

(H. B. 2569)
(Conference)

(No. 4-2012)

(Approved January 3, 2012)

AN ACT

To amend Sections 1, 2, 10, 11, 12, and 15, add a new Section 20, and renumber subsequent Sections of Act No. 2 of February 23, 1988, as amended, and known as the “Special Independent Prosecutor’s Panel Act,” in order to clarify and broaden the scope of the administrative and fiscal autonomy granted to the Office of the Special Independent Prosecutor’s Panel, and consistent with said autonomy, exclude said Agency from the application of several laws; define the duties and responsibilities of the Chair of the Panel as the executive officer in charge of the administration of the Office of the Special Independent Prosecutor’s Panel; increase the terms of the appointment of Panel members; establish a continuity clause when the appointment of Panel members expires, in order to guarantee the stability and sound operations of the Body; provide for the immunity of Panel members, in the exercise of their functions as Bar members, and of the Chair, in the exercise of his executive responsibilities, and limit the execution of certain contracts between Panel members and agencies or municipalities; clarify the administrative issues that the Special Independent Prosecutor may channel through the Panel; and for other purposes.

STATEMENT OF MOTIVES

The Office of the Special Independent Prosecutor’s Panel, hereinafter OPFEI (Spanish acronym), was created by Act No. 2 of February 23, 1988, as amended, known as the “Special Independent Prosecutor’s Panel Act.” Section 1 of said Act No. 2, establishes that

It is the public policy of the Government [...] of Puerto Rico to encourage the dedication of its public servants and employees to public service with honesty, professional and personal excellence, and absolute dedication to the well-being and integral development of our People.

Based on said policy, OPFEI has the mission to prevent, eradicate, and punish any criminal or improper conduct of government officials in order to restore the People's trust in their government and public servants. Thus, OPFEI has the duty to resort to the courts of justice, through the designated special prosecutors, on behalf of the Commonwealth of Puerto Rico, to file the pertinent criminal actions arising out of investigations it conducts on matters under its consideration.

OPFEI was created mainly to establish a neutral and independent entity to investigate and criminally prosecute unlawful actions of high-ranking and former government officials. The isolation of this Office shall prevent any undue influence, when administering justice, as well as potential conflicts or the appearance of conflict that could arise should the Secretary of Justice have to prosecute high ranking officials of the government apparatus of which he is part.

Said Act empowers the OPFEI to designate a Special Prosecutor to criminally prosecute current and former public officials. It is a special and unique authority granted to OPFEI, because the Secretary of Justice cannot appear as the legal counsel of the People to bring a criminal action through his prosecutors. The goal is for the prosecution of public officials to be objective and unbiased, without the interference of political favoritism or persecution. See *Pueblo v. Adaline Torres-Santiago*, 2008 TSPR 184.

Act No. 2, *supra*, empowered the Secretary of Justice to conduct a preliminary investigation when he receives information that, in his judgment, constitutes sufficient cause to investigate whether or not an offense included in said statute has been committed by any government official covered thereunder, to wit, the Governor, the Secretaries, and Deputy Secretaries of Government Departments; the heads or deputy heads of agencies; the Executive Directors of public corporations; mayors; members of the Legislative Assembly of Puerto Rico, advisors and aides to the Governor; judges and any person who has held any of the abovementioned offices, and has been accused of a felony or misdemeanor in the same transaction or event, and offenses against civil rights, public function, and the treasury, while holding one of the aforesaid offices.

The Secretary shall complete the preliminary investigation within an extendable term of ninety (90) days and once the same has concluded, he shall submit a report and forward the case record to the OPFEI Panel, a recommendation not to designate a Special Prosecutor notwithstanding. Once a referral is received, the Panel evaluates the report and may designate a Special Independent Prosecutor to investigate the case and decide, within a term of ninety (90) days extendable to ninety (90) additional days, if a criminal prosecution is warranted. The Panel's designations of Special Independent Prosecutors shall be made by delegation and shall expire upon the conclusion of each case. Panel determinations of whether or not a Special Prosecutor shall be designated are final and binding. Upon his designation, said Special Prosecutor shall be in charge of the investigation and shall determine if the filing of charges against the official is in order. If so, said Special Prosecutor with sole jurisdiction shall then prosecute the pertinent criminal actions.

