



**U.S. OFFICE OF SPECIAL COUNSEL**

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November 15, 2021

***Sent via electronic mail***

Tom Devine  
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Government Accountability Project  
1612 K Street NW, Suite 1100  
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***Sent via electronic mail***

Irvin McCullough  
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***Sent via electronic mail***

Freddy Martinez  
Policy Analyst  
Open the Government  
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**Re: OSC File No. MA-20-001314**

Dear Mr. Devine and Mr. McCullough:

This letter responds to the complaint the Government Accountability Project (GAP) and Open the Government (OTG) filed with the U.S. Office of Special Counsel (OSC) against the U.S. Department of Health & Human Services (HHS). I appreciate the thorough and well-researched submission, and the comprehensive supporting documentation that GAP has made available. Your efforts greatly helped OSC obtain what we view as an appropriate resolution, and on that basis, we have made a preliminary determination to close this case. Our analysis is below.

In your complaint, you alleged the following: HHS's communications policy is set forth in the Office of the Assistant Secretary for Public Affairs Playbook (Playbook). The Playbook contained multiple nondisclosure policies and agreements but failed to include statutorily defined language setting forth whistleblower protections. HHS Assistant Secretary of Public Affairs (ASPA) Michael Caputo cited the Playbook as authority to demand that all media interviews or information releases go through ASPA's preclearance process, without exceptions. Separately, Dr. Paul Alexander, a senior advisor to Mr. Caputo, requested an "immediate stop" to public

release of CDC Morbidity and Mortality Weekly Reports, pending his preclearance of the reports. Based on these facts, you claimed the Playbook, Mr. Caputo, and Dr. Alexander violated 5 U.S.C. § 2302(b)(13).

OSC examined the Playbook and additional evidence obtained through an investigation for a violation of 5 U.S.C. § 2302(b)(13). Under § 2302(b)(13), agency officials are prohibited from implementing or enforcing a non-disclosure policy, form, or agreement if it does not contain a specific statement notifying employees of their whistleblower rights and protections.

OSC's investigation confirmed that the Playbook contained nondisclosure policies or agreements but no notice of whistleblower rights. OSC notified HHS of the missing notification and requested that HHS revise the Playbook to incorporate and prominently display the statutory language set forth at 5 U.S.C. § 2302(b)(13)(A). HHS agreed. On or about October 29, 2021, HHS confirmed that it had published the revised Playbook. Besides correcting the Playbook, the revisions also provide a corrective action for Mr. Caputo's actions, given that he cited the Playbook for his authority.

Separately, it appears that HHS never implemented Dr. Alexander's request to stop public release of CDC reports. We also do not believe HHS implemented any other nondisclosure policies by Mr. Caputo or Dr. Alexander. Within 6 weeks of Dr. Alexander's request to stop the reports, Mr. Caputo and Dr. Alexander left HHS.

Based on the facts and reasoning detailed above, we do not believe we have any further corrective action to seek under § 2302(b)(13), and OSC plans to take no further action on this complaint. However, you have 13 days from the date of this letter to submit written comments or additional evidence addressing the issues raised in this letter. Please submit any such information to me at the above listed address or via email to [tcheng@osc.gov](mailto:tcheng@osc.gov) by November 29, 2021. OSC will consider your response before making a final decision. If we do not receive a timely response, we will close this case and notify you of any additional rights you may have.

Sincerely,



Timothy D. Cheng  
Attorney  
Investigation and Prosecution Division  
U.S. Office of Special Counsel