Capital**

OSC's human capital strategy is aligned with its mission, goals, and organizational objectives. It is integrated into the Budget and Strategic Plans, and is consistent with human capital guidance from OPM and OMB. OSC has internal accountability systems to ensure effective merit-based human resource management as described below.

OSC uses existing personnel flexibilities and tools, including leave flexibilities, alternative work schedules, and a fairly extensive telework program. In the last two years, OSC has developed and implemented several innovative benefits for its employees, including a successful student loan repayment / employee retention program in which 20 employees participate, and a fitness program for employees. OSC's performance management systems allow managers to differentiate between high and low performers through the use of appropriate incentives and consequences.

The agency is addressing gaps concerning specific skills in its program areas through internal development, upward mobility positions, legal internships, in-house mission-specific training, and hiring additional personnel. OSC also has a highly developed cross training program that enables employees to learn new skills and participate in the work of several units. OSC also captures valuable information and ideas of departing employees through extensive exit interviews. This information is used by senior managers to refine and improve work processes.

Performance plans are in place for SES members and managers that link to the agency's mission and to strategic goals that are in place for the individual divisions. OSC also now has measurable finite performance goals in place for each employee.

### **Competitive Sourcing**

OSC is a small agency, with a highly specialized inherently government mission. 84% of its FTE perform inherently governmental work, and 16% of its FTE are considered commercial in nature. According to OMB Circular A-76 and supplemental guidance issued by OMB, government performance of commercial functions is permitted when, as is the case at OSC, the position activity total is 10 FTE or less.

OSC has an interagency agreement with the Department of Interior's National Business Center (NBC) to perform the following services: budget accounting and budget execution, accounting services, procurement system hosting, and travel management. OSC will review the NBC interagency agreement semi-annually to confirm the agreement is meeting OSC's needs. OSC also has an interagency agreement with the National Finance Center of the Department of Agriculture to perform payroll/personnel processing functions.

### **Improved Financial Performance**

As mentioned above, OSC contracts out certain work under an interagency agreement. OSC had a unique opportunity to participate in the design of the processes used for its accounting, and to design specific customized reports that reflect exactly the information most helpful to OSC in managing its funds. Contracting

these functions out has provided OSC with more specialized expertise at a lower cost than could be accomplished internally. NBC routinely provides expenditure reports to OSC, and provides a detailed financial review every quarter. NBC also provides current financial information on day-to-day operations for payroll, procurement, and travel, as needed by OSC.

As a small agency without an Inspector General, OSC generally submits a combined Inspector General (IG) Act and Federal Manager's Financial Integrity Act report each October. OSC relies on audits and other reviews of NBC operations by the OIG and the office of the Chief Financial Officer in the National Business Center, as well as information received directly from NBC, for information about any significant issues relating to the services provided to OSC.

Historically, OSC received a waiver from OMB for the requirement to have an audit of the agency's financial statements. Since FY 2004, however, OSC has not received an audit waiver. A competitively selected audit firm evaluated OSC's financial statements for FY 2008. The auditor spent time at OSC headquarters and with the National Business Center personnel in Denver who currently perform the accounting functions for OSC. The audit resulted in an unqualified audit opinion on our annual financial statements, similar to the results of the FY 2004, FY 2005, FY 2006, and FY 2007 audits.

### **Expanded Electronic Government**

OSC provides one-stop service for those who wish to file a complaint or disclosure, or request a Hatch Act advisory opinion. Hatch Act advisory opinions may be solicited through the web site. A person can file a Prohibited Personnel Practices complaint online, which is the most common channel for PPP complaints to come into the agency. A person can also make a complete Whistleblower Disclosure online.

Those who wish to communicate with a knowledgeable OSC staffer through one of the agency's telephone hot lines will find the relevant information on the web site. OSC's web site is linked to FirstGov, as well as other agency web sites, such as those for the Office of Personnel Management, the Equal Employment Opportunity Commission, and the Office of Government Ethics, among many others. OSC's Information Technology Branch (ITB) staff are continually improving OSC's web site. User sessions on OSC's web site have continued to grow. During FY 2008, the total number of user sessions was 826,406.

OSC's Information Technology Branch is working to make OSC more efficient by continually enhancing the capabilities of the Information Technology systems of the agency. For example, a major effort during FY 2009 and FY 2010 will be the upgrading of OSC's case tracking system to become a web-based system. ITB will continue migrating the entire agency to the new standard laptop setup and implementing two factor authentications for local area network access as well as for remote Citrix access. ITB will also migrate Citrix to a 64-bit computing environment, and deploy 64-bit blade servers along with a D2D2T backup solution, which will enable OSC to phase out obsolete backup tape drives. ITB will continue its work to migrate all telecommunication services to GSA Network and WIT3 contracts. And regarding continuity of operations, ITB will evaluate alternate methodologies to interconnect OSC's headquarters and field offices.

## Appendix

## Statutory Background

OSC was first established on January 1, 1979.<sup>4</sup> From then until 1989, it operated as an autonomous investigative and prosecutorial arm of the Merit Systems Protection Board (“the Board”). By law, OSC received and investigated complaints from current and former federal employees, and applicants for federal employment, alleging prohibited personnel practices by federal agencies; provided advice on restrictions imposed by the Hatch Act on political activity by covered federal, state, and local government employees; and received disclosures from federal whistleblowers (current and former employees, and applicants for employment) about wrongdoing in government agencies. The office also enforced restrictions against prohibited personnel practices and political activity by filing, where appropriate, petitions for corrective and/or disciplinary action with the Board.

In 1989, Congress enacted the Whistleblower Protection Act. The law made OSC an independent agency within the Executive Branch, with continued responsibility for the functions described above. It also enhanced protections against reprisal for employees who disclose wrongdoing in the federal government, and strengthened OSC’s ability to enforce those protections.<sup>5</sup>

The Congress passed legislation in 1993 that significantly amended Hatch Act provisions applicable to federal and District of Columbia (D.C.) government employees, and enforced by OSC.<sup>6</sup> Provisions of the act enforced by OSC with respect to certain state and local government employees were unaffected by the 1993 amendments.

In 1994, the Uniformed Services Employment and Reemployment Rights Act became law. It defined employment-related rights of persons in connection with military service, prohibited discrimination against them because of that service, and gave OSC new authority to pursue remedies for violations by federal agencies.<sup>7</sup>

OSC’s 1994 reauthorization act expanded protections for federal employees, and defined new responsibilities for OSC and other federal agencies. It provided that within 240 days after receiving a prohibited personnel practice complaint, OSC should determine whether there are reasonable grounds to believe that such a violation occurred, exists, or is to be taken. The act extended the protections of certain legal provisions enforced by OSC to approximately 60,000 employees of what was then known as the Veterans Administration (now the Department of Veterans Affairs), and to employees of certain government corporations. It also broadened the scope of personnel actions covered under these provisions. Finally, the act made federal agencies responsible for informing their employees of available rights and remedies under the Whistleblower Protection Act, and directed agencies to consult with OSC in that process.<sup>8</sup>

In November of 2001, Congress enacted the Aviation and Transportation Security Act, which created the Transportation Security Administration (TSA). Under the act, non-security screener employees of TSA could file allegations of reprisal for whistleblowing with OSC and the MSPB. The approximately 45,000 security screeners in TSA, however, could not pursue such complaints at OSC or the MSPB. OSC efforts led to the signing of a memorandum of understanding (MOU) with TSA in May 2002, under which OSC would review whistleblower retaliation complaints from security screeners, and recommend corrective or disciplinary action to TSA when warranted. The MOU did not (and could not), however, provide for OSC enforcement action before the MSPB, or for individual right of action (IRA) appeals by security screeners to the MSPB.

## Endnotes

- 1 When the Complaints Examining Unit makes a preliminary determination to close a complaint without further investigation, it must by law provide complainants with a written statement of reasons, to which they may respond. On the basis of the response, if any, the unit decides whether to close the matter, or refer it to the Investigation and Prosecution Division.
- 2 Compare, for example, 5 U.S.C. § 1214(a)(1)(A) (“The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.”) with 5 U.S.C. app. 3, §10(a) (“[E]ach Inspector General ... is authorized— ... (2) to make such investigations and reports relating to the administration of the programs and operations of the [agency] as are, in the judgment of the Inspector General, necessary or desirable[.]”) and § 7(a) (“The Inspector General may receive and investigate complaints or information from an employee of the [agency] concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety.”). OSC cannot, however, investigate complaints over which it has no jurisdiction, with the result that some complaints are closed without further action after receipt and review. During FY2004, for example, OSC lacked jurisdiction in 617 (or 31.4%) of the complaints received, leaving 1,347 complaints (69%) in which OSC was required by statute to conduct an inquiry. In addition, discrimination based on race, color, religion, sex, or national origin, age, or handicapping condition is illegal under laws enforced by the Equal Employment Opportunity Commission (EEOC), and is also a prohibited personnel practice under 5 U.S.C. § 2302(b)(1). However, since procedures for investigating discrimination complaints have already been established in the agencies and the EEOC, the Special Counsel will normally avoid duplicating those procedures and will defer to those procedures rather than initiate an independent investigation. See 5 C.F.R. § 1810.1. When a matter is not referred for further investigation, CEU must by law provide complainants with a written statement of reasons, to which they may respond. See 5 U.S.C. § 1214(a)(1)(D). On the basis of the response, if any, CEU decides whether to finalize its preliminary determination to close the matter, or to refer the matter to the Investigation and Prosecution Division.
- 3 Corrective action seeks a remedy for any injury to the individual complaining employee, such as back pay or reinstatement, while disciplinary action seeks to impose discipline on the perpetrator of the PPP.
- 4 Public Law No. 103-94 (1993), codified in scattered sections of 5 U.S.C. and 12 U.S.C.
- 5 Public Law No. 103-353 (1994), codified at 38 U.S.C. § 4301, et seq. The Veterans’ Employment Opportunities Act of 1998 (Public Law No. 103-424) also expanded OSC’s role in protecting veterans. The act made it a prohibited personnel practice to knowingly take, recommend, or approve (or fail to take, recommend, or approve) any personnel action, if taking (or failing to take) such action would violate a veterans’ preference requirement. See 5 U.S.C. § 2302(b)(11). (The former § 2302(b)(11) was re-designated as § 2302(b)(12).)
- 6 Public Law No. 103-424 (1994), codified in various sections of title 5 of the U.S. Code. The provision making federal agencies responsible, in consultation with OSC, for informing their employees of rights and remedies under the Whistleblower Protection Act appears at 5 U.S.C. § 2302(c).
- 7 Public Law 107-71 (2001).
- 8 Unless noted otherwise, all references after this to prohibited personnel practice complaints include complaints alleging other violations of civil service law, rule, or regulation listed at 5 U.S.C. § 1216, except for alleged violations of the Hatch Act.



**FISCAL YEAR 2011  
CONGRESSIONAL BUDGET JUSTIFICATION  
AND PERFORMANCE BUDGET GOALS**



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## PART 1 – EXECUTIVE SUMMARY

In matters ranging from protecting passengers in the nation's air travel, protecting our borders, rooting out corruption, identifying waste in federal contracting and grants, correcting discrimination against service members returning from duty, to disciplining high level officials for whistleblower retaliation and use of official authority to affect elections - the U.S. Office of Special Counsel has fulfilled its role as an independent prosecutorial and investigative agency charged with bringing greater integrity and efficiency to the merit system. Granting this budget request will assist this independent agency in its mission to discover and combat fraud, waste, and abuse of authority. It will send the messages that this agency is important to the healthy functioning of the United States, and that we honor and support those who bring these matters to light.

In last year's budget justification, OSC reported how the agency had continued to enhance its protection of the merit system and to provide responsive assistance to aggrieved federal employees. From FY 2005 through FY 2007, through hard work and diligence, the chronic problem of backlogged Prohibited Personnel Practice cases, Hatch Act cases, and Disclosure Unit cases did not re-surface. In FY 2008 and FY 2009, however, the incoming caseloads increased very dramatically. OSC's streamlined processes continue to contribute to the agency's ability to handle the cases, but the caseloads are so elevated that OSC needs more employees in order to investigate the cases and enforce the laws without case backlogs and lengthy delays.

### OSC's Mission

The U.S. Office of Special Counsel's primary mission is to safeguard the merit system in federal employment by protecting employees and applicants from prohibited personnel practices (PPPs), especially reprisal for whistleblowing. In addition, the agency operates a secure channel for federal whistleblower disclosures of violations of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; and substantial and specific danger to public health and safety. OSC also has jurisdiction under the Hatch Act to enforce restrictions on political activity by government employees. Finally, OSC enforces the civilian employment and reemployment rights of military service members under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

### Summary of Request

OSC is requesting \$19,486,000 in FY 2011. This amount includes funding for the salaries and benefits for 115 FTE (an increase of four FTE) to meet increased caseloads, as well as for the projected salary and rent increases in FY 2011.

### Continuing Trend of Rising Receipts of Cases

- Prohibited Personnel Practices – 2463 cases - **up 17.9%** over FY 2008, which was **up 8.4%** over FY 2007,
- Hatch Act cases – 496 cases - **up 11%** over FY 2008, which was **up 58.2%** over FY 2007,
- Whistleblower Disclosures – 724 cases - **up 37%** over FY 2008, which was **up 10.0%** over FY 2007,
- USERRA referral cases – 41 cases – **up 173%** over FY 2008. The new Veterans' Benefits Improvement Act of 2008 (P.L. 110-389) requires action on these referrals within 60 days.

