

# EMPOWER OVERSIGHT

*Whistleblowers & Research*



October 13, 2022

VIA ELECTRONIC TRANSMISSION: FOIAREQUESTS@DODIG.MIL

Department of Defense  
Office of Inspector General  
ATTN: FOIA Appellate Authority  
Suite 10B24  
4800 Mark Center Drive  
Alexandria, VA 22350-1500

**RE: Freedom of Information Act Appeal: DODOIG-2022-000658**

Dear FOIA Appellate Authority:

## Introduction

With respect to Freedom of Information Act ("FOIA")<sup>1</sup> request DODOIG-2022-000658, Empower Oversight Whistleblowers & Research ("Empower Oversight")<sup>2</sup> appeals the decision of the Department of Defense ("DOD"), Office of Inspector General ("DOD-OIG"). Specifically, Empower Oversight challenges the reasonableness of the DOD-OIG's search for records and its claim that certain portions of the records requested by Empower Oversight are exempt from disclosure under FOIA Exemptions b(5) and b(6). Empower Oversight respectfully requests that the DOD-OIG review its search and exemption claims and correct any errors that are identified.

---

<sup>1</sup> The FOIA is codified at 5 U.S.C. § 552.

<sup>2</sup> 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.

## **Empower Oversight's FOIA Request**

On March 25, 2022, Empower Oversight filed with the DOD-OIG a request for records under the FOIA that was designed to shed light on the DOD-OIG's and other entities' responses to information of pay irregularities of two Presidentially-appointed, Senate-confirmed inspectors general.<sup>3</sup> Empower Oversight's March 25<sup>th</sup> FOIA request seeks records relating to "all communications":

1. Between and among DOD, DOD-OIG, [the National Security Agency ("NSA"), Office of Inspector General ("NSA-OIG")], and/or the [NSA Inspector General ("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, [National Reconnaissance Office ("NRO"), Office of Inspector General ("NRO-OIG")], and/or the [NRO Inspector General ("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 [the Council of Inspectors General on Integrity and Efficiency ("CIGIE")]<sup>4</sup> and/or the [CIGIE Integrity Committee ("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 Establishment Inspectors General ("EIG")s' pay during the pay years 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, and/or 2022; and/or

---

<sup>3</sup> A copy of Empower Oversight's March 25<sup>th</sup> FOIA request is attached as Exhibit A.

<sup>4</sup> CIGIE is an independent entity established within the executive branch to address integrity, economy, and effectiveness issues that transcend individual Federal agencies, and to aid in the establishment of a professional, well-trained, and highly skilled workforce in the offices of inspectors general. See, CIGIE, *What is CIGIE*, available at <https://www.ignet.gov/>.

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).

In addition, Empower Oversight requested a waiver of search and duplication fees associated with the DOD-OIG's processing of its FOIA request.

In support of its FOIA request, Empower Oversight explained that Section 4(e) of the Inspector General Act provides generally that the rate of annual basic pay of EIGs, including the NRO and NSA IGs, shall be equal to the rate payable to Level III of the Executive Schedule, plus 3%.<sup>5, 6</sup>

Level III was capped at \$165,300 per annum for the 2014 through 2018 pay years.<sup>7</sup> Beginning in 2019 and continuing through the current pay year, Level III was(is) capped at \$168,400 per annum.<sup>8</sup> 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.

A confidential whistleblower provided Empower Oversight with a copy of a Defense Department memorandum ("DOD memo"), which is dated January 25, 2022, that purports to document excess salary payments (*i.e.*, payments over and above the authorized statutory limits) to two inspectors general.<sup>9</sup> The DOD memo is from Nancy Anderson Speight, Deputy Assistant Secretary for Civilian Personnel Policy, Office of the Assistant Secretary of Defense, and it responds to a request by DOD-OIG's Deputy Inspector General for Administrative Investigations for a review of "executive pay setting methods within" the NSA-OIG and the NRO-OIG. 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

---

<sup>5</sup> 5 U.S.C. App. §§ 3(e), 12(2), 12(3).

<sup>6</sup> 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).

<sup>7</sup> <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).

<sup>8</sup> <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).

<sup>9</sup> Empower Oversight cannot independently authenticate the document and is seeking information to corroborate in good faith the representations of the confidential whistleblower.

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 the 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.”

