



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

April 19, 2018

The Honorable Kirstjen M. Nielsen
Secretary
U.S. Department of Homeland Security
245 Murray Lane, S.W.
Building 410
Washington, D.C. 20528

Re: OSC File No. DI-18-2517
Referral for Investigation – 5 U.S.C. § 1213(c)

Dear Secretary Nielsen:

I am referring to you for investigation a whistleblower disclosure that an employee at the U.S. Immigration and Customs Enforcement (ICE), Little Rock Sub-Office, Little Rock, Arkansas, may have engaged in conduct that constitutes a violation of law, rule, or regulation. A report of your investigation on these allegations and any related matters is due to the Office of Special Counsel (OSC) by June 18, 2018.

The whistleblower, [REDACTED] is an enforcement and removal assistant at ICE's Little Rock Sub-Office and has consented to the release of his name. The allegations to be investigated include the following:

- Assistant Field Office Director (AFOD) [REDACTED] misused his government computer to receive, view, and share pornographic images and lewd jokes in violation of 5 C.F.R. § 2635.704.

During the summer of 2017, AFOD [REDACTED] showed [REDACTED] 12 to 15 images of women in various stages of undress posing obscenely with bicycles on his government computer. In response to [REDACTED] subsequent expression of discomfort with the images, AFOD [REDACTED] stated that he received the images from a friend and that it was his attempt at "office humor." In addition to the pornographic images, on approximately five to six additional occasions, AFOD [REDACTED] read or showed [REDACTED] lewd jokes on his government computer.

Pursuant to my authority under 5 U.S.C. § 1213(c), I have concluded that there is a substantial likelihood that the information provided to OSC discloses a violation of law, rule, or regulation. Please note that specific allegations and references to specific violations of law, rule or regulation are not intended to be exclusive. If, in the course of your investigation, you discover additional violations, please include your findings on

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these additional matters in the report to OSC. As previously noted, your agency must conduct an investigation of these matters and produce a report, which must be reviewed and signed by you. Per statutory requirements, I will review the report for sufficiency and reasonableness before sending copies of the agency report along with the whistleblower's comments and any comments or recommendations I may have, to the President and congressional oversight committees and making these documents publicly available.

Additional important requirements and guidance on the agency report are included in the attached Appendix, which can also be accessed at <https://osc.gov/Pages/DOW.aspx>. If your investigators have questions regarding the statutory process or the report required under section 1213, please contact Catherine A. McMullen, Chief, Disclosure Unit, at (202) 804-7088 for assistance. I am also available for any questions you may have.

Sincerely,



Henry J. Kerner
Special Counsel

Enclosure

cc: John V. Kelly, Acting Inspector General

APPENDIX

AGENCY REPORTS UNDER 5 U.S.C. § 1213

GUIDANCE ON 1213 REPORT

- OSC requires that your investigators interview the whistleblower at the beginning of the agency investigation when the whistleblower consents to the disclosure of his or her name.
- Should the agency head delegate the authority to review and sign the report, the delegation must be specifically stated and include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5).
- OSC will consider extension requests in 60-day increments when an agency evidences that it is conducting a good faith investigation that will require more time to complete.
- Identify agency employees by position title in the report and attach a key identifying the employees by both name and position. The key identifying employees will be used by OSC in its review and evaluation of the report. OSC will place the report without the employee identification key in its public file.
- Do not include in the report personally identifiable information, such as social security numbers, home addresses and telephone numbers, personal e-mails, dates and places of birth, and personal financial information.
- Include information about actual or projected financial savings as a result of the investigation as well as any policy changes related to the financial savings.
- Reports previously provided to OSC may be reviewed through OSC's public file, which is available here <https://osc.gov/Pages/Resources-PublicFiles.aspx>. Please refer to our file number in any correspondence on this matter.

RETALIATION AGAINST WHISTLEBLOWERS

In some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their allegations. The Special Counsel strongly recommends the agency take all appropriate measures to protect individuals from retaliation and other prohibited personnel practices.

EXCEPTIONS TO PUBLIC FILE REQUIREMENT

OSC will place a copy of the agency report in its public file unless it is classified or prohibited from release by law or by Executive Order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs. 5 U.S.C. § 1219(a).

EVIDENCE OF CRIMINAL CONDUCT

If the agency discovers evidence of a criminal violation during the course of its investigation and refers the evidence to the Attorney General, the agency must notify the Office of Personnel Management and the Office of Management and Budget. 5 U.S.C. § 1213(f). In such cases, the agency must still submit its report to OSC, but OSC must not share the report with the whistleblower or make it publicly available. See 5 U.S.C. §§ 1213(f), 1219(a)(1).