

**BY ORDER OF THE
SECRETARY OF THE AIR FORCE**

AIR FORCE INSTRUCTION 51-1102

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Law

**COOPERATION WITH THE OFFICE OF
SPECIAL COUNSEL**

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This Instruction implements Secretary of the Air Force (SecAF) Memorandum, Delegation of Authority for Actions Associated with Investigations Directed by and/or Conducted by the Office of Special Counsel, July 25, 2014; SecAF Order 111.5, Functions and Duties of the General Counsel and the Judge Advocate General; Air Force Policy Directive (AFPD) 51-11, Coordination of Remedies for Fraud and Corruption related to Air Force Procurement Matters; and is consistent with Department of Defense (DoD) Directive (DoDD) 5500.19, Cooperation with the United States Office of Special Counsel (OSC). It assigns responsibilities and establishes procedures for cooperating with the OSC. It provides internal guidance to all Air Force civilian and military members, but does not establish an independent basis for any person or organization to assert a right, benefit, or privilege. This publication applies to all Air Force members and employees, to Air Force Reserve Command (AFRC) personnel, and to the Air National Guard (ANG). This publication does not apply to the Civil Air Patrol. As determined by the President, the provisions of this AFI that address prohibited personnel practices (PPPs) do not apply to any Air Force organization or unit in which the principal function is the conduct of foreign intelligence or counter intelligence activities, as prescribed by the Whistleblower Protection Enhancement Act (WPEA), Public Law 112-199 (2012), codified at 5 United States Code (U.S.C.) § 2302(a)(2)(C)(ii).

This publication may be supplemented at any level, but all supplements must be routed to the Office of Primary Responsibility (OPR) listed above for coordination prior to certification and approval. Refer recommended changes and questions about this publication to the OPR listed above using the AF Form 847, *Recommendation for Change of Publication*; route AF Forms 847 from the field through the appropriate functional chain of command.

No information collections are accomplished by this publication. This publication uses documents covered by the Privacy Act of 1974, 5 U.S.C. § 552a. The authorities to collect or maintain the records prescribed in this publication are 10 U.S.C. § 8013; the Whistleblower Protection Act (WPA), 5 U.S.C. §§ 1211-1221; the Hatch Act, 5 U.S.C. §§ 1501-1508, and 7321-7326; and the Inspector General Act of 1978, Pub. L. 95-452, Oct. 12, 1978, 92 Stat. 1101, as amended (current through Pub. L. 112-239, enacted January 2, 2013). System of Records Notices OSC/GOVT-1, OSC Complaint, Litigation and Political Activity Files (November 19, 1999, 64 FR 63359) and F051 AF JA D Litigation Records (except patents)(June 11, 1997, 62 FR 31793) apply. Forms affected by the PA have an appropriate PA statement. The applicable PA system notices are available on line at: <http://dpclo.defense.gov/Privacy/SORNS/asp>. Ensure that all records created as a result of processes prescribed in this publication are maintained in accordance with Air Force Manual (AFMAN) 33-363, *Management of Records*, and disposed of in accordance with the Air Force Records Disposition Schedule (RDS) located in the

Air Force Records Information Management System (AFRIMS).

Requests for waivers must be submitted through the chain of command to the OPR listed above for consideration and approval, unless otherwise noted. The authorities to waive wing/unit level requirements in this publication are identified with a Tier (“T-0, T-1, T-2, T-3”) number following the compliance statement. *See* AFI 33-360, *Publications and Forms Management*, for a description of the authorities associated with the Tier numbers. Submit requests for waivers through the chain of command to the appropriate Tier waiver approval authority, or alternatively, to the Publication OPR for non-tiered compliance items.

SUMMARY OF CHANGES

This document has been substantially revised and must be completely reviewed. Major changes include conforming the policies and procedures to the WPEA, as well as dividing the publication into separate chapters: Chapter 1 presents an overview of OSC’s statutory responsibilities; Chapter 2 clarifies and expounds on the roles and responsibilities of Air Force organizations, military members and civilian employees involved in cooperating with OSC; Chapter 3 provides greater detail and clarity into the procedures for whistleblower disclosure cases where OSC refers whistleblower allegations to the Air Force for investigation; Chapter 4 provides procedures for cooperating with OSC in its investigations into prohibited personnel actions, including expanded sections on the point of contact’s (POC) responsibilities, the process for requesting and approving legal representation, corrective and disciplinary actions as well as responsibilities for monitoring and settling OSC cases within the Air Force; Chapter 5 addresses the procedures to be used for OSC investigations into alleged violations of Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301 *et seq.*, and Hatch Act, 5 U.S.C. §§ 7321-26, as amended by the Hatch Act Modernization Act of 2012, Public Law 112-230 (2012). The Glossary has been expanded to include additional terms consistent with recent statutory changes and case precedent. Sample memorandum language has been provided for POC instructions, requests for legal representation, approval of requests for legal representation, appointment of counsel and a template response to OSC requests for information.

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Chapter 1

OVERVIEW

1.1. Establishment of Guidance. This instruction establishes guidance and procedures to Air Force officials for cooperation and interaction with the United States Office of Special Counsel (OSC). It does not establish an independent basis for any person or organization to assert a right, benefit, or privilege.

1.2. Office of Special Counsel. OSC is an independent federal investigative and prosecutorial agency whose primary mission is to safeguard the merit system by protecting civilian federal employees and applicants from PPPs, especially reprisal for whistleblowing. The Civil Service Reform Act, as amended, codified in various sections of Title 5, United States Code (Public Law 95-454 (1978)), the WPA, as amended by WPEA, Public Law 112-199 (2012), codified at 5 U.S.C. §§ 1211 *et seq.*, and 5 U.S.C. §§ 2302 *et seq.*, the Hatch Act, as amended by the Hatch Act Modernization Act of 2012, and USERRA provide OSC with statutory authority to conduct investigations and/or undertake other activities in the following areas:

1.2.1. PPPs and Whistleblower Protection. OSC receives, investigates, and prosecutes allegations of PPPs, with an emphasis on protecting federal government whistleblowers. OSC seeks corrective action remedies (such as back pay and reinstatement), either by negotiation or from the United States Merit Systems Protection Board (MSPB), for injuries suffered by whistleblowers and other complainants. OSC is also authorized to file complaints at the MSPB to seek disciplinary action against civilian employees who commit PPPs.

1.2.2. Whistleblower Disclosures. Pursuant to 5 U.S.C. § 1213, OSC provides a secure channel for federal employees, former employees and applicants for federal employment (the “Whistleblower”) to disclose workplace impropriety they believe evidences a violation(s) of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; and/or a substantial and specific danger to public health or safety (referred to herein as a 1213 disclosure allegation). If upon receipt of the complaint, OSC determines there is a substantial likelihood that such workplace impropriety occurred, OSC is required to refer the matter to the head of the respective agency for investigation under section 1213(c). (1213 Disclosure Investigation). OSC may also refer whistleblower disclosures to the head of the agency under section 1213(g). (*See* Chapter 3). Upon receipt of OSC’s 1213(c) referral, the head of the agency is required to conduct an investigation and to submit a written report to OSC (1213 Disclosure Report) in accordance with statutory requirements. Upon completion of its review process, OSC will submit the 1213 Disclosure Report to the President and to the agency’s congressional oversight committees, as well as publish a copy of the 1213 Disclosure Report on OSC’s public webpage. [**Note:** Complaints disclosing alleged PPPs in violation of 5 U.S.C. § 2302 are investigated by OSC under their statutory authority to investigate allegations of PPPs and whistleblower reprisal. (*See* ¶ 1.2.1.).]

1.2.3. Hatch Act. The Hatch Act prohibits civilian federal employees from engaging in impermissible political activity. OSC promotes compliance with the legal restrictions on political activity by providing advisory opinions, conducting investigations, issuing warning letters to employees, and prosecuting Hatch Act violations before the MSPB. OSC has

exclusive jurisdiction to investigate and prosecute complaints alleging a violation of the Hatch Act. The Hatch Act does not apply to military members.

1.2.4. **USERRA.** USERRA ensures that persons who serve or have served in the Armed Forces, including Reserve, National Guard or other “uniformed service” (1) are not disadvantaged in their civilian career because of this 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. OSC protects the civilian employment and reemployment rights of veterans and members of the Guard and Reserve by enforcing USERRA. OSC receives and investigates complaints of USERRA violations and may prosecute certain USERRA complaints involving federal executive agencies before the MSPB.

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Chapter 2

ROLES AND RESPONSIBILITIES

2.1. Office of the Secretary of the Air Force (SecAF). SecAF has delegated her OSC responsibilities, except in circumstances where delegation is prohibited by law, to the Air Force General Counsel (SAF/GC). SecAF, through SAF/GC, maintains oversight over all matters relating to OSC.

2.1.1. As head of the agency, SecAF has the legal responsibility to comply with and enforce civil service laws, rules and regulations to prevent PPPs, including reprisal for whistleblowing, and to ensure, in consultation with OSC, that federal employees are informed of their rights and remedies.

2.1.2. SecAF has responsibility to investigate OSC referrals of 1213 disclosure allegations and to personally review and sign all written Air Force 1213 Disclosure Reports prior to submission to OSC. SecAF may delegate authority to review and sign the 1213 Disclosure Reports.

2.2. The Air Force General Counsel (SAF/GC). SecAF has designated SAF/GC as the Senior Management Official (SMO) for OSC matters. In this capacity, SAF/GC is responsible for providing overall guidance on OSC matters.

2.2.1. SAF/GC shall coordinate Air Force investigations into allegations referred by OSC to SecAF for investigation and is responsible for reviewing written Air Force 1213 Disclosure Reports of Investigation for adequacy and legal sufficiency. SAF/GC shall coordinate recommended actions (taken or planned) as a result of investigations conducted pursuant to 5 U.S.C. § 1213. (*See* Chapter 3)

2.2.2. SAF/GC has general oversight of OSC-conducted investigations of alleged prohibited activities by Air Force personnel (including allegations of PPPs, such as reprisal, USERRA and Hatch Act violations). (*See* Chapters 4-5)

2.2.2.1. SAF/GC is responsible for making determinations regarding waiver of attorney-client privilege (ACP).

2.2.2.2. SAF/GC is responsible for approving requests for assignment of Air Force legal counsel, if appropriate, to represent Air Force civilian employees or military members suspected or accused by OSC of committing a PPP or an illegal or improper act if the act complained of was within the scope of the employee's official duties and such representation is in the best interest of the Air Force.

2.3. Fiscal, Ethics and Administrative Law Division (SAF/GCA). SAF/GCA is the Air Force liaison with OSC with regard to OSC contacts with the Air Force. [Note: DoDD 5500.19 makes reference to the Senior Management Official as the POC, and the employee (identified to assist the OSC investigator who may initiate an investigation at a facility, base or installation) as the "Liaison Officer." In this Instruction, the term "Point of Contact" is used to refer to the military member or civilian employee (usually a member of the wing legal office) assigned to assist the OSC investigator.]

2.3.1. SAF/GCA is the Air Force subject matter expert with regard to OSC matters, providing advice and consultation, as appropriate, to SecAF, the Secretariat, the Air Staff, and other Air Force organizations.

2.3.2. SAF/GCA oversees all OSC referrals of disclosure allegations under Sections 1213(c) and (g), including but not limited to:

2.3.2.1. Making written requests to SAF/IG (or other appropriate organization(s)) to conduct an investigation or limited inquiry into whistleblower disclosure allegations referred to the Air Force under 5 U.S.C. § 1213.

