

EMPOWER OVERSIGHT

Whistleblowers & Research



October 19, 2021

Via Electronic Transmission: foiastaff@cigie.gov

Elizabeth Sweetland, CIGIE FOIA Public Liaison
Council of the Inspectors General on Integrity and Efficiency
1717 H Street NW, Suite 825
Washington, DC 20006

**RE: STATUS OF FOIA CASE NUMBERS 6330-2021-46, 6330-2021-63, 6330-2021-70,
and 6330-2021-75**

Dear Ms. Sweetland:

This letter seeks information concerning the status of four Freedom of Information Act (“FOIA”) requests that Empower Oversight Whistleblowers & Research (“Empower Oversight”) filed with the Council of Inspectors General on Economy and Efficiency (“CIGIE”). CIGIE has long since exceeded the FOIA’s 20-business day deadline for responding to three of the requests and has unreasonably tolled its processing of the remaining request. Empower Oversight respectfully requests detailed information concerning: (a) CIGIE’s efforts to resolve the causes of its delayed responses, and (b) the dates when CIGIE will begin delivering records responsive to Empower Oversight’s requests.

FOIA Case Number 6330-2021-46

On June 16, 2021, Empower Oversight sent CIGIE a FOIA request for email communications relating to the reasons behind the unconscionably long delay of the completion of an investigation of alleged abuses by the leadership of the Federal Housing Finance Agency Office of Inspector General (“FHFA-OIG”). Specifically, Empower Oversight sought email communications:

1. Sent by (a) Laura Wertheimer, (b) Leonard DePasquale, or (c) Richard Parker; to (d) the CIGIE Chair at the relevant time (Michael Horowitz or Allison Lerner); (e) the Integrity Committee Chair at the relevant time (Scott Dahl or Kevin Winters); or (f) FDIC Inspector General Jay Lerner. The time period of the requested records is January 1, 2017, through the present.

2. Sent to (a) Laura Wertheimer, (b) Leonard DePasquale, or (c) Richard Parker; from (d) the CIGIE Chair at the relevant time (Michael Horowitz or Allison Lerner); (e) the Integrity Committee Chair at the relevant time (Scott Dahl or Kevin Winters); or (f) FDIC Inspector General Jay Lerner. The time period of the requested records is January 1, 2017, through the present.
3. Sent to or from a house.gov or senate.gov domain to or from any official (d), (e), or (f) in item 1 of this request that refers to any of the FHFA employees (a), (b), or (c) named in item 1 of this request, above, from January 1, 2017, to the present.

On June 22, 2021, CIGIE acknowledged receipt of Empower Oversight's FOIA request, designated it FOIA Case Number 6330-2021-46, surprisingly characterized the request for email communications as being overly broad,¹ advised that "before CIGIE can consider [the FOIA request to be] a perfected request which would trigger the statutory processing times, further clarification will be needed," and claimed that "emails from a house.gov or senate.gov email address are not subject to FOIA because neither legislative body is a federal agency."

By letter dated July 14, 2021, Empower Oversight disputed CIGIE's claim that all email communications from a house.gov or senate.gov domain in the possession of a federal agency are beyond the scope of the FOIA, and provided seven FHFA-OIG email addresses to assist CIGIE to conduct its search for responsive email communications.

By letter dated August 16, 2021, CIGIE, receded from its "'bright line' categorical claim that email communications from a house.gov or senate.gov domain are beyond the scope of the FOIA." Further, "[i]n order to narrow the search so as to prevent it from being overly broad," CIGIE agreed to ask the Department of Justice Office of Inspector General ("DOJ-OIG") and the National Science Foundation Office of Inspector General ("NSF-OIG")—the employers of Inspectors General Horowitz and Lerner (Allison), respectively—to conduct searches for emails to/from Inspectors General Horowitz and Lerner from/to the seven FHFA-OIG email addresses that Empower Oversight had identified on July 14th, *i.e.*, laura.wertheimer@fhfaoig.gov; jennifer.byrne@fhfaoig.gov; leonard.depasquale@fhfaoig.gov; richard.parker@fhfaoig.gov; alison.healey@fhfaoig.gov; stacey.nahrwold@fhfaoig.gov; and brian.baker@fhfaoig.gov.

