



U.S. OFFICE OF SPECIAL COUNSEL

1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

The Special Counsel

November 24, 2015

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

Re: OSC File No. DI-12-3628

Dear Mr. President:

Pursuant to my duties as Special Counsel, enclosed please find agency reports based on disclosures made by a former employee at the U.S. Commission for the Preservation of America's Heritage Abroad (Commission), Washington, D.C., alleging that Commission officials were engaging in conduct that may constitute a violation of law, rule, or regulation; gross mismanagement; and an abuse of authority.

I received these allegations from Katarina Ryan (formerly Katarina Krzysztofiak), who was a program manager and the sole federal employee at the Commission from 2004 through September 2015. She began working at the Commission as a contractor in 2001. Ms. Ryan consented to the release of her name. Ms. Ryan disclosed that former Commission Chair Warren Miller improperly appointed Jeffrey Farrow to serve as the Commission's executive director on a part-time, contractual basis, and that Mr. Farrow performed numerous inherently governmental functions in violation of the Federal Acquisition Regulation (FAR). Ms. Ryan further alleged that Messrs. Farrow and Miller used Commission resources in connection with their respective lobbying and legal practices.

In response to OSC's referral on April 16, 2013, the Commission acknowledged its non-compliance with federal regulations with respect to Mr. Farrow's position and duties. The Commission informed OSC that it would take corrective action to resolve the regulatory violations. Specifically, the Commission removed Mr. Farrow's responsibilities for supervising federal employees, signing financial documents, and acting as the Commission's designated agency ethics officer (DAEO).

General Services Administration's Office of Inspector General (GSA OIG) investigated and partially substantiated the remaining allegations in an August 15, 2013 report. The investigation confirmed that Mr. Miller used the Commission's office and resources in connection with his law practice on a limited and infrequent basis. GSA OIG did not substantiate the allegation that Mr. Miller accepted gifts from foreign officials that exceeded ethics rules.

The GSA OIG and Commission responses to OSC raised additional concerns about Mr. Farrow's employment as a contractor with the Commission. Specifically, GSA OIG

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confirmed that Mr. Farrow worked for the commission for 13 years as a contractor without a written contract. With no written agreement on terms or scope of service, Mr. Farrow's family firm, the Oliver Group, received annual payments from the Commission in amounts ranging from \$99,538 to \$104,842. Additionally, according to the Commission, Mr. Farrow worked fewer than 800 hours per year, or an average of 15 hours per week, since 2007. The Commission did not specify exactly how many hours Mr. Farrow worked in any given year, as he did not report the hours he worked.

At the same time, the Commission employed Ms. Ryan as a GS-12 federal employee, which carries a median salary of approximately \$89,000. Accordingly, for nearly a decade, total annual salary payments to Ms. Ryan and Mr. Farrow, a part-time contractor, exceeded \$190,000 annually, not including Ms. Ryan's benefits or the amounts paid to additional contract support staff. Nevertheless, the Commission repeatedly cited lack of available funding as the basis for not converting Mr. Farrow's position to a full time federal employee position. My concerns with this approach are detailed more fully in the analysis below.

After numerous requests from OSC to the Commission for supplemental reports and information, the Commission executed a written contract for Mr. Farrow's services. This is an improvement over the prior documented arrangement. Nevertheless, I urge the Commission to reconsider its current staffing needs and to more carefully consider whether it can convert its contracted personal services to a full-time government position, something the Commission has repeatedly stated would best serve the interests of the Commission and the taxpayers.

Based on the information and the Commission's supplemental reports, I have determined that the agency's findings appear reasonable with regard to the specific allegations concerning violations of the FAR and other ethics violations. As required by 5 U.S.C. § 1213(e)(3), I am now transmitting the reports and Ms. Ryan's comments to you.<sup>1</sup>

#### *I. Background of the Commission*

The Commission was established as an independent federal agency in 1985 under 16 U.S.C. § 469(j). Its mission is to preserve overseas cemeteries, monuments, and historic buildings in Eastern and Central Europe that are associated with the heritage of U.S. citizens.