Based upon the pay figures included in Deputy Assistant Secretary Speight’s DOD memo:

- **The NSA-IG was allegedly overpaid a total of approximately \$18,200 for pay years 2018 – 2020**
  - \$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 for pay years 2018 – 2020**
  - \$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 ( $\$218,650 - \$173,452 = \$45,198$ ).<sup>10</sup>

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 the DOD.<sup>11</sup> 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 is “no indication of fraud, misrepresentation, fault or lack of good faith by . . . the employee.”<sup>12</sup> DFAS additionally notes that typically:

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

---

<sup>10</sup> Deputy Assistant Secretary Speight’s DOD memo does not include pay figures for 2021 and 2022.

<sup>11</sup> 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>.

<sup>12</sup> DFAS, Debt Waivers (September 27, 2021), available at <https://www.dfas.mil/civilianemployees/debt/debtwaivers/>.

- 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.<sup>13</sup>

According to whistleblower allegations made to Empower Oversight, the cap on EIGs' pay frequently has been discussed at meetings of the CIGIE. Additionally, one or both of the NSA-IG and the NRO-IG occasionally were in attendance at CIGIE meetings when the issue was discussed. Moreover, the whistleblower alleges that CIGIE leadership warned EIGs that the January 25<sup>th</sup> DOD memo had been sent to the CIGIE-IC—on which the NSA-IG serves as vice-chairman,<sup>14</sup> but that it had refused to investigate the excess salary payments to the NSA and NRO IGs.

### **The DOD-OIG's Response to Empower Oversight's FOIA Request**

By letter dated March 29, 2022, the DOD-OIG acknowledged receipt of Empower Oversight's March 25<sup>th</sup> FOIA request and designated it DODOIG-2022-000658.

By letter dated July 29, 2022, the DOD-OIG responded to Empower Oversight's FOIA request.<sup>15</sup> DOD-OIG advised that five of its component offices had conducted a search for responsive records; the five offices located an undisclosed volume of responsive records; and that the DOD-OIG had determined that 116 pages of the undisclosed volume of responsive records were appropriate for release, subject to redactions pursuant to FOIA Exemptions b(5) and/or b(6). The DOD-OIG added that it had forwarded an undisclosed volume of responsive records that CIGIE, the NSA, or DOD had originated to the respective originators for their direct response to Empower Oversight.

### **Based upon the Circumstances, It Appears that the DOD-OIG Failed to Conduct a Records Search that Was Reasonably Calculated to Uncover All Relevant Documents**

Courts generally analyze the adequacy of a search by considering the reasonableness of the agency's effort in the context of the specific FOIA request.<sup>16</sup> The legal standard governing searches for records responsive to FOIA requests requires an agency to conduct a search that is "reasonably calculated to uncover all relevant documents."<sup>17</sup> Courts have found searches to be sufficient when, among other things, they are based on a reasonable interpretation of the scope of the subject matter of the request.<sup>18</sup>

<sup>13</sup> DFAS, Debt Waivers (September 27, 2021), available at <https://www.dfas.mil/civilianemployees/debt/debtwaivers/>.

<sup>14</sup> See, CIGIE, <https://www.ignet.gov/cigie/committees/integrity-committee>.

<sup>15</sup> A copy of the DOD-OIG's July 29<sup>th</sup> response (without the 116 pages of redacted records) to Empower Oversight's FOIA request is attached as Exhibit B.

<sup>16</sup> See, e.g., *Larson v. Dep't of State*, 565 F.3d 857, 869 (D.C. Cir. 2009) (affirming the adequacy of a search based on the agency's reasonable determination regarding records being requested).

<sup>17</sup> *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

<sup>18</sup> *Larson*, 565 F.3d at 869.

Courts tend to afford agencies leeway in determining the locations to search for responsive records. An agency, for example, “is not required to speculate about potential leads.”<sup>19</sup> Nor is an agency “obliged to look beyond the four corners of the request for leads to the location of responsive documents.”<sup>20</sup> But that does not mean that an agency “may ignore what it cannot help but know.”<sup>21</sup> No agency may ignore a responsive document that “clearly indicates the existence of [other] relevant documents, none of which were disclosed.”<sup>22</sup>

Here, in connection with its July 29<sup>th</sup> initial response to Empower Oversight’s March 25<sup>th</sup> FOIA request, the DOD-OIG repeatedly ignored information among responsive documents that it produced that clearly notified it of the existence of responsive records that it did not produce.<sup>23</sup> In that regard, numerous emails produced by the DOD-OIG reference attachments that it failed—without explanation—to produce. For example:

<b>Page of the DOD-OIG’s July 29<sup>th</sup> Initial Response</b>	<b>Email(s) Identification</b>	<b>Attachment(s) Description</b>
9, 83 – 84	March 16, 2021, email from Marguerite Garrison to Julie Blanks	“attached request”
14, 39, 63, 110, 116, 120, 123	January 25, 2022, email from DODHRA DCPAS to Ms. Garrison	“Attached are the two long-awaited memos on executive pay setting methods for the DoD Intelligence Agencies IGs.” <sup>24</sup>
20, 79	February 10, 2022, email from Paul Hadjiyane to Sean O’Donnell	“Attached for you review are the draft responses to the IC’s follow up question on the pay setting matter (same as earlier email).”
20 – 21, 80	February 10, 2022, email from Mr. Hadjiyane to Mr. O’Donnell	“Aloha kakahiaka. Attached for your review are draft responses to the IC’s follow up questions.”

<sup>19</sup> Kowalczyk v. DOJ, 73 F.3d 386, 389 (D.C. Cir. 1996).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Center for Nat’l Security Studies v. DOJ, 215 F. Supp. 2d 94, 110 (D.D.C. 2002), *aff’d in part, rev’d in part, and remanded on other grounds*, 331 F.3d 918 (D.C. Cir. 2003).

<sup>23</sup> Alternatively, the DOD-OIG notes in its July 29<sup>th</sup> response that it forwarded an undisclosed volume of responsive records to CIGIE, the NSA, and the DOD for their direct response to Empower Oversight’s March 25<sup>th</sup> FOIA request. However, some of the attachments cited in the responsive records produced by DOD-OIG plainly appear to have been originated by the DOD-OIG, not another agency. *See, e.g.*, the attachment described in Sean O’Donnell’s February 3, 2022, email to Paul Hadjiyane, which is included at page 25 of the DOD-OIG’s July 29<sup>th</sup> response to Empower Oversight’s FOIA request; and Mr. Hadjiyane’s February 11, 2022, email to “Integrity-WG,” which is included at page 85 of the DOD-OIG’s July 29<sup>th</sup> response to Empower Oversight’s FOIA request. Moreover, DOD-OIG did not mark its production in a fashion that provided Empower Oversight with any insight in to which if any of the attachments referenced in such responsive records were originated by (and forwarded to) another agency for a direct response.

<sup>24</sup> *See*, Footnote 9, above, and the text it references.



23-24	February 23, 2022, email from James Seacord to Ms. Garrison	"Attachment Name: smime.p7s"
25	February 3, 2022 (10:32 AM), email from Mr. O'Donnell to Mr. Hadjiyane	"IC Referral" "...signed, and attached"
27	February 3, 2022 (1:32 PM), email from Mr. Hadjiyane to Mr. O'Donnell	"Attached are the emails making referral to the IC of the NRO & NSA pay issues and te IC's acknowledgement of receipt."
38, 61 – 62, 108, 115, 119, 122	January 25, 2022, email from Ms. Garrison to Mr. O'Donnell	"Attached are the long awaiting memos on the Pay Setting for the Defense Intelligence IGs (NSA, NRO, NGA and DIA)."
59, 80, 87	February 9, 2022, email from Integrity-WG to Mr. O'Donnell	"Please see the attached request from the Integrity Committee (IC)."
60	February 11, 2022, email from Integrity-Complaint to Mr. O'Donnell	"Please see the attached letter from the Integrity Committee Chairperson."
64	March 2, 2022, email from Integrity-Complaint to Mr. O'Donnell	"Please see the attached letter from the Integrity Committee Chairperson."
85	February 11, 2022, email from Mr. Hadjiyane to Integrity-WG	"IG O'Donnell's responses are attached."
98	February 10, 2022, email from Mr. Hadjiyane to Steven Stebbins	"Yesterday we received the attached follow-up questions from the CIGIE IC on the NRO/NSA IG pay setting matter."
100	February 9, 2022, email from Mr. Hadjiyane to Ms. Garrison	"We received the attached follow-up questions from the Integrity Committee on the Def. Intel. pay setting matter."
115	February 7, 2022, email from Mr. O'Donnell to Michael Zola	"Have you seen these two memos? We got them on 1/25."
123 – 124	January 25, 2022, email from DODHRA DCPAS to Ms. Garrison	"Attachment Name: smime.p7s" and "Attachment Name smime.p7m"

Accordingly, please review the scope the DOD-OIG's records search to determine whether its search can be accurately characterized as reasonably calculated to lead to the discovery of all responsive documents and, if not, correct the DOD-OIG's errors and produce all non-exempt responsive records.