CIGIE's proposed resolution for the search of email communications maintained by CIGIE excluded seeking email communications maintained by the employers of Inspectors General Dahl, Winters, and Jay Lerner. CIGIE cannot demonstrate that searching a few years of activity in a handful of email accounts is unreasonably burdensome.

As you know, courts often disagree with agency assessments of what constitutes an unreasonably burdensome search. *See, e.g., Colgan v. DOJ*, No. 14-740, 2020 WL 2043828 (D.D.C. Apr. 28, 2020); *New Orleans Workers' Ctr. for Radical Just. v. ICE*, 373 F. Supp. 3d 16 (D.D.C. 2019); *Kwoka v. IRS*, No. 17-1157, 2018 WL 4681000, at *5 (D.D.C. Sept. 28, 2018).

¹ CIGIE's over breadth claim was initially puzzling. After all, the request seeks email communications from fewer than a dozen email accounts, relating to a specific topic, during a defined period of time, that could be efficiently accomplished in short order by widely available eDiscovery software. In retrospect, however, it appears that CIGIE's over breadth claim may be part of a strategy to pressure Empower Oversight to narrow or revise its FOIA requests. CIGIE has repeatedly engaged in a pattern of asserting that Empower Oversight's requests are over broad, unreasonably tolling the processing of requests, and serially requesting clarification, as time passes and production stalls.

And, self-serving agency assessments can appear even more dubious to reviewing courts when automated searches of electronic records are possible, as is the circumstance with FOIA Case Number 6330-2021-46. For example, in Leopold v. NSA, the District Court for the District of Columbia rejected the agency's unreasonable burden claim because "emails and their attachments can be searched using an eDiscovery tool without needing to open each email and its attachments individually" and where the agency provided no evidence "regarding the burden associated with running such searches." See, Leopold, 196 F. Supp. 3d 67, 75 (D.D.C. 2016).

CIGIE also agreed to search its servers for emails to/from house.gov and senate.gov domains but, again, claimed that Empower Oversight's request was "overly broad" because it would require a "search of every email account of every CIGIE official, which would include every CIGIE employee, CIGIE detailee, and CIGIE member" for a four and one-half year period. However, on its face, the third item of FOIA Case Number 6330-2021-46 is actually limited to the email accounts of Inspectors General Horowitz, Lerner(Allison), Dahl, Winters, and Lerner(Jay), and then only to matters relating to Ms. Wertheimer or Messrs. Parker and DePasquale.

FOIA Case Number 6330-2021-46 remains pending and since August 16th CIGIE has not provided Empower Oversight with any information concerning its progress in completing the steps that it agreed to (*i.e.*, compiling, reviewing, and producing responsive email communications to/from DOJ-OIG and NSF-OIG) and—having not received Empower Oversight's consent gratuitously to narrow the scope of its FOIA request—how it proposes to resolve the rest of Empower Oversight's request.

Hence, please advise of your progress at compiling and reviewing the responsive emails from DOJ-OIG and NSF-OIG, and how CIGIE plans to complete its processing of the remainder of FOIA Case Number 6330-2021-46.

Alternatively, if CIGIE continues to maintain that Empower Oversight's FOIA request is unreasonably burdensome, then deny the request so Empower Oversight can proceed to exhaust its administrative remedies and pursue judicial review, if necessary.

FOIA Case Number 6330-2021-63

On August 12, 2021, Empower Oversight sent CIGIE a FOIA request seeking:

All communications with Congressional committees or staff (1) notifying them of the reasons for the delay of the investigation(s) of (a) Laura Wertheimer, (b) Leonard DePasquale, (c) Richard Parker, or (d) Jennifer Byrne; and (2) periodically updating them of the continued status of, and reasons for, the delay of such investigation(s).

CIGIE acknowledged receipt of Empower Oversight's request on the same date and designated it FOIA Case Number 6330-2021-63.

