



Office of Inspections  
Office of Inspector General  
U.S. General Services Administration

## **Evaluation of GSA Nondisclosure Policy**

**JE18-002**  
**March 8, 2018**

## Introduction

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The Office of Inspector General (OIG), Office of Inspections reviewed allegations regarding a new General Services Administration (GSA) nondisclosure policy concerning employee communications with Congress. Our review included whether GSA implemented such a policy, and if so, whether the policy violated the Whistleblower Protection Enhancement Act (WPEA) or other laws, regulations, or GSA policy.<sup>1</sup>

From February 20, 2015 to July 24, 2017, GSA had a published policy governing congressional and intergovernmental communications. In February 2017, GSA began implementing a series of additional unpublished policies that effectively amended GSA's published policy governing communications with Congress.

On July 24, 2017, GSA issued a new published policy governing congressional and intergovernmental communications that remains in effect today. The current published policy, however, does not reflect aspects of GSA's prior unpublished policies that remained in practice as of December 2017. The current published policy also does not reference White House policy statements regarding communications with Congress, which GSA officials state are also part of GSA's policy.

The GSA policies we reviewed include:

- GSA Order ADM 1040.2, *Congressional and Intergovernmental Inquiries and Relations*, in effect February 20, 2015 until its cancellation on July 24, 2017;
- a series of unpublished policies implemented by GSA from February to May 2017, further restricting communications by GSA employees with Members of Congress or congressional staff other than committee chairmen;<sup>2</sup>
- an unpublished policy GSA implemented based on written guidance the White House Office of Legislative Affairs provided to GSA in May 2017; and
- GSA Order ADM 1040.3, *Congressional and Intergovernmental Inquiries and Relations*, in effect July 24, 2017, to the present.

All of the above GSA policies operate as nondisclosure policies, and none contain the whistleblower protection language that the WPEA requires be included in federal government nondisclosure policies. The WPEA's whistleblower protection language serves the important purpose of alerting federal employees that any nondisclosure policies, forms, or agreements imposed by the federal government do "not override employee rights and obligations created by

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<sup>1</sup> The WPEA was enacted as Pub. L. No. 112-199, 126 Stat. 1465 (2012).

<sup>2</sup> For purposes of this report, a "Member" refers to any Member of the Senate or the House of Representatives, Delegate to the House of Representatives, the Resident Commissioner from Puerto Rico, or the Vice President acting other than in the capacity of a committee chairman. See 5 U.S.C. § 2106 (2012). "Chairmen" refer to those Members acting in the capacity of a duly appointed chair of a congressional committee under the rules of the Senate and House of Representatives.

existing statute or Executive Order relating to classified information, communications with Congress, the reporting of violations to an inspector general (IG), or whistleblower protection.”<sup>3</sup>

GSA did not comply with its own internal policymaking directive in implementing its unpublished policies governing congressional communications from February to July 2017. GSA’s failure to follow its established process for creating and implementing new policies led to inconsistent awareness and interpretation of the policies. Finally, GSA’s current written policy governing congressional and intergovernmental relations and inquiries is ambiguous and should be clarified to avoid confusion on the part of GSA employees, Members of Congress, and potential whistleblowers.

Our report makes two recommendations to address the issues identified during the evaluation.

## **Background**

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### **The Whistleblower Protection Enhancement Act (WPEA)**

Congress enacted the WPEA in 2012 to strengthen federal government whistleblower rights and protections.<sup>4</sup> The WPEA requires all federal government “nondisclosure policies, forms, and agreements” implemented on or after the WPEA’s effective date to include specific language clarifying that the policy, form, or agreement in question does not impact statutory whistleblower protections.<sup>5</sup> In particular, the WPEA mandates that all such federal government nondisclosure policies, forms, and agreements include the following statement:

These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are

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<sup>3</sup> S. REP. NO. 112-155, at 16(2012), *reprinted in* 2012 U.S.C.C.A.N. 589, 604.

<sup>4</sup> *See* H.R. REP. 112-508(I), at 5, 2012 WL 1962907, at \*5 (2012) (“Whistleblowers are crucial in helping to expose waste, fraud, abuse, mismanagement and criminal activity across the Federal government. Their disclosures can save billions of dollars, and even human lives. It is vital that Congress encourage – not discourage – these well-intentioned individuals from coming forward. To accomplish that, prospective whistleblowers must be protected from reprisal.”); S. REP. NO. 112-155, at 1 (2012), *reprinted in* 2012 U.S.C.C.A.N. 589, 589 (“The Whistleblower Protection Enhancement Act of 2012 will strengthen the rights of and protections for federal whistleblowers so that they can more effectively help root out waste, fraud, and abuse in the federal government.”).

<sup>5</sup> Pub. L. No. 112-199, § 115(a)(1), 126 Stat. at 1473 (codified as 5 U.S.C. § 2302 statutory note). Section 115(a)(3)(B) of the WPEA governs nondisclosure policies, forms, or agreements in effect prior to the effective date of the WPEA. WPEA, Pub. L. No. 112-199, § 115(a)(3), 126 Stat. at 1465. All of the GSA policies reviewed in this evaluation were implemented after WPEA’s effective date.

controlling.<sup>6</sup>

As the WPEA mandates that the required whistleblower protection language be included in “any” nondisclosure policy, form, or agreement, regardless of type, the WPEA effectively requires that such policies, forms, and agreements be made in writing.

Section 104 of the WPEA defines the implementation or enforcement of any nondisclosure policy, form, or agreement as a “personnel action,” and makes it a prohibited personnel practice to implement or enforce “any nondisclosure policy, form, or agreement” that does not contain the required whistleblower protection language.<sup>7</sup> During the time period reviewed, the governing appropriations acts also contained provisions stating that “[n]o funds appropriated in this or any other Act may be used to implement or enforce ... any other nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain” the language mandated by the WPEA.<sup>8</sup>

The U.S. Office of Special Counsel is responsible for protecting federal employees and applicants from reprisal for whistleblowing and for assisting agencies in educating the federal workforce about whistleblower rights and protections. The U.S. Office of Special Counsel has advised executive departments and agencies that the statement mandated by the WPEA “should be incorporated into every non-disclosure policy, form, or agreement used by an agency.”<sup>9</sup> GSA’s internal whistleblower protection website likewise provides that the required whistleblower protection language “applies to, and must be included in, non-disclosure policies, forms, or agreements of the Federal government with current or former employees.”

### **GSA Policies Governing Congressional Inquiries during the Period Reviewed**

From February 2015 to the present, GSA implemented a series of published and unpublished policies governing communications by GSA employees to Congress and other intergovernmental entities.

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<sup>6</sup> 5 U.S.C. § 2302 statutory note (2012).

