

A

**COWDERY, ECKER & MURPHY v. U.S. DEPT. OF INTERIOR** 215

Cite as 511 F.Supp.2d 215 (D.Conn. 2007)

*Lucas Lancaster, Inc. v. Lark Int'l, Ltd.*, 186 F.3d 210 (2d Cir.1999), the court adopts the Second Circuit's interpretation that both "an arbitral clause in a contract" and "an arbitration agreement" must be "signed by the parties or contained in an exchange of letters or telegrams."<sup>3</sup> *Id.* at 218.

In *Kahn Lucas*, the court was asked to decide whether a clause printed on the reverse of two purchase orders sent by the buyer, Kahn Lucas, to the seller, Lark, constituted an "agreement in writing" under the Convention. The Second Circuit concluded that there was no "agreement in writing" because the purchase orders were neither signed by both parties, nor did they constitute "an exchange of letters or telegrams." *Id.* at 218.

[4] The phrase "exchange of letters or telegrams" suggests a level of interchange that is not present during a mere exchange of forms. The sheer number of invoices sent by JPS does not create such an interchange. In short, the facts here and in *Kahn Lucas* are sufficiently similar that the court reaches the same result as the Second Circuit. Preprinted arbitration terms on the back of a form that is not signed by both parties are not "agreements in writing" enforceable under the Convention.

**IV. CONCLUSION**

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment (Dkt. No. 15) is hereby ALLOWED, and Defendant's Motion for Summary Judgment (Dkt. No.

3. In *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666 (5th Cir.1994), the Fifth Circuit reached a different conclusion as to the meaning of "agreement in writing" as it is defined in Article II, § 2 of the Convention. The Fifth Circuit offered little analysis to support its conclusion that the Convention applies where there is "(1) an arbitral clause in a contract or (2) an arbitration agreement, (a) signed by the parties or (b) contained in an

13) is hereby DENIED. The court hereby declares that Plaintiffs are not bound to arbitrate the dispute underlying this litigation and permanently stays the arbitration proceedings initiated by Defendant regarding the dispute underlying this litigation.

The Clerk is ordered to enter judgment for Plaintiffs; the case may now be closed.

It is So Ordered.



**COWDERY, ECKER & MURPHY,  
LLC, Plaintiff,**

v.

**UNITED STATES DEPARTMENT OF  
the INTERIOR, Defendant.**

**Civil Action No. 3: 07cv00879 (SRU).**

United States District Court,  
D. Connecticut.

Sept. 14, 2007.

**Background:** Law firm brought action under the Freedom of Information Act (FOIA), seeking to compel the Department of Interior to disclose performance reviews prepared for an Associate Deputy Secretary within the Department. Department claimed two exemptions under FOIA.

**Holdings:** The District Court, Stefan R. Underhill, J., held that:

exchange of correspondence or telegrams." *Id.* at 669. In contrast, the Second Circuit went into great detail analyzing the grammar of Article II, § 2 and comparing the meaning of the section given by different foreign language versions of the Convention. The Third Circuit has also adopted the Second Circuit's analysis. *Standard Bent Glass Corp. v. Glass-robots Oy*, 333 F.3d 440, 449 (3d Cir.2003).

- (1) Department was not exempt from disclosure under privacy exception for personnel and medical files, and
- (2) Department was not exempt from disclosure under exception for inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

Motion granted.

#### 1. Records $\S$ 58

Department of Interior was not exempt, under Freedom of Information Act (FOIA) privacy exception for personnel and medical files, from disclosing performance review documents relating to Associate Deputy Secretary within the Department to plaintiff law firm; Secretary was a high-ranking government official within the Department, law firm had claimed that Secretary had acted and continued to act in an ultra vires manner, unconstitutionally exceeding his authority, already-disclosed redacted performance reviews and other documents relating to the substantive activity in which Secretary engaged did not adequately provide for the requested information, documents served to shed light on government activity, and firm did not seek personal information that would have implicated an unwarranted invasion of Secretary's privacy. 5 U.S.C.A. § 552(b)(6).

#### 2. Records $\S$ 58

In determining whether a Freedom of Information Act (FOIA) exemption exists based upon an unwarranted invasion of privacy in personnel or medical records, an analysis of the availability of other means to obtain the information sought examines whether the government is the only means for obtaining the desired information. 5 U.S.C.A. § 552(b)(6).

#### 3. Records $\S$ 58

In determining whether a Freedom of Information Act (FOIA) exemption exists

based upon an unwarranted invasion of privacy in personnel or medical records, an analysis as to whether the information sought sheds light on government activity examines whether the information sought furthers FOIA's main purpose of opening agency action to the light of public scrutiny. 5 U.S.C.A. § 552(b)(6).

#### 4. Records $\S$ 58

In determining whether a Freedom of Information Act (FOIA) exemption exists based upon an unwarranted invasion of privacy in personnel or medical records, the more information sheds light on government activity, the more disclosure is appropriate. 5 U.S.C.A. § 552(b)(6).

#### 5. Records $\S$ 58

The ultimate decision on whether a Freedom of Information Act (FOIA) request is exempt under personnel and medical records privacy exception cannot turn on the purpose for which the request for information is made. 5 U.S.C.A. § 552(b)(6).

#### 6. Records $\S$ 57

Freedom of Information Act (FOIA) exemption for inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency exempts from disclosure those documents, and only those documents, normally privileged in the civil discovery context. 5 U.S.C.A. § 552(b)(5).

#### 7. Records $\S$ 57

Department of Interior was not exempt, under Freedom of Information Act (FOIA) exemption for inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency for, from disclosing performance review documents relating to Associate Deputy Secretary within the Department

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to plaintiff law firm; Department had argued that such documents could have been requested during the course of civil discovery, and the documents pertained only to the Secretary's self-assessment and his supervisor's recommendations and assessment of his performance, not deliberations or recommendations on Department policy, personnel, or otherwise. 5 U.S.C.A. § 552(b)(5).

ate and therefore was not properly installed in his position at the Department.

CEM requested the documents at issue in a FOIA request dated January 23, 2007, and argues that their disclosure is necessary and bears on its appeal of the Department's decision. The Department now claims two exemptions from disclosure under FOIA: exemption 6, that disclosure would constitute an unwarranted invasion of Cason's privacy, and exemption 5, that these documents would not be available by law in litigation with the agency because of the deliberative process privilege that protects candid internal discussions of legal or policy matters. The Department has produced redacted versions of the requested documents to CEM. CEM argues that the redacted performance reviews do not satisfy its FOIA request, and that neither exemption 6 nor exemption 5 properly applies here.

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Thomas J. Murphy, Cowdery, Ecker & Murphy, Hartford, CT, for Plaintiff.

John B. Hughes, U.S. Attorney's Office, New Haven, CT, for Defendant.

***RULING ON MOTION FOR EXPEDITED IN CAMERA REVIEW OF WITHHELD DOCUMENTS***

STEFAN R. UNDERHILL, District Judge.