In view of the aforementioned authorities, it is evident that OPFEI has been granted a sensitive and unique authority to investigate actions attributed to high-ranking public officials. Moreover, said authorities shall be exercised with absolute independence, without any type of influence, and in strict compliance with the terms that allow for a prompt response of the justice system when there are allegations of unlawful conduct of public officials who are subject to the jurisdiction of Act No. 2, *supra*.

In view of said reality, it should come as no surprise when the Legislative Assembly stated that

when it were necessary, the Panel may request the funds needed to comply with the functions that the Act entrusts to both the Panel and the Special Independent Prosecutor, by submitting the budget directly to the Legislative Assembly without having to request the previous approval of the Office [of Management and Budget].

Furthermore, the Office was granted broad powers to deposit funds in an “account that yields considerable interest.” See Section 20 of Act No. 2, *supra*.

In spite of the clear intention of providing OPFEI with autonomy, it has come to our attention that several agencies have requested information to the OPFEI concerning sensitive operating areas thereof, and have issued orders that affect the effective administration of OPFEI. This has forced the Panel to defend its autonomy. In fact, aware of this situation, the Legislative Assembly recently provided that OPFEI would be exempt from the provisions of Act No. 7-2009, as amended.

To such effect, it is imperative to enact legislation clarifying the scope of said Office’s autonomy, and to provide it with administrative autonomy allowing for decision-making and the execution of actions aimed at expediting the functioning and operations thereof so as to promote the optimization of its services

and the discharge of its duties, consistently with the objectives set upon its creation. It is critical to legislate to provide the Office with powers and faculties that are consistent with those authorized and delegated by law to the Government Ethics Office and the Office of the Comptroller of Puerto Rico.

Furthermore, Act No. 2, *supra*, provides that an OPFEI Panel shall be constituted by three (3) members with experience in the field of criminal law and with the additional requirement that they must be former Supreme Court justices, or former judges of the Court of Appeals, or the Court of First Instance. These members are designated by the Governor and officially appointed with the advice and consent of the majority of the total number of members of the Senate and the House of Representatives. Likewise, the Governor has the prerogative to designate two alternate members to be part of the Panel in the event of abstention or any other circumstance that may prevent a regular member from performing his duties. Panel members shall serve for a three (3)-year term at the end of which they may be designated for an additional term of equal duration.

During the investigation conducted with regard to H.R.-2009, we learned that in the last five years, only three of the members designated by the Governor had served for more than one year and, of these, two were appointed officially after having been confirmed by the Legislative Assembly. The other designated members remained in office for less than a year for periods ranging from nine months to seven days.

Consequently, the Panel has experienced serious fluctuations in its composition. For approximately twenty (20) months, it had less than the three regular members required by law, and for approximately eleven (11) months, it had one or no members. From July 1, 2005 to January 10, 2006, the Panel did not operate.

The events that took place when OPFEI did not have a Panel with the required number of members disrupted its administrative, operational, and programmatic functions, in spite of the best efforts of its members. It must be considered that according to its Enabling Act, the Panel is the entity entrusted with overseeing all the operations of OPFEI, as well as supervising the group of special independent prosecutors. As a result of such events, the Panels constituted were characterized by short duration or lack of familiarity with OPFEI's administrative and operational duties. Furthermore, many officials being investigated raised questions regarding the legitimacy and lawfulness of the actions taken by a Panel constituted by a lower number of regular members than those required by law. For instance, in *Pueblo v. Adaline Torres*, 2008 T.S.P.R. 184, the Supreme Court of Puerto Rico upheld the validity of the actions taken by a Panel composed of only two members, provided that the majority requirement established in the statute for said Body to make any decisions is met.

Therefore, it is necessary for this Legislative Assembly to amend the Enabling Act of OPFEI in order to implement measures to address the issues that have arisen in recent years and to strengthen the administrative and operational infrastructure of said Office.

To such effects, it is essential to establish the administrative responsibilities of the Panel Chair, whose executive duties shall ensure the effective administration of public resources, as well as to provide the Panel with a figure of authority within its government structure. Furthermore, it is hereby established that Panel members shall be appointed for a ten (10)-year term. In this manner, organizational stability is promoted while ensuring consistency with the public policy of making said term equal to the term provided for the Comptroller and the Executive Director of the Government Ethics Office. In turn, we take this opportunity to correct the design of the Enabling Act in order to expressly provide for the creation of OPFEI, the chain

of command, and organizational structure, as well as to clarify the administrative matters that the Special Independent Prosecutor shall channel through the Panel.