## **The DOD-OIG's Redactions Pursuant to FOIA Exemption b(5) Extend Beyond What Is Allowable Under the FOIA**

FOIA Exemption b(5) provides that the FOIA “does not apply to matters that are”:

inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.<sup>25</sup>

Courts have construed FOIA Exemption b(5) to “exempt those documents, and only those documents, that are normally privileged in the civil discovery context.”<sup>26</sup> The United States Circuit Court of Appeals for the District of Columbia Circuit (“Circuit Court”) has held that “all civil discovery rules” are incorporated into FOIA Exemption b(5).<sup>27</sup>

One such civil discovery rule is the deliberative process privilege, whose purpose is to “prevent injury to the quality of agency decisions.”<sup>28</sup> In this setting, the Circuit Court has explained that “quality” encompasses encouraging frank discussions during policy making, preventing advance disclosure of decisions, and protecting against public confusion that may result from disclosure of reasons or rationales that were not in fact the grounds for agency decisions.<sup>29</sup>

To claim the deliberative process privilege with respect to a record, the Circuit Court has held that an agency must show<sup>30</sup> that the record is “predecisional” (*i.e.*, “antecedent to the adoption of agency policy”)<sup>31</sup> and “deliberative” (*i.e.*, “a direct part of the deliberative process in that it makes recommendations and expresses opinions on legal or policy matters”).<sup>32</sup> In the latter regard, a record must reflect[] the give-and-take of the consultative process,” either by assessing the merits of a particular viewpoint, or by articulating the process used by the agency to formulate policy.<sup>33</sup>

The DOD-OIG, purportedly pursuant to FOIA Exemption b(6)—has redacted records that are not predecisional and deliberative. For example:

---

<sup>25</sup> 5 U.S.C. § 552(b)(5).

<sup>26</sup> NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); *see also*, Martin v. Office of Special Counsel, 819 F.2d 1181, 1184 (D.C. Cir. 1987).

<sup>27</sup> *See*, Martin, 819 F.2d at 1185.

<sup>28</sup> Sears, 421 U.S. at 151.

<sup>29</sup> *See*, Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Coastal States Gas Corp. v. DOE, 617 F.2d 854, 866 (D.C. Cir. 1980); Jordan v. DOJ, 591 F.2d 753, 772 – 773 (D.C. Cir. 1978).

<sup>30</sup> Coastal States Gas Corp., 617 F.2d at 866.

<sup>31</sup> *See*, Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F.3d 504, 513 (D.C. Cir. 2011).

<sup>32</sup> *See*, Vaughn v. Rosen, 523 F.2d 1136, 1143 – 1144 (D.C. Cir. 1975).

<sup>33</sup> Coastal States Gas Corp., 617 F.2d at 867.



<b>Page of the DOD-OIG's July 29<sup>th</sup> Initial Response</b>	<b>Document Identification</b>	<b>Description of Possible Defect</b>
30 – 31	March 16, 2021, memorandum from Ms. Garrison to Executive Director, Office of Under Secretary of Defense for Personnel and Readiness	Redaction of two large text blocks (fourth and fifth paragraphs) in an official memorandum from the DOD-OIG to the DOD that identifies an apparent conflict between applicable laws and forwards the matter “for appropriate review and resolution.”
32 – 34	February 11, 2022, letter from Mr. O'Donnell, responding to a February 9, 2022, request for information from Kevin Winters, Chairperson, CIGIE-IC	Redaction of multiple lines of text and full paragraphs in an official letter from the DOD-OIG to the CIGIE-IC that responds to the CIGIE-ICs requests for additional information.
52 – 53	February 3, 2022, letter from Mr. O'Donnell to Mr. Winters	Redaction of multiple lines of text and a full paragraph in an official letter from DOD-OIG to CIGIE-IC that referred January 25, 2022, findings of the DOD's Deputy Assistant Secretary for Civilian Personnel Policy for consideration/investigation, to avoid a conflict that may arise if the DOD-OIG investigated the matter given that one of the subject inspectors general (IGs) has an imminently scheduled confirmation hearing to become the head of the DOD-OIG.
111	February 10, 2022, email from Mr. O'Donnell to Robert Storch, NSA-IG	Redaction of multiple lines of text and several paragraphs in official DOD-OIG correspondence that alerted Mr. Storch to the DOD-OIG's February 3, 2022, referral to the CIGIE-IC, in light of his confirmation hearing the following week.

