

EMPOWER OVERSIGHT

Whistleblowers & Research



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March 25, 2022

VIA ELECTRONIC TRANSMISSION: DOD FOIA PAL PORTAL

OSD/JS FOIA Requester Service Center
Freedom of Information Division
1155 Defense Pentagon
Washington, DC 20301-1155

RE: Request for Records Regarding Alleged Overpayments to the NSA and NRO IGs

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 such reports by, among other means, publishing information concerning the same.

A confidential whistleblower has provided Empower Oversight with a copy of a Defense Department memorandum (“DOD memo”) purporting to document excess salary payments (*i.e.*, payments over and above the authorized statutory limits to two inspectors general. Additionally, the whistleblower alleged (1) that the Council of Inspectors General on Integrity and Efficiency (“CIGIE”) Integrity Committee (“CIGIE-IC”) received a copy of the DOD memo but did not open an inquiry into the excess salary payments, and (2) that information about the memo was shared with CIGIE members.

These circumstances raise a host of serious questions of questions about the propriety of the CIGIE-IC’s handling of this matter.

BACKGROUND

Section 4(e) of the Inspector General Act provides generally that the rate of annual basic pay of Establishment Inspector Generals (“EIG”), including the Inspectors General of the National Security Agency (“NSA-IG”) and National Reconnaissance Office (“NRO-IG”), shall be equal to the rate payable to Level III of the Executive Schedule, plus 3%.^{1, 2}

¹ 5 U.S.C. App. §§ 3(e), 12(2), 12(3).

² Regarding the qualification “generally,” Inspectors General who served as Senior Executive Service (“SES”) employees immediately prior to their appointments as Inspectors General may opt to retain the basic pay levels that they attained as SES employees. See 5 U.S.C. § 3392(c).

Level III was capped at \$165,300 per annum for the 2014 through 2018 pay years.³ Beginning in 2019 and continuing through the current pay year, Level III was(is) capped at \$168,400 per annum.⁴ Hence, EIGs' annual pay levels for pay years 2014 through 2018 generally was \$170,259 ($\$165,300 \times 1.03 = \$170,259$) and was(is) \$173,452 ($\$168,400 \times 1.03 = \$173,452$) for pay years 2019 through 2022.

The DOD memo obtained by Empower Oversight is dated January 25, 2022.⁵ It is from Nancy Anderson Speight, Deputy Assistant Secretary for Civilian Personnel Policy, Office of the Assistant Secretary of Defense. It responds to a request by the Deputy Inspector General for Administrative Investigations, Office of Inspector General, Department of Defense ("DOD-OIG"), for a review of "executive pay setting methods within" the NSA-OIG and the NRO-OIG.⁶ Deputy Assistant Secretary Speight concluded that:

- The NSA-OIG correctly set the NSA-IG's pay rate upon his appointment in 2018 but, subsequently, it incorrectly adjusted his pay; and
- The NRO-OIG incorrectly set and subsequently adjusted the NRO-IG's pay rate.

Deputy Assistant Secretary Speight explained that, since the NSA-IG had been an SES employee with basic pay of \$187,000 before his appointment to the NSA-IG position, his pay should have remained at \$187,000 per annum from his appointment in January 2018 at least through calendar year 2022.

However, the NRO-IG had not been an SES employee, and so her pay should have been set according to "the applicable law in terms of pay setting and pay adjusting for" EIGs, which—as set forth above—equals \$170,259 per annum from September 2016 through December 2018 and \$173,452 from January 2019 at least through 2022.

Moreover, Deputy Assistant Secretary Speight recommended that DOD-OIG request that the NSA-OIG and NRO-OIG "take corrective action, as appropriate, with respect to pay actions for" the NSA-IG and NRO-IG, respectively, and "review their personnel policies for compliance with applicable law and adjust as necessary."