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<sup>1</sup>The Office of Special Counsel (OSC) is authorized by law to receive disclosure of information from federal employees alleging violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. § 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 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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The Commission consists of 21 members appointed by the President, one of whom is designated Chair. Members are not compensated for their service, but are allowed travel expenses and per diem allowances while performing Commission duties. The Commission is authorized to appoint federal employees subject to the provisions of Title 5 governing competitive service appointments. It may also hire temporary and intermittent experts and consultants as authorized under 5 U.S.C. § 3109(b).

## *II. The Whistleblower's Allegations*

Ms. Ryan explained that Mr. Farrow had served as the Commission's executive director since his appointment by then-Chair Warren Miller in November 2001.<sup>2</sup> She stated that Mr. Farrow performed work for the Commission on a part-time, contractual basis. She noted that he is also a registered lobbyist and the chairman of The Oliver Group, Inc., a lobbying firm operated by Mr. Farrow and his wife in Washington, D.C. Ms. Ryan asserted that Mr. Farrow conducted work relating to his lobbying practice from the Commission's office, using government resources.

Ms. Ryan reported that Mr. Farrow regularly received \$1,980.77 per week for providing "management and professional assistance" to the Commission. Invoices for his services were submitted by and paid to his firm, The Oliver Group. Mr. Farrow signed the approval form for his invoices, certifying as the Commission's contracting official that the services were received. In addition, he authorized the payments to The Oliver Group on the form submitted to GSA for payment. Ms. Ryan further alleged that in 2010 and 2011, Mr. Farrow authorized bonuses for himself in the amounts of \$5,884 and \$17,826, respectively.

Further, Ms. Ryan asserted that as executive director, Mr. Farrow performed numerous inherently governmental functions in violation of the FAR, 48 C.F.R. subparts 7.3 and 7.5. Mr. Farrow served as Ms. Ryan's supervisor, directing and overseeing her work and approving her leave forms and time reports. Mr. Farrow also served as the DAEO; prepared responses to audit reports from the Government Accountability Office (GAO); obligated Commission funds by signing interagency funding agreements with GSA as the Commission's certifying official; certified receipt of goods and services; approved financial transactions; and authorized compensation, bonuses, and pay increases for contract support personnel.

Subpart 7.5 of the FAR prescribes policies "to ensure that inherently governmental functions are not performed by contractors." Section 7.503 states, "[c]ontracts shall not be used for the performance of inherently government functions." The direction and control of federal employees, drafting responses to GAO audit reports, and control of the treasury accounts are all identified as inherently governmental functions. *See* § 7.503(c). In addition, OGE has determined that the duties of a DAEO are inherently governmental functions that

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<sup>2</sup>Mr. Miller has been a member of the Commission since 1992. He served as Chair from 2001 until January 2013 and remains a member.

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must be performed by federal employees. *See* OGE Advisory 03x4: *Inherently Governmental and Commercial Ethics Official Activities* (June 30, 2003).

The provisions of subpart 7.5 of the FAR do not apply to expert and consultant contracts under 5 U.S.C. § 3109. However, the regulations for § 3109, at 5 C.F.R. part 304, prohibit agencies from using consultants and experts to perform managerial or supervisory work, make final decisions on substantive policies, or otherwise function in the agency chain of command (e.g., to approve financial transactions and personnel actions). *See* 5 C.F.R. § 304.103(b). Ms. Ryan further contended that Mr. Farrow's length of service and pay for eleven years exceeded the limitations for contracts under § 3109. *See* 5 C.F.R. § 304.103(c)(2).

Ms. Ryan asserted that Mr. Miller was responsible for the wrongdoing alleged, as he appointed Mr. Farrow, authorized his compensation, and directed or permitted him to perform duties that were prohibited for contractors. Ms. Ryan further alleged that, while serving as chair, Mr. Miller accepted gifts from foreign officials for personal use and conducted activities relating to his law practice from the Commission's office using government resources in violation of the Standards of Ethical Conduct. *See* 5 C.F.R. § 2635.704.

### *III. The Agency's Response*

Chair Weiss submitted the Commission's initial report with the GSA OIG report on September 16, 2013, and a clarification letter on November 1, 2013. Chair Weiss's report outlined the Commission's budgetary restraints and past efforts, often undertaken by Mr. Farrow, with the ostensible goal of obtaining increased funding to hire Mr. Farrow and two additional contractors as permanent employees. The report noted that for decades the Commission used contractors to perform functions that would otherwise be performed by federal employees due to funding limitations, with the knowledge of GSA, OGE, the Office of Management and Budget (OMB), and the Senate and House Committees on Appropriations.