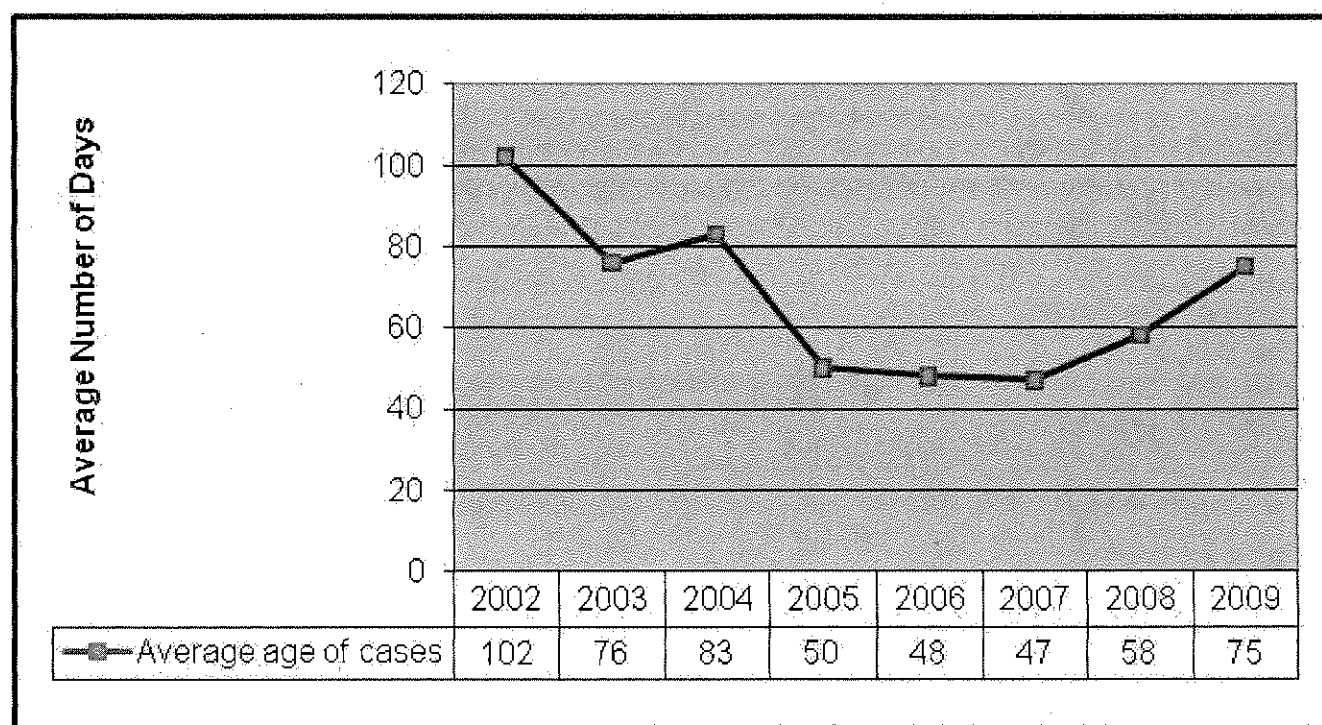
Caseloads are up in each unit, but the increase in Hatch Act cases is the most pronounced. The numbers of

Hatch Act cases received in FY 2008 (446) and FY 2009 (496) are unprecedented. *One might be tempted to think that these large increases in FY 2008 and FY 2009 were due to the presidential election and that the number of complaints will now decline. But history does not support that explanation.* In the last presidential election year, FY 2004, OSC received 248 complaints, an increase of 27% over FY 2003. But then in FY 2005, the complaints stayed constant with FY 2004, and the number received jumped upwards by 21% during FY 2006, the mid-term election year. During FY 2010, which is also a mid-term election year, we expect continued increases in PPP cases and Whistleblower Disclosures, and we expect to receive over 500 Hatch Act complaints.

### Graphical Highlights of OSC's Operations

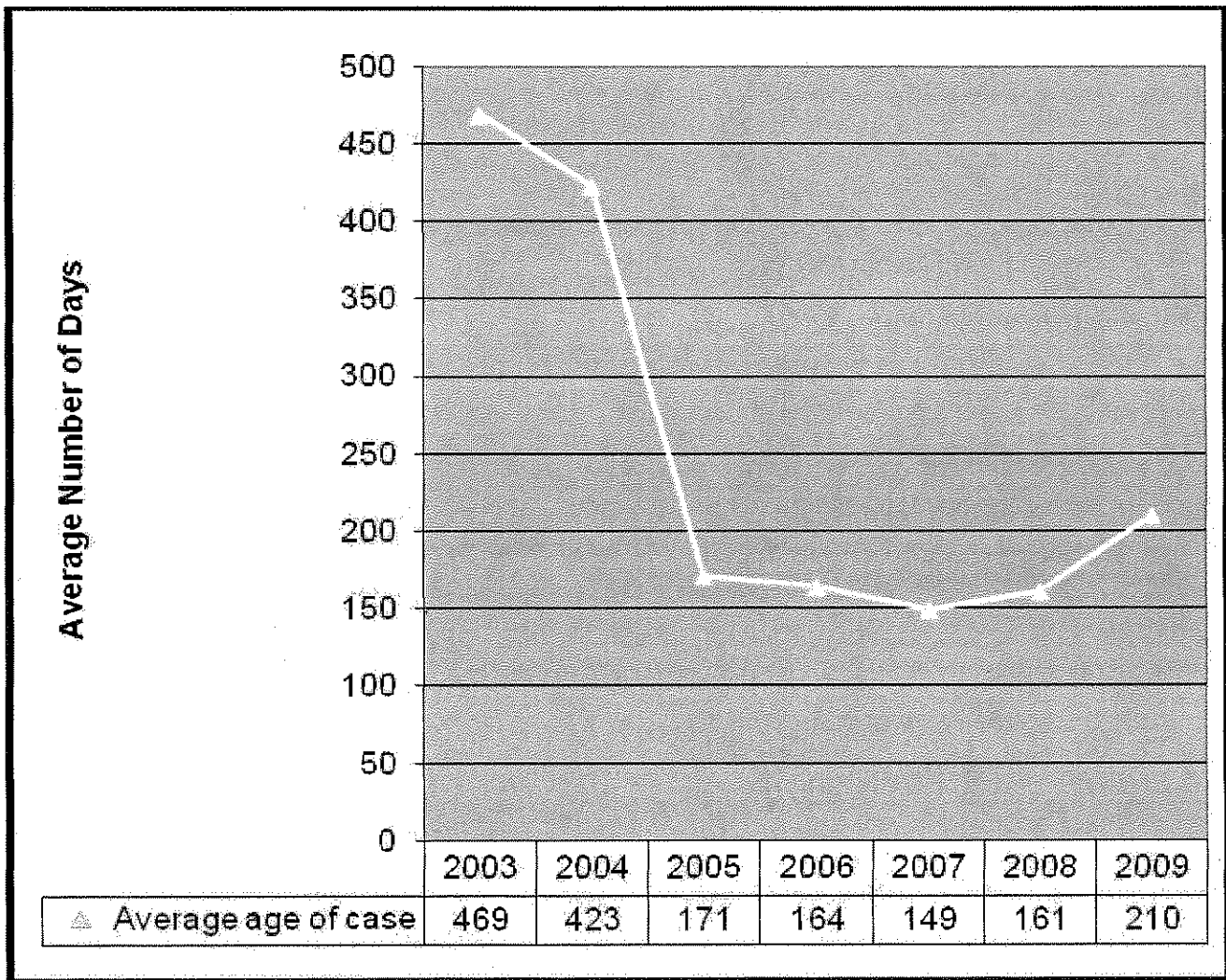
In order to bring justice swiftly to those Federal employees served by OSC, the agency tries to reach the meritorious cases quickly, seeking settlements or initiating prosecutions before evidence becomes stale and witnesses' memories fade.

**Complaints Examining Unit - Average Processing of PPP Cases in the Unit**



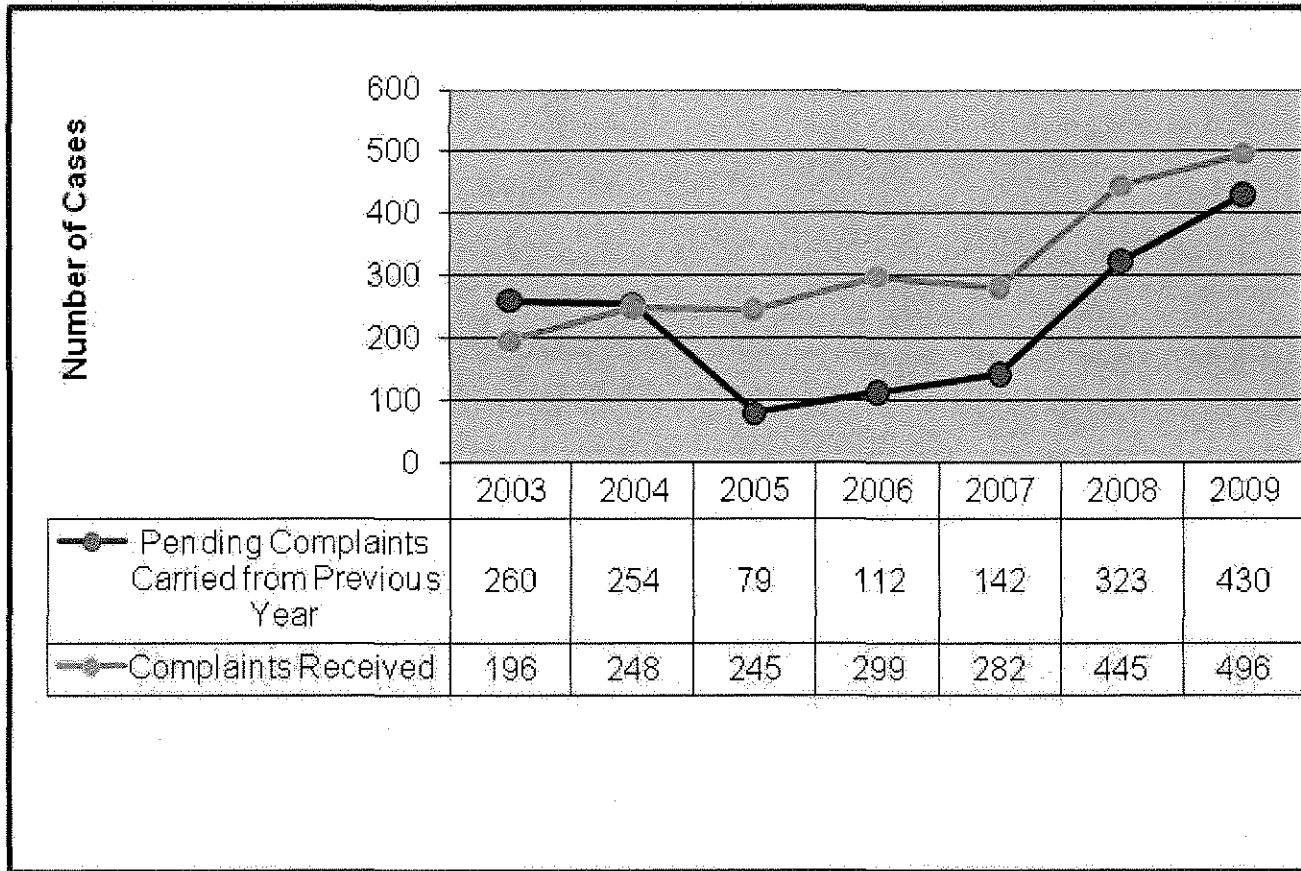
This chart shows the average number of days that a Prohibited Personnel Practice case remained in OSC's Complaints Examining Unit, before the case was either closed or referred to OSC's Investigation and Prosecution Division for further investigation. Though the processing times are below where they used to be years ago, they are increasing as OSC faces rising caseloads.

### Hatch Act Unit- Average Processing Time per Complaint



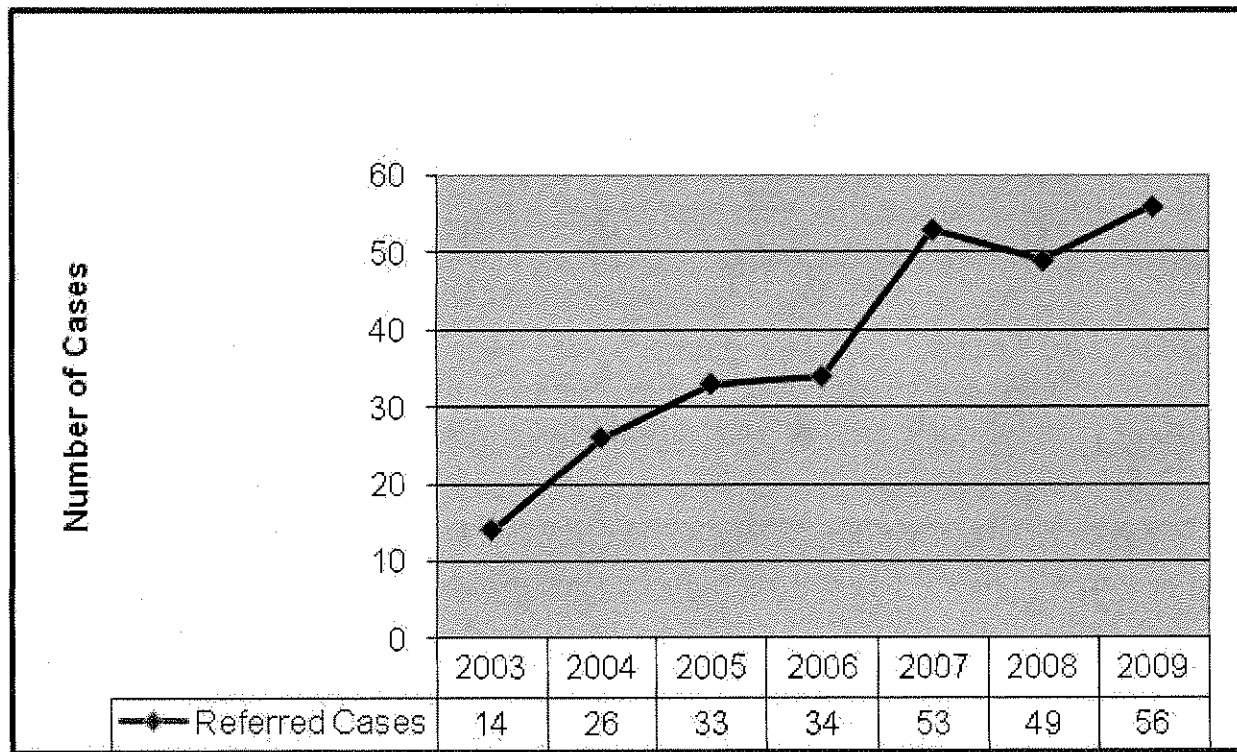
OSC's Hatch Act Unit has reduced its case processing time dramatically since FY 2003. However, due to the large increase in the number of Hatch Act cases received, the average processing time per complaint is rising.