**I. Introduction**

The plaintiff Cowdery, Ecker & Murphy, LLC ("plaintiff" or "CEM") commenced this action under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* ("FOIA"). CEM seeks to compel the Department of the Interior ("the Department" or "DOI") to disclose Senior Executive Service Performance Plan documents ("the performance reviews") prepared in the fiscal years 2004 and 2005 for Mr. James E. Cason, the nominal Associate Deputy Secretary of the Department of the Interior. In a separate lawsuit, CEM is challenging a decision by the Department to strip the Schaghticoke Tribal Nation ("the Tribe") of federal recognition as a tribal nation. Specifically, CEM argues that Cason was not confirmed by the Sen-

I have reviewed the briefs of both parties, as well as the redacted and unredacted performance reviews. The material facts related to this case are undisputed, only the legal import of those facts is contested. For the reasons discussed below, I treat the plaintiff's motion as one for summary judgment, grant that motion, and order that the Department disclose non-redacted versions of the performance reviews to CEM.<sup>1</sup>

**II. Exemption 6**

Exemption 6 under FOIA, 5 U.S.C. § 552(b)(6), states that FOIA shall not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The question before me, then, is whether disclosure of the re-

1. The Department notes in its brief that the redacted portions of the performance reviews include Cason's social security number. The department may redact Cason's social securi-

ty number in the otherwise non-redacted versions of the performance reviews that it discloses to CEM.

dacted information in the performance reviews would constitute an unwarranted invasion of Cason's privacy. Apart from Cason's social security number, the redacted information includes self-assessment of his performance in a number of areas, Department officials' recommendations with justifications for Cason's performance level and summary rating, and the final decision and justification regarding Cason's summary rating. According to the Department, this information, particularly Cason's self-assessment, is personal in nature, and disclosure would invade Cason's privacy in an unwarranted manner.

The Second Circuit has laid out a five-part balancing test to determine whether exemption 6 applies.

In balancing a government employee's privacy interests against the public's interest in disclosure, a court should consider several factors, including: (1) the government employee's rank; (2) the degree of wrongdoing and strength of evidence against the employee; (3) whether there are other ways to obtain the information; (4) whether the information sought sheds light on a government activity; and (5) whether the information sought is related to job function or is of a personal nature. The factors are not all inclusive, and no one factor is dispositive.

*Pertman v. United States Dep't of Justice*, 312 F.3d 100, 107 (2d Cir.2002), *vacated by* 541 U.S. 970, 124 S.Ct. 1874, 158 L.Ed.2d 464 (2004), *reinstated after remand*, 380 F.3d 110 (2d Cir.2004).

A. *The Government Employee's Rank*

[1] In *Pertman*, 312 F.3d at 107, the Second Circuit found that the official in question's "high rank, combined with his direct responsibility for the serious allegations examined . . . tilts strongly in favor of disclosure." Here, both parties agree that Cason is a high-ranking government official. Resp. at 9; Reply at 2. CEM

argues that Cason is "the de facto third in command" at the Department. Reply at 2. Cason's high rank in the Department weighs towards disclosure.

B. *Degree of Wrongdoing and Strength of Evidence Against the Employee*

The Department argues that CEM has not alleged wrongdoing against Cason, only that the Department did not follow certain requisite procedures in his appointment. The Department further argues that Cason was properly appointed and authorized to carry out his duties at DOI. Whether Cason was properly appointed is the ultimate issue in the related litigation between CEM and DOI, and it is not for me to decide that issue here, although I will note that, as CEM argues, the performance reviews may shed light on that ultimate issue.

CEM alleges that Cason has acted and continues to act in an *ultra vires* manner, unconstitutionally exceeding his authority. These are allegations that, if true, would constitute fairly serious wrongdoing. The strength of CEM's evidence against Cason is questionable; the unredacted performance reviews could prove to be the strongest evidence in support of CEM's allegations. Nevertheless, CEM has claimed serious wrongdoing on the part of Cason. Although stronger evidence would weigh more heavily in favor of disclosure, the degree of wrongdoing weighs towards disclosure.

C. *Availability of Other Means to Obtain the Information Sought*

[2] As *Pertman* states, "this factor examines whether the government is the only means for obtaining the desired information." 312 F.3d at 108. The Department claims, without citing any legal authority, that this factor can be extended to the question whether other information



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from within the government would serve a similar purpose without invading the privacy of government employees. Without deciding that question, I do not believe that the other means of obtaining the sought-after information that the Department identifies—Cason's deposition testimony, the already-disclosed redacted performance reviews, and other documents relating to the substantive activity in which Cason engaged—adequately provide the requested information.<sup>2</sup> CEM presently seeks disclosure of the unredacted performance reviews, and from those reviews, an open and clear assessment from both Cason and his superiors of his actual job activities and performance (as opposed to more formal and boilerplate job descriptions). It is not clear from the Department's arguments that other means could adequately provide such information and such an assessment. Accordingly, I find that this factor weighs in favor of disclosure.

D. *Whether the Information Sought Sheds Light on Government Activity*

[3] Under the *Perlman* test, "[t]his factor examines whether the information sought furthers FOIA's main purpose of 'open[ing] agency action to the light of public scrutiny.' The more the information sought sheds light on what the government is doing, the more this factor favors disclosure." *Perlman*, 312 F.3d at 108 (internal citation omitted). The Department argues here that the performance reviews do not shed light on government activity, but rather on Cason's

favorable view and characterization of his role in the Department. That argument fails to recognize that it is individual employees, particularly high-ranking employees such as Cason, whose conduct constitutes government activity. Cason's self-assessment, especially when coupled with his supervisors' ranking and evaluation, serves as both an internal marker of his activity as a government official and a public discussion of the work he does and has done in his official capacity for the Department.

[4] Furthermore, as *Perlman* clearly states, *the more* the information sheds light on government activity, *the more* disclosure is appropriate. The Department has not argued that disclosure of the performance reviews would not shed *more* light on government activity, and it would not be correct to do so. Because Cason's performance as a high-ranking Department official is part of an assessment of government activity, and because the more that the Department discloses concerning his performance, the more light is shed on government activity, this factor weighs in favor of disclosure.

E. *Whether the Information is Related to Job Function or is of a Personal Nature*

Because exemption 6 seeks to protect government employees from unwarranted invasions of privacy, it makes sense that FOIA should protect an employee's personal information, but not information related to job function. The *Perlman* court states that "the disclosed information must

2. CEM had provided the text of Judge Dorsey's discovery order regarding Cason's deposition. The order states in relevant part that "the deposition will be limited to any communication he received . . . from members of the Connecticut congressional delegation, . . . state officials or any person or entity representing the State of Connecticut, which per-

tained to the . . . petition for federal recognition and what . . . role such communications played in" the Department's decision. Reply at 5 (quoting *Schaghticoke Tribal Nation v. Norton*, 3: 06cv81 (PCD), Doc. # 93 (Nov. 2, 2006)). The information that CEM now seeks falls outside of that discovery order.

relate to the employee's performance of his public duties." *Id.* Cason's self-assessment, and his supervisors' assessment of him, relates precisely to his performance of his public duties. Specifically, the unredacted performance reviews provide the public with a review of Cason's performance, as opposed to the redacted reviews, which give some sense of Cason's duties, but not his performance of them. CEM does not seek, and would not be entitled to, personal information that would implicate an unwarranted invasion of Cason's privacy, such as his social security number, or other such sensitive personal details.

