

Note: July 29, 2018 Joseph Carson, PE continues to develop this whistleblower disclosure. He hopes it contributes to the Secretary of Energy, per his lawful duties at 5 U.S.C. §§ 2302(c) and 4302, directing the Attorney General, per 28 U.S.C. §512, to issue an opinion on the questions of law detailed in this disclosure.

Mr. Carson, via his attorney Douglas Hartnett, an experienced whistleblower lawyer, is engaged in mediation at the US Court of Appeals for the DC Circuit per his whistleblower reprisal appeal, Carson v. MSPB, docket no. 15-1286.

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Whistleblower disclosures and why they are protected

**A(1)-(3) - What information was disclosed, what did it evidence, when made, and to whom?**

Starting after 9/11 and up to the present, Mr. Carson has repeatedly disclosed information related to violations of law at the Office of Special Counsel (OSC), regarding its non-discretionary statutory duties to protect federal employees from prohibited personnel practices (PPPs) as well as its non-discretionary statutory duties as a confidential, secure disclosure channel. Ditto for the Merit Systems Protection Board (MSPB) for its violations of law in NOT conducting statutory required Special Studies of OSC and other agencies, particularly FBI and intelligence community agencies, sufficient to determine and report “as to whether the public interest in a civil service free of prohibited personnel practices (PPPs) is being adequately protected.” Ditto for the several Secretaries of Energy in this time regarding their inability, due to this compounded OSC and MSPB law-breaking, from being able to meaningfully state they are complying with their statutory duty to “prevent PPPs.” Ditto for then-President Obama for his failure or refusal to comply with his statutory duty to “take any action necessary” to ensure OSC and MSPB are properly interpreting and applying their essential non-discretionary statutory duties for the regulation of the management culture in EVERY federal agency, including the Department of Energy (DOE) so that the federal civil service “embodies” the merit system principles.

This includes numerous letters to Congress, disclosures to OSC, letters to OSC, letters to Department of Energy officials, letter to the President Obama, letters to MSPB, meetings with Department of Energy Officials, emails to Department of Energy Officials, and federal law suits.

Some related disclosures to OSC include: OSC file nos. DI-10-1485, DI-12-2141, and DI-12-3018

Some related litigation includes:

Carson v. Office of Special Counsel, docket no. 04-0315, Not Reported in F. Supp. 2d, 2006 WL 785292 (D.D.C., March 27, 2006)  
Carson v. Office of Special Counsel, 2006 WL 5085253 (D.D.C., Oct. 30, 2006) and decision on remand, Carson v. U.S. Office of Special Counsel, 2008 WL 2640283 (D.D.C., July 7, 2008)  
Carson v. Office of Special Counsel, 514 F. Supp. 2d (D.D.C. 2007)  
Carson v. Office of Special Counsel, 2008 WL 441532 (D.D.C., Feb. 19, 2008)  
Carson v. Office of Special Counsel, 2008 WL 474251 (D.D.C., Feb. 19, 2008)  
Carson v. Office of Special Counsel, docket no. 3:08-CV-330, 2009 WL 1346052 (E.D. Tenn., May 11, 2009)  
Carson v. Office of Special Counsel, docket no. 09-5645, 633 F.3d 487 (6th Cir. 2011)  
*Carson v. Office of Special Counsel*, docket no. 11-575, U.S. Supreme Court  
*Carson v. Merit Systems Protection Board*, docket no. 14-1306, U.S. Court of Appeals for D.C. Circuit.  
*Carson v. Merit Systems Protection Board*, docket no. 15-1286, U.S. Court of Appeals for D.C. Circuit.  
*Carson v. Merit Systems Protection Board*, docket no. 15-3135; -3211, U.S. Court of Appeals for the Federal Circuit

The sections of law I allege OSC is violating, in whole or part, include:

5 U.S.C. §§ 1213(g)(1) and (g)(2)  
5 U.S.C. §§ 1213(b) and (c) for employees of Tennessee Valley Authority (TVA) and other wholly-owned government corporations  
5 U.S.C. §§ 1214(a)(1)(A), (a)(1)(C), (a)(1)(D), (a)(2)(A), (a)(4), (b)(2)(A)(i) and (ii), (b)(2)(D), (e), and requirements of the “termination statement” found in endnotes of § 1214, citing Pub. L. 103-424 §12(b).

I allege MSPB is violating 5 U.S.C. §1204(a)(3)

I allege the President is unable, refusing and/or failing to comply with 5 U.S.C. § 2301(c).