## Hatch Act Complaints



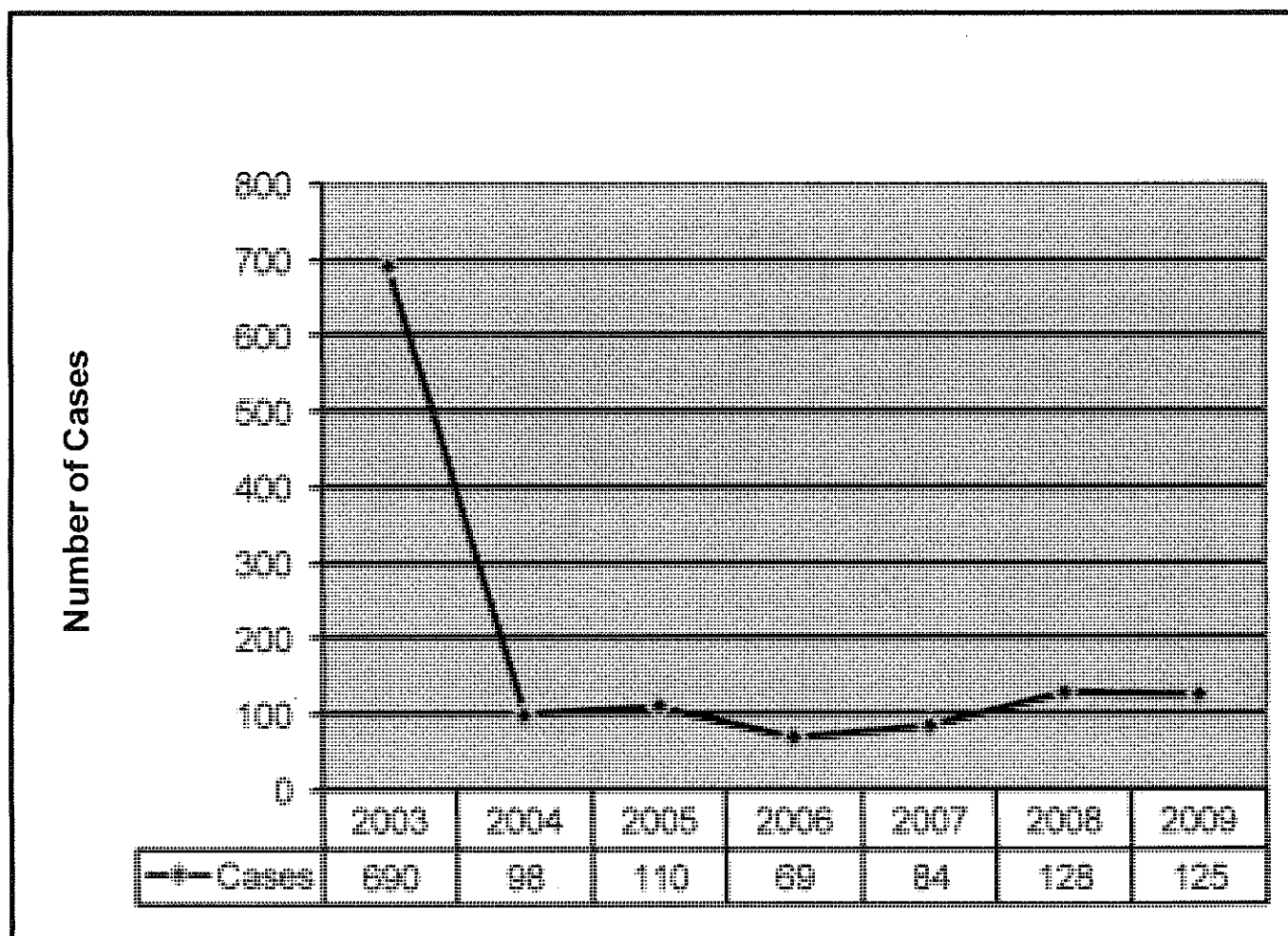
Starting in FY 2005, as OSC reduced its processing time for Hatch Act complaints, the number of pending complaints carried forward from the previous fiscal year sharply declined. From FY 2003 to FY 2006, the overall decline in processing time was 70%. But now in FY 2009, given that the number of complaints received has increased by 153% since FY 2003, the number of complaints pending at the end of the year is rising. Though OSC's Hatch Act Unit has become much more efficient, the workload has become nearly overwhelming.

### Disclosure Referrals to Agency Heads



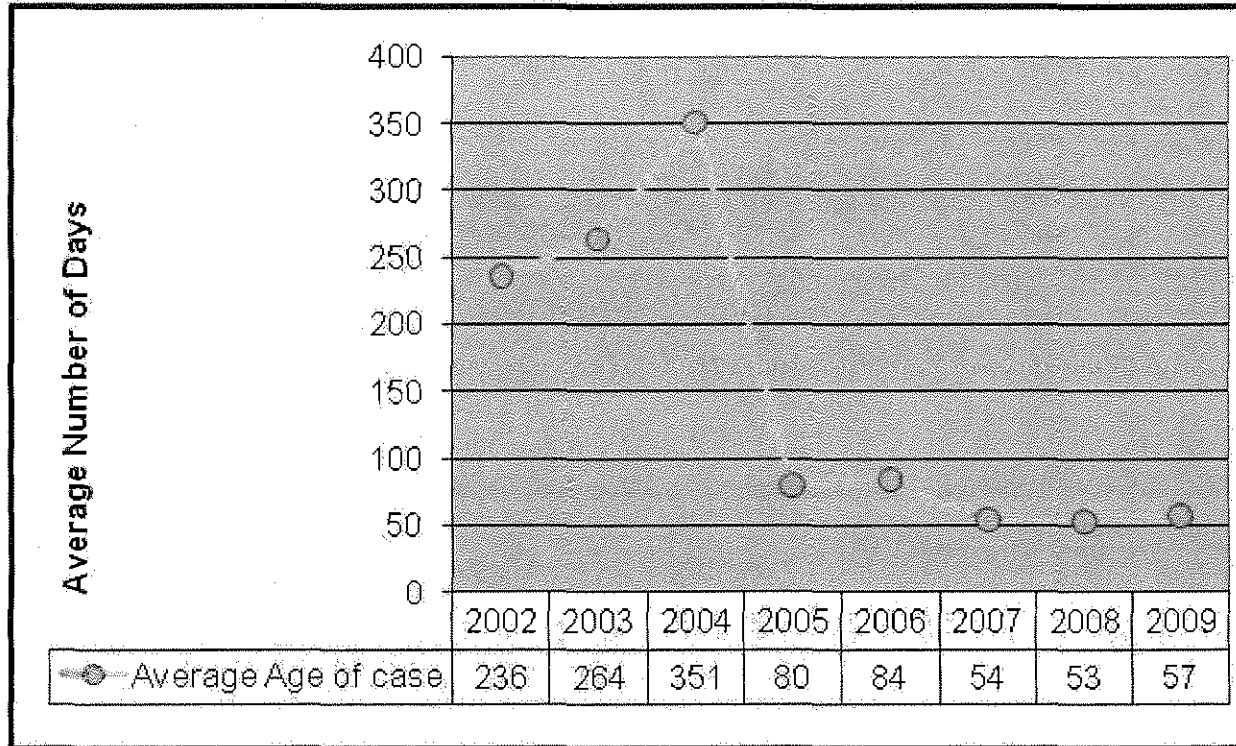
When the Special Counsel analyzes a whistleblower disclosure and determines there is substantial likelihood of wrongdoing, he refers the matter to the head of the appropriate agency, who is then required to internally investigate the matter and report the results to OSC, which, in turn, reports the results to Congress and the President. Even though caseloads in the Disclosure Unit are continuing to rise, OSC's Disclosure Unit continues to very carefully sift through each of them, in order to find the ones that warrant referral to the appropriate agency head. This chart includes several cases each year that were referred to agencies' Inspectors General.

### Disclosure Unit Cases Pending at End of Year



In FY 2003, the Disclosure Unit had a backlog of whistleblower disclosures. OSC reduced the backlog by FY 2004, and has prevented a resurgence of backlog since then. However, the increased volume of disclosures received in FY 2008 and FY 2009 resulted in higher numbers of pending disclosures at the end of FY 2008 and FY 2009.

### Disclosure Unit - Average Processing Time per Disclosure



This chart shows the improvement in processing time in OSC's Disclosure Unit. The average processing time for disclosures in FY 2009 was 57 days. This was an 84% reduction from the high of FY 2004 (an average of 351 days).



## OSC'S SUCCESSES IN FY 2009

1. **FAA Safety.** OSC has referred a substantial number of whistleblower disclosures of aviation safety vulnerabilities to the Department of Transportation for investigation in the past year, prompting additional Congressional oversight and ensuring in-depth investigations into important safety allegations.
2. **Inspector General Resignation.** Two complainants, both high-level employees of a federal agency, alleged that personnel actions were taken because they reported, or were believed to have reported, suspected travel irregularities by an agency IG to the President's Council on Integrity and Efficiency. OSC investigated and reported its findings to the President, recommending disciplinary action against the IG, and corrective action for the two complainants. The IG resigned and the agency agreed to provide full corrective action to the complainants.
3. **Threats against ATF Agent.** OSC completed a referral in which the whistleblower alleged that officials with the Bureau of Alcohol, Tobacco and Firearms (ATF) failed to adequately investigate death threats made against an agent and that ATF lacked sufficient policies on the investigation of threats and the protection of its agents. The Department of Justice found that ATF officials needlessly and inappropriately delayed investigation into some of the threats made against the agent and that ATF's policies were generally sufficient, but that an amendment was necessary to ensure that orders for emergency relocations were in writing.
4. **Missing Property.** An OSC referral substantiated two whistleblowers' claims of millions of dollars of missing government property, including computers and other electronic equipment, at Indian Health Services, Rockville, Maryland. Furthermore, the agency's report demonstrated its continued failure of accountability, which OSC reported to the President and Congress.
5. **Mediated Settlement after Aircraft Safety Disclosure.** An electronics mechanic disclosed to his agency that a specific aircraft was not being repaired and overhauled according to specifications. He alleged that this could result in an electrical short-circuit and cause a crash. Shortly thereafter, the employee was reassigned and received a letter of reprimand. Through OSC mediation, the agency agreed to remove the letter of reprimand from the employee's record and to issue him a written commendation and cash award.
6. **Mediated Settlement after Public Safety Disclosure.** A scientist alleged that he was retaliated against after raising three critical public health and safety issues and assisted a congressional committee's investigation. The scientist was demoted, placed in untenable working conditions, and given a negative performance appraisal. Through mediation, the agency agreed to pay the scientist a lump sum and to expunge any unsatisfactory performance reviews or other related documents critical of his work. The agency also agreed to pay attorney's fees.
7. **Full Corrective Action after Reprisal for Whistleblowing.** Complainant, a research pilot, alleged that he was grounded from flying, subjected to a psychiatric examination, reassigned to a non-flying position, and coerced into accepting a position at another agency facility because of his whistleblowing. He reported that several managers had violated various laws and agency aviation safety directives, engaged in gross mismanagement, abused their authority, and endangered public safety. The agency agreed to reassign complainant back to his original duty station and pay him monetary restitution.

8. **Enforcement of Veteran's Preference.** Complainant alleged that his employing agency improperly imposed a one-day cutoff in accepting applications for an information technology position. Based on the investigation, OSC determined that the agency had granted the selectee an unauthorized preference and violated veterans' reference requirements in selecting a requested candidate by name over a higher-standing preference eligible applicant. The agency agreed to offer the veteran a similar position and reassigned the human resources official from the delegated examining unit.
9. **Increased Hatch Act Litigation & Investigation.** As a result of the considerable increase in both the number and seriousness of Hatch Act violations by federal employees during the 2008 Presidential election, the Hatch Act Unit continues to generate increased investigative and litigation activity at OSC. Many of these violations involve supervisors coercing subordinates to engage in political activity and employees soliciting political contributions. In one such case, an administrative law judge recently held that a federal supervisor should be removed from her employment because she sent a partisan political e-mail to six individuals, including two subordinates, while she was on duty and in the federal workplace.
10. **Hatch Act Disciplinary Action.** OSC also has investigated many other significant Hatch Act cases and has filed seven complaints for disciplinary action with the Merit Systems Protection Board, with many more to be filed soon. For example, one case was filed against a federal supervisor who, during a mandatory staff meeting, told his subordinates which Presidential candidate he planned to vote for, polled them about the candidates for whom they planned to vote, and then encouraged them to exercise their right to vote.
11. **More Hatch Act Disciplinary Action.** Another significant investigation by OSC resulted in a 90-day suspension for a high level supervisory official at a federal agency who violated three provisions of the Hatch Act: the prohibitions against using one's official authority or influence for the purpose of affecting the result of an election; soliciting, accepting, or receiving a political contribution; and engaging in political activity while on duty or in federal room or building. The supervisor hosted a partisan political fundraising event in her home and, during a staff meeting, invited her subordinates to the event.
12. **Other Hatch Act Prosecutions.** OSC also successfully prosecuted two federal employees for violating the Hatch Act's prohibition against being a candidate in a partisan election. In both cases, the Merit Systems Protection Board ordered the federal employees removed from their employment for violating the Act.
13. **Litigating important USERRA matters.** This year, OSC tried a case of first impression that should clarify the remedies available to federal contract employees whose USERRA rights have been violated by a federal executive agency. OSC will file several other cases before the end of the year if no settlement is reached.
14. **Obtaining relief for military service members under USERRA.** OSC has received a record number of USERRA referrals from the Department of Labor, many of which have resulted in favorable settlements for service members, including retroactive promotions, back pay, and restored leave. In addition to obtaining individual relief, OSC has also sought to make broader "systemic" changes in agency policies and procedures to ensure better compliance with USERRA. This includes ensuring that agency merit promotion plans have a mechanism for considering employees who are absent due to military service.

