

**“Truth matters in our work, and it would be nice if it mattered more often to the advocacy groups, the mainstream press and some Members of Congress.”
Letter from Scott J. Bloch, U.S. Special Counsel, to American Spectator Magazine, dated April 28, 2005, published May 2, 2005.**

Facts are stubborn things, but statistics are more pliable. ~Author Unknown

There are three kinds of lies – lies, damned lies and statistics. ~Benjamin Disraeli

FACT SHEET ON BACKLOG REDUCTION AND SUMMARY CLOSURE OF CASES BY THE U.S. OFFICE OF SPECIAL COUNSEL UNDER SPECIAL COUNSEL SCOTT BLOCH

The Government Accountability Project and Public Employees for Environmental Responsibility have been reviewing recent statements by Special Counsel Scott Bloch concerning the summary disposition of cases by the United States Office of Special Counsel, under his leadership. What follows is a review of a few of the misleading or untruthful statements that Special Counsel Bloch has recently made concerning this issue.

This Fact Sheet is limited to the manipulation and misuse of statistics by Special Counsel Bloch to defend against charges that he has transformed the Office of Special Counsel into a case-closing factory. Future fact sheets will cover deceptive statements made by Special Counsel Bloch that concern other matters, including, among others, crony hiring, issuing gag orders to his own staff, and partisan handling of Hatch Act complaints.

1. What Scott Bloch has told Congress, GAO, and the press about backlog reduction

Special Counsel Bloch has been widely criticized by public interest groups, as well as his own employees for attempting to dismantle the Office of Special Counsel. Their charge is that Mr. Bloch’s management decisions and hostility to open government has disabled the Office of Special Counsel from performing its core mission of receiving and referring whistleblower disclosures for investigation, and protecting government workers against retaliation for whistleblowing and other prohibited personnel practices.

In response, Mr. Bloch has stated that his critics’ allegations are untrue. He insists that since he arrived at OSC in January 2004, he has focused on reducing an unacceptably large backlog of cases, while at the same time increasing OSC’s enforcement of protections for whistleblowers and other victims of prohibited personnel practices.

Mr. Bloch's comments in an interview with Paul Singer, of the National Journal, are typical. According to the article, Mr. Bloch "characterize[d] the complaints against his office as the work of a few disgruntled employees, reinforced by groups that are on a mission to embarrass the White House." "They don't want a Bush appointee like myself to get credit' for reducing a large backlog of cases that were languishing when [I] took office in 2004." In fact, Mr. Bloch told the reporter, "We have doubled our enforcement over prior years in all areas'." Scott Bloch, quoted by Paul Singer, "By the Horns", National Journal, March 25, 2005.

Here are a just a few of the other similar statements Mr. Bloch has made on this issue to the public, to Congress, and to the General Accounting Office:

"At the end of the first year, [Mr. Bloch] and his team have reduced the pending backlog by over 80 percent. Last year, the number of pending whistleblower claims was 690, prohibited personnel practice claims were more than 600, and Hatch Act complaints numbered nearly 200. Moreover, OSC has doubled the internal referral rate of meritorious cases for further action in the investigation and prosecution unit. Presently, the numbers of pending older complaints are approximately less than 100, 30, and 40 respectively . . ." OSC Press Release 05_01, January 7, 2005.

"In [FY] 2004, the overall case backlog was reduced by 82%, from 1021 to 201 cases according to the OSC. . ."prohibited personnel practices (PPP) [were reduced] from 447 to 119. Hohlman, David; "No Catholics Need Apply," American Spectator Magazine, April 15, 2005, para. 4, citing Special Counsel Bloch as the source. (Hereinafter referred to as "Hohlman article").

"During the period of backlog reduction, we more than doubled the rate of referral to our investigation and prosecution unit of those screened cases, so that we had more new claims that we accepted as validated in whole or in part than had been validated previously." Scott J. Bloch, April 28, 2005 Letter to American Spectator Magazine, paragraph 3, published on May 2, 2005. (Hereinafter referred to as "Bloch Spectator Letter").

"OSC referred 22% more PPPs for internal investigation during the backlog period." Hohlman article at paragraph 11.