³ <https://www.chcoc.gov/content/2014-pay-freeze-certain-senior-political-officials>; <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2013/executive-senior-level/rates-of-basic-pay-for-the-executive-schedule/>; <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2014/executive-senior-level> (click on "Rates of Pay for the Executive Schedule" Pay Table); <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2015/executive-senior-level> (click on "Rates of Pay for the Executive Schedule" Pay Table); <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2016/executive-senior-level> (click on "Rates of Pay for the Executive Schedule" Pay Table); <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2017/executive-senior-level> (click on "Rates of Pay for the Executive Schedule" Pay Table); and <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2018/executive-senior-level> (click on "Rates of Pay for the Executive Schedule" Pay Table).

⁴ <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2019/executive-senior-level> (click on "Rates of Pay for the Executive Schedule" Pay Table); <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2020/executive-senior-level> (click on "Rates of Pay for the Executive Schedule" Pay Table); <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2021/executive-senior-level> (click on "Rates of Pay for the Executive Schedule" Pay Table); and <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2022/executive-senior-level> (click on "Rates of Pay for the Executive Schedule" Pay Table).

⁵ Empower Oversight cannot independently authenticate the document and is seeking information to corroborate in good faith the representations of the confidential whistleblower.

⁶ Deputy Assistant Secretary Speight's memorandum is attached as Exhibit 1.

Based upon the pay figures included in Deputy Assistant Secretary Speight's memorandum:

- **The NSA-IG was allegedly overpaid a total of approximately \$18,200**
 - \$2,600 in 2018 ($\$189,600 - \$187,000 = \$2,600$),
 - \$5,300 in 2019 ($\$192,300 - \$187,000 = \$5,300$), and
 - \$10,300 in 2020 ($\$197,300 - \$187,000 = \$10,300$).

- **The NRO-IG was allegedly overpaid a total of approximately \$149,578**
 - \$5,120 in 2016 ($(.25 \times \$190,729 = \$47,682) - (.25 \times \$170,259 = 42,565) = \$5,120$),
 - \$20,470 in 2017 ($\$190,729 - \$170,259 = \$20,470$),
 - \$38,610 in 2018 ($\$208,869 - \$170,259 = \$38,610$),
 - \$40,180 in 2019 ($\$213,632 - \$173,452 = \$40,180$), and
 - \$45,198 in 2020 ($\$218,650 - \$173,452 = \$45,198$).⁷

Pursuant to 5 U.S.C. § 5584 and 10 U.S.C. § 2774, the Secretary of Defense can waive all or any portion of the overpayments made to the NSA and NRO IGs, upon a finding that collection is against equity and good conscience and not in the best interests of the United States, and is consistent with policies and standards established by DOD.⁸ However, a collection action and a petition for a waiver of the collection would presumably need to occur before any waiver decision is made by the Secretary.

The Defense Finance and Accounting Service (“DFAS”) advises that the determination of whether collection is “against equity and good conscience and not in the United States’ best interest” generally requires that the overpayment was an administrative error and that there “no indication of fraud, misrepresentation, fault or lack of good faith by . . . the employee.”⁹ DFAS additionally notes that typically:

[A] waiver is not allowed when you receive a significant, unexplained increase in pay or allowances, and:

- you should have known, or reasonably should have known, that an incorrect payment has occurred, and
- you fail to inquire or bring the matter to the appropriate officials’ attention.

The likelihood of a waiver depends on the facts of each particular case. Economical or financial hardship play NO ROLE in a waiver application’s review.¹⁰

According to whistleblower allegations made to Empower Oversight, the cap on EIGs’ pay has frequently been discussed at CIGIE meetings. Specifically, one or both of the NSA-IG and the NRO-IG were allegedly in attendance on such occasions. Moreover, the whistleblower alleges that CIGIE leadership recently warned EIGs that the DOD memo had been sent to the

⁷ Deputy Assistant Secretary Speight’s memorandum does not include pay figures for 2021.

⁸ See, e.g., 5 U.S.C. § 5584; *Office of Personnel Management, Policy, Data, Oversight: Fact Sheet: Waiving Overpayments* (Undated), available at <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/waiving-overpayments>.