The four communications set forth above are not “predecisional.” They plainly are not antecedent to the adoption of DOD-OIG policies; instead, they are DOD-OIG policies. They are “decisional.” Respectively, they represent the DOD-OIG:

- Alerting the DOD to an alleged conflict between “statutory limits on executive pay and pay setting provisions in the IG Reform Act of 2008;”
- Cooperating with a CIGIE-IC inquiry relative to allegations that one or more Defense intelligence agency IGs may have been paid more than the allowable rates for their positions;
- Referring allegations that one or more Defense intelligence agency IGs may have been paid more than the allowable rates for their positions to the CIGIE-IC for investigation; and

- Informing Mr. Storch that he was the subject of a CIGIE-IC inquiry in advance of his Senate confirmation hearing relating to his nomination to lead the DOD-OIG.

There was no decision remaining for DOD-OIG to make when it dispatched the four communications. DOD-OIG's decision had been rendered.

Moreover, even if the four communications set forth above could somehow be characterized as “predecisional,” factual information is not covered by the deliberative process privilege because the release of factual information does not expose the deliberations or opinions of agency personnel.<sup>34</sup> Accordingly, factual information is typically available in civil discovery and its release is not considered to have a chilling effect on agency deliberations.<sup>35</sup> And, although Empower Oversight cannot see behind the DOD-OIG's redactions, they appear to be—given their context—replete with factual information. For example, the text redacted from Mr. O'Donnell's February 11<sup>th</sup> letter to Mr. Winters responds to questions from Mr. Winters that call for factual information, not opinions or recommendations, as follows:

- When and why did you/DoD OIG senior staff ask the DoD Deputy Assistant Secretary (DASD) for Civilian Personnel Policy to review the pay policies for the DoD Intelligence Agencies?
- Was CIGIE consulted in this matter prior to the submission of the February 3, 2022, complaint? If so, to whom, and what happened?
- What steps, if any, were taken to stop the overpayments?

Moreover, three redacted text blocks at the top of the third page of the February 11<sup>th</sup> letter (*i.e.*, at the top of page 34 of the DOD-OIG's July 29<sup>th</sup> response to Empower Oversight's FOIA request), purport to recount the DOD-OIG's communications with the DOD's Office of the Under Secretary for Personnel and Readiness on March 16 and 17, 2021. The contents of communications between the DOD-OIG and another agency are facts; they are not DOD-OIG internal deliberations.

Similarly, it appears implausible that the massive redaction in the middle of Mr. O'Donnell's February 10<sup>th</sup> email to Mr. Storch—apprising him that the DOD-OIG had referred him to the CIGIE-IC for investigation on the eve his Senate confirmation hearing to lead the DOD-OIG—does not include a discussion of facts that comprise the controversy referred to the CIGIE-IC and/or the communications that facilitated such referral. Otherwise, what good would the notification have been to Mr. Storch? How could he understand the situation?

It appears that the DOD-OIG asserted FOIA Exemption b(5) with respect to numerous documents that may not be fairly characterized as “predecisional.” Moreover, even if the records in controversy may be fairly characterized as predecisional, they appear to be replete with factual information that is not “deliberative” and protected by the exemption. Accordingly, please review the DOD-OIG's assertions of FOIA Exemption b(5); confirm that they are

---

<sup>34</sup> Coastal States Gas Corp., 617 F.2d at 867; *see also*, McGrady v. Mabius, 635 F. Supp. 2d 6, 18 – 21 (D.D.C. 2009) (distinguishing between draft letters and memoranda that may be deliberative and data used during a decision making process, *e.g.*, key personnel data and evaluation summaries used in promotion decisions, which contain only factual material and are not deliberative).

<sup>35</sup> *See*, EPA v. Mink, 410 U.S. 73, 87 – 88 (1973); *see also*, Montrose Chem. Corp. v. Train, 491 F.2d 63, 66 (D.C. Cir. 1974) (holding that release of factual material would not be “injurious” to decision making process).

“predecisional,” “deliberative,” and not “segregable;”<sup>36</sup> correct any errors; and produce non-exempt records or segregable portions thereof.