Chair Weiss's report confirmed that the Commission was taking corrective action to resolve the issues of non-compliance with respect to Mr. Farrow's position and duties. The report stated that the Chair now supervises Commission personnel; signs financial and other Commission documents; and serves as the DAEO. Based on a legal opinion obtained by Mr. Farrow from GSA OGC, Chair Weiss and Mr. Farrow determined that he would no longer conduct non-Commission business in the Commission's office.

To address concerns that Mr. Farrow's contract work exceeded rules for temporary or intermittent services under 5 U.S.C. § 3109, Chair Weiss's report asserted that Mr. Farrow did not work a regular schedule and his services were used at the will of the Chair, depending on the workload and his availability in light of his outside employment. The report noted that Mr. Farrow's weekly hours varied greatly; that he spent no more than 40 percent of his time on Commission work; and, since 2007, he had worked less than 800 hours per year.

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Nevertheless, Chair Weiss acknowledged that the absence of a written contract had “proven to be problematic.” Thus, Chair Weiss stated that she was negotiating a contract for Mr. Farrow’s services and would seek guidance from the Office of Personnel Management (OPM) and GSA.

#### *IV. The GSA OIG Report*

The GSA OIG report addressed the allegations of Messrs. Miller and Farrow’s use of Commission resources for non-Commission business; the approval of bonuses for Mr. Farrow; and Mr. Miller’s acceptance of Commission gifts for personal use. The investigation did not substantiate that Mr. Miller accepted gifts from foreign officials that exceeded the minimal value permitted under 41 C.F.R. § 102-42.10. The investigation substantiated that while serving as chair, Mr. Miller used the Commission’s office and resources, including the secretarial services of a contract employee, in connection with his law practice on a limited and infrequent basis. Although these activities are prohibited by 5 C.F.R. § 2635 as the report cites, Chair Weiss determined that these limited activities were *de minimis*, and, as Mr. Miller no longer occupies a Commission office, no corrective action was warranted. With respect to Mr. Farrow, the report indicated that he used his personal phone and laptop when conducting his lobbying business from the Commission’s office. However, GSA OIG did not find sufficient evidence of a violation by Mr. Farrow. As noted above, Chair Weiss reported that Mr. Farrow ceased conducting non-Commission activities based on GSA’s advice.

GSA OIG did not find that Mr. Farrow approved bonuses for himself. Mr. Farrow explained to investigators that the orders for payments to The Oliver Group in September 2010 and August 2011 were used to reserve funds at the end of the fiscal year for possible future expenditures. The investigation did confirm, however, that the hourly rates for the Commission’s two contract employees were temporarily increased at the end of each fiscal year to consume unexpended appropriations. This resulted in a temporary pay increase ranging from \$3,100 to \$5,200 for the two contractors for at least two years. The investigation also revealed that the Commission did not have written contracts for the two contractors. The GSA OIG report further found that in 2010, Mr. Farrow directed \$500 payments to two institutions in Palau from the account for the Commission’s former tax-exempt component, “The Associates of the U.S. Commission for the Preservation of America’s Heritage Abroad” (Associates). Mr. Farrow provided a copy of his personal check reimbursing the account and explained that he made the donations through the Associates account so that his donations would be tax-deductible.

As discussed, the GSA OIG report also confirmed several allegations relating to Mr. Farrow’s position, duties, and pay, including that Mr. Farrow never had a written contract for his services, and his weekly pay of \$1,980.77 was based on an annual ceiling of \$103,000. Although Mr. Farrow’s weekly hours “varied greatly,” he was paid the same amount each

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week regardless of the amount of time he spent on Commission work. The GSA OIG report did not include any recommendations for corrective action.<sup>3</sup>

*V. The Agency's Supplemental Reports*

Supplemental Report of March 18, 2014: Chair Weiss's letter stated that through consultation with staff of the Senate Committee on Appropriations and OMB, the Commission was pursuing a legislative modification to broaden its contracting authority to allow the Commission to engage the services of contractors "as the Commission deems desirable." The letter did not discuss any further efforts to secure a written contract for Mr. Farrow and confirmed that the Commission continued to pay for his services in the same manner outlined in the GSA OIG report.