I allege the heads of the FBI and intelligence community agencies are unable, refusing and/or failing to comply with 5 U.S.C. § 2301(c).

I claim all this law-breaking precludes other agency heads from being able to comply, in any objective way, with their duty at 5 U.S.C. § 2302(c) to “prevent prohibited personnel practices (PPPs)” in their agencies.

**The specifics of the violations of these law and why I have “reasonable belief” in my whistleblower disclosures:**

**The law:**

**5 U.S.C. § 1213(g)(1):**

*If the Special Counsel receives information of a type described in subsection (a) from an individual other than an individual described in subparagraph (A) or (B) of subsection (c)(2), the Special Counsel may transmit the information to the head of the agency which the information concerns. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action shall be completed. The Special Counsel shall inform the individual of the report of the agency head.*

**How I believe it is being violated and the basis of that belief:**

OSC interprets the “individual” in subparagraph (A) or (B) in ways inconsistent with US Constitution and common sense by claiming only current federal agency employee, former federal agency employees can make whistleblower disclosures to it by this law. For instance, if a contractor employee of an agency becomes aware of violations of the government contract by their employer, they can disclose it to OSC, by OSC’s interpretation of the law, only if they were ever an employee of any federal agency, even if only for a short period of time. There is no logical reason for this interpretation and it is contrary to “equal treatment under law,” a fundamental concept of US Constitution.

My basis for my belief is correspondence with OSC and discussions with OSC. Additionally, if OSC made such a referral, the agency response becomes a permanent, publicly available record by 5 U.S.C. section 1219 and it appears no such records exist.

**Law:**

**5 U.S.C. § 1213(g)(2):**

*If the Special Counsel receives information of a type described in subsection (a) from an individual described in subparagraph (A) or (B) of subsection (c)(2), but does not make a positive determination under subsection (b), the Special Counsel may transmit the information to the head of the agency which the information concerns, except that the information may not be transmitted to the head of the agency without the consent of the individual. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action will be completed. The Special Counsel shall inform the individual of the report of the agency head.*

**How I believe it was violated for many years and the basis of that belief:**

From OSC’s creation to 2013, OSC did not comply with this law. Instead of making the referrals of such disclosures as the law describes, OSC would make informal referrals to the agency inspector general and not require a response. Apparently because of my whistleblower

disclosures to OSC about its long-standing violations of this law, OSC came into compliance with this law in 2013.

A number of OSC's annual reports to Congress prior to 2013 openly detailed OSC's practice of making such informal referrals of some disclosures it received to the agency IG. A letter OSC wrote my Congressman also described how OSC changed its practice in 2013 to comply with this section of law.

**The law:**

**5 U.S.C. section 1213(b) and (c)** (for employees of Tennessee Valley Authority (TVA) and other wholly-owned government corporations)

*(b) Whenever the Special Counsel receives information of a type described in subsection (a) of this section, the Special Counsel shall review such information and, within 15 days after receiving the information, determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety.*

(c)

*(1) Subject to paragraph (2), if the Special Counsel makes a positive determination under subsection (b) of this section, the Special Counsel shall promptly transmit the information with respect to which the determination was made to the appropriate agency head and require that the agency head—*

*(A) conduct an investigation with respect to the information and any related matters transmitted by the Special Counsel to the agency head; and*

*(B) submit a written report setting forth the findings of the agency head within 60 days after the date on which the information is transmitted to the agency head or within any longer period of time agreed to in writing by the Special Counsel.*

*(2) The Special Counsel may require an agency head to conduct an investigation and submit a written report under paragraph (1) only if the information was transmitted to the Special Counsel by—*

*(A) an employee, former employee, or applicant for employment in the agency which the information concerns; or*

*(B) an employee who obtained the information in connection with the performance of the employee's duties and responsibilities.*

**How I believe this law is being violated and the basis of that belief:**

OSC claims that employees, former employees, or applicants for employment of wholly-owned government corporations are outside this law's purview. OSC's position is directly contradicted by 5 U.S.C. §§ 2302(a)(2)(C)(i) and (b)(8) which, together, explicitly state that employees, former employees and applicants for employment in government corporations (including wholly owned ones) can make whistleblower disclosures to OSC.

I have discussed situation with the TVA and TVA agrees that OSC apparently does not allow its employees to make whistleblower disclosures to it and has not informed TVA that they can. I have discussed this matter with OSC and it does not dispute that it does not allow employees of wholly owned government corporations to make whistleblower disclosures to it.