<sup>7</sup> 5 U.S.C. §§ 2302(a)(2)(A)(xi), 2302(b)(13).

<sup>8</sup> Consolidated Appropriations Act, 2017, Div. E, Financial Services and General Government Appropriations Act, Title VII, § 744, Pub. L. No. 115-31, 131 Stat. 135, 389 (May 5, 2017); Consolidated Appropriations Act, 2016, Div. E., Financial Services and Government Appropriations Act, Title VII, § 744, Pub. L. No. 114-113, 129 Stat. 2242, 2485 (December 18, 2015); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, Div. E, Financial Services and General Government Appropriations Act, 2015, Title VI, § 747, 128 Stat. 2130, 2392 (December 16, 2014). The relevant provision of the Consolidated Appropriations Act of 2016 remained in effect through a series of continuing resolutions and legislation until the Consolidated Appropriations Act of 2017 was signed into law.

<sup>9</sup> Memorandum from Special Counsel Carolyn Lerner for Executive Departments and Agencies on the Whistleblower Protection Enhancement Act of 2012 and Non-Disclosure Policies, Forms, and Agreements, at 2 (March 14, 2013), *available at* <https://osc.gov/Pages/PPP-Resources.aspx>. See also Memorandum from Special Counsel Henry J. Kerner for Executive Departments and Agencies on Non-Disclosure Policies, Forms, or Agreements (February 1, 2018), *available at* <https://osc.gov/Resources/NDA%20Memo%20Update.pdf>.

**1. GSA Order ADM 1040.2, *Congressional and Intergovernmental Inquiries and Relations* (February 20, 2015)**

GSA Order ADM 1040.2 outlined the agency’s written policy for handling congressional and intergovernmental inquiries and relations in effect from February 20, 2015 until its cancellation on July 24, 2017. The order informed employees that “GSA must speak with one voice.” To this end, the order “sets out procedures all GSA employees must follow in providing information about GSA policies and positions to Congress, State, local, tribal, and foreign governments.”<sup>10</sup> The order required that GSA employees immediately forward all congressional communications they received, “whether by correspondence, telephone calls, email, fax, or any other media,” to GSA’s Associate Administrator for Congressional and Intergovernmental Affairs (OCIA Associate Administrator) for coordination by the Office of Congressional and Intergovernmental Affairs (OCIA). The order provided that “OCIA will be responsible for coordinating all responses back to Congress to ensure they are accurate, timely, helpful, and consistent with the views of the Agency and the Administration.”<sup>11</sup> The order did not carve out an exception for whistleblower communications.

The order also set forth GSA’s general policy that “GSA employees must obtain approval from the [OCIA] Associate Administrator ... or his/her designee before responding to inquiries from Congress for the Administrator’s or other official GSA position on legislation or other substantive issues to ensure accurate and up-to-date information is provided.”<sup>12</sup> The order defined “Congressional inquiries” to include those from Members of Congress, their personal and leadership staff, congressional committee staff and others, such as the Congressional Budget Office and Congressional Research Service.<sup>13</sup>

The order was intended to ensure, among other things, that “the Administrator’s and Administration’s positions and policies are conveyed to Congress ... accurately, clearly, promptly, professionally, and consistently” and that the Administrator be kept “informed of all agency-related matters of interest to Congress ....”<sup>14</sup>

**2. Unpublished implemented policies from February to May 2017 governing communications with Congress**

In February 2017, GSA began to deviate from its prior practices for responding to congressional inquiries, based on oral guidance and direction from the White House. GSA’s Senior White

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<sup>10</sup> GSA Order ADM 1040.2, *Congressional and Intergovernmental Inquiries and Relations* (February 20, 2015), at § 3.

<sup>11</sup> *Id.* at § 5a(1).

<sup>12</sup> *Id.* at § 4. The order provided for limited exceptions for some senior GSA officials and provided that the Associate Administrator may grant conditional waivers on a case-by-case basis. *Id.* at § 7.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at § 1.a.

House Advisor and Acting General Counsel serving at the time, orally communicated the initial changes to others at GSA. Initially, the new policy prohibited responding to “oversight” or “investigative” congressional inquiries made by Members other than Chairmen. GSA officials told us the policy was based on the conclusion that individual Members do not have oversight or investigative authority, and that only the Senate and House as a whole, or congressional committees, have this authority.

The Senior White House Advisor and Acting General Counsel communicated the new policy to GSA officials involved in coordinating communications with Congress, including personnel in the Administrator’s Office, the OCIA, the Office of Administrative Services, and the Office of General Counsel (OGC). Some of these officials then orally communicated the new policy to their subordinates. GSA personnel told us they heard about the new policy at different times and in different settings, ranging from small in-person meetings to telephone calls and hallway conversations.

Acting Administrator Timothy Horne, Acting Deputy Administrator Anthony Costa, and several other senior GSA leaders stated that the new policy was a change from GSA’s prior practice. GSA officials stated that the prior practice had been to process all congressional inquiries for a substantive response, while sometimes providing a redacted response or more limited information to Members than would be provided to Chairmen. GSA officials identified information protected from disclosure under the Privacy Act or the Procurement Integrity Act as examples of the type of information that would have been disclosed to Chairmen but not to other Members under GSA’s prior practice.<sup>15</sup>

GSA officials stated that the new policy changed over time. Initially the new policy was not to respond at all to oversight or investigative inquiries or requests from Members other than Chairmen. Some GSA officials estimated that this policy lasted approximately a month, during which the agency provided no responses to individual Member inquiries. Other GSA officials stated that the policy did not apply to inquiries made on behalf of a Member’s constituents or to inquiries relating to services GSA provided to Congress, such as furnishing office space, as these were not deemed to be oversight-related.

GSA modified the policy in March 2017 to permit the disclosure of publicly available information, or information that would be subject to release to any requester under the Freedom of Information Act (FOIA), in response to Member inquiries deemed to be oversight or

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<sup>15</sup> The Department of Justice Office of Legal Counsel (OLC) has advised that the Privacy Act generally prohibits the disclosure of protected Privacy Act information to individual Members, except for those authorized to act on behalf of a Congressional committee such as committee chairs. *Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members*, 25 Op. O.L.C. 289 (2001). Similarly, the Procurement Integrity Act prohibits the disclosure of competitively sensitive procurement information on pending federal procurements, but contains an exception for disclosure to Congress or a committee or subcommittee of Congress. 41 U.S.C. § § 2102, 2107(5) (2012).

investigative in nature. According to GSA's Chief of Staff, GSA made this change based on additional guidance from the White House.<sup>16</sup>

With this change in policy, GSA also modified its procedures for processing congressional inquiries. In responding to congressional inquiries, OCIA first made an assessment as to whether the inquiry constituted an oversight or investigative inquiry. For inquiries by Members or congressional staff that OCIA categorized as oversight or investigative in nature, OCIA then considered whether it could respond to the request with documents already publicly available. If not, OCIA referred the inquiry to GSA's FOIA office, which processed the inquiry to identify any responsive records that would be subject to release under FOIA.<sup>17</sup> The FOIA office then conveyed the results of that processing to OCIA, and identified the inquiries for which the FOIA office had found responsive documents. OCIA then resumed control of the rest of the congressional coordination process. OGC also advised on compliance with the new policy during the course of their legal review of proposed responses to congressional inquiries.

