

March 2004

U.S. OFFICE OF
SPECIAL COUNSEL

Strategy for Reducing
Persistent Backlog of
Cases Should Be
Provided to Congress



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Highlights of [GAO-04-36](#), a report to congressional requesters

U.S. OFFICE OF SPECIAL COUNSEL

Strategy for Reducing Persistent Backlog of Cases Should Be Provided to Congress

Why GAO Did This Study

The U.S. Office of Special Counsel has not been consistently processing cases within statutory time limits, creating backlogs. Because the backlogs are of concern to the Congress, this report provides information on how many cases were processed within statutory time limits, the actions taken by OSC to address case processing delays and backlog, and the agency's perspective on the adequacy of its resources and our analysis of this perspective.

What GAO Recommends

GAO recommends that the Special Counsel provide Congress with a detailed strategy designed to allow more consistent processing of cases within statutory time limits and a reduction in the backlog of cases, for which these limits have already passed.

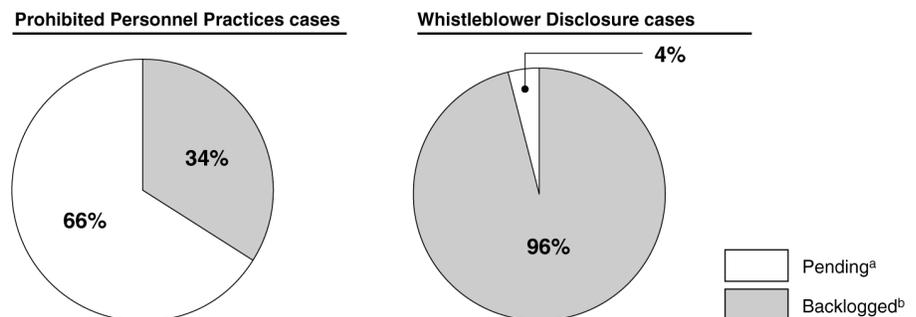
What GAO Found

The U.S. Office of Special Counsel (OSC) met the 240-day statutory time limit for processing prohibited personnel practice cases about 77 percent of the time from fiscal year 1997 through 2003 and met the 15-day limit for processing whistleblower disclosure cases about 26 percent of the time. OSC took an average of more than six months to process a whistleblower disclosure case. As shown in the pie chart below, over the seven-year period, 34 percent of the prohibited personnel practices cases were backlogged as were 96 percent of the whistleblower disclosure cases.

In an attempt to address workload issues, in 2001 OSC streamlined processes and hired additional staff. OSC data indicate that the merger of the agency's investigators and attorneys into a single unit increased the average number of cases processed per individual from June 2001 to June 2002. A case priority processing system for prohibited personnel practices and whistleblower disclosure cases allowed OSC to process more important cases more expeditiously, according to OSC.

OSC officials told us that the primary reason the agency has not been more successful in meeting the statutory time limits for its cases, particularly those involving whistleblower disclosure, is lack of an adequate number of staff. Our analysis of OSC data indicates, however, that even with increased staffing, the agency was not able to process a significantly larger number of cases within the time limits. OSC noted that staff turnover and the need to train new staff lowered its productivity. Officials also noted the difficulty in meeting the 15-day limit for processing whistleblower disclosure cases, but have not proposed an alternative time limit. In external documents to Congress, OSC has discussed its case processing and backlog difficulties, but has not developed a comprehensive strategy for dealing with them. Presenting such a strategy would provide Congress with information that it needs for oversight and resource allocation.

Percent of Pending and Backlogged Cases, Fiscal Years 1997 through 2003



Source: OSC.

^aPending cases are those that have not exceeded the statutory processing time limit.

^bBacklogged cases are those that have exceeded the statutory processing time limit.

www.gao.gov/cgi-bin/getrpt?GAO-04-36.

To view the full product, including the scope and methodology, click on the link above. For more information, contact George H. Stalcup at (202) 512-9490 or stalcupg@gao.gov.

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United States General Accounting Office
Washington, D.C. 20548

March 8, 2004

The Honorable Tom Davis
Chairman, Committee on Government Reform
House of Representatives

The Honorable Dan Burton
House of Representatives

The U.S. Office of Special Counsel's (OSC) primary mission is to protect federal employees from prohibited personnel practices. Individuals who believe that a prohibited personnel practice, such as nepotism or obstructing the right to compete for employment, has been committed may file complaints with OSC. These individuals may also disclose to OSC alleged wrongdoings by other federal employees (termed "whistleblower disclosures"), such as violations of laws and "gross waste" of funds.¹ In addition, the agency oversees laws regulating the employment rights of veterans and the political activities of individuals employed by the federal and District of Columbia governments as well as certain state and local government employees employed in connection with programs financed by federal funds.

Congress established time limits for OSC to take action on certain kinds of allegations that the agency receives. The law requires OSC to determine within 240 days of receiving an allegation of a prohibited personnel practice whether there are reasonable grounds to believe that it occurred and 15 days to determine whether there is a substantial likelihood that the allegations in a whistleblower disclosure constitute wrongdoing. Cases dealing with political activities of federal and other covered employees and reemployment rights of veterans do not have statutory case processing limits.

This report responds to your request for information on (1) OSC's caseload by type and changes to the caseload from fiscal years 1997 through 2003, (2) the extent to which cases were processed within time limits set by law during these years, (3) actions taken by OSC to address caseload issues, and (4) the agency's perspective on the adequacy of its resources and our analysis of that perspective. In addition, as requested, we are providing

¹Reprisal for a whistleblower disclosure, however, is a prohibited personnel practice.

information on OSC's data tracking system and its privacy protection policies in appendix I.

In developing information about the type and number of complaints and the case processing times, we reviewed data from OSC's data tracking system (OSC 2000), OSC's Annual Reports to Congress, and other performance and budget reports provided by agency officials for fiscal years 1997 through 2002. We assessed the reliability of case tracking data in OSC 2000 by reviewing electronic queries of required data elements for obvious errors, reviewing existing information about the data and the system that produced them, and interviewing agency officials knowledgeable about the data. We discovered discrepancies in the caseload data and brought these discrepancies to the attention of agency officials, including the chief information officer, who resolved the discrepancies. Based on our assessment of OSC 2000 and the caseload data it generated, we determined that the data for fiscal years 1997 through 2003 were sufficiently reliable for the purposes of our report. Throughout this report, we refer to "processed cases" to denote that OSC has made the determination required within the statutory time limits for prohibited personnel practices cases or whistleblower disclosure cases. We refer to "backlogged cases" as those for which OSC has not made the determination within the statutory time frame. We conducted our review in Washington, D.C., from April 2002 to February 2004 in accordance with generally accepted government auditing standards. Detailed information on our scope and methodology appears in appendix II.

Results In Brief

Three-quarters of OSC's total new cases from fiscal year 1997 through 2003 consisted of prohibited personnel practices cases. Whistleblower disclosure cases represented approximately 18 percent of total new cases. The remaining approximately 6 percent were cases involving political activities of covered employees and reemployment rights of veterans. The number of new prohibited personnel practices cases ranged from a low of 1,301 in fiscal year 2001 to a high of 1,969 the previous year—a fluctuation of 51 percent. Whistleblower disclosure cases steadily increased from fiscal year 1997 through 2000 (by about 37 percent, from 311 cases to 427) then dropped somewhat (about 11 percent) in fiscal year 2001, only to increase dramatically in fiscal years 2002 (about 46 percent) and decrease slightly in 2003 (about 4 percent). OSC officials stated that the large increase was prompted, in part, by the terrorist events of September 11, 2001, after which the agency received more cases involving allegations of

substantial and specific dangers to public health and safety and national security concerns.

OSC met the 240-day case processing statutory limit for about 77 percent of prohibited personnel practices cases from fiscal year 1997 through 2003 and met the 15-day statutory limit for whistleblower disclosure cases about 26 percent of the time. The inability to process in a timely manner new prohibited personnel practices cases received each year meant that over the 7-year period, the percentage of backlogged cases was between 29 percent and 44 percent. The percentage of whistleblower cases in backlog was always extremely high—95 to 97 percent.

Although OSC cannot control the number of new cases filed, actions the agency has taken to help it better manage its caseload have yielded some benefits, according to agency data. For example, in June 2001, the agency's divisions of investigators and attorneys merged into three parallel investigation and prosecution divisions. Shortly thereafter, OSC adopted many streamlined, pilot-tested investigative procedures, particularly for less serious cases. According to OSC officials, during the 3-1/2 years prior to the reorganization, the staffs of the separate divisions processed an average of 5.3 cases annually per person. During the first year after the merger of the divisions, productivity increased to 7 cases processed per person. In November 2001, OSC adopted a priority case processing system that classifies all its prohibited personnel practices cases into one of three categories and further prioritizes cases within each category. According to OSC, from January 1, 2002, through September 30, 2002, priority cases were processed faster than non-priority cases in all categories. Additionally, agency data show that resolution of a small number of prohibited personnel practices cases by alternative dispute resolution before the agency made the "reasonable grounds determination" has reduced the backlog slightly. OSC officials also indicated that the agency has been using a priority system for whistleblower disclosure cases since 2002. Under this priority system, disclosures involving substantial dangers to public health and safety—the most serious type—are referred to the agency head for investigation faster than those cases that do not involve public health and safety.