Supplemental Report of May 23, 2014: In response to OSC's concerns regarding the Commission's lack of progress in securing a contract and ensuring accountability for Mr. Farrow's services, Chair Weiss's letter stated that the Commission was seeking guidance from GSA. The letter stated that a GSA contract specialist had confirmed the Commission's ability to procure services as it had been, through "micro-purchasing," which does not require a written contract. Chair Weiss represented that the Commission's arrangements with The Oliver Group over many years consisted of weekly micro-purchases for services.

OSC conferred with a representative of GSA's Office of General Counsel (OGC), who advised that Mr. Farrow had inquired generally about the Commission's authority to use micro-purchasing to procure services; however, GSA did not confirm that micro-purchasing had been or could be used to procure Mr. Farrow's services. To the contrary, GSA advised Chair Weiss and Mr. Farrow that Mr. Farrow could not serve as the executive director and perform the duties attendant to that position under any contracting authority, and that modifying the Commission's contracting authority would not resolve the problem. GSA recommended seeking legislative authority to hire employees outside of title 5, a standard authority afforded to government boards.

Supplemental Report of September 12, 2014: Chair Weiss's letter stated that the Commission was working with GSA's Acquisition Management Division to use GSA's contracting authority to secure services for the Commission. The letter stated, "[t]his arrangement will replace the current practice of our engaging service providers on a short-term basis without contract," which did not accurately describe the Commission's long-term procurement of Mr. Farrow's services for more than a decade. Chair Weiss noted that the new contracting arrangement would result in increased costs for the Commission and, thus, was considered a temporary measure until the Commission could obtain an expansion of its contracting authority. The letter also noted that the Commission no longer referred to

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<sup>3</sup>The GSA OIG report references a separate letter forwarded to the Commission regarding additional issues identified during OIG's review. As reflected in the Commission's supplemental reports, OSC requested and the Commission provided the separate April 15, 2013 OIG letter to OSC. The letter is not included herein as it was not a part of the Commission's official response, and it contained unconfirmed allegations pertaining to issues that were not responsive to OSC's referral.

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Mr. Farrow as executive director and Chair Weiss continued to exercise the duties associated with that title. The letter did not clarify Mr. Farrow's role, duties, or pay, as requested.

Supplemental Report of May 4, 2015: Chair Weiss provided a final supplemental report detailing the Commission's protracted efforts to resolve its contracting issues with GSA's assistance. After pursuing a potential contractor through GSA's contracting authority, GSA advised the Commission that it would not contract for the Commission, and that GSA could only use the Commission's limited contracting authority. Thus, the Commission formalized the contract developed by GSA for a part-time subject-matter expert consultant. Per the contract, Mr. Farrow's hourly rate is \$150, with a total award amount of \$51,600 for a six-month period. The contract lists the duties to be performed, most of which are assistive in nature, and expressly prohibits the performance of inherently governmental functions. OSC independently confirmed GSA's approval of the contents and terms of the contract developed. The Commission also executed contracts for its two other contract employees.

Chair Weiss's final supplemental report also confirmed that the Commission's 2015 appropriation included a temporary modification to the Commission's contracting authority, allowing the Commission to procure temporary, intermittent, and other services notwithstanding the limits imposed by 5 U.S.C. § 3109. The Commission stated to OSC that it consulted with the House and Senate Committees on Appropriations regarding the current contract for Mr. Farrow's services, as required. The same language is included in the Commission's pending 2016 appropriation bill.

#### *VI. The Whistleblower's Comments*

Ms. Ryan provided comments on the Commission's initial report and the GSA OIG report. Overall, Ms. Ryan was disappointed with the GSA OIG investigation and the reports. She refuted the findings on Messrs. Miller and Farrow's use of the Commission's office and resources for non-Commission business, asserting that their activities were far from incidental or de minimis. She contended that the reports downplayed the extent of Mr. Farrow's lobbying activities in the Commission's office and cited several examples. Ms. Ryan asserted that in light of Messrs. Miller and Farrow's professional backgrounds and experience in the federal government, they cannot credibly claim ignorance of the law.

