

Miccosukee Tribe of Indians of Florida

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December 28, 2012

Sent by FedEx (Priority Overnight)
Office of Information Policy
United States Department of Justice
1425 New York Ave., N.W.
Suite 11050
Washington, D.C. 20530-0001

Re: FREEDOM OF INFORMATION APPEAL FOIA No. F12-
00092

Dear Office of Information Policy:

This appeal relates to the denial of a request filed by the Miccosukee Tribe of Indians of Florida (hereinafter, "the Miccosukee Tribe") pursuant to the Freedom of Information Act (5 U.S.C. § 552, *et. seq.*). Attached find the FOIA request letters, identified as **Exhibit A**.

The Miccosukee Tribe's initial FOIA request for agency records relates to events surrounding official activities performed by one of the Miccosukee Tribe's former attorneys, Mr. Guy Lewis (hereinafter, "Mr. Lewis"), who was terminated and/or forced to resigned from his position as Director of the Executive Office for United States Attorneys (hereinafter, "the EOUSA").

From 2002 through 2004, Mr. Lewis served as the Executive Director of the EOUSA. On or about 2004, after an investigation into allegations of fraud, travel malfeasance and/or other professional misconduct, Mr. Lewis was relieved of his duties as the EOUSA Executive Director. Mr. Lewis was terminated and/or forced to resign from said position. The request refers to the following information:

1. Agency records which detail any investigation by the United States' Department of Justice (hereinafter, "the DOJ"), and/or any other

internal inquiry of Mr. Lewis for any alleged wrongdoing in his capacity as the Director of EOUSA;

2. Agency records that detail the findings or conclusions of such an investigation and/or any other internal inquiry in regards to Mr. Lewis;
3. Agency records that detail any actual and/or any recommended disciplinary actions related to a DOJ investigation, and/or any other internal inquiry of Mr. Lewis for alleged wrongdoing in his capacity as the Director of the EOUSA.
4. Agency records of any disciplinary actions, reprimands, or related actions taken by the DOJ against Mr. Lewis during his tenure at the EOUSA.

As per the November 2, 2012 letter from the Office of Professional Responsibility, the Miccosukee Tribe's request was denied pursuant to Exemptions 6 and 7(C) of FOIA, 5 U.S.C. §§ 552(b)(6) and (b)(7)(C), respectively. The November 2, 2012 letter is attached as **Exhibit B**. The aforementioned letter states that lacking of individual's consent, an official acknowledgment of an investigation, or an overriding public interest, the release of the information requested would constitute a clearly and unwarranted invasion of personal privacy pursuant to 5 U.S.C. §552(b)(6) and could reasonably be expected to constitute an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § (b)(7)(C).

Neither Exemptions 6 nor 7(C) of FOIA applies to the records requested relating to Mr. Lewis because the records requested are not an unwarranted invasion of Mr. Lewis' personal privacy. Furthermore, even if a privacy interest is found the public interest in the release of these records overrides any privacy interest.

I. Exemption 6 of FOIA

Exemption 6 of FOIA, states that this section 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." 5 U.S.C. §§ 552(b)(6).

In order to determine whether Exemption 6 protects against disclosure, an agency should engage in two lines of inquiry, which include the following: first, determine whether the information at issue is contained in a personnel, medical, or "similar" file covered by Exemption 6; and, if so, determine whether disclosure "would constitute a clearly unwarranted invasion of personal privacy" by balancing the privacy interest that would be compromised by disclosure against any public interest in the requested

information. *See Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1228 (D.C. Cir. 2008); *News-Press v. DHS*, 489 F.3d 1173, 1196-97 (11th Cir. 2007).

Exemption 6 does not apply to the records requested because they are not necessarily all located within Mr. Lewis' personnel file, and even assuming they were, Mr. Lewis had no expectation of privacy in the actions leading to his termination. "[I]f no significant privacy interest is implicated . . . FOIA demands disclosure." *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1229 (D.C. Cir. 2008).

The Miccosukee Tribe does not seek any medical records or other such documents that would have a reasonable expectation of privacy, which are the type of records Exemption 6 seeks to protect. The records requested are specific and do not ask for any personal information of Mr. Lewis to which he would have a reasonable expectation of privacy.

The Miccosukee Tribe's request for agency records relates to events surrounding official activities performed by Mr. Lewis in his capacity as the Director of the EOUSA. There can be no expectation of personal privacy regarding Mr. Lewis' official activities. Shortly after his termination and/or forced resignation from the EOUSA, Mr. Lewis commenced his representation of the Miccosukee Tribe and its former Chairman, Billy Cypress, in litigation against the DOJ. Neither Mr. Lewis nor the DOJ ever informed the Miccosukee Tribe about Mr. Lewis' misconduct while employed by the DOJ. Had the Miccosukee Tribe been aware of Mr. Lewis' past misconduct with the DOJ, the Miccosukee Tribe would not have hired him.