OSC claims that its existing resources are inadequate to consistently process its cases within statutory time limits and reduce the backlog of cases. While resources may be a factor, our analysis of the agency's recent performance after hiring more staff raises questions about whether gaining authority to hire more staff would produce desired results. For example,

the agency was able to process about the same number of total cases in fiscal year 2003 as it had in fiscal year 1999 (2133 vs. 2109), despite having 16 percent more staff. Moreover, for both whistleblower disclosure and prohibited personnel practices cases, if OSC had been able to process as many cases during each of the fiscal years from 1997 through 2003 as it did in its best year for each type of case, the backlog for both would have been significantly lower by the end of fiscal 2003. OSC officials cited several mitigating factors that they say limited the agency's ability to process cases faster and reduce the backlog. First, OSC data showed a high turnover in staff between 2000 and 2003 that deprived the agency of institutional knowledge at a time when agency officials were trying to train new staff. Second, officials pointed out that new staff need training and time to develop experience before they can become full contributors to case processing efforts. Officials also noted the difficulty of meeting the 15-day limit for making the "substantial likelihood" determination required in whistleblower disclosure cases. However, OSC has not proposed an alternative time limit that officials believe is more realistic. Moreover, despite having a priority system in place that agency officials told us allows cases dealing with health and safety to be processed faster than non health and safety cases, the agency still faces mounting backlogs in whistleblower disclosure cases.

We believe that these factors highlight the need for OSC to develop a comprehensive strategy that (1) defines human capital and other limitations facing the agency, and (2) outlines the agency's plans for overcoming these limitations to allow processing more cases within statutory limits and reducing the backlog of cases. OSC officials agreed with our recommendation to provide Congress with such a strategy and indicated that the agency will work to implement the recommendation as expeditiously as possible. They also provided technical and clarifying comments, which we incorporated in the report, as appropriate.

Background

OSC's primary role is to safeguard the merit system in federal employment by protecting federal employees, former federal employees, and applicants for federal employment from prohibited personnel practices as shown:

Figure 1: Prohibited Personnel Practices

Federal employees, with authority to take, direct others to take, recommend or approve any personnel action, may not:

- Discriminate for or against an employee or applicant based on race, color, religion, sex, national origin, age, handicap, marital status, or political affiliation;
- Solicit or consider employment recommendations based on factors other than personal knowledge or records of job related abilities or characteristics;
- Coerce the political activity of any person;
- Deceive or willfully obstruct any person from competing for employment;
- Influence any person to withdraw from competition for any position so as to improve or injure the employment prospects of any other person;
- Give an unauthorized preference or advantage to improve or injure the prospects of any person for employment;
- Engage in nepotism (that is, hire, promote, or advocate the hiring or promotion of relatives);
- Take or fail to take, or threaten to take or fail to take a personnel action because of whistleblowing;
- Take or fail to take, or threaten to take or fail to take a personnel action because of the exercise of a protected activity, including a lawful appeal, complaint, or grievance;
- Discriminate based on personal conduct which does not adversely affect the performance of the employee or other employees;
- Knowingly take or fail to take a personnel action in violation of veterans' preference laws; and
- Take or fail to take a personnel action, which would violate any law, rule or regulation implementing or directly concerning merit system principles.

Source: 5 USC 2302(b).

OSC receives and independently investigates allegations of prohibited personnel practices. Before completing its investigation and making its determination about whether there are reasonable grounds for believing a violation has occurred, OSC may refer the case to its alternative dispute resolution (ADR) program. If OSC cannot process a case within the 240-day limit, the agency must get permission from the complainant to keep the case open. If OSC finds reasonable grounds for believing that a violation occurred, OSC can seek corrective action, disciplinary action, or both through negotiation with the agency involved. If an agreement cannot be reached, OSC can file a petition (for corrective action) or a complaint (seeking disciplinary action) with the Merit Systems Protection Board (MSPB).² OSC functions as a case prosecutor before the MSPB.

OSC also receives whistleblower disclosure claims. As described by law, these consist of violation of law, rule, or regulation; gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. Unless disclosure of a whistleblower's identity is necessary because of imminent danger to public health or safety or imminent violation of criminal law, OSC maintains the whistleblower's anonymity. (See app. I for more information on OSC's privacy policies.) Unlike its actions with respect to prohibited personnel practices, OSC does not independently investigate whistleblower disclosure cases. Instead, OSC is required to determine within 15 days whether there is a substantial likelihood the allegations constitute wrongdoing. If so, OSC sends the information to the head of the agency where the individual making the allegations works. The agency head must conduct an investigation and submit a written report to OSC. OSC is responsible for reviewing the agency's report to determine whether the findings appear to be reasonable and whether the report contains all of the information required by statute.

²MSPB is an independent, quasi-judicial agency in the executive branch that serves as the guardian of federal merit systems.

Unless the agency has found evidence of a criminal violation, OSC provides the whistleblower with a copy of the agency report for comment.³

OSC also investigates and prosecutes complaints about possible violations of the Hatch Act, which regulates the political activities of federal employees, District of Columbia employees, and certain state and local government employees employed in connection with programs financed by federal funds. OSC may seek corrective or disciplinary action in Hatch Act cases before the MSPB. OSC also issues advisory opinions to persons seeking advice about how certain kinds of political activity are treated under the Hatch Act. In addition, OSC investigates and prosecutes complaints under the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994, which covers the employment rights of individuals serving in the uniformed military services.

During each fiscal year, OSC receives new cases that are added to open cases from previous years, which equal the “total caseload inventory”. During the year, as OSC processes cases, the total caseload inventory decreases. At the end of the fiscal year, the agency has an “ending inventory”, which consists of pending cases (those that have not reached the applicable statutory limit for case processing) plus backlogged cases (those for which the applicable statutory limit for case processing has passed without the applicable determination being made). The ending inventory for one fiscal year becomes the beginning inventory for the following year.

³If there is no evidence found of a criminal violation, OSC transmits the agency’s report with its own comments and recommendations to the President and the congressional committees with oversight responsibility for the agency involved. OSC is required to place the report in a public file. The whistleblower’s comments are also sent to the President and congressional oversight committees. Cases where there is evidence of a criminal violation are referred by the agency to the Attorney General. In such cases, the agency is also required to notify the Office of Personnel Management and the Office of Management and Budget of the referral. The report accompanying such cases does not become part of the public record.

OSC's authority comes from five federal statutes: the Civil Service Reform Act of 1978,⁴ the Whistleblower Protection Act of 1989,⁵ the Hatch Act,⁶ Office of Special Counsel Reauthorization Act of 1994,⁷ and the Uniformed Services Employment and Reemployment Rights Act of 1994,⁸ as described in table 1.

Table 1: Statutes That Govern OSC Authority

Statute	Applicable Provisions
Civil Service Reform Act of 1978	OSC was created under the Reauthorization Plan Number 2 of 1978. The Reform Act established OSC as a part of MSPB and introduced statutory protection for whistleblowers.
Whistleblower Protection Act of 1989	The act strengthens protection for whistleblowers and, thus, encourages whistleblowing. It also separated OSC from MSPB, establishing OSC as an independent federal investigative and prosecuting agency.
Office of Special Counsel Reauthorization Act of 1994	The act gives OSC 240 days from the time it receives a complaint involving a prohibited personnel practice to determine whether there are reasonable grounds for believing that such a practice has been committed. If OSC is unable to process cases within this time, the agency is required to receive the complainant's consent to keep the case open. The act also makes federal agencies explicitly responsible for informing their employees of available rights and remedies under the Whistleblower Protection Act and related laws, and directed that OSC play a consultant role in the process.
Hatch Act	The act limits the political activities of federal employees, employees of the District of Columbia government and certain employees of state and local governments who work in connection with programs, such as public health, housing, urban renewal, and area redevelopment programs, financed in whole or in part by federal loans or grants. The Hatch Act Reform Amendments of 1993 (P.L. No. 103-94) allows most employees of the federal government and District of Columbia government to take a more active part in political management or in political campaigns, but their activities are still restricted.

⁴P.L. 95-454.

⁵P.L. 101-12.

