

EMPOWER OVERSIGHT

Whistleblowers & Research



December 1, 2021

Via Electronic Transmission: efoia@fdic.gov

Nicholas Podsiadly, General Counsel
c/o FOIA/PA Group
Legal Division
FDIC
550 17th Street, N.W.
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**RE: Freedom of Information Act Appeal
FDIC FOIA Log Number 21-0262**

Dear General Counsel Podsiadly:

Empower Oversight Whistleblowers & Research (“Empower Oversight”)¹ appeals the Federal Deposit Insurance Corporation’s (“FDIC”) *Glomar* response its request under the Freedom of Information Act (“FOIA”).²

The records Empower Oversight seeks are intended to shed light on the causes of the unconscionably long delay of an investigation of allegations of abuses among the leadership of the Federal Housing Finance Agency, Office of Inspector General (“FHFA-OIG”). FDIC’s Office of Inspector General (“FDIC-OIG”) conducted the investigation on behalf of the Council of Inspectors General on Integrity and Efficiency (“CIGIE”).

¹ Empower Oversight is a nonpartisan, nonprofit educational organization, which is dedicated to enhancing independent oversight of government and corporate wrongdoing. It works to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, and seeks to hold those authorities accountable to act on such reports by, among other means, publishing information concerning the same.

² The FOIA is codified at 5 U.S.C. § 552.

Introduction

As the Supreme Court explained more than 40 years ago, a primary purpose of the FOIA is to serve as a “check against corruption and to hold the governors accountable to the governed.”³ Accordingly, at its core, the FOIA “operates on the assumption that ‘it is for the public to know and then to judge.’”⁴ With respect to government investigations, the Court of Appeals for the District of Columbia Circuit (“Circuit Court”) has stated that the “public has an interest in knowing ‘that a government investigation itself is comprehensive, that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner.’”⁵ “That is how the FOIA helps ‘to hold the governors accountable to the governed.’”⁶ The public interest in government investigations “crescendos when the misfeasance of a federal” official with “‘the power to employ the full machinery of the state in scrutinizing any given individual’ is at stake.”⁷ “The public ‘must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.’”⁸

Offices of Inspectors General exist to detect, prevent, and report instances of waste, fraud, and abuse and to promote economy, efficiency, and effectiveness in government.⁹ If any agencies within government should operate consistent with the principles of transparency and accountability underlying the FOIA, it should be Offices of Inspectors General.

In contrast to these guiding principles, the FDIC—at FDIC FOIA Log Number 21-0262—erroneously issued a *Glomar* response to Empower Oversight’s FOIA request. As discussed in detail below, the FDIC staff erred because the FDIC-OIG’s investigation of the FHFA-OIG leadership abuses does not qualify as a “law enforcement” investigation subject to protection under Subsection b(7)(C) of the FOIA (which is a prerequisite of a *Glomar* response), and alternatively, were the investigation somehow qualified for protection under Subsection b(7)(C), then a *Glomar* response, nonetheless, is not permissible because there is a public interest in the reasons for the delay of the investigation and a redacted copy of the report of the investigation is in the public domain.

³ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

⁴ *Bartko v. DOJ*, 898 F.3d 51, 69 (D.C. Cir. 2018) (quoting, *Stern v. FBI*, 737 F.2d 84, 94 (D.C. Cir. 1984)).

⁵ *Bartko*, 898 F.3d at 69 (quoting, *Stern*, 737 F.2d at 92).

⁶ *Bartko*, 898 F.3d at 69 (quoting, *Stern*, 737 F.2d at 92).

⁷ *Bartko*, 898 F.3d at 69 (quoting, *Young v. US ex rel Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987)).

⁸ *Bartko*, 898 F.3d at 69 – 70 (quoting, *Young*, 481 U.S. at 814).

⁹ 5 U.S.C. App. § 2.

For the reasons set forth herein, Empower Oversight respectfully requests that you reverse the FDIC's initial determination and ensure that FDIC promptly compiles, reviews, and produces the records requested as required by the FOIA.

Background

IC Investigation of FHFA-OIG Leadership

It has been widely reported by the news media that by a letter to President Biden dated April 14, 2021, the Chairman of the CIGIE Integrity Committee ("CIGIE-IC") reported its findings, conclusions, and recommendations regarding allegations of misconduct against four current and former FHFA-OIG executives:

- Former Inspector General Laura Wertheimer,
- Former Associate Inspector General Jennifer Byrne,
- Former Acting Deputy Inspector General for Investigations Richard Parker,¹⁰ and
- Chief Counsel Leonard DePasquale.¹¹

At least one of the media accounts included a link to a purported copy of the CIGIE-IC Chairman's 29-page letter to the President.¹²

The CIGIE-IC Chairman's letter advised that in 2017, the CIGIE-IC began receiving multiple complaints alleging that former Inspector General Wertheimer, former Associate Inspector General Byrne, and other senior FHFA-OIG personnel had grossly mismanaged the Office of Audits, implemented coercive personnel actions, and created a culture of retaliation and abuse.¹³ In response to these complaints, the CIGIE-IC sponsored an investigation, which was carried out by FDIC-OIG,¹⁴ to determine whether:

1. Inspector General Wertheimer and a senior FHFA-OIG employee imposed (at mid-year) unachievable performance standards upon audit staff, to coerce them to separate from the agency;

¹⁰ Ms. Byrne and Mr. Parker are still employed by FHFA-OIG, but they serve in different senior positions.

¹¹ See, e.g., <https://www.washingtonpost.com/us-policy/2021/06/30/fhfa-inspector-general-resigns-laura-wertheimer/>; <https://thehill.com/homenews/senate/550777-report-finds-federal-housing-agency-official-abused-her-authority>; <https://thehill.com/homenews/administration/550761-read-watchdog-report-on-federal-housing-inspector-general>; and <https://www.govexec.com/oversight/2021/05/white-house-reviewing-recommendation-fire-housing-finance-inspector-general/174026/>.

¹² See, The Hill, *Read: Watchdog Report on Federal Housing Inspector General*, (April 28, 2021), available at <https://thehill.com/homenews/administration/550761-read-watchdog-report-on-federal-housing-inspector-general>.

¹³ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 2, ([Apr 14, 2021](#)).

¹⁴ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 2, ([Apr 14, 2021](#)).

2. Inspector General Wertheimer failed to resist or report to Congress threats by the FHFA Director to undermine FHFA-OIG's budget, staffing, and resources, and cited those threats as grounds for certain decisions;
3. Inspector General Wertheimer violated the Privacy Act by describing the details of an Equal Employment Opportunity complaint to a subordinate that had no official need to know the information;
4. Inspector General Wertheimer – since becoming aware of allegations and complaints made against her – sought to identify complainants, and disparaged and demeaned FHFA-OIG staff whom she believed complained about her or cooperated with inquiries into the complaints and allegations; and
5. Associate Inspector General Byrne threatened to retaliate against (*i.e.*, file criminal complaints against) FHFA-OIG employees who complained to Senator [Charles] Grassley's office.¹⁵

The CIGIE-IC found, by a preponderance of the evidence, that former Inspector General Wertheimer and Messrs. Parker and DePasquale “abused their authority in the exercise of their official duties,” and that former Inspector General Wertheimer “engaged in conduct that undermines the integrity reasonably expected of an” Inspector General.¹⁶

¹⁷

Specifically, the CIGIE-IC “substantiated the fourth allegation” that its inquiry sought to address, “raised significant concerns regarding the first,” and claimed that former Inspector General Wertheimer and Messrs. Parker and DePasquale “prevented IC investigators from having access to a complete record of the facts” of the matters accepted for investigation.¹⁸ Indeed, the CIGIE-IC adds that former Inspector General Wertheimer's and Messrs. Parker's and DePasquale's “wrongful withholding of evidence prevented the IC from having the necessary information to make findings on the remaining allegations of misconduct.”¹⁹

¹⁵ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 2 – 3, ([Apr 14, 2021](#)).

¹⁶ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 1 – 2, ([Apr 14, 2021](#)).

¹⁷ Section 3(a) of the Inspector General Act of 1978 states that there shall be at the head of each Office of Inspector General an Inspector General “who shall be appointed by the President, by and with the advice and consent of the Senate, without regard to political affiliation;” and who shall be selected for appointment “solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.” 5 U.S.C. App. § 3(a) (emphasis added). Regarding the first of the two criteria governing the selection of Inspectors General, the first essential meaning of “integrity” is “the quality of being honest and fair.” See, <https://www.merriam-webster.com/dictionary/integrity>.

¹⁸ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 3, ([Apr 14, 2021](#)).

¹⁹ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 25, ([Apr 14, 2021](#)).

More specifically, the CIGIE-IC concluded that former Inspector General Wertheimer:

... showed a disdain and resistance towards Congressional and IC oversight by fostering a culture of witness intimidation through a pattern of staff abuse and fear of retaliation. Furthermore, she wrongfully refused to cooperate with the IC's investigation by denying IC investigators full access to FHFA OIG personnel and documents.^{20, 21}

Moreover, the FDIC-OIG investigators caught former Inspector General Wertheimer in an effort to evade the truth during her interview. The CIGIE-IC reports that when she was first asked whether she had disparagingly referred to two FHFA-OIG executives who had cooperated with requests from Congressional investigators as “Boris and Natasha”—the names of cartoon characters—she initially denied that she had.²² Under further questioning she conceded that she “may” have done so.²³ And under further questioning she acknowledged that “she was sure she had done so.”²⁴

With respect to Messrs. Parker and DePasquale, the CIGIE-IC specifically found that they:

... were fully complicit in IG Wertheimer's refusal to cooperate, by repeatedly and improperly denying the IC access to documents and a key witness, who was CC DePasquale himself. In fact, CC DePasquale, a government employee simply refused to be interviewed by IC investigators.²⁵

In addition to his refusal to appear formally for an interview and confront issues of potential privilege and relevance on a question-by-question basis as is expected of federal employees, Chief Counsel DePasquale and Office of Legal Counsel staff under his supervision inappropriately deemed themselves arbiters of relevance and refused to

²⁰ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 3 – 4, ([Apr 14, 2021](#)).

²¹ Although the Chairman of the CIGIE-IC's April 14th letter to the President notes that the CIGIE-IC began to receive complaints and allegations about former Inspector General Wertheimer and FHFA-OIG leadership in 2017, the letter discusses witness intimidation and a pattern of staff abuse dating back to October of 2015. See, Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 5, ([Apr 14, 2021](#)).

²² Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 6 and 28, ([Apr 14, 2021](#)).

²³ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 6 and 28, ([Apr 14, 2021](#)).

²⁴ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 6 and 28, ([Apr 14, 2021](#)).

²⁵ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 5, ([Apr 14, 2021](#)).

provide the CIGIE-IC investigators information that they claimed to be “‘not directly relevant to the allegations under investigation’ or ‘unnecessary to the IC to complete a thorough investigation.’”²⁶

Moreover, they limited the FDIC-OIG investigators’ access to some records to an *in camera* review, during which three attorneys under Chief Counsel DePasquale’s supervision monitored the investigators and prohibited them from making copies of and taking notes concerning relevant materials.²⁷

For his part, former Acting Deputy Inspector General for Investigations Parker denied the FDIC-OIG investigators access to interview Chief Counsel DePasquale on the grounds of privilege (*i.e.*, alleging that former Inspector General Wertheimer’s specious attorney-client relationship with Chief Counsel DePasquale) and the absence of necessity.²⁸

The CIGIE-IC recommended that former Inspector General Wertheimer’s misconduct warranted “substantial disciplinary action, up to and including removal.”²⁹ Similarly, it recommended that Messrs. Parker and DePasquale “each be subject to appropriate disciplinary action.”³⁰ However, more than two months passed after the CIGIE-IC Chairman’s correspondence to the President and no visible action had been initiated against former Inspector General Wertheimer or Messrs. Parker and DePasquale; consequently, several public interest groups and a bipartisan group of Senators became increasingly emphatic in their encouragement that the White House act on the findings and recommendations in the CIGIE-IC Chairman’s April 14, 2021, letter to President Biden.³¹

Prior to any public action by the White House, however, former Inspector General Wertheimer announced her resignation (effective July 30, 2021) on June 29, 2021.³² As of the date of this FOIA appeal, FHFA-OIG’s website shows that Mr. Parker

²⁶ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 15, ([Apr 14, 2021](#)).

²⁷ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 15, ([Apr 14, 2021](#)).

²⁸ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 16, ([Apr 14, 2021](#)).

²⁹ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 29, ([Apr 14, 2021](#)).

³⁰ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 29, ([Apr 14, 2021](#)).

³¹ See, e.g., <https://thehill.com/homenews/administration/560560-biden-under-increasing-pressure-to-fire-housing-inspector-general>; <https://www.grassley.senate.gov/news/news-releases/grassley-hassan-call-on-biden-to-appoint-qualified-and-untainted-acting-fhfa-inspector-general>; <https://thehill.com/homenews/administration/562094-advocacy-groups-press-biden-to-name-new-inspector-general-at-housing>; <https://www.govexec.com/oversight/2021/07/agriculture-ig-named-acting-watchdog-federal-housing-finance-agency/184195/>; and <https://thehill.com/opinion/white-house/560704-its-time-for-biden-to-remove-an-inspector-general-the-right-way>.

³² See, e.g., <https://www.washingtonpost.com/us-policy/2021/06/30/fhfa-inspector-general-resigns-laura-wertheimer/>; <https://www.govexec.com/oversight/2021/06/embattled-housing-finance-agency-ig-steps-down/176819/>.

serves as the Deputy Inspector General for Compliance and Mr. DePasquale continues to serve as Chief Counsel.³³

Messrs. Parker's and DePasquale's continued presence in FHFA-OIG leadership roles stokes among FHFA-OIG staff fear of further retaliation and abuse, resentment of their apparent invulnerability to accountability, and expectation that their pattern of obstructing transparency and oversight will persist. One FHFA-OIG staffer recently advised Empower Oversight:

I work at FHFA OIG. If you look at the org chart on our website you will see that Depasquale is still the Chief Counsel and Rich Parker is still the head of Compliance. We were shocked that Acting IG Fong (whom we have great respect for by reputation and experience) left them in their former roles rather than immediately side lining them pending disciplinary action. So a fugitive from Cigie for not testifying remains the chief legal officer of the OIG. As such, he oversees FOIA requests including yours - which is an amazing conflict of interest.

Investigative Delays Enabled the Protracted Abuse of and Retaliation Against Witnesses

The CIGIE-IC Chairman's April 14, 2021, letter to President Biden plainly shows that the CIGIE-IC's investigation of former Inspector General Wertheimer's abuses of authority was not the first such investigation. The letter discusses prior investigations: one by two Senate committees and another by the Office of Special Counsel ("OSC").³⁴

According to the April 14th letter, in October of 2015 the then Chairmen of the Senate Committees on the Judiciary and Homeland Security and Government Affairs received multiple complaints about FHFA-OIG and requested information concerning FHFA-OIG personnel reductions, output, and hiring practices.³⁵ The Senators also requested that FHFA-OIG make five specifically named executives available for interview.³⁶

³³ FHFA-OIG, *Organization Chart*, available at <https://www.fhfaig.gov/about/Organization>.

³⁴ See, Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 5 and 26, ([Apr 14, 2021](#)).

³⁵ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 5, ([Apr 14, 2021](#)).

³⁶ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 5, ([Apr 14, 2021](#)).

Chief Counsel DePasquale—with the assistance of outside counsel—gathered the five executives together and aggressively discouraged them from cooperating with the Senators’ interview request.³⁷

Regarding the executives who failed to succumb to Chief Counsel DePasquale’s intimidation, the CIGIE-IC found evidence that former Inspector General Wertheimer was “not happy” with them, openly disparaged them, and re-assigned them to Chief Counsel DePasquale to “punish” them and insulate herself from them.³⁸ The CIGIE-IC Chairman devotes more than three pages (about 10%) of his letter to the President to descriptions of former Inspector General Wertheimer’s pervasive retaliation against two of the executives and her comical lack of candor regarding such retaliation when confronted with evidence of it by the FDIC-OIG investigators.³⁹

Moreover, the CIGIE-IC noted that former Inspector General Wertheimer’s retaliation against the two executives had a chilling effect on the willingness of other FHFA-OIG employees to cooperate with oversight inquiries,⁴⁰ and concluded that humiliating, demeaning, and embarrassing staff:

. . . is inappropriate on its face and is exacerbated by IG Wertheimer’s employment of these techniques against actual or potential witnesses or whistleblowers – the very people IGs are supposed to protect. Such behavior suggests a hostility to oversight and is widely known to be unacceptable in the IG community and beneath the standard of integrity expected of an IG.^{41, 42}

The CIGIE-IC Chairman’s letter also references an intervening OSC investigation of a 2015 change of auditor performance standards that caused the majority of FHFA-OIG auditors to resign *en masse*.⁴³ Like the two Senator Chairman, the OSC sought the

³⁷ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 5 fn. 18, ([Apr 14, 2021](#)).

³⁸ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 5, ([Apr 14, 2021](#)).

³⁹ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 5 – 8, and 28, ([Apr 14, 2021](#)).

⁴⁰ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 9, ([Apr 14, 2021](#)).

⁴¹ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 11, ([Apr 14, 2021](#)).

⁴² Sections 3(d) and 7(b) of the Inspector General Act of 1978, as amended, expressly elevate the importance and protection of whistleblowers within Offices of Inspector General. Section 3(d) requires each Inspector General to designate a Whistleblower Protection Coordinator to, among other things, educate agency employees about prohibitions against retaliation for protected disclosures, and assist the Inspector General in promoting the timely and appropriate handling and consideration of protected disclosures and allegations of reprisal. 5 U.S.C. App. § 3(d)(1)(C). Whereas, Section 7(b) generally prohibits Inspectors General from disclosing the identity of agency employees who submit complaints or provide information to the Office of Inspector General. 5 U.S.C. App. § 7(b).

⁴³ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 25 – 26, ([Apr 14, 2021](#)).

testimony of one of the two executives whom former Inspector General Wertheimer had previously retaliated against; and, in defiance of her continued retaliation, he complied with OSC's request.

OSC determined that, although the announcement of a performance standards change amounted to a threat of a personnel action, threats do not violate 5 U.S.C. § 2302(b)(12).⁴⁴ OSC, nonetheless, referred its findings to the CIGIE-IC, and suggested that “the problematic conduct might be wrongdoing under the CIGIE-IC’s broader standard.”⁴⁵ OSC’s referral comprises the first allegation in the CIGIE-IC’s investigation of the aforementioned FHFA-OIG leaders, but the CIGIE-IC Chairman reported that lack of cooperation by former Inspector General Wertheimer and FHFA-OIG prevented the CIGIE-IC from developing the necessary facts to make a final determination on the issue.⁴⁶

Throughout the more than five-year pendency of the three investigations former Inspector General Wertheimer and her leadership team were enabled to retaliate persistently against staff who cooperated with the Senate, OSC, and CIGIE-IC investigations. In other words, some FHFA-OIG staff, such as two of the five executives that the Senate specifically requested for interview in 2015 (one of whom was also requested for interview by OSC and the CIGIE-IC), were subjected to more than five years of disparagement, embarrassment, and humiliation at the hands of former Inspector General Wertheimer and her inner circle.

And, as the CIGIE-IC found, the pervasive retaliation against such executives served as a bold and effective deterrent against other FHFA-OIG staff cooperating with legitimate oversight efforts directed at former Inspector General Wertheimer,⁴⁷ and as an implicit directive to ostracize staff who had cooperated. It is not reasonable to expect whistleblowers to endure years of retaliation or to believe that anyone would risk reporting government waste, fraud, and abuse in an environment where such circumstances are tolerated. Hence, if the Inspector General Community is to have any credibility that it will protect would-be whistleblowers within its own ranks, then Offices of Inspectors General must themselves demonstrate transparency and accountability. Further, if the public is not reassured that Offices of Inspectors General will efficiently, thoroughly, and timely investigate and report on witness intimidation and retaliation by

⁴⁴ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 25 – 27, ([Apr 14, 2021](#)). The performance standard change was issued three-quarters of the way through the Fiscal Year 2015 performance period. The revised standard provided that auditors would receive minimally successful ratings unless they published a report during the performance period. However, former Inspector General Wertheimer had complete control over which reports got published and when. Accordingly, the revised standard served as a threat that encouraged auditors to leave the FHFA-OIG.

⁴⁵ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 27, ([Apr 14, 2021](#)).

⁴⁶ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 27, ([Apr 14, 2021](#)).

⁴⁷ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 9, ([Apr 14, 2021](#)).

Inspectors General and senior officials within the Inspector General Community, then the chilling effect on whistleblowing will be devastating.

Empower Oversight's FOIA Requests

On June 16, 2021, Empower Oversight sent two FOIA requests to CIGIE.

Empower Oversight's first FOIA request sought "an unredacted version of the [the CIGIE-IC Chairman's April 14, 2021, letter to President Biden], and the five enclosures to that letter." (*See*, Exhibit 1). Its second request sought:

1. Emails 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. Emails 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. Emails 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. (*See*, Exhibit 2).

In support of its FOIA requests, Empower Oversight explained that:

The public has an interest in understanding why the CIGIE-IC took so long to elevate this matter to the White House with a recommendation to consider imposing appropriate discipline. It is unclear from the public record whether the CIGIE-IC had previously made similar recommendations during President Trump's tenure in office, and if not, why it failed to do so. (*See*, Exhibits 1 and 2).

Empower Oversight intends to analyze the requested information in furtherance of two purposes:

1. To understand whether the CIGIE-IC investigation of former Inspector General Wertheimer, former Associate Inspector General Byrne, and Messrs. Parker and DePasquale was delayed solely by the actions of the investigative targets

themselves, or whether there were other intentional or unintentional causes of the delay; and

2. To develop and propose to Congress legislative remedies to:
 - a. Protect whistleblowers from continued retaliation during the pendency of investigations stemming from their complaints or with which they cooperate; and
 - b. Overcome lack of cooperation or obstruction of investigations of wrongdoing by government officials.⁴⁸

CIGIE's FOIA Public Liaison acknowledged Empower Oversight's two FOIA requests on June 22, 2021. She assigned FOIA case number 6330-2021-45 to Empower Oversight's first FOIA request (*i.e.*, its request for an unredacted copy of the CIGIE-IC Chairman's April 14, 2021 letter to President Biden) (*see*, Exhibit 3A) and assigned FOIA case number 6330-2021-46 to its second FOIA request (*i.e.*, its request for email communications among CIGIE leadership, the targets of the CIGIE-IC investigation, and Congress) (*see*, Exhibit 4).