The FOIA process involves a search of existing agency records to identify responsive records subject to public release and it is not well equipped to respond to some types of congressional inquiries, such as requests for narrative responses to questions. In such cases, GSA would not provide a complete response.

Shortly after they modified the policy, GSA officials also determined that requests made under the so-called "Seven Member Rule" would be processed as individual requests on the part of each requesting Member. The Seven Member Rule refers to a statute providing that, on the request of any seven Members of the House Committee on Government Operations (now known as the House Committee on Oversight and Government Reform), or any five Members of the Senate Committee on Governmental Affairs (now known as the Senate Committee on Homeland Security and Governmental Affairs), an Executive agency "shall submit any information requested of it relating to any matter within the jurisdiction of the committee."<sup>18</sup>

The treatment of requests made under the Seven Member Rule became an issue after eight Members of the House Committee on Oversight and Government Reform requested documents from GSA in a February 8, 2017, letter invoking the Seven Member Rule.<sup>19</sup> GSA had recently provided documents in response to a previous request invoking the Seven Member Rule statute

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<sup>16</sup> The GSA Senior White House Advisor became the GSA Chief of Staff on March 26, 2017.

<sup>17</sup> Prior to the implementation of this new policy, the FOIA division had not been involved in the processing of congressional inquiries, although the OCIA and FOIA offices would sometimes coordinate on overlapping congressional and FOIA requests.

<sup>18</sup> 5 U.S.C. § 2954 (2012).

<sup>19</sup> The February 8, 2017, request sought unredacted documents pertaining to the Trump Old Post Office ground lease that GSA had previously declined to produce in response to a request by four Representatives.

on January 3, 2017.<sup>20</sup> However, GSA officials told us that the Department of Justice Office of Legal Counsel (OLC) instructed GSA not to provide any documents in response to the February 8, 2017, Seven Member Rule request. These officials understood from OLC that under the Department of Justice's long-standing interpretation the statute applied only to a limited set of old reports that were relevant during the 1920s and that the Seven Member Rule statute was now effectively obsolete. After discussing the matter with OLC, GSA decided to process Seven Member Rule requests as individual Member requests and to obtain OLC concurrence before releasing responses to such requests.<sup>21</sup>

GSA's decision to process individual Member and Seven Member Rule inquiries through its FOIA office meant that the agency effectively handled such requests as FOIA requests without officially designating them as such. As a result, FOIA procedural safeguards may not apply to Member requests. A private citizen unhappy with an agency's response to a FOIA request has the right to challenge the agency's determinations on releasability through both an administrative appeal and judicial remedies. The GSA officials we interviewed said they did not know whether the agency's response to a Member request processed through GSA's FOIA office would be subject to the FOIA appeal process, as that issue had not yet come up.

In at least one instance, GSA did not provide documentation to Minority congressional leaders despite being expressly requested to do so by a Chairman. Representative Jason Chaffetz, then serving as Chairman of the U.S. House Committee on Oversight and Government Reform, sent two congressional requests to GSA, dated February 9, 2017 and February 16, 2017 respectively, on behalf of that Committee.<sup>22</sup> Both Chairman requests stated, "When producing documents to the Committee, please deliver production sets to the Majority staff in Room 2157 of the Rayburn House Office Building and the Minority staff in Room 2471 of the Rayburn House Office Building." The instructions on the Committee's document requests likewise directed GSA to deliver two sets of the documents to be produced, "one set to the Majority Staff and one set to the Minority Staff."

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<sup>20</sup> The January 3, 2017, response pertained to a December 22, 2016, request that sought information related to the Trump Old Post Office ground lease.

<sup>21</sup> A November 2, 2017, federal suit brought by 17 Democratic Members of the U.S. House of Representatives Committee on Oversight and Government Reform against Acting Administrator Horne alleges that GSA denied the plaintiffs' Seven Member Rule request, as well as two subsequent letters invoking the Seven Member Rule statute, in a letter dated July 17, 2017, which stated that "the Executive Branch's longstanding policy has been to engage in the established process for accommodating congressional requests for information only when those requests come from a committee, subcommittee, or chairman authorized to conduct oversight." (*Elijah E. Cummings, et al, v. Timothy O. Horne*, No. 1:17-CV-02308 (D.D.C. filed November 2, 2017) (Complaint ¶¶ 4, 21-27).

<sup>22</sup> The first request asked GSA to describe its plans to address a specific clause (37.19) found in the Trump Old Post Office, LLC ground lease agreement and to provide all guidelines and policies that GSA utilized in administering its outlease program. The second requested information and documents regarding GSA's efforts to address recommendations made by the Government Accountability Office regarding GSA's building portfolio and the Federal Buildings Fund.

Despite these instructions, OCIA officials stated that they did not send the responses to Minority staff members as directed and “assumed they [Minority staff] received this information as part of the internal committee staff distribution.” A GSA Senior Advisor to the Administrator, notified the GSA White House Liaison and the GSA Senior White House Advisor, on February 28, 2017 that “I will have [OCIA] take off the cc to Cummings [Congressman Elijah Cummings, Ranking Member]” for the congressional request dated February 16, 2017. The GSA Senior Advisor to the Administrator then communicated this guidance to the Acting Associate Administrator for OCIA.

### **3. Unpublished policy based on written White House guidance in May 2017**

Until May 2017, GSA officials communicated all information regarding GSA’s new treatment of Member inquiries orally and did not reduce GSA’s unpublished policies to writing. GSA officials told us that this was because GSA expected more definitive guidance from the White House or OLC before formalizing the policy.

On May 19, 2017, the White House Office of Legislative Affairs provided the OCIA Associate Administrator with written guidance on responding to letters from Members of Congress.<sup>23</sup> Senior GSA officials, including Administrator Emily Murphy (who was then serving as Senior Advisor to Acting Administrator Horne), told us they understood this to be the more definitive guidance that GSA officials had been expecting.<sup>24</sup> According to these officials, the guidance was consistent with what GSA had already put into place. Under GSA’s policy, GSA only would provide publicly available facts and publicly accessible records to Member inquiries that were oversight in nature.