[5] The Department argues that, because CEM has a particular interest in the requested materials for the purpose of the underlying challenge to the Department's decision to strip the Tribe of federal recognition, disclosure of the requested performance reviews does not serve a public purpose. Citing *Vunder v. Potter*, 2006 WL 162985 at \*2 (D.Utah Jan. 20, 2006), where the court ruled against disclosure of a Postal Service employee's performance review, the Department claims that, because the information sought is "specific to the requestor," this factor should weigh against disclosure. See also *New England Apple Council v. Donovan*, 725 F.2d 139 (1st Cir.1984). "The ultimate decision cannot turn on the purpose for which the request for information is made." *Vunder*, 2006 WL 162985 at \*2; see also *Sheet Metal Workers Local No. 9 v. United States Air Force*, 63 F.3d 994, 997 (10th Cir.1995). In *Vunder*, however, the court found that there was no "discernible public interest" in the document sought, and that "[t]here is nothing about the document that would assist the public in better understanding the Postal Service's activities of [sic] performance of its statutory duties. Thus, disclosure would constitute a clearly unwarranted invasion of personal privacy." 2006 WL 162985 at \*3. Here, as discussed above and in light of Cason's high rank

and the wrongdoing that CEM alleges, there is a public interest in the information contained in the unredacted performance reviews. This factor therefore weighs in favor of disclosure.

F. *The Perlman Balancing Test Points to Disclosure of the Performance Reviews*

Each of the five factors of the *Perlman* test weigh in favor of disclosure of the performance reviews. Accordingly, I find that exemption 6 does not apply here.

III. Exemption 5

Exemption 5 under FOIA, 5 U.S.C. § 552(b)(5), states that "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" are exempt under FOIA. The Department invokes exemption 5 for the first time in its Response to CEM's motion for in camera review, claiming that the performance reviews are protected by the "deliberative process privilege that protects candid internal discussions of legal or policy matters." Resp. at 15-16 (citing *Maricopa Audubon Society v. U.S. Forest Service*, 108 F.3d 1082, 1084 n. 1 (9th Cir.1997)).

[6] "[I]t is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context." *N.L.R.B. v. Sears, Roebuck, & Co.*, 421 U.S. 132, 149, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975). As discussed above, the Department has argued here that CEM could have, and perhaps should have, requested the sought-after information during the course of civil discovery in their underlying challenge to the Department's decision. The Department cannot have it both ways: if the information sought is discoverable, exemption 5 does not apply.

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[7] Relevant case law makes clear that “to come within . . . Exemption 5, the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Vaughn v. Rosen*, 523 F.2d 1136, 1143–44 (D.C.Cir. 1975). The Department argues that legal or policy matters include matters of personnel policy, and that disclosure of the performance reviews would discourage open and honest feedback from Cason and other Department employees in future performance reviews. The sought-after information includes Cason’s self-assessment and his supervisor’s recommendations and assessment of his performance, not deliberations or recommendations on Department policy, personnel or otherwise. Exemption 5 does not apply to the requested performance reviews.

**IV. Conclusion**

Treating the pending motion as a motion for summary judgment, the motion is granted. Because neither exemption 5 nor exemption 6 to FOIA applies to the performance reviews that CEM has requested from the Department, I declare the withholding of the performance reviews is unlawful and order the Department to disclose the unredacted performance reviews to CEM forthwith. The clerk shall enter judgment in favor of CEM and close this file.

**Hugo Vinicio HERNANDEZ, Plaintiff,**

v.

**CAVALIERE CUSTOM HOMES, INC.  
n/k/a Cavaliere Custom Contractors,  
Inc., Defendant/Third-Party Plaintiff**

v.

**Michael De Vesta d/b/a Carpentry  
Concepts, Third-Party  
Defendant.****Civil No. 3:04CV01931 (AWT).**United States District Court,  
D. Connecticut.

Sept. 24, 2007.

**Background:** Employee of framing subcontractor brought personal injury action against general contractor for the construction of home on property owned by general contractor, alleging employee fell from lift truck that general contractor owned and allowed subcontractor to use. General contractor brought third-party claims against subcontractor, under Connecticut law, for common law indemnification and breach of contract.

**Holding:** On subcontractor’s motion for summary judgment, the District Court, Alvin W. Thompson, J., held that subcontractor did not have express or implied contractual duty to indemnify general contractor.

Motion granted.

**1. Federal Civil Procedure ¶2552**

When ruling on a motion for summary judgment, the district court must respect the province of the jury, and the district court therefore may not try issues of fact. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.



**B**

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

**SCHAGHTICOKE TRIBAL NATION** :  
**Petitioner,** :

v. :

**Civil No. 3:06CV00081(PCD)**

**DIRK KEMPTHORNE, SECRETARY,** :  
**DEPARTMENT OF THE INTERIOR,** :  
**ET AL.,** :  
**Respondents,** :

**STATE OF CONNECTICUT, KENT** :  
**SCHOOL CORPORATION, THE** :  
**CONNECTICUT LIGHT AND POWER** :  
**COMPANY, and TOWN OF KENT,** :  
**Intervenors-Respondents.** :

**DECLARATION OF MICHAEL D. OLSEN**

I, Michael D. Olsen, hereby declare as follows:

1. I am a Deputy Assistant Secretary in the Office of the Assistant Secretary - Land and Minerals Management, United States Department of the Interior ("Department") and have served in this position from April 1, 2007 to the present. Prior to this, I served in the Office of the Assistant Secretary - Indian Affairs ("AS-IA"). I was initially appointed Counselor to the AS-IA on May 16, 2003. I served in that position until June 9, 2006 when I was appointed the Principal Deputy AS-IA. The attached SF-50Bs (Exhibit 1), which are true copies of the Department's personnel records, document the positions I held in the Office of the AS-IA. All documents referred to in this Declaration are documents produced by the Department in the normal course of

business. All information herein is based upon my personal knowledge and experience resulting from my official capacity as Counselor to the AS-IA.

2. In August of 2004 while I was serving as Counselor to the AS-IA, David Anderson, the Principal Deputy AS-IA, Aurene Martin, announced her intention to resign the following month. Mr. Anderson, the AS-IA, asked me to assist him in managing the Principal Deputy's workload. *See Exhibit 2, Memorandum from the AS-IA, Leadership Transition, dated August 16, 2004.*

Although I took on most of the Principal Deputy AS-IA responsibilities, I was not appointed the Principal Deputy AS-IA (and in fact was never even formally designated the Acting Principal Deputy AS-IA) and remained in the position Counselor to the AS-IA until June 2006 when I was appointed Principal Deputy AS-IA. The position of Principal Deputy AS-IA remained vacant from the time of Ms. Martin's resignation in September 2004 until my appointment in June 2006.