⁶The provisions commonly referred to as the Hatch Act, as applied to federal and District of Columbia employees, are found under subchapter III of chapter 73 of title 5. The Hatch Act provisions relating to certain state and local employees are found under chapter 15 of title 5. OSC also provides advisory opinions to persons seeking advice about political activity. In fiscal year 2002, OSC received 213 Hatch Act violation allegations and following initial investigation, fully investigated eight allegations and filed four enforcement actions with MSPB. For that same year, OSC issued over 3,200 Hatch Act advisory opinions.

⁷P.L. 103-424.

⁸P.L. 103-353.

(Continued From Previous Page)

Statute	Applicable Provisions
Uniformed Services Employment and Reemployment Rights Act of 1994	The act prohibits discrimination against persons because of their service in the Armed Forces Reserve, the National Guard, or other uniformed services. The act also protects the reemployment rights and benefits of persons who were absent due to military service or training. The act authorizes OSC to initiate an action on behalf of a federal employee before the MSPB to enforce the act's provisions. OSC may appeal an MSPB decision on behalf of the employee before the U. S. Court of Appeals for the Federal Circuit.

Source: OSC.

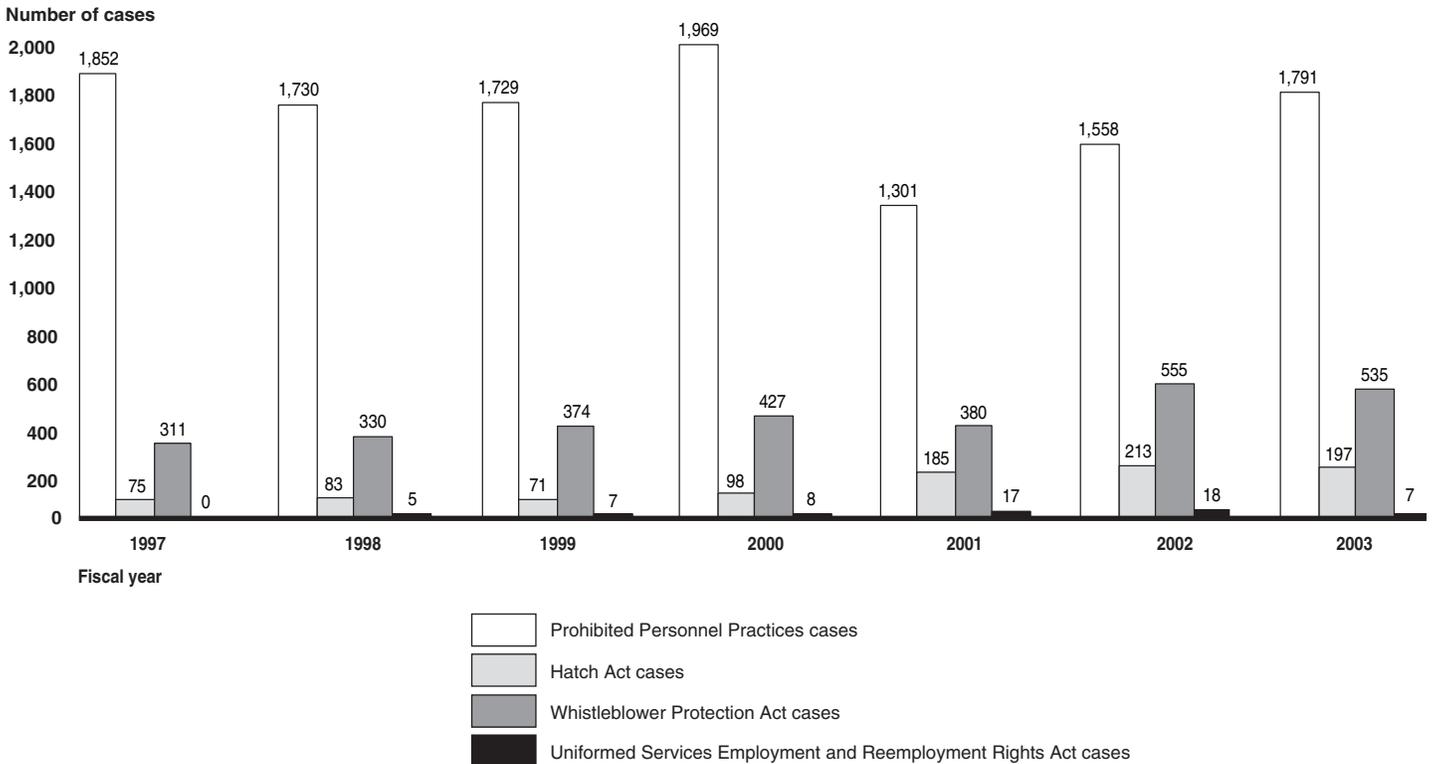
OSC maintains its headquarters in Washington, D.C., and has field offices in Dallas, Texas, and Oakland, California. A Special Counsel appointed by the President and confirmed by the Senate for a five-year term heads the agency. OSC is organized into five operating divisions and two administrative support branches. Appendix III discusses OSC's organizational structure for its operating divisions and explains how those divisions process cases.

Caseload Has Consisted Mainly of Prohibited Personnel Practices Cases, and a Large Increase in Whistleblower Disclosure Cases Occurred After September 11, 2001

Seventy-five percent of OSC's new cases from fiscal year 1997 through 2003 consisted of prohibited personnel practices cases. Whistleblower disclosure cases represented approximately 18 percent of total new cases. The remaining approximately 6 percent were Hatch Act and USERRA cases.

As shown in figure 2, the number of new prohibited personnel practices cases ranged from a low of 1,301 in fiscal year 2001 to a high of 1,969 in fiscal year 2000—a fluctuation of 51 percent. In fiscal year 2001, the number of new cases decreased sharply from the previous year. Excluding fiscal year 2001, however, the number of new prohibited personnel practices cases ranged from a low of 1,558 in fiscal year 2002 to a high of 1,969 in fiscal year 2000 – a fluctuation of 26 percent. Whistleblower disclosure cases steadily increased from fiscal year 1997 through 2000 (by about 37 percent, from 311 to 427) then dropped somewhat (about 11 percent) in fiscal year 2001, only to increase dramatically in fiscal year 2002 (about 46 percent) and decrease slightly in fiscal year 2003 (about 4 percent).

Figure 2: Number of New Cases by Case Type, Fiscal Years 1997-2003



Source: OSC.

OSC officials could not tell us with any certainty the reasons for the year-to-year fluctuations in prohibited personnel practices cases. They said increases may have resulted from outreach efforts by OSC to educate federal employees and others about their rights and the agency's roles. As for the steep decline in prohibited personnel practices cases in fiscal year 2001, officials said it may have resulted from increased awareness by federal managers about OSC's role and responsibilities, which may have led managers to consult more with personnel specialists to avoid actions that could have led to a prohibited personnel practice.

OSC officials expressed more certainty about the reasons for the fluctuation in whistleblower disclosure cases. Officials said the steady increase in such cases from fiscal year 1997 through 2000 may have been due to media coverage of several cases that brought attention to the agency and its role in handling these cases. OSC officials stated that the big jump

in whistleblower disclosure cases in fiscal year 2002 was prompted, in part, by the terrorist events of September 11, 2001, after which the agency received more cases involving allegations of substantial and specific dangers to public health and safety and national security.

While OSC Was Far More Successful in Meeting Time Limits For Processing Prohibited Personnel Practices Cases than Whistleblower Disclosure Cases, Backlogs of Both Types of Cases Persisted

OSC met the 240-day case processing statutory limit for about 77 percent of prohibited personnel practices cases from fiscal years 1997 through 2003 and met the 15-day statutory limit for whistleblower disclosure cases about 26 percent of the time. For prohibited personnel practices cases, the inability to process all new cases received each year in a timely manner meant that the annual number of backlogged cases was never below 29 percent and was as high as 44 percent.⁹ The percentage of whistleblower cases in backlog was always extremely high—95 to 97 percent.

OSC's Record in Meeting Statutory Time Limits for Processing Prohibited Personnel Practices and Whistleblower Disclosure Cases Differed Greatly

From fiscal year 1997 through 2003, OSC processed about 77 percent of prohibited personnel practices cases within the 240-day statutory limit. As shown in table 2, the number of cases processed within the limit decreased steadily from fiscal year 1998 through 2001 before increasing substantially in fiscal years 2002 and 2003. The total number of cases processed declined from fiscal year 1997 through 2000, and increased slightly each ensuing year. Nevertheless, in fiscal years 2002 and 2003, OSC's improvement in both areas was still not as good as it had been in its best years—fiscal years 1998 and 1997, respectively. OSC did dramatically reduce the average processing time of a case in fiscal year 2002 (to 187 days) and fiscal year 2003 (to 135 days)—the best of the seven years.

⁹OSC may continue to investigate beyond the 240-day limit with the complainant's permission.

