



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

February 4, 2014

The President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-12-3610

Dear Mr. President:

Pursuant to 5 U.S.C. § 1213(e)(3), enclosed please find agency reports based on disclosures made by an employee at the Department of Health and Human Services (HHS), Washington, D.C. The whistleblower, Evelyn Brown, who consented to the release of her name, alleged that HHS employees engaged in conduct that constituted a violation of law, rule, or regulation by failing to comply with the reporting requirements of the Notification and Federal Employee Anti-discrimination and Retaliation Act, (the "No FEAR Act"), Public Law No. 107-174.

The agency investigation substantiated Ms. Brown's allegations, finding that HHS was not fully compliant with the No FEAR Act. The reports specifically noted that although HHS provided written notification to applicants and current and former employees, and posted summary statistical data regarding equal employment opportunity complaints, it did not prepare and submit required annual reports to Congress and other delineated agencies. In response to the findings, the agency took corrective actions to ensure appropriate future No FEAR Act report submission. I have determined that the agency report contains all of the information required by statute and that the findings of the agency head appear reasonable.

The allegations were referred to HHS Secretary Kathleen Sebelius on January 25, 2013. Review of the matter was delegated to Assistant Secretary for Administration E.J. Holland, Jr., who tasked the Office of Human Resources (OHR) with investigating the allegations. Mr. Holland transmitted the agency's report to the Office of Special Counsel (OSC) on May 30, 2013. On July 12, 2013, OHR provided a supplemental report at OSC's request. Ms. Brown declined to provide comments on the reports. As required by 5 U.S.C. § 1213(e)(3), I am transmitting the agency reports to you.¹

¹ The Office of Special Counsel (OSC) is authorized by law to receive disclosures of information from federal employees alleging violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. §

Ms. Brown's Disclosures

Ms. Brown disclosed that HHS failed to provide to Congress mandatory reports under the No FEAR Act, which became effective on October 1, 2003. Section 203 of the No FEAR Act requires that agencies publish an annual report to the Speaker of the House of Representatives, the President pro tempore of the Senate, the Senate Committee on Homeland Security and Governmental Affairs, the House Committee on Oversight and Government Reform, each committee of Congress with jurisdiction relating to the agency, and the Attorney General. Section 203 details the contents of the report and establishes a deadline of 180 days after the end of each fiscal year. Ms. Brown filed a Freedom of Information Act (FOIA) request with HHS, requesting a copy of all No FEAR Act Annual Reports to Congress from January 2, 2002, to January 2, 2012. The agency responded that several divisions in the Office of the Secretary, including the Office of the Assistant Secretary for Administration, identified no such records responsive to Ms. Brown's request. Likewise, the Office of the Inspector General FOIA Officer found no records responsive to this inquiry.

The Agency Report

The agency reviewed relevant records and conducted interviews with Ms. Brown and current and former leadership personnel. The investigation determined that the department was not fully compliant with the statute. Specifically, the investigation revealed that although HHS provided written notification to applicants and current and former employees, and posted summary statistical data regarding equal employment opportunity complaints, it did not file reports with Congress or other delineated agencies pursuant to Section 203 of the No FEAR Act.

In response to the investigative findings, the Assistant Secretary for Administration assigned the responsibility of managing the submission of reports to the Diversity and Inclusion Division in OHR and implemented new procedures to ensure compliance. The Diversity and Inclusion division detailed a number of actions undertaken to ensure that HHS meets statutory requirements. These include assigning responsibility for the No FEAR Act report to the OHR Data Analytics and Reporting Unit, which is now responsible for the annual collection of data and report preparation. Additionally, OHR added the No FEAR Act report to the list of reports actively tracked

1213(a) and (b). OSC does not have the authority to investigate a whistleblower's disclosure; rather, if the Special Counsel determines that there is a substantial likelihood that one of the aforementioned conditions exists, she is required to advise the appropriate agency head of her determination, and the agency head is required to conduct an investigation of the allegations and submit a written report. 5 U.S.C. § 1213(c) and (g). Upon receipt, the Special Counsel reviews the agency report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(e)(2). The Special Counsel will determine that the agency's investigative findings and conclusions appear reasonable if they are credible, consistent, and complete based upon the facts in the disclosure, the agency report, and the comments offered by the whistleblower under 5 U.S.C. § 1213(e)(1).

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and managed by HHS's Compliance-Reports Community of Practice to ensure timely completion. The Community of Practice meets on a monthly basis to discuss issues related to the compliance reports HHS is required to complete for other federal agencies such as the Equal Employment Opportunity Commission and the Office of Personnel Management. The Community of Practice develops project plans for the completion and dissemination of the report data.

Further, OHR noted additional planned actions, including updating OHR's Master Calendar of reporting requirements to include the No FEAR Act Report, and drafting and implementing a project plan for the No FEAR Act report submission. This will include milestones for completion and timelines to compile the report, complete the management vetting, and ensure that the report is submitted by the annual reporting deadline.

The Special Counsel's Findings and Conclusion

I have reviewed the original disclosure and the agency reports. Based on my review, I have determined that the agency reports meet all statutory requirements and that the findings of the agency head appear reasonable.

As required by 5 U.S.C. § 1213(e)(3), I have sent copies of the reports to the Chairman and Ranking Member of the House Committee on Energy and Commerce, and the Chairman and Ranking Member of the Senate Committee on Health, Education, Labor and Pensions. I have also filed copies of the reports in OSC's public file, which is now available online at www.osc.gov. OSC has now closed this file.

Respectfully,



Carolyn N. Lerner

Enclosures