We believe that these measures shall promote stability and the effective exercise of OPFEI's administrative duties, in order to prevent findings that could affect the determinations and ministerial duties thereof. These measures shall also contribute to strengthening the decision-making autonomy of OPFEI's members.

For all the aforesaid considerations, it is deemed imperative to strengthen one of the fundamental Institutions to contribute to maintain the People's trust in public institutions.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF PUERTO RICO:

Section 1.— Section 1 of Act No. 2 of February 23, 1988, as amended, is hereby amended to read as follows:

“Section 1.- Statement of Public Policy and the Creation of the Office of the Special Independent Prosecutor's Panel.

It is the public policy of the Government of Puerto Rico to encourage the dedication of its public servants and employees to public service with honesty, professional and personal excellence, as well as absolute dedication to the well-being and integral development of our People. To achieve these objectives, it is essential to strengthen the institution of a neutral and independent forum to promptly clarify any conduct attributable to government officials, and to ensure that the investigations are objective, impartial, independent, and of excellence.

To achieve the abovementioned objectives, the Office of the Special Independent Prosecutor's Panel is created as an entity of the Executive Branch with administrative, operational, and fiscal autonomy. This Office shall be composed of one (1) Panel with three (3) official members and two (2) alternate members, who shall be selected from among former court judges or justices

according to the procedure provided below, and the personnel designated by the former to carry out the tasks expressly delegated under this Act.

The Office shall have juridical personality and legal standing to sue and be sued. Furthermore, the Office shall be empowered to adopt, promulgate, amend, and repeal rules, orders, and regulations that shall govern the procedures related to the management, contracting, or hiring of the human resources thereof, as well as those related to property, technology infrastructure, budget administration, among others as are necessary and appropriate to exercise its powers and discharge its duties. This power includes the authority to devise and implement strategic plans that allow for the development of swift administrative methods or processes, as well as an adequate infrastructure with the latest and most efficient technology.

In exercising said powers, the Office may incorporate cutting-edge administrative principles that guarantee the contracting, selection, and hiring of persons who satisfy the criteria pertaining to confidentiality, personal and professional integrity, excellence, competence, and objectivity; that promote professional development; optimize resources; and guarantee the sound and prudent use of public property and funds.”

Section 2.— Section 2 of Act No. 2 of February 23, 1988, as amended, is hereby amended to read as follows:

“Section 2.- Definitions.

...

(1) Agency - Means any government body of the Government of Puerto Rico, including the public corporations and dependencies thereof, but excluding the municipal corporations and the political subdivisions thereof.

(2) Office - Means the Office of the Special Independent Prosecutor’s Panel.

(3) Panel Chair - Means the member of the Panel with executive powers, as established in this Act.

(4) Special Prosecutor - ...

(5) Panel - ...

(6) Secretary - ...

(7) Department - ...

(8) Decision - Means a determination of whether or not there is sufficient cause that warrants further investigation or the filing of complaints or charges.

(9) Recommendation - Determination of the Department of Justice on the request to the Panel to determine whether a Special Independent Prosecutor should be designated.

(10) Sworn Complaint - Document submitted under oath.”

Section 3.— Section 10 of Act No. 2 of February 23, 1988, as amended, is hereby amended to read as follows:

“Section 10.- Special Independent Prosecutor's Panel - Designation, Powers, and Faculties.

(1) The Governor of Puerto Rico shall designate, with the advice and consent of a majority of the total number of members of the Senate and the House of Representatives of Puerto Rico, three (3) official members with experience in the field of criminal law. These three (3) members shall constitute the Panel and shall be selected from among former Supreme Court justices, or former judges of the Court of Appeals or the Court of First Instance. Likewise, the Governor of Puerto Rico shall also designate, from among former Supreme Court justices or former judges of the Court of Appeals or the Court of First Instance, two (2) alternate members who shall be part of the Panel in the event of abstention or other circumstances that prevent any of the official members from discharging their

duties. Regular members shall designate the Panel Chair from among them. The Panel shall be denominated the ‘Special Independent Prosecutor’s Panel.’

(2) The Panel Chair shall be the executive officer who shall supervise the administration and management of the Office. The Panel shall adopt the rules that shall govern the designation of an Acting Chair in the event of temporary absence of the Chair. The Panel Chair shall have the same rights and duties as the other Panel members in terms of decisions and votes regarding cases or matters referred to the attention of said Collegiate Body. The Panel Chair or his delegate shall have the power to:

(a) Organize the Office and appoint or hire personnel as are necessary to discharge the functions and duties established by law in accordance with the criteria that shall ensure the rendering of services and the compliance with the ministerial duties subject to the regulations approved by the Office.