Table 2: Processing Times for Prohibited Personnel Practices Cases, Fiscal Years 1997-2003

Fiscal year	Processed within 240 days	Processed in over 240 days	Total processed	Average days to process	Percent processed within 240 days
1997	1,499	604	2,103	194	71
1998	1,577	362	1,939	162	81
1999	1,395	300	1,695	167	82
2000	1,361	253	1,614	166	84
2001	945	680	1,625	242	58
2002	1,284	420	1,704	187	75
2003	1,471	261	1,732	135	85
Average ^a	1,362	411	1773	179	77

Source: OSC.

^aNumbers and percentages may not add due to rounding.

OSC's efforts to process whistleblower disclosure cases were not as timely. From fiscal year 1997 through 2003, OSC met the 15-day statutory time limit for processing whistleblower disclosure cases 26 percent of the time. OSC's average time to process a whistleblower disclosure case was more than six months for each of the seven years we examined.

Table 3: Processing Times for Whistleblower Disclosure Cases, Fiscal Years 1997-2003

Fiscal year	Processed within 15 days	Processed in over 15 days	Total processed	Average days to process	Percent processed within 15 days
1997	73	209	282	193	26
1998	53	268	321	272	17
1999	71	343	414	253	17
2000	122	267	389	226	31
2001	97	243	340	267	29
2002	94	192	286	230	33
2003	111	290	401	264	28
Average ^a	89	259	348	244	26

Source: OSC.

Note: Processing a case is defined as when OSC (a) determines that the case has merit and refers it to the agency head, or (b) determines it lacks jurisdiction over the employee or the agency; the disclosure does not meet the substantial likelihood criterion that the alleged wrongdoing occurred; the disclosure is minor in nature; or the information is second hand or unsupported.

^aNumbers and percentages may not add due to rounding.

Of the 2,433 whistleblower disclosure cases that OSC processed during fiscal years 1997 through 2003, OSC found a “substantial likelihood” of wrongdoing for 86, or approximately 4 percent, and referred these cases to the head of the agency involved for investigation. In the remaining 96 percent of cases which were not referred to the agency head, OSC took no further action for reasons such as (1) lack of jurisdiction,¹⁰ (2) lack of sufficient information to make a substantial likelihood determination, (3) the complainant’s agency inspector general had already investigated the disclosure, or (4) the disclosure was minor, withdrawn, or duplicative. In addition, in cases where OSC concludes there is not a substantial likelihood of wrongdoing, with the consent of the whistleblower, OSC may transmit the information to the head of the agency where the complainant works.

Congress has not established statutory limits for processing Hatch Act enforcement or USERRA cases. In fiscal year 2003, average processing time was 469 days for Hatch Act enforcement cases and 193 days for USERRA cases. OSC has established a standard of 30 days for processing Hatch Act advisory opinions. In fiscal year 2003, average time spent processing opinions was 106 days.

OSC Has Backlog in Prohibited Personnel Practices and Whistleblower Disclosure Cases

As shown in table 4, the percentage of prohibited personnel practices cases in backlog fluctuated between 29 and 44 percent during the seven-year period. In fiscal year 1999, the number of cases processed declined by nearly 13 percent from the previous year. This decline, coupled with a nearly identical increase (nearly 14 percent) in cases received in fiscal year 2000, resulted in the large backlog of cases by the end of that year. The number of cases received in fiscal year 2001 dropped substantially from the previous year. While the number of cases processed in fiscal year 2001 was slightly higher than the previous year, the number of cases in backlog by the end of fiscal year 2001 increased from the previous year. The lower

¹⁰In cases where OSC cannot act because the disclosure is from an anonymous source, but believes an allegation may warrant investigation, it may refer the allegation to the Inspector General’s office for the agency involved.

beginning inventory in fiscal year 2002, combined with a modest increase in new cases and processed cases, resulted in an ending inventory that was about 33 percent less than the ending inventory in fiscal year 1997. However, an increase in the number of new cases in fiscal year 2003 and a smaller increase in cases processed that year, led to an increase in ending inventory, but a decrease in the part of that inventory consisting of backlogged cases.

Table 4: Prohibited Personnel Practices Case Inventories, Fiscal Years 1997-2003

Fiscal year	Beginning inventory	Cases received	Total caseload	Processed cases	Ending inventory	Pending cases ^a	Backlogged cases ^b	Percent of cases in backlog
1997	1,135	1,852	2,987	2,103	884	629	255	29
1998	884	1,730	2,614	1,939	675	435	240	36
1999	675	1,729	2,404	1,695	709	504	205	29
2000	709	1,969	2,678	1,614	1,064	756	308	29
2001	1,064	1,301	2,365	1,625	740	414	326	44
2002	740	1,558	2,298	1,704	594	362	232	39
2003	594	1,791	2,385	1,732	653	449	204	31
Average ^c	829	1,704	2,533	1,773	760	507	253	34

Source: OSC.

^aPending cases are those cases in the ending inventory that have not exceeded 240 days.

^bBacklogged cases are those cases in the ending inventory for which the 240-day processing limit has passed.

^cNumbers and percentages may not add due to rounding.

Table 5 shows that over the seven-year period, whistleblower disclosure cases in backlog averaged 96 percent. Total caseload increased by about 20 percent from fiscal year 1997 through 2001, then jumped an additional 34 percent in fiscal year 2002 and about 30 percent in fiscal year 2003. This resulted in an ending inventory in fiscal year 2003 that was about 24 percent higher than the previous year and about 188 percent higher than in fiscal year 1997, as well as an increase in backlogged cases that was about 23 percent higher than in fiscal year 2002 and 192 percent higher than in fiscal year 1997.

Table 5: Whistleblower Disclosure Case Inventories, Fiscal Years 1997-2003

Fiscal Year	Beginning inventory	Cases received	Total caseload	Processed cases	Ending inventory	Pending cases ^a	Backlogged cases ^b	Percent of cases in backlog
1997	211	311	522	282	240	11	229	95
1998	240	330	570	321	249	8	241	97
1999	249	374	623	414	209	9	200	96
2000	209	427	636	389	247	11	236	96
2001	247	380	627	340	287	11	276	96
2002	287	555	842	286	556	14	542	97
2003	556	535	1,091	401	690	21	669	97
Average ^c	286	416	702	348	354	12	342	96

Source: OSC.

^aPending cases are those cases in the ending inventory that have not exceeded 15 days.

^bBacklogged cases are those in the ending inventory for which the 15-day processing limit has passed.

^cNumbers and percentages may not add due to rounding.

Agency Data Indicate Attempts to Handle Caseload More Efficiently Have Had Salutary Effects

Although OSC cannot control the number of new cases filed, actions the agency has taken to handle its caseload more efficiently have yielded some benefits, according to agency data. These data show that the merger of the agency’s investigators and attorneys into three parallel investigative and prosecutive units and the adoption of streamlined investigative procedures increased productivity, while the adoption of a priority system for processing prohibited personnel practices and whistleblower disclosure cases allowed more important cases to be handled more expeditiously. Agency data also show that referral of a small number of prohibited personnel practices cases for ADR prior to determining a “reasonable grounds” has reduced the backlog.

Merger of Investigative, Legal Divisions and Adoption of Streamlined Procedures Increased Productivity

In June 2001, OSC merged its investigators and attorneys, who had been in two separate divisions, into three parallel divisions in an attempt to (1) foster a closer and more effective coordination of strategy between attorneys and investigators, (2) produce a more efficient case-handling procedure geared to helping the agency process cases within existing statutory time limits, and (3) target resources so that the most important cases could receive more in-depth and prompt attention.

Shortly after the reorganization, OSC also adopted many of the streamlined investigative procedures that it had pilot tested. These included conducting more interviews by telephone for cases involving the least serious personnel actions and using a more flexible written format for documenting the findings of the investigation. Standard procedures require that the findings of an investigation be recorded in a detailed written report. However, on a case-by-case basis, a less formal report of investigation can be used. For example, the investigator may, with supervisory approval, opt to eliminate a detailed report of investigation if the evidence is so clear that it is not necessary.

OSC officials stated that the reorganization increased productivity, thereby allowing cases to be processed faster. According to OSC officials, during the 3-1/2 years prior to the reorganization, the staffs of the separate divisions processed an average of 5.3 cases annually per person. During the first year after the merger of the divisions, productivity increased to 7 cases processed per person.

Adoption of Priority System Enabled Agency to Process Certain Higher Priority Cases Faster

In November 2001, OSC issued a policy directive that adopted a priority case processing system that classifies all its prohibited personnel practices cases into one of three categories. Under this approach, cases are investigated and analyzed based on the category to which they have been assigned. Category 1 prohibited personnel practices cases consist of the most serious personnel actions, involving employees who are threatened with removals, suspensions for more than 14 days, geographic reassignments, and reductions in grade. Category 2 cases are less severe, including cases where suspensions are 14 days or fewer, performance appraisal ratings are below “fully successful,” and denials of within-pay grade increases are being challenged. Category 3 cases involve the least serious adverse personnel actions, such as lower performance ratings that are still “fully successful,” non-geographical reassignments or details, failure to promote, and reprimands. For category 3 cases, investigators may use streamlined procedures that may require less time and staff resources to complete.