"We're finding more wheat in the chaff", Bloch said. Further, according to OSC, about 500 backlogged cases were low priority and already slated for closure by Bloch's predecessor." Hohlman article at paragraph 12

"We had hundreds of whistleblower disclosures that were literally sitting in piles, unattended, some for more than three years, which were authorized under [former Special Counsel Elaine] Kaplan's priority system for closure as low priority probably closures, a system she created." Bloch Spectator Letter at paragraph 5.

“We did not shift cases from one backlog to another, and we have insisted that older claims be dealt with. I have oft repeated William Gladstone’s famous aphorism: ‘Justice delayed is justice denied’.” Bloch Spectator Letter, at para. 4.

“I have kept my pledge to Congress and federal employees, and am pleased to report that we have made tremendous progress in our first year [reducing the “backlog”]. In January 2005, the backlog was reduced to approximately 100 cases [in the Disclosure Unit], 30 cases [prohibited personnel practices], and 40 cases [Hatch Act unit.” February 14, 2005 Letter from Special Counsel Bloch to Rep. Henry Waxman, at 2.

“I am happy to report that OSC has reduced the overall case backlog by 82 percent, from 1121 to 201 cases, by the end of Calendar Year (CY) 2004” . . . “Furthermore, during the backlog reduction project period, OSC increased by 22% the internal referral rate of meritorious cases for further action in the investigation and prosecution unit.” May 17, 2005 Letter from Scott Bloch to David Walker, GAO, at 2. See also Attachment A “OSC Backlogged Cases in CY 2003, v. CY 2004 (observing that “**the overall case backlog reduction is 82%**”)(original emphasis).

“The IPD (Investigation and Prosecution Division) Strategy to Reduce the Backlog: I created four mechanisms that substantially reduced the PPP case backlog and will ensure this large backlog never occurs again.” May 17, 2005 Letter from Scott Bloch to David Walker, GAO, at 6.

“In FY 2003, DU [the Disclosure Unit] had 690 cases in its inventory. . . Although a majority of those cases had been slated for closure by my predecessor as low priority cases as far as severity of potential harm, we nearly doubled the number of referrals in FY 2004. Moreover, the Agency referrals increased from 14 in FY 2003 to 26 in FY 2004.” May 17, 2005 Letter from Scott Bloch to David Walker, GAO, at 10.

2. The Truth Behind the Numbers Game:

Scott Bloch’s claim that he has reduced the overall backlog of disclosures and prohibited personnel practice complaints at OSC by 82% is a lie. His claim that he has doubled the number of cases referred for a full investigation is also untrue. Further, the evidence shows that, far from “doubling enforcement” in prohibited personnel practice cases, he appears to have cut it in half.

How PPP cases are processed:

Prohibited personnel practice (PPP) complaints at OSC are received and screened in the Complaints Examining Unit (CEU). CEU either closes the cases or refers them to the investigative divisions (IPDs) for a complete investigation and legal disposition. By

statute, OSC is supposed to resolve ppp claims within 240 days. 5 U.S.C. §1214(b)(2)(A)(i). The “backlog” accordingly, consists of cases that are over 240 days old. See Strategy for Reducing Persistent Backlog of Cases Should Be Provided to Congress, GAO-04-36 (March 2004)(hereinafter “GAO Report”) at p.2.

Exaggerating the Initial “Backlog” of PPP cases by Including All Cases in the Agency’s Inventory, Rather Than Just Over-Age Cases

Mr. Bloch has consistently blurred the distinction between the number of PPP cases in OSC’s inventory and the number of PPP cases that are “backlogged.” This is an important distinction. In fact, the GAO report that Mr. Bloch has used to justify his “reorganization” and case closure project noted that between 1997 and 2003, in 77% of the PPP cases that OSC had resolved, it had met the 240 day time limit. GAO Report at p.11. Further, the GAO figures show that while a backlog of overage PPP cases certainly still existed, the percentage of cases resolved within the statutory time limit had been improving steadily between FY 2001 and FY 2003 as a result of a reorganization conducted by the previous Special Counsel (from 58% in FY 2001, to 75% in FY 2002, to 85% in FY 2003), as well as the implementation of an Alternative Dispute Resolution (ADR) program. Id. at 12.¹

Failure to Provide Key Information

Mr. Bloch claims that he has further reduced what he calls the “backlog” of PPP cases (by which he means the inventory of cases in CEU). But Mr. Bloch has never released figures, comparative or otherwise, concerning the number of PPP cases at the agency that were over 240 days old at the end of FY 2004, as compared to the end of FY 2003, or even on a calendar year basis. Most important of all, Mr. Bloch has never publicly disclosed how many cases (either backlogged or otherwise) are now stuck in the middle of OSC’s pipeline in the IPDs.