2.3.2.2. Reviewing and revising, as appropriate, any written Air Force 1213 Disclosure Report to OSC.

2.3.2.3. Submitting requests to OSC, such as requests to extend deadlines.

2.3.2.4. Coordinating recommended actions taken or planned (including administrative and disciplinary actions) as a result of investigations conducted pursuant to 5 U.S.C. § 1213.

2.3.2.5. Responding to requests from OSC for supplemental reports and other information.

2.3.2.6. Coordinating with SAF/PA, SAF/LL and other Air Force organizations as necessary.

2.3.3. SAF/GCA oversees all OSC-conducted investigations into alleged prohibited activity (PPPs, USERRA and/or Hatch Act violations), including, but not limited to:

2.3.3.1. Ensuring that OSC has a proper Air Force POC to provide administrative assistance to OSC in conducting investigations of alleged prohibited activities (PPPs, USERRA and/or Hatch Act investigations);

2.3.3.1.1. Requesting, for most cases, in conjunction with the Labor Law Field Support Center (AFLOA/JACL-LLFSC), Air Force Materiel Command, Judge Advocate (AFMC/JA), Air Force Reserve Command, Judge Advocate (AFRC/JA), (referenced herein collectively as Coordinating Air Force Legal Office), as appropriate, an attorney to serve as the POC for PPP, USERRA and/or Hatch Act investigations conducted by OSC. Where appropriate, SAF/GCA and/or the Coordinating Air Force Legal Office shall consult with the National Guard Bureau, Office of the Chief Counsel (NGB/JA).

2.3.3.1.2. Providing designated POC with POC authorization letter. (*See* sample template at Attachment 2).

2.3.3.1.3. Serving, in high profile or sensitive cases, as the Air Force POC providing administrative assistance to OSC investigators.

2.3.3.2. Determining, to the extent practicable, in coordination with SAF/IG, and the Coordinating Air Force Legal Office, as appropriate, whether any investigation is being, or has been, conducted that replicates in whole or in part the proposed or incomplete investigation by OSC and conveying that information to OSC to avoid redundant investigative efforts.

2.3.3.3. Ensuring, in coordination with the appropriate Coordinating Air Force Legal Office, staff judge advocates (SJAs) and designated POCs, appropriate Air Force personnel are fully apprised of the nature and basis for an OSC investigation, as well as the rights and duties of Air Force personnel in regard to such investigation.

2.3.3.4. Coordinating on all requests under this Instruction for Air Force legal counsel to represent an Air Force civilian employee or military member who is the subject of an OSC investigation as set forth in this Instruction.

2.3.3.5. Coordinating on OSC requests to engage in alternative dispute resolution (ADR) and settlement discussions.

2.3.3.6. Coordinating, reviewing and approving all settlement agreements derived from OSC investigations.

2.3.3.7. Referring, in conjunction with the appropriate Coordinating Air Force Legal Office, SJAs and designated POCs, OSC recommendations for corrective action to responsible commanders and/or management officials.

2.3.3.8. Coordinating and reviewing all corrective actions derived from OSC investigations.

2.3.3.9. Ensuring that disciplinary action against a civilian employee deemed to be at fault following completion of an OSC investigation is considered by appropriate management officials to avoid the need for an MSPB proceeding.

2.3.3.10. Seeking approval of the Special Counsel, as required by statute, for any proposed disciplinary action against a civilian employee for an alleged PPP or illegal or improper act under investigation by the OSC, when it is determined that such discipline is warranted.

2.3.3.11. Ensuring, in conjunction with the appropriate Coordinating Air Force Legal Office, SJAs and designated POCs, that information concerning military members who are found by the Air Force to have committed a PPP, or other illegal or improper act in the exercise of their authority over civilian personnel, is referred to the appropriate military authority.

2.3.3.12. Ensuring, in conjunction with the appropriate Coordinating Air Force Legal Office, SJAs and designated POCs, that any corrective or disciplinary action based on facts disclosed by such an investigation is accomplished in a timely manner.

2.3.3.13. Monitoring OSC investigations within the Air Force.

2.3.3.14. Informing OSC of any matters required by law, or when otherwise appropriate.

2.3.3.15. Taking other actions related to OSC as it deems appropriate.

2.4. The Inspector General (SAF/IG). (*See Chapter 3*)

2.4.1. Upon referral by OSC and the written request of SAF/GCA, SAF/IG is responsible for investigating allegations of a violation of any law, rule, or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety set forth in OSC's referral letter.

2.4.2. SAF/IG shall submit a written report of investigation to SAF/GCA within the time constraints determined by SAF/GCA to ensure compliance with statutory deadlines requiring 1213 Disclosure Reports be submitted by SecAF within 60 days after the case is referred to the agency. If additional time is needed for the investigation, SAF/IG shall provide proper justification to SAF/GCA to support a request to OSC for an extension of time.

2.4.3. As appropriate, SAF/IG will coordinate with SAF/GCA on recommended actions taken or planned as a result of a 1213 Disclosure Investigation.

2.5. Office of the Judge Advocate General (AF/JA).

2.5.1. AF/JA, through the Administrative Law Directorate (AF/JAA) (or other appropriate judge advocate office), provides advice to SAF/IG during the pendency of the 1213 Disclosure Investigation and performs a review of SAF/IG's underlying investigation and resulting Report of Investigation for legal sufficiency. (*See* Chapter 3).

2.5.2. As appropriate, AF/JA, in conjunction with supervisory Judge Advocate channels, the appropriate Coordinating Air Force Legal Office, and/or SJAs, coordinates with SAF/GCA on actions taken or planned as a result of the 1213 Disclosure Investigation/Inquiry and assists in implementing the administrative and disciplinary actions taken as a result of a 1213 Disclosure Investigation and Report. (*See* Chapter 3).

2.5.3. AF/JA provides guidance for OSC-conducted investigations of alleged PPPs and allegations of USERRA and Hatch Act violations through supervisory Judge Advocate channels to the AFLOA/JACL-LLFSC, AFMC/JA, AFRC/JA, SJAs at all levels and designated POCs. Where the OSC-conducted investigation involves Title 32 personnel (military or civilian technician), guidance shall be coordinated with NGB/JA prior to the provision of such guidance. (*See* Chapters 4 and 5). AF/JA has responsibility for:

2.5.3.1. Informing, or requiring subordinate Air Force legal offices to inform SAF/GCA of any OSC contact, request for information, request to engage in ADR, and/or investigation within the Air Force;

2.5.3.2. Coordinating on requests from employees alleged to have committed PPPs (subjects) for agency counsel as set forth in this Instruction;

2.5.3.3. When approved by SAF/GC, detailing, as appropriate, counsel for military members and civilian employees who are subjects of an OSC investigation. [**Note:** Military members may request legal counsel from their servicing Area Defense Counsel (ADC) office. Military members being disciplined for misconduct arising from improper or illegal conduct, or a PPP, are entitled to an ADC under the Uniform Code of Military Justice (UCMJ). The procedures for assigning a military defense counsel to represent a military member are set by the Air Force Legal Operations Agency, Trial Defense Division (AFLOA/JAJD).]

2.5.3.4. Overseeing, as appropriate, any military justice actions taken in relation to OSC investigations;

2.5.3.5. Monitoring on-going OSC investigations and providing status updates to SAF/GCA; and

2.5.3.6. Representing the Air Force in any administrative OSC-related MSPB proceedings.

2.6. COORDINATING AIR FORCE LEGAL OFFICE. Coordinating Air Force Legal Offices, under their respective jurisdiction, are responsible for coordinating on OSC investigations. (See Chapters 4 and 5):

[**Note:** For purposes of this Instruction, the following AFMC bases fall within the jurisdiction of, and shall coordinate with, AFMC/JA: Hill AFB, Wright-Patterson AFB, Robins AFB and Tinker AFB. The following Air Reserve Bases and Air Reserve Stations (ARS) fall within the jurisdiction of AFRC/JA: Westover ARB, Niagara Falls ARS, Youngstown ARS, Pittsburgh ARS, Homestead ARB, Joint Reserve Base Ft Worth, Dobbins ARB, Grissom ARB, Minneapolis St. Paul ARS, and March ARB. All other bases fall under the jurisdiction of, and shall coordinate with, the AFLOA/JACL-LLFSC. For all actions involving Title 32 personnel (military and technician), the Coordinating Air Force Legal Office shall consult and coordinate through NGB/JA as the channel of communication with the 54 States, Territories and District.]

2.6.1. Informing SAF/GCA of any OSC contact, request for information, request to engage in ADR, and/or investigation within the Air Force.

2.6.2. Determining, to the extent practicable, in coordination with SAF/IG and SAF/GCA, whether an investigation is being, or has been, conducted that replicates, in whole or in part, the proposed or incomplete investigation by OSC, and conveying that information to SAF/GCA whenever this might avoid redundant investigative effort.

2.6.3. Consulting with SAF/GCA on legal or policy issues arising from such OSC contact, request for information and/or investigation.

2.6.4. Identifying, upon the request of SAF/GCA, a POC to provide administrative assistance in any OSC request for information and/or investigation into an alleged PPP, USERRA or Hatch Act violation.

2.6.5. Apprising, in coordination with SAF/GCA, SJAs and designated POCs, appropriate Air Force personnel of the nature and basis for an OSC investigation, as well as the rights and duties of Air Force personnel in regard to such investigation.

2.6.6. Providing advice and consultation, as appropriate, on OSC matters to the Air Force legal community, designated POCs, and the field.

2.6.7. Coordinating on all requests for agency counsel to represent an Air Force civilian employee and/or military member (seeking counsel under authority of this Instruction) who is the subject of an OSC investigation as set forth in this Instruction.

2.6.8. As appropriate, reviewing recommendations on corrective and disciplinary actions related to OSC matters, coordinating with SAF/GCA and providing related legal advice to appropriate management officials.

2.6.9. Referring, in conjunction with SAF/GCA, SJAs and designated POCs, recommendations by the OSC for corrective action to responsible officials.

2.6.10. Referring, in conjunction with SAF/GCA, SJAs and designated POCs, information concerning military members found by the Air Force to have committed a PPP or, other illegal or improper act in the exercise of authority over their civilian personnel to appropriate military authority.

2.6.11. Ensuring, in conjunction with SAF/GCA, SJAs, and designated POCs, that any corrective or disciplinary action considered appropriate because of facts disclosed by such an investigation is accomplished in a timely manner.

2.6.12. Monitoring on-going OSC investigations within the Air Force and providing monthly status updates to SAF/GCA, unless otherwise requested, including, but not limited to, immediate notification of an initial direct contact by OSC, requests for ADR, requests to waive ACP, request for legal counsel, offers of settlement and closure of case by OSC.

2.6.13. Representing the Air Force in any OSC-related MSPB administrative proceeding.

2.7. POC for OSC Investigator (see Chapters 4 and 5). SAF/GCA, in coordination with AFLOA/JACL-LLFSC, AFMC/JA, and/or AFRC/JA, , as appropriate, will designate a POC to provide administrative assistance to the OSC investigator examining alleged PPP, USERRA or HATCH Act violation(s). Where the investigation involves Title 32 personnel (military and/or technician), as the complainant, the subject(s), and/or a witness(es), the Coordinating Air Force Legal Office shall consult with NGB/JA. The POC, who must be an attorney, is responsible for:

2.7.1. Acting as the official Air Force POC for the OSC investigator on the particular matter being investigated;

2.7.2. Assisting the OSC investigator with administrative matters, to include arranging witness interviews, answering OSC interrogatories, and answering OSC requests for documents;

2.7.3. Acting as a legal representative for the command, activity, or installation on the particular OSC matter, within limitations set forth in this Instruction;

2.7.4. Informing Air Force personnel, as appropriate, of the nature and basis of the OSC investigation, the authority of OSC, and the rights and duties of Air Force personnel;

2.7.5. Consulting with the AFLOA/JACL-LLFSC, AFMC/JA, AFRC/JA, and/or NGB/JA, as appropriate, on policy and legal issues arising from the OSC investigation.

2.7.6. Advising civilian employees and military members suspected of, or accused by, the OSC of committing a PPP or an illegal or improper act of their right to request legal representation from the Air Force and receiving and processing such requests for legal representation.

2.7.7. As appropriate and in coordination with SAF/GCA through the appropriate Coordinating Air Force Legal Office, reviewing recommendations on corrective and disciplinary actions related to OSC matters and referring such recommendations to responsible officials; referring information concerning military members who are found by the Air Force to have committed a PPP or other violation of this AFI in the exercise of authority over civilian personnel to the appropriate military authority; providing related legal advice to appropriate management officials; and ensuring that any corrective or disciplinary action considered appropriate, because of facts disclosed by such an investigation, is accomplished in a timely manner.

2.7.8. Providing weekly updates to the appropriate Coordinating Air Force Legal Office on the status of his or her OSC investigation(s).

2.8. Deputy Chief of Staff for Manpower, Personnel and Services (AF/A1) is responsible for providing SAF/GC with military and civilian personnel policy guidance for OSC issues.

2.9. Civilian Personnel Offices are responsible for:

2.9.1. Ensuring that local training for all civilian personnel specialists, attorneys, and management officials covers OSC functions and activities;

2.9.2. As appropriate, assisting management officials with implementing corrective and disciplinary actions.

2.10. Air Force Commanders and Management Officials. Air Force officials with delegated authority for any aspect of personnel management have the legal responsibility to prevent PPPs, including reprisal for whistleblowing; to comply with and enforce civil service laws, rules and regulations; and to ensure, in consultation with Air Force civilian personnel offices, that federal employees are informed of their rights and remedies.

2.10.1. Commanders and management officials shall ensure that managers, civilian employees, and military members refer all initial contacts from OSC to SAF/GCA through their local SJAs and Coordinating Air Force Legal Office, as appropriate. (T-1)

2.10.2. Civilian personnel actions taken by Air Force commanders, management officials, civilian employees and military members with delegated authority to take personnel actions, shall conform to laws and regulations implementing established merit system principles and must be free of any PPPs, as described in 5 U.S.C. § 2302. (T-0)

2.10.3. It is the responsibility of each Air Force commander and management official to take vigorous corrective action and, when appropriate, to initiate disciplinary measures when PPPs occur.

2.11. All Air Force Civilian Employees and Military Members must cooperate with and participate in OSC investigations, subject only to specific constitutional and/or statutory protections. (T-0)

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Chapter 3

WHISTLEBLOWER DISCLOSURE CASES

3.1. OSC Referral. Pursuant to their authority under 5 U.S.C. §§ 1213(c) and (g), OSC refers alleged violations of law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety, to SecAF, as the head of the agency. The Office of the Secretary will forward OSC's referral letter to SAF/GC for action.

Section 3A -- OSC 1213(c) Referral

3.2. Request for Investigation. Upon review of OSC's referral letter and any accompanying evidence, SAF/GCA will make a written request to SAF/IG (or other appropriate organization) for an investigation of the allegations of a violation of any law, rule, or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety set forth in OSC's referral letter. The written request will, at a minimum, request an investigation, identify the allegations referred by OSC which are to be investigated, and provide a suspense date by which the report of investigation (ROI) and all underlying evidence must be provided to SAF/GCA.

3.3. 1213 Disclosure Investigation. A 1213 Disclosure Investigation into allegations referred to the Air Force by OSC is not a standard inspector general investigation. The disclosure allegations to be investigated are framed by OSC in its referral letter, not by the investigating officer (IO) through a complaint analysis process. OSC's allegations may be broad in scope and generally include a qualification that, where a specific allegation of wrongdoing (*i.e.*, a violation of law, rule or regulation) is identified in the referral letter, it is not intended to be exclusive. Consequently, the OSC referred allegation(s) usually requires a broad inquiry into the subject matter. For purposes of investigation, the IO oftentimes paraphrases OSC's allegations. Such paraphrased allegations for 1213 Disclosure Investigations must encompass all reasonably foreseeable issues related to the initial allegations referred by OSC and should be coordinated with SAF/GCA prior to commencing the investigation. In no case should the IO's paraphrased allegations limit or narrow the OSC referred allegations.

3.4. Appointment of Investigation Officer. Upon receipt of SAF/GCA's request for an investigation, SAF/IG will appoint an IO.

3.4.1. **Consult with SAF/GCA.** Upon appointment, prior to the initiation of the investigation, the IO will consult with SAF/GCA for guidance and to discuss the IO's investigative plan.

3.4.2. **Interviews.** In cases where the identity of the whistleblower is known, the IO will interview the whistleblower first (except for interviews with subject matter experts).

3.4.3. **Complaint Analysis.** Depending on the circumstances and how much information is known at the start of the investigation, the IO may find it helpful to conduct a complaint analysis. The complaint analysis cannot limit or narrow the OSC referred allegations.

3.4.4. **Legal Review.** AF/JA, through AF/JAA (or other appropriate judge advocate office), provides advice to SAF/IG during the pendency of the 1213 Disclosure Investigation and

performs a review of SAF/IG's underlying investigation and resulting ROI for legal sufficiency.

3.5. Time is of the essence. Under 5 U.S.C. § 1213(c), SecAF (or his/her delegatee) must submit the 1213 Disclosure Report to OSC within 60 days after the case is referred to the Agency. As such, time is of the essence.

3.5.1. To allow sufficient time for review, revision and coordination, the disclosure investigation must be conducted within the suspense provided by SAF/GCA in its request for investigation. If the IO needs more time to conduct a thorough investigation, the IO must immediately notify SAF/GCA of the reasons and/or circumstances that warrant an extension of time and the length of time requested, not to exceed 60 days.

3.5.2. With proper justification, and where appropriate, SAF/GCA will make a written request to OSC for an extension of time within which to submit the 1213 Disclosure Report. [Note: OSC *may* grant the Air Force's request for an extension of time; however, such extensions by OSC are not automatic.]

3.6. Report Requirements. Under 5 U.S.C. § 1213(c), 1213 Disclosure Reports generated for submission to OSC must include the following five categories of information: [Note: The IO must include the first four categories of information in the ROI. With regard to the last category, the IO may include recommendations for actions based on the investigation.]

3.6.1. A summary of the information giving rise to the investigation;

3.6.2. A description of the conduct of the investigation;

3.6.3. A summary of any evidence obtained from the investigation;

3.6.3.1. Because 5 U.S.C. § 1213(c) requires a summary of the evidence, as opposed to the evidence itself, it is Air Force policy to provide a comprehensive written summary of the facts of the case in the report, rather than attach the evidence (*i.e.* transcripts of testimony or documents) as an exhibit to the report.

3.6.3.2. The summary of evidence assists the public in easily understanding the facts of the case and protects information gathered in the investigation that is either unnecessary to address the OSC-referred allegations or is inappropriate to release publicly.

3.6.4. A listing of any violation or apparent violation of any law, rule, or regulation; and

3.6.5. A description of any action taken or planned as a result of the investigation;

3.6.5.1. Actions taken or planned as a result of the investigation may include changes in agency rules, regulations or practices; the restoration of any aggrieved employee; disciplinary action against any employee or military member; and referral to the Attorney General of any evidence of a criminal violation.

3.6.5.2. This section of the 1213 Disclosure Report is generally not part of the underlying investigation conducted by SAF/IG. However, where appropriate, the IO may include recommendations in the ROI for such actions based on the investigation.

3.6.5.3. SAF/GCA will coordinate with the appropriate Coordinating Air Force Legal Office and management official(s) to determine what, if any, action should be taken and assist in implementing such action(s). Such actions may include both administrative and

disciplinary actions. Where appropriate, SAF/GCA and/or the Coordinating Air Force Legal Office shall consult with NGB/JA.

3.6.5.4. SAF/GCA will prepare this section of the 1213 Disclosure Report.

3.7. Provision of ROI and Evidence to SAF/GCA. After completion of the investigation, and in accordance with SAF/GCA's suspense, SAF/IG will deliver a ROI and all the evidence obtained during the investigation to SAF/GCA.

3.7.1. SAF/GCA reserves the right to request evidence (testimony and exhibits) obtained in the investigation be provided prior to the completion of the investigation.

3.7.2. SAF/GCA must review the SAF/IG ROI and the underlying evidence, and may request further investigation.

3.7.3. SAF/GCA may also choose to author a separate 1213 Disclosure Report for submission to OSC, which is derivative of the SAF/IG ROI and the underlying evidence.

3.8. Coordination. Prior to submission to OSC, the final 1213 Disclosure Report must be reviewed and approved by SAF/GC and signed by SecAF (or his/her delegatee).

3.8.1. The final draft 1213 Disclosure Report for submission to OSC is only required to be staffed from SAF/GCA to SAF/GC to SecAF.

3.8.2. At the request of SAF/GC or the direction of SecAF, the final drafted 1213 Disclosure Report may be coordinated through any other office for review and comment.

3.9. OSC's Review Process. Under OSC's review process, the Air Force 1213 Disclosure Report is shared with the whistleblower(s) who may comment on it in writing. Thereafter, OSC may come back to the Air Force for clarification or with additional questions, requiring additional investigation, information and/or a supplemental report.

3.9.1. SAF/GCA will work with SAF/IG if additional investigation is needed.

3.9.2. SAF/GCA will respond to OSC's requests for additional information.

3.9.3. When appropriate, SAF/GCA will prepare and submit any required supplemental reports. If necessary, SAF/GCA will coordinate for SecAF's signature on any substantial supplemental report.

3.10. OSC Submission of Final 1213 Disclosure Report. OSC is required by law to submit the final Air Force 1213 Disclosure Report to the President and DoD's congressional oversight committees, and to post the report along with OSC's review and any written comments from the whistleblower(s) on the OSC's public website, <http://www.osc.gov>.

3.10.1. Until OSC makes the required submissions and publication on its website, the investigation is still considered open. Accordingly, until such time, the 1213 Disclosure Report is not considered final, may be used for official use only, and should not be released beyond those Air Force employees who have a need to know.

Section 3B – OSC 1213(g) Referral

3.11. OSC Referral. Under section 1213(g), OSC may refer allegations to SecAF without making a determination of substantial likelihood of a violation.

3.11.1. Under this provision, SecAF is required, within a reasonable time after OSC's transmittal of information, to inform the Special Counsel in writing of what action has been taken or is being taken and when such action will be completed.

3.11.2. OSC will provide the Air Force response to a 1213(g) referral to the President and the DoD Congressional Committees, as well as post it on OSC's public website.

3.11.3. In certain cases, after receiving the Air Force Disclosure Report, OSC may make an official referral under 1213(c), requiring an official investigation and report of investigation.

3.11.4. As a matter of Air Force policy, upon receipt of a section 1213(g) referral, the procedures set forth above for referrals made under section 1213(c) will be followed. Exceptions to this policy will be directed by SAF/GCA on behalf of the Headquarters Air Force (HAF). SAF/GCA, in its discretion, may determine that a limited inquiry rather than a full investigation would be appropriate. For example, where the referred allegations of wrongdoing have already been investigated, in whole or in part, through another process (*i.e.* IG investigation, Commander Directed Investigation, etc.), a limited inquiry may be appropriate to avoid redundant investigative effort. SAF/GCA retains the discretion, in appropriate circumstances, to request a limited inquiry into the allegations, rather than a full IG investigation and will prepare a written response based upon such inquiry.

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Chapter 4

OSC CONDUCTED INVESTIGATIONS INTO ALLEGED PROHIBITED PERSONNEL PRACTICES

Section 4A—OSC Contacts, Designation and Responsibilities of POC and Funding

4.1. Air Force Liaison. SAF/GCA is the Air Force liaison with OSC.

4.2. OSC Contact and Notification Requirements. OSC may contact the Air Force at any organizational level. Typical contacts include requests for information from OSC's Complaints Examination Unit seeking information to determine whether to open an investigation; requests to mediate a complaint from OSC's ADR/mediation unit; and/or a request for a POC or for information from an IO with OSC's Investigation/Prosecution Unit. In the event a representative from OSC initiates direct contact with Air Force personnel concerning an alleged PPP, the Air Force organization, unit or civilian employee or military member contacted shall immediately refer the OSC representative to SAF/GCA. (T-1) After appropriate local coordination (to include their local SJA), notice of the OSC contact must be provided to SAF/GCA by close of business the following day. (T-1)

4.3. Designation of a Point of Contact. Upon notification of an OSC contact, SAF/GCA will generally make a request to the appropriate Coordinating Air Force Legal Office, depending on the Air Force organization or unit at issue, for identification of a POC to work with OSC on the particular request for information, ADR request and/or investigation.

4.3.1. The Coordinating Air Force Legal Office, through appropriate AF/JA channels, will identify a POC to respond to OSC's request for information, assess OSC's ADR request, and/or administratively assist OSC in its investigation. Usually, the POC will be a judge advocate or civilian attorney assigned to the Air Force legal office for the installation where the alleged PPP took place. Where appropriate, the Coordinating Air Force Legal Office shall consult with NGB/JA.

4.3.2. The Coordinating Air Force Legal Office, as appropriate, will provide the POC's name and contact information to SAF/GCA.

4.3.3. SAF/GCA will officially designate the POC and communicate the POC designation to OSC, along with the POC's name and contact information.

4.3.3.1. The POC may not delegate this designation to another attorney without the express, written approval of SAF/GCA.

4.3.3.2. If the POC is scheduled to PCS, go on extended temporary duty assignment (TDY), separate from the United States Air Force, retire, or otherwise be unavailable to serve as POC, the POC must provide timely notification to SAF/GCA, through his or her judge advocate chain of command, of the need to identify and designate a replacement POC.

4.3.4. In certain cases arising out of the HAF (especially those involving senior officials), or for cases that are particularly sensitive or high profile, SAF/GCA may elect to serve as the POC to OSC.

4.4. POC Responsibilities. This instruction defines the authority of the POC , subject to expansion or reduction by direction of SAF/GC or SAF/GCA. Following POC designation, SAF/GCA, and/or the Coordinating Air Force Legal Office, as appropriate, will send an authorization letter to the POC setting forth the limits of the POC's authority with respect to the OSC investigation. (See Attachment 2 for a sample authorization letter). Upon designation, the POC responsibilities include:

4.4.1. Responding to OSC requests for information (including interrogatories and requests for documents);

4.4.2. Acting as the official POC for the OSC investigator on the particular matter being investigated;

4.4.3. Assisting the OSC investigator with administrative matters, to including arranging witness interviews and related logistical requirements;

4.4.4. Acting as a legal representative for the command, activity or installation on the particular OSC matter, within limitations set forth in this Instruction and his/her authorization letter;

4.4.5. Informing Air Force personnel, as appropriate, of the nature and basis of the OSC investigation, the authority of OSC, and the rights and duties of Air Force personnel;

4.4.6. Advising employees and military members suspected or accused by the OSC of committing a PPP or an illegal or improper act of their right to request legal representation from the Air Force as set forth in this Instruction (*but see Note* at ¶ 2.5.3.3.) and receiving and processing such requests for legal representation;

4.4.7. Consulting with the Coordinating Air Force Legal Offices, and NGB/JA, as appropriate, on policy and legal issues arising from the OSC investigation;

4.4.8. Immediately contacting the Coordinating Air Force Legal Office, as appropriate, (who will notify SAF/GCA), if, during the course of an investigation, OSC files a stay of agency action. The appropriate Coordinating Air Force Legal Office will handle the stay (in conjunction with the POC) before the MSPB. (*See* ¶ 4.8. below.)

4.4.9. Immediately contacting the Coordinating Air Force Legal Office, as appropriate, (who will notify SAF/GCA), if OSC requests ADR/mediation or seeks to initiate settlement discussions in an effort to resolve the case. Only SAF/GCA is authorized to engage with OSC regarding ADR and/or settlement. This authority may be delegated by SAF/GCA to the appropriate Coordinating Air Force Legal Office or the POC. (*See* ¶ 4.6. below.)

4.4.10. Providing regular updates on the status of the assigned OSC investigation to the appropriate Coordinating Air Force Legal Office to assist in monitoring OSC investigations in the Air Force. During the course of an investigation, status updates shall be provided at least every two weeks or sooner if a major event warrants. (*See* ¶ 4.7. below.)

4.5. Request for Information. Upon designation, the POC will respond to OSC's requests for information. Requests for information may include requests for copies of Commander Directed Investigations or Inspector General ROI. The POC must coordinate with the respective commander or IG office on such requests.

4.5.1. OSC has statutory authority to issue subpoenas as part of an official PPP investigation for documents held by an agency. It is unusual for OSC to issue a subpoena for a typical document production request. However, the Air Force considers an OSC document request to have the full force and effect of a subpoena, and the Air Force will provide documents in response to such an OSC request, provided the following factors are met:

4.5.1.1. The OSC request for document production is in writing;

4.5.1.2. The document requested is in the custody of the Air Force;

4.5.1.3. The release of the document is not prohibited by any law, regulation, executive order, or DoD or Air Force instruction; and

4.5.1.4. The information contained in the document is not protected by the ACP or the attorney work-product doctrine (AWP) and is not otherwise protected from disclosure.

4.5.2. It is the responsibility of the POC to ensure every factor is met prior to releasing any document to OSC, although the POC may consult with the appropriate Coordinating Air Force Legal Office as needed.

4.5.3. Documents that are protected by the AWP and/or the ACP must be withheld from disclosure to OSC by the POC. In the event only part of a document is protected from release to OSC, the protected information must be redacted with a clear marking by the POC of the redacted information. For example, if a sentence in an email is privileged, the POC should white-out that sentence, then draw a line through the whited-out portion and mark it "REDACTED – ACP" or with similar language; then copy the page to ensure the redaction cannot be read from the reverse side. The POC must also keep a log of all redactions, as well as unredacted versions of all documents.

4.5.4. SAF/GC is the approval authority for waiver of the ACP and for the release of AWP. Any request for such waiver/release will be routed through AF/JA and SAF/GCA, and any approval of such waiver/release will be made in writing by SAF/GC or SAF/GC's designee, SAF/GCA.

4.5.5. Any OSC request for classified information shall be processed under all applicable laws and regulations governing the handling and disclosure of classified information. (T-0) SAF/GCA must be notified that an OSC request covers classified information. (T-1)

4.5.6. Only SAF/GCA is authorized to release Air Force documents to OSC. However, this authority is routinely delegated to the designated POC and to the appropriate Coordinating Air Force Legal Office. [Note: *But see* ¶ 4.11.1. regarding employees or applicants filing complaints].

4.6. Request for ADR/Mediation or Initiation of Settlement Discussions. In an effort to resolve the case, OSC may request ADR or initiate settlement discussions with the POC. If OSC requests to engage in ADR or initiates settlement discussions, the POC must contact SAF/GCA immediately, through appropriate channels. (T-1) Absent affirmative delegation, only SAF/GCA is authorized to engage with OSC regarding ADR and/or settlement. This authority will often be delegated by SAF/GCA to the Coordinating Air Force Legal Office (as appropriate) or the POC. When such authority is delegated, the Coordinating Air Force Legal Office or the POC will provide SAF/GCA with the draft settlement agreement for review. Upon SAF/GCA's approval, the settlement agreement may be finalized.

4.7. Monitoring of PPP Investigations. The POC is required to keep the Coordinating Air Force Legal Office (as appropriate) apprised of the status of any OSC investigations. (T-1) During the course of the OSC investigation, the POC shall provide updates at least every two weeks or when a major event warrants. The Coordinating Air Force Legal Office (as appropriate) will monitor each OSC PPP investigation under their jurisdiction and update SAF/GCA on the status of all OSC investigations on a monthly basis or when a major event warrants. SAF/GCA, in turn, will keep the SAF/GC informed of the status of OSC investigations in the Air Force.

4.8. Petitions for Stays of a Personnel Action Filed by OSC. The OSC may request that the MSPB stay a personnel action pursuant to 5 U.S.C. § 1214. When the OSC serves an activity with a petition for stay, the POC, if designated, or the SJA, if no POC has been designated, must immediately notify the appropriate Coordinating Air Force Legal Office. See Title 5 of the Code of Federal Regulations (C.F.R.), *Administrative Personnel*, Part 1201, *Practices and Procedures*, Subpart D, *Procedures for Original Jurisdiction Cases* for further information.

4.8.1. When the Air Force voluntarily agrees to a stay of a personnel action or where the MSPB grants a stay at the request of the OSC, the POC must provide weekly status updates to the appropriate Coordinating Air Force Legal Office, which addresses any development concerning the employee(s) affected by the stay, including “no change” reports. This weekly written report shall be e-mailed by close of business each Friday during the period of the stay. (T-1)

4.9. Funding. The command, activity, or installation within which the alleged PPP arose will provide funding for travel, per diem, and other expenses related to the OSC investigation. These expenses may include appropriate funding for witnesses and other administrative support. (T-1)

[NOTE: When an ANG witness is required by OSC, it may be necessary to provide a Title 10 line of accounting to ensure the witness is in an appropriate military duty status.]

Section 4B—Civilian Employee and Military Member Cooperation

4.10. Requirement to Cooperate. All Air Force civilian employees and military members must cooperate in all OSC investigations, subject to the proper exercise of rights pursuant to the Fifth Amendment of the Constitution; Article 31 of the UMCJ, as applicable; and any other law, regulation, Executive Order, DoD or Air Force Instruction, privilege, or doctrine that prohibits or otherwise protects certain information from being released. Subject to these limitations, civilian employees and military members are required to answer all questions truthfully and completely and request clarification of anything that the civilian employee or military member does not clearly understand.

4.11. Document Production. Documents will be provided to OSC only by the designated POC, the Coordinating Air Force Legal Office, when authorized, or SAF/GCA, and only after the appropriate review required in Section 4A. The POC may contact civilian employees and military members to assist in document production and answering interrogatories. All civilian employees and military members must cooperate with requests of the POC subject to ¶ 4.10. In response to a direct request for information from OSC, a civilian employee or military member is not permitted to provide Air Force or other government documents directly to OSC.

The civilian employee or military member contacted shall immediately refer the OSC representative to the designated POC (if there is one) or to SAF/GCA. (T-1) After appropriate local coordination (to include their local SJA), notice of the OSC request for information must also be provided to SAF/GCA.

4.11.1. This Instruction does not prohibit Air Force employees (civilian or military and/or applicants for employment) from filing complaints with OSC and/or from providing supporting documentation with their complaint, as long as the release of such documentation is not prohibited by any law, regulation, executive order, DoD or Air Force Instruction.

4.12. Official Business. Civilian employee and military member participation in OSC investigations, MSPB hearings, and other related proceedings is considered official business if the civilian employee or military member is otherwise in duty status. Participation in an OSC investigation should be coordinated with the civilian employee's or military member's supervisor. [Note: When the presence of a reserve military member not currently in military duty status is required or desired, contact the legal office at Air Force Reserve Command or the member's servicing JA representative for assistance. Similarly, contact NGB/JA if Title 32 personnel (military or technician) are involved.]

4.13. Witness Testimony/Reprisal. No Air Force civilian employee or military member shall influence witness testimony or create the appearance of influencing witness testimony. (T-0) Further, civilian employees and military members are protected by law from reprisal for cooperating in an OSC investigation.

4.13.1. If a civilian employee or military member believes they are subject to retaliation because of their participation in an OSC investigation, they may contact an appropriate official within or outside the Air Force. If the civilian employee or military member elects to report the retaliation within the Air Force, they may contact the designated POC or the local IG's office. The civilian employee or military member is free, however, to contact officials within their chain of command, the SJA, or any other official he/she deems appropriate.

4.14. Recording Testimony. A civilian employee or military member may personally create an audio recording of a meeting with OSC if the recording device is in plain view, all attendees at the interview have knowledge that the meeting may be recorded, and the OSC investigator agrees to allow the recording to take place.

4.15. OSC Recording Testimony. An OSC investigator may create an audio recording of an interview with an employee or military member if the OSC investigator notifies the civilian employee or military member that an audio recording is being made and the recording device is in plain view.

4.16. Affidavits. A civilian employee or military member is not required to sign an affidavit or written summary of their testimony, but may do so subject to the following:

4.16.1. A civilian employee or military member may edit the document to correct errors with an ink pen, and must initial the edits.

4.16.2. A civilian employee or military member may request a copy of the affidavit or written summary as a condition of signing.

Section 4C—Legal Representation during a PPP Investigation

4.17. Witnesses. Civilian employees and military members asked to provide testimony or documents or otherwise participate in an OSC investigation, whom OSC has not identified as a suspect or who do not reasonably believe the OSC suspects or accuses them of improper or illegal conduct (*i.e.* a witness), do not qualify for Air Force-provided personal legal representation under this Instruction. Such witnesses may, however, receive legal advice from Air Force attorneys regarding the investigation, including legal advice on their rights and obligations. However, no attorney-client relationship will attach as a result of rendering such advice (*but see Note* at ¶ 2.5.3.3.). The attorney-client relationship shall not be established unless the civilian employee or military member is suspected or accused by OSC of committing a PPP or other illegal or improper act, the civilian employee or military member has requested legal representation in writing, SAF/GC has approved such request, and the employee or military member has been assigned Air Force or DoD counsel.

4.18. Approval Authority. In accordance with DoDD 5500.19, SAF/GC may approve the assignment of Air Force legal counsel, upon request, to represent the personal interests of an Air Force employee or military member suspected or accused by the OSC of committing a PPP or an illegal or improper act, provided:

- 4.18.1. The alleged PPP or other illegal or improper act complained of was done within the scope of the employee's official responsibilities; and
- 4.18.2. The assignment of agency counsel to the employee or military member is in the best interest of the Air Force.

4.19. Procedures. The following procedures will apply when a civilian employee or military member requests an Air Force attorney be appointed to represent his or her personal interests during an OSC investigation:

- 4.19.1. The civilian employee or military member must submit a written request for legal representation to the designated Air Force POC. (T-0) The written request must state that the employee is requesting an Air Force attorney be appointed to represent his or her personal interests; indicate whether, in connection with an OSC investigation, he or she has retained legal counsel from outside the Air Force; and explain the circumstances that justify the requested Air Force counsel. In addition, the civilian employee or military member must attach all documents served on that civilian employee or military member by OSC, and attach any other relevant evidence supporting the request. (*See Attachment 3 for a sample.*)
- 4.19.2. The burden is on the requester to supply sufficient facts to establish that the appointment of an Air Force attorney would be in the Air Force's best interest.
- 4.19.3. In addition, the civilian employee or military member must obtain a written certification from his or her supervisor that the civilian employee or military member was acting within the scope of his or her official duties and that no adverse or disciplinary personnel action has been initiated or taken by the Air Force against the employee for the conduct being investigated by the OSC. (T-0)
- 4.19.4. The POC shall immediately notify the appropriate Coordinating Air Force Legal Office as well as SAF/GCA when a request is initiated. (T-1) The POC shall also coordinate with OSC to ensure that any interviews are scheduled to allow sufficient time for the civilian employee or military member to obtain legal representation. (T-0)

4.19.5. Once a request for government legal representation has been initiated, if the employee or member chooses to obtain private counsel, in connection with an OSC investigation, the employee or member shall immediately notify the POC. (T-1)

4.19.6. The POC, with the coordination of the servicing SJA, must write a litigation report/opinion that details the known relevant facts under investigation, including the requesting employee's relationship to the complainant and involvement in the allegations under investigation, with a recommendation as to whether or not providing an Air Force counsel would be appropriate. (T-1)

4.19.7. Except as set forth below, the servicing SJA will route the request package along with the POC's written litigation report/opinion through JA channels to the MAJCOM. (T-1) The MAJCOM will forward the entire request package to AFLOA/JACL-LLFSC, AFMC/JA, and/or AFRC/JA, as appropriate, who will provide a written evaluation of the request and forward the package to AF/JA for coordination. AF/JA will then forward the package to SAF/GCA, who will provide a recommendation and forward the request to SAF/GC for final decision.

4.20. Approval Authority. SAF/GC is the approval and denial authority for Air Force legal counsel requests made under this section. Upon approval, SAF/GCA will provide the civilian employee or military member with a written explanation of the terms of legal representation. (See Attachment 5 for a sample). The civilian employee or military member must accept the conditions of legal representation in writing. (T-0)

4.21. Duration of Representation. If the request for Air Force legal counsel is approved under this Instruction, the representation will only extend to the OSC investigation. Air Force resources cannot be used to provide legal representation for a civilian employee for disciplinary action initiated against the employee for committing or participating in a PPP or for engaging in other illegal or improper conduct, regardless of whether that participation or conduct is also the basis for the disciplinary action proposed by OSC.

4.22. Appointment of Counsel/Conflict of Interest. Upon approval of a request for legal representation and the acceptance of the conditions of legal representation by the employee or military member, SAF/GC will notify and coordinate with AF/JA who will identify and detail agency counsel. Appointment of counsel should be made after notification and consultation with that attorney's commander or MAJCOM (or equivalent (SJA)). If legal representation is approved for Title 32 personnel, AF/JA shall consult with NGB/JA prior to appointment and detail of agency counsel.

4.22.1. Prior to appointment, AF/JA, in consultation with SAF/GC, shall determine whether an Air Force attorney under consideration to represent the employee or member is likely to have a conflict of interest. Any Air Force attorney considered for appointment under this section to represent the personal interests of an Air Force employee or military member is disqualified from such consideration if the attorney has a conflict of interest in the matter. Where appropriate, AF/JA shall also consult with NGB/JA.

4.22.2. In the event no Air Force attorney qualifies for consideration because of conflicts of interest, the SAF/GC or AF/JA on behalf of SAF/GC, may contact other Military Departments to identify legal counsel. Upon identification and appointment by the other

Military Department, that attorney shall be made available to the employee or member requesting representation. (T-1)

4.22.3. In the event no attorney within the DoD is qualified for consideration and/or available, the request for representation made by the employee or military member will normally be denied.

4.23. Private Counsel. The Air Force will not provide, retain or fund private outside legal counsel on behalf of a civilian employee or military member or provide funds to a civilian employee or military member for the purpose of retaining outside counsel, except in unusual circumstances as determined by and subject to, the personal approval of DoD/GC.

4.24. Letters of Appointment. All letters of appointment must clearly explain the scope and limits of the legal representation (which should mirror the conditions set forth in the SAF/GC approval letter). (*See* Attachment 4 for a sample). When appointed to such a duty, an Air Force attorney's client in the matter is the civilian employee or military member, and the attorney shall diligently represent that assigned client in matters related to the OSC investigation. (T-0) The attorney's professional responsibility to DoD and the Air Force is satisfied by fulfilling this responsibility to the civilian employee or military member.

4.25. Termination of Legal Representation. SAF/GC is the approval and denial authority for all requests to terminate legal representation under this section.

4.25.1. An Air Force attorney may request to terminate the legal representation or withdraw from representing the civilian employee or military member, by sending a request for termination or withdrawal to SAF/GC.

4.25.2. Requests will be justified by the attorney to the extent they do not conflict with the attorney's rules of professional responsibility.

4.25.3. An Air Force attorney may request to withdraw from representing the civilian employee or military member, subject to SAF/GC approval, and without explanation, where the justification for the withdrawal request provides that further explanation would compromise the ACP.

4.25.4. The attorney client relationship may be terminated if the assigned Air Force attorney for the civilian employee or military member determines, with the approval of SAF/GC, that:

4.25.4.1. The civilian employee or military member was acting outside the scope of his or her official duties when engaging in the conduct that is the basis for the OSC investigation or charge; and

4.25.4.2. Termination of the professional representation is not in violation of the rules of professional conduct applicable to the assigned counsel.

4.26. Area Defense Counsel. Military members may request legal counsel from their servicing Area Defense Counsel (ADC) office. Military members being disciplined for misconduct arising from improper or illegal conduct, or a PPP, are entitled to military defense counsel under the UCMJ. The procedures for whether a military defense counsel will be assigned to represent a military member are set by AFLOA/JAJD. (*See* Note, ¶ 2.5.3.3.)

4.27. Private Counsel. Military members and civilian employees are always permitted to retain civilian counsel at their own expense. Neither the Air Force nor DoD will reimburse any costs to

a civilian employee or military member who retains private counsel unless the employee or military member obtains advance authorization from SAF/GC and DoD/GC for such representation.

Section 4D—Corrective Action

4.28. Remedies. If it is determined that a PPP took place, corrective action may result. As set out in 5 U.S.C. § 1214(g), corrective action may include remedies taken to place the individual, as nearly as possible, in the position the individual would have been in had the PPP not occurred (often referred to as returned to “*status quo ante*”); reimbursement for attorneys’ fees; back pay and related benefits; medical costs incurred, travel expenses, any reasonable and foreseeable consequential damages and compensatory damages (including interest, reasonable expert fees, and costs). [Note: The WPEA was signed into law on November 27, 2012, with an effective date of December 27, 2012. The MSPB has held that the WPEA provision providing for compensatory damages does not apply retroactively to cases that were pending on the effective date of the WPEA.]

4.29. Settlement. Upon finding a PPP took place, and sometimes prior to the completion of an investigation, OSC may attempt to broker a settlement between the Air Force and the affected employee to satisfactorily return the employee to *status quo ante* and negate the need to litigate corrective action. In doing so, OSC acts as the intermediary between the Air Force and the affected employee during settlement discussions. Generally, OSC drafts and approves settlement agreements.

4.30. Authority to Settle. SAF/GCA has the sole authority, absent delegation, to conduct settlement negotiations with OSC, in consultation with the Coordinating Air Force Legal Office and the designated POC (as appropriate) and with the assistance of any other necessary Air Force employee. SAF/GCA also has the discretion to delegate the authority to conduct settlement negotiations with OSC in a particular case to the POC or another Air Force attorney.

4.31. Settlement and Air Force Responsibility for PPPs. While OSC may sometimes attempt to settle a case for corrective action prior to the completion of their investigation (either directly or through ADR/mediation), it may not be in the best interests of the Air Force to do so, especially if OSC declines to provide underlying information relating to the PPP allegation. It is usually in the best interests of the Air Force to fully investigate claims of PPPs so that decisions on whether or not to grant corrective action, as well as whether or not to take disciplinary action, are based on full knowledge of the facts. The Air Force has a responsibility to identify PPPs and to correct them. Settling a corrective action case simply for expediency or “nuisance value” is generally inappropriate.

4.32. Corrective Action during Investigation. Where it is determined by a preponderance of evidence that a PPP took place, it is Air Force policy to enter into a settlement agreement with the employee to take appropriate corrective action to return the employee harmed to *status quo ante*. When the Air Force determines that a PPP likely took place, there may be circumstances during the pendency of an OSC investigation where it may be prudent for the Air Force to take certain corrective action. Generally, the corrective action contemplated in such circumstances would be to forego further personnel actions related to the employee. For example, if it appears that a proposal for removal was tainted with retaliatory motive, it may be prudent to simply withdraw the proposal. Where deemed appropriate, the Air Force may take such corrective

action without a settlement agreement. In no case, however, should management officials take corrective action related to an OSC investigation without consultation with SAF/GCA.

4.33. Review of Settlement Agreements. Regardless of which Air Force attorney conducts the settlement negotiations, SAF/GCA will review all written settlement agreements related to OSC investigations prior to execution. SAF/GCA will consult with the servicing legal office on whether the settlement agreement is in the best interests of the Air Force. While the appropriate management official maintains the authority to approve or disapprove a settlement agreement, that authority may be withheld by a more senior management official in any case depending on the best interests of the Air Force.

4.34. OSC Prosecution. In the event a settlement cannot be reached and management officials decline to take corrective action, OSC has the statutory authority to file the case with the MSPB to request an order for corrective action. OSC may also choose not to file, in which case OSC will issue the employee an individual right of action (IRA) to file with the MSPB. In the event a corrective action case is filed with the MSPB, the Coordinating Air Force Legal Office, as appropriate, is responsible for representing the Air Force in the proceeding.

4.35. Funding. Funding for corrective actions, whether through settlement or ordered by MSPB, will be provided from the command, activity, or installation from which the PPP allegations arose. (T-1)

Section 4E—Disciplinary Action

4.36. Special Counsel Approval. By statute, 5 U.S.C. § 1214(f), the Air Force is prohibited from taking disciplinary action against an employee for any alleged PPP (or for any related activity) that is under investigation by OSC, *unless* the Special Counsel approves.

4.37. OSC Prosecution of Disciplinary Action. OSC is charged, by statute, with prosecuting the appropriate disciplinary action against the employee at the MSPB upon finding that a civilian employee committed a PPP, violated the provisions of any law, rule or regulation, engaged in any other conduct within the jurisdiction of the Special Counsel as described in 5 U.S.C. § 1216, or knowingly and willfully refused or failed to comply with an order of the MSPB.

4.38. OSC Request for Agency Action. OSC may request that the Air Force take the appropriate disciplinary action. Upon such a request, SAF/GCA, the Coordinating Air Force Legal Office and the appropriate servicing legal office, will advise on the appointment of appropriate proposing and deciding officials, and discipline will be considered per standard Air Force policy, federal employment law and regulations. Prior to the imposition of any discipline, SAF/GCA will consult with OSC on the matter to gain OSC's approval. In the event OSC does not approve of the proffered disciplinary action, the Air Force will close the matter internally so that OSC can move forward with their own prosecution. Disciplinary action may not be proposed against a civilian employee for an alleged PPP under investigation by OSC, without OSC's written approval.

4.39. Evidence. To consider appropriate discipline, generally it is necessary to obtain OSC's evidence file from their investigation. SAF/GCA is responsible for coordinating with OSC to obtain all necessary evidence. If OSC refuses to provide the necessary evidence, the Air Force may decline to prosecute disciplinary action or may undertake a separate investigation to determine whether sufficient evidence exists to support disciplinary action.

4.40. Discipline for Military Members. Upon finding that a military member engaged in a PPP, OSC may recommend disciplinary or other appropriate action to SecAF in conjunction with providing the evidence on which such recommendation is made. Upon the referral of such a recommendation, the matter will be delegated to the lowest appropriate authority for consideration. OSC has no authority to take disciplinary action against a military member. However, SecAF is required to report to OSC on actions taken or proposed against a military member if OSC refers such a case after a PPP investigation.

4.41. Disciplinary Action After OSC Case Closed. If OSC closes its investigation without taking any disciplinary action, and the Air Force determines that a PPP or other misconduct has taken place, the Air Force may determine responsibility for such misconduct and consider appropriate disciplinary action against those responsible.

Chapter 5

OSC CONDUCTED INVESTIGATIONS INTO OTHER ALLEGED PROHIBITED ACTIVITIES (USERRA AND HATCH ACT VIOLATIONS)

5.1. Procedure. Upon OSC notice to the Air Force of OSC complaints containing allegations of violation(s) of the Hatch Act or USERRA, the basic procedure set forth in Chapter 4 for PPP investigations will be used.

5.2. Designation of POC. A POC will be designated and he or she will have the same substantive duties as a POC in a PPP investigation. (See ¶s 4.3. and 4.4. above.)

5.3. Duty to Cooperate. Civilian employees and military members have the same duty to cooperate with OSC and the POC in these investigations, subject to the same limitations set forth in Chapter 4. (See section 4B above.)

5.4. Legal Representation. Requests for legal representation will be handled according to the same procedure as set forth in Section 4C.

5.5. ADR and Settlement. The roles, responsibilities and procedures for ADR and settlement authority for these investigations will follow the same guidelines as set forth in Chapter 4. (See ¶ 4.6. above.)

5.6. Notification of OSC Contact and Monitoring. The guidance on notification requirements for OSC contacts and for monitoring of Hatch Act and USERRA investigations conducted by OSC is the same as set forth in Chapter 4. (See ¶s 4.2. and 4.7. above.)

5.7. Funding. The command, activity, or installation within which the alleged Hatch Act or USERRA violation arose will provide funding for travel, per diem, and other expenses related to the OSC investigation. These expenses may include appropriate funding for witnesses and other administrative support. (T-1)

5.8. Corrective Action – USERRA: The specific relief granted for a particular USERRA violation will depend on what needs to be remedied (for example, restoration of leave that was denied, reemployment in the position that was previously held, compensation for any loss of wages or benefits, or promotion due to the escalator principle). However, the core principle is to put the appellant where he or she would have been if not for the violation. In addition, where appropriate, such individuals may also receive reasonable attorney fees, expert witness fees and other litigation expenses.

5.9. Disciplinary Action – USERRA: As warranted, disciplinary actions based on a USERRA investigation may be taken against civilian employees and military members found responsible for USERRA violations.

5.10. Disciplinary Action – Hatch Act: The Hatch Act Modernization Act of 2012, effective January 27, 2013, modified the penalty structure for violations of the Hatch Act by federal employees. Under the modified penalty structure, an employee who violates the Hatch Act is subject to a range of disciplinary actions, including removal from federal service, reduction in grade, debarment from federal employment for a period not to exceed 5 years, suspension, reprimand, or a civil penalty not to exceed \$1,000. (Before enactment of these amendments, an employee was subject to removal, or in some cases, a suspension of no less than 30 days for

Hatch Act violations). The modified penalty structure applies to violations that occurred before, on, or after January 27, 2013, unless OSC has already initiated a complaint with the MSPB as of that date, or an employee has already entered into a settlement agreement with OSC. OSC has exclusive jurisdiction to investigate and prosecute complaints alleging a violation of the Hatch Act.

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Gordon O. Tanner
General Counsel

Attachment 1**GLOSSARY OF REFERENCES AND SUPPORTING INFORMATION*****References***

United States Constitution, Fifth Amendment

Public Law 95-454 *Civil Service Reform Act of 1978*, as amended, codified in scattered sections of Title 5, United States Code

Title 5 U.S.C. §§ 1211 *et seq.*, and §§ 2302 *et seq.*, as amended

Public Law 112-199, *Whistleblower Protection Enhancement Act of 2012*, 27 November 2012

Title 5 U.S.C. Chapter 73, Subchapter III, §§ 1501-1508 and 7321-7326, as amended, *The Hatch Act*

Public Law 112-230, *Hatch Act Modernization Act of 2012*, 28 December 2012

Title 38 U.S.C. §§ 4301 *et seq.*, *Uniformed Services Employment and Reemployment Rights Act*

Title 32 U.S.C. §§ 101 *et seq.*, *National Guard*

Title 10 U.S.C. § 8013, *Secretary of the Air Force*

Title 5 U.S.C. § 552(a), *Privacy Act of 1974*

Public Law 95-452, as amended, *Inspector General Act of 1978*, 12 October 1978

Title 10 U.S.C. Article 31, *Uniform Code of Military Justice*

DoDD 5500.19, *Cooperation with the United States Office of Special Counsel (OSC)*, 24 May 2004

Title 5, C.F.R. *Administrative Personnel*, Part 1201, *Practices and Procedures*, Subpart D, *Procedures for Original Jurisdiction Cases*

Secretary of the Air Force Delegation of Authority for Actions Associated with Investigations Directed by and/or Conducted by the Office of Special Counsel, July 25, 2014

Secretary of the Air Force Order 111.5, Functions and Duties of the General Counsel and the Judge Advocate General, July 14, 2005

Air Force Policy Directive (AFPD) 51-11, Coordination of Remedies for Fraud and Corruption related to Air Force Procurement Matters

AFI 33-360, Publications and Forms Management

AFMAN 33-363, Management of Records

Prescribed Forms

None

Adopted Forms

Air Force Form 847, *Recommendation for Change of Publication*

Abbreviations and Acronyms

ACP—Attorney-Client Privilege

ADC—Area Defense Counsel

ADR—Alternative Dispute Resolution

AF/A1—Deputy Chief of Staff of the Air Force for Manpower, Personnel and Services

AFB—Air Force Base

AFI—Air Force Instruction

AF/JA—The Judge Advocate General of the Air Force

AF/JAA—Air Force Administrative Law Directorate

AFLOA/JACL—LLFSC—Air Force Legal Operations Agency, Civil Litigation (Labor Law Field Support Center)

AFLOA/JAJD—Air Force Legal Operations Agency, Trial Defense Division

AFMAN—Air Force Manual

AFMC/JA—Air Force Materiel Command, Judge Advocate

AFPD—Air Force Policy Directive

AFRC/JA—Air Force Reserve Command, Judge Advocate

AFRIMS—Air Force Records Information Management System

ANG—Air National Guard

ARB—Air Reserve Base

ARS—Air Reserve Station

AWP—Attorney Work-Product Privilege

CFR—Code of Federal Regulations

Coordinating Air Force Legal Office—AFLOA/JACL-LLFSC, AFMC/JA, and/or AFRC/JA

DoD—Department of Defense

DoDD—Department of Defense Directive

DoD/GC—Department of Defense General Counsel

HAF—Headquarters Air Force

IG—Inspector General

IO—Investigating Officer

IRA—Individual Right of Action

JA—Judge Advocate

MAJCOM—Major Command

MSPB—Merit Systems Protection Board

NAF—Numbered Air Force

NGB/JA—National Guard Bureau, Office of the Chief Counsel

OPR—Office of Primary Responsibility

OSC—Office of Special Counsel

PA—Privacy Act

POC—Point of Contact

PPP—Prohibited Personnel Practice

RDS—Records Disposition Schedule

ROI—Report of Investigation

SAF/GC—Air Force General Counsel

SAF/GCA—Air Force General Counsel (Fiscal, Ethics and Administrative Law Division)

SAF/IG—Air Force Inspector General

SAF/LL—Air Force Legislative Liaison

SAF/PA—Air Force Public Affairs

SecAF—Secretary of the Air Force

SJA—Staff Judge Advocate

SMO—Senior Management Official

TDY—Temporary Duty Assignment

UCMJ—Uniform Code of Military Justice

USERRA—Uniformed Services Employment and Reemployment Rights Act

USC—United States Code

WPEA—Whistleblower Protection Enhancement Act

WPA—Whistleblower Protection Act

Terms of Art (as defined by Statute and caselaw)

Abuse of Authority—occurs when there is an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons. The definition of abuse of authority does not contain a *de minimis* standard or threshold.

Corrective Action for a PPP may include—

- That the individual be placed, as nearly as possible, in the position the individual would have been in had the PPP not occurred;
- Reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert fees, and costs); and

- Any corrective action may include fees, costs, or damages reasonably incurred due to an agency investigation.

Covered Position. To qualify under civilian reprisal law, the complainant must be in a “covered position.” A “covered position” means any civilian position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service. It does not include any position which is, prior to the personnel action, 1) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; 2) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration; 3) a contract position; or 4) a uniformed military personnel position.

Gross Mismanagement means a management action or inaction which creates a substantial risk of significant adverse impact upon the agency’s ability to accomplish its mission. It does not include management decisions which are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing.

Gross Waste of Funds means a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government.

Personnel Action. As used IAW 5 U.S.C. § 2302(a)(2)(A), a “personnel action” with respect to an employee in or applicant for a covered position within the Air Force means any actual adverse or unfavorable personnel action taken or threatened or any positive personnel action withheld (failed to take), to include the following:

- An appointment
 - By way of example, a failure to take an action may include cancellation of a vacancy announcement.
- A promotion
- An action under chapter 75 of Title 5 or other disciplinary or corrective action
 - Applies to more than just actions in an employee’s official personnel file such as suspensions or removals.
 - By way of example, it also applies to a letter of admonishment or suspension of law enforcement authority.
- A detail, transfer, or reassignment
- A reinstatement
- A restoration
- A reemployment
- A performance evaluation under chapter 43 of Title 5
 - A threatened action may include placing an employee on a Performance Improvement Plan (PIP) if all other elements of civilian reprisal are present.
- A decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph
 - By way of illustration, this includes but is not limited to:
 - Placement of an employee in a leave without pay or absent without leave status;

- Denial of annual leave; and
 - Denial of an opportunity to earn overtime pay that an employee would otherwise have been provided.
- A decision to order psychiatric testing or examination
 - Any other significant change in duties, responsibilities, or working conditions
 - Under this item, case law has included a variety of management actions that may be considered changes in duties or working conditions, including but not limited to retaliatory investigations, reorganizations, deliberate idling, cessation of communications with the employee by the manager, development of an occupational disease because of working conditions, and denial of courteous treatment (*i.e.* being subject to yelling, profanity, embarrassment).
 - Under Federal Circuit case law, a revocation of a security clearance is not considered a personnel action; however DoD/IG may take these types of civilian reprisal cases.

Prohibited Personnel Practice. An action taken by an employee who has authority to take, direct others to take, recommend, or approve any personnel action, when such action is prohibited by 5 U.S.C. §§ 2302(b)(1) - 2302(b)(13). Such employee shall not, with respect to his or her authority:

- 1) Discriminate for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation, as prohibited by certain specified laws in 5 U.S.C. § 2302(b)(1);
- 2) Solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests, or is under consideration for, any personnel action, unless the recommendation or statement is based on the personal knowledge or records of the person furnishing it, and consists of an evaluation of the work performance, ability, aptitude, or general qualifications of the individual, or an evaluation of the character, loyalty, or suitability of such individual (5 U.S.C. § 2302(b)(2));
- 3) Coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity (5 U.S.C. § 2302(b)(3));
- 4) Deceive or willfully obstruct any person with respect to such person's right to compete for employment (5 U.S.C. § 2302(b)(4));
- 5) Influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment (5 U.S.C. § 2302(b)(5));
- 6) Grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment (5 U.S.C. § 2302(b)(6));
- 7) Appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative as defined in 5 U.S.C. § 3110 of the employee if the position is in the Agency in which the employee is serving as a public official (as defined in reference (h)) or over which the employee exercises jurisdiction or control as an official (5 U.S.C. § 2302(b)(7));

- 8) Take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of whistleblower disclosures. (5 U.S.C. § 2302(b)(8));
 - 9) Take or fail to take a personnel action against an employee or applicant for employment as a reprisal for the exercise of any appeal, complaint or grievance right granted by law, rule, or regulation or testify for or otherwise lawfully assist any individual in the exercise of any appeal, complaint, or grievance, right granted by any law, rule, regulation; cooperating with or disclosing any information to the Inspector General of any Agency, or the Special Counsel, in accordance with applicable provisions of law; or for refusing to obey an order that would require an individual to violate a law (5 U.S.C. § 2302(b)(9));
 - 10) Discriminate for or against any employee or applicant for employment on the basis of conduct that does not adversely affect the performance of the employee or applicant or the performance of others (5 U.S.C. § 2302(b)(10));
 - 11) Knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veteran's performance requirement; or fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veteran's performance requirement (5 U.S.C. § 2302(b)(11));
 - 12) Take or fail to take any other personnel action if the taking, or failure to take, such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in 5 U.S.C. § 2301 (5 U.S.C. § 2302(b)(12)); or
 - 13) Implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive Order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive Orders and statutory provisions are incorporated into this agreement and are controlling."
- (T-0 (for all))

Protected Disclosure. A protected disclosure is any formal or information communication or transmission of information by an employee or applicant which the employee or applicant reasonably believes evidences one or more of the following:

1. Any violation of any law, rule or regulation;
2. Gross mismanagement;
3. Gross waste of funds;
4. Abuse of authority; or
5. Substantial and specific danger to public health or safety.

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs. Disclosures that are prohibited by law or required to be kept secret are protected if they are made to the Special Counsel or to an agency's IG.

- The term "protected disclosure" does not include a communication concerning policy

decisions that lawfully exercise discretionary authority, unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences a violation of law, rule or regulation, gross mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to public health or safety.

- A disclosure shall not be excluded because—
 - Of the employee's or applicant's motive for making the disclosure;
 - Of the amount of time which has passed since the occurrence of events described; or
 - The disclosure
 - was made to a supervisor;
 - was made in the normal course of duties;
 - was made to a person who participated in the disclosed wrongdoing;
 - revealed information that had been previously disclosed;
 - was not made in writing; or
 - was made while the employee was off duty.

Substantial or Specific Danger to Public Health or Safety. For civilian reprisal, a disclosure of a “danger to public health or safety” must be substantial and specific. A variety of factors may determine when a disclosed danger is sufficiently substantial and specific. Two of these are (1) the likelihood of harm resulting from the danger and (2) when the alleged harm may occur. If the disclosed danger could only result in harm under speculative or improbable conditions, or is not likely to occur in the immediate or near future but rather manifest only in the distant future, it would not qualify. The nature of the harm, that is the potential consequences, affects the substantiality of the danger.

Whistleblower. A present or former Federal employee or applicant for Federal employment who makes a protected disclosure of information he or she reasonably believes evidences:

- A violation of any law, rule, or regulation;
- Gross mismanagement;
- A gross waste of funds;
- An abuse of authority; or
- A substantial or specific danger to public health or safety,

if such disclosures are not specifically prohibited by law and if such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs (5 U.S.C. § 2302(b)(8)(A)).

Attachment 2**SAMPLE POC AUTHORIZATION LETTER**

(Date)

MEMORANDUM FOR _____ (Air Force Attorney)

FROM: SAF/GCA

Subject: Designation of Office of Special Counsel Point of Contact

You [have been] [are hereby] designated as the point of contact (POC) for the Office of Special Counsel (OSC) in their investigation [case citation if known] into allegation(s) of prohibited personnel practices against (employee) by (management official). While we are not privy to the complaint made or other details of the case, we have been told by OSC that the matter involves _____. You are instructed to review AFI 51-1102 in its entirety. You may also find it helpful to review DoDD 5500.19.

Your role as POC is to act as the official contact with the OSC investigator on this particular matter being investigated. In this case, the OSC investigator is (name) and he/she can be contacted at (telephone) or by email at (email address). Please establish contact with him/her as soon as practical. According to OCS, POCs should expect an explanation of (in general terms) the allegation(s) under investigation but often OSC will not reveal the name of the complainant.

In conducting their investigation, the OSC investigator will require your assistance. Generally, OSC will ask you to produce documents, answer interrogatories, and arrange for witness interviews. You are responsible for coordinating on all these requests. As it is unlikely that you can personally find and produce all requested documents and/or answer all interrogatories, you have the authority to retrieve documents and information from any Air Force employee in order to respond completely to OSC's requests. In turning over documents or interrogatory answers to OSC, you should be mindful that it is your responsibility to review every aspect of what is turned over. As the gatekeeper, you must ensure that the information released to OSC is not only accurate and complete, but also free of classified, privileged, or otherwise protected information. See AFI 51-1102 for procedures on how to handle such information.

OSC investigators generally conduct either a telephonic or on-site interview with witnesses. You will be responsible for arranging access to witnesses by way of scheduling the interviews and arranging for a secure location if interviews are conducted on-site. As the POC, you must ensure that 1) witnesses are aware of their responsibility to provide truthful testimony; 2) subjects of the investigation are aware that OSC permits them to be represented personally by counsel during their interviews; 3) witnesses are aware of their responsibility to protect classified, privileged or otherwise protected information; and 4) that management officials are aware that an agency attorney generally has no right to be present at witness/subject interviews. Agency attorneys may not sit in on OSC interviews of agency employees for informational

purposes or to represent the agency. Under AFI 51-1102, it is Air Force policy that all Air Force employees fully cooperate with OSC investigations, to include retrieving documents and information at your request as well as being available for an interview with OSC. In the event you encounter an uncooperative employee, please notify my office immediately. You should be aware that OSC reserves the right to contact witnesses directly as they deem appropriate.

While you may serve as a legal advisor to management officials related to this case, please be aware of the coordination and reviewing authorities outlined in AFI 51-1102. Specifically, corrective actions may not be taken and disciplinary actions may not be proposed without first coordinating with SAF/GCA. POCs must make management officials aware of the provisions of 5 U.S.C. § 1214(f), which states that during the course of any OSC investigation, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the prior approval of the Special Counsel. If such disciplinary action is contemplated, contact SAF/GCA through [AFLOA/JACL-LLFSC, AFMC/JA, and/or AFRC/JA] *prior* to proposing such action.

Further, OSC may request ADR/mediation or attempt to broker a settlement agreement between the complainant and the Air Force. In the event this occurs, you must contact [] immediately, who will notify SAF/GCA. You are not authorized to engage with OSC on settlement negotiations at this time.

You are required to keep [AFLOA/JACL-LLFSC, AFMC/JA, AFRC/JA, and/or NGB/JA] apprised of the status of this case. It is expected you will provide regular updates, generally not less frequently than once every two weeks. However, in the event of a major event, you should provide an update immediately. Major events would include your completion of OSC requests, OSC's request for ADR/mediation, OSC's request for settlement discussions and OSC informing you that their investigation is closed.

(Signature Block)

Cc: [AFLOA/JACL-LLFSC, AFMC/JA, AFRC/JA and/or NGB/JA]

Attachment 3**SAMPLE REQUEST FOR AIR FORCE COUNSEL**

(Date)

MEMORANDUM FOR SAF/GC

FROM: _____ (employee under investigation)

Subject: Request for Appointment of Air Force Counsel

I, _____ am advised that I am the subject of an investigation that will be conducted by the Office of Special Counsel. I am employed by the Department of the Air Force as a _____ (job title) for _____ (office symbol) at _____ (office location).

I request that the General Counsel of the Air Force appoint an attorney to represent me. I do not intend to hire a private attorney from outside the Department of Defense. I understand that if I hire a private attorney the Air Force will not reimburse any expenses that I incur with the private attorney except in highly unusual circumstances as personally determined by and subject to the advance approval of the General Counsel of the Department of Defense.

The facts and circumstances surrounding this investigation are stated as follows:
_____ (To the extent known, include a detailed explanation about the factual circumstances from which the OSC allegations against you likely arose).

I have also attached copies of all pleadings and other documents that OSC has given to me, as well as _____ (any other documentation relevant to the allegations). I understand it is my burden to demonstrate the facts of the case sufficient to justify why an Air Force attorney should be appointed in my case. I further understand that if I fail to bring forward sufficient evidence, my request will likely be denied.

I certify that my actions, which are the focus of the OSC investigation, were done in the course of my duties as a [civilian employee or military member] of the Air Force and that I have not been notified of the Air Force taking any disciplinary action against me as a result of the alleged conduct that is the focus of the OSC investigation.

I understand that if the Air Force appoints an attorney to represent me, that attorney will represent me and consult with me on my personal interests related to the OSC investigation. I understand my consultations with this attorney will be protected by the attorney-client privilege. I further understand this attorney will only represent me for the matter under investigation by OSC and only for the duration of the investigation. I understand in no circumstance will the representation include assistance for any other matters, including but not limited to advising me on potential disciplinary actions proposed or taken against me and/or representing me in front of the Merit System Protection Board.

I understand that I may terminate my appointed attorney representation for any reason, and if I do so that the Air Force has no obligation to appoint another attorney to represent me. I understand that if my appointed attorney wishes to withdraw from representing me for any reason, the withdrawal is subject to the approval by the General Counsel of the Air Force. I understand that upon the termination of representation, the attorney must maintain attorney-client confidentiality with respect to communications between me and the appointed attorney that were made during the time period the appointed attorney was representing me, unless the release of such communication is required or allowed by law, regulation, or rule of professional responsibility.

(Signature Block)

Attachment 4**SAMPLE AIR FORCE COUNSEL APPOINTMENT LETTER**

(Date)

MEMORANDUM FOR _____ (Air Force Attorney)

FROM: [To be determined by AF/JA]

Subject: Appointment Letter

You are hereby appointed to represent _____ (name of subject employee under investigation) related to (his/her) personal interests regarding a pending investigation by the Office of Special Counsel (OSC). You may not represent the Air Force on any related matter, and if you believe a conflict of interests exists you must notify [] immediately.

Your representation of _____ (name of employee under investigation) in (his/her) personal interests only extends to matters directly related the OSC investigation. _____ (name of employee under investigation) is your client for these matters, with all protections of the attorney-client privilege and all duties imposed by your rules of professional responsibility [i.e. state bar(s), Air Force Rules of Professional Conduct]. For these matters, the Air Force is not your client.

Your representation of _____ (name of employee under investigation) may not extend to any matters beyond representation during the OSC investigation and will terminate at the end of the OSC investigation. In no circumstance will the representation include assistance for any other matters, including but not limited to rendering advice on potential disciplinary actions proposed or taken and/or representation in front of the Merit System Protection Board.

In the event you wish to withdraw from representing _____ (name of employee under investigation) for any reason, you must submit a request for withdrawal to the Air Force General Counsel, through JA channels and SAF/GCA. Requests for termination may be approved where you have (1) determined that (a) the employee you are representing is not a subject of the OSC investigation or (b) the employee was acting outside the scope of his/her official responsibilities when he/she engaged in the conduct that is the focus of the OSC investigation and (2) the termination of representation does not violate your attorney rules of professional conduct [i.e. state bar(s), Air Force Rules of Professional Conduct]. You may wish to withdraw from representing the employee for other reasons but may do so only upon approval by the General Counsel of the Air Force. The Air Force General Counsel retains the discretion to terminate your detail as appointed counsel if he determines legal representation is no longer in the best interest of the Air Force. Regardless of the reason, at the termination of your representation you are required to maintain attorney-client confidentiality with respect to communication between _____ (name of employee under investigation), unless the release of such communication required or allowed by law, regulation, or rule of professional responsibility.

(Signature Block)

Attachment 5**SAMPLE AIR FORCE COUNSEL APPROVAL LETTER**

MEMORANDUM FOR [NAME]

FROM: SAF/GCA

SUBJECT: Approval of Request for Representation and Terms of Air Force (AF) Legal
Representation – [NAME] AFB

Your request for legal representation has been approved by the AF General Counsel. This approval is based upon a determination that (1) you have been named a subject of the above-referenced Office of Special Counsel (OSC) investigation, (2) you were acting within the scope of your official responsibilities when you engaged in the alleged conduct that is the focus of the OSC investigation and (3) such representation is in the best interest of the AF.

Pursuant to AFI 51-1102, the AF Judge Advocate General or his designee shall appoint a judge advocate or attorney advisor after notification and consultation with that attorney's commander or MAJCOM (or equivalent) staff judge advocate. You will be notified by [AFLOA/JACL-LLFSC, AFMC/JA, AFRC/JA and/or NGB/JA] of the name of your appointed counsel and his/her contact information.

Legal representation has been approved to provide you legal advice with respect to the above-referenced OSC Investigation. Your appointed counsel shall diligently represent you; however, legal representation is specifically limited to providing advice during the investigation, in accordance with AFI 51-1102. Your appointed counsel may advise you on your participation in the OSC investigation and assist you with any information you provide to OSC (whether in the form of documents, interviews or testimony). Attached for your information is OSC's Policy on Legal Representation at OSC Interviews (dated March 15, 2002), including OSC's required Designation of Personal Legal Representative Form.

An attorney-client relationship shall be established and continued between you and your assigned counsel. Unless required or allowed by law, regulation, or professional responsibility ethical rules, your appointed attorney must maintain attorney-client confidentiality with respect to communications with you that were made during the time period the appointed attorney was representing you. You may terminate your appointed attorney representation for any reason. However, the AF has no obligation to appoint another attorney to represent you if you terminate the appointed attorney representation.

In the event the attorney wishes to withdraw from representing you, your attorney must submit a request for withdrawal to the General Counsel of the AF who has the authority to approve or deny such request. Requests for termination may be approved where your appointed counsel (1) determines that (a) you are not a subject of the OSC investigation, or (b) you were acting outside the scope of your official responsibilities when you engaged in the conduct that is the focus of the OSC investigation; and (2) the termination of representation does not violate the appointed attorney's rules of professional conduct. Your appointed attorney may wish to

withdraw from representing you for an unspecified reason but only upon approval by the AF General Counsel. The AF General Counsel retains the discretion to terminate the detail of your appointed counsel as your legal representative if he determines legal representation is no longer in the best interest of the AF. Regardless of the reason, at the termination of the representation, the attorney is required to maintain attorney-client confidentiality with respect to your communications, unless release of such communication is required or allowed by law, regulation, or rule of professional responsibility.

Pursuant to AFI 51-1102, you must cooperate in all OSC proceedings requested by the OSC or the AF, subject to proper exercise of rights pursuant to the Fifth Amendment, Article 31 of the UCMJ (for military members), or any applicable contractual requirements regarding statutory rights to union representation. Subject to this limitation, you are required to answer all questions truthfully and completely and request clarification of any questions that you do not clearly understand.

The representation by your appointed AF attorney for your personal interests only extends to matters directly related the OSC investigation. The representation may not extend to any matters beyond the OSC investigation and will terminate at the end of the OSC investigation. In no circumstance will the representation include assistance for any other matters, including but not limited to rendering advice on potential disciplinary actions proposed or taken and/or representation in front of the Merit System Protection Board. Pursuant to AFI 51-1102, AF resources cannot be used to provide legal representation for a civilian employee with respect to an AF disciplinary action against the employee for committing or participating in a prohibited personnel practice or for engaging in improper or illegal conduct, regardless of whether that participation or conduct is also the basis for the disciplinary action proposed by OSC.

The acknowledgment below must be executed and returned to SAF/GCA as part of your request for legal representation by the AF. The acknowledgment is designed to advise you of the extent and nature of legal representation that can be provided to you by the AF for OSC investigations. Your signature below indicates your understanding of and agreement to such legal representation. Please keep a copy of this approval for your records and return a signed copy to SAF/GCA at the above address.

(Signature Block)

ACKNOWLEDGMENT:

I have read the foregoing conditions of AF legal representation and accept its terms.

(Signature)

(Date)

Cc: [AFLOA/JACL-LLFSC, AFMC/JA, AFRC/JA and/or NGB/JA]

Attachment 6

SAMPLE TEMPLATE RESPONSE TO REQUESTS FOR
DOCUMENTS/INTERROGATORIES

[AF Address]

[date]

[OSC investigator]
Investigation and Prosecution Division
Office of Special Counsel
[] Field Office
[OSC address]

Dear [name OSC IO]:

This is in response to your request for information or assistance dated [date] regarding OSC File Number MA-1x-xxxx. You have been provided [state what has been provided – i.e. Bates numbers of documents produced].

The attached documentation includes information that is covered by the Privacy Act. We have redacted social security numbers, but other Privacy Act information was disclosed to you to assist with your investigation. We request that Privacy Act information not be disclosed, discussed, or shared with individuals unless they have a direct need-to-know in the performance of their official duties.

We object to these questions and document production requests to the extent such requested information falls within the attorney client and/or attorney work product privileges. We also object to providing draft [type *i.e.* contract] documents based upon the deliberative process privilege. Without waiving the above privileges, the Department of the Air Force responds to the following requests of the Special Counsel in the above-numbered file as follows:

Question 1: Identify by name, position, title, division, and work telephone number, each individual who was involved in the decision to [action].

Response:

Document Production Request No. x:

Response:

You may reach me at [phone number/email] with any questions or concerns.

Sincerely,

[name]
[title]

Attachment:
Bates numbers [xxx-xxx]