The following week, Acting Administrator Horne testified before a congressional subcommittee that GSA “has instituted a new policy that matters of oversight need to be requested by the Committee Chair.”<sup>25</sup> Horne testified that the policy had already been implemented, though it was not yet in writing, and that GSA was “working on formalizing the policy.”<sup>26</sup> Horne described GSA’s practice under the new policy as follows:

However, if it’s an oversight matter not requested by the Committee chair, we’ll respond to the letter saying that we can’t provide ... if it’s information that’s not

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<sup>23</sup> The GSA Senior Advisor to the Administrator became the OCIA Associate Administrator on April 30, 2017. The guidance provided to GSA was marked as a “Presidential record” excluded from public disclosure under the Presidential Records Act.

<sup>24</sup> Administrator Murphy served as the White House Liaison from January to April 2017 and Senior Advisor from April to December 2017. She was sworn in as Administrator on December 12, 2017.

<sup>25</sup> See Testimony of GSA Acting Administrator Hon. Tim Horne before the U.S. House of Representatives Committee on Appropriations, Subcommittee on Financial Services, at 1:15:40-51 (May 24, 2017), available at <https://appropriations.house.gov/calendar/eventsingle.aspx?EventID=394879>.

<sup>26</sup> *Id.* at 1:15:54-1:16:04.

public information, information that would need to be redacted then we will redact the information -- we will provide public information but for matters of oversight the request needs to come from the Committee chair.<sup>27</sup>

Horne confirmed that the policy extended to requests made under the Seven Member Rule statute.<sup>28</sup>

On July 12, 2017, Horne testified before another congressional subcommittee that he had “been given an overall general policy of the Administration that for matters of oversight, that those requests need to come from the Chair.”<sup>29</sup> He also testified that GSA had “received a policy that says on matters of oversight we will respond to committee requests, not individual Member requests.”<sup>30</sup>

#### **4. GSA Order ADM 1040.3 *Congressional and Intergovernmental Inquiries and Relations* (July 24, 2017)**

On July 24, 2017, GSA issued GSA Order ADM 1040.3, which revised and replaced GSA’s February 2015 order. Like its predecessor, GSA Order ADM 1040.3 “sets out procedures all GSA employees must follow in providing information about GSA policies and positions to Congress, State, local, tribal, and foreign governments.” The order also admonishes that “GSA must speak with one voice,” requires that employees forward all congressional communications they receive to the OCIA Associate Administrator, and requires that OCIA coordinate all responses to Congress.<sup>31</sup>

The new written order largely tracks the language of the prior order, with two changes of significance for purposes of this review. First, in describing OCIA’s responsibility for coordinating responses to Congress, GSA ADM 1040.3 adds a reference to a published opinion issued by OLC on May 1, 2017.<sup>32</sup> The new GSA Order states:

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<sup>27</sup> *Id.* at 1:18:56-1:19:23.

<sup>28</sup> Responding to a question as to why GSA had not responded to an outstanding request made under the Seven Member Rule, Horne responded, “It’s the policy of the Administration that for matters of oversight GSA will respond to the Committee chair.” *Id.* at 1:18:32-41.

<sup>29</sup> Testimony of GSA Acting Administrator Hon. Tim Horne before the U.S. House Committee on Transportation and Infrastructure, Subcommittee on Economic Development, Public Buildings, and Emergency Management, at 1:39:50-1:40:00 (July 12, 2017), *available at* <https://transportation.house.gov/calendar/eventsingle.aspx?EventID=401734>.

<sup>30</sup> *Id.* at 2:12:20-2:12:39.

<sup>31</sup> GSA Order ADM 1040.3 *Congressional and Intergovernmental Inquiries and Relations* (July 24, 2017), at §§3, 5(a)(1).

<sup>32</sup> The referenced OLC opinion is available at <https://www.justice.gov/olc/opinions-main>.

The Office of Congressional and Intergovernmental Affairs (OCIA) will be responsible for coordinating all responses back to Congress to ensure they are accurate, timely, helpful, and consistent with the views of the Agency and the Administration *as outlined in the Department of Justice Office of Legal Counsel opinion “Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch,” dated May 1, 2017.*<sup>33</sup>

We discuss this OLC opinion in Finding 3 below. Second, GSA ADM 1040.3 adds a new provision entitled “Whistleblower Protection” which states:

This Order does not abrogate or interfere with any rights or protections extended to GSA employees by the Whistleblower Protection Act of 1989 (WPA) as amended by the Whistleblower Protection Enhancement Act of 2012 (WPEA).<sup>34</sup>

The order does not contain the whistleblower protection language provided in the WPEA.

The order also does not address the continuing applicability of GSA’s prior unpublished policy as described by Acting Administrator Horne in congressional testimony less than two weeks before the new order was issued. The continued application of the unpublished policy was evident on August 2, 2017, when the GSA Public Buildings Service Acting Commissioner testified before the Senate Committee on Environmental and Public Works. In response to a question whether he would commit to fully responding to questions from any member of the Committee regarding the procurement process for a new FBI headquarters, the Acting Commissioner stated “GSA will respond to questions from the Chair, yes.”<sup>35</sup> When asked if GSA would respond only to the Chair, the Acting Commissioner replied that “GSA’s response will be in line with the current Administration’s policy on responding to oversight questions.”

## Findings

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**Finding 1: GSA policies regarding communications with Congress operate as nondisclosure policies under the WPEA but do not include the WPEA’s whistleblower protection language.**

The WPEA requires all federal government “nondisclosure policies, forms, and agreements” implemented after its effective date to include specific language clarifying that the policy, form, or agreement in question does not impact statutory whistleblower protections.

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<sup>33</sup> GSA Order ADM 1040.3 *Congressional and Intergovernmental Inquiries and Relations* (July 24, 2017), at § 5(a)(1) (new language in italics).

<sup>34</sup> *Id.* at § 7.

<sup>35</sup> Testimony of GSA Acting Commissioner, Public Buildings Service, Michael Gelber before the U.S. Senate Committee on Environment and Public Works, at 00:55:10-00:55:50 (August 2, 2017), *available at* <https://www.epw.senate.gov/public/index.cfm/hearings?ID=3C2544C2-0031-4813-8230-A7143EE5D6D2>.

The Senate report described the history and purpose of these provisions:

In 1988, Senator Grassley sponsored an amendment to the Treasury, Postal and General Government Appropriations bill, which is referred to as the “anti-gag” provision. This provision has been included in appropriations legislation every year since then. The annual anti-gag provision states that no appropriated funds may be used to implement or enforce agency non-disclosure policies or agreements unless there is a specific, express statement informing employees that the disclosure restrictions do not override their right to disclose waste, fraud, and abuse under the WPA, to communicate with Congress under the Lloyd-La Follette Act, and to make appropriate disclosures under other particular laws specified in the statement.