In addition, within each of these categories, prohibited personnel practices cases may be designated “priority”—meaning they will receive the most prompt attention—based on the following factors: the urgency of the need for redress, the strength of the evidence supporting a violation, or the public interest in prompt resolution of the case. For instance, priority cases within category 1 must either (1) meet OSC’s criteria for seeking a

stay of the personnel action or already have a stay in effect, or (2) be a case in which OSC believes, on the basis of the evidence, that there is a substantial likelihood that the complaint is meritorious and in which OSC will seek corrective or disciplinary action. Within each category, whistleblower reprisal complaints are given top priority.

Since the implementation of this system for prohibited personnel practices, OSC has been able to process priority cases faster than the non-priority cases. OSC's statistics show that from January 1, 2002, through September 30, 2002, OSC processed category 1 priority cases 17 percent faster than non-priority cases, category 2 priority cases 30 percent faster, and category 3 priority cases 50 percent faster. From October 1, 2002, through July 31, 2003, similar results were reported for category 1 and 3 cases. The number of category 2 priority cases during this period was too small for a reliable comparison with non-priority cases.

OSC also has procedures to prioritize whistleblower disclosures. Although these procedures have been in use since 2002, an agency official indicated that they have not been adopted through a policy directive. Under the priority system, all cases are reviewed by the unit head, who makes an initial assessment of whether the cases are likely to meet the "substantial likelihood" determination and places the cases in one of three priority categories. Priority 1 cases are those that would likely meet the determination and would be referred to the agency head for investigation. Priority 1 cases are further categorized into two subcategories. Subcategory A cases deal with disclosures of substantial and specific dangers to public health and safety, while subcategory B cases are those dealing with non health and safety disclosures. Priority 2 cases are those where further review may be appropriate and would be referred to the agency's Office of the Inspector General. These cases do not include health and safety allegations. Priority 3 cases are those that are not likely to meet the substantial likelihood determination and, therefore, likely to be closed. OSC further categorizes these disclosures into subcategory A for those that involve disclosures of public health and safety and subcategory B for all other disclosures. According to OSC, in fiscal year 2002, on average, priority 1A cases—dealing with health and safety disclosures—were referred to agency heads 1.2 times faster than priority 1B cases, which deal with other violations. In fiscal year 2003, on average, OSC stated that priority 1A disclosures were referred to agency heads 2.4 times faster than priority 1B disclosures.

Since 2000, OSC has been using an ADR program for a small number of prohibited personnel practices cases, which has reduced the average processing time for these cases and reduced case backlog slightly. Through ADR, OSC reported that it resolved 13 cases in fiscal year 2002 and 15 cases in fiscal year 2003. The number of backlogged cases in table 4 reflects the resolution of these cases through ADR. Similarly, OSC reported that cases that went through ADR took 115 days in fiscal year 2002 and 122 days in fiscal year 2003. The data from table 2 on the processing time for prohibited personnel practices cases reflect that a small percentage of these cases was resolved through ADR. OSC's ADR program is further discussed in appendix III.

Agency Says Existing Resources Are Inadequate, But It Is Not Clear How Additional Resources Would Help Alleviate Backlogs

OSC told us that the primary reason it was not able to process cases more quickly was inadequate resources. Our analysis shows that additional staff alone may not solve the case processing problems. For example, the agency processed about the same number of cases in fiscal year 2003 that it had in fiscal year 1999 (2133 vs. 2109), despite having 16 percent more attorneys and investigators. OSC noted several mitigating factors, including staff turnover and the need to train new staff, which limited its ability to process more cases and reduce the backlog of cases. While OSC notes that it is difficult to meet the 15-day limit for whistleblower disclosure cases, the agency has not proposed an alternative time limit that officials believe is more realistic. Moreover, while the agency's priority system appears to help handle high priority cases faster, delays in processing whistleblower disclosure cases are still pervasive. OSC has not detailed in any of its documents created for Congress or the executive branch a comprehensive strategy for processing more cases within statutory time limits and reducing the backlog of cases.

Claim that Budget for Staff Has Not Kept Pace with Caseload Does Not Fully Explain OSC's Case Processing Record

OSC officials told us that the primary reason that the agency has not been more successful in meeting the statutory time limit for its cases, particularly those involving whistleblower disclosure, is lack of an adequate number of staff.

A preliminary OSC analysis of prohibited personnel practices caseload since 1984 showed that through 1989, the agency's caseload, staffing levels, and budget were fairly stable. From fiscal year 1991 to 1993, the number of new cases increased nearly 36 percent. Still, OSC data show that at the beginning of fiscal year 1993, no prohibited personnel practices case was

more than 6 months old—well within the 240-day limit. The number of new cases declined slightly between fiscal years 1994 and 1996. During this period (1991-1996) the number of full-time equivalent staff dropped from 90 to 86. These data, however, cover a period before the seven-year period that we examined. Since 1994, OSC has had backlogged prohibited personnel practices cases, and the number of such cases has fluctuated.

OSC officials said budget for staff has not increased fast enough to allow the agency to consistently meet the statutory time limits, especially for whistleblower disclosure cases. During fiscal years 2000 and 2001, Congress authorized OSC to hire 15 additional staff, which brought its full-time equivalent staff to 106. To decrease case processing times, most of the new staff were added to the divisions responsible for investigating and prosecuting cases.

It does not appear that these staff and productivity increases after the merger of attorneys and investigators into one division translated into the processing of a significantly larger number of prohibited personnel practices and whistleblower disclosure cases. The total cases processed in fiscal year 1997 was 2,385. The figure dropped in each of fiscal years 1998, 1999, 2000, and 2001 before increasing slightly in fiscal year 2002 and moderately in fiscal year 2003. The number of whistleblower disclosure cases processed dropped in both fiscal year 2001 (by about 13 percent) and the following year (by about 16 percent), before rebounding with a 40 percent increase in fiscal year 2003. But the number of such cases processed that year was still slightly less than in fiscal year 1999 (401 cases vs. 414). The number of new prohibited personnel practices cases processed declined from fiscal year 1997 through fiscal year 2000, with small increases in each of the next three years. But the number of cases processed in fiscal year 2003 was about the same (1732 vs. 1695) as that in fiscal year 1999.

OSC officials offered several mitigating factors that they say limited the agency's ability to process more cases despite increases in staff. First, agency data showed a high turnover in staff between 2000 and 2003, which deprived the agency of institutional knowledge at a time when officials were trying to train the new staff. During this period, OSC hired 47 new staff and had 37 departures—all of whom were investigators or attorneys involved in processing cases. Second, officials indicated that new staff need training and time to develop experience before they can become full contributors to case processing efforts. The ability of the staff to develop

requisite experience through on-the-job training was hindered by the high turnover.

Another contributing factor cited by OSC officials leading to the agency's difficulty in processing prohibited personnel practices cases within statutory time limits are the substantive and procedural processing requirements imposed by the Whistleblower Protection Act of 1989 and the OSC Reauthorization Act of 1994. The OSC reauthorization law added to the time it could take the agency to process certain prohibited personnel practices cases. Before the law was enacted, if OSC decided there were no reasonable grounds for believing such a violation occurred, the agency could immediately issue a final letter notifying a complainant of the termination of the investigation. The reauthorization law, however, requires OSC to send the complainant a status report of its proposed fact findings and legal conclusions supporting this decision and give the complainant 10 days to submit comments before OSC's decision becomes final.

The 1989 whistleblower law and the 1994 reauthorization law require more information in the final letters OSC sends to complainants notifying them of the termination of the prohibited personnel practice investigation. Prior to the 1989 law, OSC was simply required to notify the complainant of the termination "and the reasons therefore". The 1989 law required additional information in the notification letter, namely a summary of the relevant facts, including the facts that support, and do not support, the complainant's allegations. In addition, the 1994 OSC reauthorization law required that the notification letter address any comments submitted by the complainant in response to OSC's proposal to terminate the investigation. While the expanded letters were intended to be more "customer friendly", they are more time-consuming to write than the shorter letters that the agency sent to complainants before the 1989 law was enacted.

According to OSC, in the fall of 1993, the agency implemented new procedures in response to congressional criticism about the breadth of the agency's investigations and to be more consistent with the "spirit" of the Whistleblower Protection Act of 1989. These new procedures required broader investigations in all cases and created additional internal memoranda on each case. As a result, investigations take longer, resulting in the processing of fewer cases, and an increased backlog. Before these new procedures were implemented, OSC officials said, the agency achieved higher productivity by limiting the duration of the investigation and the

subsequent explanation of the reasons for closure in cases where the agency found no merit.