By letter dated August 19, 2021, CIGIE provided an interim response to FOIA Case Number 6330-2021-63. CIGIE's interim response referred to Congressional testimony of former Inspector General Scott S. Dahl, before the U.S. House of Representatives, Committee on Oversight and Reform, Subcommittee on Government Operations, as being responsive to Empower Oversight's request; advised that the CIGIE Integrity Committee's ("CIGIE-IC")

reports to Congress identify delayed investigations by the numbers assigned to such investigations, rather than by the names of the targets thereof; and, in light of the manner that the CIGIE-IG identifies investigations in its delay reports to Congress, CIGIE encouraged Empower Oversight to revise the terms and scope of its request.

On August 24, 2021, in response to CIGIE's August 19th encouragement to revise the terms and scope of FOIA Case Number 6330-2021-63, Empower Oversight—expressly reserving the right to appeal CIGIE's processing of the FOIA request—amended the operative text of its request. As amended, FOIA Case Number 6330-2021-63 seeks:

All communications with Congressional committees or staff, pursuant to Section 8(A) of CIGIE's Integrity Committee Policies and Procedures (2018), notifying them of the continued status of, and general reasons for, the delay of any and all Integrity Committee investigations, for the period January 1, 2017, through June 1, 2021.

CIGIE, by email dated August 25, 2021, confirmed the revision of the operative text of FOIA Case Number 6330-2021-63.

By email dated September 7, 2021, CIGIE advised:

On Thursday of last week (Sept. 2nd), I worked with CIGIE's IT department to run a search for responsive records for 6330-2021-63. As yet, I have not started to go through the records because I was out on Friday and spent today catching up on some other CIGIE matters.

You have called twice and I apologize for not responding until now. I would very much like to schedule time for a call so that we could work through a better understanding of your remaining open requests.²

Since September 8, 2021, CIGIE has provided Empower Oversight zero responsive records and no information concerning its efforts to respond to, FOIA Case Number 6330-2021-63.

Two months have passed since CIGIE acknowledged receipt of FOIA Case Number 6330-2021-63, and more than a month has passed since it advised that its Information Technology department had run a search for responsive records and internally forwarded the results of its search for review. It is beyond time for CIGIE to disclose how many responsive records were located, whether CIGIE believes that any of such records are subject to a FOIA exemption (and, if so, which exemption(s)), and when Empower Oversight can expect to receive responsive, non-exempt records.

FOIA Case Number 6330-2021-70

On August 26, 2021, Empower Oversight sent CIGIE a FOIA request seeking:

1. Internal communications from Faith Coutier, Michael Horowitz, Allison Lerner, Kevin Winters, or Scott Dahl regarding the status of, and reasons for, delays in the completion

² Within an hour, Empower Oversight emailed a response, proposing multiple dates and times for the call that CIGIE suggested. And, a conference call was held the next day.

of Integrity Committee investigations beyond the 150-day threshold set forth at Section 8(A) of CIGIE's Integrity Committee Policies and Procedures (2018).

2. External communications from or to Faith Coutier, Michael Horowitz, Allison Lerner, Kevin Winters, or Scott Dahl regarding the status of, and reasons for, delays in the completion of Integrity Committee investigations beyond the 150-day threshold set forth at Section 8(A) of CIGIE's Integrity Committee Policies and Procedures (2018).

CIGIE acknowledged receipt Empower Oversight's request on the same date, designated it FOIA Case Number 6330-2021-70, noted that the first paragraph of the request would likely be subject FOIA Exemption b(5) on account of some of the records being protected by attorney-client privilege,³ and advised that the second paragraph of the request "is quite broad and appears to overlap with your client's other two open FOIA requests (6330-2021-46 and 6330-2021-63)." CIGIE added that it "would welcome a dialog that would clarify this request in the context of those other two requests."

Empower Oversight and CIGIE convened a conference call on September 8, 2021, primarily to discuss search terms to assist CIGIE—more specifically CIGIE's Information Technology department—to conduct searches for records responsive to FOIA Case Numbers 6330-2021-46 and 6330-2021-70.⁴ During the call, CIGIE gave every indication that it was satisfied with the search terms that Empower Oversight recommended.

Almost two months have passed since CIGIE acknowledged receipt of FOIA Case Number 6330-2021-70, and more than a month has passed since it conferred with Empower Oversight regarding search terms to guide its automated search for responsive records. It is beyond time for CIGIE to apprise Empower Oversight whether it has completed its search, whether responsive records were located, whether CIGIE believes that any of such records are subject to a FOIA exemption (and, if so, which exemption(s)), and when Empower Oversight can expect to receive responsive, non-exempt records.