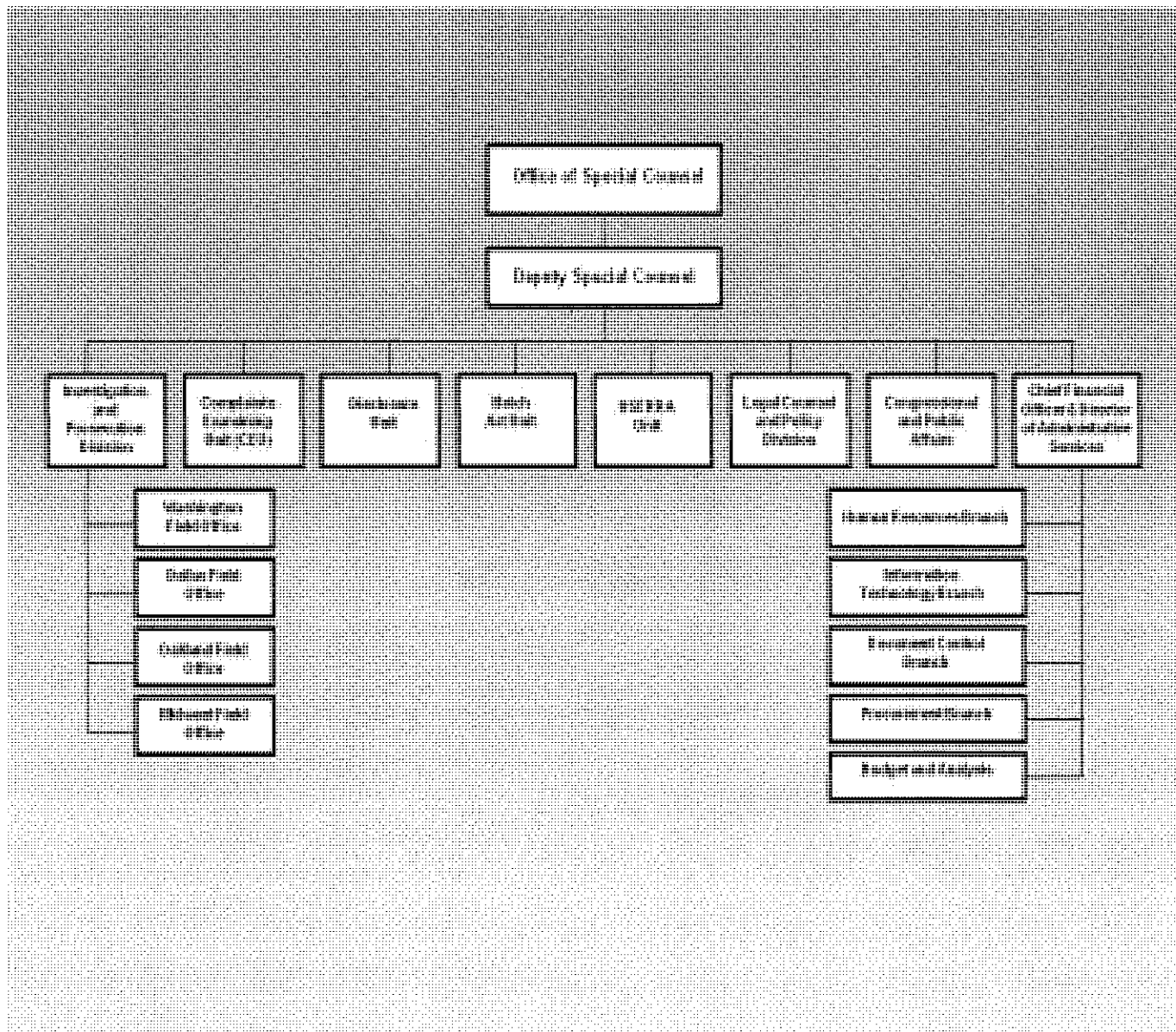
15. **OSC continues to enhance its resources for conducting mediations.** Instead of having one full time mediator, seven people from different parts of the agency have received training in conducting mediations. OSC now has a cadre of professionals with varied skills and legal expertise in multiple areas from which to draw.

### Strategic Objectives

OSC has four strategic objectives (see table below), each of which is supported by a series of operational goals. These operational goals are described in Part 3, in the appropriate section for each budget program.

Strategic Objectives of the Agency	
U.S. Office of Special Counsel	
Strategic Objective 1	OSC will protect the Merit System and promote justice in the Federal workforce through investigation and prosecution of the Prohibited Personnel Practices.
Strategic Objective 2	OSC will protect the Merit System and promote justice in the Federal workforce by enforcing the Hatch Act.
Strategic Objective 3	OSC will promote public safety, and efficiency through acting as a channel for whistleblowers in the Federal workforce to disclose information.
Strategic Objective 4	OSC will protect veterans in the Federal workforce through enforcement of the Uniformed Services Employment and Reemployment Rights Act.

## OSC ORGANIZATIONAL CHART



## Internal Organization

OSC maintains a headquarters office in Washington, D.C., and four field offices (located in Dallas, Detroit, Oakland, and Washington, D.C.). Agency components during FY 2008 included the Immediate Office of the Special Counsel, five program/operating units, and several support units (described further below).

Immediate Office of the Special Counsel (IOSC). The Special Counsel and the IOSC staff are responsible for policy-making and overall management of OSC. This encompasses management of the agency's congressional liaison and public affairs activities, and coordination of its outreach program. The latter includes promotion of compliance by other federal agencies with the employee information requirement at 5 U.S.C. § 2302(c).

## Program Units

Complaints Examining Unit (CEU). This unit is the intake point for all complaints alleging prohibited personnel practices and other violations of civil service law, rule, or regulation within OSC's jurisdiction. CEU screens over 2,400 such complaints each year. Attorneys and personnel management specialists conduct an initial review of complaints to determine if they are within OSC's jurisdiction, and if so, whether further investigation is warranted. The unit refers all matters stating a potentially valid claim to the Investigation and Prosecution Division for further investigation or possible mediation.

Investigation and Prosecution Division (IPD). IPD is comprised of four field offices, and is generally responsible for conducting field investigations of matters referred after preliminary inquiry by CEU. In selected cases referred by CEU for further investigation, IPD coordinates mediation of complaints in which the complainant and the agency involved have agreed to participate in OSC's voluntary Alternative Dispute Resolution (ADR) Program. In other cases, after field investigation of matters referred by CEU, legal analyses are done by IPD attorneys to determine whether the evidence is sufficient to establish that a prohibited personnel practice (or other violation within OSC's jurisdiction) has occurred. IPD investigators work with the attorneys in deciding whether a matter warrants corrective action, disciplinary action, or both. If meritorious cases cannot be resolved through negotiation with the agency involved, the attorneys represent the Special Counsel in litigation before the MSPB. They also represent the Special Counsel when OSC intervenes, or otherwise participates, in other proceedings before the Board. Finally, IPD investigators and attorneys assist the Hatch Act Unit and the USERRA Unit, as needed, with cases handled by those components.

Disclosure Unit (DU). This component receives and reviews disclosures from federal whistleblowers. Reporting directly to the Deputy Special Counsel, DU recommends the appropriate disposition of disclosures, which may include referral to the head of the agency involved for investigation and a report to the Special Counsel; informal referral to the Inspector General (IG) of the agency involved; or closure without further action. Unit attorneys review each agency report of investigation to determine its sufficiency and reasonableness before the Special Counsel sends the report to the President and responsible congressional oversight committees, along with any comments by the whistleblower and the Special Counsel.

Hatch Act Unit (HAU). This unit enforces and investigates complaints of Hatch Act violations, and represents OSC in litigation before the MSPB seeking disciplinary action. In addition, the HAU is responsible for providing legal advice on the Hatch Act to federal, D.C., state and local employees, as well as the public at large.

USERRA Unit. This component reviews USERRA cases referred by the Department of Labor (DOL) to OSC for legal representation of the claimant before the MSPB, if warranted. Under a nearly three-year demonstration project established by Congress, the USERRA Unit also directly received and investigated approximately one-half of all federal sector USERRA cases filed between February of 2005 and December of 2007, bypassing DOL.

## Supporting Units

**Legal Counsel and Policy Division.** This division serves as OSC's office of general counsel, and provides policy advice and support to the agency. The division's responsibilities include provision of legal advice and support in connection with management and administrative matters; defense of OSC interests in litigation filed against the agency; management of the agency's Freedom of Information Act, Privacy Act, and ethics programs; and policy planning and development.

**Office of the Chief Financial Officer and Director of Administrative Services.** This office manages OSC's budget and provides management support and administrative services to the agency. Component units are the Budget and Analysis Branch, Document Control Branch, Human Resources Branch, Information Technology Branch, and the Procurement Branch.

## Budget by Program

The following table provides an estimate of the FTE and budgetary resources for each program.

<b>FY 2011 Budget by Program</b>						
(in thousands of dollars)						
<b>Program</b>	<b>FY 2010 Estimate</b>		<b>FY 2011 Estimate</b>		<b>Increase/Decrease</b>	
	<b>\$</b>	<b>FTE</b>	<b>\$</b>	<b>FTE</b>	<b>\$</b>	<b>FTE</b>
Investigation and Prosecution of Prohibited Personnel Practices	\$9,520	57	\$9,612	57	\$92	0
Hatch Act Enforcement	\$1,959	12	\$2,434	15	\$475	3
Whistleblower Disclosure Unit	\$2,114	12	\$2,289	13	\$174	1
USERRA Enforcement and Prosecution	\$384	2	\$388	2	\$4	0
Office of the Special Counsel	\$594	4	\$803	4	\$209	0
Office of the Agency General Counsel	\$993	5	\$1,002	5	\$9	0
Office of the CFO - Management / Information Technology / Budget / Human Resources / Procurement / Document Control / Planning / Analysis / Facilities	\$2,930	19	\$2,959	19	\$29	0
<b>totals</b>	<b>\$18,495</b>	<b>111</b>	<b>\$19,486</b>	<b>115</b>	<b>\$992</b>	<b>4</b>

## **PART 2 - FY 2010 BUDGET REQUEST – ADDITIONAL INFORMATION**

OSC is requesting \$19,486,000. This includes funding for OSC's current staff of 111 FTE, funding for four new FTE to address increasing caseloads, rent and salary increases for FY 2011. This number of FTE is necessary to manage and process the agency's elevated workload of prohibited personnel practice complaints, whistleblower disclosures, Hatch Act complaints, Hatch Act cases, Hatch Act advisory opinions, special task force investigations, and USERRA cases in a manner that precludes the formation of case backlogs. The workload has steadily increased since 2000, and steeply increased by almost 30% during the last two years.

### **Budgetary Factors**

Over 90% of OSC's budget goes toward salary, benefits, and office space rent. The first two factors described below are the two main drivers of the FY 2011 increase.

**1. Increased costs for salaries and benefits.** In FY 2011, for the first time in several years, OSC will have a full political staff of four to five employees for a complete fiscal year. Given the continued rapid increase in caseloads and the fact that four to five of OSC's employees will be used for political staff, it is imperative that OSC operate with 110 career employees during all of FY 2011. In sum, OSC will need sufficient funding to support 115 FTE, including the pay raise of FY 2010, and the projected raise of FY 2011.