### **The DOD-OIG’s Redactions Pursuant to FOIA Exemption b(6) Extend Beyond What Is Allowable Under the FOIA**

FOIA Exemption b(6) provides that the FOIA “does not apply to matters that are ... personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”<sup>37</sup> Courts have found that the plain language of the exemption requires agencies to engage in a four-step analysis of records that are potentially responsive to a FOIA request; agencies 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.<sup>38</sup>

The responsive records that the DOD-OIG produced on July 29<sup>th</sup> include several redactions—made purportedly pursuant to FOIA Exemption b(6)—that appear either not to involve a protected privacy interest or, if they do implicate a protected privacy interest, involve strong countervailing public interests in disclosure that the DOD-OIG has not demonstrated that it considered. In the latter regard, the public has a keen interest in the activities of high-level government officials whose duties include the oversight of potential fraud, waste, and abuse within their respective agencies, especially when there are allegations that the officials failed to enforce Federal pay rules when such failure benefited them. Additionally, the DOD-OIG effectively invalidated its assertion of the exemption with respect to one of the officials pursuant to an ineffective redaction. For example, see the DOD-OIG’s FOIA Exemption b(6) claims at:

<b>Page of the DOD-OIG’s July 29<sup>th</sup> Initial Response</b>	<b>Document Identification</b>
32 – 34	February 11, 2022, letter from Mr. O’Donnell, responding to a February 9, 2022, request for information from Mr. Winters
52 – 53	February 3, 2022, letter from Mr. O’Donnell to Mr. Winters

<sup>36</sup> Even if portions of responsive documents are covered a FOIA exemptions, the statute requires that agencies must produce any reasonably segregable of such documents that are not subject to a FOIA exemption. 5 U.S.C. § 552(a)(3)(B). “The burden is on the agency to show that no segregable materials exist.” Carter, Fullerton & Hayes, LLC v. FTC, 601 F. Supp. 2d 728, 744 (E.D. Va. 2009).

<sup>37</sup> 5 U.S.C. § 552(b)(6).

<sup>38</sup> See, Multi Ag Media LLC v. USDA, 515 F.3d 1224, 1229 (D.C. Cir. 2008); NARA v. Favish, 541 U.S. 157, 172 (2004); Wash. Post Co. v. HHS, 690 F.2d 252, 261 (D.C. Cir. 1982).

Generally, according to an Office of Personnel Management (“OPM”) regulation, the names, titles, grades, salaries, duty stations, and position descriptions of all officials of the United States government is public information.<sup>39</sup> Thus, the names, titles, and pay of government officials generally should not be protected under FOIA Exemption b(6).<sup>40</sup> Yet, the DOD-OIG repeatedly shields this information relating to two inspectors general of DOD intelligence agencies whom it has referred to the CIGIE-IC for investigation of salary overpayments.

Further, although courts have endorsed protecting the privacy interests of lower-level government employees who are investigated for misconduct,<sup>41</sup> they conversely have found that there is a substantial and countervailing public interest in information about misconduct investigations when high-level government employees are involved, or when the existence of the requested information has been officially acknowledged.<sup>42</sup>

Discussing the “public interest” defended by the FOIA, the Department of Justice’s FOIA Guide states:

Public oversight of government operations is the essence of public interest under the FOIA, one of the purposes of which is to “check against corruption and to hold the governors accountable to the governed.” Accordingly, disclosure of information that informs the public of violations of the public trust has been found to serve a strong public interest and is accorded great weight in the balancing process.<sup>43</sup>

Here, there is a strong public interest in discerning:

- The circumstances surrounding allegations that one or more of four DOD intelligence agency IGs were paid in excess of the rate of pay applicable to their positions;
- How the DOD-OIG learned of and responded to the allegations;<sup>44</sup> and
- How the CIGIE-IC responded to the DOD-OIG’s referral of such allegations.

Given that Section 4(a)(3) of the Inspector General Act entrusts the four DOD intelligence agency IGs with the responsibility to “conduct, supervise, or coordinate other

---

<sup>39</sup> 5 C.F.R. § 293.311(a).

<sup>40</sup> See, Kimberlin v. DOJ, 139 F.3d 944, 949 (D.C. Cir. 1998) (recognizing that government officials have a diminished privacy interest); see also, Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (noting that Justice Department paralegals’ names and work numbers “are already publicly available from” OPM), *appeal dismissed voluntarily*, No. 06-5055, 2006 WL 1214937 (D.C. Cir. April 28, 2006).

<sup>41</sup> 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).

<sup>42</sup> 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).

<sup>43</sup> DOJ, Department of Justice Guide to the Freedom of Information Act, “Exemption 6,” p. 63 (Updated August 19, 2022) (citations omitted), available at <https://www.justice.gov/oip/doj-guide-freedom-information-act-0> (last accessed on October 7, 2022).