(b) Acquire real and personal property through lawful means including, but not limited to, the acquisition by purchase, lease, lease with purchase option, bequest, or gift; as well as to own, preserve, use, or dispose of any property, whether real or personal, improved or not, or any asset, right, or interest thereon, in the manner deemed to be most effective, efficient, and necessary for the benefit of the Office.

(c) Enter into contracts and execute any instruments as are necessary and convenient to attain the objectives and purposes of the Office.

(d) Approve regulations as are necessary to exercise the powers conferred by this Act.

(e) Take any other administrative or managerial action or measure as is necessary and convenient to achieve the purposes of this Act.

(3) Panel members shall serve for a term of ten (10) years. Persons thus designated shall not be appointed for more than one (1) consecutive term. In the event of a vacancy before the expiration of the ten (10)-year term, the new appointment shall be for a ten (10)-year term. The terms served by alternate members shall not be counted against them in case they are designated as official members. Panel members whose appointment terms have expired shall continue to hold office until their successors are appointed and take office.

This ten (10)-year term shall be extended to Panel members who are in office on the date of the approval of this Act and shall be computed as of the date on which they were sworn in, upon confirmation by the Senate and the House of Representatives.

(4) In case of vacancy, the Governor shall make a new appointment for a ten (10)-year term.

(5) The Panel's decisions shall be made by a simple majority.

(6) Panel members shall be entitled to a two hundred dollars (\$200) per diem for each day or fraction thereof they perform the tasks entrusted to them by the Panel or Panel Chair regarding the duties established hereunder. Said per diem shall be exempt from the tax imposed under Act No. 1-2011, as amended, known as the 'Internal Revenue Code for a New Puerto Rico.' Panel members shall be entitled to reimbursement for any necessary expenditures incurred while discharging their duties, responsibilities, or official business inside or outside the jurisdiction of Puerto Rico, subject to the regulations adopted therefor by the Panel.

(7) Panel members shall be deemed to be public officials with respect to their actions in the discharge of their duties, obligations, and prerogatives under this Act. Members shall have quasi-judicial immunity in their individual capacity while discharging their duties. Moreover, they shall have the same immunity

granted to the members of the executive cabinet. Within the extent of their duties, they shall be entitled to request and receive legal representation and protection pursuant to Act No. 104 of June 29, 1955, as amended.

(8) Panel members shall not intervene in any other civil, administrative, or criminal matter having common or similar elements that cause or seem to cause a conflict of interest with any matter that is or may be under their jurisdiction.

(9) Panel members shall not enter into contracts to provide legal representation in matters or cases that entail litigation against an Agency, municipality or the Legislative or Judicial Branches, while they are Panel members. This prohibition shall not include entering into training, advisory or consulting services, contracts with any agency, municipality, or the Legislative or Judicial Branches; serving as professor in the University of Puerto Rico and its campuses; serving as an expert, special commissioner in the Judicial Branch in any civil, administrative, or criminal case or matter; or intervening as mediator or arbitrator in any matter under the consideration of said public entities. The exemptions set forth in Sections 3.3(d) and (e) of Act No. 12 of July 24, 1985, as amended, known as the ‘Puerto Rico Government Ethics Act,’ shall also apply. In order to safeguard the independence of this Office, any dispensations requested under Section 3.3(d) and (e) by any official of this Office shall be evaluated by the Government Ethics Office, which shall issue the appropriate determination under the regulations adopted.”

Section 4.— Section 11 of Act No. 2 of February 23, 1988, as amended, is hereby amended to read as follows:

“Section 11.- Special Independent Prosecutor’s Panel - Duties.

- (1) ...
 - (a) ...
 - (b) ...

(c) ...

(2) In appointing a Special Prosecutor, the Panel shall establish the limits of his commission and jurisdiction. The Panel shall reveal the identity of the Special Prosecutor as well as establish the limits of his commission and jurisdiction.

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...”

Section 5.— Section 12 of Act No. 2 of February 23, 1988, as amended, is hereby amended to read as follows:

“Section 12.- Provisions Regarding the Special Prosecutor.

(1) ...

(2) ...

(3) ...

(a) Request the Panel to contract professional advisory services or services of any other nature without being subject to the bidding process;

(b) ...

(c) ...

(d) ...