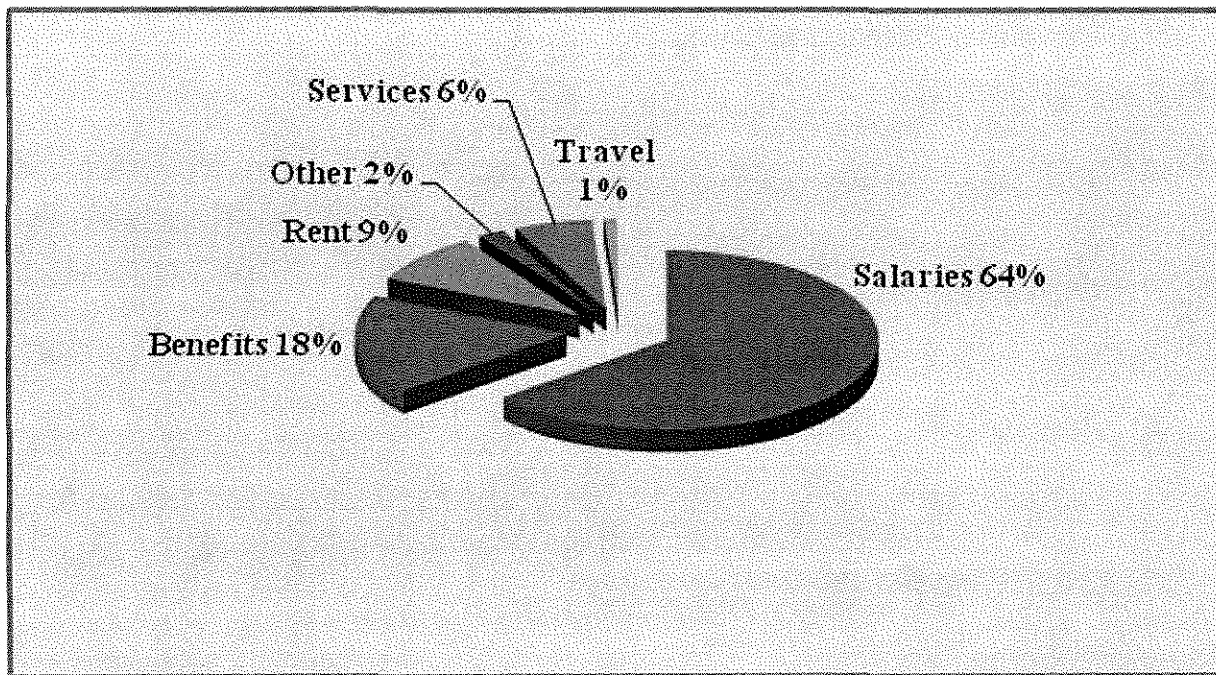
**2. New GSA lease for OSC's headquarters.** OSC's has a new ten-year lease for its headquarters space in Washington, D.C. FY 2011 will be the first full year of operating under the new lease. Rent for OSC's headquarters and three field offices will be \$529,000 higher than during the last full year of the old lease, FY 2009. This rent increase is an unavoidable expense.

**3. Information Technology Necessity.** OSC needs to convert its ten-year old case tracking system to a web-based platform. OSC will work to accomplish as much as possible towards this goal, recognizing that salary, benefits and rent expenses for during FY 2011 are the highest priorities.

Other notable increased expenses for OSC include the higher cost of legal information services (projected 10% increase), the higher cost of mandatory security charges payable to DHS (projected 18% increase), and the higher cost of transit subsidies (projected 10% increase). As the agency operates with more employees than it has in the past, a marginal increase in expenditures for supplies, travel, equipment, and other services can be expected. The agency's interagency agreement for outsourced accounting and payment services will also increase.

## Components of Budget Request

The following chart estimates how the requested FY 2011 funding will be distributed on a percentage basis:



Field office expenditures are almost entirely driven by the number of employees in the field offices. Below is a list of approximate staffing levels by field office. Staffing levels vary during the year due to hires, departures, and the management needs of the agency.

Headquarters	approximately 75-78 employees
Midwest Field Office	approximately 7 employees
Dallas Field office	approximately 8-9 employees
Oakland Field Office	approximately 9-10 employees
Washington DC Field Office	approximately 10-12 employees



**FY 2010 Budget Request by Budget Object Class:**

For a detailed projection of the expenditures that will be required in each Budget Object Class (BOC) during FY 2010, see Budget Table 1 below.

<b>Budget Table 1</b> <b>U.S. Office of Special Counsel</b> <b>Budget Object Classification of Obligations: FY2009-FY2011</b> <i>(in thousands of dollars)</i>			
Budget Object Classification of Obligations	FY2009 <i>Actual</i>	FY2010 <i>(projected)</i>	FY2011 <i>(projected)</i>
11.0 Personnel compensation	10,789	11,880	12,468
12.0 Civilian personnel benefits	3,049	3,202	3,358
13.0 Benefits to former personnel	30	24	24
21.0 Travel and transportation of persons	217	225	225
22.0 Transportation of things	20	21	21
23.1 Rental payments to GSA	1,291	1,588	1,795
23.3 Communications, utilities and misc. charges	140	120	120
24.0 Printing and reproduction	18	20	20
25.0 Other services	1,272	1,160	1,193
26.0 Supplies and materials	137	111	111
31.0 Equipment	370	151	151
32.0 Land & Structures	0	0	0
42.0 Tort Claims	0	0	0
<b>99.9 Total</b>	<b>17,333</b>	<b>18,495</b>	<b>19,486</b>

Notes concerning detailed BOC line items:

Object Class 12.0 Civilian Personnel Benefits: This category includes the agency's Student Loan Repayment / Employee Retention Program, as well as transit subsidies.

Object Class 23.1 Rental Payments to GSA: The increase in this category reflects the agency's new lease for its headquarters space, as well as increasing real estate taxes from the District of Columbia.

<b>Budget Table 2</b> <b>Analysis of Resources: FY2009-FY2011</b> <i>(in thousands of dollars)</i>			
Description	FY2009 <i>(Actual)</i>	FY2010 <i>(projected)</i>	FY2011 <i>(projected)</i>
Budget authority	17,468	18,495	19,486
Outlays	15,784	16,731	17,611
Approximate full-time equivalent employment FTE) work years	105	111	115

## **PART 3 - BUDGET PROGRAMS AND PERFORMANCE PLAN**

### **Investigation and Prosecution of Prohibited Personnel Practices**

Unlike many other investigative entities or agencies, OSC must, as a general rule, conduct an inquiry after receipt of complaints alleging the commission of a prohibited personnel practice.<sup>2</sup> The nature of the inquiry ranges from a screening analysis by the CEU to an IPD field investigation. Complaints received by OSC can and often do involve multiple allegations, some of which can involve different prohibited personnel practices. In all such matters, an OSC inquiry requires the review of, and a legal determination about, each allegation and prohibited personnel practice.

After a complaint is received by OSC, CEU attorneys and personnel management specialists conduct an initial review to determine whether it is within OSC's jurisdiction, and whether further investigation is warranted. CEU refers all matters stating a potentially valid claim to the IPD for further investigation. All such matters are reviewed first by the ADR Unit.

In selected cases that have been referred for further investigation, a trained OSC ADR specialist contacts the complainant and the employing agency to invite them to participate in the agency's voluntary ADR Program. If both parties agree, OSC conducts a mediation session, led by OSC trained mediators who have experience in federal personnel law. When mediation resolves the complaint, the parties execute a binding written settlement agreement. If mediation does not resolve the complaint, it is referred for further investigation, which would have been the normal course of action had the parties not attempted mediation.

The IPD conducts investigations to review pertinent records and to interview complainants and witnesses with knowledge of the matters alleged. Matters undergo legal review and analysis to determine whether the matter warrants corrective action, disciplinary action, or both.

If OSC believes a prohibited personnel practice has been committed and initiates discussions with an agency, the matter is often resolved through negotiation. Before OSC may initiate an enforcement proceeding seeking corrective action (relief intended to make an aggrieved employee whole) at the MSPB, the Special Counsel must make a formal request to the agency involved, reporting on its findings and recommendations. Only when the agency has had a reasonable period of time to take corrective action and fails to do so, may OSC proceed to petition the MSPB for corrective action. When an agency refuses to grant appropriate corrective action, OSC generally proceeds immediately to file a complaint with the MSPB. If OSC determines that disciplinary action (the imposition of discipline on an employee who has committed a violation) is warranted, it can file a complaint directly with the MSPB. Should the agency agree to take appropriate disciplinary action on its own initiative, then the matter can be settled without resort to an MSPB proceeding.

In addition to rectifying the matter at issue, OSC litigation before the MSPB – whether by enforcement actions seeking to obtain corrective and/or disciplinary action, or by intervention or other participation in matters filed by others – often has the additional benefit of clarifying and expanding existing law. It also brings greater public attention to OSC's mission and work, a factor likely to increase the deterrent effect of its efforts.

During FY 2009, OSC received 3,725 new matters, including PPP, Hatch Act, and Disclosure matters (see Table 1). This was an increase of 19.5% over the number received in FY 2008.

## Resource Estimates

During FY2010 the Investigation and Prosecution of Prohibited Personnel Practices will use approximately 57 FTE at a cost of approximately \$9,520,000. During FY 2011, we estimate the cost of the program will be approximately \$9,612,000 with 57 FTE.

TABLE 1 Summary of All OSC Case Activity					
	FY 2004	FY 2006	FY 2007	FY 2008	FY 2009
Matters pending at start of fiscal year	718	777	667 <sup>a</sup>	699	943
New matters received	2,684	2,718	2,880	3,118	3,725
Matters closed	2,683	2,814	2,842	2,873	3,337
Hatch Act advising officers closed	2,538	3,004	2,598	1,991	3,733
Matters pending at end of fiscal year	777	681	698	937	1,324

<sup>a</sup> "Matters" in this table includes prohibited personnel practice cases (including TSA matters), Hatch Act complaints, whistleblower disclosures, and USERRA cases.

<sup>b</sup> Closure entries in the agency case tracking system were made in early FY 2007 for several cases completed during FY 2006.

OSC's largest program is devoted to the processing of PPP complaints. Of the total 3,725 new matters OSC received during FY 2009, 2,463 or 66% were new PPP complaints (see Table 2).

TABLE 2 Summary of All Prohibited Personnel Practice Complaints Activity - Receipts and Processing <sup>a</sup>					
	FY 2005	FY 2006	FY 2007 <sup>b</sup>	FY 2008	FY 2009
Pending complaints carried over from prior fiscal year	524	521	388	358	474
New complaints received	1,771	1,805	1,970	2,089	2,463
Total complaints	2,295	2,326	2,366	2,447	2,937
Complaints referred by OLC for investigation to IPD	198	143	125	135	169
Complaints processed by IPD	216	256	151	88 <sup>c</sup>	150
Complaints pending in OLC at end of fiscal year	283	155	136	155	201
Total complaints processed and closed (OLC and IPD combined)	1,774	1,930	1,996	1,971	2,173
Complaints resolved within 240 days	1,198	1,693	1,874	1,866	2,045
Complaints resolved over 240 days	576	237	121	85	127
Percentage resolved within 240 days	67.3%	88%	94%	95%	94%

<sup>a</sup> Complaints frequently contain more than one type of allegation. This table, however, records all allegations received in a complaint as a single matter.

<sup>b</sup> Numbers shown in this column in last year's annual report were recalculated due to an administrative error. Calculations are now performed with a new standardized query tool.

<sup>c</sup> "New complaints received" includes a few re-opened cases each year, as well as prohibited personnel practice cases referred by the MSPB for possible disciplinary action.

<sup>d</sup> In FY 2008, IPD not only processed 88 PPP complaints, but also handled 17 USERRA demonstration project cases and one Hatch Act case.

Table 3 below provides information regarding the numbers of corrective actions obtained in Prohibited Personnel Practice cases.

TABLE 3 Summary of All Favorable Actions – Prohibited Personnel Practice Complaints <sup>a</sup>		FY 2005	FY 2006	FY 2007	FY 2008 <sup>b</sup>	FY 2009
Total favorable actions negotiated with agencies (all PPRC)	# of actions	45	52	29	58	62
	# of matters	45	48	19	33	53
Total favorable actions negotiated with agencies (not for whistleblower)	# of actions	37	40	21	44	35
	# of matters	37	37	21	20	29
Disciplinary actions negotiated with agencies		3	4	5	3	5
Stays negotiated with agencies		3	8	2	2 <sup>c</sup>	2
Stays obtained from MSPB		1	1	3	0	0
Corrective action complaints filed with the MSPB		1	1	1	0	0
Disciplinary action complaints filed with the MSPB		1	0	0	1	0

<sup>a</sup> OSC used a newly developed standardized query tool to generate the numbers for FY 2008. When applied backwards to the years FY 2004 through FY 2007, the query tool generated slightly different numbers for several of the figures. Differences are caused by entry of valid data into the case tracking system after annual report figures were compiled and reported, and by data entry errors in earlier years that have since been corrected.

<sup>b</sup> Actions itemized in this column occurred in matters referred by CEU and processed by IPD.

<sup>c</sup> Incorrectly reported as 4 in OSC's FY 2007 report to Congress due to administrative error.

<sup>d</sup> Represents two stays obtained in each of two cases.

## Alternative Dispute Resolution

Among the factors that determine “mediation-appropriate” cases are the complexity of the issues, the nature of the personnel action, and the relief sought by the Complainant. Once a case has been identified as mediation appropriate, OSC Alternative Dispute Resolution Specialist contacts the parties to discuss the ADR Program. “Pre-mediation” discussions are designed to help the parties form realistic expectations and well-defined objectives regarding the mediation process.

During fiscal year 2009, 88% of the agencies accepted initial mediation and there were eleven successfully mediated resolutions (see Table 4).

TABLE 4 ADR Program Activity - Mediation of Prohibited Personnel Practice Complaints						
		FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Mediation of prohibited personnel practice complaints		22	52	38	31	28
Initial acceptance rate by parties	Complainants	27%	81%	71%	94%	61%
	Agencies	77%	59%	50%	94%	88%
Mediated and other resolutions*		3	11	10	8	11
Resolution rate - OSC initiative program		100%	55%	50%	50%	100%

\* Category includes complaints settled through mediation by OSC (including "reverse-referrals" - i.e., cases referred back to ADR program staff by IPD after investigation had begun, due to the apparent potential for a mediated resolution). Category also includes complaints that entered the initial OSC mediation process, and were then resolved by withdrawal of the complaint, or through mediation by an agency other than OSC.

Mediation settlement outcomes in OSC's Mediation Program vary, depending on the interests of the parties. Monetary recovery includes retroactive promotions, attorney fees, and lump sum payments. In addition to monetary recovery, the benefits received by complainants in ADR include revised performance appraisals, reinstatement of employment, and transfers to better working environments.