<sup>44</sup> For example, the public has a right to gain a fulsome understanding of the reasons why misconduct of one or more of the DOD intelligence agency inspectors general was(were) allowed to continue from the receipt of the allegations in July 28, 2020 until at least February 3, 2022, when the allegations were referred to CIGIE-IC. See, Exhibit B, pp. 33 and 52.

activities carried out or financed by such [their respective agencies] for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations,” the public interest in the information sought by Empower Oversight’s FOIA request is indisputable. It is imperative for the integrity of the DOD intelligence agency IGs (and for the inspectors general community writ large) that “rules for thee and not for me” mindsets are rooted out, and misimpressions about such mindsets are clarified. The DOD-OIG’s redactions threaten to allow such mindsets to endure and misimpressions to persist. The public has a right to know what the DOD intelligence agency IGs did and, if they did nothing inappropriate, then the IGs have an equally valid right to have the records in question exposed, assuaging concerns about their activities.

Moreover, any diminished privacy interest that four inspectors general may possess in the public revelation of the details of their potential misconduct does **not** survive other disclosures that the DOD-OIG made in response to Empower Oversight’s FOIA request on July 29<sup>th</sup>.<sup>45</sup> Although the DOD-OIG has redacted the names of the DOD intelligence agency inspectors general, the records it disclosed on July 29<sup>th</sup>:

- Identifies the four DOD intelligence agencies (*i.e.*, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the NRO, and the NSA);<sup>46</sup> and
- Includes a February 10, 2022, email from Mr. O’Donnell to “Storch, Robert P, HON’ <(b)(6)@nsa.gov>” that mentions the DOD-OIG’s referral to the CIGIE-IC, which Mr. O’Donnell states he wanted to bring to Mr. Storch’s “attention before [his] hearing next week.”<sup>47</sup>

Accordingly, please review the DOD-OIG’s assertions of FOIA Exemption b(6); confirm that the redacted information involves a protected privacy interest that, after appropriate and documented balancing of interests, is superior to the public interest in disclosing such information; correct identified errors; and produce non-exempt records or segregable portions thereof.

---

<sup>45</sup> See, e.g., *Bartko v. DOJ*, 898 F.3d 51, 69 (D.C. Cir. 2018), 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”).

<sup>46</sup> See, The DOD-OIG’s July 29<sup>th</sup> response to Empower Oversight’s FOIA request, p. 52, n. 1; see also, p. 33 (identifying the NRO and NSA IGs). In turn, the identities of the inspectors general of the four agencies are publicly available, among other places, on CIGIE’s website. See, <https://www.ignet.gov/content/inspectors-general-directory>.

<sup>47</sup> See, The DOD-OIG’s July 29<sup>th</sup> response to Empower Oversight’s FOIA request, p. 111. To add context, the DOD-OIG’s February 3<sup>rd</sup> referral to the CIGIE-IC advises that the NSA IG has been nominated to become the DOD inspector general and that his confirmation hearing is scheduled for February 15, 2022. See, The DOD-OIG’s July 29<sup>th</sup> response to Empower Oversight’s FOIA request, p. 53

## **Conclusion**

For the reasons set forth herein, Empower Oversight respectfully requests that the FOIA Appellate Authority review the DOD-OIG's search for responsive records and its determinations of the applicability of FOIA Exemptions b(5) and b(6), confirm that its search and determinations are appropriate, and—if they are not—correct the DOD-OIG's errors and produce the non-exempt records or portions thereof.

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

Cordially,

[/Jason Foster/](#)

Jason Foster  
Founder & President



# Exhibit *A*

# EMPOWER OVERSIGHT

---

*Whistleblowers & Research*



March 25, 2022

**VIA ELECTRONIC TRANSMISSION: FOIAREQUESTS@DODIG.MIL**

Department of Defense Office of Inspector General  
ATTN: FOIA Requester Service Center, Suite 10B24  
4800 Mark Center Drive  
Alexandria, VA 22350-1500

**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%.<sup>1, 2</sup>

Level III was capped at \$165,300 per annum for the 2014 through 2018 pay years.<sup>3</sup> Beginning in 2019 and continuing through the current pay year, Level III was(is) capped at \$168,400 per annum.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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

---

<sup>1</sup> 5 U.S.C. App. § 3(e), 12(2), 12(3).

<sup>2</sup> 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).

<sup>3</sup> <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).

<sup>4</sup> <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).