FOIA Case Number 6330-2021-75

In its June 22, 2021, letter acknowledging receipt of FOIA Case Number 6330-2021-46, CIGIE asserted that none of the personnel named in the request are CIGIE employees, and thus it anticipated that it would need to contact the employers of Inspectors General Horowitz, Allison Lerner, Dahl, Winters, Jay Lerner, and FHFA-OIG for the email communications requested.

In light of CIGIE's June 22nd correspondence, on August 12, 2021, Empower Oversight submitted FOIA requests to the employers of Inspectors General Horowitz, Allison Lerner, Dahl, Winters, Jay Lerner, and to FHFA-OIG, seeking:

1. Communications relating to the CIGIE-IC investigation [of alleged abuses by four or fewer FHFA-OIG senior executives] sent by (a) Laura Wertheimer, (b) Leonard

³ CIGIE did not indicate what portion of the responsive records in its possession are subject to attorney-client privilege.

⁴ Although the search terms that were discussed could also have been used to respond to FOIA Case Number 6330-2021-63, as discussed above, CIGIE advised on September 7th that its Information Technology department had already completed its records search.

DePasquale, (c) Richard Parker, (d) Jennifer Byrne, (e) Brian Baker, (f) Stacey Nahrwold, or (g) Alison Healey to (h) the Council of the Inspectors General on Integrity and Efficiency (“CIGIE”) Chair at the relevant time (i.e., Michael Horowitz or Allison Lerner), (i) the CIGIE-IC Chair at the relevant time (i.e., Scott Dahl or Kevin Winters), (j) Federal Deposit Insurance Corporation (“FDIC”) Inspector General Jay Lerner, or (k) any FDIC Office of Inspector General personnel assigned to assist the CIGIE-IC investigation.

2. Communications relating to the CIGIE-IC investigation sent to (a) Laura Wertheimer, (b) Leonard DePasquale, (c) Richard Parker, (d) Jennifer Byrne, (e) Brian Baker, (f) Stacey Nahrwold, or (g) Alison Healey from (h) the CIGIE Chair at the relevant time (i.e., Michael Horowitz or Allison Lerner), (i) the CIGIE-IC Chair at the relevant time (i.e., Scott Dahl or Kevin Winters), (j) FDIC Inspector General Jay Lerner, or (k) any FDIC Office of Inspector General personnel assigned to assist the CIGIE-IC investigation.
3. Communications sent to or from a house.gov or senate.gov domain to or from any official described in subsections (h), (i), or (j) of item 1 of this request, to the extent that such communication refers to any of the FHFA-OIG employees named in subsections (a), (b), or (c) of item 1 of this request, above.

On August 17, 2021, Inspector General Horowitz’s employer, DOJ-OIG, acknowledged receipt of Empower Oversight’s FOIA request, designated it as Request 21-OIG-298, and advised “the records you seek are under the jurisdiction and control of the Council of the Inspectors General on Integrity and Efficiency (CIGIE), therefore, we have forwarded your requests to that office for processing and direct response to you.”

When CIGIE and Empower Oversight conferred on September 8, 2021, (*see*, above), we noted that CIGIE had not acknowledged the referral from DOJ-OIG, and expressed concern that it had been lost in the shuffle. CIGIE responded that it had not received the referral. The next day, CIGIE advised that it had received the referral but that Empower Oversight’s FOIA request file was corrupted and asked it to resend the request to CIGIE. Empower Oversight complied with CIGIE’s request the following morning.

On September 21, 2021, CIGIE formally acknowledged receipt of Empower Oversight’s request that DOJ-OIG referred to it, designated it FOIA Case Number 6330-2021-75, and stated:

CIGIE seeks a clearer understanding on how you think the parameters of this request differ from your others such as: 6330-2021-63; 6330-2021-66; 6330-2021-67; 6330-2021-69; 6330-2021-71. Moreover, the wording of 6330-2021-63 (modified after the date of the instant request) and the wording of 6330-2021-70, submitted after the date of the instant request, are both more likely to result in a release of responsive records. Given all of these factors, it is not clear how the wording of 6330-2021-75 could be interpreted in a way other than the way in which CIGIE has interpreted the other identically worded requests that have already been addressed and closed. CIGIE will consider 6330-2021-75 as a tolled request until we have reached a mutual understanding of how, if at all, it differs from the other related requests listed above.