#### Goals and Results – Prohibited Personnel Practices

OSC's Strategic Objective 1 is to protect the Merit System and promote justice in the Federal workforce through investigation and prosecution of the Prohibited Personnel Practices. The following tables describe the three operational goals supporting this strategic objective.

<b>Goal 1: TO PROTECT THE MERIT SYSTEM THROUGH TIMELY CASE PROCESSING</b>	
<b>PPP Enforcement Mission</b>	<b>PROHIBITED PERSONNEL PRACTICES CASES</b>
<b>PERFORMANCE INDICATOR</b>	<b>Indicator A: Percentage of cases processed in less than 240 days.</b>
<b>FY 2006 TARGET</b>	85%
<b>FY 2006 RESULTS</b>	89%
<b>FY 2007 TARGET</b>	92%
<b>FY 2007 RESULTS</b>	94%
<b>FY 2008 TARGET</b>	92%
<b>FY 2008 RESULTS</b>	95%
<b>FY 2009 TARGET</b>	92%
<b>FY 2009 RESULTS</b>	94%
<b>FY 2010 TARGET</b>	94%
<b>FY 2010 RESULTS</b>	
<b>FY 2011 TARGET</b>	94%
<b>FY 2011 RESULTS</b>	

OSC achieved its timeliness target in FY 2009. We are maintaining 94% as the target in FY 2011. Full field investigations often take longer than 240 days due to factors outside of OSC's control, such as extensions of time requested by the agency under investigation, and the timeframes associated with litigation. Therefore, raising the target above 94% would not be realistic or helpful.

<b>Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS</b>	
<b>PPP Enforcement Mission</b>	<b>Prohibited Personnel Practices Cases</b>
<b>PERFORMANCE INDICATOR</b>	<b>Indicator A: % favorable outcomes in cases determined by OSC to be meritorious = (# of settlements achieved + # of successful litigations) / (# meritorious cases)</b>
<b>FY 2006 TARGET</b>	99%
<b>FY 2006 RESULTS</b>	100%
<b>FY 2007 TARGET</b>	99%
<b>FY 2007 RESULTS</b>	100%
<b>FY 2008 TARGET</b>	100%
<b>FY 2008 RESULTS</b>	100%
<b>FY 2009 TARGET</b>	100%
<b>FY 2009 RESULTS</b>	100%
<b>FY 2010 TARGET</b>	100%
<b>FY 2010 RESULTS</b>	
<b>FY 2011 TARGET</b>	100%
<b>FY 2011 RESULTS</b>	

OSC did not lose any cases this year in PPP litigation before the board. Normally, agencies will settle the matter when OSC outlines the nature of the prohibited personnel practices that have been committed. We are maintaining the FY 2011 target at 100%.



<b>Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES</b>	
<b>PPP Enforcement Mission</b>	<b>PROHIBITED PERSONNEL PRACTICES CASES</b>
<b>PERFORMANCE INDICATOR</b>	<b>Indicator A: # of new Federal agencies certified in the 2302 (c) Program by OSC.</b>
<b>FY 2006 TARGET</b>	5
<b>FY 2006 RESULTS</b>	6
<b>FY 2007 TARGET</b>	5
<b>FY 2007 RESULTS</b>	3
<b>FY 2008 TARGET</b>	5
<b>FY 2008 RESULTS</b>	5
<b>FY 2009 TARGET</b>	5
<b>FY 2009 RESULTS</b>	11
<b>FY 2010 TARGET</b>	5
<b>FY 2010 RESULTS</b>	
<b>FY 2011 TARGET</b>	5
<b>FY 2011 RESULTS</b>	

During FY 2009, eleven agencies were certified or re-certified under OSC's 2302(c) program. This spike was due to an OSC effort to re-certify agencies whose certifications were expiring. We are not increasing the FY 2011 target for certifying agencies, because many agencies involved with the program have exhibited dwindling interest. We note that the statutory provision upon which OSC's certification program is based - 5 USC § 2302(c) - does not provide an enforcement tool to require agencies to become certified.

## **Hatch Act Enforcement Program**

OSC is also responsible for enforcing the Hatch Act, including investigating and prosecuting complaints alleging violations of the Act, and providing advisory opinions on the Act's requirements. The Hatch Act Unit is responsible for a nationwide program that provides legal advice on the Hatch Act to federal, state and local employees and the public at large. Specifically, the Hatch Act Unit has the unique responsibility of providing Hatch Act information and legal advice to White House staff, Congressional staff, the national press, senior management officials throughout the federal government, and state and local government officials. The Hatch Act Unit provides all of OSC's advisory opinions. When provided to individuals, the advisory opinions enable them to determine whether they are covered by the Act, and whether their contemplated activities are permitted under the Act.

The Hatch Act Unit also enforces compliance with the Act by receiving complaints alleging Hatch Act violations, conducting preliminary inquiries into complaint allegations and, (where warranted) further investigating allegations or referring the complaints to OSC's IPD (for further investigation). Depending on the severity of the violation, the Hatch Act Unit will either issue a warning letter to the employee, attempt to informally resolve the violation, prosecute the case before the MSPB or send it to the IPD to prosecute before the MSPB.

A string of Hatch Act cases involving high-profile employees over the last three years has resulted in significant national press coverage. There is now a very heightened awareness of the Hatch Act among Federal employees. In FY 2009, the unit received an all time high of 496 complaints, an increase of 11.5% over FY 2008 and 75.9% over FY 2007. In FY 2009, OSC's Hatch Act Unit achieved 24 corrective actions, including 15 withdrawals from partisan races and 6 resignations from covered employment (see **Table 5**).

To further its advisory role, the Hatch Act Unit is very active in OSC's outreach program; the unit conducted over 50 outreach presentations in FY2009 to various federal agencies and employee groups concerning federal employees' rights and responsibilities under the Act. Many of these programs involved high-level agency officials. Also, the unit attempted to informally resolve as many ongoing Hatch Act violations as possible without resorting to litigation. As usual, advisories concerning partisan activity surrounding state and local elections have accounted for a fair amount of OSC's work this fiscal year.

### **Resource estimates:**

During FY 2010, the Hatch Enforcement Program will use approximately 12 FTE at a cost of approximately \$1,959,000. During FY 2011, we estimate the cost of this program to be \$2,434,000 for 15 FTE.

TABLE 3 Summary of Hatch Act Complaint and Advisory Opinion Activity		FY 2003	FY 2006	FY 2007	FY 2008	FY 2009
Federal written advisory opinions received		191	237	194	242	227
Federal written advisory opinions issued		183	230	176	273	226
Total advisory opinions issued <sup>a</sup>		2,558	3,004	2,598	2,991	3,743
New complaints received <sup>b</sup>		245	299	282	445	496
Complaints processed and closed		310	266	252	264	288
Warning letters issued		87	76	68	70	132
Corrective actions taken by memo letter recipients:	Withdrawal from partisan force	4	9	15	13	15
	Resigned or forced to leave employee unit	10	22	6	17	6
	Other	3	2	1	2	3
	Total	17	33	22	32	24
Disciplinary actions completed files with MSPB		11	6	1	3	10
Disciplinary actions obtained by negotiation or ordered by MSPB		12	10	5	11	5
Complaints pending at end of fiscal year		79	112	142	373	470

<sup>a</sup> All oral, e-mail, and written advisory opinions issued by OSC.

<sup>b</sup> Includes cases that were re-opened.

<sup>c</sup> Numbers revised for fiscal years 2005 - 2008 based upon a new query which includes disciplinary actions obtained in both negotiated Hatch Act settlements and litigated Hatch Act cases, not just litigated cases in the past. As a result, the numbers have increased from what was previously reported (except for FY 2004, which remained the same).

## Task Force Investigations

In the spring of 2007, the Special Counsel created a new task force to investigate numerous allegations that high level agency officials may have violated the Hatch Act or other civil service laws. Specifically, the task force is investigating numerous allegations that certain agency officials may have encouraged or allowed partisan political forces to improperly influence government decisions. Among the allegations that the task force is currently investigating are those regarding certain political briefings given by the White House Office of Political Affairs to political appointees throughout the federal government and various hiring practices at the Justice Department. This task force has completed its investigations and expects to submit its report to the Special Counsel in February 2010.

## Goals and Results - Hatch Act Program

OSC's Strategic Objective 2 is to protect the Merit System and promote justice in the Federal workforce by enforcing the Hatch Act. The tables below describe the three operational goals supporting this strategic objective.

<b>Goal 1: TO DEFEND THE MERIT SYSTEM BY ENFORCING THE HATCH ACT – THROUGH TIMELY CASE PROCESSING</b>			
<b>HATCH ACT MISSION</b>	<b>HATCH ACT WRITTEN ADVISORY OPINIONS</b>	<b>HATCH ACT ORAL &amp; EMAIL ADVISORY OPINIONS</b>	<b>HATCH ACT COMPLAINTS</b>
<b>PERFORMANCE INDICATORS</b>	<b>Indicator A: Percentage of formal written advisory opinions issued in less than 120 days.</b>	<b>Indicator B: Percentage of oral and e-mail advisory opinions issued in less than five business days</b>	<b>Indicator C: Percentage of matters resolved in less than 365 days.</b>
<b>FY 2006 TARGET</b>	75%	99%	60%
<b>FY 2006 RESULTS</b>	93%	100%	84%
<b>FY 2007 TARGET</b>	80%	99%	70%
<b>FY 2007 RESULTS</b>	91%	99%	92%
<b>FY 2008 TARGET</b>	85%	99%	80%
<b>FY 2008 RESULTS</b>	60%	100% oral 95% email	88%
<b>FY 2009 TARGET</b>	90%	99% oral 95% email	85%
<b>FY 2009 RESULTS</b>	82%	99% oral 98% email	84%
<b>FY 2010 TARGET</b>	90%	99% oral 95% email	85%
<b>FY 2010 RESULTS</b>			
<b>FY 2011 TARGET</b>	85%	99% oral 95% email	85%
<b>FY 2011 RESULTS</b>			

Indicator A: During FY 2009, OSC issued formal written advisory opinions 82% of the time within 120 days, missing the target of 90%. This is due to the tremendous increase in Hatch Act caseload. During FY 2009, the number of Hatch Act complaints requiring investigation climbed to nearly 500. Prior to FY 2008, the number of complaints was always less than 300. When considering these steep increases in caseload, issuing 82% of the written advisories within 120 days was an accomplishment. OSC's target in FY 2011 will be to issue 85% of the opinions within 120 days.

<b>Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS</b>	
<b>HATCH ACT MISSION</b>	<b>HATCH ACT CASES</b>
<b>PERFORMANCE INDICATOR</b>	<b>Indicator A: % favorable outcomes in meritorious cases</b>
<b>FY 2006 TARGET</b>	90%
<b>FY 2006 RESULTS</b>	97%
<b>FY 2007 TARGET</b>	90%
<b>FY 2007 RESULTS</b>	97%
<b>FY 2008 TARGET</b>	97%
<b>FY 2008 RESULTS</b>	96%
<b>FY 2009 TARGET</b>	97%
<b>FY 2009 RESULTS</b>	100%
<b>FY 2010 TARGET</b>	97%
<b>FY 2010 RESULTS</b>	
<b>FY 2011 TARGET</b>	97%
<b>FY 2011 RESULTS</b>	

During FY 2009, for the first time in recent years, OSC achieved 100% favorable outcomes in meritorious Hatch Act cases, exceeding the target of 97%. Due to the high volume of upcoming litigation in FY 2010 and FY 2011 and the degree of unpredictability inherent whenever a new board is put in place at the MSPB, the agency is maintaining its FY 2011 target at 97%.

<b>Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES</b>		
<b>HATCH ACT MISSION</b>	<b>HATCH ACT OUTREACH VISITS</b>	<b>HATCH ACT SECTION OF OSC WEBSITE</b>
<b>PERFORMANCE INDICATORS</b>	<b>Indicator A: (# of HA trainings and outreaches given) / (# of invitations to provide HA training or outreach, where the inviter sponsors OSC)</b>	<b>Indicator B: Number of new advisory complex opinions added every month to the website.</b>
<b>FY 2006 TARGET</b>	90%	One
<b>FY 2006 RESULTS</b>	96%	One
<b>FY 2007 TARGET</b>	90%	One
<b>FY 2007 RESULTS</b>	100%	One
<b>FY 2008 TARGET</b>	95%	One
<b>FY 2008 RESULTS</b>	98%	One
<b>FY 2009 TARGET</b>	95%	One
<b>FY 2009 RESULTS</b>	98%	One
<b>FY 2010 TARGET</b>	95%	One
<b>FY 2010 RESULTS</b>		
<b>FY 2011 TARGET</b>	97%	One
<b>FY 2011 RESULTS</b>		

Indicator A: During FY 2009, OSC's Hatch Act Unit provided training to federal, state, and local agencies 98% of the time when the agency offered to sponsor the cost of the training. This exceeded the target of 95%. Only one training had to be declined this year, due to scheduling. OSC is increasing its target for FY 2011 to 97%.

## Whistleblower Disclosure Channel Program

In addition to its investigative and prosecutorial mission, OSC provides a safe channel through which federal employees, former federal employees, or applicants for federal employment may, under 5 U.S.C. § 1213(a), disclose information they reasonably believe evidences a violation of law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. At present, the Disclosure Unit staff is comprised of the Chief, ten attorneys and one paralegal. The Disclosure Unit is responsible for reviewing the information submitted by whistleblowers, and advising the Special Counsel whether it shows that there is a substantial likelihood that the type of wrongdoing described in § 1213(a) has occurred or is occurring. Where a substantial likelihood determination is made, the Special Counsel must transmit the disclosure to the head of the relevant agency for action. The agency is required to conduct an investigation and submit a report to OSC describing the results of the investigation and the steps taken in response to the investigative findings. Under § 1213(e), the whistleblower is also provided with a copy of the report for comment. The Special Counsel is then required to review the report in order to determine whether it meets the requirements of the statute and its findings appear reasonable. The report is then forwarded to the President and appropriate Congressional oversight committees.