**The law:**

5 U.S.C. § 1214(a)(1)(A):

*The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.*

**How I believe this law is being violated and the basis of that belief:**

OSC fails or refuses to investigate many, if not most or almost all, PPP complaints it receives “to extent necessary to determine whether there are reasonable grounds to believe (the allegation).”

Instead, OSC uses the term “insufficient evidence” without stating the evidentiary standard by which it was insufficient. The law is explicit about the evidentiary standard for OSC investigation determinations “reasonable grounds to believe.” When OSC closes an investigation by merely citing, “insufficient evidence,” it could well mean that OSC has determined there is “insufficient evidence” by the “incontrovertible” evidentiary standard or other evidentiary standard above the “reasonable grounds to believe” evidentiary standard.

Mr. Carson has this point with OSC, written to OSC, spoken to OSC and no one at OSC disagrees with his claims. A review of OSC annual reports to Congress will also show that OSC does not state it uses “reasonable grounds to believe” as its evidentiary standard to make a positive PPP determination, unlike how it stresses is uses the “substantial likelihood” evidentiary standard to refer a whistleblower disclosure to the agency head.

**The law:**

5 U.S.C. § 1214(a)(1)(C):

*Unless an investigation is terminated under paragraph (2), the Special Counsel shall—*  
*(i) within 90 days after notice is provided under subparagraph (B), notify the person who made the allegation of the status of the investigation and any action taken by the Office of the Special Counsel since the filing of the allegation;*  
*(ii) notify such person of the status of the investigation and any action taken by the Office of the Special Counsel since the last notice, at least every 60 days after notice is given under clause (i); and*

*(iii) notify such person of the status of the investigation and any action taken by the Special Counsel at such time as determined appropriate by the Special Counsel.*

**How Mr. Carson believes this law is being violated and the basis of that belief:**

These letters do not inform the complainant of “any action” taken by OSC since the previous letter, instead they only report the status of the investigation.

**The Law:**

**5 U.S.C. § 1214(a)(1)(D):**

*No later than 10 days before the Special Counsel terminates any investigation of a prohibited personnel practice, the Special Counsel shall provide a written status report to the person who made the allegation of the proposed findings of fact and legal conclusions. The person may submit written comments about the report to the Special Counsel. The Special Counsel shall not be required to provide a subsequent written status report under this subparagraph after the submission of such written comments.*

**How I believe this law is being violated and the basis of that belief:**

These letters do not report the required proposed findings of fact and legal conclusions. They do not report “OSC has determine there is (there is not) reasonable grounds to believe the alleged PPP occurred.” Instead, they almost always report “OSC has determined there is insufficient evidence for OSC to seek corrective action.” Given that OSC’s determination to seek corrective action is always discretionary, the statement is irrelevant to OSC’s non-discretionary statutory duties to protect federal employees alleging PPPs to it - to perform investigation adequate to makes the required determination and to report that determination to the complainant (and, if positive, to the head of the agency too, so they can use it to take the necessary action to comply with their duty to “prevent PPPs”).

See OSC annual reports to Congress, see OSC letters to me

**The Law:**

**5 U.S.C. § 1214(a)(2)(A):**

*If the Special Counsel terminates any investigation under paragraph (1), the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of—*

- (i) the termination of the investigation;*
- (ii) a summary of relevant facts ascertained by the Special Counsel, including the facts that support, and the facts that do not support, the allegations of such person;*

- (iii) the reasons for terminating the investigation; and*
- (iv) a response to any comments submitted under paragraph (1)(D).*

**How I believe this law is being violated and the basis of that belief:**

OSC's investigation closure letters do not provide a summary of facts ascertained by OSC, particularly including the facts that support the complainant. There is only one allowable reason for OSC to terminate an investigation - it has investigated the complainant to the extent necessary to determine whether there are reasonable grounds to believe the alleged PPP occurred and its reporting that determination and how and why it reached it to the complainant.

See annual reports to Congress and letters to me.

**The law:**

**5 U.S.C. § 1214(a)(4):**

*If an employee, former employee, or applicant seeks a corrective action from the Board under section 1221, pursuant to the provisions of paragraph (3)(B), the Special Counsel may continue to seek corrective action personal to such employee, former employee, or applicant only with the consent of such employee, former employee, or applicant.*

**How I believe this law is being violated and the basis of that belief:**

OSC is open it stating that it routinely ends investigations of PPPs if the employee files an IRA. Nothing in the law allows OSC to end its investigation for this reason - its continuing investigation may uncover evidence helpful to the employee and OSC should share it with the employee.