S. 743 would institutionalize the anti-gag provision by codifying it and making it enforceable. Specifically, section 115 of the bill would require every nondisclosure policy, form, or agreement of the U.S. Government to contain specific language set forth in the legislation informing employees of their rights. This required language will alert employees that the nondisclosure policy, form, or agreement does not override employee rights and obligations created by existing statute or Executive Order relating to classified information, communications with Congress, the reporting of violations to an inspector general (IG), or whistleblower protection.<sup>36</sup>

Each of the GSA policies outlined above operate as a deterrence to GSA employees who wish to report waste, fraud, and abuse in GSA programs to Congress. The Office of Special Counsel has determined that a supervisor’s email to employees “not to communicate with Inspector General auditors, stating that ‘We need to have one voice’” was “a nondisclosure policy in violation of the WPEA.”<sup>37</sup> Both GSA Order ADM 1040.2 and 1040.3 caution employees that

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<sup>36</sup> S. REP. NO. 112-155, at 16 (2012), *reprinted in* 2012 U.S.C.C.A.N. 589, 604; *see also id.* at 45, 2012 U.S.C.C.A.N. at 633 (“Section 115(a) requires all federal nondisclosure policies, forms, and agreements to contain specified language preserving employee obligations, rights, and liabilities created by existing statute and Executive Order with respect to disclosure of information.”); H. REP. NO. 112-508(I), 2012 WL 1962907, at \*9 (Section 115 “[c]odifies and gives a remedy for the anti-gag statute from overriding whistleblower rights. Specifically, the bill would require every nondisclosure policy, form, or agreement of the Government to contain specific language informing employees of their rights.”).

The Senate Report, S. Rep. No. 112-155, at 16 n. 64 (2012), *reprinted in* 2012 U.S.C.C.A.N. at 604, notes that the Lloyd-La Follette Act is codified at 5 U.S.C. § 7211 (2012), which provides: “The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.” For purposes of Title 5, “Member of Congress” means the Vice President, a member of the Senate or the House of Representatives, a Delegate to the House of Representatives, and the Resident Commissioner from Puerto Rico.” 5 U.S.C. § 2106 (2012).

<sup>37</sup> *See* Press Release, U.S. Office of Special Counsel, OSC’s Enforcement of the Anti-Gag Order Provision in Whistleblower Law (January 25, 2017), *available at* <https://osc.gov/News/pr17-03.pdf>.

“GSA must speak with one voice.” Moreover, both orders require employees to report all communications they receive from Congress, and to coordinate their responses through OCIA. Employees understandably may be deterred from reporting waste, fraud, or abuse to Congress if agency policy requires them to immediately forward to the OCIA Associate Administrator any congressional inquiries they receive and to coordinate their responses through OCIA.

Several of the GSA officials we interviewed stated that whistleblowers were not considered in the implementation of the series of unpublished policies from February to July of 2017, and that GSA did not intend that any of the policies discourage or otherwise impact whistleblowers. However, given that the written policies state that “GSA must speak with one voice,” and direct employees to forward all congressional inquiries to and coordinate any response with OCIA, the absence of the WPEA language in these policies increases the potential for employee confusion about the impact of the policies on whistleblower protections and may chill the willingness of potential whistleblowers to come forward. As discussed in Finding 2, the risk of confusion is even greater with respect to the unpublished policies.

GSA should have included the WPEA’s “anti-gag” whistleblower protection language in each of its policies, to ensure the policies made clear that they did not affect the protections afforded to federal government whistleblowers. Agency officials have agreed that the policies need clarification on this point. Acting Administrator Horne testified before Congress that while the unpublished policy then in place at GSA would not preclude GSA employees from having whistleblower-type conversations with congressional representatives, “we do need to clarify the policy.”<sup>38</sup> Similarly, Acting Deputy Administrator Costa stated that GSA Order 1040.2 was perhaps “not so clear” with respect to its application to whistleblower activity. The inclusion in GSA’s new Order 1040.3 of a brief statement on whistleblower protection is a step in the right direction. However, even this statement is insufficient because it does not track the more detailed anti-gag language mandated by the WPEA.

In response to our report, GSA accepts our first recommendation and reports it has initiated the formal clearance process to amend GSA Order ADM 1040.3 in order to include the WPEA’s mandatory anti-gag provision. GSA’s inclusion of this language will notify employees that the order does not impact their whistleblower rights and protections. (See Appendix.)

GSA, however, disagrees with the OIG’s interpretation of the WPEA that ADM 1040.3, as written, operates as a nondisclosure policy. Instead, GSA asserts that the scope of the WPEA’s anti-gag rule can be read as limited to two commonly used government nondisclosure

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<sup>38</sup> The Acting Administrator stated, “the new policy would apply to matters of oversight and ... we would manage that through our correspondence system, so ... there is nothing that would preclude any member of GSA from having any conversation, whistleblower-type conversations, with any Member. The issue is that the Administration policy says that oversight issues need to come from the Committee Chair .... [W]e do need to clarify the policy.” Testimony of GSA Acting Administrator Hon. Tim Horne before the U.S. House of Representatives Committee on Appropriations, Subcommittee on Financial Services, at 1:17:16-50 (May 24, 2017), *available at* <https://appropriations.house.gov/calendar/eventsingle.aspx?EventID=394879>.

agreements for classified national security information access, settlement agreements with nondisclosure provisions, and “policies related to these types of items.” GSA points to § 115(a) of the WPEA, codified as 5 U.S.C. § 2302 note, which provides: “Each agreement in Standard Forms 312 and 4414 of the Government and any other nondisclosure policy, form, or agreement of the Government shall contain” the language found in § 2302(b)(13). We do not believe that the language relied upon by GSA supports such a narrow interpretation. The Supreme Court rejected the type of statutory analysis GSA makes when the Court considered analogous language in *Ali v. Federal Bureau of Prisons*, 552 U.S. 214 (2008). Nothing in the overall statutory context of the WPEA suggests that the two listed national security nondisclosure agreements were the exclusive focus of its anti-gag provision or that Congress was unconcerned about other types of nondisclosure policies, forms, and agreements.<sup>39</sup> Instead, the requirements of the WPEA extend to those widely used forms “*and any other* nondisclosure policy, form, or agreement of the Government.”<sup>40</sup> As the Court concluded with the statutory language at issue in *Ali*, such “unmodified, all-encompassing” language is best read as “what it literally says.”<sup>41</sup>

The agency also asserts that ADM 1040.3 is “no different from” OMB Circular A-19 which “does not contain” the WPEA’s anti-gag rule language. However, as the agency acknowledges, A-19 addresses coordination between OMB and executive agencies. A-19, most recently revised in 1979, does not address which employees may or may not make disclosures to Congress. While an agency is entitled to have policies to ensure that communications of official agency positions are cleared through designated officials, as discussed in our report we found that GSA used language that inhibits whistleblowers from reporting their concerns to Congress.