In the Disclosure Unit, 724 new matters were received in FY 2009, a 36.6% increase over the previous fiscal year. During FY 2009, the unit referred 46 matters to agency heads for investigation under § 1213(c). (See Table 6).

The Disclosure Unit's more complex cases are very labor-intensive and often require the attention of more than one attorney. These cases can take more than a year to fully complete for a number of reasons—agencies routinely request additional time to conduct the investigation and write the report, whistleblowers request additional time to prepare their comments, and Disclosure Unit attorneys and the Special Counsel must review the report to determine whether it contains the information required by statute, its findings appear reasonable, and to prepare any comments the Special Counsel may have on the report.

This year, for the sake of brevity, we are not including a representative sample of cases that have been referred by the Special Counsel to the heads of the agencies pursuant to 5 U.S.C. § 1213(c) and closed after receipt and review of the agency report. We are also not including summaries of cases that are presently under investigation by agency heads, though all of these summaries are available. In many cases, OSC's efforts have resulted in significant media coverage and reform efforts.

TABLE 6 Summary of Whistleblower Disclosure Activity - Receipts and Dispositions <sup>a</sup>					
		FY 2005	FY 2006	FY 2007	FY 2008
Pending disclosures carried over from prior fiscal year		98	110	69	84
New disclosures received		485	435	482	530
Total disclosures		583	545	551 <sup>b</sup>	614
Disclosures referred to agency heads for investigation and report		19	24	42	40
Referrals to agency IGs		14	10	11	9
Agency head reports sent to President and Congress		18	24	20	25
Results of agency investigations and reports	Disclosures substantiated in whole or in part	15	21	19	22
	Disclosures unsubstantiated	0	3	1	3
Disclosure processing times	Within 15 days	236	203	285	236
	Over 15 days	237	235	182	292
Percentage of disclosures processed in less than 15 days		50%	42%	61%	52%
Disclosure matters processed and closed		473	478	467	488

<sup>a</sup> Many disclosures contain more than one type of allegation. This table, however, records each whistleblower disclosure as a single matter, even if multiple allegations were included.

<sup>b</sup> Correctly reported in OSC's FY 2006 report to Congress, but mistakenly published in the FY 2007 report as 269.

<sup>c</sup> Incorrectly reported as 599 in OSC's FY 2007 report to Congress.

### Resource Estimates:

During FY 2010, the Whistleblower Disclosure Unit will use approximately 12 FTE at a cost of \$2,114,000. During FY 2011, we estimate the cost of the program will be \$2,289,000 with an increase of one FTE.

### Goals and Results - Whistleblower Disclosure

OSC's Strategic Objective 3 is to promote public safety and efficiency through acting as a channel for whistleblowers in the Federal workforce to disclose information. The following tables below describe the two operational goals supporting this strategic objective.



<b>Goal 1: TO RECEIVE AND RESOLVE WHISTLEBLOWER DISCLOSURES WITH TIMELY PROCESSING</b>	
<b>WHISTLEBLOWER DISCLOSURE MISSION</b>	<b>DISCLOSURES</b>
<b>PERFORMANCE INDICATORS</b>	<b>Indicator A: Percentage of disclosures resolved within the statutory 15 day time frame</b>
<b>FY 2006 TARGET</b>	50%
<b>FY 2006 RESULTS</b>	42%
<b>FY 2007 TARGET</b>	50%
<b>FY 2007 RESULTS</b>	61%
<b>FY 2008 TARGET</b>	50%
<b>FY 2008 RESULTS</b>	52%
<b>FY 2009 TARGET</b>	50%
<b>FY 2009 RESULTS</b>	54%
<b>FY 2010 TARGET</b>	50%
<b>FY 2010 RESULTS</b>	
<b>FY 2011 TARGET</b>	50%
<b>FY 2011 RESULTS</b>	

OSC's Disclosure Unit exceeded its target of 50% during FY 2009. Because of the time involved in preparing cases for referral under § 1213 and in cases referred to the IG, the statutory 15-day time frame is difficult to meet in these cases. It should also be noted that the agency is considering proposing a legislative change in the statutory language to enlarge the time frame from 15 days to 45 days, a number which would more accurately reflect the average amount of time required to resolve a whistleblower disclosure.

<b>Goal 2: TO PROMOTE JUSTICE AND PROTECT THE MERIT SYSTEM THROUGH THE QUALITY OF DETERMINATIONS AND REFERRALS</b>	
<b>WHISTLEBLOWER DISCLOSURE MISSION</b>	<b>DISCLOSURES</b>
<b>PERFORMANCE INDICATORS</b>	<b>Indicator A: % Percentage of disclosures referred to agency head, pursuant to 5 U.S.C. § 1213, or under the informal IG referral process.</b>
<b>FY 2006 TARGET</b>	7%
<b>FY 2006 RESULTS</b>	8%
<b>FY 2007 TARGET</b>	7%
<b>FY 2007 RESULTS</b>	10%
<b>FY 2008 TARGET</b>	7%
<b>FY 2008 RESULTS</b>	6%
<b>FY 2009 TARGET</b>	7%
<b>FY 2009 RESULTS</b>	7%
<b>FY 2010 TARGET</b>	7%
<b>FY 2010 RESULTS</b>	
<b>FY 2011 TARGET</b>	7%
<b>FY 2011 RESULTS</b>	

During FY 2009, the overall number of disclosures received by the agency rose to 724 (from 530 in FY 2008). The number of referrals to agency heads and IGs rose by 7. However, the quality of the incoming disclosures is the major driver of the percent referred to agencies for investigation.

## **USERRA Enforcement and Prosecution Program**

With the enactment of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Congress expanded OSC's role in enforcing federal employment rights. USERRA protects the civilian employment and reemployment rights of those who serve the nation in the Armed Forces, including the National Guard and Reserves, and other uniformed services by prohibiting employment discrimination due to past, present, or future uniformed service (including initial hiring, promotion, retention, or any benefit of employment) and providing for prompt reemployment of service members in their civilian jobs after they return from military duty. Congress intends for the federal government to be a "model employer" under USERRA.

OSC plays a critical role in enforcing USERRA by providing representation, when warranted, before the MSPB and the U.S. Court of Appeals for the Federal Circuit to service members whose USERRA complaints involve federal executive agencies. From 2005 through 2007, Congress temporarily expanded OSC's role in USERRA enforcement under a demonstration project, which is described further below.

### **USERRA Referral Cases**

Under USERRA, a claimant alleging a violation by a federal executive agency may either file an appeal with the MSPB or file a complaint with the Department of Labor, Veterans' Employment and Training Service (VETS). If the claimant chooses to file a complaint with VETS, VETS must investigate and attempt to resolve the complaint. If it cannot resolve the matter, the claimant may direct VETS to refer the complaint to OSC for possible representation before the MSPB, regardless of merit. If, after reviewing the complaint and investigative file, and conducting any necessary follow-up investigation, OSC is reasonably satisfied that the claimant is entitled to relief under USERRA, it may act as the claimant's attorney and initiate an action before the MSPB.

During FY 2009, OSC received forty-one USERRA complaints referred from VETS, a record number. OSC anticipates this trend continuing given current levels of military activity and new case processing deadlines established by Congress in 2008.

TABLE 7 Summary of USERRA Referral and Litigation Activity <sup>a</sup>				
	FY 2006	FY 2007	FY 2008	FY 2009
Pending referrals carried over from prior fiscal year	6	5	3	5
New referrals received from VETS during fiscal year	11	4	15	41
Referrals closed	14	4	12	19
Referrals closed with corrective action	3	0	2	4
Referrals closed with no corrective action	11	4	11	15
Referrals pending at end of the fiscal year	3	3	5	7
Litigation cases carried over from prior fiscal year	0	0	1	1
Litigation cases closed	1	0	1	0
Litigation closed with corrective action	1	0	0	0
Litigation closed with no corrective action	0	1	1	0
Litigation pending at end of fiscal year	0	1	1	1

<sup>a</sup> This table has been reorganized, and some categories and figures changed from prior reports to correct discrepancies and more clearly present relevant information.

### USERRA Demonstration Project

In early 2005, OSC's role in enforcing USERRA expanded. The Veterans Benefits Improvement Act of 2004 (VBIA) set up a Demonstration Project giving OSC, rather than the Department of Labor's Veterans Employment and Training Service (VETS), the exclusive authority to investigate federal sector USERRA claims brought by persons whose social security number ended in an odd-numbered digit. Under the project, OSC also received and investigated all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC had jurisdiction regardless of the person's social security number. The original term of the three-year demonstration project ended on September 30, 2007, but Congress extended the program through the continuing resolutions until December 31, 2007.

OSC's USERRA Unit attained exemplary results in the demonstration project cases through its aggressive enforcement of service members' employment and reemployment rights. GAO was tasked with comparing the performance of OSC and DOL under the demonstration project, but instead focused on the two agencies' case tracking systems. OSC has an excellent case tracking system, but much more importantly for the veterans with claims, OSC achieved an outstanding rate of corrective action on behalf of veterans.

### Corrective Action Results:

During FY 2009, OSC's USERRA Unit focused on the few remaining Demonstration Project cases that were still open. Overall, OSC's corrective action rate for the Demonstration Project is a remarkable 27% of the USERRA cases it investigated (see Table 8).

TABLE 8 Summary of USERRA Demonstration Project Activity <sup>a</sup>					
	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Outstanding cases carried over from prior fiscal years	0	54	95	113	13
New cases opened	111	168	142	37	0
Cases closed	57	126	123	139	10
Closed cases with corrective action	16	35	43	26	2
Closed cases with no corrective action	38	91	80	113	8
Cases remaining at end of fiscal year	54	95	114	13	4 <sup>b</sup>

<sup>a</sup> Under the demonstration project authorized by the VBIA, OSC received cases from February 2005 through December 2007.

<sup>b</sup> This includes one case that was re-opened due to changing legal precedent (not reflected in the figures above).

### Resource Estimates:

During FY 2010, because the demonstration project has ended and the only new cases coming into the USERRA Unit are the referrals from DOL (whereby OSC uses its prosecutorial authority to represent the claimant before the MSPB and, if required, the U.S. Court of Appeals for the Federal Circuit), the unit will use only two FTE, with a total program cost of \$384,000. Projecting the same number of FTE into FY 2011 requires a total program cost of approximately \$388,000.

### Educating the Federal Sector and Preventing Future Violations

In FY 2009, OSC continued its education and outreach efforts by conducting USERRA seminars for the Federal Employment Lawyers Group and at national conferences for Army and Air Force labor attorneys. OSC also maintained e-mail and telephonic hotlines to provide technical assistance to employees and employers with USERRA questions.

### Goals and Results – USERRA Enforcement and Prosecution Program

OSC's Strategic Objective 4 is to protect veterans in the Federal workforce through enforcement of the Uniformed Services Employment and Reemployment Rights Act. The tables below describe the three operational goals supporting this strategic objective.

<b>Goal 1: TO ENFORCE THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT THROUGH TIMELY CASE PROCESSING</b>	
<b>USERRA MISSION</b>	<b>USERRA Referral (RE) Cases</b>
<b>PERFORMANCE INDICATORS</b>	Percent of cases in which the case is settled, closed, or a decision to litigate is made within 60 days.
<b>FY 2007 TARGET</b>	75 days
<b>FY 2007 RESULTS</b>	33 days
<b>FY 2008 TARGET</b>	75 days
<b>FY 2008 RESULTS</b>	110 days
<b>FY 2009 TARGET</b>	80% in 60 days
<b>FY 2009 RESULTS</b>	74% in 60 days
<b>FY 2010 TARGET</b>	80% in 60 days
<b>FY 2010 RESULTS</b>	
<b>FY 2011 TARGET</b>	80% in 60 days
<b>FY 2011 RESULTS</b>	

OSC changed this performance indicator for FY 2009 to reflect the Veterans' Benefits Improvement Act of 2008 (P.L. 110-389), which amended USERRA to require that OSC make its representation decision within 60 days of receiving a case from the Department of Labor (unless the claimant agrees to an extension of time). The amendments also require OSC to submit Quarterly Reports to Congress concerning its compliance with the new deadline. Because the law became effective on October 10, 2008, OSC excluded from its Quarterly Reports cases it received before that date, resulting in a higher compliance rate for FY 2009 than reported above (82% vs. 74%).

Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS		
USERRA MISSION	USERRA CASES	
PERFORMANCE INDICATORS	Indicator A: % favorable outcomes in cases determined by OSC to be meritorious = (# successful meditations + # of settlements achieved + # of successful litigations) / (# meritorious cases)	Indicator B: # of "test cases" filed
FY 2006 TARGET	90%	Inappropriate to set a specific target
FY 2006 RESULTS	100%	0
FY 2007 TARGET	90%	Inappropriate to set a specific target
FY 2007 RESULTS	100%	1
FY 2008 TARGET	95%	Inappropriate to set a specific target
FY 2008 RESULTS	97%	1
FY 2009 TARGET	99%	Inappropriate to set a specific target
FY 2009 RESULTS	100%	0
FY 2010 TARGET	90%	Inappropriate to set a specific target
FY 2010 RESULTS		
FY 2011 TARGET	90%	Inappropriate to set a specific target
FY 2011 RESULTS		

Indicator A: OSC was successful in 6 out of 6 meritorious cases during FY 2009.

Indicator B: There were no test cases filed in FY 2009 that fall in this category.