3. In January 2005, Mr. Anderson announced that he would be resigning effective February 12, 2005. *See Exhibit 3, Press Release, Department of the Interior, Assistant Secretary for Indian Affairs Dave Anderson Announces His Decision to Resign and Resume His Entrepreneur Career (January 31, 2005).* With the Principal Deputy AS-IA position vacant, no one was available to automatically become Acting AS-IA. Although I performed many of the Principal Deputy AS-IA duties, I was not the appointed Principal Deputy and could not become the Acting AS-IA under the Vacancies Reform Act, 5 U.S.C. §§ 3345-3349d ("VRA"). *See Exhibit 4, Secretarial Memorandum, Designation of Successors for Presidentially-Appointed, Senate-Confirmed Positions, January 5, 2004 and November 13, 2005 (pursuant to this Memorandum, the Principal Deputy AS-IA is the first assistant to the AS-IA, who would, upon a vacancy, succeed to the office on an acting basis pursuant to 5 U.S.C. § 3345(a)(1)).*

4. With no one appropriately situated to become Acting AS-IA, the Secretary decided to delegate the non-exclusive functions and duties of the AS-IA position to another Department official. The Solicitor provided legal advice to the Secretary on the delegation of non-exclusive duties under the VRA. The Solicitor's memorandum specifically reviewed what, if any, duties of


the AS-IA were exclusive and unable to be re-delegated. *See* Exhibit 5, Memorandum from Solicitor to Secretary, *Redelegation of Duties of Assistant Secretary-Indian Affairs*, Jan. 28, 2005.

5. On February 8, the Secretary issued Order 3259, with an effective date of February 13, 2005. This Order temporarily delegated all the non-exclusive duties and functions of the AS-IA position to Mr. James E. Cason, the Associate Deputy Secretary. *See* Exhibit 6, Secretarial Order 3259 and Order 3259 Amendment No. 1 dated August 11, 2005, and Order 3259 Amendment No. 2, dated March 31, 2006.

6. I am not aware that anyone at the Department formally notified the General Accountability Office that the AS-IA position was vacant as required by the VRA. I am aware that the Department notified the relevant Congressional committees that Mr. Anderson was resigning and that Mr. Cason would be carrying out the non-exclusive duties of the AS-IA. *See* Exhibit 7, The Department of the Interior's Congressional and Legislative Affairs Office Fax Log Sheet for January 31, 2005, evidencing that the Press Release cited in Exhibit 4 was faxed to the Senate Committee on Indian Affairs and the House Committee on Resources on that day.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31st day of October, 2007.

  
Michael D. Olsen  
Deputy Assistant Secretary,  
Land and Minerals Management  
Office of the Assistant Secretary,  
Land and Minerals Management  
Department of the Interior

**LIST OF EXHIBITS FOR**  
**DECLARATION OF MICHAEL D. OLSEN**

1. Notice of Personnel Action, Standard Form 50-B
2. Memorandum from the AS-IA, *Leadership Transition*, dated August 16, 2004
3. Press Release, Department of the Interior, *Assistant Secretary for Indian Affairs Dave Anderson Announces His Decision to Resign and Resume His Entrepreneur Career* (January 31, 2005)
4. Secretarial Memorandum, *Designation of Successors for Presidentially-Appointed, Senate-Confirmed Positions*, January 5, 2004 and November 13, 2005
5. Memorandum from Solicitor to Secretary, *Redelegation of Duties of Assistant Secretary-Indian Affairs*, January 28, 2005
6. Secretarial Order 3259, dated February 8, 2005, Order 3259 Amendment No. 1, dated August 11, 2005 and Order 3259 Amendment No. 2, dated March 31, 2006
7. The Department of the Interior's Congressional and Legislative Affairs Office Fax Log Sheet for January 31, 2005



**EXHIBIT 1**

**Notice of Personnel Action, Standard Form 50-B**

Standard Form 50-B  
Rev. 7/91  
U.S. Office of Personnel Management  
FPM Supp. 296-33, Subch. 4

**NOTIFICATION OF PERSONNEL ACTION**

|   |                           |                  |                                      |
|---|---------------------------|------------------|--------------------------------------|
| 1. Name (Last, First, Middle)<br><b>OLSEN, MICHAEL D.</b> | 2. Social Security Number | 3. Date of Birth | 4. Effective Date<br><b>05/18/03</b> |
|---|---------------------------|------------------|--------------------------------------|

| FIRST ACTION            |  | SECOND ACTION |                       |
|-------------------------|--|---------------|-----------------------|
| 5-A. Code<br><b>170</b> | 5-B. Nature Of Action<br><b>EXC APPT</b>       | 6-A. Code     | 6-B. Nature of Action |
| 5-C. Code<br><b>Y7M</b> | 5-D. Legal Authority<br><b>SCH C, 213.3301</b> | 6-C. Code     | 6-D. Legal Authority  |
| 5-E. Code               | 5-F. Legal Authority                           | 6-E. Code     | 6-F. Legal Authority  |

|                                    |  |
|------------------------------------|--|
| 7. FROM: Position Title and Number | 15. TO: Position Title and Number<br><b>COUNSELOR TO THE ASSISTANT SECRETARY<br/>INDIAN AFFAIRS<br/>50000000 IGS1016</b> |
|------------------------------------|--|

|                          |                             |                              |                            |                               |                                     |                                  |                               |                              |                            |                                     |                            |
|--------------------------|-----------------------------|------------------------------|----------------------------|-------------------------------|-------------------------------------|----------------------------------|-------------------------------|------------------------------|----------------------------|-------------------------------------|----------------------------|
| 8. Pay Plan<br><b>GS</b> | 9. Occ. Code<br><b>0301</b> | 10. Grade/Level<br><b>15</b> | 11. Step/Rate<br><b>10</b> | 12. Total Salary<br><b>\$</b> | 13. Pay Basis<br><b>PA</b>          | 16. Pay Plan<br><b>GS</b>        | 17. Occ. Code<br><b>0301</b>  | 18. Grade/Level<br><b>15</b> | 19. Step/Rate<br><b>10</b> | 20. Total Salary/Award<br><b>\$</b> | 21. Pay Basis<br><b>PA</b> |
| 12A. Basic Pay           | 12B. Locality Adj.          | 12C. Adj. Basic Pay          | 12D. Other Pay             | 20A. Basic Pay<br><b>\$</b>   | 20B. Locality Adj.<br><b>\$ ---</b> | 20C. Adj. Basic Pay<br><b>\$</b> | 20D. Other Pay<br><b>\$ 0</b> |                              |                            |                                     |                            |

|  |   |
|--|---|
| 14. Name and Location of Position's Organization | 22. Name and Location of Position's Organization<br><b>ASST SECY-INDIAN AFFAIRS<br/><br/>WASHINGTON, DC</b> |
|--|---|

| EMPLOYEE DATA   |   |  |  | 25. Agency Use                                     |   | 26. Veterans Preference for RIF |  |
|---|---|--|--|--|---|---------------------------------|--|
| 23. Veterans Preference<br><b>1</b> 1 - None<br>2 - 5-Point | 3 - 10-Point/Disability<br>4 - 10-Point/Compensable | 5 - 10-Point Other<br>6 - 10-Point/Compensable/30% | 24. Tenure<br><b>3</b> 0 - None<br>1 - Permanent | 2 - Conditional<br>3 - Indefinite                  | <b>M</b> SEX                                | YES <input type="checkbox"/>    | NO <input checked="" type="checkbox"/> |
| 27. FEGLI <b>BASIC + OPTIONAL (2X)</b>                      |   |  |  | 28. Annuitant Indicator<br><b>9 NOT APPLICABLE</b> | 29. Pay Rate Determinant<br><b>7</b>        |                                 |  |
| 30. Retirement Plan<br><b>K FERS &amp; FICA</b>             |   | 31. Service Comp. Date (Leave)<br><b>04/16/01</b>  | 32. Work Schedule<br><b>F FULL-TIME</b>          |  | 33. Part-Time Hours Per Biweekly Pay Period |                                 |  |

