

Mr. Scott Bloch  
U.S. Special Counsel  
1730 M Street, N.W.  
Washington, DC 20036-4505

April 15, 2004

Dear Mr. Bloch:

On behalf of the Government Accountability Project, Public Employees for Environmental Responsibility, and the Project on Government Oversight, we are writing to express our profound concern about your recent decision to impose a gag order on the career staff of the Office of Special Counsel. In an email sent to all employees last week, you prohibited them from discussing what you called “confidential or sensitive internal agency matters” with anyone outside the agency, without advance approval from you or one of your political appointees. The email was originally sent to the heads of OSC’s program divisions who were apparently instructed to distribute it to the entire OSC staff. In its entirety, it reads as follows:

“The Special Counsel has requested that we convey to you that he and his staff have completed their legal review of OSC’s jurisdiction to process claims under title 5, section 2302(b)(10), alleging sexual orientation discrimination. Their conclusions can be found in a recently posted press release on OSC’s website. If, in the performance of your case-processing duties, current or potential complainants, their representatives, or agency representatives ask about OSC’s policy on (b)(10) complaints, you should simply refer them to the press release on our web site as a complete and definitive statement of OSC’s policy.

Please also note that the Special Counsel has directed that any official comment on or discussion of confidential or sensitive internal agency matters with anyone outside OSC must be approved in advance by an IOSC official.”

We were surprised at the sweeping and overbroad language contained in paragraph two of the email, because it is antithetical to OSC’s mission, and violates the very laws you are charged with enforcing. These laws include the Whistleblower Protection Act, the “Anti-Gag” statute, and the First Amendment. Indeed, we would expect that if another agency imposed such an order on its own employees, OSC would open an investigation and demand its withdrawal. In the interests of open government and protecting federal employees’ rights to free speech as well as the public’s right to know, our organizations are calling upon you now to withdraw this improper, counterproductive policy. We also call upon you to reassure OSC employees that you will respect their exercise of these important rights, just as OSC expects other agencies to do for their own workforce.

First, your directive violates the Whistleblower Protection Act. As the head of the agency, you are entitled to require the agency’s employees to clear with you any official statements they make on behalf of the agency. Your order, however, is not limited to

official statements. It implies that such clearance is required for “discussions” held in any context, to any audience. On its face, in direct contravention of the Whistleblower Protection Act, the order prohibits OSC’s career employees from making disclosures of misconduct or malfeasance to members of Congress, its oversight committees, and/or the press. Such disclosures would, by definition, involve “sensitive internal agency matters.” And it goes without saying that one could hardly expect employees to be willing to come forward and make such disclosures, if they had to be cleared in advance, perhaps with the very individuals engaging in the misconduct.

Your distribution of this email also violates the “Anti-Gag” statute, [H.R. 2673, Sec. 620, passed as P.L. 108-199, signed January 23, 2004]. That statute prohibits the use of appropriated funds to implement “nondisclosure policies” that do not contain provisions explicitly preserving employees’ rights to make disclosures as guaranteed by the WPA, and other laws.

Finally, your new policy violates the First Amendment. The phrase “confidential or sensitive internal agency matters” is vague and overbroad. The use of this vague phrase as part of a prior restraint on speech has a clear chilling effect on the rights of OSC’s employees to express their opinions in their personal capacities on any matter of public concern that falls within the agency’s jurisdiction. Such prior restraints on the speech of public employees are heavily disfavored and have been ruled unconstitutional because of their negative impact on both the free speech rights of employees and upon the public’s interest in knowing what its government is doing. See e.g. *Harman v. City of New York*, 140 F.3d 111 (2d Cir. 1998)(striking down executive orders requiring public employees to secure advance approval before speaking to the media about policies and activities of child welfare and social services agencies).

This directive is even more disturbing coming on the heels of recent statements you made to Federal Times. In an interview with Federal Times, excerpts of which were published in the March 22nd edition, you expressed annoyance that employees whom you disparagingly referred to as “leakers” might have notified the press about your decision to take information regarding sexual orientation discrimination off OSC’s website and out of other public documents. If, in fact, employees had provided this information to the press, they would have been acting well within their rights under the First Amendment to comment on matters of public concern, and possibly under the Whistleblower Protection Act, to disclose what they reasonably believed were violations of laws, rules or regulations, or abuses of authority.

As the head of the agency charged with protecting whistleblowers, it is deeply offensive that you chose to use the pejorative term “leaker” to refer to your own employees who may have engaged in protected speech. Indeed, the irritation you expressed about “leakers” within OSC suggests your endorsement of a form of secret government that is inconsistent with the Special Counsel’s role as a champion of open government.

In closing, we remind you that our organizations are devoted to protecting the rights of employees, in both the public and private sector, to speak out on matters of public

concern. In recent years, the staff of the Office of Special Counsel has worked in partnership with us to that end. It is crucial to protect their rights to speak out, for the same reason it is important to protect the free speech rights of those employees who come to OSC seeking its assistance. Indeed, as head of OSC, you should be setting an example of openness for other agencies to follow. Your contrary example does not bode well, not only for OSC's own employees but for the thousands of others who will come to the agency during your tenure, seeking its protection.

Sincerely,

Danielle Brian  
Executive Director  
Project on Government Oversight

Jeff Ruch  
Executive Director  
Public Employees for Environmental Responsibility (PEER)

Louis Clark  
President  
The Government Accountability Project