<b>Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES</b>		
<b>USERRA MISSION</b>	<b>USERRA CASES</b>	
<b>PERFORMANCE INDICATORS</b>	<b>Indicator A: (# of USERRA trainings and outreaches given) / (# of invitations to provide USERRA training or outreach visits {where inviting agency sponsors OSC})</b>	<b>Indicator B: (# of USERRA trainings and outreaches given) / (# of invitations to provide USERRA training or outreach visits {where OSC pays expenses})</b>
<b>FY 2006 TARGET</b>	90%	50%
<b>FY 2006 RESULTS</b>	NA	100%
<b>FY 2007 TARGET</b>	90%	50%
<b>FY 2007 RESULTS</b>	100%	100%
<b>FY 2008 TARGET</b>	90%	75%
<b>FY 2008 RESULTS</b>	100%	NA
<b>FY 2009 TARGET</b>	90%	75%
<b>FY 2009 RESULTS</b>	100%	NA
<b>FY 2010 TARGET</b>	100%	75%
<b>FY 2010 RESULTS</b>		
<b>FY 2011 TARGET</b>	100%	75%
<b>FY 2011 RESULTS</b>		

Three outreaches were requested in FY 2009. All three were accomplished by the USERRA Unit.



## OSC and the Future of USERRA Enforcement

Congress has expressed continuing interest in expanding OSC's role in USERRA enforcement. H.R. 1089, the "Veterans Employment Rights Realignment Act of 2009," would grant OSC exclusive authority to receive, investigate, and prosecute USERRA claims involving federal executive agencies. On May 19, 2009, H.R. 1089 was passed by the House of Representatives by a 423-0 margin. It was subsequently received in the Senate and referred to the Committee on Veterans' Affairs.

For several reasons, OSC is uniquely suited to handle additional responsibilities under USERRA:

1. **Technical Expertise:** OSC employs a staff of attorneys, investigators, and personnel specialists who are experts in federal personnel law and are trained to evaluate, investigate, analyze, and resolve federal employment complaints. OSC also has substantial in-house technical USERRA expertise from its longstanding role as federal-sector USERRA prosecutor and its administration of the demonstration project. This expertise resulted in high corrective action rates and quick processing times in those cases for which OSC had responsibility under the project.
2. **Specialized Focus:** OSC's staff specializes in federal personnel law, of which USERRA is a part, and its primary mission and focus is protecting the merit system of federal employment (in contrast to DOL, which administers numerous, varied federal programs and laws). As under the Demonstration Project, OSC's USERRA Unit would be centralized in one location, with an experienced, specialized group of attorneys and investigators working closely and collaboratively on a daily basis to investigate and resolve USERRA claims (in contrast to DOL, which assigns USERRA claims to its local VETS offices, and has investigators and attorneys in separate locations). All investigations and resolutions would (1) receive legal and supervisory review throughout the process (in contrast to DOL, which has investigators handle all claims, with supervisory review of only a limited number and legal consultation only on an ad-hoc basis) and (2) be approved by the USERRA Unit Chief (in contrast to DOL, which conducts quality control review on only a very small percentage of its USERRA cases, which are randomly selected). OSC's structure and process ensures consistency, quality, and, most importantly, correctness under the law.
3. **Credible Threat of Litigation before MSPB:** Only OSC possesses the authority and experience to file suit with the MSPB in meritorious USERRA cases against federal agencies. OSC has a track record of doing so when an agency refuses to take the necessary corrective action. This includes pursuing "test cases" where the law is unsettled but OSC believes there is a viable legal argument that the claimant is entitled to relief, as in the case of a federal contract employee OSC successfully represented before the MSPB. Consequently, federal agencies are more willing to quickly resolve meritorious claims (as they often did under the demonstration project) when OSC is involved.

If H.R. 1089 or similar legislation were to become law, the Congressional Budget Office (CBO) "expects that handling an estimated 200 to 300 additional [USERRA] cases per year would increase the OSC's annual budget of \$17 million by about \$3 million a year and \$14 million over the next five years." See CBO Cost Estimate for H.R. 1089, dated May 13, 2009, p. 1. Upon request, OSC can provide further information on the costs associated with an expansion of its role under USERRA.

## **OSC's Outreach Program**

The Outreach Program assists agencies in meeting the statutory mandate of 5 U.S.C. § 2302(c). This provision requires that federal agencies inform their workforces in consultation with the OSC about the rights and remedies available to them under the whistleblower protection and prohibited personnel practice provisions of the Whistleblower Protection Act.

In an effort to assist agencies in meeting the statutory requirement, in FY 2002, OSC designed and created a five step educational program, the 2302(c) Certification Program. This program gives guidance to agencies and provides easy-to-use methods and training resources to assist agencies in fulfilling their statutory obligation. Agencies that complete the program receive a certificate of compliance from OSC.

In an effort to promote OSC's mission and programs, OSC provides formal and informal outreach sessions, including making materials available on the agency web site. During FY 2009, OSC employees spoke at approximately 60 events nationwide, including American Bar Association events, agency training sessions, conferences and meetings. Several OSC employees presented at the Government Ethics Conference this year.

Finally, OSC has continued its policy of issuing press releases when OSC files a significant litigation petition, or achieves significant corrective or disciplinary action through settlement. Many of these cases generate considerable press coverage, which contributes to federal employees' and managers' awareness about the merit system protections enforced by OSC.

## **PART 4 – MANAGEMENT PERFORMANCE**

### **Strategic Management of Human Capital**

OSC's human capital strategy is aligned with its mission, goals, and organizational objectives. It is integrated into the Budget and Strategic Plans, and is consistent with human capital guidance from OPM and OMB. OSC has internal accountability systems to ensure effective merit-based human resource management as described below.

OSC uses existing personnel flexibilities and tools, including leave flexibilities, alternative work schedules, and a fairly extensive telework program. In the last two years, OSC has developed and implemented several innovative benefits for its employees, including a successful student loan repayment / employee retention program in which 27 employees participate, and a fitness program for employees. OSC's performance management systems allow managers to differentiate between high and low performers through the use of appropriate incentives and consequences.

The agency is addressing gaps concerning specific skills in its program areas through internal development, upward mobility positions, legal internships, in-house mission-specific training, and hiring additional personnel. OSC also has a cross-training program that enables employees to learn new skills and participate in the work of several units. OSC also captures valuable information and ideas of departing employees through extensive exit interviews. This information is used by senior managers to refine and improve work processes.

Performance plans are in place for SES members and managers that link to the agency's mission and to strategic goals that are in place for the individual divisions. OSC also now has measurable finite performance goals in place for each employee.

### **Competitive Sourcing**

OSC is a small agency, with a highly specialized inherently government mission. 84% of its FTE perform inherently governmental work, and 16% of its FTE are considered commercial in nature. According to OMB Circular A-76 and supplemental guidance issued by OMB, government performance of commercial functions is permitted when, as is the case at OSC, the position activity total is 10 FTE or less.

OSC has an interagency agreement with the Department of Interior's National Business Center (NBC) to perform the following services: budget accounting and budget execution, accounting services, procurement system hosting, and travel management. OSC will review the NBC interagency agreement semi-annually to confirm the agreement is meeting OSC's needs. OSC also has an interagency agreement with the National Finance Center of the Department of Agriculture to perform payroll/personnel processing functions.

### **Improved Financial Performance**

As mentioned above, OSC contracts out certain work under an interagency agreement. OSC had a unique opportunity to participate in the design of the processes used for its accounting, and to design specific customized reports that reflect exactly the information most helpful to OSC in managing its funds. Contracting these functions out has provided OSC with more specialized expertise at a lower cost than could be accomplished internally. NBC routinely provides expenditure reports to OSC, and provides a detailed financial review every

quarter. NBC also provides current financial information on day-to-day operations for payroll, procurement, and travel, as needed by OSC.

As a small agency without an Inspector General, OSC generally submits a combined Inspector General (IG) Act and Federal Manager's Financial Integrity Act report each October. OSC relies on audits and other reviews of NBC operations by the OIG and the office of the Chief Financial Officer in the National Business Center, as well as information received directly from NBC, for information about any significant issues relating to the services provided to OSC.

Historically, OSC received a waiver from OMB for the requirement to have an audit of the agency's financial statements. Since FY 2004, however, OSC has not received an audit waiver. A competitively selected audit firm evaluated OSC's financial statements for FY 2008. The auditor spent time at OSC headquarters and with the National Business Center personnel in Denver who currently perform the accounting functions for OSC. The audit resulted in an unqualified audit opinion on our annual financial statements, similar to the results of the FY 2004, FY 2005, FY 2006, FY 2007, and FY 2008 audits.

### **Expanded Electronic Government**

OSC provides one-stop service for those who wish to file a complaint or disclosure, or request a Hatch Act advisory opinion. Hatch Act advisory opinions may be solicited through the web site. A person can file a Prohibited Personnel Practices complaint online, which is the most common channel for PPP complaints to come into the agency. A person can also make a complete Whistleblower Disclosure online.

Those who wish to communicate with a knowledgeable OSC staffer through one of the agency's telephone hot lines will find the relevant information on the web site. OSC's web site is linked to FirstGov, as well as other agency web sites, such as those for the Office of Personnel Management, the Equal Employment Opportunity Commission, and the Office of Government Ethics, among many others. OSC's Information Technology Branch (ITB) staff are continually improving OSC's web site. User sessions on OSC's web site have continued to grow. During FY 2009, the total number of user sessions was 929,303, an increase of 12% over FY 2008.

OSC's Information Technology Branch is working to make OSC more efficient by continually enhancing the capabilities of the Information Technology systems of the agency. For example, a major effort during FY 2010 and FY 2011 will be the upgrading of OSC's case tracking system to become a web-based system.

ITB will continue migrating the entire agency to the new standard laptop setup and implementing two factor authentications for local area network access as well as for remote Citrix access. ITB will also migrate Citrix to a 64-bit computing environment, and deploy 64-bit blade servers along with a D2D2T backup solution, which will enable OSC to phase out obsolete backup tape drives. ITB will continue its work to migrate all telecommunication services to GSA Networkx and WIT3 contracts. And regarding continuity of operations, ITB will evaluate alternate methodologies to interconnect OSC's headquarters and field offices.

## **Appendix**

## Statutory Background

OSC was first established on January 1, 1979. From then until 1989, it operated as an autonomous investigative and prosecutorial arm of the Merit Systems Protection Board (“the Board”). By law, OSC received and investigated complaints from current and former federal employees, and applicants for federal employment, alleging prohibited personnel practices by federal agencies; provided advice on restrictions imposed by the Hatch Act on political activity by covered federal, state, and local government employees; and received disclosures from federal whistleblowers (current and former employees, and applicants for employment) about wrongdoing in government agencies. The office also enforced restrictions against prohibited personnel practices and political activity by filing, where appropriate, petitions for corrective and/or disciplinary action with the Board.

In 1989, Congress enacted the Whistleblower Protection Act. The law made OSC an independent agency within the Executive Branch, with continued responsibility for the functions described above. It also enhanced protections against reprisal for employees who disclose wrongdoing in the federal government, and strengthened OSC’s ability to enforce those protections.<sup>1</sup>

The Congress passed legislation in 1993 that significantly amended Hatch Act provisions applicable to federal and District of Columbia (D.C.) government employees, and enforced by OSC.<sup>2</sup> Provisions of the act enforced by OSC with respect to certain state and local government employees were unaffected by the 1993 amendments.

In 1994, the Uniformed Services Employment and Reemployment Rights Act became law. It defined employment-related rights of persons in connection with military service, prohibited discrimination against them because of that service, and gave OSC new authority to pursue remedies for violations by federal agencies.<sup>3</sup>

OSC’s 1994 reauthorization act expanded protections for federal employees, and defined new responsibilities for OSC and other federal agencies. It provided that within 240 days after receiving a prohibited personnel practice complaint, OSC should determine whether there are reasonable grounds to believe that such a violation occurred, exists, or is to be taken. The act extended the protections of certain legal provisions enforced by OSC to approximately 60,000 employees of what was then known as the Veterans Administration (now the Department of Veterans Affairs), and to employees of certain government corporations. It also broadened the scope of personnel actions covered under these provisions. Finally, the act made federal agencies responsible for informing their employees of available rights and remedies under the Whistleblower Protection Act, and directed agencies to consult with OSC in that process.

In November of 2001, Congress enacted the Aviation and Transportation Security Act,<sup>4</sup> which created the Transportation Security Administration (TSA). Under the act, non-security screener employees of TSA could file allegations of reprisal for whistleblowing with OSC and the MSPB. The approximately 45,000 security screeners in TSA, however, could not pursue such complaints at OSC or the MSPB. OSC efforts led to the signing of a memorandum of understanding (MOU) with TSA in May 2002, under which OSC would review whistleblower retaliation complaints from security screeners, and recommend corrective or disciplinary action to TSA when warranted. The MOU did not (and could not), however, provide for OSC enforcement action before the MSPB, or for individual right of action (IRA) appeals by security screeners to the MSPB.

## Endnotes

1. Public Law No. 103-424 (1994), codified in various sections of title 5 of the U.S. Code. The provision making federal agencies responsible, in consultation with OSC, for informing their employees of rights and remedies under the Whistleblower Protection Act appears at 5 U.S.C. § 2302(c).
2. Public Law No. 103-94 (1993), codified in scattered sections of 5 U.S.C. and 12 U.S.C.
3. Public Law No. 103-353 (1994), codified at 38 U.S.C. § 4301, et seq. The Veterans' Employment Opportunities Act of 1998 (Public Law No. 103-424) also expanded OSC's role in protecting veterans. The act made it a prohibited personnel practice to knowingly take, recommend, or approve (or fail to take, recommend, or approve) any personnel action, if taking (or failing to take) such action would violate a veterans' preference requirement. See 5 U.S.C. § 2302(b)(11). (The former § 2302(b)(11) was re-designated as § 2302(b)(12).)
4. Public Law 107-71 (2001).