Additionally, with respect to CIGIE FOIA case number 6330-2021-45, CIGIE's FOIA Public Liaison advised that it is CIGIE's policy that "in all cases CIGIE will neither confirm nor deny the existence of a non-public law enforcement matter involving any particular individual." (*See*, Exhibit 3A). This type of response to a FOIA request is typically referred to as a "*Glomar* response," after the Circuit Court's decision in Phillippi v. CIA.⁴⁹

On October 6, 2021, Empower Oversight appealed CIGIE's *Glomar* response to CIGIE FOIA case number 6330-2021-45. In support of its appeal, among other things, Empower Oversight pointed out that former Inspector General Wertheimer, through her attorney, had publicly acknowledged the IC's investigation, and thus undermined the

⁴⁸ Gerald Connolly, Chairman of the House Government Operations Subcommittee, Committee on Oversight and Reform, described former Inspector General Wertheimer as "the poster child for why the House will pass" the Integrity Committee Reform Act of 2021, H.R. 2681. *See*, Press Release: *Connolly Statement on IG Wertheimer's Planned Resignation*, (June 29, 2021), available at <https://connolly.house.gov/news/documentsingle.aspx?DocumentID=4330>. The Integrity Committee Reform Act of 2021 would amend the Section 11 of the Inspector General Act of 1978 to require the CIGIE-IC to include additional information in its reports to Congress and submit semiannual reports to Congress that include, among other things, descriptions of any attempt to prevent or hinder an CIGIE-IC investigation or any concerns about the integrity or operations of an Office of Inspector General. Empower Oversight is encouraged by the supplemental reporting requirements envisioned by the Integrity Committee Reform Act of 2021, but it also believes that close analysis of the unredacted CIGIE-IC Chairman's April 14, 2021, letter to President Biden with its five enclosures would likely result in legislative proposals to enable the CIGIE-IC or another authority to overcome impediments and unreasonable delays like those encountered by the CIGIE-IC during its investigation of FHFA-OIG leadership.

⁴⁹ 546 F.2d 1009 (D.C. Cir. 1976).

legal rationale for refusing to confirm or deny it. (*See*, Exhibit 3B). And, on November 19, 2021, CIGIE granted Empower Oversight’s appeal, in part, on the grounds that former Inspector General Wertheimer had “publicly associated herself with the IC’s investigation,” making it inappropriate to refuse to confirm or deny its existence. (*See*, Exhibit 3C, pp. 2 – 3).

Regarding Empower Oversight’s second FOIA request, CIGIE FOIA case number 6330-2021-46, CIGIE’s FOIA Public Liaison claimed that none of the personnel named in the request are CIGIE employees. (*See*, Exhibit 4). Hence, CIGIE anticipated that it would need to contact FDIC-OIG, Department of Justice-OIG (“DOJ-OIG”), National Science Foundation-OIG (“NSF-OIG”), Department of Labor-OIG (“DOL-OIG”), and Amtrak-OIG for the email communications of Inspectors General Lerner, Horowitz, Lerner, Dahl, and Winters, respectively, as well as FHFA-OIG for the email communications of the investigative targets. (*See*, Exhibit 4).

In light of the CIGIE FOIA Public Liaison’s June 22nd correspondence, on August 12, 2021, Empower Oversight submitted FOIA requests to FDIC-OIG, FHFA-OIG, DOJ-OIG, NSF-OIG, DOL-OIG, Amtrak-OIG, and FDIC-OIG. (Empower Oversight’s FOIA request to FDIC-OIG is attached as Exhibit 5.)⁵⁰ These requests sought:

1. Communications relating to the CIGIE-IC investigation sent by (a) Laura Wertheimer, (b) Leonard 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.

⁵⁰ *See also*, Empower Oversight, *Empower Oversight Seeks Answers on Multi-year Delay of FHFA Inspector General Report*, (August 13, 2021) available at <https://empowr.us/empower-oversight-seeks-answers-on-multi-year-delay-of-fhfa-inspector-general-report/> <https://empowr.us/empower-oversight-seeks-answers-on-multi-year-delay-of-fhfa-inspector-general-report/> (the referenced FOIA requests are listed and linked at the foot of the press release).

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. (See, Exhibit 5.)^{51, 52}

On September 22, 2021, FDIC responded to Empower Oversight's above-quoted FOIA request with a Glomar response. (FDIC's response is attached as Exhibit 6.) FDIC advised, "We have considered your request, and can neither confirm nor deny the existence of records responsive to your request." (See, Exhibit 6.)

FDIC's Response to Empower Oversight's FOIA Requests Is in Error

FDIC's *Glomar* response is in error because:

- The CIGIE-IG's/FDIC-OIG's investigation of allegations of misconduct by former Inspector General Wertheimer, former Associate Inspector General Byrne, and Messrs. Parker and DePasquale does not qualify as a "law enforcement" investigation protected by Exemption b(7)(C); and
- Had the CIGIE-IC's/FDIC-OIG's investigation qualified as a "law enforcement" investigation protected by Exemption b(7)(C), then a *Glomar* response, nonetheless, would not have been permissible because there is a public interest in the reasons for the delay of the investigation and the CIGIE-IC Chairman's April 14, 2021, letter to President Biden is in the public domain.

Exemption b(7) "Law Enforcement" Investigations

When records sought under the FOIA relate to an inquiry concerning the activities of one or more federal employees, the key to the applicability of a *Glomar*

⁵¹ See also, Empower Oversight, *Empower Oversight Seeks Answers on Multi-year Delay of FHFA Inspector General Report*, (August 13, 2021) available at <https://empowr.us/empower-oversight-seeks-answers-on-multi-year-delay-of-fhfa-inspector-general-report/> <https://empowr.us/empower-oversight-seeks-answers-on-multi-year-delay-of-fhfa-inspector-general-report/> (the referenced FOIA requests are listed and linked at the foot of the press release).

⁵² Empower Oversight sent two FOIA requests to DOJ-OIG and FHFA-OIG: one as set forth above, and another seeking:

1. Communications relating to the CIGIE-IC investigation sent by Laura Wertheimer to the Council of the Inspectors General on Integrity and Efficiency ("CIGIE") Chair, Michael Horowitz.
2. Communications relating to the CIGIE-IC investigation sent to Laura Wertheimer from CIGIE Chair Michael Horowitz.

See, Empower Oversight, *Empower Oversight Seeks Answers on Multi-year Delay of FHFA Inspector General Report*, (August 13, 2021) available at <https://empowr.us/empower-oversight-seeks-answers-on-multi-year-delay-of-fhfa-inspector-general-report/> <https://empowr.us/empower-oversight-seeks-answers-on-multi-year-delay-of-fhfa-inspector-general-report/> (the referenced FOIA requests are listed and linked at the foot of the press release; compare, DOJ Letter Delay FOIA 1 and FHFA Letter Delay 1 with DOJ Letter Delay FOIA 2 and FHFA Letter Delay 2).

response or Exemption b(7) applicability is determining whether the records truly qualify as protected “law enforcement records.”⁵³ This determination requires:

distinguishing between two types of files that relate to federal employees: (1) government surveillance or oversight of the performance of duties of its employees; and (2) investigations which focus directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved result in civil or criminal sanctions.⁵⁴

To qualify as law enforcement records, the documents sought must arise out of “investigations which focus directly on specifically alleged illegal acts . . . which could, if proved result in civil or criminal sanctions.”⁵⁵ Conversely, documents that reflect only “government surveillance or oversight of the performance of duties of its employees’ do *not* qualify,” as law enforcement records.⁵⁶ Further, an agency must anticipate more than an ephemeral possibility of an enforcement action when it undertakes oversight to transform such oversight into a law enforcement investigation.⁵⁷

The Circuit Court explained the distinction as follows:

To put the question [*i.e.*, was an investigation for law enforcement purposes] another way . . . is an agency’s internal monitoring to ensure that its employees are acting in accordance with statutory mandate and the agency’s own regulations an investigation for “law enforcement purposes” within the meaning of exemption 7?

On its face, exemption 7’s language appears broad enough to include all such internal audits. If this broad interpretation is accepted, however, we immediately encounter the problem that most information sought by the Government about its own operations is for the purpose ultimately of determining whether such operations comport with applicable law, and thus is “for law enforcement purposes.” Any internal auditing or monitoring conceivably could result in disciplinary action, in dismissal, or indeed criminal charges against the employees. But if this broad interpretation is correct, then the exemption swallows up the Act;

⁵³ See, *e.g.*, Bartko, 898 F.3d at 64 – 66, 68; Jefferson v. DOJ, 284 F.2d 172, 176 – 181 (D.C. Cir. 2002); Rural Housing Alliance v. U.S.D.A., 498 F.2d 73, 79 – 82 (D.C. Cir. 1974).

⁵⁴ Rural Housing Alliance, 498 F.2d at 81.

⁵⁵ Bartko, 898 F.3d at 64 (*quoting*, Rural Housing Alliance, 498 F.2d at 81).

⁵⁶ Bartko, 898 F.3d at 64 (*quoting*, Rural Housing Alliance, 498 F.2d at 81) (emphasis original).

⁵⁷ Bartko, 898 F.3d at 68 (*quoting*, Rural Housing Alliance, 498 F.2d at 82 n. 48).

exemption 7 defeats one central purpose of the Act to provide access to information concerning the Government's own activities.

We think “investigatory files compiled for law enforcement purposes” must be given the same result, or a meaning to achieve the same result, whether the subject of the files is a government employee or an ordinary citizen. . . .

The purpose of the “investigatory files” is thus the critical factor. Was the purpose of the disputed report to determine if grounds existed for bringing [an enforcement action against a specific government employee]? If the purpose of the investigation was to consider an action equivalent to those which the Government brings against private parties, thus demonstrating that the “law enforcement purpose” was not customary surveillance of the performance of duties by government employees, but an inquiry as to an identifiable possible violation of law, then such inquiry would have been “for law enforcement purposes” whether the individual were a private citizen or a government employee.⁵⁸

Finally, the agency making the *Glomar* response bears the burden of establishing that the records in controversy qualify as law enforcement records.⁵⁹ CIGIE has not, and cannot, carry its burden herein. It is inconceivable that the CIGIE-IC anticipated that there was a reasonable possibility that criminal or civil enforcement proceedings would result when it initiated its/FDIC-OIG's investigation, and the allegations that were accepted for investigated (or CIGIE-IC is authorized to investigate, for that matter) have little or no practical application against private citizens.

In defense of its *Glomar* response, FDIC states only “We have considered your request, and can neither confirm nor deny the existence of records responsive to your request.” (See, Exhibit 6.) At best, this implies—without actually asserting—FDIC's mistaken belief that “law enforcement” records protected by Exemption b(7) are in issue, given that such a condition is a necessary prerequisite to a *Glomar* response.

Section 11 of the Inspector General Act of 1978, as amended, established CIGIE and—at Subsection (d)(1)—the CIGIE-IC with the authority to “receive, review, and refer for investigation allegations of wrongdoing that are made against Inspectors General” and designated high-level staff that report directly to such Inspectors General.⁶⁰

⁵⁸ *Rural Housing Alliance*, 498 F.2d at 81 – 82.

⁵⁹ *Jefferson*, 284 F.2d at 178.

⁶⁰ See, 5 U.S.C. App. § 11; see also, CIGIE, *Integrity Committee Policies and Procedures*, § 4, (2018).

Section 11(d)(5)(A) of the Inspector Act of 1978, as amended, requires representatives of the Department of Justice, the OSC, and the CIGIE-IC—collectively referred to as the “Allegation Review Group”⁶¹—to review applicable allegations of wrongdoing within seven days of the CIGIE-IC’s receipt thereof, and to refer them to either the Department of Justice, the OSC, or the Chairman of the CIGIE-IC for consideration of internal review.⁶² Regarding such referrals to the Department of Justice and the OSC, the CIGIE-IC’s procedures state that the Department of Justice representative on the Allegation Review Group will identify potential criminal offenses, which will be referred to the Public Integrity Section of the Department of Justice, and the OSC representative will identify any remaining allegations within the jurisdiction of the OSC, which will be referred to it.⁶³ Pertinent to this matter, the OSC has investigative and prosecutorial jurisdiction to protect federal employees and applicants for federal employment from prohibited personnel practices set forth at 5 U.S.C. § 2302(b), especially reprisal for whistleblowing.⁶⁴

Any allegations not referred to the Department of Justice or the OSC may be referred to the Chairman of the CIGIE-IC for consideration of an internal investigation.⁶⁵ According to the CIGIE-IC’s policies, it may investigate allegations of wrongdoing against Inspectors General and their high-level direct reports, if such allegations involve:

- Abuse of authority in the exercise of official duties or while acting under color of office;
- Substantial misconduct, such as gross mismanagement, gross waste of funds, or a substantial violation of law, rule, or regulation; or
- Conduct that undermines the independence or integrity reasonably expected of such officials.⁶⁶

However, as discussed above, the Department of Justice side-tracks allegations of potential criminal offenses to the Public Integrity Section of the Department of Justice,

⁶¹ See, CIGIE, *Integrity Committee Policies and Procedures*, §§ 3(F) and 6(B), (2018).

⁶² See, 5 U.S.C. App. § 11(d)(5)(A); see also, CIGIE, *Integrity Committee Policies and Procedures*, § 6(B), (2018).

⁶³ See, CIGIE, *Integrity Committee Policies and Procedures*, § 6(B), (2018).

⁶⁴ Office of Special Counsel, *The U.S. Office of Special Counsel’s Role in Protecting Whistleblowers and Serving as a Safe Channel for Government Employees to Disclose Wrongdoing*, p. 2, (Undated), available at <https://osc.gov/Documents/PPP/OSC's%20Role/OSC%E2%80%99s%20Role%20in%20Protecting%20Whistleblowers%20and%20Serving%20as%20a%20Safe%20Channel%20for%20Government%20Employees%20to%20Disclose%20Wrongdoing.pdf>.

⁶⁵ See, CIGIE, *Integrity Committee Policies and Procedures*, § 6(B), (2018).

⁶⁶ CIGIE, *Integrity Committee Policies and Procedures*, § 7(A), (2008); see also, Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 1, ([Apr 14, 2021](#)).

and the OSC assumes jurisdiction over allegations of civil infractions within its authority.

Hence, any matters that remain for the CIGIE-IC to investigate—such as abuse of authority, mismanagement, waste of funds, and conduct that undermines independence or integrity—are unlikely to be criminal offenses. Rather, they are performance and employment misconduct issues. Moreover, the CIGIE-IC Chairman’s April 14, 2021, letter to President Biden specifically describes the allegations that the CIGIE-IC accepted for investigation⁶⁷ as “gross[] mismanagement,” “coercive personnel practices,” and “a culture of retaliation and abuse.”⁶⁸ These are unmistakably employee performance and misconduct issues rather than criminal violations or civil infractions.

When the Allegation Review Group refers allegations to the Chairman of the CIGIE-IC for consideration, the CIGIE-IC affords itself discretion to:

- Request additional information;
- Request that the subject of the allegations respond to them in writing; or
- Take one of the following actions:
 - Close the matter because the allegations do not satisfy CIGIE-IC’s threshold for investigation (*i.e.*, allegations of wrongdoing that involve abuse of authority in the exercise of official duties or while acting under color of office; substantial misconduct, such as gross mismanagement, gross waste of funds, or a substantial violation of law, rule, or regulation; or conduct that undermines independence or integrity);
 - Close the matter on the grounds that the subject sufficiently refuted the allegations in writing;
 - Make findings on the existing record;

⁶⁷ With respect to the first, fourth, and fifth allegations investigated by the CIGIE-IC, its Chairman’s April 14, 2021, letter to President Biden notes that OSC had referred the first allegation to the CIGIE-IC because OSC determined that former Inspector General Wertheimer’s announcement that auditors would receive minimally successful ratings unless they published a report during the Fiscal Year 2015 performance period (when she had complete control over which reports got published and when), threatened a personnel action but threats do not violate 5 U.S.C. § 2302(b)(12). *See*, Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 25 – 27, ([Apr 14, 2021](#)). OSC, nonetheless, referred its findings to the CIGIE-IC, and suggested that “the problematic conduct might be wrongdoing under the CIGIE-IC’s broader standard.” *See*, Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 27, ([Apr 14, 2021](#)). Further, the Office of Special Counsel’s failure to take control of the fourth and fifth allegations suggests that its representative on the Allegation Review Group was dubious about whether such allegations amounted to civil violations of 5 U.S.C. § 2302(b)(8); otherwise, he/she would have assumed jurisdiction over the allegations for the Office of Special Counsel. *See*, ftns. 63 and 64 and its accompanying text, above.

⁶⁸ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 2, ([Apr 14, 2021](#)).

- Refer the matter for investigation;
- Refer the matter to another agency for whatever action it deems appropriate; or
- Refer the matter to the CIGIE Chairman for appropriate action (if the allegations do not meet the CIGIE-IC's threshold for review).^{69, 70}

During fiscal years 2017 through 2020, CIGIE-IC received 2,631 complaints alleging wrongdoing.⁷¹ Of these 2,631 complaints, less than 1% of them (*i.e.*, 17) were referred to the Chairman of the CIGIE-IC for investigation.⁷² Prior to submission to the Allegation Review Group, CIGIE removed from its docket a far greater percentage of the complaints—roughly 90% ($2,363 \div 2,631 = 0.89813$)—on the grounds that they represented duplicate complaints or complaints that it deemed to be characterized by “objectively unreliable information” or to be outside of its jurisdiction.⁷³

⁶⁹ CIGIE, *Integrity Committee Policies and Procedures*, § 7(C), (2018).

⁷⁰ If the CIGIE-IC decides to investigate a matter, then it may assign the investigation to any Inspector General who is a member of CIGIE. See 5 U.S.C. App. § 11(d)(6)(B).

⁷¹ CIGIE, *Annual Report to the President and Congress, Fiscal Year 2020*, p. 6, (Undated), available at https://www.ignet.gov/sites/default/files/417329-FY20_Annual_Report-President%26Congress-WEB.pdf (in Fiscal Year 2020, CIGIE-IC received 1,152 complaints); CIGIE, *Annual Report to the President and Congress, Fiscal Year 2019*, p. 6, (Undated), available at https://www.ignet.gov/sites/default/files/files/FY19_Annual_Report_to_the_President_and_Congress.pdf (in Fiscal Year 2019, CIGIE-IC received 1,035 complaints); CIGIE, *Annual Report to the President and Congress, Fiscal Year 2018*, p. 6, (Undated), available at https://www.ignet.gov/sites/default/files/files/FY18_Annual_Report_to_the_President_and_Congress.pdf (in Fiscal Year 2018, CIGIE-IC received 385 complaints); CIGIE, *Annual Report to the President and Congress, Fiscal Year 2017*, p. 6, (Undated), available at https://www.ignet.gov/sites/default/files/files/FY17_Annual_Report_to_the_President_and_Congress.pdf (in Fiscal Year 2017, CIGIE-IC received 59 complaints).

⁷² CIGIE, *Annual Report to the President and Congress, Fiscal Year 2020*, p. 6, (Undated), available at https://www.ignet.gov/sites/default/files/417329-FY20_Annual_Report-President%26Congress-WEB.pdf (in Fiscal Year 2020, CIGIE-IC referred 3 complaints to the Chairman of the CIGIE-IC for investigation); CIGIE, *Annual Report to the President and Congress, Fiscal Year 2019*, p. 6, (Undated), available at https://www.ignet.gov/sites/default/files/files/FY19_Annual_Report_to_the_President_and_Congress.pdf (in Fiscal Year 2020, CIGIE-IC referred 7 complaints to the Chairman of the CIGIE-IC for investigation); CIGIE, *Annual Report to the President and Congress, Fiscal Year 2018*, p. 6, (Undated), available at https://www.ignet.gov/sites/default/files/files/FY18_Annual_Report_to_the_President_and_Congress.pdf (in Fiscal Year 2020, CIGIE-IC referred 5 complaints to the Chairman of the CIGIE-IC for investigation); CIGIE, *Annual Report to the President and Congress, Fiscal Year 2017*, p. 6, (Undated), available at https://www.ignet.gov/sites/default/files/files/FY17_Annual_Report_to_the_President_and_Congress.pdf (in Fiscal Year 2020, CIGIE-IC referred 2 complaints to the Chairman of the CIGIE-IC for investigation).

⁷³ CIGIE-IC, *Annual Report on the Activities of the CIGIE Integrity Committee, Fiscal Year 2020*, pp. 4 – 6, (December 8, 2020), available at <https://www.ignet.gov/sites/default/files/files/FY20ICAnnualReport.pdf> (CIGIE culled out 1,071 complaints prior to submission to the Allegation Review Committee); CIGIE-IC, *Annual Report on the Activities of the CIGIE Integrity Committee, Fiscal Year 2019*, (February 14, 2020), available at

Moreover, regarding the tiny percentage of complaints that the CIGIE-IC accepts for investigation, CIGIE has no authority to take action with respect to any of the CIGIE-IC's investigative findings; rather, it is limited to forwarding reports of its findings and recommendations to the President (or to the employing agency for Inspectors General whose appointments are not subject to the advice and consent of the Senate) for any action that he/she/they deem appropriate.⁷⁴

The Circuit Court's decision in the Bartko case is instructive here. In Bartko, the Circuit Court reversed a lower court's decision affirming actions by DOJ's Office of Professional Responsibility ("OPR") to make a *Glomar* response to, and denials pursuant to Exemptions b(6) and b(7)(C) of, a FOIA request for records relating to allegations or investigations of misconduct by an Assistant United States Attorney ("AUSA").⁷⁵ The FOIA request arose from a criminal prosecution of an Atlanta-based securities broker, in which the Court of Appeals for the Fourth Circuit questioned the discovery practices of the United States Attorney's Office for the Eastern District of North Carolina and made a referral to the OPR as a result.⁷⁶

Regarding OPR's denial of the subject FOIA request under Exemption b(7)(C), the Circuit Court determined that the OPR failed to justify its actions, and characterized the OPR's investigation as "several steps removed from the type of 'adjudicative or enforcement' proceeding or civil sanctions that could warrant Exemption 7(C) protection."⁷⁷ The key factors that the Circuit Court pointed to in support of its characterization of the OPR's investigation were that the OPR closed most of the misconduct complaints referred to it without investigating them, and that where it did investigate such complaints—and substantiated allegations of misconduct—it ordinarily referred its findings to another entity for action.⁷⁸ The Circuit Court stated:

OPR explained that most misconduct referrals are closed immediately "with no misconduct findings," or on the written record without a "full investigation, which includes requesting and reviewing relevant documents and conducting interviews of witnesses and the subject attorney." Even

<https://www.ignet.gov/sites/default/files/files/FY19-IC-Annual-Report.pdf> (CIGIE culled out 973 complaints prior to submission to the Allegation Review Committee); CIGIE-IC, *Annual Report on the Activities of the CIGIE Integrity Committee, Fiscal Year 2018*, pp. 2 – 3, (January 7, 2019), available at https://www.ignet.gov/sites/default/files/files/2018_IC_Annual_Report.pdf (CIGIE culled out 299 complaints prior to submission to the Allegation Review Committee); CIGIE-IC, *Annual Report on the Activities of the CIGIE Integrity Committee, Fiscal Year 2017*, (December 28, 2017), available at <https://www.ignet.gov/sites/default/files/files/2017%20IC%20Annual%20Report.pdf> (CIGIE culled out 20 complaints prior to submission to the Allegation Review Committee).