| POSITION DATA   |  |  |                          | 36. Appropriation Code                       |   | 37. Bargaining Unit Status |  |
|---|--|--|--------------------------|--|---|----------------------------|--|
| 34. Position Occupied<br><b>2</b> 1 - Competitive Service<br>2 - Excepted Service | 3 - SES General<br>4 - SES Career Reserved | 35. FLSA Category<br><b>E</b> E - Exempt<br>N - Nonexempt  | 36. Appropriation Code   |  | 37. Bargaining Unit Status<br><b>8888</b> |                            |  |
| 38. Duty Station Code<br><b>11-0010-001</b>                                       |  | 39. Duty Station (City - County - State or Overseas Location)<br><b>WASHINGTON, DISTRICT OF COLUMBIA</b> |                          |  |   |                            |  |
| 40. Agency Data<br><b>CLS 00</b>  | 41. VET-STAT<br><b>X</b>                   | 42. EDUC LVL<br><b>15</b>  | 43. SUPV LVL<br><b>8</b> | 44. POSITION SENSITIVITY<br><b>HIGH RISK</b> |   |                            |  |

45. Remarks  
 APPOINTMENT AFFIDAVIT EXECUTED 05/19/03.  
 CREDITABLE MILITARY SERVICE: NONE.  
 PREVIOUS RETIREMENT COVERAGE: PREVIOUSLY COVERED.  
 OPF MAINTAINED BY MINERALS MANAGEMENT SERVICE PERSONNEL IN HERNDON, VA.  
 SUPERIOR QUALIFICATIONS APPOINTMENT MADE UNDER REG. 531.203 (B).  
 POSITION IS AT THE FULL PERFORMANCE LEVEL.  
 FROZEN SERVICE 0000.  
 EMPLOYEE IS AUTOMATICALLY COVERED UNDER FERS.  
 HEALTH BENEFITS COVERAGE CONTINUES.

|  |  |                                      |  |  |
|--|--|--------------------------------------|--|--|
| 46. Employing Department or Agency<br><b>IN - OFC OF THE SECRETARY</b> |  |                                      | 50. Signature/Authentication and Title of Approving Official<br><i>Sandra Streets</i><br><b>SANDRA STREETS<br/>PERSONNEL OFFICER<br/>030858737</b> |  |
| 47. Agency Code<br><b>IN01</b>   | 48. Personnel Office ID<br><b>4342</b> | 49. Approval Date<br><b>05/16/03</b> |  |  |

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**NOTIFICATION OF PERSONNEL ACTION**

|   |  |   |   |                            |  |                               |                            |  |                              |   |                            |                        |                          |                               |
|---|--|---|---|----------------------------|--|-------------------------------|----------------------------|--|------------------------------|---|----------------------------|------------------------|--------------------------|-------------------------------|
| 1. Name (Last, First, Middle)<br><b>OLSEN, MICHAEL D.</b>   |  |   |   |                            | 2. Social Security Number  |                               |                            | 3. Date of Birth                                 |                              | 4. Effective Date<br><b>10/21/04</b>  |                            |                        |                          |                               |
| <b>FIRST ACTION</b>   |  |   |   |                            | <b>SECOND ACTION</b>   |                               |                            |  |                              |   |                            |                        |                          |                               |
| 5-A. Code<br><b>546</b>   |  | 5-B. Nature Of Action<br><b>CONV TO SES NONCAREER</b>     |   |                            | 5-A. Code  |                               | 5-B. Nature of Action      |  |                              |   |                            |                        |                          |                               |
| 5-C. Code<br><b>V4L</b>   |  | 5-O. Legal Authority<br><b>5 U.S.C. 3394(A) NONCAREER</b> |   |                            | 5-C. Code  |                               | 5-D. Legal Authority       |  |                              |   |                            |                        |                          |                               |
| 5-E. Code<br><b>AWM</b>   |  | 5-F. Legal Authority<br><b>OPM APPROVAL, DTD 10/20/04</b> |   |                            | 5-E. Code  |                               | 5-F. Legal Authority       |  |                              |   |                            |                        |                          |                               |
| 7. FROM: Position Title and Number<br><b>COUNSELOR TO THE ASSISTANT SECRETARY<br/>INDIAN AFFAIRS<br/>50000000 IGS1016</b>   |  |   |   |                            | 15. TO: Position Title and Number<br><b>COUNSELOR TO THE ASSISTANT SECRETARY<br/>INDIAN AFFAIRS<br/>50000000 IES1505</b> |                               |                            |  |                              |   |                            |                        |                          |                               |
| 8. Pay Plan<br><b>GS</b>  |  | 9. Occ. Code<br><b>0301</b>                               | 10. Grade/Level<br><b>15</b>                      | 11. Step/Rate<br><b>10</b> | 12. Total Salary   |                               | 13. Pay Basis<br><b>PA</b> | 16. Pay Plan<br><b>ES</b>                        | 17. Occ. Code<br><b>0301</b> | 18. Grade/Level<br><b>00</b>  | 19. Step/Rate<br><b>00</b> | 20. Total Salary/Award | 21. Pay Bas<br><b>PA</b> |                               |
| 12A. Basic Pay  |  | 12B. Locality Adj.  |   | 12C. Adj. Basic Pay        |  | 12D. Other Pay<br><b>\$ 0</b> |                            | 20A. Basic Pay                                   |                              | 20B. Locality Adj.  |                            | 20C. Adj. Basic Pay    |                          | 20D. Other Pay<br><b>\$ 0</b> |
| 14. Name and Location of Position's Organization<br><b>ASST SECY-INDIAN AFFAIRS<br/><br/>WASHINGTON, DC</b>   |  |   |   |                            | 22. Name and Location of Position's Organization<br><b>ASST SECY-INDIAN AFFAIRS<br/><br/>WASHINGTON, DC</b>              |                               |                            |  |                              |   |                            |                        |                          |                               |
| <b>EMPLOYEE DATA</b>  |  |   |   |                            | <b>EMPLOYEE DATA</b>   |                               |                            |  |                              |   |                            |                        |                          |                               |
| 23. Veterans Preference<br><b>1</b><br>1 - None<br>2 - 5-Point<br>3 - 10-Point/Disability<br>4 - 10-Point Compensable<br>5 - 10-Point Other<br>6 - 10-Point/Compensable/30% |  |   |   |                            | 24. Tenure<br><b>0</b><br>0 - None<br>1 - Permanent<br>2 - Conditional<br>3 - Indefinite                                 |                               |                            | 25. Agency Use                                   |                              | 26. Veterans Preference for RI<br><input type="checkbox"/> YES <input checked="" type="checkbox"/> NO |                            |                        |                          |                               |
| 27. FEGLI<br><b>K0 BASIC + OPTIONAL (2X)</b>  |  |   |   |                            | 28. Annuitant Indicator<br><b>9 NOT APPLICABLE</b>   |                               |                            | 29. Pay Rate Determinant<br><b>0</b>             |                              |   |                            |                        |                          |                               |
| 30. Retirement Plan<br><b>K FERS &amp; FICA</b>   |  |   | 31. Service Comp. Date (Leave)<br><b>04/16/01</b> |                            | 32. Work Schedule<br><b>F FULL-TIME</b>  |                               |                            | 33. Part-Time Hours Per Biweekly Pay Period      |                              |   |                            |                        |                          |                               |
| 34. Position Occupied<br><b>3</b><br>1 - Competitive Service<br>2 - Excepted Service<br>3 - SES General<br>4 - SES Career Reserved  |  |   |   |                            | 35. FLSA Category<br><b>E</b><br>E - Exempt<br>N - Nonexempt   |                               |                            | 36. Appropriation Code                           |                              | 37. Bargaining Unit Status<br><b>8888</b>   |                            |                        |                          |                               |
| 38. Duty Station Code<br><b>11-0010-001</b>   |  |   |   |                            | 39. Duty Station (City - County - State or Overseas Location)<br><b>WASHINGTON, DISTRICT OF COLUMBIA</b>                 |                               |                            |  |                              |   |                            |                        |                          |                               |
| 40. Agency Data<br><b>CLS 00</b>  |  | 41. VET-STAT<br><b>X</b>                                  |   | 42. EDUC LVL<br><b>15</b>  |  | 43. SUPV LVL<br><b>2</b>      |                            | 44. POSITION SENSITIVITY<br><b>MODERATE RISK</b> |                              |   |                            |                        |                          |                               |

