

EMPOWER OVERSIGHT

Whistleblowers & Research



April 15, 2024

VIA DOJ OFFICE OF INFORMATION POLICY FOIA STAR PORTAL

Director Bobak Talebian
Office of Information Policy
U.S. Department of Justice
441 G Street, NW, Sixth Floor
Washington, DC 20530

**RE: FOIA APPEAL OF REQUEST NUMBER JMD FOIA
#131167**

Dear Director Talebian:

INTRODUCTION

Empower Oversight Whistleblowers & Research (“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.

BACKGROUND

Empower Oversight appeals the January 22, 2024, decision by Deputy General Counsel John Thompson of the Justice Management Division (“JMD”) of the Department of Justice (“DOJ”) partially denying Empower Oversight’s May 18, 2023, request for records related to the DOJ’s hiring and employment of Christina Calce, pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Specifically, the following request was rejected: “All forms completed by Ms. Calce in the application, hiring, and onboarding processes at DOJ[.]” The denial was based on “FOIA Exemption 6 for certain personally identifiable information.” Specifically, Mr. Thompson stated:

After carefully reviewing the records responsive to your request (*i.e.*, healthcare, retirement, financial, tax, and other related application and onboarding forms), JMD has determined to withhold them in full pursuant to FOIA Exemption 6 for certain personally identifiable

information. JMD has determined that the privacy interests in this information outweigh the public interest in its disclosure.

ANALYSIS

Although Empower Oversight recognizes some information might need to be withheld, categorical denial of the requested records here is improper.

FOIA Exemption 6, 5 U.S.C. § 552(b)(6), exempts “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” If records meet the threshold requirement for Exemption 6 that they are personnel, medical, or similar files, courts require a balancing analysis to determine whether the records are exempt. In this determination, “we first ask ‘whether disclosure would compromise a substantial, as opposed to a *de minimis*, privacy interest.’ If so, we ‘balance the privacy interest in non-disclosure against the public interest.’” *Telematch, Inc. v. United States Dep’t of Agric.*, 45 F.4th 343, 351 (D.C. Cir. 2022) (quoting *Consumers’ Checkbook Ctr. for the Study of Servs. v. HHS*, 554 F.3d 1046, 1050 (D.C. Cir. 2009)).

The use of the “word substantial in this context means less than it might seem. A substantial privacy interest is anything greater than a *de minimis* privacy interest.” *Multi Ag Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1229–30 (D.C. Cir. 2008) (internal citation omitted). “Finding a substantial privacy interest does not conclude the inquiry; it only moves it along to the point where [a court] can ‘address the question whether the public interest in disclosure outweighs the individual privacy concerns.’ In other words, a privacy interest may be substantial—more than *de minimis*—and yet be insufficient to overcome the public interest in disclosure.” *Id.* at 1230 (internal citation omitted).

Courts must also “balance the public interest in disclosure against the interest Congress intended the Exemption to protect.” *U.S. Dep’t of Def. v. Fed. Lab. Rels. Auth.*, 510 U.S. 487, 495 (1994) (quoting *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 776 (1989)) (also evaluating an Exemption 6 argument). In the case of Exemption 6, “the statute instructs the court to tilt the balance in favor of disclosure.” *Rural Housing Alliance v. U.S. Dep’t of Agric.*, 498 F.2d 73, 77 (D.C. Cir. 1974) (citation omitted). “FOIA’s exemptions ‘do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.’” *Multi Ag*, 515 F.3d at 1227 (internal citations omitted). “And there is nothing about invoking Exemption 6 that lightens the agency’s burden. In fact, ‘under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act.’” *Id.* (citation omitted).

A. Pay Information

Under civil service regulations, “[p]resent and past annual salary rates (including performance awards or bonuses, incentive awards, merit pay amount, Meritorious or Distinguished Executive Ranks, and allowances and differentials)” are “available to the public.” 5 C.F.R. § 293.311(a)(4). Thus, Ms. Calce has no privacy interest in such information.