⁷⁴ See, 5 U.S.C. App. § 11(d)(8)(A)(ii).

⁷⁵ Bartko, 898 F.3d at 63 – 67.

⁷⁶ Bartko, 898 F.3d at 60 – 61.

⁷⁷ Bartko, 898 F.3d at 67 – 68.

⁷⁸ Bartko, 898 F.3d at 68.

when a full investigation leads to the conclusion that an attorney has engaged in professional misconduct, “those findings could result in a referral to the attorney’s state bar or disciplinary action by the Department.”

That description of OPR’s review process reveals just how attenuated its “law enforcement” function is. For starters, most matters do not even result in an investigation, making a finding of law-enforcement-triggering misconduct implausible in the vast majority of cases. . . .

In addition, according to OPR’s own explanation, even when misconduct is found, all that usually occurs is a finding of poor judgment or intentional misconduct. Discipline is left to the department head, and perhaps referral to a state bar that would presumably go through its own investigative process (and compile its own records) to determine whether punishment should ensue.⁷⁹

Like OPR, the CIGIE-IC closes the vast majority of the allegations of misconduct that it receives—over 99% of them—without opening an internal investigation.⁸⁰ Indeed, it closes roughly 90% of them without even submitting them to the Allegation Review Group for vetting.⁸¹ Further, when the CIGIE-IC investigates, and substantiates

⁷⁹ Bartko, 898 F.3d at 68 (citations omitted).

⁸⁰ CIGIE, *Annual Report to the President and Congress, Fiscal Year 2020*, p. 6, (Undated), available at https://www.ignet.gov/sites/default/files/417329-FY20_Annual_Report-President%26Congress-WEB.pdf (in Fiscal Year 2020, CIGIE-IC referred 3 complaints to the Chairman of the CIGIE-IC for investigation); CIGIE, *Annual Report to the President and Congress, Fiscal Year 2019*, p. 6, (Undated), available at https://www.ignet.gov/sites/default/files/files/FY19_Annual_Report_to_the_President_and_Congress.pdf (in Fiscal Year 2020, CIGIE-IC referred 7 complaints to the Chairman of the CIGIE-IC for investigation); CIGIE, *Annual Report to the President and Congress, Fiscal Year 2018*, p. 6, (Undated), available at https://www.ignet.gov/sites/default/files/files/FY18_Annual_Report_to_the_President_and_Congress.pdf (in Fiscal Year 2020, CIGIE-IC referred 5 complaints to the Chairman of the CIGIE-IC for investigation); CIGIE, *Annual Report to the President and Congress, Fiscal Year 2017*, p. 6, (Undated), available at https://www.ignet.gov/sites/default/files/files/FY17_Annual_Report_to_the_President_and_Congress.pdf (in Fiscal Year 2020, CIGIE-IC referred 2 complaints to the Chairman of the CIGIE-IC for investigation).

⁸¹ CIGIE-IC, *Annual Report on the Activities of the CIGIE Integrity Committee, Fiscal Year 2020*, pp. 4 – 6, (December 8, 2020), available at <https://www.ignet.gov/sites/default/files/files/FY20ICAnnualReport.pdf> (CIGIE culled out 1,071 complaints prior to submission to the Allegation Review Committee); CIGIE-IC, *Annual Report on the Activities of the CIGIE Integrity Committee, Fiscal Year 2019*, (February 14, 2020), available at <https://www.ignet.gov/sites/default/files/files/FY19-IC-Annual-Report.pdf> (CIGIE culled out 973 complaints prior to submission to the Allegation Review Committee); CIGIE-IC, *Annual Report on the Activities of the CIGIE Integrity Committee, Fiscal Year 2018*, pp. 2 – 3, (January 7, 2019), available at https://www.ignet.gov/sites/default/files/files/2018_IC_Annual_Report.pdf (CIGIE culled out 299 complaints prior to submission to the Allegation Review Committee); CIGIE-IC, *Annual Report on the Activities of the CIGIE Integrity Committee, Fiscal Year 2017*, (December 28, 2017), available at

allegations of misconduct, its authority is limited to forwarding reports of its findings and recommendations to the President or the employing agency for any action that they deem appropriate.⁸² Thus, according to the Circuit Court in Bartko, the CIGIE-IC's investigations are several steps removed from the types law enforcement investigations protected by Exemption b(7). To state it another way, in the District of Columbia Circuit, CIGIE-IC-sponsored investigations of misconduct do not qualify as "law enforcement investigations" for purposes of Subsection b(7) of the FOIA, which is a precondition of a *Glomar* response.⁸³

Glomar

Courts have endorsed *Glomar* responses to FOIA requests seeking records that might reveal whether low-level government employees were investigated for misconduct because even to acknowledge the existence of such records could cause unwarranted invasions of personal privacy.⁸⁴ On the other hand, courts have found *Glomar* responses to be inappropriate, when there is a substantial FOIA public interest in the requested information that outweighs the privacy interest, or when the existence of the requested information has been officially acknowledged.⁸⁵

FDIC's *Glomar* response herein appears faulty because it reveals no effort to analyze the possibility that the FOIA public interest may outweigh any privacy interests associated with requested records, or that the requested information has been officially acknowledged. (See, Exhibit 6.) Further, in failing to account for the possibility of the exceptions to the allowable application of a *Glomar* response, FDIC failed to consider whether the FOIA public interest in the unreasonable delay of the investigation of former Inspector General Wertheimer, former Associate Inspector General Byrne, and Messrs. Parker and DePasquale, and the official acknowledgement thereof, precludes its *Glomar* responses herein.

The "public interest" championed by the FOIA is to inform the public about "an agency's performance of its statutory duties."⁸⁶ Such information is "a structural necessity in a real democracy" and "should not be dismissed."⁸⁷

<https://www.ignet.gov/sites/default/files/files/2017%20IC%20Annual%20Report.pdf> (CIGIE culled out 20 complaints prior to submission to the Allegation Review Committee).

⁸² See, 5 U.S.C. App. § 11(d)(8)(A)(ii).

⁸³ Bartko, 898 F.3d at 64 ("to invoke *Glomar*, OPR had to make a threshold showing that the FOIA request seeks records 'compiled for law enforcement purposes'") (citing, Jefferson, 284 F.2d at 176).

⁸⁴ See, e.g., Beck v. DOJ, 997 F.2d 1489 (D.C. Cir. 1993); Lewis v. DOJ, 733 F. Supp. 2d 97, 112 (D.D.C. 2010).

⁸⁵ See, e.g., ACLU v. CIA, 710 F.3d 422, 427 (D.C. Cir. 2013); Roth v. DOJ, 642 F.3d 1161, 1176 (D.C. Cir. 2011); Parker v. EOUSA, 852 F. Supp. 2d 1, 10-13 (D.D.C. 2012).

⁸⁶ DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).

⁸⁷ NARA v. Favish, 541 U.S. 157, 172 (2004).

There is a strong public interest in discerning why it took the CIGIE-IC/FDIC-OIG so long to complete its investigation of former Inspector General Wertheimer, former Associate Inspector General Byrne, and Messrs. Parker and DePasquale. Was the unreasonable delay caused solely by the actions of the targets themselves, or could the CIGIE-IC/FDIC-OIG have conducted and reported its investigation in a more expeditious fashion, which would have protected whistleblowers and other FHFA-OIG staff who braved the efforts of former Inspector General Wertheimer and Messrs. Parker and DePasquale to silence them and thus conceal their own misconduct?

Any diminished privacy interest that the investigative targets may possess in the public revelation of the details of their misconduct (*see, below*)⁸⁸ does **not** withstand the public interest in gaining an understanding of the reasons that their misconduct was enabled to endure for over five years through a succession of three separate investigations. Analogously, the decision in Parker v. EOUSA recognized that, although an AUSA had a valid privacy interest at stake in DOJ's disclosure of disciplinary documents about her, there was a countervailing public interest in knowing how DOJ handles its investigations of unlicensed attorneys.⁸⁹ Similarly, the public has a right to know how the CIGIE-IC/FDIC-OIG handled the subject investigation.

Regarding the official acknowledgement of the investigation of former Inspector General Wertheimer, former Associate Inspector General Byrne, and Messrs. Parker and DePasquale, and the resulting diminishment of their privacy interest in the details of their misconduct, on April 28, 2021, Senator Chuck Grassley, Ranking Member of the Senate Judiciary Committee, issued a press release advising that he and Senator Ron Johnson had recommended that President Biden remove former Inspector General Wertheimer for her "consistent failures, contempt for congressional oversight and whistleblower retaliation."⁹⁰ In support of the Senators' recommendation, the press release mentioned the CIGIE-IC/FDIC-OIG investigation and included a link (*i.e.*, "separate review of CIGIE's integrity committee") to the CIGIE-IC Chairman's April 14, 2021, letter to President Biden.⁹¹ The letter, thus, is officially acknowledged and

⁸⁸ *See, e.g., Bartko*, 898 F.3d at 69, citing Reporters Comm., 489 U.S. at 763 n.15, (1989) ("[T]he interests in privacy fade when the information involved already appears on the public record") and Kimberlin v. DOJ, 139 F.3d 944, 949 (D.C. Cir. 1998) ("[The AUSA's] statement to the press undoubtedly does diminish his interest in privacy: the public already knows who he is, what he was accused of, and that he received a relatively mild sanction").

⁸⁹ Parker, 852 F. Supp. 2d at 10 – 13.

⁹⁰ Press Release, Grassley, *Johnson Call for Removal of FHFA Inspector General Following Findings of Misconduct, Reprisal*, (April 28, 2021), available at <https://www.grassley.senate.gov/news/news-releases/grassley-johnson-call-for-removal-of-fhfa-inspector-general-following-findings-of-misconduct-reprisal>.

⁹¹ Press Release, Grassley, *Johnson Call for Removal of FHFA Inspector General Following Findings of Misconduct, Reprisal*, (April 28, 2021), available at <https://www.grassley.senate.gov/news/news-releases/grassley-johnson-call-for-removal-of-fhfa-inspector-general-following-findings-of-misconduct-reprisal>.

publically available at

https://www.grassley.senate.gov/imo/media/doc/cigie_ic_report_on_fhfa_oig.pdf.⁹²

Also on April 28, 2021, a copy of the CIGIE-IC Chairman's April 14, 2021, letter to President Biden was made public. On that date, *The Hill* published "Read: Watchdog Report on Federal Housing Inspector General," which allowed the reader to view and download the April 14th letter, which had been uploaded to Scribd.com.⁹³

Moreover, former Inspector General Wertheimer, by her personal representative, Emmet T. Flood, a lawyer who worked in the White House under former President Trump and who now works at Williams and Connolly LLP, publicly acknowledged the CIGIE-IC investigation of her.⁹⁴ Disputing an allegation that former Inspector General Wertheimer had called an overweight employee "Baby Huey," the large diaper-wearing, dimwitted cartoon duck from the 1950s, Mr. Flood told *The Hill*:

This accusation fits the prior pattern of false leaks from Congressional staff, and it too is untrue. Not only did Inspector General Wertheimer not call anyone by this name, the notion that she did is directly contradicted by the testimony of a witness given on the record in the underlying investigation.⁹⁵

Similarly, directly responding to the findings in the CIGIE-IC Chairman's April 14, 2021, letter to President Biden, Mr. Flood told *The Washington Post* that former Inspector General Wertheimer played no role in deciding what materials to provide to the FDIC-OIG investigators, did not obstruct or resist the investigation, and that it was difficult for her to respond to specific complaints about intimidation since the April 14th

⁹² Section 11(d)(8)(A)(ii) of the Inspector General Act of 1978, as amended, requires the CIGIE-IC to submit to congressional committees of jurisdiction – here, given the Inspectors General involved in the allegations under investigation, the execution of the CIGIE-IC investigation, and CIGIE's management of the CIGIE-IC, committees of jurisdiction includes Judiciary, among others – an executive summary of reports of CIGIE-IC investigations and resulting recommendations, and Section 11(d)(10)(C) requires the CIGIE-IC to provide access to more detailed information about specific allegations upon request by, among others, the ranking member of a committee of jurisdiction. See, 5 U.S.C. App., § 11(d). Hence, the Inspector General Act of 1978 authorized Senator Grassley, as the ranking member of the Senate Judiciary Committee, access to Chairman Winters' April 14, 2021, letter report to the President. And, his release thereof was an official act.

⁹³ See, *The Hill*, *Read: Watchdog Report on Federal Housing Inspector General*, (April 28, 2021), available at <https://thehill.com/homenews/administration/550761-read-watchdog-report-on-federal-housing-inspector-general>.

⁹⁴ Humphreys, Crawford, *Biden Under Increasing Pressure to Fire Housing Inspector General*, (June 28, 2021), available at <https://thehill.com/homenews/administration/560560-biden-under-increasing-pressure-to-fire-housing-inspector-general>.

⁹⁵ Humphreys, Crawford, *Biden Under Increasing Pressure to Fire Housing Inspector General*, (June 28, 2021) (emphasis added), available at <https://thehill.com/homenews/administration/560560-biden-under-increasing-pressure-to-fire-housing-inspector-general>.

letter did not include witness names.⁹⁶ Thus, former Inspector General Wertheimer's denial, through counsel, of the content of the CIGIE-IC Chairman's April 14, 2021, letter to President Biden is itself an acknowledgment of the investigation. And FDIC's refusal to confirm an investigation, through a *Glomar* response, that the subject of the investigation's lawyer has already confirmed on the public record is nonsensical.⁹⁷

Conclusion

For the reasons set forth herein, Empower Oversight respectfully requests that FDIC reverse its initial determination (*i.e.*, the erroneous *Glomar* response to FDIC FOIA Log Number 21-0262), and ensure that its staff promptly compile, review, and produce the records requested by Empower Oversight as required by the FOIA.

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

Cordially,

/Jason Foster/

Jason Foster
Founder & President

⁹⁶ See, Siegel, Rachel, *Inspector General Overseeing Federal Housing Agency Resigns, Months After Watchdog Report Finds Abuse of Authority*, (June 30, 2021), available at <https://www.washingtonpost.com/us-policy/2021/06/30/fhfa-inspector-general-resigns-laura-wertheimer/>.

⁹⁷ As stated above, on November 19, 2021, CIGIE granted Empower Oversight's appeal of a its *Glomar* response to a FOIA request for an unredacted copy of the report of FDIC-OIG's investigation of allegations of abuses by FHFA-OIG leadership, on the grounds that former Inspector General Wertheimer had "publicly associated herself with the IC's investigation," making it inappropriate to refuse to confirm or deny its existence. (See, Exhibit 3C, pp. 2 – 3).

Exhibit 1

EMPOWER OVERSIGHT

Whistleblowers & Research



June 16, 2021

VIA ELECTRONIC TRANSMISSION: FOIASTAFF@CIGIE.GOV

FOIA Officer
Council of the Inspectors General on Integrity and Efficiency
1717 H Street, NW, Suite 825
Washington, DC 20006

RE: FREEDOM OF INFORMATION ACT REQUEST

Dear FOIA Officer:

Empower Oversight Whistleblowers & Research (“Empower Oversight”) is a nonpartisan, nonprofit educational organization dedicated to enhancing independent oversight of government and corporate wrongdoing. We work to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities while also seeking to hold those authorities accountable to act on those reports.

In a letter to President Biden dated April 14, 2021, the Council of the Inspectors General on Integrity and Efficiency’s Integrity Committee (CIGIE-IC) reported its findings, conclusions, recommendations regarding allegations of misconduct against four Federal Housing Finance Agency employees: Inspector General Laura Wertheimer; Chief Counsel Leonard DePasquale; Acting Deputy Inspector General for Investigations Richard Parker; and Associate Inspector General Jennifer Byrne.¹

The CIGIE-IC report to the President is the result an oversight process that began more than *five years ago*, with whistleblowers contacting Congress and Senators writing letters to inquire about their claims.² The public has an interest in understanding why the CIGIE-IC took so long to elevate this matter to the White House with a recommendation to consider imposing appropriate discipline. It is unclear from the public record whether the CIGIE-IC had previously made similar recommendations during President Trump’s tenure in office, and if not, why it failed to do so.

¹ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President ([Apr 14, 2021](#)).

² See, e.g. “Senators Probing Effectiveness of FHFA’s Watchdog,” *Daily Dose* ([Jul 11, 2016](#)).

Accordingly, pursuant to the Freedom of Information Act, 5 U.S.C. § 552, please provide an unredacted version of the above-referenced letter, and the five enclosures to that letter.

Empower Oversight agrees to pay up to \$25.00 in applicable fees. Please note that Empower Oversight is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code and that it has no commercial interest in making this request.

If you have any questions about this request, you may reach me by telephone at (703) 972-5445 or by e-mail at info@empowr.us. Thank you for your prompt attention to this matter.

Cordially,

A handwritten signature in blue ink, appearing to read "Jason Foster", with a stylized, cursive script.

Jason Foster
Founder & President

Exhibit 2

EMPOWER OVERSIGHT

Whistleblowers & Research



June 16, 2021

VIA ELECTRONIC TRANSMISSION: FOIASTAFF@CIGIE.GOV

FOIA Officer
Council of the Inspectors General on Integrity and Efficiency
1717 H Street, NW, Suite 825
Washington, DC 20006

RE: FREEDOM OF INFORMATION ACT REQUEST

Dear FOIA Officer:

Empower Oversight Whistleblowers & Research (“Empower Oversight”) is a nonpartisan, nonprofit educational organization dedicated to enhancing independent oversight of government and corporate wrongdoing. We work to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities while also seeking to hold those authorities accountable to act on those reports.

In a letter to President Biden dated April 14, 2021, the Council of the Inspectors General on Integrity and Efficiency’s Integrity Committee (CIGIE-IC) recommended that three Federal Housing Finance Agency (FHFA) employees be disciplined for abusing their authority: Inspector General Laura Wertheimer; Chief Counsel Leonard DePasquale; and Acting Deputy Inspector General for Investigations Richard Parker.¹

The CIGIE-IC report to the President is the result an oversight process that began more than *five years ago*, with whistleblowers contacting Congress and Senators writing letters to inquire about their claims.² The public has an interest in understanding why the CIGIE-IC took so long to elevate this matter to the White House with a recommendation to consider imposing appropriate discipline. It is unclear from the public record whether the CIGIE-IC had previously made similar recommendations during President Trump’s tenure in office, and if not, why it failed to do so.

Accordingly, to shed further light on this matter, please provide the following records pursuant to the Freedom of Information Act, 5 U.S.C. § 552:

¹ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President ([Apr 14, 2021](#)).

² See, e.g. “Senators Probing Effectiveness of FHFA’s Watchdog,” *Daily Dose* ([Jul 11, 2016](#)).

1. Emails 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. Emails 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. Emails 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.

Empower Oversight agrees to pay up to \$25.00 in applicable fees. Please note that Empower Oversight is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code and that it has no commercial interest in making this request.

If you have any questions about this request, you may reach me by telephone at (703) 972-5445 or by e-mail at info@empowr.us. Thank you for your prompt attention to this matter.

Cordially,



Jason Foster
Founder & President

Exhibit 3A



Council of the
INSPECTORS GENERAL
on INTEGRITY and EFFICIENCY

June 22, 2021

Gary J. Aguirre
gary@aguirrelawapc.com

Subject: CIGIE Freedom of Information/Privacy Act Request 6330-2021-4539

Dear Mr. Aguirre,

This letter responds to your client's Freedom of Information Act (FOIA) request dated June 17, 2021, to the Council of the Inspectors General on Integrity and Efficiency (CIGIE). This request was assigned FOIA case number 6330-2021-45. As worded in the request, you seek an unredacted version of the following:

[A] letter to President Biden dated April 14, 2021, the Council of the Inspectors General on Integrity and Efficiency's Integrity Committee (CIGIE-IC) reported its findings, conclusions, recommendations regarding allegations of misconduct against four Federal Housing Finance Agency employees: Inspector General Laura Wertheimer; Chief Counsel Leonard DePasquale; Acting Deputy Inspector General for Investigations Richard Parker; and Associate Inspector General Jennifer Byrne ... and the five enclosures to that letter.

As an attorney, you will undoubtedly recognize that this is a third-party request for law enforcement records covered by a system of records notice, involving the Privacy Act, and FOIA provisions which protect personal privacy.

Please note that FOIA requires that the Federal government treat all requesters alike, regardless of whether they have some knowledge about a particular law enforcement activity for which they are seeking additional information. In addition, FOIA requests and the responses thereto are themselves available to the public under FOIA. As a result, if a request specifies the information desired by identifying a person involved in a law enforcement activity, or by providing sufficient information to enable the easy identification of one or more parties through public sources, and if CIGIE were to respond by providing that information, the result would be a pair of publicly available documents that linked the identified person to a law enforcement activity.

Under FOIA exemption (b)(6), records are exempt from disclosure if the records are "personnel and medical files and similar files the disclosure of which would constitute an unwarranted invasion of personal privacy." Under FOIA exemption (b)(7)(C), law enforcement information that, if disclosed, could reasonably be expected to constitute an unwarranted invasion of personal privacy is similarly exempt from disclosure. Disclosure is unwarranted if the private interest in nondisclosure outweighs the public interest in disclosure.