**Finding 2: GSA’s implementation of unpublished policies between February and July 2017 did not comply with GSA’s internal directive for creating and implementing new policy, leading to opportunities for confusion, misinterpretation, and inconsistent application.**

GSA did not follow its own policy for establishing internal directives when it implemented its unpublished policies governing communications with Congress. GSA Order OAS P 1832.1A, *The GSA Internal Directives System* (October 10, 2014), establishes “a single, uniform system of authoritative issuances used to convey organization functions, policies, responsibilities, and required procedures.” The internal directives system provides for the orderly processing, internal review, approval, and dissemination of directives. Order OAS P 1832.1A sets out a clearance process that includes reviews by the primary office involved in drafting the directive and a review by the Executive Secretariat and additional stakeholders, including a required legal

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<sup>39</sup> *Ali v. Fed. Bur. of Prisons*, 552 U.S. at 226 (interpreting the phrase “by any officer of customs or excise or any other law enforcement officer” in the Federal Tort Claims Act, 28 U.S.C. § 2680(c) (2012)).

<sup>40</sup> 5 U.S.C. § 2302 note (emphasis added).

<sup>41</sup> *Id.*, at 214, 227-28; *see also id.* at 220 (“Congress’ use of ‘any’ to modify ‘other law enforcement officer’ is most naturally read to mean law enforcement officers of whatever kind”).

review by OGC. This process requires concurrence of all parties before the policy is finalized in writing.

In implementing changes to its policy governing congressional communications from February to July 2017, GSA did not publish the terms of the policy, and instead orally communicated the terms of the policy to a limited number of GSA employees, who in turn orally communicated the policy to others. The unpublished policy also evolved over time.

As a result, interpretation of the new policy varied from one GSA official to another. We interviewed 13 GSA officials from the Office of the Administrator, OGC, OCIA, Office of Administrative Services, and Public Buildings Service. One of the GSA officials, an OCIA Congressional Liaison Specialist who served as the Acting Associate Administrator for OCIA from January to April 2017, stated that there was not a new policy but that OCIA had received oral “instructions” that GSA needed to be thoughtful and prioritize requests from Chairmen. Another GSA official, the former OGC Regional Counsel for the National Capital Region, said she could only recall receiving “direction,” not a new policy, on providing responses to congressional requests. However, the remaining 11 GSA officials told us there was a new oral policy, and variably described the policy as:

- not to respond to Minority party Members of Congress (1);
- not to respond to anyone but committee chairs (2);
- not to respond to anyone but committee chairs, but only in oversight matters (6);
- provide unredacted information to committee chairs only (1); or
- only provide Minority party Members of Congress information that would be released to the general public (1).

The GSA officials also provided various responses as to when the policy was actually in effect. Several GSA officials stated that there was uncertainty and confusion about the terms and scope of the policy, particularly in its early stages. Murphy described initially receiving multiple questions about the policy and requesting further clarification from the GSA Acting General Counsel about it. Some GSA officials also said they were not certain they were always familiar with the most current version of the policy, given that it was often evolving.

We have not been able to identify the full impact of the potentially inconsistent interpretation and application of the GSA policies reviewed because of limitations in GSA’s recordkeeping. OCIA officials stated that they only tracked formal congressional inquiries. The Associate Administrator for OCIA told us that OCIA did not maintain records of phone calls or informal requests from congressional members or their staff, and did not keep notes of GSA briefings to Congress.

GSA employees stated that its unpublished policies were based on the conclusion that the law did not require GSA to respond to oversight or investigative inquiries other than those coming from Chairmen. GSA provided no precise definition for what constituted an oversight or investigative congressional inquiry. Different GSA officials and documents referenced the following categories of information as potentially outside the scope of oversight or investigatory

inquiries: information on legislation, requests related to confirmation proceedings, project-related issues, “general program information,” and requests for “technical assistance.” Murphy stated that GSA clarified the policy at some point to permit responses to oversight inquiries by subcommittee chairs, and Horne stated that the policy did not apply if a Chairman stated that he or she wanted GSA to respond to a request from a particular Member. Despite these reported refinements the GSA Public Buildings Service Acting Commissioner understood the policy simply to be not to respond to requests from Minority members of Congress. He also stated that the policy appeared to be inconsistently applied.

To the extent that GSA employees, including potential whistleblowers, received differing information, there was no written document that they could consult to confirm the official terms of the policy. This remained the case even after GSA received written guidance from the White House Office of Legislative Affairs in May 2017. GSA did not incorporate the terms of that guidance into any internally published GSA order, policy, guidance, or other document that GSA employees could consult. The only written policy in place at the time governing GSA congressional inquiries was GSA Order ADM 1040.2, which did not address the terms of GSA’s unpublished policies.

GSA’s management displayed apparent confusion concerning the policy when two congressional hearings held on the same day produced contradictory testimony about the policy. On July 12, 2017, before a subcommittee of the U. S. House Transportation and Infrastructure Committee, Acting Administrator Horne reiterated his previous testimony regarding the nondisclosure policy stating, “...the Administration’s policy is to respond on matters of oversight ... to requests from the chairman.” However, in a separate hearing held later on that same day, both Alan Thomas, Commissioner of the GSA Federal Acquisition Service, and Robert Cook, Deputy Commissioner and Director of Technology Transformation Services, stated they were not aware of the nondisclosure policy attested to by Horne.<sup>42</sup> Further, when Mr. Cook was questioned if he would commit to responding to requests from members of Congress, Mr. Cook responded that the Technology Transformation Services would respond regardless of “where the request came from” which contradicted the policy relayed by Horne just a few hours earlier.