The Backlog of Overage PPP Cases Has Likely Increased, Possibly By Significant Amounts

Although Mr. Bloch has never released the figures, there is good reason to believe that the inventory of cases in the IPDs, as well as the backlog of such cases, have increased, possibly in a dramatic fashion during the reported periods (either calendar or fiscal year).² With respect to prohibited personnel practices, Mr. Bloch has devoted the

¹ In his reorganization, Mr. Bloch proposed to move the highly successful ADR program to Detroit. Both the Chief of the ADR program and the Director of Mediation left the agency rather than accepting the involuntary transfers. As a result, there is no one at OSC now who has any significant experience running such a program, or mediating cases.

² The tables and figures supplied to GAO in Mr. Bloch’s letter of May 17th are sometimes based on calendar year, and sometimes based on fiscal year. At page 4, n.3, Mr. Bloch claims that fiscal year figures concerning the number of cases processed by

lion's share of OSC's resources to CEU where cases can always be handled more quickly because that unit's function is limited to screening complaints. The IPDs are where the most time consuming investigative and legal work, by far, is done. For that reason, the vast majority of the older "backlogged" cases are always in the IPDs, not CEU. Accordingly, if the number of cases in the IPD inventory has increased by 50% for example, a corresponding 75% reduction of the inventory of cases in CEU could mean that the backlog (i.e. of overage cases) has actually increased. There is no way of knowing the scope of this problem because Mr. Bloch has persistently hidden these figures, even as he purports to report back to GAO on the "reduction" of the "backlog."

Backlogs in the Investigative Units Are Especially Damaging; The Number of Complainants Receiving Relief Has Dropped Precipitously

In any event, the number of cases in the IPDs is very important as a practical matter because, as noted, the cases in the IPDs take much longer to resolve. By diverting resources away from the IPDs to show a drop in the number of cases in the intake unit, and by driving away as many of 30% of the senior attorneys and investigators assigned to the IPDs, Mr. Bloch has created the more serious problem identified above: a backlog of overage cases in the IPDs.

The diversion of resources away from the IPDs and the high attrition rate of experienced personnel caused by Mr. Bloch's policies has a negative impact upon all complainants, but especially those with the most meritorious cases. In the vast majority of cases, a complainant who has a meritorious case receives relief through an informal settlement, which occurs while their case is being investigated in an IPD or at the end of that process. Settlements rarely occur while cases are in the intake unit. Thus, under Mr. Bloch's tenure, the number of favorable actions secured by complainants appears to have dropped precipitously. According to OSC's annual reports, in FY 2002, OSC secured 126 favorable actions for complainants. In FY 2003, OSC secured 115 favorable actions for complainants. Mr. Bloch has never announced the number of corrective actions achieved in FY 2004 (the year that he implemented his backlog reduction plan). That figure is nonetheless buried in the President's Budget request for FY 2005 (at page 1209). In FY 2004, the number of favorable actions secured by OSC dropped to 66.

The Claim that the Referral Rate for PPP cases Has Doubled is Untrue

Finally, the claim that Mr. Bloch has "doubled enforcement" and that under his watch the rate of referral of cases for investigation has gone from 10% to 22%, is untrue. In fact, in his letter to Comptroller General David Walker (at page 4), Mr. Bloch notes that the referral rate in FY 2004 was the same as the referral rate in FY 2003 (10%), which is consistent with historical rates of referral at the agency. His reference to a temporary 22% referral rate covers only part of the period, in the second half of fiscal

CEU "are not available." This claim is false. OSC maintains a case-tracking system that can be searched, and from which reports can be retrieved. Until Mr. Bloch arrived, OSC always reported its case figures on a fiscal year basis.

year 2004, where he instructed OSC staff to start referring more cases to the IPDs. This increase in referrals at the end of the fiscal year helped reduce the number of cases in the CEU inventory (which is the only PPP figure that Mr. Bloch has reported). It only increased the inventory in the IPDs. This is nothing more than moving deck chairs around on the Titanic.³

Time to Tell the Truth:

Mr. Bloch, tell Congress the truth: how many cases are stuck in the IPDs and how are you going to fully investigate them? Is it your intention to create a new short cuts so that you can close those cases and claim to have addressed the new backlog you have created? How are you going to conduct full investigations of these cases in the IPDs now that you have wasted energy and resources to open an unnecessary field office in Detroit, destroyed the ADR program, and driven a large portion of the experienced career staff out of the agency?