Ms. Ryan also maintained that GSA OIG did not thoroughly investigate the allegations of additional payments that Mr. Farrow authorized for contract employees and himself. She also refuted the accuracy of the budget information that the Commission provided and believes that GSA failed to conduct an adequate review of the Commission's financial records. Ms. Ryan suggested that GAO conduct a comprehensive financial audit of the Commission for the time period between 2001 and 2013.

Ms. Ryan also noted her concern that Mr. Farrow communicated with relevant federal agencies during the investigation, and that it is apparent to her that he assisted Chair Weiss in responding to the allegations of his own wrongdoing. She commented that for years Mr. Farrow had exclusive access to OPM and GSA decision-makers, and, because he controlled

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the communications, he was able to influence the process in his favor. She noted her concern regarding Mr. Farrow's involvement in negotiating a contract for his services and again influencing the process to broker the best contract for himself. She questioned what safeguards were in place to disconnect him from influencing the process for his self-interest. Ms. Ryan further asserted that the Commission is an example of misspent federal funds. She recommended that in light of the duplicative functions and overlay of programs, the Commission should be incorporated within the Department of State.

### *VII. The Special Counsel's Findings*

I have reviewed the original disclosure, agency reports, and whistleblower comments. I have determined that the reports contain all of the information required by statute. Nevertheless, I am concerned by the Commission's actions during this matter, which raise questions regarding the Commission's ability or willingness to maintain effective control of Mr. Farrow's limited contractual, though highly compensated, role with the Commission.

Of note, OSC's referral letter to Chair Weiss requested that the letter not be shared with Messrs. Miller and Farrow and noted that both should recuse themselves from the matter because they were subjects of the allegations. Nevertheless, the information provided to OSC confirms that Mr. Farrow was actively involved in the Commission's resolution of this matter. In response to OSC's referral, Mr. Farrow attempted to gain approval to perform activities that are prohibited for contractors, including inquiring with OGE about continuing to serve as DAEO and requesting a legal opinion from GSA on his use of the Commission's office for non-Commission business. Further, Mr. Farrow's communications with GSA regarding micro-purchasing authority demonstrate his attempt to gain retroactive approval for the Commission's past procurement practices for his services, which were improper, as GSA confirmed. Chair Weiss's subsequent representation that the Commission had properly acquired Mr. Farrow's services through weekly micro-purchases was not supported by GSA and belied the Commission's prior acknowledgement of non-compliance. There is no evidence that the Commission considered GSA's recommendation to pursue the hiring authority typically granted to government boards, as noted above.

Mr. Farrow's involvement in the resolution of these issues is troubling not only because he was the key subject, but because his involvement created an opportunity for self-dealing. His actions also may not have served the best interests of the Commission. Chair Weiss emphasized the vital role that Mr. Farrow holds with the Commission. Nevertheless, he remains a contractor, and as such, he is not permitted to serve as executive director or perform many of the vital functions he previously performed. His contract reflects that he now serves in merely an assistive capacity for all but a few of those activities, many of which are administrative in nature. The limitations on Mr. Farrow's current role raise several questions. For example, would it be more cost-effective to have a permanent employee fill this position, rather than a part-time contract expert consultant who is still paid more than \$103,000 per year, yet is required by law to perform a smaller range of duties while earning the same pay.

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While Mr. Farrow may have valuable institutional knowledge of the Commission's work, it seems that the Commission members, many of whom have served on the Commission for years, also have significant knowledge to contribute. I urge the Commission to objectively reconsider its staffing needs and the cost-effectiveness of its current contract for expert consultative services. Further, I recommend greater oversight and scrutiny of the Commission's activities to ensure compliance and to maintain the integrity of the Commission.

As required by 5 U.S.C. § 1213(e)(3), I have sent copies of the reports and Ms. Ryan's comments to the Chairmen and Ranking Members of the Senate Committee on Foreign Relations and House Committee on Foreign Affairs. I have also filed copies of the reports and Ms. Ryan's comments in our public file, which is available online at [www.osc.gov](http://www.osc.gov). OSC has now closed this file.

Sincerely,



Carolyn N. Lerner

Enclosures