45. Remarks

VETERAN PREFERENCE IS NOT APPLICABLE TO THE SENIOR EXECUTIVE SERVICE.  
TENURE AS USED FOR 5 U.S.C. 3502 IS NOT APPLICABLE TO THE SENIOR EXECUTIVE SERVICE.  
CREDITABLE MILITARY SERVICE: NONE.  
PREVIOUS RETIREMENT COVERAGE: PREVIOUSLY COVERED.

|  |  |                                      |  |  |  |
|--|--|--------------------------------------|--|--|--|
| 46. Employing Department or Agency<br><b>IN - OFC OF THE SECRETARY</b> |  |                                      | 50. Signature/Authentication and Title of Approving Official<br><i>Sandra Streets</i><br><b>SANDRA STREETS<br/>PERSONNEL OFFICER<br/>041530593</b> |  |  |
| 47. Agency Code<br><b>IN01</b>   | 48. Personnel Office ID<br><b>4342</b> | 49. Approval Date<br><b>10/29/04</b> |  |  |  |

Standard Form 50-B  
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FPM Supp. 298-33, Subch. 4

**NOTIFICATION OF PERSONNEL ACTION**

|   |  |   |  |                            |   |                  |   |                                      |  |                              |                              |                            |                        |                |                            |
|---|--|---|--|----------------------------|---|------------------|---|--------------------------------------|--|------------------------------|------------------------------|----------------------------|------------------------|----------------|----------------------------|
| 1. Name (Last, First, Middle)<br><b>OLSEN, MICHAEL D.</b>   |  |   |  | 2. Social Security Number  |   | 3. Date of Birth |   | 4. Effective Date<br><b>06/11/06</b> |  |                              |                              |                            |                        |                |                            |
| <b>FIRST ACTION</b>   |  |   |  | <b>SECOND ACTION</b>       |   |                  |   |                                      |  |                              |                              |                            |                        |                |                            |
| 5-A. Code<br><b>546</b>   |  | 5-B. Nature Of Action<br><b>CONV TO SES NONCAREER</b>       |  |                            |   | 6-A. Code        |   | 6-B. Nature of Action                |  |                              |                              |                            |                        |                |                            |
| 5-C. Code<br><b>V4L</b>   |  | 5-D. Legal Authority<br><b>5 U.S.C. 3394 (A) NONCAREER</b>  |  |                            |   | 6-C. Code        |   | 6-D. Legal Authority                 |  |                              |                              |                            |                        |                |                            |
| 5-E. Code<br><b>AWM</b>   |  | 5-F. Legal Authority<br><b>OPM APPROVAL, DATED 06-09-06</b> |  |                            |   | 6-E. Code        |   | 6-F. Legal Authority                 |  |                              |                              |                            |                        |                |                            |
| 7. FROM: Position Title and Number<br><b>COUNSELOR TO THE ASSISTANT SECRETARY<br/>INDIAN AFFAIRS<br/>50000000 IES1505</b>                                 |  |   |  |                            | 15. TO: Position Title and Number<br><b>PRINCIPAL DEPUTY ASSISTANT SECRETARY-<br/>INDIAN AFFAIRS<br/>50000000 IES1551</b> |                  |   |                                      |  |                              |                              |                            |                        |                |                            |
| 6. Pay Plan<br><b>ES</b>  |  | 9. Occ. Code<br><b>0301</b>                                 | 10. Grade/Level<br><b>00</b>   | 11. Step/Rate<br><b>00</b> | 12. Total Salary  |                  | 13. Pay Basis<br><b>PA</b>                  | 16. Pay Plan<br><b>ES</b>            |  | 17. Occ. Code<br><b>0301</b> | 18. Grade/Level<br><b>00</b> | 19. Step/Rate<br><b>00</b> | 20. Total Salary/Award |                | 21. Pay Basis<br><b>PA</b> |
| 12A. Basic Pay  |  | 12B. Locality Adj.  |  | 12C. Adj. Basic Pay        |   | 12D. Other Pay   |   | 20A. Basic Pay                       |  | 20B. Locality Adj.           |                              | 20C. Adj. Basic Pay        |                        | 20D. Other Pay |                            |
| \$ 0  |  | \$  |  | \$                         |   | \$ 0             |   | \$                                   |  | \$ 0                         |                              | \$                         |                        | \$ 0           |                            |
| 14. Name and Location of Position's Organization<br><b>ASST SECY-INDIAN AFFAIRS<br/><br/>WASHINGTON, DC</b>   |  |   |  |                            | 22. Name and Location of Position's Organization<br><b>ASST SECY-INDIAN AFFAIRS<br/><br/>WASHINGTON, DC</b>               |                  |   |                                      |  |                              |                              |                            |                        |                |                            |
| <b>EMPLOYEE DATA</b>  |  |   |  |                            | <b>EMPLOYEE DATA</b>  |                  |   |                                      |  |                              |                              |                            |                        |                |                            |
| 23. Veterans Preference<br><b>1</b> 1 - None 2 - 5-Point 3 - 10-Point/Disability 4 - 10-Point Compensable 6 - 10-Point Other 8 - 10-Point/Compensable/30% |  |   |  |                            | 24. Tenure<br><b>0</b> 0 - None 1 - Permanent 2 - Conditional 3 - Indefinite  |                  | 25. Agency Use                              |                                      | 26. Veterans Preference for RIF<br><input type="checkbox"/> YES <input checked="" type="checkbox"/> NO |                              |                              |                            |                        |                |                            |
| 27. FEGLI<br><b>K0 BASIC + OPTIONAL (2X)</b>  |  |   |  |                            | 28. Annuity Indicator<br><b>9 NOT APPLICABLE</b>  |                  | 29. Pay Rate Determinant<br><b>0</b>        |                                      |  |                              |                              |                            |                        |                |                            |
| 30. Retirement Plan<br><b>K FERS &amp; FICA</b>   |  |   | 31. Service Comp. Date (Leave)<br><b>04/16/01</b>  |                            | 32. Work Schedule<br><b>F FULL-TIME</b>   |                  | 33. Part-Time Hours Per Biweekly Pay Period |                                      |  |                              |                              |                            |                        |                |                            |
| 34. Position Occupied<br><b>3</b> 1 - Competitive Service 2 - Excepted Service 3 - SES General 4 - SES Career Reserved                                    |  |   | 35. FLSA Category<br><b>E</b> E - Exempt N - Nonexempt   |                            | 36. Appropriation Code  |                  | 37. Bargaining Unit Status<br><b>8888</b>   |                                      |  |                              |                              |                            |                        |                |                            |
| 38. Duty Station Code<br><b>11-0010-001</b>   |  |   | 39. Duty Station (City - County - State or Overseas Location)<br><b>WASHINGTON, DISTRICT OF COLUMBIA</b> |                            |   |                  |   |                                      |  |                              |                              |                            |                        |                |                            |
| 40. Agency Code<br><b>CLS 00</b>  |  | 41. VET-STAT<br><b>X</b>                                    | 42. EDUC LVL<br><b>15</b>  | 43. SUPV STAT<br><b>2</b>  | 44. POSITION SENSITIVITY<br><b>MODERATE RISK</b>  |                  |   |                                      |  |                              |                              |                            |                        |                |                            |

