

# Exhibit 1



U.S. Department of Justice

Office of Professional Responsibility

950 Pennsylvania Avenue, N.W., Suite 3266  
Washington, D.C. 20530  
(202) 514-3365

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January 9, 2015

J. Mark White  
Attorney  
White Arnold & Dowd  
2025 Third Avenue North, Suite 500  
Birmingham, AL 35203

Via e-mail: [THardee@whitearnolddowd.com](mailto:THardee@whitearnolddowd.com)

Re: OPR FOIA No. F15-00022

Dear Mr. Hubbard:

This is in response to your January 8, 2015 Freedom of Information Act (FOIA) request to the Office of Professional Responsibility (OPR) seeking information regarding a former Department attorney. OPR received your request on January 8, 2015. It has been assigned request number F15-00022. Please refer to that number in any correspondence pertaining to this matter.

Pursuant to Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. §§ 552(b)(6) and (b)(7)(C), I am refusing to confirm or deny the existence of records responsive to your request. Lacking an individual's consent, an official acknowledgment of an investigation, or an overriding public interest, even to acknowledge the existence of investigatory records pertaining to an individual would constitute a clearly 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. § 552(b)(7)(C). For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you are not satisfied with this response, you may appeal in writing within sixty days of the date of this letter to the Director, Office of Information Policy. Your letter and envelope should be marked "FREEDOM OF INFORMATION APPEAL" and addressed to:

Office of Information Policy  
United States Department of Justice  
1425 New York Ave., N.W.

Suite 11050  
Washington, D.C. 20530-0001

You may also appeal through OIP's eFOIA portal at <http://www.justice.gov/oip/oip/efoia-portal.html>.

If you are dissatisfied with the result of any appeal you make, judicial review may thereafter be available to you in the United States district court for the judicial district in which you reside, or in which you have your principal place of business, or in the District of Columbia.

Sincerely,



Date: 2015.01.09  
12:55:24 -05'00'

Lyn Hardy  
Special Counsel  
for Freedom of Information and Privacy Acts

## Exhibit 2

Director  
Office of Information Policy  
United States Department of Justice  
1425 New York Avenue, N.W.  
Suite 11050  
Washington, D.C. 20530-0001

**RE: Freedom of Information Act Appeal  
OPR FOIA No. F15-00022**

Dear Director:

This letter constitutes an appeal of the denial of requests made in the above-referenced matter pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (the "Requests").

**I. BACKGROUND**

By way of background, the Requests generally seek records pertaining to the conduct of a former employee of the Department of Justice while performing within the line and scope of his duties as an Assistant United States Attorney in the Northern District under United States Attorneys Alice Martin and Joyce White Vance. *See* Requests, at 1. The conduct at issue relates to complaints that this former Assistant United States Attorney, Matt Hart, engaged in improper prosecutorial conduct during the course of the grand jury proceedings. *Id.* The conduct at issue is the subject of a publicly available decision, *USA v. Roger W. Taylor*, 7:09-cr-0048-SLB-JEO, Doc. 199, Report and Recommendation, p. 41, in which the court found that Mr. Hart's conduct was improper. *Id.*

On January 8, 2015, the undersigned properly and with justification submitted the following requests pursuant to the provisions of FOIA:

**Documents Requested**

The undersigned requests records of the Department of Justice including copies of the following:

1. Documents reflecting any formal or informal complaint ("Complaint") made to the Office of Personal Responsibility, the U.S. Attorney's Office for the Northern District of Alabama, and/or any other division of the Department of Justice regarding the prosecutorial conduct of Miles Matthew Hart;
2. Any formal or informal findings related to any Complaint;
3. Any warnings, reprimands, and/or other disciplinary actions taken against Miles Matthew Hart during his tenure with the Department of Justice;

4. Any requests for information from any governmental entity outside of the Department of Justice regarding the prosecutorial conduct of Miles Matthew Hart;

5. Any requests for information from any non-governmental entity outside of the Department of Justice regarding the prosecutorial conduct Miles Matthew Hart;

*Id.* at 1 & 2.

The next day, on January 9, 2015, your Department prepared a letter summarily denying the Requests, citing Exemptions 6 and 7(c) of FOIA. For the reasons stated below, these Exemptions do not provide adequate bases for the denial or our Requests.

## **II. THE DOJ'S STATED BASES FOR WITHHOLDING ARE WITHOUT MERIT.**

### **A. The DOJ Failed to Uphold the President's Commitment to Transparency**

In summarily denying the Requests, the Department failed to honor President Obama's commitment to transparency. It is of particular concern that the Department of Justice grant, fulfill, and process this FOIA request as expeditiously as possible.