(e) Upon the approval of the Panel, grant witnesses in criminal, civil, or administrative cases the immunity he deems necessary to effectively discharge his duties in accordance with this Act;

(f) ...

(g) ...

(h) ...

(i) ...

(j) ...

(k) Request the Panel to refer matters related to his commission;

(l) Request the Panel to process the assignment of human resources from other government agencies as are necessary to carry out the type of investigation entrusted.

(4) ...

(5) If the investigation is not completed within an additional ninety (90)-day extension, and if the statute of limitation of the offenses has not elapsed, the Panel, in the exercise of its discretion may direct *motu proprio* the investigation to be extended within a strict term that shall not exceed thirty (30) days.

(6) ...

(7) ...

(8) ...

(9) ...”

Section 6.— Section 15 of Act No. 2 of February 23, 1988, as amended, is hereby amended to read as follows:

“Section 15.- Special Independent Prosecutor's Panel - Reports.

(1) ...

(2) ...

(3) ...”

Section 7.— A new Section 20 is hereby added to Act No. 2 of February 23, 1988, as amended, to read as follows:

“Section 20.- Exclusion from Application of Laws.

In order to promote and ensure the administrative autonomy that is essential to carry out the critical function entrusted thereto, the Office of the Special Independent Prosecutor’s Panel shall be excluded from the application of Act No.

184-2004, as amended, known as the ‘Public Service Human Resources Administration Act of the Commonwealth of Puerto Rico’; Act No. 230 of July 23, 1974, as amended, known as the ‘Government of Puerto Rico Accounting Act’; Reorganization Plan 3-2011, known as the ‘2011 General Services Administration Reorganization Plan’; Act No. 78-1997, as amended, known as the ‘Act to Regulate Controlled Substances Detection Tests in the Public Sector Workplace’ and from the Unique Registry of Bidders attached to the General Services Administration; Act No. 45-1998, known as the ‘Puerto Rico Public Service Labor Relations Act’; Act No. 5 of December 8, 1955, as amended, known as the ‘Public Documents Administration Act’; Act No. 265-2003, known as the ‘Act for Regulating Certain Government Financing and Personal Property Leasing Contracts’; Act No. 147 of June 18, 1980, as amended, known as the ‘Organic Act of the Office of Management and Budget’; and Act No. 209-2003, as amended, known as the ‘Puerto Rico Statistics Institute Act.’ Likewise, the Office shall remain exempt from the provisions of Act No. 7-2009, as amended, known as the ‘Special Act to Declare a State of Fiscal Emergency and Establish a Comprehensive Fiscal Stabilization Plan to Salvage the Credit of Puerto Rico.’ The provisions of Act No. 197-2002, known as the ‘Act to Regulate the Transition Process of the Government of Puerto Rico,’ shall only apply to the Office solely with respect to the fiscal account statements.”

Section 7[sic].— Sections 20, 21, and 22 of Act No. 2 of February 23, 1988, as amended, are hereby renumbered as Sections 21, 22, and 23, respectively.

Section 8.— Severability Clause.

If any clause, paragraph, subparagraph, section, provision, article, or part of this Act were held to be null or unconstitutional, the holding to such effect shall not affect, impair, or invalidate the remainder of this Act. The effect of such

holding shall be limited to such clause, paragraph, subparagraph, section, provision, article, or part of this Act thus held to be null or unconstitutional.

Section 9.— Repealing Clause.

Any Act or part thereof that is inconsistent with the provisions of this Act is hereby repealed.

Section 10.— Effectiveness.

This Act shall take effect immediately after its approval.

CERTIFICATION

I hereby certify to the Secretary of State that the following **Act No. 4-2012 (H. B. 2569) (Conference)** of the **2nd Special Session** of the **16th Legislative Assembly of Puerto Rico**:

AN ACT to amend Sections 1, 2, 10, 11, 12, and 15, add a new Section 20, and renumber subsequent Sections of Act No. 2 of February 23, 1988, as amended, and known as the “Special Independent Prosecutor’s Panel Act,” in order to clarify and broaden the scope of the administrative and fiscal autonomy granted to the Office of the Special Independent Prosecutor’s Panel, and consistent with said autonomy, exclude said Agency from the application of several laws; define the duties and responsibilities of the Chair of the Panel as the executive officer in charge of the administration of the Office of the Special Independent Prosecutor’s Panel; [...]

has been translated from Spanish to English and that the English version is correct.

In San Juan, Puerto Rico, on this 13th day of December, 2017.

Orlando Pagán-Ramírez
Acting Director