The changes prompted by these statutes and congressional interest, however, were implemented before the period that we examined. Thus, it is worth noting that for both whistleblower disclosure and prohibited personnel practices cases, if OSC had been able to process as many cases during each of the fiscal years from 1997 through 2003 as it did in its best year for each type of case (1997 for prohibited personnel practices cases, 1999 for whistleblower disclosure cases), the backlog for both would have been significantly lower by the end of fiscal 2003 than it was. Other than the increase in, and complexity of, whistleblower disclosure cases after September 11, 2001, OSC did not inform us of any significant events during the years for which we obtained data that would have prevented the agency from achieving this goal.

Meeting 15-day Limit for Whistleblower Disclosure Cases Is Difficult, But OSC Has Not Proposed an Alternative Time Limit

According to OSC, in 1978, during congressional consideration of the Civil Service Reform Act of 1978, senators drafting the legislation envisioned that 15 to 20 full-time staff would be needed to process whistleblower disclosure cases within 15 days. OSC has never assigned more than five staff to whistleblower disclosure cases and typically has assigned only two. Given that OSC's total full-time staff has never exceeded more than 106 and given the greater volume of prohibited personnel practices cases, assigning several more staff to whistleblower disclosure cases would require the agency to shift staff from one kind of case to the other. OSC officials said they have not shifted staff from what they consider their primary mission—prohibited personnel practices cases—to whistleblower disclosure cases because this would decrease timeliness for prohibited personnel practices cases.

OSC officials pointed out that no special counsel has believed that OSC could meet the 15-day case processing time limit for whistleblower disclosures and that cases have generally become more complex in recent years. OSC officials told us they were not aware of any proposal by the agency to have the 15-day limit increased.

Another reason that OSC officials cited for not meeting the 15-day time limit is that it can be difficult to contact whistleblowers to discuss their allegations and receive relevant documentation from them and from agency officials within this short time frame. In one case that was referred by a congressional committee, for example, it became increasingly difficult

to conduct business during the day because the whistleblower preferred to receive calls at night and would use only a commercial fax machine on weekends to send supporting documentation. In this case, delays in submitting the evidence contributed to OSC missing the 15-day limit.

More broadly, if OSC has a strategy for deploying any or all of the additional staff it received in 2000 and 2001 on whistleblower disclosure cases and a way of evaluating whether that strategy is working, the agency has not shared it with us. Having such a strategy could be important for ensuring that the most serious whistleblower disclosure cases receive not just the most prompt—but also the most comprehensive—attention. If the OSC 2000 data are any guide to the future, the majority of cases (96 percent from fiscal years 1997-2003) will continue to be those that do not meet the “substantial likelihood” standard. If a quick determination can be made in a large number of these cases that the standard is not met, it may be that OSC should deploy more staff to this “weeding out” process. Alternatively, if it is not immediately clear in a significant number of these cases whether the “substantial likelihood” standard can be met, then OSC might consider devoting more staff to reviewing these cases. Although OSC’s description of the cases priority system indicates that they can track pending and closed whistleblower disclosure cases and use these data to review workload distribution and cases processing efficiency, officials have not indicated that they have been able to use these data to reduce the time spent processing cases.

While OSC Reports to Congress and OMB Specify Some Reasons for Case Processing Difficulties, These Reports Have Not Proposed Solutions to Them

In the last several years, OSC has issued a number of mandated reports and correspondence to the Congress and the Office of Management and Budget that discuss OSC’s case processing difficulties and resulting backlog. But OSC has not specified proposed long-term solutions for them. In its Annual Report to Congress, OSC is required to report information on prohibited personnel practices cases that are backlogged. In the annual reports that we reviewed, the agency did so and acknowledged that the backlog was a problem. For example, in its fiscal year 1999 report to Congress, OSC disclosed that a significant backlog of cases was pending at the agency that resulted in delays in resolving complaints. The fiscal year 2002 report noted that reducing the backlog is important because (1) Congress imposed the 240-day limit for prohibited personnel practices cases in response to widespread criticism concerning long delays in the processing of complaints by OSC, and (2) a large backlog can prevent OSC staff from quickly investigating and resolving more critical cases. But none of the annual reports has discussed specific actions that OSC expects to take and

how these actions would affect its ability to process cases—either within or outside statutory time limits—and reduce the backlog or the actual effects of actions the agency took in previous years.

OSC requested seven additional staff in its fiscal year 2004 budget request to the Congress, but did not discuss how the additional staff would be deployed or the extent to which they would help the agency process cases more quickly and reduce the backlog. Nor did OSC provide the Congress with an estimate of the number of staff required to solve these problems and/or an analysis of other changes necessary to do so.

In September 2003, the Chairman of the Senate Finance Committee wrote to OSC expressing concerns about the backlog of whistleblower disclosure cases and requesting information on how OSC planned to address the backlog. In an October 2003 response, the Acting Special Counsel said OSC has long struggled with how best to address the backlog of whistleblower disclosure cases. He cited past efforts, including assigning such cases to attorneys from units that would not normally handle whistleblower disclosure cases, which led to the resolution of some cases, but was not as successful as the agency hoped. He said he had assigned two more investigators to assist with the whistleblower disclosure caseload. But the Acting Special Counsel did not specifically discuss what effect the additional investigators would have on the agency's ability to meet the 15-day limit or to reduce the number of backlogged whistleblower disclosure cases.

Strategic workforce planning—planning that focuses on developing long-term strategies for acquiring, developing, and retaining an organization's people aligned with human capital approaches that are clearly linked to achieving programmatic goals—is an essential element of a modern, effective human capital management system. OSC's fiscal year 2004 annual performance plan includes workforce strategy as one of six strategic goals and discusses strategies that the agency plans to take “to maintain a highly skilled, well-trained, customer-oriented workforce, and to deploy it most effectively to carry out the agency's mission.” This plan discusses changes in staff at the beginning of fiscal year 2001 due to attrition and the addition of new staff, and the fact that experienced staff has been diverted from their usual duties to mentor and help train new staff. The agency has also identified critical skills and developed data on employee attrition and retirement.¹¹ However, the agency's planning to date lacks in long-term solutions directly associated with improving case processing and reducing case backlog. The agency has not identified (1) critical skills needed to meet current and emerging goals, (2) gaps in identified skills, (3) strategies to meet gaps, (4) an action plan to implement strategy, and (5) a plan to evaluate the results.

Conclusion

OSC's challenge in meeting its case processing time standards continues despite actions taken by the Congress and the agency. The delays in processing whistleblower disclosure cases are pervasive: Of the total inventory of cases at the end of fiscal year 2003, 97 percent had not been processed in the 15-day statutory time frame. OSC's actions, including realigning its staff and developing a case priority system, have not significantly reduced the case backlog. Presenting a strategy to Congress that demonstrates how additional staffing, organizational changes, or legislative solutions would help reduce the backlog of prohibited personnel practices and whistleblower disclosure cases would provide Congress with information that it needs for oversight and resource allocation.

Recommendation for Executive Action

We recommend that the Special Counsel provide Congress with a detailed strategy designed to allow more consistent processing of cases within

¹¹This workforce plan was prepared by OSC in response to “Workforce Planning and Restructuring,” OMB Bulletin No. 01-07, May 8, 2001.

statutory time limits and a reduction in the backlog of cases for which these limits have already passed.

Agency Comments

On January 21, 2004, we provided a draft of this report to OSC for review and comment. We met with the Special Counsel and the Associate Special Counsel for Legal Counsel and Policy to discuss the draft report and also received written comments from the agency. OSC generally agreed with the contents of the report noting that our review “has addressed a critical, long-standing issue of importance not just to this agency, but to individuals who seek its assistance, other government agencies, Congress, and the public.” The agency agreed with our recommendation to provide Congress with a detailed strategy designed to allow more consistent processing of cases within statutory time limits and a reduction in the backlog of cases. Noting that its annual report to Congress for fiscal year 2003 has been substantially completed, OSC stated that it plans to report to Congress on its future strategy as expeditiously as possible this year. We believe this is reasonable. OSC’s written response is included in appendix IV. In addition, OSC provided technical comments and clarifications, which we have incorporated where appropriate.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days after its issuance date. At that time we will send copies to OSC and interested congressional committees. We will make copies available to others upon request. In addition, the report will be available at no charge on GAO’s Web site at <http://www.gao.gov>. If you or your staff have questions about this report, please call me at (202) 512-9490 or Belva Martin, Assistant Director, on (202) 512-4285. Key contributors to this engagement are listed in appendix V.

Sincerely yours,



George H. Stalcup
Director, Strategic Issues

OSC's Data Tracking System and Privacy Protection Policies

Data Tracking System

In July 1999, OSC developed a system that tracks its workload across the different case types. This computerized system, known as "OSC 2000," serves two purposes (1) to code and track information received in, and all official actions taken on, each case so that it is available independent of the official paper case file, and (2) to create a database from which management workload and other reports can be generated.

OSC 2000 is designed to capture and record data on all case types from the initial filing of the complaint, disclosure, or request for an advisory opinion, until closure and archiving of the file. Information, including data on the complainant, agency involved, named official, allegations, assigned OSC staff person, and all official OSC actions in the case are captured in chronological order. A case "profile" report has real time information on a case from the point of initiation to closure, including the case status, actions taken, staff assigned, allegations and other complaint-related information. Only those users who have need for the information OSC 2000 contains, which generally includes attorneys, investigators and managers, have access rights. In addition, only those users who have the need for information on a day-to-day basis are assigned a logon identification and password. For example, the Human and Administrative Resource Management Branch has no need to use the system because that unit only deals with internal OSC personnel and administrative issues; therefore, none of its staff can access OSC 2000.

OSC 2000 includes an automated real-time data reporting system, OSC 2000 Reports, which queries the database to create a number of management and workload reports. Reports include ones for total pending workload, average age of cases, cases pending by division, attorney or investigator; and cases resolved by month and category. These reports serve as tools for management to look across the agency at the status of caseload activity and resource allocation.

To help ensure reliable and accurate data, and reports generated based on that data, OSC 2000 has a number of built-in, multi-layered safeguard and security features. For example, the system is designed to control what can be entered, edited, or deleted by a given user. The system also incorporates several layers of review to minimize the possibility of user error. Other procedures maintain integrity of key data entered into the system. These include system blocks to prevent case closures without essential data, and data reconciliation, as needed, by the Records Management Officer and management officials. Moreover, senior staff are required to review and

continually monitor monthly reports pertaining to case intake and processing. These reports provide the basis for the statistical data reported in OSC's Annual Reports to Congress.

OSC 2000 is tied to the agency's network operating system and its e-mail system. When a new case is entered into the system, required reporting dates for the case are calculated and the system automatically notifies the assigned staff before these dates arrive. For prohibited personnel practices cases, OSC is required by law to provide each complainant:

- (1) a letter acknowledging receipt of the complaint and identifying the agency staff member assigned to the case within 15 days of receipt;
- (2) a status report 90 days after the acknowledgement letter and a status report every 60 days thereafter while the case is active; and
- (3) a preliminary determination letter when OSC proposes to close a complaint based on a lack of evidence or insufficient evidence, providing the complainant with one more opportunity for input before OSC makes its final decision.

OSC's Information Systems Branch has oversight responsibility for OSC 2000 to ensure reliability and accuracy is maintained. For example, system users cannot delete a case; only the system administrator is permitted to do so. To safeguard against accidental deletions, data pertaining to a specific type of allegations and certain case actions, such as the date when a complaint is received, cannot be deleted by anyone. Also, for security purposes, the system maintains an audit trail for deletions. This audit trail keeps track of all deleted data, which are kept in the system's "holding area" in accordance with an electronic record retention schedule. Paper documents in a typical case file are retained for a total of three years after closure before being destroyed.

All OSC program staff receive training about the operation of OSC 2000 and OSC 2000 Reports as part of new employee orientation, and on an ongoing basis. Moreover, an "OSC 2000 Users' Group" meeting is held approximately every six weeks with representatives from each work unit. The purpose is to obtain regular feedback from customers, and to review changes and improvements to the system. These regular meetings provide a forum for problems to be raised and solved and for enhancements to the system to be suggested.

Privacy Protection Policies

Given the nature of OSC's enforcement mission, its complaint and litigation files often contain personal or sensitive information, including information from or about complaint filers, and other information made or received by OSC during its investigative and prosecuting activities. OSC's basic privacy protection policies are derived from the Privacy Act of 1974, 5 U.S.C., section 552a.¹ In addition to the Privacy Act, the Whistleblower Protection Act requires that the identity of any employee, former employee, or applicant for employment who makes a whistleblower disclosure may not be disclosed by OSC without such individual's consent unless OSC determines that the disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.

Generally, unless permitted under one of the Privacy Act's exceptions, OSC cannot disclose any of its records by any means to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains. Exceptions to the Privacy Act permit certain disclosures without such a request or consent. For example, OSC may disclose information within the agency when other OSC employees need the information to do their jobs, to federal law enforcement agencies for civil or criminal law enforcement purposes, or under OSC's routine uses.

Under the Privacy Act, OSC is permitted to disclose information from its files when doing so would be in accordance with a routine use of such information. As required by the Privacy Act, OSC has published a descriptive listing of its routine uses in the *Federal Register*, 66 Fed. Reg. 36611 and 51095 (2001). For example, OSC may provide information to the Equal Employment Opportunity Commission about allegations of discrimination and to the Merit Systems Protection Board when filing a petition for disciplinary action. In the event that OSC believes that disclosure may be appropriate in a circumstance when it has not received a written request or consent from a complainant or whistleblower, and

¹The Privacy Act addresses the permissible disclosure of those agency records that are contained in a system of records, which is a group of records from which information is retrievable by name or other personal identifier of an individual. OSC's system of records, designated as "OSC GOVT-1, Complaint, Litigation and Political Activity Files," include records in complaint files, disclosures files, Hatch Act advisory opinion files, and litigation files. OSC is required to publish in the *Federal Register* upon establishing or revising its record system a notice of the existence and character of the system of records.

routine use or other Privacy Act condition of disclosure does not apply, OSC will seek written authorization from the complainant or whistleblower.

Regardless of the permissibility of disclosure under the Privacy Act, OSC is specifically prohibited by law from responding to inquiries concerning work performance, ability, aptitude, general qualifications, character, loyalty or suitability for any personnel action of any complainant who filed a prohibited personnel practice allegation, unless (1) the complainant consents in advance, or (2) an agency requires the information in order to make a determination concerning the complainant's access to highly-sensitive national security information. (5 U.S.C., § 1212(g)(2)).

When a prohibited personnel practice complaint is filed, it is OSC's policy not to reveal the identity of the complainant even to the involved agency unless OSC has the complainant's consent. OSC requires each filer to select one of three consent statements that contains varying restrictions on OSC's disclosure and use of complainant information.

OSC has taken a number of steps within the agency to ensure that the rights and privacy of the complainants are adequately protected. The agency requires that all staff receive training about ensuring the confidentiality of OSC records and the privacy rights of those individuals bringing cases to it. In addition, the agency makes information about its policy statements and disclosure policies under the Whistleblower Protection Act available to each person alleging reprisal for whistleblowing.² For example, in April 1995, OSC issued "Policy Statement Concerning the Disclosure of Information Regarding Prohibited Personnel Practice Complaints." OSC enhanced this statement in September 1995, when it issued another policy statement on the "Disclosure and Use of Information from OSC Files," which contains disclosure information relevant to all OSC case types and outlines the Privacy Act provisions under which OSC may disclose information about a case. Moreover, in September 2002, OSC issued two updates to the statements that expounded on the disclosure and use of information from OSC program files. These policy papers afford better understanding of how OSC uses and discloses the information that OSC acquires or creates while investigating and prosecuting cases.

²The Office of Special Counsel Reauthorization Act of 1994, P.L. 103-424, required OSC to issue a policy statement providing detailed guidelines on the disclosure and the use of information to be made available to each person alleging reprisal for whistleblowing.

Scope and Methodology

We examined efforts by OSC to manage its caseload. Our review provided information in the following areas (1) OSC's caseload by type and number and changes to the caseload between fiscal years 1997 to 2003, (2) the extent to which cases were processed within time frames set by Congress, (3) actions taken by management to address workload issues, and (4) the agency's perspective on the adequacy of its resources. In addition, we were asked to provide information on OSC's data tracking system and its privacy protection policies.

To determine the agency's caseload by type, number, and changes over time, we reviewed OSC's Annual Reports to Congress for fiscal years 1997 through 2002, the latest available, as well as information in OSC's budget request, annual performance plans, and other reports to Congress. We examined the information across the various reports and compared them to agency-generated data to ensure that data for each year were consistently stated. We discussed with agency officials the reasons for the fluctuations that occurred in the caseload over time.

For the reportable years under review, we received and reviewed data by case type. In our examination of the data, we identified discrepancies, primarily in the beginning and ending inventory of cases. To resolve these discrepancies, we met with OSC's Chief Information Officer. He told us that the methodology used for querying the system had limitations. In particular, the data entry operator used ad hoc queries that were not reviewed and verified. To provide us with accurate data, he developed a software program that offered a more reliable and consistent approach to querying OSC's database. We tested the accuracy and completeness of a sample of cases from OSC's database. Based on the results of our tests of required elements, we determined that the data were sufficiently reliable for the purposes of our report.

To determine the statutory time frames set by Congress, we reviewed statutory requirements for processing prohibited personnel practice and whistleblower disclosure cases. To determine the number of cases that were not meeting the prescribed timeframes, we obtained data on (1) the total number of cases processed, including subsets of the number of cases processed within and outside of the statutory timeframes, (2) the average time spent to process cases, (3) the beginning inventory levels, and (4) the number of cases in backlog. Based on this information, we computed and verified the number and percentage of cases in backlog for each year. Throughout the report, we refer to "processed cases" to denote that OSC has made the determination required within the statutory time limits for

prohibited personnel practices cases or whistleblower disclosure cases. We met with agency officials to discuss the delays in processing the cases and to obtain their views on the agency's ability to meet these time standards.

To learn about the actions taken by management to address workload issues, we met with various managers and staff responsible for implementing several agency-wide initiatives. We reviewed documentation describing the progress the agency made toward accomplishing internal reforms, including a major restructuring of organizational units and streamlining case processing procedures. We examined productivity measures resulting from changes to case processing procedures.

To obtain the agency's perspective on the adequacy of its resources, we spoke with agency officials and reviewed documents on the benefits of obtaining additional staff and funding to help eliminate the backlog and process cases more timely. We discussed the agency's view on the principal contributors to its inability to eliminate backlog cases. We then analyzed the information that we obtained to form conclusions about the extent to which the agency had made optimum use of its existing resources. Our findings about the need for an overall strategy on how the agency plans to reduce the backlog are based in part on our extensive work on strategic workforce planning.

To learn about OSC's case tracking system, OSC 2000, we reviewed documentation on the system's internal security controls and security features for safeguarding complaint information. To determine the policies and procedures in place, and management oversight capabilities to ensure reliability and quality, we met with the Chief Information Officer and the System Administrator. We also received a hands-on demonstration of system requirements for entering data. We assessed the reliability of the data in OSC 2000 by reviewing electronic queries of required data elements, reviewing existing information about the data and the system that produced them, and interviewing agency officials knowledgeable about the data. Based on our assessment of required data elements, including the recently generated caseload data, we determined that the data were sufficiently reliable for the purposes of our report.

To determine OSC's policy on privacy protection for the types of cases that it handles, we met with agency officials and examined agency policy statements and disclosure procedures developed for the privacy and confidentiality of complainants.

Organization of the Office of Special Counsel

In fiscal year 2003, OSC had five operating divisions: the Complaints and Disclosure Analysis Division, three Investigation and Prosecution Divisions, and the Legal Counsel and Policy Division. The three Investigation and Prosecution Divisions resulted from the 2001 merging of the former Investigation Division and Prosecution Divisions.

The Complaints and Disclosure Analysis Division includes OSC's two principal intake units for new cases received by the agency—the Complaints Examining Unit and the Disclosure Unit—and employs a total of 24 staff. The Complaints Examining Unit is the intake point for all prohibited personnel practices and other violations of civil service law, rule, or regulation within the OSC's jurisdiction. The attorneys and personnel management specialists in this unit conduct an initial review of complaints to determine whether they are within OSC's jurisdiction and whether further investigation is warranted. They refer all matters with a potentially valid claim to the Investigation and Prosecution Divisions.¹ The Disclosure Unit is responsible for reviewing information submitted by whistleblowers, and for advising the Special Counsel on the appropriate disposition of the case, including possible referral to the head of the relevant agency for investigation, referral to an agency Inspector General, or closure. Attorneys in this unit also analyze the reports of agency heads in response to the Special Counsel's referral to determine whether the reports appear reasonable and meet statutory requirements before the Special Counsel transmits them to the President and appropriate congressional oversight committees.

The Investigation and Prosecution Divisions consist of three divisions, including the Hatch Act Unit and the Alternative Dispute Resolution Unit. The three Investigation and Prosecution Divisions investigate complaints referred to them by the Complaints Examining Unit. Each division reviews pertinent records and interviews complainants and witnesses with knowledge of the matters alleged. Matters not resolved during the investigative phase undergo legal review and analysis to determine whether the matter warrants corrective action, disciplinary action or both. Attorneys from these units conduct litigation before the Merit Systems Protection Board. The units also represent the Special Counsel when OSC

¹When a matter is not referred for investigation, OSC provides complainants with a written statement of reasons, to which they may respond. On the basis of the response, if any, the Complaints Unit decides whether to finalize its preliminary determination to close the matter or to refer the matter for investigation.

intervenes or otherwise participates in other proceedings before the Merit Systems Protection Board.

The Hatch Act Unit, part of one of the Investigation and Prosecution Divisions, is responsible for the administration of Hatch Act restrictions on political activity by federal and certain state and local government employees. The unit issues advisory opinions to requesters seeking information about the application of the Act's provisions to specific activities. It also receives and reviews complaints alleging Hatch Act violations, referring complaints to an Investigation and Prosecution Division, when warranted, for further investigation and possible prosecution before the Merit Systems Protection Board.

In selected cases that have been referred for further investigation, the Alternative Dispute Resolution (ADR) unit, a part of another one of the Investigation and Prosecution Divisions, contacts the complainant and the employing agency to invite them to participate in OSC's voluntary Mediation Program. If both parties agree, OSC conducts a mediation session, led by OSC mediators who have mediation training and experience in federal personnel law. When mediation resolves the complaint, the parties execute a written and binding settlement agreement. If mediation does not resolve the complaint, it is referred for further investigation, as it would have been had the parties not attempted mediation.

The Legal Counsel and Policy Division serves as OSC's office of general counsel, manages the agency's Freedom of Information/Privacy Act, and ethics programs, and engages in policy planning, development, and implementation. The division is allotted five positions to carry out these functions.

OSC also has two administrative support units. The Human and Administrative Resources Management Branch, composed of six employees, provides personnel, procurement, and other administrative services; and the Information Systems Branch, with seven employees, provides information technology, records management and mail services.

Comments from the Office of Special Counsel



The Special Counsel

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

February 24, 2004

The Honorable David M. Walker
Comptroller General of the United States
General Accounting Office
441 G Street, N.W.
Washington, DC 20548

Dear Mr. Walker:

Thank you for the opportunity to formally respond in writing to the General Accounting Office's (GAO's) recent draft report (# GAO-04-36) on case management-related operations of the U.S. Office of Special Counsel (OSC). OSC has already conveyed several technical edits and corrections that I understand will be incorporated in the final report.

In examining case processing backlogs at OSC (primarily those involving prohibited personnel practice complaints and whistleblower disclosures), the GAO review has addressed a critical, long-standing issue of importance not just to this agency, but to individuals who seek its assistance, other government agencies, Congress, and the public. In the draft report received last month, GAO recommended that OSC's next annual report to Congress provide a detailed strategy designed to allow more consistent processing of cases within statutory time limits, and a reduction in the backlog of cases for which these limits have already passed. I accept the recommendation to provide Congress with such a strategy, and will work to implement that recommendation as expeditiously as possible.

As noted in the meeting with the GAO review team two weeks ago, previous Special Counsels have employed a variety of strategies to address case processing backlogs in one or more units of the agency; they have also communicated those strategies at various times and by various means within the Executive Branch (primarily to the Office of Management and Budget), and to OSC congressional oversight committees. Some strategies have succeeded more than others, and progress was made in reducing the backlog of prohibited personnel practice complaints during fiscal year (FY) 2003, but OSC cannot become complacent in the face of the continuing challenges posed by case processing backlogs across the board.

The Special Counsel

Letter to Hon. David M. Walker
February 24, 2004
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In the less than three months that I have been Special Counsel, it is already clear that the reasons for the persistence of case processing backlogs are many and variable; some are within OSC's control, while others are not. More remains to be done in coming weeks and months before we can arrive at and communicate a comprehensive and feasible strategy to address long-standing case processing backlogs. For that reason, and because OSC's annual report to Congress for FY 2003 has been substantially completed, a report to Congress on OSC's future strategy will be made as expeditiously as possible this year.

In closing, the convergence of the GAO report with the start of my tenure as Special Counsel has presented me and my staff with a valuable opportunity to build upon what has gone before, and to define a comprehensive new strategy for dealing with OSC case processing backlogs. I appreciate the contribution your staff has made to our understanding of the issues involved as we embark on that process, in furtherance of our commitment to provide all those we serve with quality service on a timely basis.

Sincerely,



Scott J. Bloch

GAO Contact and Staff Acknowledgments

GAO Contact

Belva Martin, (202) 512-4285

Acknowledgments

In addition to the person named above, Karin Fangman, Sharon Hogan, Michael Rose, and Greg Wilmoth made key contributions to this report.

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