CIGIE takes the position that the disclosure of even the existence of a law enforcement matter involving any particular individual would constitute an unwarranted invasion of privacy unless it has become a matter of public record as a result of successful criminal prosecution, recent civil legal action, or active government-wide debarment or voluntary exclusion, that is adjudged or imposed based on the law enforcement matter. Furthermore, if our office routinely confirmed the absence of a law enforcement matter for individuals not investigated by our office, our failure to do so in other cases where an individual had been investigated would amount to an implied disclosure of that fact. Accordingly, in all cases CIGIE will neither confirm nor deny the existence of a non-public law enforcement matter involving any particular individual.

No public record of CIGIE activity, of the type mentioned above, exists with regard to the parties described in your request. For the reasons noted above, CIGIE can neither confirm nor deny the existence of any of the attachments or the underlying records involving any of the parties in question. Therefore, your FOIA request is denied under FOIA exemptions (b)(6) and (b)(7)(C).

You may also contact me at my direct phone number (202) 478-8265 or by sending an email to FOIASTAFF@cigie.gov. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
ogis@nara.gov
(202) 741-5770
(877) 684-6448 (toll free)
(202) 741-5769 (facsimile)

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

A requester may appeal a determination denying a FOIA request in any respect to the CIGIE Chairperson c/o Office of General Counsel, Council of the Inspectors General on Integrity and Efficiency, 1717 H Street NW, Suite 825, Washington, DC 20006. The appeal must be in writing, and must be submitted either by:

- (1) Regular mail sent to the address listed in this subsection, above; or
- (2) By fax sent to the FOIA Officer at (202) 254-0162; or
- (3) By email to FOIAAPPEAL@cigie.gov.

Exhibit 3B

EMPOWER OVERSIGHT

Whistleblowers & Research



October 6, 2021

Via Electronic Transmission: FOIAAPPEAL@cigie.gov

Allison C. Lerner, Chair
c/o Office of General Counsel
Council of the Inspectors General on Integrity and Efficiency
1717 H Street NW, Suite 825
Washington, DC 20006

RE: Freedom of Information Act Appeal
CIGIE FOIA Case Nos. 6330-2021-45, 6330-2021-65, 6330-2021-66,
6330-2021-67, 6330-2021-69, and 6330-2021-71

Dear Chair Lerner:

Empower Oversight Whistleblowers & Research's ("Empower Oversight")¹ appeals the denial of Council of Inspectors General on Integrity and Efficiency ("CIGIE") FOIA case numbers 6330-2021-45, 6330-2021-65, 6330-2021-66, 6330-2021-67, 6330-2021-69, and 6330-2021-71, which seek two narrowly defined categories of records.

The records sought are intended to shed light on the causes of the unconscionably long delay of CIGIE's investigation of allegations of abuses among the leadership of the Federal Housing Finance Agency, Office of Inspector General ("FHFA-

¹ Empower Oversight is a nonpartisan, nonprofit educational organization, which is dedicated to enhancing independent oversight of government and corporate wrongdoing. It works to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, and seeks to hold those authorities accountable to act on such reports by, among other means, publishing information concerning the same.

OIG”). The summary denials undermine CIGIE’s own criticisms of FHFA-OIG leadership’s disdain for independent oversight. CIGIE’s Integrity Committee (“CIGIE-IC”) should be responsive to Congressional and public scrutiny through FOIA just as the FHFA-OIG should have been responsive to scrutiny from the CIGIE-IC.

Moreover, in addition to reversing the initial CIGIE denials of our FOIA requests, Empower Oversight asks that CIGIE ensure that the FHFA-OIG employees who were the subjects of the underlying investigations at issue are not allowed to participate in adjudicating or screening documents pursuant to our FOIA requests.

Introduction

As the Supreme Court explained more than 40 years ago, a primary purpose of the Freedom of Information Act (“FOIA”)² is to serve as a “check against corruption and to hold the governors accountable to the governed.”³ Accordingly, at its core, the FOIA “operates on the assumption that ‘it is for the public to know and then to judge.’”⁴ With respect to government investigations, the Court of Appeals for the District of Columbia Circuit (“Circuit Court”) has stated that the “public has an interest in knowing ‘that a government investigation itself is comprehensive, that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner.’”⁵ “That is how the FOIA helps ‘to hold the governors accountable to the governed.’”⁶ The public interest in government investigations “crescendos when the misfeasance of a federal” official with “‘the power to employ the full machinery of the state in scrutinizing any given individual’ is at stake.”⁷ “The public ‘must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.’”⁸

Offices of Inspectors General exist to detect, prevent, and report instances of waste, fraud, and abuse and to promote economy, efficiency, and effectiveness in government.⁹ If any agencies within government should operate consistent with the principles of transparency and accountability underlying the FOIA, it should be inspectors general.

² The FOIA is codified at 5 U.S.C. § 552.

³ NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

⁴ Bartko v. DOJ, 898 F.3d 51, 69 (D.C. Cir. 2018) (quoting, Stern v. FBI, 737 F.2d 84, 94 (D.C. Cir. 1984)).

⁵ Bartko, 898 F.3d at 69 (quoting, Stern, 737 F.2d at 92).

⁶ Bartko, 898 F.3d at 69 (quoting, Stern, 737 F.2d at 92).

⁷ Bartko, 898 F.3d at 69 (quoting, Young v. US ex rel Vuitton et Fils S.A., 481 U.S. 787, 814 (1987)).

⁸ Bartko, 898 F.3d at 69 – 70 (quoting, Young, 481 U.S. at 814).

⁹ 5 U.S.C. App. § 2.

Yet, in contrast to these guiding principles, CIGIE staff have issued *Glomar* responses to CIGIE FOIA case numbers 6330-2021-45, 6330-2021-65, 6330-2021-66, 6330-2021-67, 6330-2021-69, and 6330-2021-71, and have denied them categorically pursuant to Subsections b(6) and b(7)(C) of the FOIA.

Empower Oversight appeals the initial determinations of CIGIE's staff. As discussed in detail below, CIGIE staff erred because CIGIE's investigation of the FHFA-OIG leadership abuses does not qualify as a "law enforcement" investigation subject to protection under Subsection b(7)(C) of the FOIA (which is a prerequisite of a *Glomar* response), and alternatively, were the investigation somehow qualified for protection under Subsection b(7)(C), then:

- A *Glomar* response, nonetheless, is not available because there is a public interest in the reasons for the delay of the CIGIE's investigation and a redacted copy of the report of the investigation is in the public domain; and
- A categorical denial pursuant to Subsection b(7)(C) is not available under these circumstances.

Categorical denials typically are not available under Subsection b(6), and CIGIE staff did not identify, evaluate, and balance the privacy and public interests on a document-by-document basis—a necessary step in invoking Subsections b(6) and b(7)(C) under the circumstances of this matter.

Empower Oversight respectfully requests that you reverse the initial determinations of your staff and ensure that they promptly compile, review, and produce the records requested as required by the FOIA.

Background

IC Investigation of FHFA-OIG Leadership

It has been widely reported by the news media that by a letter to President Biden dated April 14, 2021, the Chairman of the CIGIE-IC reported its findings, conclusions, and recommendations regarding allegations of misconduct against four current and former FHFA-OIG executives:

- Former Inspector General Laura Wertheimer,
- Former Associate Inspector General Jennifer Byrne,
- Former Acting Deputy Inspector General for Investigations Richard Parker, and

- Chief Counsel Leonard DePasquale.^{10, 11}

At least one of the media accounts included a link to a copy of the CIGIE-IC Chairman's 29-page letter to the President.¹²

The CIGIE-IC Chairman's letter advised that in 2017, the CIGIE-IC began receiving multiple complaints alleging that former Inspector General Wertheimer, former Associate Inspector General Byrne, and other senior FHFA-OIG personnel had grossly mismanaged the Office of Audits, implemented coercive personnel actions, and created a culture of retaliation and abuse.¹³ In response to these complaints, the CIGIE-IC sponsored an investigation to determine whether:

1. Inspector General Wertheimer and a senior FHFA-OIG employee imposed (at mid-year) unachievable performance standards upon audit staff, to coerce them to separate from the agency;
2. Inspector General Wertheimer failed to resist or report to Congress threats by the FHFA Director to undermine FHFA-OIG's budget, staffing, and resources, and cited those threats as grounds for certain decisions;
3. Inspector General Wertheimer violated the Privacy Act by describing the details of an Equal Employment Opportunity complaint to a subordinate that had no official need to know the information;
4. Inspector General Wertheimer – since becoming aware of allegations and complaints made against her – sought to identify complainants, and disparaged and demeaned FHFA-OIG staff whom she believed complained about her or cooperated with inquiries into the complaints and allegations; and
5. Associate Inspector General Byrne threatened to retaliate against (*i.e.*, file criminal complaints against) FHFA-OIG employees who complained to Senator [Charles] Grassley's office.¹⁴

¹⁰ See, *e.g.*, <https://www.washingtonpost.com/us-policy/2021/06/30/fhfa-inspector-general-resigns-laura-wertheimer/>; <https://thehill.com/homenews/senate/550777-report-finds-federal-housing-agency-official-abused-her-authority>; <https://thehill.com/homenews/administration/550761-read-watchdog-report-on-federal-housing-inspector-general>; and <https://www.govexec.com/oversight/2021/05/white-house-reviewing-recommendation-fire-housing-finance-inspector-general/174026/>.

¹¹ Ms. Byrne and Mr. Parker are still employed by FHFA-OIG, but they serve in different senior positions.

¹² See, The Hill, *Read: Watchdog Report on Federal Housing Inspector General*, (April 28, 2021), available at <https://thehill.com/homenews/administration/550761-read-watchdog-report-on-federal-housing-inspector-general>.

¹³ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 2, ([Apr 14, 2021](#)).

¹⁴ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 2 – 3, ([Apr 14, 2021](#)).

The CIGIE-IC found, by a preponderance of the evidence, that former Inspector General Wertheimer and Messrs. Parker and DePasquale “abused their authority in the exercise of their official duties,” and that former Inspector General Wertheimer “engaged in conduct that undermines the integrity reasonably expected of an” Inspector General.^{15, 16}

Specifically, the CIGIE-IC “substantiated the fourth allegation” that its inquiry sought to address, “raised significant concerns regarding the first,” and claimed that former Inspector General Wertheimer and Messrs. Parker and DePasquale “prevented IC investigators from having access to a complete record of the facts” of the matters accepted for investigation.¹⁷ Indeed, the CIGIE-IC adds that former Inspector General Wertheimer’s and Messrs. Parker’s and DePasquale’s “wrongful withholding of evidence prevented the IC from having the necessary information to make findings on the remaining allegations of misconduct.”¹⁸

More specifically, the CIGIE-IC concluded that former Inspector General Wertheimer:

... showed a disdain and resistance towards Congressional and IC oversight by fostering a culture of witness intimidation through a pattern of staff abuse and fear of retaliation. Furthermore, she wrongfully refused to cooperate with the IC’s investigation by denying IC investigators full access to FHFA OIG personnel and documents.^{19, 20}

Moreover, the CIGIE-IC caught former Inspector General Wertheimer in an effort to evade the truth during her interview. The CIGIE-IC reports that when she was first asked whether she had disparagingly referred to two FHFA-OIG executives who had cooperated with requests from Congressional investigators as “Boris and Natasha”—the

¹⁵ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 1 – 2, ([Apr 14, 2021](#)).

¹⁶ Section 3(a) of the Inspector General Act of 1978 states that there shall be at the head of each Office of Inspector General an Inspector General “who shall be appointed by the President, by and with the advice and consent of the Senate, without regard to political affiliation;” and who shall be selected for appointment “solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.” 5 U.S.C. App. § 3(a) (emphasis added). Regarding the first of the two criteria governing the selection of Inspectors General, the first essential meaning of “integrity” is “the quality of being honest and fair.” See, <https://www.merriam-webster.com/dictionary/integrity>.

¹⁷ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 3, ([Apr 14, 2021](#)).

¹⁸ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 25, ([Apr 14, 2021](#)).

¹⁹ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 3 – 4, ([Apr 14, 2021](#)).

²⁰ Although the Chairman of the CIGIE-IC’s April 14th letter to the President notes that the CIGIE-IC began to receive complaints and allegations about former Inspector General Wertheimer and FHFA-OIG leadership in 2017, the letter discusses witness intimidation and a pattern of staff abuse dating back to October of 2015. See, Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 5, ([Apr 14, 2021](#)).

names of cartoon characters—she initially denied that she had.²¹ Under further questioning she conceded that she “may” have done so.²² And under further questioning she acknowledged that “she was sure she had done so.”²³

With respect to Messrs. Parker and DePasquale, the CIGIE-IC specifically found that they:

. . . were fully complicit in IG Wertheimer’s refusal to cooperate, by repeatedly and improperly denying the IC access to documents and a key witness, who was CC DePasquale himself. In fact, CC DePasquale, a government employee simply refused to be interviewed by IC investigators.²⁴

In addition to his refusal to appear formally for an interview and confront issues of potential privilege and relevance on a question-by-question basis as is expected of federal employees, Chief Counsel DePasquale and Office of Legal Counsel staff under his supervision improperly refused to provide the CIGIE-IC investigators information that they claimed to be “not directly relevant to the allegations under investigation’ or ‘unnecessary to the IC to complete a thorough investigation.’”²⁵

Moreover, they limited the CIGIE-IC investigators’ access to some records to an *in camera* review, during which three attorneys under Chief Counsel DePasquale’s supervision monitored the investigators and prohibited them from making copies of and taking notes concerning relevant materials.²⁶

For his part, former Acting Deputy Inspector General for Investigations Parker denied the CIGIE-IC investigators access to interview Chief Counsel DePasquale on the grounds of privilege (*i.e.*, alleging that former Inspector General Wertheimer’s specious attorney-client relationship with Chief Counsel DePasquale) and the absence of necessity.²⁷

The CIGIE-IC recommended that former Inspector General Wertheimer’s misconduct warranted “substantial disciplinary action, up to and including removal.”²⁸

²¹ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 6 and 28, ([Apr 14, 2021](#)).

²² Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 6 and 28, ([Apr 14, 2021](#)).

²³ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 6 and 28, ([Apr 14, 2021](#)).

²⁴ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 5, ([Apr 14, 2021](#)).

²⁵ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 15, ([Apr 14, 2021](#)).

²⁶ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 15, ([Apr 14, 2021](#)).

²⁷ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 16, ([Apr 14, 2021](#)).

²⁸ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 29, ([Apr 14, 2021](#)).

Similarly, it recommended that Messrs. Parker and DePasquale “each be subject to appropriate disciplinary action.”²⁹ However, more than two months passed after the CIGIE-IC Chairman’s correspondence to the President and no visible action had been initiated against former Inspector General Wertheimer or Messrs. Parker and DePasquale; consequently, several public interest groups and a bipartisan group of Senators became increasingly emphatic in their encouragement that the White House act on the findings and recommendations in the CIGIE-IC Chairman’s April 14, 2021, letter to President Biden.³⁰

Prior to any public action by the White House, however, former Inspector General Wertheimer announced her resignation (effective July 30, 2021) on June 29, 2021.³¹ As of the date of this FOIA appeal, FHFA-OIG’s website shows that Mr. Parker serves as the Deputy Inspector General for Compliance and Mr. DePasquale continues to serve as Chief Counsel.³²

Messrs. Parker’s and DePasquale’s continued presence in FHFA-OIG leadership roles stokes among FHFA-OIG staff fear of further retaliation and abuse, resentment of their apparent invulnerability to accountability, and expectation that their pattern of obstructing transparency and oversight will persist. One FHFA-OIG staffer recently advised Empower Oversight:

I work at FHFA OIG. If you look at the org chart on our website you will see that Depasquale is still the Chief Counsel and Rich Parker is still the head of Compliance. We were shocked that Acting IG Fong (whom we have great respect for by reputation and experience) left them in their former roles rather than immediately side lining them pending disciplinary action. So a fugitive from Cigie for not testifying remains the chief legal officer of the OIG. As such, he oversees FOIA requests including yours - which is an amazing conflict of interest.³³

²⁹ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 29, ([Apr 14, 2021](#)).

³⁰ See, e.g., <https://thehill.com/homenews/administration/560560-biden-under-increasing-pressure-to-fire-housing-inspector-general>; <https://www.grassley.senate.gov/news/news-releases/grassley-hassan-call-on-biden-to-appoint-qualified-and-untainted-acting-fhfa-inspector-general>; <https://thehill.com/homenews/administration/562094-advocacy-groups-press-biden-to-name-new-inspector-general-at-housing>; <https://www.govexec.com/oversight/2021/07/agriculture-ig-named-acting-watchdog-federal-housing-finance-agency/184195/>; and <https://thehill.com/opinion/white-house/560704-its-time-for-biden-to-remove-an-inspector-general-the-right-way>.

³¹ See, e.g., <https://www.washingtonpost.com/us-policy/2021/06/30/fhfa-inspector-general-resigns-laura-wertheimer/>; <https://www.govexec.com/oversight/2021/06/embattled-housing-finance-agency-ig-steps-down/176819/>.

³² FHFA-OIG, *Organization Chart*, available at <https://www.fhfaoig.gov/about/Organization>.

³³ The FHFA-OIG staffer may have been prescient. See, fn. 56 below and the accompanying text, which recounts a curious and sudden reversal of cooperation on a FOIA request by an FHFA-OIG attorney under Chief Counsel DePasquale’s command.

Investigative Delays Enabled the Protracted Abuse of and Retaliation Against Witnesses

The CIGIE-IC Chairman's April 14, 2021, letter to President Biden plainly shows that the CIGIE-IC's investigation of former Inspector General Wertheimer's abuses of authority was not the first such investigation. The letter discusses prior investigations: one by two Senate committees and another by the Office of Special Counsel ("OSC").³⁴

According to the April 14th letter, in October of 2015 the then Chairmen of the Senate Committees on the Judiciary and Homeland Security and Government Affairs received multiple complaints about FHFA-OIG and requested information concerning FHFA-OIG personnel reductions, output, and hiring practices.³⁵ The Senators also requested that FHFA-OIG make five specifically named executives available for interview.³⁶

Chief Counsel DePasquale—with the assistance of outside counsel—gathered the five executives together and aggressively discouraged them from cooperating with the Senators' interview request.³⁷

Regarding the executives who failed to yield to Chief Counsel DePasquale's intimidation, the CIGIE-IC found evidence that former Inspector General Wertheimer was "not happy" with them, openly disparaged them, and re-assigned them to Chief Counsel DePasquale to "punish" them and insulate herself from them.³⁸ The CIGIE-IC Chairman devotes more than three pages (about 10%) of his letter to the President to descriptions of former Inspector General Wertheimer's pervasive retaliation against two of the executives and her comical lack of candor regarding such retaliation when confronted with evidence of it by the CIGIE-IC's investigators.³⁹

Moreover, the CIGIE-IC noted that former Inspector General Wertheimer's retaliation against the two executives had a chilling effect on the willingness of other FHFA-OIG employees to cooperate with oversight inquiries,⁴⁰ and concluded that humiliating, demeaning, and embarrassing staff:

³⁴ See, Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 5 and 26, ([Apr 14, 2021](#)).

³⁵ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 5, ([Apr 14, 2021](#)).

³⁶ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 5, ([Apr 14, 2021](#)).

³⁷ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 5 fn. 18, ([Apr 14, 2021](#)).

³⁸ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 5, ([Apr 14, 2021](#)).

³⁹ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 5 – 8, and 28, ([Apr 14, 2021](#)).

⁴⁰ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 9, ([Apr 14, 2021](#)).

. . . is inappropriate on its face and is exacerbated by IG Wertheimer’s employment of these techniques against actual or potential witnesses or whistleblowers – the very people IGs are supposed to protect. Such behavior suggests a hostility to oversight and is widely known to be unacceptable in the IG community and beneath the standard of integrity expected of an IG.^{41, 42}

The CIGIE-IC Chairman’s letter also references an intervening OSC investigation of a 2015 change of auditor performance standards that caused the majority of FHFA-OIG auditors to resign *en masse*.⁴³ Like the two Senators, the OSC sought the testimony of one of the two executives whom former Inspector General Wertheimer had previously retaliated against; and, in defiance of her continued retaliation, he complied with OSC’s request.

OSC determined that although the announcement of a performance standards change amounted to a threat of a personnel action, threats do not violate 5 U.S.C. § 2302(b)(12).⁴⁴ OSC, nonetheless, referred its findings to the CIGIE-IC, and suggested that “the problematic conduct might be wrongdoing under the CIGIE-IC’s broader standard.”⁴⁵ OSC’s referral comprises the first allegation in the CIGIE-IC’s investigation of the aforementioned FHFA-OIG leaders, but the CIGIE-IC Chairman reported that lack of cooperation by former Inspector General Wertheimer and FHFA-OIG prevented the CIGIE-IC from developing the necessary facts to make a final determination on the issue.⁴⁶

Throughout the more than five-year pendency of the three investigations former Inspector General Wertheimer and her leadership team were enabled to retaliate

⁴¹ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 11, ([Apr 14, 2021](#)).

⁴² Sections 3(d) and 7(b) of the Inspector General Act of 1978, as amended, expressly elevate the importance and protection of whistleblowers within Offices of Inspector General. Section 3(d) requires each Inspector General to designate a Whistleblower Protection Coordinator to, among other things, educate agency employees about prohibitions against retaliation for protected disclosures, and assist the Inspector General in promoting the timely and appropriate handling and consideration of protected disclosures and allegations of reprisal. 5 U.S.C. App. § 3(d)(1)(C). Whereas, Section 7(b) generally prohibits Inspectors General from disclosing the identity of agency employees who submit complaints or provide information to the Office of Inspector General. 5 U.S.C. App. § 7(b).

⁴³ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 25 – 26, ([Apr 14, 2021](#)).

⁴⁴ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 25 – 27, ([Apr 14, 2021](#)). FHFA-OIG orchestrated the performance standard change three-quarters of the way through the Fiscal Year 2015 performance period. The revised standard provided that auditors would receive minimally successful ratings unless they published a report during the performance period. However, former Inspector General Wertheimer had complete control over which reports got published and when. Accordingly, the revised standard served as a threat used to encourage auditors to leave the FHFA-OIG.