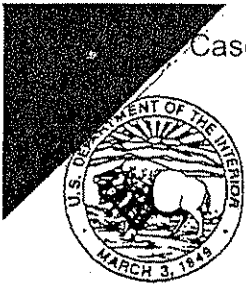
45. Remarks  
 VETERAN PREFERENCE IS NOT APPLICABLE TO THE SENIOR EXECUTIVE SERVICE.  
 TENURE AS USED FOR 5 U.S.C. 3502 IS NOT APPLICABLE TO THE SENIOR EXECUTIVE SERVICE.  
 CREDITABLE MILITARY SERVICE: NONE  
 PREVIOUS RETIREMENT COVERAGE: PREVIOUSLY COVERED  
 SES MEMBER SUBJECT TO POST-EMPLOYMENT RESTRICTIONS UNDER 18 U.S.C. 207(C)  
 FROZEN SERVICE NONE  
 EMPLOYEE IS AUTOMATICALLY COVERED UNDER FERS.  
 HEALTH BENEFITS COVERAGE CONTINUES.

|  |  |                                      |   |  |  |
|--|--|--------------------------------------|---|--|--|
| 46. Employing Department or Agency<br><b>IN - OFC OF THE SECRETARY</b> |  |                                      | 50. Signature/Authentication and Title of Approving Official<br><b>AUTHORIZING OFFICIAL<br/>061164757</b> |  |  |
| 47. Agency Code<br><b>IN01</b>   | 48. Personnel Office ID<br><b>4342</b> | 49. Approval Date<br><b>06/09/06</b> |   |  |  |

**EXHIBIT 2**

**Memorandum from the AS-IA, *Leadership Transition*, dated August 16, 2004**





## United States Department of the Interior

BUREAU OF INDIAN AFFAIRS  
Washington, D.C. 20240

IN REPLY REFER TO

### MEMORANDUM

To: AS-IA and BIA employees

From: Assistant Secretary, Indian Affairs

Subject: Leadership Transition

AUG 16 2004

After three years of service with the U.S. Department of the Interior, Aurene Martin, Principal Deputy Assistant Secretary, Indian Affairs, has informed the Secretary of her plans to leave the Department effective September 10, 2004.

During my short tenure as Assistant Secretary, Indian Affairs, I have had an opportunity to work with Aurene on several issues and, as a result, have joined the ranks of the other Interior officials who view Aurene as a tremendous asset. I have high regard for her capabilities and leadership and I have found her legal background and her Capitol Hill experience to be extremely valuable. I've also been impressed with her contributions on Indian education, gaming, law enforcement, fiduciary trust management, and appropriations. I am confident that Aurene will make a smooth transition into the private sector and, once there, will continue to provide leadership and objective counsel on the key issues that affect Indian Country. Please join me, in your own way, in wishing her well in her future pursuits.

Aurene has taken initial steps to seek private sector employment and, consistent with the advice from Interior's Ethics Office, has recused herself from any decisions that may be of interest to these prospective employers. Therefore, please be advised that to ensure day-to-day policy and program decisions continue to be made in a timely manner, I have asked Mike Olsen, Counselor to the Assistant Secretary – Indian Affairs, (202) 208-3671, to assist me in managing the workload normally assigned to the Principal Deputy Assistant Secretary. Mike will be responsible for determining whether Aurene may be involved in any particular matter or task. Therefore, during this period of transition, please coordinate workflow and reporting responsibilities through Mike Olsen as of Monday, August 16, 2004. Thank you, in advance, for your assistance, patience and cooperation.

**EXHIBIT 3**

***Press Release, Department of the Interior, Assistant Secretary for Indian Affairs Dave Anderson Announces His Decision to Resign and Resume His Entrepreneur Career (January 31, 2005)***

Department of the Interior



# NEWS

## U.S. Department of the Interior

Office of the Secretary  
For Immediate Release: January 31, 2005

Contact: Tina Kreisher (202) 208-6416  
Nedra Darling (202) 208-3710

### **Assistant Secretary for Indian Affairs Dave Anderson Announces His Decision to Resign and Resume His Entrepreneur Career**

*Secretary Gale Norton:  
"Convinced Indian Country is Better Off Because You Served"*

*Associate Deputy Secretary Jim Cason  
to Temporarily Assume Responsibilities of Assistant Secretary of Indian Affairs*

(WASHINGTON) - Assistant Secretary of Indian Affairs Dave Anderson today announced his decision to resign, effective February 12, 2005.

In a letter to Interior Secretary Gale Norton, Assistant Secretary Anderson said that, "I have concluded that I can have the greatest impact to improve the future of Indian Country, not by managing the day-to-day operations of BIA programs, but by focusing my time on developing private sector economic opportunities for Indian entrepreneurs."

In response, Secretary Norton wrote, "It is with both understanding and regret that I received your letter today informing me of your decision to resign as Assistant Secretary of Indian Affairs, effective February 12, 2005."

"On behalf of President Bush, I thank you for your service, and I am convinced that Indian Country is better off because you served. You can take justifiable pride in your efforts to improve Indian education, law enforcement, and trust services. You have also been a terrific role model to young people in Indian Country. I have received many reports from people who have been encouraged by your message of hope, self-reliance, and belief in the personal worth and dignity of each Native American."

Secretary Norton also announced that she will be working with the White House and leaders in Indian Country to select a new Assistant Secretary for Indian Affairs. In the meantime, Jim Cason, currently Associate Deputy Secretary, will be tasked with fulfilling the responsibilities of the Assistant Secretary for Indian Affairs. For the past three-and-a-half-years, Cason has worked extensively on a variety of Indian issues including law enforcement, land management and fractionation, trust responsibilities, historical accounting, and probate.