President Obama has made transparency and openness important goals of his administration.

On his first full day in office, President Barack Obama signed an executive order and two presidential memoranda heralding what he called a "new era of openness." Announcing a Presidential Memorandum on the Freedom of Information Act to reestablish a presumption of disclosure for information requested under FOIA, President Obama said that "every agency and department should know that this administration stands on the side not of those who seek to withhold information, but those who seek to make it known."<sup>1</sup>

In this regard, President has quoted and agreed with Supreme Court Justice Louis Brandeis' statement that "sunlight is said to be the best of disinfectants."<sup>2</sup>

Attorney General Eric Holder has made clear the obligation of federal agencies to fully implement a more transparent government. "Information should not automatically be withheld just because an exemption technically or legally might apply. Indeed, if agency personnel find

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<sup>1</sup> The National Security Archive, *President Obama Embraces Openness On Day One, As Urged By The National Security Archive And A Coalition Of More Than 60 Organizations*, Jan. 21, 2009 (<http://www2.gwu.edu/~nsarchiv/news/20090121/>).

<sup>2</sup> *Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act* ([http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct))

themselves struggling to fit something into an exemption, they should be aware of the President's directive that "[i]n the face of doubt, openness prevails."<sup>3</sup>

## B. ARGUMENT

The adverse determination asserts that the withheld records are exempt from release under FOIA's Exemptions 6 and 7(c). For the reasons discussed below, this conclusion is in error. The responsive records should be released in full, or at a minimum in redacted form.

As an initial matter, with regard to the Exemptions, the burden of proof is on the agency, which must justify its decision to withhold any information. *See* 5 U.S.C. § 552(a)(4)(B); *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1037 (7th Cir. 1998) ("The government bears the burden of justifying its decision to withhold the requested information pursuant to a FOIA exemption."); *Church of Scientology Int'l v. United States Dep't of Justice*, 30 F.3d 224, 228 (1st Cir. 1994) (same). The DOJ has not met and cannot meet that burden here.

There are at least three reasons why the DOJ's adverse determination of the Requests is unlawful: (1) the DOJ is withholding public records maintained by the DOJ in contravention of the FOIA; (2) the DOJ failed to segregate records in its possession for documents responsive to the FOIA Request; and (3) the cited exemptions do not form a basis for withholding the requested documents for any number of the reasons that follow.

- i. The DOJ has an obligation to produce the requested documents.

The documents requested are public records maintained by the Commission that are not subject to withholding based on any recognized FOIA exception. Accordingly, the Commission is required to produce all documents that are responsive to the FOIA Request.

Under FOIA, federal agencies are required to release agency records upon receiving a request that reasonably describes such records. 5 U.S.C. § 552(a)(3)(A). For requested materials to qualify as agency records, two requirements must be satisfied. *United States DOJ v. Tax Analysts*, 492 U.S. 136, 144, 109 S. Ct. 2841 (1989). "First, an agency must either create or obtain the requested materials as a prerequisite to its becoming an agency record within the meaning of the Freedom of Information Act (FOIA)." *Id.* "Second, the agency must be in control of the requested materials at the time the FOIA request is made." *Id.*

If requested materials qualify as agency records, they must be disclosed unless they are withheld pursuant to one of the nine enumerated exceptions listed in 5 U.S.C. § 552(b). *See United States DOJ v. Julian*, 486 U.S. 1, 8, 108 S. Ct. 1606, 1611 (1988). If an agency fails to produce documents that do not fit into one of the nine enumerated exemptions, such documents

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<sup>3</sup> " OIP Guidance, *President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines, Creating a "New Era of Open Government, U.S. D.O.J., Office of Information Policy*, April 17, 2009 (<http://www.justice.gov/oip/blog/foia-post-2009-creating-new-era-open-government>).

"are 'improperly' withheld." *United States DOJ v. Tax Analysts*, 492 U.S. 129, 144, 109 S. Ct. 2841 (1989).

The FOIA Request is comprised of narrowly tailored requests that seek records and documents that easily qualify as agency records. First, the requests seek documents requested and obtained by the DOJ regarding complaints relating to the conduct of a prosecutor during proceedings that have been fully and finally resolved and is no longer pending. Second, the records and documents are in the DOJ's control and were in the DOJ's control at the time the request was made. Moreover, the requested documents satisfy the DOJ's definition of public records because they are (or should be) documents that, in some cases, are part of the formal record of former actions and/or investigations. Furthermore, the requested documents are not exempt from disclosure under any of the nine enumerated FOIA exceptions. *See* 5 U.S.C. § 552(b).