⁴⁵ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 27, ([Apr 14, 2021](#)).

⁴⁶ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 27, ([Apr 14, 2021](#)).

persistently against staff who cooperated with the Senate, OSC, and CIGIE-IC investigations. In other words, some FHFA-OIG staff, such as two of the five executives that the Senate specifically requested for interview in 2015 (one of whom was also requested for interview by OSC and the CIGIE-IC), were subjected to more than five years of disparagement, embarrassment, and humiliation at the hands of former Inspector General Wertheimer and her inner circle.

And, as the CIGIE-IC found, the pervasive retaliation against such executives served as a bold and effective deterrent against other FHFA-OIG staff cooperating with legitimate oversight efforts directed at former Inspector General Wertheimer,⁴⁷ and as an implicit directive to ostracize staff who had cooperated. It is not reasonable to expect whistleblowers to endure years of retaliation or to believe that anyone would become a whistleblower in an environment where such circumstances are tolerated. Hence, if the Inspector General Community is to have any credibility that it will protect would-be whistleblowers within its own ranks, then the CIGIE-IC must itself demonstrate transparency and accountability.

Further, if the public is not reassured that the CIGIE-IC will efficiently, thoroughly, and timely investigate and report on witness intimidation and retaliation by Inspectors General and senior officials within the Inspector General Community, then the chilling effect on whistleblowing will be devastating.

Empower Oversight's FOIA Requests

On June 16, 2021, Empower Oversight sent two FOIA requests to CIGIE.

Empower Oversight's first FOIA request sought "an unredacted version of the [the CIGIE-IC Chairman's April 14, 2021, letter to President Biden], and the five enclosures to that letter." (See, Exhibit 1).

Its second request sought:

1. Emails 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. Emails sent to (a) Laura Wertheimer, (b) Leonard DePasquale, or (c) Richard Parker; from (d) the CIGIE Chair at the relevant time (Michael Horowitz or

⁴⁷ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 9, ([Apr 14, 2021](#)).

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. Emails 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. (See, Exhibit 2).

In support of its FOIA requests, Empower Oversight explained that:

The public has an interest in understanding why the CIGIE-IC took so long to elevate this matter to the White House with a recommendation to consider imposing appropriate discipline. It is unclear from the public record whether the CIGIE-IC had previously made similar recommendations during President Trump's tenure in office, and if not, why it failed to do so. (See, Exhibits 1 and 2).

Empower Oversight intends to analyze the requested information in furtherance of two purposes:

1. To understand whether the CIGIE-IC investigation of former Inspector General Wertheimer, former Associate Inspector General Byrne, and Messrs. Parker and DePasquale was delayed solely by the actions of the investigative targets themselves, or whether there were other intentional or unintentional causes of the delay; and
2. To encourage Congress to consider legislative remedies to:
 - a. Protect whistleblowers from continued retaliation during the pendency of investigations stemming from their complaints or with which they cooperate; and
 - b. Overcome lack of cooperation or obstruction of investigations of wrongdoing by government officials.⁴⁸

⁴⁸ Gerald Connolly, Chairman of the House Government Operations Subcommittee, Committee on Oversight and Reform, described former Inspector General Wertheimer as "the poster child for why the House will pass" the Integrity Committee Reform Act of 2021, H.R. 2681. See, Press Release: *Connolly Statement on IG Wertheimer's Planned Resignation*, (June 29, 2021), available at <https://connolly.house.gov/news/documentsingle.aspx?DocumentID=4330>. The Integrity Committee Reform Act of 2021 would amend the Section 11 of the Inspector General Act of 1978 to require the CIGIE-IC to include additional information in its reports to Congress and submit semiannual reports to Congress that include, among other things, descriptions of any attempt to prevent or hinder an CIGIE-IC

CIGIE's FOIA Public Liaison acknowledged Empower Oversight's two FOIA requests on June 22, 2021. She assigned FOIA case number 6330-2021-45 to Empower Oversight's first FOIA request (*i.e.*, its request for an unredacted copy of the CIGIE-IC Chairman's April 14, 2021 letter to President Biden) (*see*, Exhibit 3) and assigned FOIA case number 6330-2021-46 to its second FOIA request (*i.e.*, its request for email communications among CIGIE leadership, the targets of the CIGIE-IC investigation, and Congress) (*see*, Exhibit 4).

Additionally, with respect to Empower Oversight's first FOIA request, CIGIE FOIA case number 6330-2021-45, CIGIE's FOIA Public Liaison advised that it is CIGIE's policy that "in all cases CIGIE will neither confirm nor deny the existence of a non-public law enforcement matter involving any particular individual."⁴⁹ (*See*, Exhibit 3). This type of response to a FOIA request is typically referred to as a "*Glomar* response," after the Circuit Court's decision in *Phillippi v. CIA*.⁵⁰ She then denied the request under FOIA Exemptions b(6)⁵¹ and b(7)(C).⁵² (*See*, Exhibit 3).

Regarding Empower Oversight's second FOIA request, CIGIE FOIA case number 6330-2021-46, CIGIE's FOIA Public Liaison claimed that, because the time frame of the **email** communications sought by Empower Oversight spanned several years, without some added search terms to narrow the scope of CIGIE's search over the requested date range, the request is overly broad, and she requested that Empower Oversight recommend to CIGIE supplemental search terms. (*See*, Exhibit 4). She added that CIGIE only has the capacity to search the emails of CIGIE employees, and that none of the personnel named in the request are CIGIE employees. Hence, CIGIE anticipated that it would need to contact Department of Justice-OIG ("DOJ-OIG"), National Science Foundation-OIG ("NSF-OIG"), Department of Labor-OIG ("DOL-OIG"), and Amtrak-OIG for the email communications of Inspectors General Horowitz, Lerner, Dahl, and Winters, respectively, as well as FHFA-OIG for the email communications of the

investigation or any concerns about the integrity or operations of an Office of Inspector General. Empower Oversight is encouraged by the supplemental reporting requirements envisioned by the Integrity Committee Reform Act of 2021, but it also believes that close analysis of the unredacted CIGIE-IC Chairman's April 14, 2021, letter to President Biden with its five enclosures would likely result in legislative proposals to enable the CIGIE-IC or another authority to overcome impediments and unreasonable delays like those encountered by the CIGIE-IC during its investigation of FHFA-OIG leadership.

⁴⁹ *See*, DOJ, *FOIA Update: OIP Guidance: Privacy "Glomarization"*, (January 1, 1986), available at <https://www.justice.gov/oip/blog/foia-update-oip-guidance-privacy-glomarization>.

⁵⁰ 546 F.2d 1009 (D.C. Cir. 1976).

⁵¹ Section b(6) of the FOIA exempts from production "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (emphasis added).

⁵² Section b(7)(C) of the FOIA exempts from production: "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . ." 5 U.S.C. § 552(b)(7)(C) (emphasis added).

investigative targets. (See, Exhibit 4). Further, regarding email communications “sent to or from a house.gov or senate.gov domain,” she claimed that they “are not subject to FOIA because neither legislative body is a federal agency; FOIA, of course, only applies to federal agency records.” (See, Exhibit 4).

By letter dated July 14, 2021, Empower Oversight objected to CIGIE’s FOIA Public Liaison’s conclusion with respect to CCIGIE FOIA case number 6330-2021-46, to the extent that it concerns email communications sent to or from a house.gov or senate.gov domain, pointing out that it contrasted with explicit DOJ guidance. (See, Exhibit 5). In reply, CIGIE’s FOIA Public Liaison receded from her “bright line” categorical denial” and accordingly agreed that CIGIE will conduct a search for responsive emails and will apply applicable law to determine whether each such email is releasable. (See, Exhibit 6).

By letter dated August 16, 2021, CIGIE’s FOIA Public Liaison, referencing the first and second items CIGIE FOIA case number 6330-2021-46, proposed that “[i]n order to narrow the search so as to prevent it from being overly broad,” CIGIE would ask DOJ-OIG and NSF-OIG to conduct a search for emails to/from Inspectors General Horowitz and Lerner, respectively from/to six FHFA-OIG email addresses, *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. (See, Exhibit 6). Her proposal made no provision for searches of email communications maintained by CIGIE, FHFA-OIG, Amtrak-OIG, or DOL-OIG. CIGIE FOIA case number 6330-2021-46 remains pending.

In the meantime, on August 12, 2021 Empower Oversight submitted FOIA requests to FHFA-OIG, DOJ-OIG, NSF-OIG, DOL-OIG, Amtrak-OIG, and FDIC-OIG, in response to CIGIE’s FOIA Public Liaison’s June 22nd communication, which indicated that documents requested by Empower Oversight largely were not in CIGIE’s possession.⁵³ These requests sought:

1. Communications relating to the CIGIE-IC investigation sent by (a) Laura Wertheimer, (b) Leonard 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

⁵³ See, Empower Oversight, *Empower Oversight Seeks Answers on Multi-year Delay of FHFA Inspector General Report*, (August 13, 2021) available at <https://empowr.us/empower-oversight-seeks-answers-on-multi-year-delay-of-fhfa-inspector-general-report/> <https://empowr.us/empower-oversight-seeks-answers-on-multi-year-delay-of-fhfa-inspector-general-report/> (the referenced FOIA requests are listed and linked at the foot of the press release).

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.^{54, 55}

FHFA-OIG acknowledged receipt of Empower Oversight’s two FOIA requests on August 13, 2021. In her acknowledgement letters, FHFA-OIG’s FOIA Officer designated the FOIA requests as 2021-FOIA-00016 (Horowitz/Wertheimer communications request) and 2021-FOIA-00017 (wider communications request); placed the requests on FHFA-OIG’s “Standard Track,” which pertains to “requests that are routine or require little or no search time, review, or analysis of records;” and granted Empower Oversight’s request for a fee waiver. (See, Exhibits 7 and 8). In contrast to FHFA-OIG’s FOIA Officer’s prompt cooperation, however, two weeks later, Gregg M. Schwind, an attorney under Chief Counsel DePasquale’s supervision, purportedly on behalf of FHFA-OIG’s FOIA Officer, advised “Empower Oversight requests records related to matters under the purview of the Council of the Inspectors General on Integrity and Efficiency

⁵⁴ See, Empower Oversight, *Empower Oversight Seeks Answers on Multi-year Delay of FHFA Inspector General Report*, (August 13, 2021) available at <https://empowr.us/empower-oversight-seeks-answers-on-multi-year-delay-of-fhfa-inspector-general-report/> <https://empowr.us/empower-oversight-seeks-answers-on-multi-year-delay-of-fhfa-inspector-general-report/> (the referenced FOIA requests are listed and linked at the foot of the press release).

⁵⁵ Empower Oversight sent two FOIA requests to DOJ-OIG and FHFA-OIG: one as set forth above, and another seeking:

1. Communications relating to the CIGIE-IC investigation sent by Laura Wertheimer to the Council of the Inspectors General on Integrity and Efficiency (“CIGIE”) Chair, Michael Horowitz.
2. Communications relating to the CIGIE-IC investigation sent to Laura Wertheimer from CIGIE Chair Michael Horowitz.

See, Empower Oversight, *Empower Oversight Seeks Answers on Multi-year Delay of FHFA Inspector General Report*, (August 13, 2021) available at <https://empowr.us/empower-oversight-seeks-answers-on-multi-year-delay-of-fhfa-inspector-general-report/> <https://empowr.us/empower-oversight-seeks-answers-on-multi-year-delay-of-fhfa-inspector-general-report/> (the referenced FOIA requests are listed and linked at the foot of the press release; compare, DOJ Letter Delay FOIA 1 and FHFA Letter Delay 1 with DOJ Letter Delay FOIA 2 and FHFA Letter Delay 2).

(CIGIE). For this reason, FHFA-OIG has referred the requests to CIGIE, whose FOIA office will respond to you directly.” (See, Exhibit 9).⁵⁶

The next business day, *i.e.*, August 30, 2021, CIGIE’s Senior Assistant General Counsel, Faith R. Coutier,⁵⁷ advised Empower Oversight that FHFA-OIG had referred to CIGIE FOIA requests 2021-FOIA-00016 and 2021-FOIA-00017; and CIGIE had consolidated the requests into a single FOIA request: CIGIE FOIA case number 6330-2021-71. (See, Exhibit 11). Ms. Coutier added that, as she had previously advised Empower Oversight in “response to FOIA requests 6330-2021-65, 6330-2021-66, 6330-2021-67, and 6330-2021-69,”⁵⁸ it is CIGIE’s policy that “in all cases CIGIE will neither confirm nor deny the existence of a non-public law enforcement matter involving any particular individual.” (See, Exhibit 11). She then denied the request under FOIA Exemptions b(6) and b(7)(C). (See, Exhibit 11).⁵⁹

In contrast to Ms. Coutier’s hasty and summary denials of CIGIE FOIA case numbers 6330-2021-65, 6330-2021-66, 6330-2021-67, 6330-2021-69, and 6330-2021-71, to date CIGIE’s FOIA Public Liaison continues to process CIGIE’s FOIA case number 6330-2021-46, which is the progenitor of, and functionally equivalent to, the requests that were summarily denied by Ms. Coutier.

⁵⁶ Mr. Schwind’s action “(for)” FHFA-OIG’s FOIA Officer is curious because the FOIA Officer was available on the date of Mr. Schwind’s letter notifying Empower Oversight of the referral to CIGIE; FHFA-OIG’s FOIA Officer actually forwarded a .pdf of Mr. Schwind’s letter on the date of the letter. (See, Exhibit 10).

⁵⁷ Ms. Coutier is not CIGIE’s FOIA Public Liaison. Empower Oversight is advised that she serves as legal counsel to the CIGIE-IC.

⁵⁸ CIGIE FOIA case numbers 6330-2021-65, 6330-2021-66, 6330-2021-67, and 6330-2021-69, which collectively are attached as Exhibit 12, represent referrals from DOJ-OIG, NSF-OIG, DOL-OIG, and Amtrak-OIG, respectively, of Empower Oversight’s August 12th FOIA requests. With respect to CIGIE FOIA case number 6330-2021-67, Ms. Coutier advised Empower Oversight that CIGIE had received a referral of its FOIA request, which CIGIE was denying pursuant to FOIA exemptions b(6) and b(7)(C), on the same date that DOL-OIG acknowledged receipt of, and referred to CIGIE, Empower Oversight’s FOIA request. In the case of 6330-2021-69, Ms. Coutier advised Empower Oversight that CIGIE had received a referral of its FOIA request, which CIGIE was denying pursuant to FOIA exemptions b(6) and b(7)(C), on the day after Amtrak-OIG acknowledged receipt of and referred Empower Oversight’s FOIA request. In the case of 6330-2021-65 and 6330-2021-66, Ms. Coutier advised Empower Oversight that CIGIE had received a referral of its FOIA requests, which CIGIE was denying pursuant to FOIA exemptions b(6) and b(7)(C) within 48 hours of DOJ-OIG and NSF-OIG acknowledging receipt of and referring Empower Oversight’s FOIA requests to CIGIE.

⁵⁹ Ms. Coutier also noted that Empower Oversight’s FOIA request “constitutes a third-party request for law enforcement records covered by a system of records notice (SORN), involving the Privacy Act.” (See, Exhibit 11). That very well may be, but it is well established that the Privacy Act does not prohibit disclosure that the FOIA requires. See News-Press v. DHS, 489 F.3d 1173, 1189 (11th Cir. 2007) (“The net effect of the interaction between the two statutes is that where the FOIA requires disclosure, the Privacy Act will not stand in its way, but where the FOIA would permit withholding under an exemption, the Privacy Act makes such withholding mandatory upon the agency”); accord, Greentree v. U.S. Customs Serv., 674 F.2d 74, 79 (D.C. Cir. 1982).

CIGIE Denied Empower Oversight's FOIA Requests in Error

CIGIE's *Glomar* responses and categorical denials pursuant to FOIA Exemptions b(6) and b(7)(C) constitute serious errors that, if uncorrected, will seriously undermine transparency and oversight of the Inspector General Community. In brief:

- The CIGIE-IC's investigation of allegations of misconduct by former Inspector General Wertheimer, former Associate Inspector General Byrne, and Messrs. Parker and DePasquale does not qualify as a "law enforcement" investigation protected by Exemption b(7)(C);
- Had the CIGIE-IC's investigation qualified as a "law enforcement" investigation protected by Exemption b(7)(C), then:
 - a. *Glomar* responses would still be impermissible because there is a public interest in the reasons for the delay of the CIGIE-IC's investigation and the CIGIE-IC Chairman's April 14, 2021, letter to President Biden is in the public domain; and
 - b. Categorical denials pursuant to Exemption b(7)(C) are not available under these circumstances;
- Categorical denials typically are not available under Exemption b(6); and
- CIGIE failed to identify, evaluate, and balance the privacy and public interests on a document-by-document basis—a necessary step in invoking Exemptions b(6) and b(7)(C) under these circumstances.

Exemption b(7)(C) "Law Enforcement" Investigations

When records sought under the FOIA relate to an inquiry concerning the activities of one or more federal employees, the key to the applicability of a *Glomar* response or Exemption b(7)(C) denial is determining whether the records truly qualify as protected "law enforcement records."⁶⁰ This determination requires:

distinguishing between two types of files that relate to federal employees: (1) government surveillance or oversight of the performance of duties of its employees; and (2) investigations which focus directly on specifically

⁶⁰ See, e.g., Bartko, 898 F.3d at 64 – 66, 68; Jefferson v. DOJ, 284 F.2d 172, 176 – 181 (D.C. Cir. 2002); Rural Housing Alliance v. U.S.D.A., 498 F.2d 73, 79 – 82 (D.C. Cir. 1974).

alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved result in civil or criminal sanctions.⁶¹

To qualify as law enforcement records, the documents sought must arise out of “investigations which focus directly on specifically alleged illegal acts . . . which could, if proved result in civil or criminal sanctions.”⁶² Conversely, documents that reflect only “government surveillance or oversight of the performance of duties of its employees’ do *not* qualify,” as law enforcement records.⁶³ Further, an agency must anticipate more than an ephemeral possibility of an enforcement action when it undertakes oversight to transform such oversight into a law enforcement investigation.⁶⁴

The Circuit Court explained the distinction as follows:

To put the question [*i.e.*, was an investigation for law enforcement purposes] another way . . . is an agency’s internal monitoring to ensure that its employees are acting in accordance with statutory mandate and the agency’s own regulations an investigation for “law enforcement purposes” within the meaning of exemption 7?

On its face, exemption 7’s language appears broad enough to include all such internal audits. If this broad interpretation is accepted, however, we immediately encounter the problem that most information sought by the Government about its own operations is for the purpose ultimately of determining whether such operations comport with applicable law, and thus is “for law enforcement purposes.” Any internal auditing or monitoring conceivably could result in disciplinary action, in dismissal, or indeed criminal charges against the employees. But if this broad interpretation is correct, then the exemption swallows up the Act; exemption 7 defeats one central purpose of the Act to provide access to information concerning the Government’s own activities.

We think “investigatory files compiled for law enforcement purposes” must be given the same result, or a meaning to achieve the same result, whether the subject of the files is a government employee or an ordinary citizen. . . .

The purpose of the “investigatory files” is thus the critical factor. Was the purpose of the disputed report to determine if grounds existed for bringing [an enforcement action against a specific government employee]? If the

⁶¹ Rural Housing Alliance, 498 F.2d at 81.

⁶² Bartko, 898 F.3d at 64 (*quoting*, Rural Housing Alliance, 498 F.2d at 81).

⁶³ Bartko, 898 F.3d at 64 (*quoting*, Rural Housing Alliance, 498 F.2d at 81) (emphasis original).

⁶⁴ Bartko, 898 F.3d at 68 (*quoting*, Rural Housing Alliance, 498 F.2d at 82 n. 48).

purpose of the investigation was to consider an action equivalent to those which the Government brings against private parties, thus demonstrating that the “law enforcement purpose” was not customary surveillance of the performance of duties by government employees, but an inquiry as to an identifiable possible violation of law, then such inquiry would have been “for law enforcement purposes” whether the individual were a private citizen or a government employee.⁶⁵

Finally, the agency making the *Glomar* response, or asserting Exemption b(7)(C), bears the burden of establishing that the records in controversy qualify as law enforcement records.⁶⁶ CIGIE has not, and cannot, carry its burden herein. It is inconceivable that the CIGIE-IC anticipated that there was a reasonable possibility that criminal or civil enforcement proceedings would result when it initiated its investigation, and the allegations that it investigated (or is authorized to investigate, for that matter) have little or no practical application against private citizens.

In defense of their *Glomar* responses and denials pursuant to Exemption b(7)(C), CIGIE’s FOIA Public Liaison and Ms. Coutier make nothing more than the bare-bones, self-serving declarations that Empower Oversight had requested law enforcement records, that “in all cases CIGIE will neither confirm nor deny the existence of a non-public law enforcement matter involving any particular individual;” that CIGIE has not released the requested records publicly; and that, therefor, Empower Oversight’s “FOIA request is denied under FOIA exemptions (b)(6) and (b)(7)(C).” Exhibits 3, 11, and 12.

Section 11 of the Inspector General Act of 1978, as amended, established CIGIE and—at Subsection (d)(1)—the CIGIE-IC with the authority to “receive, review, and refer for investigation allegations of wrongdoing that are made against Inspectors General” and designated high-level staff that report directly to such Inspectors General.⁶⁷

Section 11(d)(5)(A) of the Inspector Act of 1978, as amended, requires representatives of the Department of Justice, the Office of Special Counsel, and the CIGIE-IC—collectively referred to as the “Allegation Review Group”⁶⁸—to review applicable allegations of wrongdoing within seven days of the CIGIE-IC’s receipt thereof, and to refer them to either the Department of Justice, the Office of Special Counsel, or the Chairman of the CIGIE-IC for consideration of internal review.⁶⁹ Regarding such referrals to the Department of Justice and the Office of Special Counsel,

⁶⁵ *Rural Housing Alliance*, 498 F.2d at 81 – 82.

⁶⁶ *Jefferson*, 284 F.2d at 178.

⁶⁷ *See*, 5 U.S.C. App. § 11; *see also*, CIGIE, *Integrity Committee Policies and Procedures*, § 4, (2018).

⁶⁸ *See*, CIGIE, *Integrity Committee Policies and Procedures*, §§ 3(F) and 6(B), (2018).