**Finding 3: GSA Order ADM 1040.3 is ambiguous and lacks transparency as to what GSA’s current congressional communications policy is.**

GSA Order ADM 1040.3 makes two changes of significance for this review to the prior GSA Order ADM 1040.2. First, the order adds a “Whistleblower Protection” provision that differs from the language in the WPEA. Second, the order adds new language that creates uncertainty over GSA’s actual practices and its adherence to Administration policy. The earlier order provided that congressional responses be “accurate, timely, helpful, and consistent with the

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<sup>42</sup> Hearing before the U.S. House Committee on Oversight and Government Reform, Subcommittees on Government Operations and Information Technology. Testimony of Mr. Alan Thomas and Mr. Robert Cook.

views of the Agency and the Administration.”<sup>43</sup> The new order adds: “as outlined in the Department of Justice Office of Legal Counsel opinion, ‘Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch,’ dated May 1, 2017.”<sup>44</sup>

It is not clear from the order itself, or from a review of the referenced May 1, 2017, OLC opinion, what GSA’s policy is with regard to individual Member requests. The OLC opinion concluded that individual Members “do not have the authority to conduct oversight in the absence of a specific delegation by a full house, committee, or subcommittee.”<sup>45</sup> The opinion also recognized that Executive Branch agencies have discretion in deciding whether and how to respond to inquiries from individual Members, and have historically followed a “general policy of providing only documents and information that are already public or would be available to the public through the Freedom of Information Act, 5 U.S.C. § 552.”<sup>46</sup> GSA’s unpublished policies with regard to individual Member requests comported with the historical practice described in the OLC opinion. However, the new order does not explicitly adopt that practice as GSA’s policy.

Further confusing the issue, just days before the issuance of GSA Order ADM 1040.3, the Director of the White House Office of Legislative Affairs stated that the May 1, 2017, OLC opinion did not set forth the current Administration’s policy. On June 7, 2017, Senator Charles E. Grassley, Chairman of the U.S. Senate Committee on the Judiciary, wrote to the President objecting to the conclusions reached in the May 1, 2017, OLC opinion and urging the White House to rescind the opinion.<sup>47</sup> The White House Director of Legislative Affairs responded in a letter dated July 20, 2017, that the May 1, 2017, OLC opinion constituted legal advice and “was

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<sup>43</sup> GSA Order ADM 1040.2, *Congressional and Intergovernmental Inquiries and Relations*, § 5.a.(1) (February 20, 2015).

<sup>44</sup> GSA Order ADM 1040.3, *Congressional and Intergovernmental Inquiries and Relations*, § 5.a.(1) (July 24, 2017) (emphasis added), available at <https://www.justice.gov/olc/opinions>.

<sup>45</sup> See *Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch*, Op. O.L.C., at 1 (May 1, 2017) (hereinafter “the May 1, 2017, OLC opinion”).

<sup>46</sup> *Id.* at 3.

<sup>47</sup> Letter from Chairman Charles Grassley to the Hon. Donald J. Trump (June 7, 2017), available at <https://www.grassley.senate.gov/news/news-releases/grassley-calls-president-rescind-olc-opinion-shielding-bureaucrats-scrutiny>. Chairman Grassley contended that the OLC opinion “erroneously rejects any notion that individual members of Congress who may not chair a relevant committee need to obtain information from the Executive Branch in order to carry out their Constitutional duties,” and urged the Executive Branch to “work to cooperate in good faith with all congressional requests to the fullest extent possible.” *Id.* at 2, 6.

not intended to provide, and did not purport to provide, a statement of Administration policy.”<sup>48</sup>  
The letter further stated:

The Administration’s policy is to respect the rights of all individual Members, regardless of party affiliation, to request information about Executive Branch policies and programs. The Administration will use its best efforts to be as timely and responsive as possible in answering such requests consistent with the need to prioritize requests from congressional Committees, with applicable resource constraints, and with any legitimate confidentiality or other institutional interest of the Executive Branch. Moreover, this policy will also apply to other matters on which individual Members may have an interest, whether it be considering possible legislation, evaluating nominees for confirmation, or providing service to constituents.<sup>49</sup>

The OCIA Associate Administrator and an OCIA Congressional Liaison Specialist told us that GSA has fully adopted the Administration’s positions outlined in the July 20, 2017, White House letter. These officials also stated that OCIA continues to process most Member requests that it deems oversight in nature through GSA’s FOIA office, and that OCIA limits its responses accordingly. They stated that there are exceptions to FOIA processing, such as requests or inquiries where a “yes” or “no” answer, an easily accessible answer, or a narrative response is deemed appropriate and there is no need for further FOIA processing. The Congressional Liaison Specialist stated that GSA applies this same process to requests made under the Seven Member Rule statute, though GSA has not yet provided any responses processed through the FOIA office to any Seven Member Rule requests.

Based on the above, GSA appears to be following its unpublished policy concerning the processing of individual Member oversight requests as FOIA inquiries. However, GSA’s order does not state this, and does not contain the full anti-gag language prescribed by the WPEA. Clarifying GSA’s current policy, and including the WPEA’s whistleblower protection language, would provide GSA employees with a written document that clearly informs them of the official terms of the policy. Including the language prescribed by the WPEA would also assure employees that GSA’s policy does not supersede, conflict with, or otherwise alter existing employee whistleblower and congressional communication protections. Such clarification would

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<sup>48</sup> See Letter from White House Director of Legislative Affairs Marc Short to Chairman Charles Grassley, at 2 (July 20, 2017) (hereinafter the “July 20, 2017, White House letter”), *available at* <https://www.grassley.senate.gov/news/news-releases/grassley-wins-commitments-cooperation-administration-oversight-requests>. It is not clear whether GSA was aware of the July 20, 2017, White House letter when it adopted GSA Order ADM 1040.3 on July 24, 2017. While the letter was dated July 20, 2017, it was not made public by Chairman Grassley’s office until July 28, 2017. See Press Release, Office of Sen. Charles Grassley, *Grassley Wins Commitments of Cooperation from Administration on Oversight Requests* (July 28, 2017).

<sup>49</sup> *Id.* at 2.

promote transparency and minimize the potential for confusion, misinterpretation, and inconsistent application.

In response to our report, the agency stated that it commits to responding to requests from individual Members “to the fullest extent allowable under the law” but qualifies that request by referring to unspecified longstanding policies. (See Appendix.)

## **Conclusion**

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From 2015 through 2017, GSA implemented a series of published and unpublished policies governing responses to congressional inquiries. These policies should have contained, but did not contain, the whistleblower protection language that the WPEA requires be included in nondisclosure policies. GSA’s failure to include the required language increases the risk of confusion and may chill the willingness of potential whistleblowers to come forward.

GSA’s use of unpublished policies did not comply with internal directives and created opportunities for confusion, misinterpretation, and inconsistent application among its officials and employees. GSA officials informed of the policies described different interpretations of the policies and the time periods in which they were in place. Other GSA employees, including some senior GSA officials, were either not informed of the policies or learned of them only second-hand.

Finally, GSA’s current policy with respect to congressional inquiries lacks transparency, despite GSA’s issuance of a new published order in July 2017. GSA officials in OCIA stated that at least some aspects of the prior unpublished policy are still in place, yet the current order does not clarify whether GSA is continuing its prohibition of employees from responding to individual Member inquiries deemed to be oversight or investigative in nature, or limiting the response to such inquiries to agency records identified through GSA’s FOIA process.