A review of the legal advice and actions by Mr. Lewis during his representation of the clearly reveals a myriad of conflicts of interest, unethical actions, and fraudulent activities against the Miccosukee Tribe that are very similar to the conduct that led to Mr. Lewis' termination and/or forced resignation from the DOJ. The Miccosukee Tribe has suffered irreparable harm as a result of Mr. Lewis' wrongful conduct.

The Miccosukee Tribe has taken corrective measures against Mr. Lewis' unethical and wrongful conduct. A copy of the Miccosukee Tribe's complaints filed against Mr. Lewis, and others, in the State and Federal courts of Miami, Florida are attached as **Exhibit C**.

The information requested by the Miccosukee Tribe is of public interest because it is being requested by a Federally-recognized Indian tribe in connection to its current investigation of matters that significantly affect tribal governmental interests. *See Associated Press v. DOD*, 554 F.3d 274, 291 (2d Cir. 2009) ("Only where a privacy interest is implicated does the public interest for which the information will serve become relevant and

require a balancing of the competing interests." (quoting *FLRA v. VA*, 958 F.2d 503, 509 (2d Cir. 1992))). Additionally and in furtherance of disclosure, the United States has a historical, legal and moral obligation to protect Indian tribes under the Trust Responsibility Doctrine.

Pursuant to President Barack Obama's Memorandum on Regular and Meaningful Consultation and Collaboration with Native American tribes, dated November 5, 2009, and the federal government's trust responsibility with Native American tribes, the Miccosukee Tribe seeks cooperation in obtaining a copy of the records requests and information regarding Mr. Lewis's termination and/or forced resignation from employment with the DOJ as a result of his official misconduct.

It is in the public interest to release the requested information which is available and which relates to Mr. Lewis' alleged misconduct while employed as a government official in order to prevent any further injustice. While under oath at a recent deposition, Mr. Lewis stated that he was not dismissed from his previous employment at the EOUSA for any wrongdoing. Instead, Mr. Lewis asserted that he had left the EOUSA "for political reasons." A copy of the transcript of Mr. Lewis' deposition is attached as **Exhibit D**.

The Miccosukee Tribe and the public are entitled to know the truth. As such, this request for documents should be granted. The United States owes a legal duty under its Federal Trust Responsibility to the Miccosukee Tribe, as well as other Native American Tribes to ensure that they do not fall victim to the predatory practices of attorneys such as Mr. Lewis by knowing the truth through production of the requested records.

Furthermore, Mr. Lewis continues as a practicing attorney in the State of Florida and continues to represent several clients that would benefit from the release of any relevant information concerning any misconduct related to Mr. Lewis. As a result, the public will benefit from the release of the information being requested. The release of the requested information will allow members of the public to make informed decisions regarding the hiring of Mr. Lewis as counsel, while taking into account his past professional conduct. This request seeks to prevent others from becoming victims of the professional misconduct perpetrated by Mr. Lewis on the Miccosukee Tribe and the DOJ.

II. Exemption 7(C) of FOIA

Exemption 7(C) of FOIA states that this section does not apply to matters that are "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information...(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. §§ 552(b)(7)(C).

The Miccosukee Tribe only seeks information as to the agency investigations of Mr. Lewis that were conducted by the DOJ. Although Mr. Lewis is currently a private citizen, his conduct while acting in his capacity as the Director of EOUSA, and the records related to his alleged wrongdoing in this capacity should not be protected by any exemption to FOIA.

In the seminal case of *Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984), the D.C. Circuit Court held "that the level of responsibility held by a federal employee" and the type of wrongdoing committed by that employee "are appropriate considerations" in this privacy analysis. *Id.* at 92-94 (protecting identities of lower-level employees, who were found only to be negligent, but ordering disclosure of identity of higher-level official who knowingly participated in cover-up). Mr. Lewis was not a lower-level employee nor was the allegations of wrongdoing as simple as negligence. In fact, when a plaintiff has demonstrated significant misconduct by a government official, particularly when that official is a higher-level employee, courts have found that disclosure would serve a public interest and have ordered release of the names. *See, e.g., Perlman v. DOJ*, 312 F.3d 100, 107-09 (2d Cir. 2002) (ordering release of extensive details concerning Inspector General's investigation of former Immigration and Naturalization Service's general counsel who was implicated in wrongdoing, and enunciating a five-factor test to balance government employee's privacy interest against public interest in disclosure, including the employee's rank, degree of wrongdoing and strength of evidence, availability of information, whether information sheds light on government activity, and whether information is related to job function or is personal in nature).