⁶⁹ *See*, 5 U.S.C. App. § 11(d)(5)(A); *see also*, CIGIE, *Integrity Committee Policies and Procedures*, § 6(B), (2018).

the CIGIE-IC's procedures state that the Department of Justice representative will identify potential criminal offenses, which will be referred to the Public Integrity Section of the Department of Justice, and the Office of Special Counsel representative will identify any remaining allegations within the jurisdiction of the Office of Special Counsel, which will be referred to it.⁷⁰ Pertinent to this matter, the Office of Special Counsel has investigative and prosecutorial jurisdiction to protect federal employees and applicants for federal employment from prohibited personnel practices set forth at 5 U.S.C. § 2302(b), especially reprisal for whistleblowing.⁷¹

Any allegations not referred to the Department of Justice or the Office of Special Counsel may be referred to the Chairman of the CIGIE-IC for consideration of an internal investigation.⁷² According to the CIGIE-IC's policies, it may investigate allegations of wrongdoing against Inspectors General and their high-level direct reports that involve:

- Abuse of authority in the exercise of official duties or while acting under color of office;
- Substantial misconduct, such as gross mismanagement, gross waste of funds, or a substantial violation of law, rule, or regulation; or
- Conduct that undermines the independence or integrity reasonably expected of such officials.⁷³

However, as discussed above, the Department of Justice side-tracks allegations of potential criminal offenses to the Public Integrity Section of the Department of Justice, and the Office of Special Counsel assumes jurisdiction over allegations of civil infractions within its authority.

Hence, any matters that remain for the CIGIE-IC to investigate are neither criminal nor civil offenses, but rather administrative reviews. According to the CIGIE-IC Chairman's April 14, 2021, letter to President Biden the allegations that the CIGIE-IC

⁷⁰ See, CIGIE, *Integrity Committee Policies and Procedures*, § 6(B), (2018).

⁷¹ Office of Special Counsel, *The U.S. Office of Special Counsel's Role in Protecting Whistleblowers and Serving as a Safe Channel for Government Employees to Disclose Wrongdoing*, p. 2, (Undated), available at <https://osc.gov/Documents/PPP/OSC's%20Role/OSC%E2%80%99s%20Role%20in%20Protecting%20Whistleblowers%20and%20Serving%20as%20a%20Safe%20Channel%20for%20Government%20Employees%20to%20Disclose%20Wrongdoing.pdf>.

⁷² See, CIGIE, *Integrity Committee Policies and Procedures*, § 6(B), (2018).

⁷³ CIGIE, *Integrity Committee Policies and Procedures*, § 7(A), (2008); see also, Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 1, ([Apr 14, 2021](#)).

accepted for investigation do not relate to criminal violations or civil infractions.⁷⁴ Instead, they amount to “gross[] mismanagement,” “coercive personnel practices,” and “a culture of retaliation and abuse,”⁷⁵ which are clearly administrative in nature, amounting to employee performance issues.

When the Allegation Review Group refers allegations to the Chairman of the CIGIE-IC for consideration, the CIGIE-IC affords itself discretion to:

- Request additional information;
- Request that the subject of the allegations respond to them in writing; or
- Take one of the following actions:
 - a. Close the matter because the allegations do not satisfy CIGIE-IC’s threshold for investigation (*i.e.*, allegations of wrongdoing that involve abuse of authority in the exercise of official duties or while acting under color of office; substantial misconduct, such as gross mismanagement, gross waste of funds, or a substantial violation of law, rule, or regulation; or conduct that undermines independence or integrity);
 - b. Close the matter on the grounds that the subject sufficiently refuted the allegations in writing;
 - c. Make findings on the existing record;
 - d. Refer the matter for investigation;
 - e. Refer the matter to another agency for whatever action it deems appropriate; or

⁷⁴ With respect to the first, fourth, and fifth allegations investigated by the CIGIE-IC, its Chairman’s April 14, 2021, letter to President Biden notes that OSC had referred the first allegation to the CIGIE-IC because OSC determined that former Inspector General Wertheimer’s announcement that auditors would receive minimally successful ratings unless they published a report during the Fiscal Year 2015 performance period (when she had complete control over which reports got published and when), threatened a personnel action but threats do not violate 5 U.S.C. § 2302(b)(12). *See*, Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, pp. 25 – 27, ([Apr 14, 2021](#)). OSC, nonetheless, referred its findings to the CIGIE-IC, and suggested that “the problematic conduct might be wrongdoing under the CIGIE-IC’s broader standard.” *See*, Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 27, ([Apr 14, 2021](#)). Further, the Office of Special Counsel’s failure to take control of the fourth and fifth allegations suggests that its representative on the Allegation Review Group was dubious about whether such allegations amounted to civil violations of 5 U.S.C. § 2302(b)(8); otherwise, he/she would have assumed jurisdiction over the allegations for the Office of Special Counsel. *See*, ftns. 70 and 71 and its accompanying text, above.

⁷⁵ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 2, ([Apr 14, 2021](#)).

- f. Refer the matter to the CIGIE Chairman for appropriate action (if the allegations do not meet the CIGIE-IC's threshold for review).^{76, 77}

During fiscal years 2017 through 2020, CIGIE-IC received 2,631 complaints alleging wrongdoing.⁷⁸ Of these 2,631 complaints, less than 1% of them (*i.e.*, 17) were referred to the Chairman of the CIGIE-IC for investigation.⁷⁹ Prior to submission to the Allegation Review Group, CIGIE removed from its docket roughly 90% of the complaints on the grounds that they represented duplicate complaints or complaints that it deemed to be characterized by “objectively unreliable information” or to be outside of its jurisdiction.⁸⁰

⁷⁶ CIGIE, *Integrity Committee Policies and Procedures*, § 7(C), (2018).

⁷⁷ If the CIGIE-IC decides to investigate a matter, then it may assign the investigation to any Inspector General who is a member of CIGIE. See 5 U.S.C. App. § 11(d)(6)(B).

⁷⁸ CIGIE, *Annual Report to the President and Congress, Fiscal Year 2020*, p. 6, (Undated), available at [https://www.ignet.gov/sites/default/files/417329-FY20 Annual Report-President%26Congress-WEB.pdf](https://www.ignet.gov/sites/default/files/417329-FY20%20Annual%20Report-President%26Congress-WEB.pdf) (in Fiscal Year 2020, CIGIE-IC received 1,152 complaints); CIGIE, *Annual Report to the President and Congress, Fiscal Year 2019*, p. 6, (Undated), available at [https://www.ignet.gov/sites/default/files/files/FY19 Annual Report to the President and Congress.pdf](https://www.ignet.gov/sites/default/files/files/FY19%20Annual%20Report%20to%20the%20President%20and%20Congress.pdf) (in Fiscal Year 2019, CIGIE-IC received 1,035 complaints); CIGIE, *Annual Report to the President and Congress, Fiscal Year 2018*, p. 6, (Undated), available at [https://www.ignet.gov/sites/default/files/files/FY18 Annual Report to the President and Congress.pdf](https://www.ignet.gov/sites/default/files/files/FY18%20Annual%20Report%20to%20the%20President%20and%20Congress.pdf) (in Fiscal Year 2018, CIGIE-IC received 385 complaints); CIGIE, *Annual Report to the President and Congress, Fiscal Year 2017*, p. 6, (Undated), available at [https://www.ignet.gov/sites/default/files/files/FY17 Annual Report to the President and Congress.pdf](https://www.ignet.gov/sites/default/files/files/FY17%20Annual%20Report%20to%20the%20President%20and%20Congress.pdf) (in Fiscal Year 2017, CIGIE-IC received 59 complaints).

⁷⁹ CIGIE, *Annual Report to the President and Congress, Fiscal Year 2020*, p. 6, (Undated), available at [https://www.ignet.gov/sites/default/files/417329-FY20 Annual Report-President%26Congress-WEB.pdf](https://www.ignet.gov/sites/default/files/417329-FY20%20Annual%20Report-President%26Congress-WEB.pdf) (in Fiscal Year 2020, CIGIE-IC referred 3 complaints to the Chairman of the CIGIE-IC for investigation); CIGIE, *Annual Report to the President and Congress, Fiscal Year 2019*, p. 6, (Undated), available at [https://www.ignet.gov/sites/default/files/files/FY19 Annual Report to the President and Congress.pdf](https://www.ignet.gov/sites/default/files/files/FY19%20Annual%20Report%20to%20the%20President%20and%20Congress.pdf) (in Fiscal Year 2020, CIGIE-IC referred 7 complaints to the Chairman of the CIGIE-IC for investigation); CIGIE, *Annual Report to the President and Congress, Fiscal Year 2018*, p. 6, (Undated), available at [https://www.ignet.gov/sites/default/files/files/FY18 Annual Report to the President and Congress.pdf](https://www.ignet.gov/sites/default/files/files/FY18%20Annual%20Report%20to%20the%20President%20and%20Congress.pdf) (in Fiscal Year 2020, CIGIE-IC referred 5 complaints to the Chairman of the CIGIE-IC for investigation); CIGIE, *Annual Report to the President and Congress, Fiscal Year 2017*, p. 6, (Undated), available at [https://www.ignet.gov/sites/default/files/files/FY17 Annual Report to the President and Congress.pdf](https://www.ignet.gov/sites/default/files/files/FY17%20Annual%20Report%20to%20the%20President%20and%20Congress.pdf) (in Fiscal Year 2020, CIGIE-IC referred 2 complaints to the Chairman of the CIGIE-IC for investigation).

⁸⁰ CIGIE-IC, *Annual Report on the Activities of the CIGIE Integrity Committee, Fiscal Year 2020*, pp. 4 – 6, (December 8, 2020), available at <https://www.ignet.gov/sites/default/files/files/FY20ICAnnualReport.pdf> (CIGIE culled out 1,071 complaints prior to submission to the Allegation Review Committee); CIGIE-IC, *Annual Report on the Activities of the CIGIE Integrity Committee, Fiscal Year 2019*, (February 14, 2020), available at <https://www.ignet.gov/sites/default/files/files/FY19-IC-Annual-Report.pdf> (CIGIE culled out 973 complaints prior to submission to the Allegation Review Committee); CIGIE-IC, *Annual Report on the Activities of the CIGIE Integrity Committee, Fiscal Year 2018*, pp. 2 – 3, (January 7, 2019), available at https://www.ignet.gov/sites/default/files/files/2018_IC_Annual_Report.pdf (CIGIE culled out 299 complaints prior to submission to the Allegation Review Committee); CIGIE-IC, *Annual Report on the*

Moreover, regarding the few complaints that the CIGIE-IC accepts for investigation, CIGIE has no authority to take action with respect to any of the CIGIE-IC's investigative findings; rather, it is limited to forwarding reports of its findings and recommendations to the President (or to the employing agency for Inspectors General whose appointments are not subject to the advice and consent of the Senate) for any action deemed appropriate.⁸¹

The Circuit Court's decision in the Bartko case is instructive here. In Bartko, the Circuit Court reversed a lower court's decision affirming actions by DOJ's Office of Professional Responsibility ("OPR") to make a *Glomar* response to, and denials pursuant to Exemptions b(6) and b(7)(C) of, a FOIA request for records relating to allegations or investigations of misconduct by an Assistant United States Attorney ("AUSA").⁸² The FOIA request arose from a criminal prosecution of an Atlanta-based securities broker, in which the Court of Appeals for the Fourth Circuit questioned the discovery practices of the United States Attorney's Office for the Eastern District of North Carolina and made a referral to the OPR as a result.⁸³

Regarding OPR's denial of the subject FOIA request under Exemption b(7)(C), the Circuit Court determined that the OPR failed to justify its actions, and characterized the OPR's investigation as "several steps removed from the type of 'adjudicative or enforcement' proceeding or civil sanctions that could warrant Exemption 7(C) protection."⁸⁴ The key factors that the Circuit Court pointed to in support of its characterization of the OPR's investigation were that the OPR closed most of the misconduct complaints referred to it without investigating them, and that where it did investigate such complaints – and substantiated allegations of misconduct – it ordinarily referred its findings to another entity for action.⁸⁵ The Circuit Court stated:

OPR explained that most misconduct referrals are closed immediately "with no misconduct findings," or on the written record without a "full investigation, which includes requesting and reviewing relevant documents and conducting interviews of witnesses and the subject attorney." Even when a full investigation leads to the conclusion that an attorney has

Activities of the CIGIE Integrity Committee, Fiscal Year 2017, (December 28, 2017), available at <https://www.ignet.gov/sites/default/files/files/2017%20IC%20Annual%20Report.pdf> (CIGIE culled out 20 complaints prior to submission to the Allegation Review Committee).

⁸¹ See, 5 U.S.C. App. § 11(d)(8)(A)(ii).

⁸² Bartko, 898 F.3d at 63 – 67.

⁸³ Bartko, 898 F.3d at 60 – 61.

⁸⁴ Bartko, 898 F.3d at 67 – 68.

⁸⁵ Bartko, 898 F.3d at 68.

engaged in professional misconduct, “those findings could result in a referral to the attorney’s state bar or disciplinary action by the Department.”

That description of OPR’s review process reveals just how attenuated its “law enforcement” function is. For starters, most matters do not even result in an investigation, making a finding of law-enforcement-triggering misconduct implausible in the vast majority of cases. . . .

In addition, according to OPR’s own explanation, even when misconduct is found, all that usually occurs is a finding of poor judgment or intentional misconduct. Discipline is left to the department head, and perhaps referral to a state bar that would presumably go through its own investigative process (and compile its own records) to determine whether punishment should ensue.⁸⁶

Like OPR, the CIGIE-IC closes the vast majority of the allegations of misconduct that it receives—over 99% of them—without opening an internal investigation.⁸⁷ Indeed, it closes roughly 90% of them without even submitting them to the Allegation Review Group for vetting.⁸⁸ Further, when the CIGIE-IC investigates, and substantiates, such

⁸⁶ *Bartko*, 898 F.3d at 68 (citations omitted).

⁸⁷ CIGIE, *Annual Report to the President and Congress, Fiscal Year 2020*, p. 6, (Undated), available at [https://www.ignet.gov/sites/default/files/417329-FY20 Annual Report-President%26Congress-WEB.pdf](https://www.ignet.gov/sites/default/files/417329-FY20%20Annual%20Report-President%26Congress-WEB.pdf) (in Fiscal Year 2020, CIGIE-IC referred 3 complaints to the Chairman of the CIGIE-IC for investigation); CIGIE, *Annual Report to the President and Congress, Fiscal Year 2019*, p. 6, (Undated), available at [https://www.ignet.gov/sites/default/files/files/FY19 Annual Report to the President and Congress.pdf](https://www.ignet.gov/sites/default/files/files/FY19%20Annual%20Report-to-the-President-and-Congress.pdf) (in Fiscal Year 2020, CIGIE-IC referred 7 complaints to the Chairman of the CIGIE-IC for investigation); CIGIE, *Annual Report to the President and Congress, Fiscal Year 2018*, p. 6, (Undated), available at [https://www.ignet.gov/sites/default/files/files/FY18 Annual Report to the President and Congress.pdf](https://www.ignet.gov/sites/default/files/files/FY18%20Annual%20Report-to-the-President-and-Congress.pdf) (in Fiscal Year 2020, CIGIE-IC referred 5 complaints to the Chairman of the CIGIE-IC for investigation); CIGIE, *Annual Report to the President and Congress, Fiscal Year 2017*, p. 6, (Undated), available at [https://www.ignet.gov/sites/default/files/files/FY17 Annual Report to the President and Congress.pdf](https://www.ignet.gov/sites/default/files/files/FY17%20Annual%20Report-to-the-President-and-Congress.pdf) (in Fiscal Year 2020, CIGIE-IC referred 2 complaints to the Chairman of the CIGIE-IC for investigation).

⁸⁸ CIGIE-IC, *Annual Report on the Activities of the CIGIE Integrity Committee, Fiscal Year 2020*, pp. 4 – 6, (December 8, 2020), available at <https://www.ignet.gov/sites/default/files/files/FY20ICAnnualReport.pdf> (CIGIE culled out 1,071 complaints prior to submission to the Allegation Review Committee); CIGIE-IC, *Annual Report on the Activities of the CIGIE Integrity Committee, Fiscal Year 2019*, (February 14, 2020), available at <https://www.ignet.gov/sites/default/files/files/FY19-IC-Annual-Report.pdf> (CIGIE culled out 973 complaints prior to submission to the Allegation Review Committee); CIGIE-IC, *Annual Report on the Activities of the CIGIE Integrity Committee, Fiscal Year 2018*, pp. 2 – 3, (January 7, 2019), available at [https://www.ignet.gov/sites/default/files/files/2018 IC Annual Report.pdf](https://www.ignet.gov/sites/default/files/files/2018%20IC%20Annual%20Report.pdf) (CIGIE culled out 299 complaints prior to submission to the Allegation Review Committee); CIGIE-IC, *Annual Report on the Activities of the CIGIE Integrity Committee, Fiscal Year 2017*, (December 28, 2017), available at <https://www.ignet.gov/sites/default/files/files/2017%20IC%20Annual%20Report.pdf> (CIGIE culled out 20 complaints prior to submission to the Allegation Review Committee).

allegations of misconduct, its authority is limited to forwarding reports of its findings and recommendations to the President or the employing agency for any action that they deem appropriate.⁸⁹ Thus, according to the Circuit Court in Bartko, the CIGIE-IC's investigations are several steps removed from the types law enforcement investigations protected by Exemption b(7)(C). To state it another way, in the District of Columbia Circuit, the CIGIE-IC's investigations of misconduct do not qualify as "law enforcement investigations" for purposes of Subsection b(7)(C) of the FOIA, which also is a precondition of a *Glomar* response.⁹⁰

Glomar

Courts have endorsed *Glomar* responses to FOIA requests seeking records that might reveal whether low-level government employees were investigated for misconduct because even to acknowledge the existence of such records could cause unwarranted invasions of personal privacy.⁹¹ On the other hand, courts have found *Glomar* responses to be inappropriate when there is a substantial FOIA public interest in the requested information that outweighs the privacy interest, or when the existence of the requested information has been officially acknowledged.⁹²

CIGIE's policy "in all cases . . . [to] neither confirm nor deny the existence of a non-public law enforcement matter involving any particular individual," (see, Exhibits 3, 11, and 12) (emphasis added)), is faulty because it fails to account for the possibility that the FOIA public interest may outweigh the privacy interests associated with requested records, or that the requested information has been officially acknowledged. Further, in failing to account for the possibility of the exceptions to the allowable application of a *Glomar* response, CIGIE failed to consider whether the FOIA public interest in the unreasonable delay of the investigation of former Inspector General Wertheimer, former Associate Inspector General Byrne, and Messrs. Parker and DePasquale, and the official acknowledgement thereof, precludes CIGIE's *Glomar* responses herein.

⁸⁹ See, 5 U.S.C. App. § 11(d)(8)(A)(ii).

⁹⁰ Bartko, 898 F.3d at 64 ("to invoke *Glomar*, OPR had to make a threshold showing that the FOIA request seeks records 'compiled for law enforcement purposes'") (citing, Jefferson, 284 F.2d at 176).

⁹¹ See, e.g., Beck v. DOJ, 997 F.2d 1489 (D.C. Cir. 1993); Lewis v. DOJ, 733 F. Supp. 2d 97, 112 (D.D.C. 2010).

⁹² See, e.g., ACLU v. CIA, 710 F.3d 422, 427 (D.C. Cir. 2013); Roth v. DOJ, 642 F.3d 1161, 1176 (D.C. Cir. 2011); Parker v. EOUSA, 852 F. Supp. 2d 1, 10-13 (D.D.C. 2012).

The “public interest” championed by the FOIA is to inform the public about “an agency's performance of its statutory duties.”⁹³ Such information is “a structural necessity in a real democracy” and “should not be dismissed.”⁹⁴

There is a strong public interest in discerning why it took the CIGIE-IC so long to complete its investigation of former Inspector General Wertheimer, former Associate Inspector General Byrne, and Messrs. Parker and DePasquale. Was the unreasonable delay caused solely by the actions of the targets themselves, or could the CIGIE-IC have conducted and reported its investigation in a more expeditious fashion, which would have protected whistleblowers and other FHFA-OIG staff who braved the efforts of former Inspector General Wertheimer and Messrs. Parker and DePasquale to silence them and thus conceal their own misconduct?

Any diminished privacy interest that the investigative targets may possess in the public revelation of the details of their misconduct⁹⁵ does **not** withstand the public interest in gaining an understanding of the reasons that their misconduct was enabled to endure for over five years through a succession of three separate investigations. Analogously, the decision in Parker v. EOUSA recognized that, although an AUSA had a valid privacy interest at stake in DOJ’s disclosure of disciplinary documents about her, there was a countervailing public interest in knowing how DOJ handles its investigations of unlicensed attorneys.⁹⁶ Similarly, the public has a right to know how the CIGIE-IC handled its investigation.

Regarding the official acknowledgement of the investigation of former Inspector General Wertheimer, former Associate Inspector General Byrne, and Messrs. Parker and DePasquale, and the resulting diminishment of their privacy interest in the details of their misconduct, on April 28, 2021, Senator Chuck Grassley, Ranking Member of the Senate Judiciary Committee, issued a press release advising that he and Senator Ron Johnson had recommended that President Biden remove former Inspector General Wertheimer for her “consistent failures, contempt for congressional oversight and whistleblower retaliation.”⁹⁷ In support of the Senators’ recommendation, the press

⁹³ DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).

⁹⁴ NARA v. Favish, 541 U.S. 157, 172 (2004).

⁹⁵ See, e.g., Bartko, 898 F.3d at 69, citing Reporters Comm., 489 U.S. at 763 n.15, (1989) (“[T]he interests in privacy fade when the information involved already appears on the public record”) and Kimberlin v. DOJ, 139 F.3d 944, 949 (D.C. Cir. 1998) (“[The AUSA’s] statement to the press undoubtedly does diminish his interest in privacy: the public already knows who he is, what he was accused of, and that he received a relatively mild sanction”).

⁹⁶ Parker, 852 F. Supp. 2d at 10 – 13.

