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January 29, 2016

VIA ELECTRONIC TRANSMISSION

Melanie Ann Pustay
Director
Office of Information Policy (OIP)
U.S. Department of Justice

Dear Director Pustay:

There's perhaps no better tool that Americans have to help ensure open government than the Freedom of Information Act (FOIA). The chief purpose of FOIA is for the public to know "what the Government is up to."¹ Your office has the critical role of encouraging agency compliance with FOIA and ensuring implementation of the President's FOIA Memorandum and the Attorney General's FOIA Guidelines.² To these ends, OIP develops and issues policy guidance to all agencies on proper implementation of FOIA.³

In addition, OIP provides individualized advice to agency personnel and other interested parties regarding any FOIA-related issue.⁴ According to OIP, this type of advice is "a further means of encouraging agency compliance with the FOIA."⁵

¹ *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 773 (1989) (internal citation omitted).

² <http://www.justice.gov/oip/about-office>; 28 C.F.R. § 0.24.

³ *Id.*

⁴ See 28 C.F.R. § 0.24(c).

⁵ The Dep't of Justice, Freedom of Information Act, 2014 Litigation and Compliance Report (Mar. 31, 2015), at 11, *available at* http://www.justice.gov/sites/default/files/oip/pages/attachments/2015/03/31/2014_foia_litigation_and_compliance_report.pdf.

However, a recent situation has raised concerns about the advice given by these “FOIA counselors.”

In 2008, through a process of the Integrity Committee of the Council of the Inspectors General on Integrity and Efficiency, the Department of the Interior Office of Inspector General (DOI-OIG) was tasked with investigating allegations of serious misconduct committed by the Deputy Inspector General of the Department of Veterans Affairs (VA).⁶ At one time, this Deputy Inspector General was the Acting Inspector General of the VA-OIG, despite the fact that prior to the 2008 misconduct he was disciplined in 2003 for having unauthorized sexually explicit material on his work computer.

The report of investigation authored by the DOI-OIG has not been made public. This is despite a pending 2013 FOIA request to DOI-OIG and requests made directly to the VA-OIG in 2012. DOI-OIG officials believe that the report DOI-OIG authored should be produced pursuant to FOIA; however, the recipient of the report, the VA-OIG, reportedly, does not.

According to DOI-OIG officials, they received conflicting advice from your office on whether the investigative report should be released pursuant to FOIA and whether that decision should be made by DOI-OIG or was appropriately referred to the VA-OIG. The result of the first consultation, which occurred sometime between November 2 and November 5, 2015, was reportedly that, as the originator of the report, DOI-OIG should process the record and seek a consultation with the VA-OIG. However, in the second consult, on December 7, 2015, an OIP counselor reportedly determined that the FOIA request should be referred to the VA-OIG.

This conflicting advice, provided approximately a month apart, implicates a variety of concerns. First, it raises questions about the integrity of OIP’s counseling process, including how consistency of advice is ensured and whether agencies are able to “cherry-pick” FOIA guidance from OIP and rely on the advice that is most advantageous. Second, it raises questions about this specific investigative report and the justification for an OIP counselor to advise DOI-OIG to refer and not release it.

Based on established FOIA guidance, it is unclear on what basis OIP would opine that the VA-OIG should be responsible for FOIA processing in this instance. In particular, it appears that the document was an agency record in the control of DOI-OIG, endorsed by that office and maintained in its official investigative files. While the VA-OIG may have a “substantial interest” in the document that would lead to a

⁶ See Luke Rosiak, *Top VA Watchdog Resigned After Being Caught Masturbating On The Job*, The Daily Caller (Dec. 6, 2015, 8:24PM), <http://dailycaller.com/2015/12/06/va-cop-chose-the-wrong-beat/>.

consultation with that agency, DOI-OIG is the originator of the document. The fact that an OIP attorney directed the request be referred to the VA-OIG is both perplexing and troubling: the VA-OIG was deemed too self-interested to conduct an impartial investigation into this matter and yet is permitted to be the arbiter of whether the results of that investigation should be released. The VA-OIG's conflict of interest in this matter has not abated as the VA-OIG has apparently repeatedly denied access to this potentially embarrassing document. This is a result that the process of assigning a neutral investigator was intended to avert.

Moreover, the basis for shielding this document is dubious. As your *Guide to the Freedom of Information Act* makes clear, as “a general rule [] demonstrated wrongdoing of a serious and intentional nature by high-level government officials is of sufficient public interest to outweigh almost any privacy interest of that official.”⁷ This rule applies in the context of both FOIA exemptions 6 and 7(C).⁸ Indeed, the President has declared, “The Government should not keep information confidential merely because public officials might be embarrassed by disclosure. . . Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve.”⁹ Here, the report centered on a high-ranking VA-OIG official—the Deputy Inspector General—who at one time was the Acting Inspector General. As the President has supposedly made clear with respect to FOIA, “[a] democracy requires accountability, and accountability requires transparency.”¹⁰ To make good on this principle, agencies should not be permitted to hide the results of investigations they do not like.

In order to better understand how OIP maintains the integrity and consistency of its counseling service, how conflicting advice was provided, and the outcome in this matter, please respond to the following:

1. How does OIP ensure the accuracy and integrity of the advice it provides through its FOIA counselors?
2. What controls are in place to ensure that such advice is appropriate? For example, who reviews advice given?

⁷ *United States Department of Justice Guide to the Freedom of Information Act, Exemption 6*, at 64 (Jan. 10, 2014), available at <http://www.justice.gov/oip/doj-guide-freedom-information-act-0>.

⁸ *Id.* at 64 n.208. This is not to suggest that the names of witnesses or other third parties are not properly redacted in this context.

⁹ Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

¹⁰ *Id.*

3. How does OIP ensure consistency of advice across FOIA counselors?
4. What circumstances would lead to two FOIA counselors providing conflicting advice approximately one month apart? What controls are in place to ensure that this does not occur and that agencies are not permitted to “forum-shop” among OIP FOIA attorneys?
5. Why was conflicting advice given in this instance?
6. What is the basis for directing DOI-OIG to refer the FOIA request of its investigative report to the VA-OIG?
7. Is OIP willing to reconsider its advice on this matter?
8. What is the basis for withholding the investigative report in this matter? Please explain how any privacy exemption applies to this report.
9. How can an investigative report showing the substantiated misconduct of a senior government official not be “of sufficient public interest to outweigh almost any privacy interest of that official” in this instance?
10. Has OIP otherwise opined on the availability of a report of investigation conducted by one agency into the conduct of an official of another agency? Please describe OIP’s advice or policy in this area.

Please provide your response no later than February 15, 2016. Please contact Jay Lim of my Committee staff at (202) 224-5225 should you have any questions. Thank you for your cooperation in this important matter.

Sincerely,



Charles E. Grassley
Chairman
Senate Committee on the Judiciary

cc:

The Honorable Patrick Leahy
Ranking Member
Senate Committee on the Judiciary

The Honorable Ron Johnson
Chairman
Senate Committee on Homeland Security and Government Affairs

The Honorable Thomas Carper
Ranking Member
Senate Committee on Homeland Security and Government Affairs

Linda A. Halliday
Acting Inspector General
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

Mary L. Kendall
Acting Inspector General
Department of the Interior
1849 C Street, N.W.
Mail Stop 4428
Washington, D.C. 20240

Michael J. Missal
Inspector General Designate
U.S. Department of Veterans Affairs
K&L Gates LLP
1601 K Street, NW
Washington, DC 20006