OSC annual reports and other statements.

**The Law:**

**5 U.S.C. § 1214(b)(2)(A)(i) and (ii):**

- (i) Except as provided under clause (ii), no later than 240 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.*
- (ii) If the Special Counsel is unable to make the required determination within the 240-day period specified under clause (i) and the person submitting the allegation of a prohibited personnel practice agrees to an extension of time, the determination shall be made within such additional period of time as shall be agreed upon between the Special Counsel and the person submitting the allegation.*

**How I believe this law is being violated and the basis of that belief:**

OSC simply does not make and/or report to the employee “a determination whether there are reasonable grounds to believe that a PPP has occurred.” Instead, it reports “there is insufficient evidence for OSC to seek corrective action for the complaint,” a statement it could make even if the evidence for the PPP was incontrovertible, because OSC has complete discretion, regardless of its required determination, about seeking corrective action.

letters, osc reports

**The law:**

**5 U.S.C. §1214(b)(2)(D):**

*If the Special Counsel finds, in consultation with the individual subject to the prohibited personnel practice, that the agency has acted to correct the prohibited personnel practice, the Special Counsel shall file such finding with the Board, together with any written comments which the individual may provide.*

**How I believe this law is being violated and the basis of that belief:**

Based on FOIA responses, conversations with OSC personnel, MSPB responses to FOIA, conversations with MSPB personnel, this just doesn't happen - OSC makes no such report. There is no OSC nor MSPB regulation that mentions it.

**The Law:**

**5 U.S.C. §1214(e):**

*If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred other than one referred to in subsection (b) or (d), the Special Counsel shall report such violation to the head of the agency involved. The Special Counsel shall require, within 30 days after the receipt of the report by the agency, a certification by the head of the agency which states—*

- (1) that the head of the agency has personally reviewed the report; and*
- (2) what action has been or is to be taken, and when the action will be completed.*

**How I believe this law is being violated and the basis of that belief:**

OSC violates this statute by claiming it has total discretion, contrary to the explicit wording of several laws, to:

1) whether to investigate a PPP complaint to “extent necessary to determine whether there are reasonable grounds to believe a PPP occurred.”

- 2) whether to report its determination, if the instances in which it deigns to make it, to the complainant
- 3) whether to report its determination to anyone else, in particular the head of the complainant's agency.

Instead, OSC, with no basis in law and contrary to law, will approach agencies, in some PPP complaints and offer to "make it all go away," if the agency will toss the employee some bone.

Then OSC destroys all the investigative files a short time later - unique and unlawful for a law enforcement agency, but OSC is a fraud of a law enforcement agency

3)

**The requirements of the "termination statement" found in endnotes of §1214, citing Pub. L. 103-424 § 12(b).**

*The Special Counsel shall include in any letter terminating an investigation under section 1214(a)(2) of title 5, United States Code, the name and telephone number of an employee of the Special Counsel who is available to respond to reasonable questions from the person regarding the investigation or review conducted by the Special Counsel, the relevant facts ascertained by the Special Counsel, and the law applicable to the person's allegations.*

**How I believe this law is being violated and the basis of that belief:**

**The Law:**

**5 U.S.C. §1204(a)(3):**

*The Merit Systems Protection Board shall conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected*

**How I believe this law is being violated and the basis of that belief:**

**I allege the President, because of the law-breaking at OSC and MSPB, is unable, refusing and/or failing to comply with his primary statutory duty to the 2 million members of the federal civil service at 5 U.S.C. § 2301(c).**

*In administering the provisions of this chapter-*

*(1) with respect to any agency (as defined in section 2302(a)(2)(C) of this title), the President shall, pursuant to the authority otherwise available under this title, take any action, including the issuance of rules, regulations, or directives; and*

*(2) with respect to any entity in the executive branch which is not such an agency or part of such an agency, the head of such entity shall, pursuant to authority otherwise available, take any action, including the issuance of rules, regulations, or directives;*

*which is consistent with the provisions of this title and which the President or the head, as the case may be, determines is necessary to ensure that personnel management is based on and embodies the merit system principles.*

I claim all this law-breaking precludes agency heads from being able to comply with their primary statutory duty to their employees - to “prevent prohibited personnel practices” - per 5 U.S.C. § 2302(c):

*"The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management..... Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.*