⁹⁷ Press Release, Grassley, *Johnson Call for Removal of FHFA Inspector General Following Findings of Misconduct, Reprisal*, (April 28, 2021), available at <https://www.grassley.senate.gov/news/news-releases/grassley-johnson-call-for-removal-of-fhfa-inspector-general-following-findings-of-misconduct-reprisal>.

release mentioned the CIGIE-IC investigation and included a link (i.e., “separate review of CIGIE’s integrity committee”) to the CIGIE-IC Chairman’s April 14, 2021, letter to President Biden.⁹⁸ The letter, thus, is officially acknowledged and publically available at https://www.grassley.senate.gov/imo/media/doc/cigie_ic_report_on_fhfa_oig.pdf.⁹⁹

Also on April 28, 2021, a copy of CIGIE-IC Chairman Winters’ April 14, 2021, letter to President Biden was made available for public inspection on a commercial framework. On that date, *The Hill* published “Read: Watchdog Report on Federal Housing Inspector General,” which included a window that allowed the reader to view and download the April 14th letter, which had been uploaded to Scribd.com.¹⁰⁰

Moreover, former Inspector General Wertheimer, by her personal representative, Emmet T. Flood, a lawyer who worked in the White House under former President Trump and who now works at Williams and Connolly LLP, publicly acknowledged the CIGIE-IC investigation of her.¹⁰¹ Disputing an allegation that former Inspector General Wertheimer had called an overweight employee “Baby Huey,” the large diaper-wearing, dimwitted cartoon duck from the 1950s, Mr. Flood told *The Hill*:

This accusation fits the prior pattern of false leaks from Congressional staff, and it too is untrue. Not only did Inspector General Wertheimer not call anyone by this name, the notion that she did is directly contradicted by the testimony of a witness given on the record in the underlying investigation.¹⁰²

⁹⁸ Press Release, Grassley, *Johnson Call for Removal of FHFA Inspector General Following Findings of Misconduct, Reprisal*, (April 28, 2021), available at <https://www.grassley.senate.gov/news/news-releases/grassley-johnson-call-for-removal-of-fhfa-inspector-general-following-findings-of-misconduct-reprisal>.

⁹⁹ Section 11(d)(8)(A)(ii) of the Inspector General Act of 1978, as amended, requires the CIGIE-IC to submit to congressional committees of jurisdiction – here, given the Inspectors General involved in the allegations under investigation, the execution of the CIGIE-IC investigation, and CIGIE’s management of the CIGIE-IC, committees of jurisdiction includes Judiciary, among others – an executive summary of reports of CIGIE-IC investigations and resulting recommendations, and Section 11(d)(10)(C) requires the CIGIE-IC to provide access to more detailed information about specific allegations upon request by, among others, the ranking member of a committee of jurisdiction. See, 5 U.S.C. App., § 11(d). Hence, the Inspector General Act of 1978 authorized Senator Grassley, as the ranking member of the Senate Judiciary Committee, access to Chairman Winters’ April 14, 2021, letter report to the President. And, his release thereof was an official act.

¹⁰⁰ See, *The Hill*, *Read: Watchdog Report on Federal Housing Inspector General*, (April 28, 2021), available at <https://thehill.com/homenews/administration/550761-read-watchdog-report-on-federal-housing-inspector-general>.

¹⁰¹ Humphreys, Crawford, *Biden Under Increasing Pressure to Fire Housing Inspector General*, (June 28, 2021), available at <https://thehill.com/homenews/administration/560560-biden-under-increasing-pressure-to-fire-housing-inspector-general>.

¹⁰² Humphreys, Crawford, *Biden Under Increasing Pressure to Fire Housing Inspector General*, (June 28, 2021) (emphasis added), available at <https://thehill.com/homenews/administration/560560-biden-under-increasing-pressure-to-fire-housing-inspector-general>.

Similarly, directly responding to the findings in the CIGIE-IC Chairman’s April 14, 2021, letter to President Biden, Mr. Flood told *The Washington Post* that former Inspector General Wertheimer played no role in deciding what materials to provide to investigators, did not obstruct or resist the investigation, and that it was difficult for her to respond to specific complaints about intimidation since the April 14th letter did not include witness names.¹⁰³ Thus, former Inspector General Wertheimer’s denial, through counsel, of the content of the CIGIE-IC Chairman’s April 14, 2021, letter to President Biden is itself an acknowledgment of the investigation. And CIGIE’s refusal to confirm an investigation, through a *Glomar* response, that the subject of the investigation’s lawyer has already confirmed on the public record is nonsensical.

Categorical b(7)(C) Exemption

Subsection b(7)(C) of the FOIA exempts from production: “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . .” 5 U.S.C. § 552(b)(7)(C) (emphasis added). By comparison to the “would constitute a clearly unwarranted invasion of personal privacy” language of Subsection b(6), courts have determined that Subsection b(7)(C), with its broader language and traditionally recognized privacy interests inherent in law enforcement records, allows for categorical withholding of information.¹⁰⁴ The Supreme Court in DOJ v. Reporters Committee for Freedom of the Press explained that the privacy interests inherent in law enforcement records pertaining to a private citizen that are requested by a third party—who/which seeks no official information about the activities or operations of the law enforcement agency that originated or possesses the law enforcement records—constitutes and unwarranted privacy invasion.¹⁰⁵

On the other hand, in Kimberlin v. DOJ, the Circuit Court clarified that the categorical rule that Reporters Committee permits for law enforcement records

¹⁰³ See, Siegel, Rachel, *Inspector General Overseeing Federal Housing Agency Resigns, Months After Watchdog Report Finds Abuse of Authority*, (June 30, 2021), available at <https://www.washingtonpost.com/us-policy/2021/06/30/fhfa-inspector-general-resigns-laura-wertheimer/>.

¹⁰⁴ See, SafeCard v. SEC, 926 F.2d 1197, 1206 (D.C. Cir. 1991); see also, Schoenman v. FBI, 575 F. Supp. 2d 136, 159 (D.D.C. 2008).

¹⁰⁵ Reporters Committee for Freedom of the Press, 489 U.S. at 780; accord, DOJ, Guide to the Freedom of Information Act: Exemption 7(C), p. 1, (Last Updated August 20, 2021), available at <https://www.justice.gov/oip/page/file/1206756/download> (last visited on September 17, 2021) (“In *DOJ v. Reporters Committee for Freedom of the Press*, the Supreme Court discussed the strong privacy interests protected under Exemption 7(C) and found that a third party’s request for law enforcement records pertaining to a private citizen categorically invades that citizen’s privacy, and that where a request seeks no official information about a government agency, the privacy invasion is unwarranted”) (emphasis added)).

pertaining to private citizens—when no information about government activities and operations is sought—is not available for records relating to higher-level public officials involved in misconduct. Instead, the Kimberlin court suggested that the law requires the use of case-by-case balancing test involving consideration of “rank of public official involved and the seriousness of misconduct alleged.”^{106, 107}

By all outward appearances, CIGIE’s FOIA Public Liaison and Ms. Coutier categorically denied Empower Oversight’s FOIA requests, CIGIE FOIA case numbers 6330-2021-45, 6330-2021-65, 6330-2021-66, 6330-2021-67, 6330-2021-69, and 6330-2021-71, without considering the rank of former Inspector General Wertheimer and her key deputies and the seriousness of their misconduct that the CIGIE-IC uncovered as is required by the Circuit Court in Kimberlin. Their responses to Empower Oversight include no analysis of the rank of former Inspector General Wertheimer’s (*i.e.*, she was a Presidentially-appointed, Senate-confirmed civil servant, who supervised an office with an annual budget of \$49.9 million¹⁰⁸), the high rank of her key deputies, the seriousness of their misconduct (*e.g.*, multiple patterns of abuses of authority that continued for years in succession), or the public interest in understanding the reasons for the unconscionable delay of the CIGIE-IC’s investigation for a reviewing court to evaluate.¹⁰⁹

Moreover, it defies credulity to suggest that Ms. Coutier had sufficient time to analyze (or even retrieve for analysis) potentially responsive records according to the applicable standard. She denied CIGIE FOIA case numbers 6330-2021-65, 6330-2021-66, 6330-2021-67, 6330-2021-69, and 6330-2021-71 the day of, the day after, or within 48 hours of CIGIE’s receipt of referrals of the requests.¹¹⁰

Categorical b(6) Exemption

Subsection b(6) of the FOIA exempts from production “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted

¹⁰⁶ Kimberlin, 139 F.3d at 948 (D.C. Cir. 1998); *see also*, Davin v. DOJ, 60 F.3d 1043, 1060 (3d Cir. 1995) (ruling that “government must conduct a document by document fact-specific balancing”).

¹⁰⁷ Given that Section 11(d)(1) of the Inspector General Act of 1978, as amended, restricts the investigative jurisdiction of the CIGIE-IC to high-level personnel, CIGIE’s categorical denials pursuant to Exemption b(7)(C) of requests for CIGIE-IC investigations are difficult to reconcile. *See*, 5 U.S.C. App. § 11(d)(1); *see also*, CIGIE, *Integrity Committee Policies and Procedures*, § 4, (2018).

¹⁰⁸ FHFA, *Annual Report to Congress 2020*, p. 81, (June 15, 2021), available at <https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/Annual-Report-to-Congress-2020.pdf>.

¹⁰⁹ *See*, Bartko, 898 F.3d at 67 – 68 (*citing*, Jefferson, 284 F.3d at 176).

¹¹⁰ By contrast, with respect to CIGIE FOIA case number 6330-2021-46, which is functionally equivalent to CIGIE FOIA case numbers 6330-2021-65, 6330-2021-66, 6330-2021-67, 6330-2021-69, and 6330-2021-71, CIGIE’s FOIA Public Liaison expressly recognized that she needed to retrieve records from Offices of Inspector General and then review them pursuant to the applicable standards. *See*, Exhibit 6.

invasion of personal privacy.”¹¹¹ Courts have found that “categorical” denials of FOIA requests on personal privacy grounds tend to be antithetical to Exemption b(6) when they are made without a document-by-document review of personal privacy-implicated information in individual records and a balancing of identified personal privacy interests against the public interest in disclosure of the records, tend.¹¹²

The plain language of Subsection b(6) invariably precludes agencies from categorically denying FOIA requests because it requires them to engage in a four-step analysis of records that are potentially responsive to the request; they must:

1. Determine whether a record at issue constitutes a personnel, medical, or “similar” file;
2. Determine whether there is a significant privacy interest invoked by information in such records;
3. Evaluate the requester’s asserted FOIA public interest in disclosure of the records that include information that invoke a privacy interest; and
4. Balance competing interests to determine whether disclosure of the records “would constitute a clearly unwarranted invasion of personal privacy,” if there is a FOIA public interest in disclosure of records that include information that invokes a significant privacy interest.¹¹³

Again, by all outward appearances, CIGIE’s FOIA Public Liaison and Ms. Coutier failed to perform the four-step analysis that Exemption b(6) requires with respect to Empower Oversight’s FOIA requests, CIGIE FOIA case numbers 6330-2021-45, 6330-2021-65, 6330-2021-66, 6330-2021-67, 6330-2021-69, and 6330-2021-71. Their responses to Empower Oversight include no analysis of the above-referenced steps for Empower Oversight to contest, or a reviewing court to evaluate the applicability of the exemption.¹¹⁴

Moreover, it again defies credulity to suggest that Ms. Coutier even had time on the day of, the day after, or within 48 hours of, CIGIE’s receipt of referrals of Empower Oversight’s FOIA requests to analyze (or retrieve for analysis) potentially responsive records according to the applicable standard.

¹¹¹ 5 U.S.C. § 552(b)(6) (emphasis added).

¹¹² See, e.g., Bartko, 898 F.3d at 69 – 70; Schoenman, 575 F. Supp. 2d at 159 (quoting SafeCard, 926 F.2d at 1206).

¹¹³ See, Multi Ag Media LLC v. USDA, 515 F.3d 1224, 1229 (D.C. Cir. 2008); NARA, 541 U.S. at 172; Wash. Post Co. v. HHS, 690 F.2d 252, 261 (D.C. Cir. 1982).

¹¹⁴ See, Bartko, 898 F.3d at 67 – 68 (citing, Jefferson, 284 F.3d at 176).

Balancing Private and Public Interests

As a consequence of their flawed reliance on *Glomar* responses and categorical denials, the CIGIE FOIA Public Liaison and Ms. Coutier articulated no consideration of the public interest in the causes of the unreasonable delay of the CIGIE-IC's investigation of former Inspector General Wertheimer, former Associate Inspector General Byrne, or Messrs. Parker and DePasquale. Yet, the public interest in all aspects of the CIGIE-IC's investigation is instantly recognizable.

The Circuit Court's opinion in Bartko is instructive. In Bartko, the Circuit Court stated:

The public has an interest in knowing that a government investigation itself is comprehensive, that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner. That is how the FOIA helps to hold the governors accountable to the governed. That interest crescendos when the misfeasance of a federal prosecutor with the power to employ the full machinery of the state in scrutinizing any given individual is at stake. The public must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.¹¹⁵

Here, the public has a keen interest in learning whether the delay of the CIGIE-IC's investigation—which continued long past the 150-day baseline set forth at Section 11(d)(7)(C)(i) of the Inspector General Act of 1978, as amended¹¹⁶—was caused solely by the actions of the investigative targets themselves and whether the CIGIE-IC did everything that it could do to counter those actions. Or, whether there were other intentional or unintentional causes of the delay, *e.g.*:

- Did the CIGIE-IC fail, and if so, why did it fail to exhaust its potential avenues to appeal to political leadership in the Executive and Legislative Branches to exercise oversight over former Inspector General Wertheimer's refusal to comply with CIGIE-IC processes; or
- Could the CIGIE-IC's finding that former Inspector General Wertheimer abused her authority by retaliating against staff who cooperated with legitimate oversight efforts by the Senate, OSC, and/or the CIGIE-IC, have been severed from the

¹¹⁵ Bartko, 898 F.3d at 69 - 70 (internal citations and quotation marks omitted).

¹¹⁶ *See*, 5 U.S.C. App. § 11(d)(7)(C)(i); *see also*, CIGIE, *Integrity Committee Policies and Procedures*, § 8(a), (2008).

larger investigation and submitted for consideration of discipline as the remainder of the investigation carried on?¹¹⁷ And, if so, why did the CIGIE-IC fail to sever the abuse/retaliation finding and issue an interim report about it sooner?

The Bartko Circuit Court added:

The significant public interest in this case is corroborated by the decision of the U.S. Attorney's Office to overhaul its discovery and disclosure practices in response to the Fourth Circuit's decision. Indeed, the U.S. Attorney's Office admitted its failures and imposed more stringent discovery review and disclosure policies on its attorneys. Such matters of substantive law enforcement policy, and the events that set them in motion, are properly the subject of public concern. There is also a corresponding public interest in knowing if the government's remedial measures adequately redressed the harm that prompted the policy changes.¹¹⁸

Like the belated remedial actions by the United States Attorney's Office for the Eastern District of North Carolina, the House of Representatives actions demonstrate the public interest in these issues through its legislative activities related to the hindrance of IC investigations and the need for increased transparency of such investigations.¹¹⁹

Conclusion

Empower Oversight respectfully requests CIGIE leadership to review and correct the errors of its staff in improperly presenting *Glomar* responses and categorical denials pursuant to FOIA Exemptions b(6) and b(7)(C) to Empower Oversight requests in CIGIE FOIA case numbers 6330-2021-45, 6330-2021-65, 6330-2021-66, 6330-2021-67, 6330-2021-69, and 6330-2021-71.

Correcting these errors is essential for CIGIE to repair its reputation regarding lack of transparency with the public and their representatives in Congress in matters of inspector general oversight. CIGIE leaderships need to intervene to ensure that its staff

¹¹⁷ Apparently, the CIGIE-IC Chairman was confident that severance is possible because he advised President Biden that, "Notwithstanding [former Inspector General Wertheimer's and her staff's 'unprecedented' refusal to cooperate with the CIGIE-IC's investigation, which prevented it from fully completing its investigation of all allegations], the IC determined there was sufficient evidence to make preliminary findings of wrongdoing" See, Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President, p. 2, ([Apr 14, 2021](#)). What is not clear is when severance became feasible? And, if severance was delayed, what was the cause of the delay?

¹¹⁸ Bartko, 898 F.3d at 70 (internal citations and quotation marks omitted).

¹¹⁹ See, H.R. 2681, The Integrity Committee Reform Act of 2021 would amend the Section 11 of the Inspector General Act of 1978, § 4.

promptly compiles, reviews, and produces the records requested by Empower Oversight as required by the FOIA.

Sincerely,

[/Jason Foster/](#)

Founder & President
Empower Oversight Whistleblowers & Research

cc: Chairman Gary Peters & Ranking Member Rob Portman
Senate Homeland Security and Governmental Affairs Committee

Chairwoman Carolyn Maloney & Ranking Member James Comer
House Oversight and Reform Committee

Chairman Richard Durbin & Ranking Member Charles Grassley
Senate Committee on the Judiciary

Chairman Jon Ossoff & Ranking Member Ron Johnson
Senate Permanent Subcommittee on Investigations

CIGIE Vice Chair Mark Greenblatt

Former CIGIE Chair Michael Horowitz
Justice Department Inspector General

Acting Inspector General Phyllis K. Fong
Federal Housing Finance Agency

Exhibit 3C



Council of the
INSPECTORS GENERAL
on INTEGRITY and EFFICIENCY

November 19, 2021

Via Email

Jason Foster
Founder & President
Empower Oversight Whistleblowers & Research
jf@empowr.us

Subject: CIGIE Freedom of Information Act Requests 6330-2021-45, 6330-2021-65, 6330-2021-66, 6330-2021-67, 6330-2021-69, and 6330-2021-71

Dear Mr. Foster:

This letter responds to your administrative appeal of the above-referenced Freedom of Information Act (FOIA) requests. For the reasons discussed below, the original determinations of the Council of the Inspector General on Integrity and Efficiency (CIGIE) in these matters are affirmed in part, reversed in part, and remanded to the CIGIE FOIA Office for further processing in accordance with this letter.

Background and Summary

While the specific requests in the above-referenced matters vary, they all request documents associated with an investigation you assert was conducted by the CIGIE Integrity Committee (IC) into one or more officials at the Federal Housing and Finance Administration Office of Inspector General (FHFA-OIG). In all of the above-referenced matters, CIGIE issued Glomar responses, based on FOIA Exemptions 6 and 7(C), thereby denying your requests.¹

You argue that the denials were in error. Specifically, CIGIE understands your contentions to be as follows: (1) IC records do not constitute law enforcement records, making Exemption 7(C) unavailable; (2) an "official acknowledgment" of the IC investigation precludes CIGIE's Glomar responses; (3) any privacy interest held by investigative targets does not withstand the public interest in "gaining an understanding of the reasons that their misconduct was enabled to endure for over five years . . ."; (4) that at least one of the subjects of the investigation has publicly acknowledged the investigation through her attorney; and (5) CIGIE failed to adequately perform the required balancing tests in applying Exemptions 7(C) and 6.

As discussed below, upon review of your appeal and additional information regarding public acknowledgments by one subject of their involvement in the investigation in question, through her attorney, CIGIE has determined that a Glomar response is, with respect to that subject, no longer appropriate. With that said, CIGIE correctly determined in its initial response to your requests that records maintained by the IC are law enforcement records. Therefore, CIGIE is remanding these matters to the CIGIE FOIA Office for further processing in accordance with this letter.

¹ A Glomar response reflects an agency's refusal to confirm or deny the existence of responsive records and "takes its name from the CIA's refusal to confirm or deny the existence of records about the Hughes Glomar Explorer, a ship used in a classified CIA project to raise a sunken Soviet submarine from the floor of the Pacific Ocean to recover the missiles, codes, and communications equipment onboard for analysis by United States military and intelligence experts." People for the Ethical Treatment of Animals v. NIH, 745 F.3d 535, 540 (D.C. Cir. 2014) (internal quotations omitted).

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Analysis and Decision

In denying the above-referenced requests, the CIGIE FOIA Office determined that your requests sought records pertaining to a non-public law enforcement matter involving one or more particular individuals, and accordingly declined to confirm or deny the existence of responsive records pursuant to FOIA Exemptions 6 and 7(C). Before turning to the question of whether the requested records constitute law enforcement records, the question will be addressed of whether public acknowledgments by one subject or other publicity impacts the appropriateness of the Glomar responses.

Public Acknowledgments by Subject and Other Publicity

To date, CIGIE has not publicly acknowledged the IC investigation you have described in the above-referenced FOIA requests. Nonetheless, after analyzing relevant FOIA and Privacy Act legal principles, CIGIE has determined that it would not be appropriate to maintain a Glomar response with regard to former FHFA-OIG Inspector General (IG), Laura Wertheimer. This is chiefly due to the numerous public statements made by Emmet Flood, Ms. Wertheimer's attorney, to the press regarding the investigation:

- "Emmet Flood, . . . who is now representing Wertheimer, called her a 'superlative IG' in an email to POLITICO. 'Far from supporting the notion that there was a culture of intimidation or retaliation against witnesses, the investigative report did not find that even a single witness had declined to cooperate out of intimidation or fear,' he said. 'And it expressly says that 'it did not find evidence of actual retaliation.'" Politico, April 28, 2021 ([Grassley, Johnson call for removal of housing regulator watchdog - POLITICO](#)).
- "Emmet Flood, an attorney at Williams & Connolly LLP who is representing Wertheimer, said Grassley and Johnson were misrepresenting the report. 'In more than 25 years in Washington, I have never once commented for the record about any of my matters,' Flood wrote. 'I'm making an exception for this case because it's a late hit after the whistle: Far from supporting the notion that there was a culture of intimidation or retaliation against witnesses, the investigative report did not find that even a single witness had declined to cooperate out of intimidation or fear. And it expressly says that 'it did not find evidence of actual retaliation.'" Flood stated. 'Inspector General Wertheimer has been a superlative IG and members of her oversight committee have commended her for her frankness, courage and service. She and her staff were awarded the 2019 CIGIE Government Ethics Award for Excellence. Anyone with an interest in her performance as IG can consult the FHFA-OIG website, where the record of her team's accomplishments is public, extensive and incontestable.' The Hill, April 28, 2021 ([Report finds federal housing agency official 'abused her authority' | TheHill](#)).
- "Wertheimer's attorney, Emmet Flood, disputed that account when contacted for comment by The Hill. 'This accusation fits the prior pattern of false leaks from Congressional staff, and it too is untrue. Not only did Inspector General Wertheimer not call anyone by this name, the notion that she did is directly contradicted by the testimony of a witness given on the record in the underlying investigation. A pathetically false allegation,' Flood . . . said in a statement." The Hill, June 28, 2021 ([Biden under increasing pressure to fire housing inspector general | TheHill](#)).
- "Flood told The Post on Tuesday that Wertheimer played no role in deciding what materials to provide to investigators and that she did not obstruct or resist the fact-finding mission. Flood said it was difficult to respond to specific complaints about intimidation since the report did not include witness names. 'There was no evidence of retaliation against witnesses,' Flood said. 'There was no evidence offered of intimidation.'" The Washington Post, June 30, 2021 ([Inspector general overseeing FHFA, Laura Wertheimer, resigns following CIGIE report - The Washington Post](#)).