As discussed, the documents requested by FOIA Request qualify as public documents. As such, the DOJ is required to produce documents responsive to that request. The DOJ's failure to produce such documents is unlawful and in contravention of the FOIA.

## **II. Exemption 6 is not a proper basis to deny the FOIA Requests and ignores the presumption in strong favor of disclosure.**

In the Department of Justice Guide to the Freedom of Information Act (the "DOJ Guide"), the Department reminded agencies that it is "important" when engaging in an Exemption 6 analysis "to remember that the Court of Appeals for the District of Columbia Circuit has declared that "under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act." DOJ Guide, at 417 (quoting *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1227 (D.C. Cir. 2008) (quoting *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002)); *see also Consumers' Checkbook Ctr. for the Study of Servs. v. HHS*, 554 F.3d 1046, 1057 (D.C. Cir. 2009) (stating that FOIA's "presumption favoring disclosure . . . is at its zenith under Exemption 6"); *Lawyers' Comm. for Civil Rights of S.F. Bay Area v. Dep't of the Treasury*, No. 07-2590, 2008 WL 4482855, at \*20 (N.D. Cal. Sept. 30, 2008) ("The burden remains on the agency to justify any withholdings under Exemption 6 since the presumption in favor of disclosure under this exemption is as strong as that with other exemptions."))

To warrant protection, two threshold requirements must be met: (1) the records must be contained in a personnel and medial file or similar file, and (2) there must be a "real rather than speculative", "substantial, as opposed to de minimis", protectable privacy interest that would be threatened by disclosure. *Multi Ag*, 515 F.3d at 1229; *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 391 (D.C. Cir. 1987)(stating "[w]ithholding information to prevent speculative harm is contrary to FOIA's pro-disclosure policy); *Caution v. DOJ*, No. 05-0567, 2006 WL 581250, at \*3 (D.D.C. Mar. 9, 2006) ("To justify its exemption 6 withholdings, the defendant must show that the threat to employees' privacy is real rather than speculative.")

The DOJ cannot meet either of these threshold requirements. As to the first, the undersigned requested information that goes to Mr. Hart's compliance with regulations, rules of



conduct and the law. To the extent he failed to comply, he was acting outside of the line and scope of his employment. Information pertaining to an employee's compliance with regulations outside of the scope of their employment does not go to personal information. *Cf. Greenpeace USA, Inc. v. EPA*, 735 F. Supp. 13, 14 (D.D.C. 1990). Moreover, to the extent the record reflects a communication from someone outside of the DOJ complaining or describing Mr. Hart's conduct, this correspondence does not become personal solely because it identifies Mr. Hart. *Aguirre v. SEC*, 551 F. Supp. 2d 33, 54 (D.D.C. 2008). Finally, records such as the ones sought are routinely available by government agencies. *See* OPM Regulation, 5 C.F.R. 293.311 (2009).

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The DOJ has not and cannot identify a "real rather than speculative" or "substantial as opposed to de minimis" protectable privacy interest. First, the disclosure of unfavorable personnel records does not serve as a basis to avoid compliance with FOIA. *Fortson v. Harvey*, 407 F. Supp. 2d 13, 17 (D.D.C. 2005)(supposed harm of disclosing unfavorable personnel evaluations was "pure speculation"). Courts have dealt with the availability of records similar to those sought here and have uniformly found in favor of disclosure. *See, e.g.*, DOJ Guide, at 431 (citing, among others, *Habeas Corpus Resource Ctr. v. DOJ*, No. 08-2649, 2008 WL 5000224, at \*4 (N.D. Cal. Nov. 21, 2008) (ordering release of email chains regarding the decision to hire a DOJ attorney because "[p]laintiff's interest - and the public's interest - in determining whether [attorney's] hiring was improper is sufficient to outweigh any minimal privacy interest [the attorney] may have in keeping these opinions from the public")); *Simble v. U.S. Dep't of Commerce*, No 1:92-225 slip. op. at 11 (S.D. Ga. September 22, 1994) (requiring disclosure of successful job applicant's "undergraduate grades, private sector performance awards; foreign language abilities, and his answers to questions concerning prior firings, etc., convictions, delinquencies on federal debt and pending charges against him)). Further, given the types of the documents relating to employment that the DOJ routinely seeks from adverse parties in civil and criminal cases, and uses in criminal and civil trials, the DOJ can hardly be heard to complain when the very same type of material is sought regarding one of their own.