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

<sup>6</sup> Deputy Assistant Secretary Speight’s memorandum is attached as Exhibit 1.

for” the NSA-IG and NRO-IG, respectively, and “review their personnel policies for compliance with applicable law and adjust as necessary.”

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 ( $\$218,650 - \$173,452 = \$45,198$ ).<sup>7</sup>

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.<sup>8</sup> 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.”<sup>9</sup> 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.<sup>10</sup>

---

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

<sup>8</sup> 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>.

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

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

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 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 12<sup>th</sup> 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](mailto: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”<sup>11</sup> 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

---

<sup>11</sup> On September 23, 2021, in connection with a FOIA appeal arising from Empower Oversight’s August 12<sup>th</sup> 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/>.

# Exhibit B



**INSPECTOR GENERAL**  
**DEPARTMENT OF DEFENSE**  
4800 MARK CENTER DRIVE  
ALEXANDRIA, VIRGINIA 22350-1500

July 29, 2022  
Ref: DODOIG-2022-000658

**SENT VIA EMAIL TO: [jf@empowr.us](mailto:jf@empowr.us)**

Mr. Jason Foster  
Empower Oversight  
601 King Street, Suite 200  
Alexandria, VA 22314-3151

Dear Mr. Foster:

This responds to your Freedom of Information Act (FOIA) request, as attached. We received your request on March 25, 2022, and assigned it case number DODOIG-2022-000658.

The Administrative Investigations Component, Mission Support Team, Office of General Counsel, Office of the Inspector General, and Office of Legislative Affairs and Communications conducted a search and located records responsive to your request. Upon review, we determined that the attached 116 pages are appropriate for release in part pursuant to the following FOIA (5 U.S.C. § 552) exemptions:

- (b)(5), which pertains to certain inter-and intra-agency communications protected by the attorney-client and deliberative process privileges. The purpose for withholding such recommendations is to encourage the free and candid exchange of opinions and advice during the decision-making process. In applying the foreseeable harm standard, we determined that disclosure of this information is likely to diminish the candor of agency deliberations in the future; and
- (b)(6), which pertains to information, the release of which would constitute a clearly unwarranted invasion of personal privacy.

If you consider this an adverse determination, you may submit an appeal. Your appeal, if any, must be postmarked within 90 days of the date of this letter, clearly identify the determination that you would like to appeal, and reference to the FOIA case number above. Send your appeal to the Department of Defense, Office of Inspector General, ATTN: FOIA Appellate Authority, Suite 10B24, 4800 Mark Center Drive, Alexandria, VA 22350-1500, or via facsimile to 571-372-7498. However, please note that FOIA appeals can only examine adverse determinations concerning the FOIA process. For more information on appellate matters and administrative appeal procedures, please refer to 32 C.F.R. Sec. 286.9(e) and 286.11(a).

During our review, we identified records that originated with the Council of the Inspectors General on Integrity and Efficiency (CIGIE), the National Security Agency (NSA), and the Office of the Secretary of Defense and Joint Staff (OSD/JS). Therefore, we have referred those pages to those offices for processing and direct response to you. If you would like to inquire about the status of these records, please contact those offices directly at the following addresses:

July 29, 2022  
Ref: DODOIG-2022-000658

CIGIE  
ATTN: FOIA Officer  
1717 H Street NW, Suite 825  
Washington, DC 20006  
<https://www.ignet.gov/content/foia-0>

NSA  
ATTN: FOIA/PA Office  
9800 Savage Road, Suite 6932  
Fort George G. Meade, MD 20755-6932  
<https://www.nsa.gov/Helpful-Links/NSA-FOIA/>

OSD/JS FOIA Requester Service Center  
Freedom of Information Division  
1155 Defense Pentagon  
Washington, DC 20301-1155  
<https://www.esd.whs.mil/FOID/>

You may contact our FOIA Public Liaison at [FOIAPublicLiaison@dodig.mil](mailto:FOIAPublicLiaison@dodig.mil), or by calling 703-604-9785, for any further assistance with 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, MD 20740-6001, email at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769. However, OGIS does not have the authority to mediate requests made under the Privacy Act of 1974 (request to access one's own records).

If you have any questions regarding this matter, please contact Ms. Derrica Stone at 703-604-9775 or via email at [foiarequests@dodig.mil](mailto:foiarequests@dodig.mil).

Sincerely,



Searle Slutzkin  
Division Chief  
FOIA, Privacy and Civil Liberties Office

Attachment(s):  
As stated