Council of the
INSPECTORS GENERAL
on INTEGRITY and EFFICIENCY

November 19, 2021

Via Email

Jason Foster
Founder & President
Empower Oversight Whistleblowers & Research
jf@empowr.us

Subject: CIGIE Freedom of Information Act Requests 6330-2021-45, 6330-2021-65, 6330-2021-66, 6330-2021-67, 6330-2021-69, and 6330-2021-71

Dear Mr. Foster:

This letter responds to your administrative appeal of the above-referenced Freedom of Information Act (FOIA) requests. For the reasons discussed below, the original determinations of the Council of the Inspector General on Integrity and Efficiency (CIGIE) in these matters are affirmed in part, reversed in part, and remanded to the CIGIE FOIA Office for further processing in accordance with this letter.

Background and Summary

While the specific requests in the above-referenced matters vary, they all request documents associated with an investigation you assert was conducted by the CIGIE Integrity Committee (IC) into one or more officials at the Federal Housing and Finance Administration Office of Inspector General (FHFA-OIG). In all of the above-referenced matters, CIGIE issued Glomar responses, based on FOIA Exemptions 6 and 7(C), thereby denying your requests.[1]

You argue that the denials were in error. Specifically, CIGIE understands your contentions to be as follows: (1) IC records do not constitute law enforcement records, making Exemption 7(C) unavailable; (2) an "official acknowledgment" of the IC investigation precludes CIGIE's Glomar responses; (3) any privacy interest held by investigative targets does not withstand the public interest in "gaining an understanding of the reasons that their misconduct was enabled to endure for over five years . . ."; (4) that at least one of the subjects of the investigation has publicly acknowledged the investigation through her attorney; and (5) CIGIE failed to adequately perform the required balancing tests in applying Exemptions 7(C) and 6.

As discussed below, upon review of your appeal and additional information regarding public acknowledgments by one subject of their involvement in the investigation in question, through her attorney, CIGIE has determined that a Glomar response is, with respect to that subject, no longer appropriate. With that said, CIGIE correctly determined in its initial response to your requests that records maintained by the IC are law enforcement records. Therefore, CIGIE is remanding these matters to the CIGIE FOIA Office for further processing in accordance with this letter.

[1] A Glomar response reflects an agency's refusal to confirm or deny the existence of responsive records and "takes its name from the CIA's refusal to confirm or deny the existence of records about the Hughes Glomar Explorer, a ship used in a classified CIA project to raise a sunken Soviet submarine from the floor of the Pacific Ocean to recover the missiles, codes, and communications equipment onboard for analysis by United States military and intelligence experts." People for the Ethical Treatment of Animals v. NIH, 745 F.3d 535, 540 (D.C. Cir. 2014) (internal quotations omitted).

Analysis and Decision

In denying the above-referenced requests, the CIGIE FOIA Office determined that your requests sought records pertaining to a non-public law enforcement matter involving one or more particular individuals, and accordingly declined to confirm or deny the existence of responsive records pursuant to FOIA Exemptions 6 and 7(C). Before turning to the question of whether the requested records constitute law enforcement records, the question will be addressed of whether public acknowledgments by one subject or other publicity impacts the appropriateness of the Glomar responses.

Public Acknowledgments by Subject and Other Publicity

To date, CIGIE has not publicly acknowledged the IC investigation you have described in the above-referenced FOIA requests. Nonetheless, after analyzing relevant FOIA and Privacy Act legal principles, CIGIE has determined that it would not be appropriate to maintain a Glomar response with regard to former FHFA-OIG Inspector General (IG), Laura Wertheimer. This is chiefly due to the numerous public statements made by Emmet Flood, Ms. Wertheimer's attorney, to the press regarding the investigation:

- "Emmet Flood, . . . who is now representing Wertheimer, called her a 'superlative IG' in an email to POLITICO. 'Far from supporting the notion that there was a culture of intimidation or retaliation against witnesses, the investigative report did not find that even a single witness had declined to cooperate out of intimidation or fear,' he said. 'And it expressly says that 'it did not find evidence of actual retaliation.'" Politico, April 28, 2021 (Grassley, Johnson call for removal of housing regulator watchdog - POLITICO).

- "Emmet Flood, an attorney at Williams & Connolly LLP who is representing Wertheimer, said Grassley and Johnson were misrepresenting the report. 'In more than 25 years in Washington, I have never once commented for the record about any of my matters,' Flood wrote. 'I'm making an exception for this case because it's a late hit after the whistle: Far from supporting the notion that there was a culture of intimidation or retaliation against witnesses, the investigative report did not find that even a single witness had declined to cooperate out of intimidation or fear. And it expressly says that 'it did not find evidence of actual retaliation.'' Flood stated. 'Inspector General Wertheimer has been a superlative IG and members of her oversight committee have commended her for her frankness, courage and service. She and her staff were awarded the 2019 CIGIE Government Ethics Award for Excellence. Anyone with an interest in her performance as IG can consult the FHFA-OIG website, where the record of her team's accomplishments is public, extensive and incontestable.' The Hill, April 28, 2021 (Report finds federal housing agency official 'abused her authority' | TheHill)

- "Wertheimer's attorney, Emmet Flood, disputed that account when contacted for comment by The Hill. 'This accusation fits the prior pattern of false leaks from Congressional staff, and it too is untrue. Not only did Inspector General Wertheimer not call anyone by this name, the notion that she did is directly contradicted by the testimony of a witness given on the record in the underlying investigation. A pathetically false allegation,' Flood . . . said in a statement." The Hill, June 28, 2021 (Biden under increasing pressure to fire housing inspector general | TheHill).

- "Flood told The Post on Tuesday that Wertheimer played no role in deciding what materials to provide to investigators and that she did not obstruct or resist the fact-finding mission. Flood said it was difficult to respond to specific complaints about intimidation since the report did not include witness names. 'There was no evidence of retaliation against witnesses," Flood said. "There was no evidence offered of intimidation.'" The Washington Post, June 30, 2021 (Inspector general overseeing FHFA, Laura Wertheimer, resigns following CIGIE report - The Washington Post).

By and through these statements made on behalf of Ms. Wertheimer through her attorney, she publicly associated herself with the IC's investigation. As a result, a Glomar response, as it relates to Ms. Wertheimer, is not appropriate. See, e.g., Citizens for Responsibility & Ethics in Washington v. DOJ, 746 F.3d 1082, 1091-92 (D.C. Cir. 2014) (holding that subject's public statements that he had been, but was no longer, under investigation, made Glomar response inappropriate).

Accordingly, CIGIE reverses its initial Glomar decision regarding the request for documents insofar as they relate to Ms. Wertheimer. The requests for documents related to Ms. Wertheimer are remanded to the CIGIE FOIA Office for further processing in accordance with applicable FOIA and Privacy Act legal principles.

Regarding the requests for records related to other individuals you assert were subjects in the investigation, you have pointed to no similar public acknowledgment by such individuals. Moreover, you have not pointed to any prior official public acknowledgment by CIGIE of the identity of any of the subjects. As a result, CIGIE cannot make a similar finding with regard to the records requests related to these individuals. While you have pointed to documents made publicly available by persons other than CIGIE, CIGIE has not publicly acknowledged these documents and does not now. Any official acknowledgment by CIGIE regarding a document purporting to name subjects could in itself constitute a disclosure of information that is not currently publicly available (i.e., CIGIE's official acknowledgment of subjects' identities). However, the issue of the appropriateness of the Glomar responses for the other individuals need not be resolved today. As a significant portion of your requests is being remanded for further processing, and because the requests are inherently intertwined, this issue is also remanded to the CIGIE FOIA Office for further consideration in light of the partial reversal. The CIGIE FOIA Office is to reconsider your requests with regard to the other individuals you have named, factoring in the arguments you have raised in this appeal (e.g., application of appropriate balancing tests).

Law Enforcement Status of Integrity Committee Records

For the reasons described below, CIGIE affirms the CIGIE FOIA Office insofar as it determined that IC records are generally complied for law enforcement purposes and thus meet the threshold of Exemption 7.

When answering the question of whether given records constitute law enforcement records, case law makes clear that the law to be enforced includes "investigatory files related to enforcement of all kinds of laws," Jefferson v. DOJ, 284 F.3d 172, 178 (D.C. Cir 2002) (internal quotation omitted), including civil, criminal, and administrative, to include administrative disciplinary actions, Gray v. U.S. Army Criminal Investigation Command, 742 F. Supp. 2d 68, 73 (D.D.C. 2010). In order meet the law enforcement purpose threshold for investigatory files, CIGIE is required to consider which of two categories the files fall within: "(1) files in connection with government oversight of the performance of duties by agency employees, and (2) files in connection with investigations that focus directly on specific alleged illegal acts which could results in civil or criminal sanction." Jefferson, 284 F.3d at 177 (internal citation omitted). The former category addresses cases "involving personnel files maintained in the ordinary course of monitoring employees' performance," the latter category addresses records which "were compiled to investigate allegations that specific individuals . . . engaged in specific acts that could constitute violations of criminal and civil laws." Nat'l Whistleblower Ctr. v. HHS, 849 F. Supp. 2d 13, 27 (D.D.C. 2012). When records fall within the latter category, the Exemption 7 threshold is met.

In your appeal, you rely heavily on Bartko v. DOJ, 898 F.3d 51 (D.C. Cir. 2018). In Bartko, the Court held that the DOJ Office of Professional Responsibility (OPR) could not be afforded deference in its attempt to shield records under Exemption 7(C) because OPR does not specialize in law enforcement. Id., at 64 (internal quotation omitted). The Court noted that it had previously "declined to hold as a matter of law that all OPR records are necessarily law enforcement records . . . because one of OPR's primary responsibilities is to secure reports, as distinct from compiling them, that arise as result of internal agency

monitoring and review allegations of non-law violations by Department attorneys for internal disciplinary purposes. " Id., at 64-65 (internal quotation and emphasis omitted). As a result, OPR bore "the burden of showing on a case-by-case basis that any requested records were actually complied for law-enforcement, *rather than employment-supervision, purposes*." Id., at 65. The Bartko Court further noted that,

> OPR's mission today . . . has narrowed to focus primarily on internal disciplinary matters. Justice Department regulations provide that OPR shall "receive, review, investigate and refer appropriate allegations of misconduct involving Department attorneys . . ." 28 CFR § 0.39a(a)(1) (2006). Absent from that assignment is any reference to the investigation of criminal wrongdoing or violations of law. That marks a shift in OPR's responsibilities towards the "internal agency monitoring" end of the spectrum, where Exemption 7(C) has no purchase.

Id., at 65-66.

In contrast, the IC's oversight responsibilities and processes, by statutory design, are exclusively outward facing, regularly involve assessments of allegations involving violations of law, and have numerous intersections and co-mingling of equities with DOJ and the Office of Special Counsel (OSC). The IC was established under Inspector General Act of 1978, as amended, 5 USC App. (IG Act), to "receive, review, and refer for investigation *allegations of wrongdoing* that are made against Inspectors General and [designated] staff members of the various Offices of Inspector General." Section 11(d)(1) of the IG Act (emphasis added). There are no CIGIE employees (i.e., internal staff) subject to IC oversight – all Covered Persons are employed by external entities. Pursuant to the IC Policies and Procedures (2018) (ICP&P),

> [t]he IC takes action on allegations of wrongdoing against a Covered Person that involve *abuse of authority* in the exercise of official duties or while acting under color of office, *substantial misconduct*, such as gross mismanagement, gross waste of funds, *or a substantial violation of law, rule, or regulation*, or conduct that undermines the independence or integrity reasonable expected of a Covered Person.

Section 7(A) of the ICP&P (emphasis added).[2] Such allegations involving substantial violations of law can include, but are not limited to, not only those with civil implications, but those with criminal implications. Indeed, when allegations are received by the IC, those allegations go through an initial review by a three-member panel which includes representatives from the DOJ, OSC, and the IC, to ensure that the equities of all three entities are protected. See section 11(d)(5)(A) of the IG Act.