In his letter to Secretary Norton, Assistant Secretary Dave Anderson said, "Working with President Bush, Bureau of Indian Affairs staff, the more than 560 federally recognized Indian tribes, your staff and you, we made this a year of remarkable progress in Indian Country. Our accomplishments include:

- An additional \$32.4 million in higher education funding was provided for BIA-managed schools as a result of President Bush's No Child Left Behind Act.
- Key components of the No Child Left Behind Act will be implemented in a soon to be published final rule, following extensive consultation with Indian country.
- A new Replacement School Construction List was developed to establish priority funding for Indian Country schools that have critical health and safety concerns.
- Thousands of safety and security improvements were made in Indian country detention centers.
- A new American Indian Records Repository was dedicated, in order to preserve and consolidate Indian records that are essential to carry out Interior's trust reform responsibilities.
- Ground was broken on a new National Indian Programs Training Center as part of an effort to improve the delivery of federal services to Indian country."

Assistant Secretary Anderson added, "Perhaps more important are the countless opportunities I had to meet with Indian parents, teachers and children to encourage them to reach their potential, to climb the academic ladder of achievement and prepare them to become contributing members of their families and tribes."

Anderson's letter to Secretary Norton concluded by saying "More than you can imagine, I am honored by the trust President Bush and you placed in me by asking me to serve as Assistant Secretary for Indian Affairs. To lead Indian Country for the past year has been a great honor and valuable experience. As I return to private life, my experiences this past year have better prepared me to encourage all those in Indian Country to achieve their God-given potential."

The letters exchanged between Secretary Norton and Assistant Secretary Anderson can be found at [http://www.doi.gov/news/05\\_News\\_Releases/anderson.pdf](http://www.doi.gov/news/05_News_Releases/anderson.pdf) and [http://www.doi.gov/news/05\\_News\\_Releases/norton.pdf](http://www.doi.gov/news/05_News_Releases/norton.pdf)

-DOI-

Selected News Releases

Anderson said, "Mike's determination to help Native people and his dedication as a public servant has made him my choice for this new assignment."

-DOI-

Selected News Releases



**EXHIBIT 4**

**Secretarial Memorandum, *Designation of Successors for  
Presidentially-Appointed, Senate-Confirmed Positions*, January  
5, 2004 and November 13, 2005**



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, D.C. 20240

JAN 5 2003

## Memorandum

To: Assistant Secretary - Policy, Management and Budget

From: Principal Deputy Assistant Secretary - Indian Affairs *Aurene M Martin*

Subject: Designation of Successors for Presidentially-Appointed, Senate Confirmed Positions

Subject to the Vacancies Act, the following positions in the Office of the Assistant Secretary-Indian Affairs will automatically succeed the Assistant Secretary – Indian Affairs (AS-IA) in the absence of the incumbent and in the order listed. Incumbents in all of the positions listed are hereby delegated the authority to perform all duties and responsibilities of the AS-IA when required to ensure continued, uninterrupted direction and supervision and to perform essential functions and activities of the office. The authority to exercise the authority of the AS-IA may be exercised only when an official in one of the following positions is reasonably certain that no superior in the list is able and available to exercise the authority and when the nature of the situation requires immediate action. Individuals exercising the authority of the AS-IA will be relieved of this responsibility as soon as a superior on the list is available and able to exercise the authority of the AS-IA or when an official with the requisite authority designates a permanent or acting AS-IA. Individuals exercising the authority of the AS-IA will keep a record of important actions they took and the period during which they exercised the authority.

Position One: Principal Deputy Assistant Secretary-Indian Affairs  
 Position Two: Deputy Assistant Secretary – Indian Affairs (Management)  
 Position Three: Deputy Assistant Secretary – Indian Affairs (Policy and Economic Development)  
 Position Four: Deputy Assistant Secretary – Indian Affairs (Information Resources Management)  
 Position Five: Director, Bureau of Indian Affairs  
 Positions Six: Director, Office of Indian Education Programs

The Attachment, which will be updated as needed, lists the current incumbents of these positions.

Signature:

*Aurene M Martin*

Date:

*January 5, 2004*

Concur:

*Gale A Norton*

JAN 6 2004

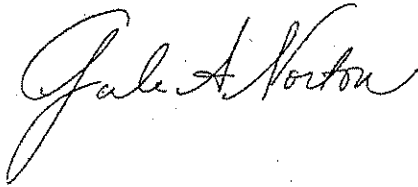
cc: Director, Office of Planning and Performance Management  
 Director, Office of Managing Risk and Public Safety

## Attachment

### Designation of Successors for Assistant Secretary-Indian Affairs: List of Incumbents

- Position One: Principal Deputy Assistant Secretary-Indian Affairs - Aurene Martin
- Position Two: Deputy Assistant Secretary – Indian Affairs (Management) – Woodrow Hopper
- Position Three: Deputy Assistant Secretary – Indian Affairs (Policy and Economic Development) – George Skibine (Acting)
- Position Four: Deputy Assistant Secretary – Indian Affairs (Information Resources Management) – Brian Burns
- Position Five: Director, Bureau of Indian Affairs – Terrance Virden
- Position Six: Director, Office of Indian Education Programs – Ed Parisian

Approved:



Date:

JAN 6 2004



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, D.C. 20240



## Memorandum

To: Gale A. Norton  
Secretary of the Interior

NOV 13 2005

From: James E. Cason  
Associate Deputy Secretary

Subject: Designation of Successors for Presidentially-Appointed, Senate-Confirmed Positions

Subject to the Vacancies Act, the following positions in the Office of the Assistant Secretary - Indian Affairs (Office) will automatically succeed the Assistant Secretary-Indian Affairs (AS-IA) in the absence of the incumbent and in the order listed. Incumbents in all of the positions listed are hereby delegated the authority to perform all duties and responsibilities of the AS-IA when required to ensure continued, uninterrupted direction and supervision and to perform essential functions and activities of the Office. The authority to exercise the authority of the AS-IA may be exercised only when an official in one of the following positions is reasonably certain that no supervisor on the list is able and available to exercise the authority and when the nature of the situation requires immediate action. Individuals exercising the authority of the AS-IA will be relieved of authority as soon as a superior on the list is available and able to exercise the authority of the AS-IA, or when an official with the requisite authority designates a permanent or acting AS-IA. Individuals exercising the authority of the AS-IA will keep a record of important actions they take and the period during which they exercised that authority.

Position One: Principal Deputy Assistant Secretary-Indian Affairs  
Position Two: Deputy Assistant Secretary-Indian Affairs (Management)  
Position Three: Deputy Assistant Secretary-Indian Affairs (Policy and Economic Development)  
Position Four: Deputy Assistant Secretary-Indian Affairs (Information Resources Management)

Signature

*James E. Cason*

Date

*11/17/05*

Concur

*Gale A. Norton*

Date

*12/15/05*

Attachment: List of incumbents to the above positions

cc: Director, DOI Office of Planning and Performance Management  
Director, DOI Office of Law Enforcement and Security  
Deputy Bureau Director, Office of Law Enforcement Services

**Attachment**

- Position One: Acting Principal Deputy Assistant Secretary-Indian Affairs, