

FREQUENTLY ASKED QUESTIONS

Congress has provided the U.S. Office of Special Counsel (OSC) with necessary authorities to obtain information, including materials containing privileged material. OSC takes seriously its duties in using such material. Below are responses regarding some of the most commonly-asked questions regarding OSC's right of access to the government's privileged material in OSC's investigations of federal agencies.

Why did Congress clarify that OSC has access to privileged agency material? Some agencies were denying OSC access to privileged material, so in the OSC Reauthorization Act of 2017 (passed as part of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91 (Dec. 12, 2017)), Congress made clear that when OSC is conducting an investigation, review, or inquiry, agencies must timely provide OSC with access to all relevant material. Congress provided that agencies may not withhold material from OSC based on any common law privilege. The result of the Act is to make clear that OSC has the same authority to gather privileged material as agency inspectors general (IGs). Both IGs and the Special Counsel were established to step into the shoes of the agency to determine if administrative wrongdoing has occurred, and that investigative responsibility requires that OSC have the authority to obtain and review all relevant agency material, including otherwise privileged material.

What does OSC do to protect privileged agency material in its custody? OSC routinely receives privileged material from agencies in furtherance of OSC's investigations, reviews, and inquiries. OSC takes every precaution to safeguard such material in its possession. For example, OSC's ordinary practice is to segregate in its files the information agencies have identified as privileged.

Does providing privileged agency material to OSC waive the privilege to non-governmental parties? No. The Reauthorization Act provides that agencies' submission of privileged material to OSC does not waive the agency's privilege; the agency may still assert the privilege against a non-federal entity or against an individual in any other proceeding.

How does OSC handle privileged agency material that is responsive to a Freedom of Information Act (FOIA) request? For records in which other agencies have equities, OSC ordinarily either consults with the relevant agency and processes the responsive records that contain privileged material, or OSC refers the records to the relevant agency for that agency to do the FOIA processing and response directly. *See* 5 C.F.R. § 1820.3.

How does OSC handle privileged agency material that is responsive to a request from Congress? If Congress requests from OSC records that include other agencies' privileged material, OSC will confer with the agency whose equities are at stake to determine if OSC can release the agency's privileged material to Congress. For documents that originate with another agency, OSC will refer Congress to the relevant agency so Congress can make its request directly to the agency.