After this initial review, regardless of any action taken by DOJ or OSC, all allegations against persons subject to IC oversight are placed on the agenda for review by the IC. See section 6(F) of the ICP&P. The IC then deliberates on each allegation of wrongdoing to determine whether it will direct the IC Chairperson to initiate an investigation. See section 11(d)(5)(B)(i) of the IG Act. If so required, the IC Chairperson is to conduct a thorough and timely investigation of each allegation. Section 11(d)(6)(A) of the IG Act. While the IC Chairperson may request the assistance of a disinterested OIG, see section 11(d)(6)(B) of the IG Act, the IC Chairperson is responsible for the conduct of the investigation, see section 11(d)(6)(A). Notably, while DOJ and OSC are given the opportunity to take action on allegations received by the IC, such action does not foreclose the ability of the IC to investigate. The IG Act permits the Chairperson of the IC to "conduct any related investigation . . . concurrently with the Department of Justice or the Office of Special Counsel, as applicable." Section 11(d)(7)(D) of the IG Act. Additionally, because allegations received or evidence uncovered by the IC can have criminal equities, even when DOJ does not initially accept a case, DOJ plays an ongoing role in the IC process, including in

[2] This provision is also known as the IC's "threshold standard."

deliberations: "T]he Chief of the Public Integrity Section of the Criminal Division of the Department of Justice, or his designee, shall serve as a legal advisor to the Integrity Committee." Section 11(d)(3) of the IG Act.

Upon conclusion of the IC Chairperson's investigation, the IC Chairperson submits the report to the IC for assessment. Notably, both DOJ and OSC must also submit any reports of investigation resulting from allegations they accepted through their initial review as members of the three-member panel. Section 11(d)(7)(E) of the IG Act. Whether authored by the IC, DOJ, or OSC, the IC must then review the report and forward the same with its findings and recommendations, to include those on disciplinary action, to the relevant appointing official (i.e., the President or head of agency), Congress, and others. The President or agency head then takes action on IC's recommendation and the final disposition is reported back to the IC. See section 11(d)(8)(B) of the IG Act.

In summary, the oversight the IC performs rises well above that of the "internal agency monitoring" and "non-law violations by Department attorneys for internal disciplinary purposes" for "employment-supervision" purposes at issue in Bartko. The ICP&P make clear that the IC is not engaged in "customary surveillance of the performance of duties by government employees."[3] Jefferson, 284 F.3d at 177. And the fact that discipline is contemplated in the process does not mean that the records do not constitute law enforcement records; rather, this supports their status as law enforcement records. Gray, 742 F.Supp.2d at 73 (holding that "records complied for a pending administrative disciplinary action may fall within Exemption 7(A)"). As described above, the IC process involves the review of allegations of substantial violations of law and other significant wrongdoing external to CIGIE of individuals at the highest level of government. Indeed, it is difficult to imagine a matter investigated by the IC that meets its threshold standard that would, at the same time, constitute the "customary surveillance of the performance of duties by government employees." Moreover, as described, the process is also inherently intertwined with allegations of wrongdoing in which DOJ, a well-recognized law enforcement entity, has strong equities. There is no doubt that the IC's records constitute law enforcement records.

As the law enforcement status of IC records is affirmed, in reaching its determinations on remand, the CIGIE FOIA Office should consider the applicability of Exemptions 7(A) and 7(C).

Conclusion

For the reasons stated above, this matter is reversed in part, affirmed in part, and remanded to the CIGIE FOIA Office for further processing. Please note, this decision does not mean that CIGIE will disclose a particular record, or any record at all. The CIGIE FOIA office will review your request and disclose records as required by law.

If you are dissatisfied with this decision, you may seek judicial review of the decision in the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia, pursuant to 5 U.S.C.§ 552(a)(4)(B).

If you have questions about this response, you may contact CIGIE FOIA staff at FOIASTAFF@cigie.gov. 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:

[3] For example, as reflected in Appendix A to the ICP&P, the definition of "gross mismanagement" makes clear that "[i]t does not include discretionary management decisions, or action or inaction that constitutes simple negligence or wrongdoing. There must be an element of willful misconduct or gross and wanton negligence." Similarly, the definition of "gross waste of funds" states that it must be "an expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government; it is more than a debatable expenditure."

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
ogis@nara.gov
(202) 741-5770
(877) 684-6448 (toll free)
(202) 741-5769 (facsimile)

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.

Sincerely,

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Atticus J. Reaser
General Counsel

cc: Bryan Saddler, Esq. (bsaddler@empowr.us)