Given that CIGIE's request for further information does not pertain to the applicability, assessment, or payment of search and duplication fees, it is limited to a single tolling "while it is awaiting such information that it has reasonably requested from the requester." 5 U.S.C. § 552(a)(6)(A)(ii)(I) (emphasis added); *see also*, DOJ, *New Limitations on Tolling the FOIA's Response Time* (Updated July 27, 2021), available at <https://www.justice.gov/oip/blog/foia-post-2008-oip-guidance-new-limitations-tolling-foias-response-time>. But, CIGIE's request for information is not reasonable, and its tolling of its processing of Empower Oversight's FOIA request thus is in error.

First, it is obvious that FOIA Case Number 6330-2021-75 is dissimilar to FOIA Case Numbers 6330-2021-63 and 6330-2021-70. The former FOIA request seeks communications sent from or received by specifically identified parties, concerning a specifically identified CIGIE-IC investigation of four or fewer FHFA-OIG senior executives. By contrast, the latter FOIA requests seek communications concerning approximately 27 CIGIE-IC investigations of unidentified targets about which CIGIE apprised Congress of investigative delays exceeding the 150-day deadline set forth at Section 8(A) of the CIGIE-IC's procedures.

If there is any overlap at all, then such overlap relates to only one of the 27 investigations involved in FOIA Case Numbers 6330-2021-63 and 6330-2021-70.

Second, it is equally obvious that FOIA Case Number 6330-2021-75 is similar to "identically worded" FOIA Case Numbers 6330-2021-66, 6330-2021-67, 6330-2021-69, and 6330-2021-71. Further, with respect to FOIA Case Numbers 6330-2021-66, 6330-2021-67, 6330-2021-69, and 6330-2021-71, which CIGIE has "addressed and closed," Empower Oversight has filed an administrative appeal of CIGIE's unwarranted refusals to confirm or deny the aforementioned CIGIE-IC investigation of four or fewer FHFA-OIG senior executives and erroneous denials under FOIA exemptions b(6) and b(7)(C).⁵

Third, under the circumstances, CIGIE's request for additional information can hardly be considered "reasonable" because it was delayed by more than a month as the result of CIGIE's administrative error. When Empower Oversight initially inquired about DOJ-OIG's referral of Request 21-OIG-298, CIGIE denied having received the referral. The next day, September 9, 2021, CIGIE advised that it had received the referral. Attached to CIGIE's September 9th email to Empower Oversight confirming that it had received Request 21-OIG-298 is an August 17, 2021, email from a DOJ Government Information Specialist that forwarded what became FOIA Case Number 6330-2021-75. Then, another 12 days passed before CIGIE formally acknowledged receipt of Empower Oversight's FOIA request and forwarded its request for a "clearer understanding of the parameters" of the request (*i.e.*, September 9th to September 21st). In other words, more than a month passed between CIGIE's receipt of FOIA Case Number 6330-2021-75 on August 17th and its dubious request for a clearer understanding on September 21st.

Accordingly, please advise when Empower Oversight can expect to receive records responsive to FOIA Case Number 6330-2021-75.

⁵ See, Empower Oversight, *Empower Oversight Appeals CIGIE's Denial of FOIA Requests into Abuse Allegations at FHFA* (October 7, 2021), available at <https://empower.us/empower-oversight-appeals-cigies-denial-of-foia-requests-into-abuse-allegations-at-fhfa/>.

Alternatively, if CIGIE continues to maintain that its initial determinations with respect to FOIA Case Numbers 6330-2021-66, 6330-2021-67, 6330-2021-69, and 6330-2021-71 were correct and—because of its similarity to them—that FOIA Case Numbers 6330-2021-75 should be resolved in the same fashion, then deny the request so Empower Oversight can exhaust its administrative remedies and pursue judicial review, if necessary.

Thank you for your time and consideration. Please don't hesitate to contact me with any questions.

Cordially,

[/Jason Foster/](#)

Jason Foster
Founder & President