⁹ DFAS, Debt Waivers (September 27, 2021), available at <https://www.dfas.mil/civilianemployees/debt/debtwaivers/>.

¹⁰ DFAS, Debt Waivers (September 27, 2021), available at <https://www.dfas.mil/civilianemployees/debt/debtwaivers/>.

CIGIE-IG, but that it had refused to investigate the excess salary payments to the NSA and NRO IGs.

RECORDS REQUEST

To shed light on NSA-OIG's, NRO-OIG's, DOD-OIG's, DOD's, and CIGIE's responses to information of pay irregularities of two Presidentially-appointed, Senate-confirmed inspectors general, Empower Oversight hereby requests, pursuant to the FOIA, 5 U.S.C. § 552, all communications:

1. Between and among DOD, DOD-OIG, NSA-OIG, and/or the NSA-IG:
 - a. Pertaining to overpayments of the NSA-IG's basic pay from January 2018 through April 1, 2022;
 - b. Demanding repayment of such overpayments;
 - c. Requesting the full or partial waiver of such repayment demand; and/or
 - d. Responding to such full or partial waiver requests.
2. Between and among DOD, DOD-OIG, NRO-OIG, and/or the NRO-IG:
 - a. Pertaining to overpayments of the NRO-IG's basic pay from September 2016 through April 1, 2022;
 - b. Demanding repayment of such overpayments;
 - c. Requesting the full or partial waiver of such repayment demand; and/or
 - d. Responding to such full or partial waiver requests.
3. Received by, or sent to/from CIGIE and/or the CIGIE-IC:
 - a. Pertaining:
 - i. to overpayments of the NSA-IG's basic pay from January 2018 through April 1, 2022;
 - ii. to overpayments of the NRO-IG's basic pay from September 2016 through April 1, 2022; and/or
 - b. Concerning the cap on EIGs' pay during the pay years 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, and/or 2022; and/or
 - c. Regarding the disposition of any complaint, referral, or other communication to the CIGIE-IC related to alleged salary overpayments made to one or more EIG(s).

DEFINITIONS

“PROCESSING NOTES” means all records created by the SEC's FOIA Research Specialists and other personnel that reflects the record systems and information platforms that were searched, and the search terms used, to respond to Empower Oversight's August 12th FOIA request.

“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, Slack 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,” “CONCERNS,” “BEARS UPON,” 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.

“INCLUDING” means comprising part of, but not being limited to, the whole.

INSTRUCTIONS

The time period of the requested records is January 1, 2014, 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 FOIA 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 notes that it qualifies as a “representative of the news media”¹¹ and 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, which helps 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. Empower Oversight has no commercial interest in making this request.

Further, the information that Empower Oversight seeks is in the public interest because it is likely to contribute significantly to the public’s understanding of the collection of salary overpayments to Presidentially-appointed, Senate-confirmed inspectors general, and the CIGIE’s efforts to determine the causes for and factors surrounding such overpayments.

Empower Oversight is committed to government accountability, public integrity, and transparency. In the latter regard, the information that that Empower Oversight receives that tends to explain the subject matter of this FOIA request will be disclosed publicly via its website, and copies will be shared with other news media for public dissemination.

For ease of administration and to conserve resources, we ask that documents be produced in a readily accessible electronic format. Thank you for your time and consideration. Please don’t hesitate to contact me with any questions.

Cordially,

/Jason Foster/

Jason Foster
Founder & President

¹¹ On September 23, 2021, in connection with a FOIA appeal arising from Empower Oversight’s August 12th FOIA request, the Securities Exchange Commission conceded that Empower Oversight qualifies as a news media requester for purposes of fees assessed pursuant to the FOIA. “Empower Oversight Wins Appeal of Erroneous SEC Fee Decision: Must be treated as a “media requestor” in seeking ethics records of senior officials,” Empower Oversight Press Release (Sep 24, 2021), <https://empowr.us/empower-oversight-wins-appeal-of-erroneous-sec-fee-decision-must-be-treated-as-a-media-requestor-in-seeking-ethics-records-of-senior-officials/>.