2. The Truth About Backlog Reduction in the Disclosure Unit

The Backlog in the Disclosure Unit

While the number of overage PPP cases has been steadily decreasing, there has been a large increase in the number of overage cases in the Disclosure Unit over the last few years. All observers, including Mr. Bloch, have agreed that this spike is due in large part to increased public awareness of that Unit and high profile disclosures investigated under the previous Special Counsel. Intake in that Unit has skyrocketed since 2001.

The Failure to Fill Vacant Positions in the Disclosure Unit

In light of this surge in new disclosures cases, at the request of the previous Administration, OSC secured enough additional positions for FY 2004 to double the size of the Disclosure Unit staff (from 5 to 10). Those positions were never filled; instead, Mr. Bloch decided to dramatically decrease the attention given to whistleblower disclosures, particularly in so-called “low priority” cases. He then used the career slots that Congress provided for the Disclosure Unit to increase his own political staff, so that it is now more than double the size of the Schedule C staff in previous administrations.

³ Mr. Bloch has never separately broken down the rate of referral of whistleblower retaliation cases, which has historically been higher than the rate of referral of other kinds of prohibited personnel practices. The rate of referral of whistleblower retaliation cases for investigation was 16 % in FY 2002, 19% in FY 2001, and 29% in FY 2000. (Derived by comparing the number of whistleblower retaliation cases referred each year to the number of such cases over which OSC had jurisdiction that were processed).

Cooking the Books, Closing Whistleblower Disclosures Without Adequate Review, and Fraudulent Claims that More Disclosures Are Being Investigated

Mr. Bloch has announced that during his tenure, he has reduced the number of whistleblower disclosure cases at OSC from an inventory of 690 at the end of FY 2003 to an inventory of 108 at the end of FY 2004. In FY 2004, the Disclosure Unit processed 1154 cases as compared to 401 in FY 2003.

First, it bears noting that over 100 of the disclosures Mr. Bloch counts among those he closed involved a single matter that was outside of OSC's jurisdiction to begin with: a petition filed by some 1000 private citizens concerning the possibility of a link between autism and mercury in childhood vaccines. OSC PR 04_07 (May 20, 2004). It is suspected by some staff that Mr. Bloch was personally interested in this issue and may well encouraged the filing of that petition, despite the fact that OSC had no jurisdiction over it. He subsequently used agency resources to review the petition and then to provide Congress and the President with his own personal views about this highly technical issue, observing, despite the contrary views of the Center for Disease Control and the Food and Drug Administration, that "[i]t appears the science is inconclusive, not definitive." Indeed, he noted, "based on my limited review of the literature, there appears to be equally qualified experts on both sides of the emotional scientific and medical debate."

Similarly, a sizable portion of the increase in the number of disclosures processed is attributable to the summary closure of 500 so-called "low priority" cases. Mr. Bloch has stated that these cases were already "slated for closure" under the previous Administration, and that he has actually increased (indeed, "doubled") the number of disclosures referred, by finding "finding more wheat in the chaff."

These claims are untrue and misleading. When OSC makes a referral under 5 U.S.C. §1213(c), the head of the agency involved must conduct an investigation and report back to the Special Counsel, who then considers the whistleblower's comments and makes a determination whether the investigation appears reasonable. The Special Counsel then makes the investigative report public and refers it to the President and Congress for further action.

In FY 2003, when the agency was without political leadership for 5 months (due to the expiration of the previous Special Counsel's term), OSC referred 11 disclosures to heads of agencies for investigation under 5 U.S.C. §1213(c). The preceding year, FY 2002, OSC had referred 19 disclosures for investigation pursuant to section 1213(c).

Mr. Bloch has claimed that in FY 2004, while more than doubling the number of disclosures dismissed without referral, he also increased the number of disclosures referred for investigation to 26. He has made this claim in an effort to show that—despite the fact that the percentage of disclosures he has referred is much lower than in previous years, he is not giving whistleblower disclosures short shrift. Indeed, he and his aides have repeatedly claimed that 500 of the disclosures have been closed without

referral were slated for closure by the previous Special Counsel, so that those disclosures should not, in any event, be counted against their overall percentage of matters referred.