## **Recommendations**

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GSA’s leadership should:

1. Include the anti-gag provision required by the Whistleblower Protection Enhancement Act of 2012 in GSA’s order on congressional and intergovernmental inquiries and relations.
2. Clarify GSA’s policy on communications with Members of Congress in GSA’s order on congressional and intergovernmental inquiries and relations.

## **Objectives, Scope, and Methodology**

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This evaluation was conducted by the Office of Inspections to determine whether GSA implemented a nondisclosure policy regarding employee communications with Congress and if so, whether the policy violates the Whistleblower Protection Enhancement Act or other laws, regulations, or GSA policy. To accomplish our objectives, we:

- Researched laws, rules, regulations, and other federal guidance on employee and agency communications with Congress;
- Reviewed GSA policies, orders, and procedures related to the management of responses to congressional inquiries;
- Reviewed relevant audits and inspections conducted by GSA OIG, GAO, and other federal agencies;
- Interviewed agency management and staff from the OCIA, OGC, FOIA office, and Administrator's Office
- Reviewed OCIA correspondence records; and
- Reviewed email documentation for OCIA, OGC, and the Administrator's Office staff.

Our evaluation was conducted from May through December 2017, in accordance with the Council of the Inspectors General on Integrity and Efficiency *Quality Standards for Inspection and Evaluation* (January 2012).

## Appendix: Management Comments

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Office of Congressional and Intergovernmental Affairs

March 2, 2018

MEMORANDUM FOR PATRICIA D. SHEEHAN  
ASSISTANT INSPECTOR GENERAL FOR INSPECTIONS (JE)

FROM: P. BRENNAN HART, III  
ASSOCIATE ADMINISTRATOR  
OFFICE OF CONGRESSIONAL AND INTERGOVERNMENTAL  
AFFAIRS (S)

SUBJECT: *Evaluation of GSA Nondisclosure Policy Draft Report (JEF-010-000)*

The U. S. General Services Administration (GSA) and the Office of Inspector General (OIG) share the goal of fostering an environment where it is safe to report waste, fraud, or mismanagement. With this in mind, GSA appreciates the OIG review and two recommendations regarding the GSA policy governing official congressional communications, ADM 1040.3 (the GSA Order). GSA is committed to being as forthcoming as possible with regard to congressional oversight requests and individual Member requests for information.

Regarding the first recommendation, GSA firmly recognizes the importance of protection for whistleblowers and the valuable role that whistleblowers play in bolstering oversight. GSA consistently supports employees' rights in this area through whistleblower trainings and circulating information stating whistleblower rights, processes, and assurances of legal protection. Respectfully, GSA disagrees with OIG's interpretation of the Whistleblower Protection Enhancement Act of 2012 (P.L. 112-199) (WPEA) and its conclusion that the GSA Order constitutes a "nondisclosure policy" under the statute. Notwithstanding that disagreement, GSA amended the GSA Order to include the paragraph referenced in 5 U.S.C. § 2302(b)(13), as recommended by the OIG, and has initiated the formal clearance process for the amended Order.

There is nothing in the WPEA or its legislative history that defines "nondisclosure policy" for the purposes of 5 U.S.C. § 2302(b)(13). A reasonable person can interpret the requirements of that provision as limited to items like specific nondisclosure agreements (e.g., Standard Forms 312 and 4414), settlement agreements with a nondisclosure provision, or policies related to these types of items. For example, WPEA section 115(a), "Nondisclosure policies, forms, and agreements," contains a government-wide prohibition on the use of nondisclosure agreements without the whistleblower protection statement found in 5 U.S.C. § 2302(b)(13) and specifically enumerates Standard Forms 312 and 4414 as subject to the prohibition.

Unlike those examples of nondisclosure policies, the GSA Order states a procedure to ensure that all official responses to congressionally initiated requests are vetted to provide the agency's

1800 F Street, NW  
Washington, DC

[www.gsa.gov](http://www.gsa.gov)

official position on particular matters. This centralization of congressional interaction ensures both uniformity and consistency of message, which minimizes confusion on behalf of agency personnel, Members and staff in Congress, and the public. Previous GSA orders on the topic detail similar requirements for Office of Congressional and Intergovernmental Affairs involvement. While the GSA Order does not detail every step or consideration in a response, it ensures there is a single office with the appropriate authority and discretion to properly present the official agency position on any matter of congressional inquiry. In that respect, the GSA Order is no different from the Office of Management and Budget's (OMB) Circular A-19 Legislative Coordination and Clearance, which requires prior coordination by agencies with OMB on various interactions with Members of Congress and does not contain the language found in 5 U.S.C. § 2302(b)(13) regarding whistleblower rights.

Ultimately, what differentiates the GSA Order from a nondisclosure policy is that a whistleblower's communications with Congress are not official agency positions and are therefore outside the scope of the GSA Order. This is consistent with the definition of "disclosure" in 5 U.S.C. § 2302(a)(2)(D), which specifically exempts "a communication concerning policy decisions that lawfully exercise discretionary authority." However, it is always worthwhile to remind employees of their whistleblower rights and, therefore, as stated above, GSA has replaced the general reference to whistleblower rights in the GSA Order with the specific language contained in the statute.

With respect to the second recommendation, the OIG evaluation stated there was uncertainty in the GSA Order on GSA's policy of responding to individual Members of Congress. For clarity, GSA has updated the Order and removed the reference to the Office of Legal Counsel's May 1, 2017, opinion. GSA will continue to use its best efforts to be timely in responding to requests from all Members of Congress. As White House Director of Legislative Affairs, Marc Short, stated in his July 20, 2017, letter to Chairman Chuck Grassley, "... the Executive Branch should voluntarily release information to individual Members where possible." The OIG evaluation also commented that Members of Congress (non-chairmen) who submit requests for records are often treated like requesters under the Freedom of Information Act (FOIA). GSA recognizes the important role of congressional oversight and routinely provides information through document productions and briefings upon request to Members on a variety of topics in efforts to maintain transparency. GSA's actions are consistent with longstanding Executive Branch policy through numerous administrations.<sup>1</sup> GSA will continue to respond to congressional requests to the fullest extent allowable under the law and consistent with longstanding agency and Executive Branch policies.

GSA appreciates its partnership with the legislative branch and looks forward to continued opportunities to work with Congress—Committees and individual Members.

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<sup>1</sup> *Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members*, 25 Op. O.L.C. 289 (2001). See also, *Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch*, 41 Op. O.L.C. 1 (2017). See also, Alissa M. Dolan *et al.*, Cong. Research Serv., RL30240, *Cong. Oversight Manual* 56 (2014).



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