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By and through these statements made on behalf of Ms. Wertheimer through her attorney, she publicly associated herself with the IC's investigation. As a result, a Glomar response, as it relates to Ms. Wertheimer, is not appropriate. See, e.g., Citizens for Responsibility & Ethics in Washington v. DOJ, 746 F.3d 1082, 1091-92 (D.C. Cir. 2014) (holding that subject's public statements that he had been, but was no longer, under investigation, made Glomar response inappropriate).

Accordingly, CIGIE reverses its initial Glomar decision regarding the request for documents insofar as they relate to Ms. Wertheimer. The requests for documents related to Ms. Wertheimer are remanded to the CIGIE FOIA Office for further processing in accordance with applicable FOIA and Privacy Act legal principles.

Regarding the requests for records related to other individuals you assert were subjects in the investigation, you have pointed to no similar public acknowledgment by such individuals. Moreover, you have not pointed to any prior official public acknowledgment by CIGIE of the identity of any of the subjects. As a result, CIGIE cannot make a similar finding with regard to the records requests related to these individuals. While you have pointed to documents made publicly available by persons other than CIGIE, CIGIE has not publicly acknowledged these documents and does not now. Any official acknowledgment by CIGIE regarding a document purporting to name subjects could in itself constitute a disclosure of information that is not currently publicly available (i.e., CIGIE's official acknowledgment of subjects' identities). However, the issue of the appropriateness of the Glomar responses for the other individuals need not be resolved today. As a significant portion of your requests is being remanded for further processing, and because the requests are inherently intertwined, this issue is also remanded to the CIGIE FOIA Office for further consideration in light of the partial reversal. The CIGIE FOIA Office is to reconsider your requests with regard to the other individuals you have named, factoring in the arguments you have raised in this appeal (e.g., application of appropriate balancing tests).

Law Enforcement Status of Integrity Committee Records

For the reasons described below, CIGIE affirms the CIGIE FOIA Office insofar as it determined that IC records are generally compiled for law enforcement purposes and thus meet the threshold of Exemption 7.

When answering the question of whether given records constitute law enforcement records, case law makes clear that the law to be enforced includes "investigatory files related to enforcement of all kinds of laws," Jefferson v. DOJ, 284 F.3d 172, 178 (D.C. Cir. 2002) (internal quotation omitted), including civil, criminal, and administrative, to include administrative disciplinary actions, Gray v. U.S. Army Criminal Investigation Command, 742 F. Supp. 2d 68, 73 (D.D.C. 2010). In order meet the law enforcement purpose threshold for investigatory files, CIGIE is required to consider which of two categories the files fall within: "(1) files in connection with government oversight of the performance of duties by agency employees, and (2) files in connection with investigations that focus directly on specific alleged illegal acts which could results in civil or criminal sanction." Jefferson, 284 F.3d at 177 (internal citation omitted). The former category addresses cases "involving personnel files maintained in the ordinary course of monitoring employees' performance," the latter category addresses records which "were compiled to investigate allegations that specific individuals . . . engaged in specific acts that could constitute violations of criminal and civil laws." Nat'l Whistleblower Ctr. v. HHS, 849 F. Supp. 2d 13, 27 (D.D.C. 2012). When records fall within the latter category, the Exemption 7 threshold is met.

In your appeal, you rely heavily on Bartko v. DOJ, 898 F.3d 51 (D.C. Cir. 2018). In Bartko, the Court held that the DOJ Office of Professional Responsibility (OPR) could not be afforded deference in its attempt to shield records under Exemption 7(C) because OPR does not specialize in law enforcement. Id., at 64 (internal quotation omitted). The Court noted that it had previously "declined to hold as a matter of law that all OPR records are necessarily law enforcement records . . . because one of OPR's primary responsibilities is to secure reports, as distinct from compiling them, that arise as result of internal agency

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monitoring and review allegations of non-law violations by Department attorneys for internal disciplinary purposes. “*Id.*, at 64-65 (internal quotation and emphasis omitted). As a result, OPR bore “the burden of showing on a case-by-case basis that any requested records were actually compiled for law-enforcement, *rather than employment-supervision, purposes.*” *Id.*, at 65. The Bartko Court further noted that,

OPR’s mission today . . . has narrowed to focus primarily on internal disciplinary matters. Justice Department regulations provide that OPR shall “receive, review, investigate and refer appropriate allegations of misconduct involving Department attorneys . . .” 28 CFR § 0.39a(a)(1) (2006). Absent from that assignment is any reference to the investigation of criminal wrongdoing or violations of law. That marks a shift in OPR’s responsibilities towards the “internal agency monitoring” end of the spectrum, where Exemption 7(C) has no purchase.

Id., at 65-66.

In contrast, the IC’s oversight responsibilities and processes, by statutory design, are exclusively outward facing, regularly involve assessments of allegations involving violations of law, and have numerous intersections and co-mingling of equities with DOJ and the Office of Special Counsel (OSC). The IC was established under Inspector General Act of 1978, as amended, 5 USC App. (IG Act), to “receive, review, and refer for investigation *allegations of wrongdoing* that are made against Inspectors General and [designated] staff members of the various Offices of Inspector General.” Section 11(d)(1) of the IG Act (emphasis added). There are no CIGIE employees (i.e., internal staff) subject to IC oversight – all Covered Persons are employed by external entities. Pursuant to the IC Policies and Procedures (2018) (ICP&P),

[t]he IC takes action on allegations of wrongdoing against a Covered Person that involve *abuse of authority* in the exercise of official duties or while acting under color of office, *substantial misconduct*, such as gross mismanagement, gross waste of funds, *or a substantial violation of law, rule, or regulation*, or conduct that undermines the independence or integrity reasonable expected of a Covered Person.

Section 7(A) of the ICP&P (emphasis added).² Such allegations involving substantial violations of law can include, but are not limited to, not only those with civil implications, but those with criminal implications. Indeed, when allegations are received by the IC, those allegations go through an initial review by a three-member panel which includes representatives from the DOJ, OSC, and the IC, to ensure that the equities of all three entities are protected. See section 11(d)(5)(A) of the IG Act.

After this initial review, regardless of any action taken by DOJ or OSC, all allegations against persons subject to IC oversight are placed on the agenda for review by the IC. See section 6(F) of the ICP&P. The IC then deliberates on each allegation of wrongdoing to determine whether it will direct the IC Chairperson to initiate an investigation. See section 11(d)(5)(B)(i) of the IG Act. If so required, the IC Chairperson is to conduct a thorough and timely investigation of each allegation. Section 11(d)(6)(A) of the IG Act. While the IC Chairperson may request the assistance of a disinterested OIG, see section 11(d)(6)(B) of the IG Act, the IC Chairperson is responsible for the conduct of the investigation, see section 11(d)(6)(A). Notably, while DOJ and OSC are given the opportunity to take action on allegations received by the IC, such action does not foreclose the ability of the IC to investigate. The IG Act permits the Chairperson of the IC to “conduct any related investigation . . . concurrently with the Department of Justice or the Office of Special Counsel, as applicable.” Section 11(d)(7)(D) of the IG Act. Additionally, because allegations received or evidence uncovered by the IC can have criminal equities, even when DOJ does not initially accept a case, DOJ plays an ongoing role in the IC process, including in

² This provision is also known as the IC’s “threshold standard.”

November 19, 2021

CIGIE Freedom of Information Act Requests 6330-2021-45, 6330-2021-65, 6330-2021-66, 6330-2021-67, 6330-2021-69, and 6330-2021-71

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deliberations: “[T]he Chief of the Public Integrity Section of the Criminal Division of the Department of Justice, or his designee, shall serve as a legal advisor to the Integrity Committee.” Section 11(d)(3) of the IG Act.

Upon conclusion of the IC Chairperson’s investigation, the IC Chairperson submits the report to the IC for assessment. Notably, both DOJ and OSC must also submit any reports of investigation resulting from allegations they accepted through their initial review as members of the three-member panel. Section 11(d)(7)(E) of the IG Act. Whether authored by the IC, DOJ, or OSC, the IC must then review the report and forward the same with its findings and recommendations, to include those on disciplinary action, to the relevant appointing official (i.e., the President or head of agency), Congress, and others. The President or agency head then takes action on IC’s recommendation and the final disposition is reported back to the IC. See section 11(d)(8)(B) of the IG Act.

In summary, the oversight the IC performs rises well above that of the “internal agency monitoring” and “non-law violations by Department attorneys for internal disciplinary purposes” for “employment-supervision” purposes at issue in Bartko. The ICP&P make clear that the IC is not engaged in “customary surveillance of the performance of duties by government employees.”³ Jefferson, 284 F.3d at 177. And the fact that discipline is contemplated in the process does not mean that the records do not constitute law enforcement records; rather, this supports their status as law enforcement records. Gray, 742 F.Supp.2d at 73 (holding that “records compiled for a pending administrative disciplinary action may fall within Exemption 7(A)”). As described above, the IC process involves the review of allegations of substantial violations of law and other significant wrongdoing external to CIGIE of individuals at the highest level of government. Indeed, it is difficult to imagine a matter investigated by the IC that meets its threshold standard that would, at the same time, constitute the “customary surveillance of the performance of duties by government employees.” Moreover, as described, the process is also inherently intertwined with allegations of wrongdoing in which DOJ, a well-recognized law enforcement entity, has strong equities. There is no doubt that the IC’s records constitute law enforcement records.

As the law enforcement status of IC records is affirmed, in reaching its determinations on remand, the CIGIE FOIA Office should consider the applicability of Exemptions 7(A) and 7(C).

Conclusion

For the reasons stated above, this matter is reversed in part, affirmed in part, and remanded to the CIGIE FOIA Office for further processing. Please note, this decision does not mean that CIGIE will disclose a particular record, or any record at all. The CIGIE FOIA office will review your request and disclose records as required by law.

If you are dissatisfied with this decision, you may seek judicial review of the decision in the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia, pursuant to 5 U.S.C. § 552(a)(4)(B).

If you have questions about this response, you may contact CIGIE FOIA staff at FOIASTAFF@cigie.gov. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows:

³ For example, as reflected in Appendix A to the ICP&P, the definition of “gross mismanagement” makes clear that “[i]t does not include discretionary management decisions, or action or inaction that constitutes simple negligence or wrongdoing. There must be an element of willful misconduct or gross and wanton negligence.” Similarly, the definition of “gross waste of funds” states that it must be “an expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government; it is more than a debatable expenditure.”

November 19, 2021

CIGIE Freedom of Information Act Requests 6330-2021-45, 6330-2021-65, 6330-2021-66, 6330-2021-67, 6330-2021-69, and 6330-2021-71

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Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
ogis@nara.gov
(202) 741-5770
(877) 684-6448 (toll free)
(202) 741-5769 (facsimile)

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

Sincerely,

Atticus J. Reaser
General Counsel

cc: Bryan Saddler, Esq. (bsaddler@empowr.us)

Exhibit 4



Council of the
INSPECTORS GENERAL
on INTEGRITY and EFFICIENCY

June 22, 2021

Gary J. Aguirre
gary@aguirrelawapc.com

Subject: CIGIE Freedom of Information/Privacy Act Request [6330-2021-46]

Dear Mr. Aguirre,

Your request for information relating to the above-cited subject was received in this office on June 17, 2021. As worded in the request, you seek the following:

- 1. Emails 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. Emails 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. Emails 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.*

CIGIE will process your request under the provisions of the Freedom of Information Act (5 U.S.C. §552). Moreover, CIGIE has assigned the following control number: 6330-2021-46. Please cite this number in any further communications about the subject request.

Please note that before CIGIE can consider this a perfected request which would trigger the statutory processing times, further clarification will be needed. Since you are an attorney filing a FOIA request on behalf of a client, you have undoubtedly already familiarized yourself with the Inspector General Act (IG Act). Accordingly, you understand that during the requested date range of over 4 years of emails, the requested parties would have communicated with each other in a variety of contexts, many of which would not be responsive. More specifically, as you probably already realize, IGs send emails sometimes in the capacity as IGs of their respective agencies, and sometimes in their CIGIE capacity. Without some added search terms to narrow the search over such an extended date range, your request is overly broad. Moreover, CIGIE only has the capability to search the emails of CIGIE employees. None of the personnel named in your request

are CIGIE employees. As the IG Act makes clear, CIGIE members and covered personnel for purposes of the CIGIE Integrity Committee are not CIGIE employees. Rather, IGs and other covered personnel are employees of the agencies for which they provide oversight under the IG Act. Before CIGIE can ask other OIGs to conduct searches for CIGIE equities in their respective email systems, much more specificity will be needed.

Regarding the third prong of your request, please note that emails from a house.gov or a senate.gov email address are not subject to FOIA because neither legislative body is a federal agency; FOIA, of course, only applies to federal agency records. For all three of the prongs in the subject request, please list search terms applicable to the subject and/or body of the emails so as to narrow the search to responsive emails, rather than the entire universe of emails many or most of which will be unresponsive.

While you consider ways to clarify your request, please feel free to engage with me at my direct phone number (202) 478-8265. You may also send an email to FOIASTAFF@cigie.gov. I look forward to reaching a meeting of the minds so that we may move forward on your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
ogis@nara.gov
(202) 741-5770
(877) 684-6448 (toll free)
(202) 741-5769 (facsimile)

Sincerely,

Elizabeth Sweetland
Senior Assistant General Counsel
FOIA Public Liaison

June 22, 2021
FOIA Case No. 6330-2021-45

Your appeal must be received within 90 days of the date of this letter. The outside of the envelope should be clearly marked "FOIA APPEAL."

Sincerely,

Elizabeth Sweetland
Senior Assistant General Counsel
FOIA Public Liaison

Exhibit 5

EMPOWER OVERSIGHT

Whistleblowers & Research



August 12, 2021

VIA ELECTRONIC TRANSMISSION: EFOIA@FDIC.GOV

Federal Deposit Insurance Corporation
FOIA/Privacy Act Group, Legal Division
550 17th Street, N.W.
Washington, DC 20429-9990

RE: FREEDOM OF INFORMATION ACT REQUEST

Dear FOIA Officer:

Introduction

Empower Oversight Whistleblowers & Research (“Empower Oversight”) is a nonpartisan, nonprofit educational organization dedicated to enhancing independent oversight of government and corporate wrongdoing. We work to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, and seek to hold those authorities accountable to act on those reports by, among other means, publishing information concerning the same.

Background

In a letter to President Biden dated April 14, 2021, the Integrity Committee of the Council of the Inspectors General on Integrity and Efficiency (“CIGIE-IC”) recommended that three Federal Housing Finance Agency Office of Inspector General (“FHFA-OIG”) employees be disciplined for abusing their authority.¹ The three employees are former Inspector General Laura Wertheimer, Chief Counsel Leonard DePasquale, and former Acting Deputy Inspector General for Investigations Richard Parker.

CIGIE-IC’s April 14th letter to the President is the culmination of an oversight process that began more than *five years ago*, with whistleblowers contacting Congress and Senators writing letters to inquire about their claims.² The public has an interest in understanding why CIGIE-IC took so long to elevate this matter to the White House

¹ Letter from CIGIE Integrity Committee Chair Kevin H. Winters to the President ([Apr 14, 2021](#)).

² See, e.g. “Senators Probing Effectiveness of FHFA’s Watchdog,” *Daily Dose* ([Jul 11, 2016](#)).

with a recommendation to consider imposing appropriate discipline. It is unclear from the public record whether CIGIE-IC had previously made similar recommendations during President Trump's tenure in office, and if not, why it failed to do so.

Records Request

To shed light on the referenced CIGIE-IC investigation, please provide the following records pursuant to the Freedom of Information Act, 5 U.S.C. § 552:

1. Communications relating to the CIGIE-IC investigation sent by (a) Laura Wertheimer, (b) Leonard 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.

Definitions

"COMMUNICATION(S)" means every manner or method of disclosure, exchange of information, statement, or discussion between or among two or more persons, including but not limited to, face-to-face and telephone conversations, correspondence, memoranda, telegrams, telexes, email messages, voice-mail messages, text messages, meeting minutes, discussions, releases, statements, reports, publications, and any recordings or reproductions thereof.

"DOCUMENT(S)" or "RECORD(S)" mean any kind of written, graphic, or recorded matter, however produced or reproduced, of any kind or description, whether sent, received, or neither, including drafts, originals, non-identical copies, and information stored magnetically, electronically, photographically or otherwise. As used herein, the terms "DOCUMENT(S)" or "RECORD(S)" include, but are not limited to, studies, papers, books, accounts, letters, diagrams, pictures, drawings, photographs, correspondence, telegrams, cables, text messages, emails, memoranda, notes, notations, work papers, intra-office and inter-office communications, communications to, between

and among employees, contracts, financial agreements, grants, proposals, transcripts, minutes, orders, reports, recordings, or other documentation of telephone or other conversations, interviews, affidavits, slides, statement summaries, opinions, indices, analyses, publications, questionnaires, answers to questionnaires, statistical records, ledgers, journals, lists, logs, tabulations, charts, graphs, maps, surveys, sound recordings, data sheets, computer printouts, tapes, discs, microfilm, and all other records kept, regardless of the title, author, or origin.

“PERSON” means individuals, entities, firms, organizations, groups, committees, regulatory agencies, governmental entities, business entities, corporations, partnerships, trusts, and estates.

“REFERS,” “REFERRING TO,” “REGARDS,” “REGARDING,” “RELATES,” “RELATING TO,” or “PERTAINS TO” mean containing, alluding to, responding to, commenting upon, discussing, showing, disclosing, explaining, mentioning, analyzing, constituting, comprising, evidencing, setting forth, summarizing, or characterizing, either directly or indirectly, in whole or in part.

Instructions

The time period of the requested records is January 1, 2017, through the present.

The words “and” and “or” shall be construed in the conjunctive or disjunctive, whichever is most inclusive.

The singular form shall include the plural form and vice versa.

The present tense shall include the past tense and vice versa.

In producing the records described above, you shall segregate them by reference to each of the numbered items of this Freedom of Information Act request.

If you have any questions about this request, please contact Bryan Saddler by e-mail at bsaddler@empowr.us.

Fee Waiver Request

Empower Oversight agrees to pay up to \$25.00 in applicable fees, but requests a waiver of any fees that may be associated with processing this request, in keeping with 5 U.S.C. § 552 (a)(4)(A)(iii).

Empower Oversight is a non-profit educational organization as defined under Section 501(c)(3) of the Internal Revenue Code, and has no commercial interest in making this request. Accordingly, pursuant to 5 U.S.C. § 552 (a)(4)(A)(ii)(II), it is subject only to “reasonable standard charges for document duplication.”

Moreover, the information that Empower Oversight seeks is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government.

Related to CIGIE-IC investigations of allegations of wrongdoing by an Inspector General and/or members of her principal staff, CIGIE-IC policy section 8(A) provides:

The IC Chairperson shall complete an investigation within 150 days after receiving a referral for investigation by the IC. If the investigation cannot be completed within the 150-day period, the IC Chairperson will promptly notify the Congressional committees of jurisdiction regarding the general reasons for the delay. The notification shall be updated every 30 days until the investigation is complete.³

The public has a significant interest in understanding the reasons why a CIGIE-IC investigation that was supposed to take no more than 150 days to conduct took several years to complete. Empower Oversight is committed to government accountability and public integrity and is committed to public disclosure of documents via its website, and by providing these documents to the media for public dissemination. Hence, information that it receives, which tends to explain the unreasonable delay of the CIGIE-IE investigation of former Inspector General Wertheimer, Chief Counsel DePasquale, and former Deputy Inspector General for Investigations Parker will be published, making this request undeniably eligible for a waiver or reduction of fees under 5 U.S.C. § 552 (a)(4)(A)(iii)

Thank you for your prompt attention to this matter.

Cordially,

/Jason Foster/

Jason Foster
Founder & President

³ See, CIGIE, Integrity Committee Policies and Procedures (2018), available at https://www.ignet.gov/sites/default/files/files/Integrity_Committee_Policies_and_Procedures_Revised_Jan-2018_Final.pdf (last accessed on August 9, 2021).

Exhibit 6



Federal Deposit Insurance Corporation

550 17th Street, NW, Washington, DC 20429-9990

Legal Division

September 22, 2021

Jason Foster
Empower Oversight
2615 Columbia Pike #445
Arlington, Virginia 22204

RE: FDIC FOIA Log Number 21-0262

Dear Mr. Foster:

This will respond to your Freedom of Information Act (FOIA) request received on August 12, 2021, in which you requested the following:

1. Communications relating to the CIGIE-IC investigation sent by (a) Laura Wertheimer, (b) Leonard 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.

We have considered your request, and can neither confirm nor deny the existence of records responsive to your request. To the extent that this request seeks records from the Council of the Inspectors General on Integrity and Efficiency Integrity Committee, this request should be directed to Council of the Inspectors General on Integrity and Efficiency (CIGIE). You may wish to direct your request to the CIGIE FOIA office at: ignet.gov/content/foia-0

You may contact me at 703-562-2067, or our FOIA Public Liaison, FDIC Ombudsman M. Anthony Lowe, by email at MLowe@fdic.gov or telephone at 312-382-7552, for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of

Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, email at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with the response to this request, you may administratively appeal by writing to the FDIC's General Counsel. Your appeal must be postmarked or electronically transmitted within 90 days of the date of the response to your request. Your appeal should be addressed to the FOIA/PA Group, Legal Division, FDIC, 550 17th Street, NW, Washington, D.C. 20429. Please refer to the log number and include any additional information that you would like the General Counsel to consider.

Sincerely,

Natasha Smith
Government Information Specialist
FOIA/Privacy Act Group