Mr. Bloch is again manipulating figures to hide the truth. As shown in the small print of the President's budget submission for FY 2005, at p. 1209, during FY 2004, OSC made 18 referrals under section 1213(c), not 26. That number is higher than FY 2003, when there was a vacancy in the Special Counsel position for five months, but slightly lower than FY 2002, under the previous Special Counsel.⁴ Thus, while Mr. Bloch has surely closed many more disclosures than ever before, he has not increased the number of referrals correspondingly. The referral percentage is much lower.

Separating the Wheat From the Chaff?: Unnecessary and Irresponsible Summary Disposition of 500 Whistleblower Disclosures

Contrary to repeated representations made by Mr. Bloch and his political staff, under prior policy, cases that were assigned to the lowest priority level were not thereby slated for closure. Priorities were assigned to disclosures based upon the information initially provided by the whistleblower in his or her written submission. The priority system determined when not if a disclosure would receive full review.

Before Mr. Bloch initiated his "backlog reduction" effort, whistleblowers were contacted before even "low priority" cases would be dismissed. Sometimes, as a result of those contacts (usually by telephone), a decision was made that the disclosures should have a higher priority and that they should not be dismissed but instead referred for investigation.

One such case, ironically enough, is the one that Mr. Bloch refers to in his letter of May 17th, at p. 11, involving "an Army rocket system not working." That particular disclosure was referred for investigation before Mr. Bloch became Special Counsel. Mr. Bloch purports to distinguish that case from those he has summarily closed. In fact, the non-functioning rocket system had been a "low priority" case, until the Disclosure Unit spoke with the whistleblower.

⁴ The other eight cases (of the total 26) were disclosures that OSC simply sent over to various Inspector General offices, for their consideration of whether an investigation was warranted. OSC has had a policy of making such referrals to Inspectors General where the disclosures appear substantiated but the matters disclosed are relatively minor. Unlike section 1213(c) referrals to agency heads, inspectors general are not required to investigate matters referred by OSC. Further, OSC has historically referred all anonymous whistleblower disclosures to IG offices because it lacks jurisdiction over anonymous disclosures. Before Mr. Bloch became Special Counsel OSC kept track of the number of cases referred to inspector generals in its annual reports, but did not identify specifically which cases were sent over because the whistleblowers were anonymous, and which were sent because the matters involved were minor. Its annual reports for FY 2000, 2001, and 2002 show 114, 134, and 144 IG referrals.

Another “low priority” matter is a case that Mr. Bloch has been touting widely in the press, which involved Kristin Shott, a Navy welder, and recipient of the last Special Counsel’s Public Servant Award ever given.⁵ Originally, Ms. Shott’s disclosure had been given a low priority because her filings themselves did not provide information about the welding defects that were ultimately the subject of the prior Special Counsel’s referral of that case. It was only after a telephone call from the Disclosure Unit, that the scope of her disclosure was discovered and a decision was made to refer the matter for investigation. Thereafter, an investigation was conducted and significant safety problems were identified.

OSC has never kept track of how many disclosures that were initially given a low priority were ultimately referred for investigation after they were reviewed and the whistleblower was contacted. As these two cases demonstrate, however, it makes a difference when whistleblowers are contacted. Closing 500 disclosures without making such contact may improve OSC’s statistics but it is irresponsible.

The summary procedures Mr. Bloch has adopted to review disclosures are especially irresponsible because Mr. Bloch did not have to take short cuts with these 500 cases. As noted above, in light of the massive increase in new disclosures, Congress had allocated additional staff to the Disclosure Unit, beginning in FY 2004. Additional staff could have tackled the “pile” of disclosures to which Mr. Bloch dismissively refers, in a responsible manner.

CONCLUSION

As the philosopher Hilaire Belloc put it: “It has long recognized by public men of all kinds ... that statistics come under the head of lying, and that no lie is so false or inconclusive as that which is based on statistics.” Special Counsel Bloch needs to stop manipulating statistics, and provide the “truth” he accuses others of distorting.

⁵ Ms. Shott received this award in March 2003, at the end of the prior Special Counsel’s term. Mr. Bloch has not issued any Public Servant awards.