Even if she did, there is a substantial public interest in pay and benefits information here because of the questions about Ms. Calce’s political contributions described in the request. According to Federal Elections Commission (“FEC”) data, in August, September, and October of 2020, Ms. Calce made eight political contributions

totaling \$75,304.38 to the Democratic National Committee (“DNC”), the Biden Victory Fund, and Biden for President.¹ While employed by the DNC, records indicate that she made \$50,000 in political contributions on August 1, 2020:

- \$19,400 to the DNC,
- \$25,000 to the Biden Victory Fund, and
- \$5,600 to Biden for President, *Id.*

The records also show that on September 16, 2020, she contributed \$152.19 to the Biden Victory Fund and \$152.19 to the Democratic National Committee. *Id.* And, on October 19, 2020, she contributed \$12,500 to the Biden Victory Fund and \$12,500 to the Democratic National Committee. *Id.*

Although those contributions were made before she began working at DOJ, the public has a substantial interest in learning what pay she earned working for the Government after making such large political contributions.

B. Nondisclosure Agreements and Agreements to Abide by Regulations and Ethical Rules.

Ms. Calce has a minimal privacy interest in any nondisclosure agreements or forms where Ms. Calce agreed to abide by regulations or ethical rules. As a public servant, Ms. Calce owed and does owe the American people a commitment to follow all laws and regulations, including nondisclosure agreements.

Even if she had a privacy interest in those forms or agreements, there is a substantial public interest in disclosure of those records. As described in the request, while serving in high-level positions in DOJ’s Office of Legislative Affairs from May 2021 to January 2023, Ms. Calce was in a position to oversee requests members of Congress and congressional committees sent to DOJ and its components, including the Federal Bureau of Investigation (“FBI”). While she served in that position, Representative Jim Jordan, then Ranking Member of the House Committee on the Judiciary sent a letter dated September 19, 2022, to FBI Director Christopher Wray asking for information concerning FBI whistleblower allegations that “the FBI is deliberately manipulating the way case files related to January 6 investigations are maintained in order to create a false and misleading narrative that domestic violent extremism is increasing around the country.”² Furthermore, Representative Jordan has issued a press release that “President Joe Biden ‘was excited ... to go after parents’ with the FBI after receiving the National School Boards Association letter asking his administration to treat concerned parents as ‘domestic terrorists’ and use the Patriot Act...”³

¹ See https://www.fec.gov/data/receipts/individual-contributions/?contributor_name=christina+calce&contributor_state=DC.

² Rep. Jordan Letter to FBI Director Wray (Sept. 19, 2023) available at <https://judiciary.house.gov/sites/evo-subsites/repUBLICANS-judiciary.house.gov/files/2022-09/2022-09-19-JDJ-to-Wray-re-WFO-DT-investigations.pdf>.

³ Rep. Jordan Press Release, *Jim Jordan: Joe Biden ‘Excited’ About ‘Going After Parents’ with ‘Domestic Terrorism’ Letter, ‘All About Intimidation’* (Jun. 14, 2022) available at <https://judiciary.house.gov/media/press-releases/jim-jordan-joe-biden-excited-about-going-after-parents-with-domestic-terrorism>.

Most recently, Ms. Calce has gone from working for DOJ to working as the Chief Counsel for Oversight - Democratic Staff of the House Judiciary Committee with oversight over DOJ.⁴ In that capacity, she is working on matters involving these same FBI whistleblowers in which she was presumably involved at DOJ.

Because she has switched sides from DOJ to the House Judiciary Committee and has been involved in cases of FBI whistleblowers whose information was reported to DOJ components when she held a high-level position at DOJ's Office of Legislative Affairs, the public has a substantial interest in shedding light on Ms. Calce's possible conflicts of interest and specifically any agreements she made to follow DOJ regulations and keep DOJ information confidential. This public interest is heightened by the fact that while Ms. Calce was serving on the minority staff of the committee, they released a staff report disclosing confidential whistleblower testimony without the committee's authorization.

C. Applications

Furthermore, considering Ms. Calce's political contributions to President Biden's campaign and the DNC, which represented a substantial portion of her reported income at the time, and reports about the Biden Administration possibly misusing the FBI for political purposes, there is a public interest in records that would shed light on how Ms. Calce came to work for DOJ. Specifically, the public has an interest in any applications she submitted and any records showing how her application was processed and by whom.

Finally, under 5 U.S.C. § 552(a)(4)(B), "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

Thus, if there are bits and pieces of information where privacy interests do outweigh the public interest in disclosure, such information can be redacted.

Empower Oversight respectfully requests that DOJ reverse the categorical denial of the referenced records by JMD.

Cordially,

/Tristan Leavitt/
Tristan Leavitt
Empower Oversight
Founder and Chairman

⁴ See <https://www.linkedin.com/in/christina-calce-0202624a/>