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4 5 C.F.R. § 293.311, Availability of information, provides in pertinent part:

(a) The following information from both the OPF and employee performance file system folders, their automated equivalent records, and from other personnel record files that constitute an agency record within the meaning of the FOIA and which are under the control of the Office, about most present and former Federal employees, is available to the public:

(1) Name;

(2) Present and past position titles and occupational series;

(3) Present and past grades;

(4) Present and past annual salary rates (including performance awards or bonuses, incentive awards, merit pay amount, Meritorious or Distinguished Executive Ranks, and allowances and differentials);

(5) Present and past duty stations (includes room numbers, shop designations, or other identifying information regarding buildings or places of employment); and

(6) Position descriptions, identification of job elements, and those performance standards (but not actual performance appraisals) that the release of which would not interfere with law enforcement programs or severely inhibit agency effectiveness. Performance elements and standards (or work expectations) may be withheld when they are so intertwined with performance appraisals that their disclosure would reveal an individual's performance appraisal.

The DOJ also cannot deny the existence of a substantial public interest in the records sought. A respected court of law has already found that Mr. Hart engaged in improper conduct while acting as a United States Attorney. These are not mere allegations. This is the finding of a court. As recognized in DOJ Guide, a “central purpose of the FOIA is to ‘check against corruption and to hold governors accountable to the governed.’” DOJ Guide, at 460 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). In fact, the DOJ recognizes that “disclosure of information that would inform the public of violations of public trust serves a strong public interest and is accorded great weight in the balancing process.” *Id.* 460-461. More to the point, “[a]s a general rule, demonstrated wrongdoing of a serious and intentional nature by a high-level government official is of sufficient public interest to outweigh almost any privacy interest of that official.” *Id.* at 461. Moreover, aside from the actual misconduct at issue in the court finding and any alleged misconduct currently, Mr. Hart’s qualifications to serve in his current capacity are certainly of public interest.

For the reasons stated above, Exemption 6 clearly cannot be relied upon to avoid disclosure of the requested records.

### III. Exemption 7 does not apply.

The Department of Justice Guide to the Freedom of Information Act (the “DOJ Guide”) provides in pertinent part: “Exemption 7 of the Freedom of Information Act protects from disclosure “records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information: ... (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.” DOJ Guide, at 491.

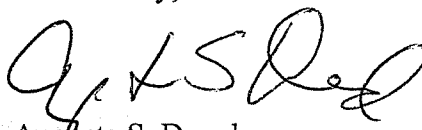
The adverse determination fails to adequately demonstrate that the withheld records are protected by Exemption 7(c). First, the documents requested are not records compiled for law enforcement purposes. Instead, the records sought are compiled regarding the conduct of a federal employee. That this employee is involved, on some level, in law enforcement, does not make every record associated with him a record that is “compiled for law enforcement purposes.” To the contrary, by suggesting that records relating to Mr. Hart’s conduct were compiled for law enforcement purposes, that would indicate that Mr. Hart was the subject or target of an investigation or focus of a civil action, and that the DOJ sought or believed that it may pursue Mr. Hart in a future proceeding. To meet the standard under such circumstances, the DOJ must evidence that the documents were compiled in an effort to focus on “specific and potentially unlawful activity by particularly employees of a civil or criminal nature” and could subject Mr. Hart to criminal or civil penalties.” DOJ Guide, at 507 and 507 fn 40. If this is correct, and these documents were compiled for law enforcement purposes and focused on specific potentially unlawful activity by Mr. Hart of a civil or criminal nature, please let the undersigned know that this is your contention. Absent such a specific contention, it is inexplicable how the records sought could possibly fall within Exemption 7. Moreover, please identify the types of files at issue because, as the Department knows, not all types of records fall within Exemption 7 when an employee has a mixed-function, as Mr. Hart arguably did. For example, an investigation into an employee’s violation of their duties for purposes of disciplining

that employee does not fall within Exemption 7. *See, e.g., Wood v. FBI*, 312 F. Supp. 2d 328, 345 (D. Conn. 2004).

Further, Exemption 7 does not protect records simply because they are "compiled for law enforcement purposes." The records must also satisfy one of the six subparts of the Exemption (A through F). The adverse determination fails to satisfy the DOJ's obligation to show specifically how any of these subparts are satisfied. In this case, the DOJ alleges only that the records fall within subsection (c) of Exemption 7. For all the reasons stated above regarding Exemption 6, the disclosure of these documents are not an unwarranted invasion of personal privacy.

For all of these reasons, Speaker Hubbard and his counsel request that you will grant, fulfill, and process the FOIA request as expeditiously as possible.

Yours truly,



Augusta S. Dowd

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