Similar to Exemption 6, "[t]he first question to ask in determining whether Exemption 7(C) applies is whether there is any privacy interest in the information sought." *See, e.g., Associated Press v. DOD*, 554 F.3d 274, 284 (2d Cir. 2009); *Albuquerque Publ'g Co. v. DOJ*, 726 F. Supp. 851, 855 (D.D.C. 1989) ("Our preliminary inquiry is whether a personal privacy interest is involved."); *see also Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. DOJ*, 503 F. Supp. 2d 373, 383 (D.D.C. 2007) (cautioning that even though more protection is afforded information compiled for law enforcement purposes, the agency must still prove that it is reasonably expected that disclosure would result in an unwarranted invasion of privacy); FOIA Update, Vol. X, No. 2, at 7 (advising that there first must be a viable privacy interest of an identifiable, living person in the requested information for any further consideration of privacy-exemption protection to be appropriate). As previously argued above, Mr. Lewis has no privacy interest in the records sought because the information requested relates to his official duties and in his official capacity as a federal government employee.

Under the traditional Exemption 7(C) analysis, once a privacy interest has been identified and its magnitude has been assessed, it is balanced against the magnitude of any recognized public interest that would be served by disclosure. *See Schiffer v. FBI*, 78 F.3d 1405, 1410 (9th Cir. 1996) (explaining that once an agency shows that privacy interest exists, a court must balance it against the public's interest in disclosure). It is in the interest of the United States, the Miccosukee Tribe and the public to be informed of the misconduct by Mr. Lewis as Director of the EOUSA so as to assist in determining whether that same type of conduct played a major role and was directly related to his wrongful course of conduct and faulty legal advice during his subsequent representation of the Miccosukee Tribe in litigation against the DOJ in matters that are still pending.

III. Three Categories of Exclusions

The letter of November 2, 2012, also states as a reason for denial that “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). The three exclusions are as follows: (1) protect against disclosure of a pending criminal law enforcement investigation where there is reason to believe that the target is unaware of the investigation and disclosure of its existence could reasonably be expected to interfere with enforcement proceedings; (2) applies only to records maintained by criminal law enforcement agencies, protects against disclosure of unacknowledged, confidential informants; and (3) applies only to the FBI and protects against disclosure of foreign intelligence or counterintelligence, or international terrorism records, when the existence of those records is classified. None of the three discrete categories apply to the records requested because there is no pending criminal law enforcement investigation against Mr. Lewis regarding his misconduct while he was the Director of the EOUSA, the records requested are of a civil administrative nature and are not maintained by criminal law enforcement agencies and they do not include unacknowledged, confidential informants, or involve the disclosure of foreign intelligence or counterintelligence, or international terrorism record whose existence is classified.

Conclusion

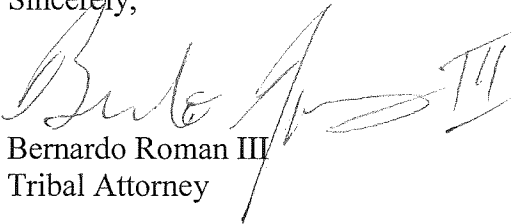
The Miccosukee Tribe respectfully requests reconsideration of its FOIA request for the reasons stated. The information requested herein is relevant to a current governmental purpose involving the Miccosukee Tribe, a fellow government with a historical and legally-recognized government-to-government relationship with the United States. The information requested herein is also relevant to current legal and governmental issues involving the United States and the Miccosukee Tribe. It is in the public interest for the public to have access to this kind of information in order to prevent

further harm to the general public from Mr. Lewis' unprofessional and unscrupulous actions and pattern of conduct as an attorney. Furthermore, the information requested by the Miccosukee Tribe is not properly protected by any personal privacy privilege, and would nevertheless be outweighed by the public interest and the importance of its disclosure. As such, the information requested by the Miccosukee Tribe should be disclosed for the protection of the Miccosukee Tribe, other Native American tribes, the United States, and the general public.

Due to the special circumstances in this particular request involving a Native American tribe, the Miccosukee Tribe respectfully requests a Vaughn Index of records found and that the agency does not wish to release. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir, 1973), *cert. denied*, 415 U.S. 977 (1974). A Vaughn Index must (1) identify each document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure would damage the interests protected by the claimed exemption." *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995).

If you have any questions, do not hesitate to call me directly at 305-894-5214. Thank you for your cooperation in this matter.

Sincerely,



Bernardo Roman III
Tribal Attorney

Enclosures

cc: Miccosukee Business Council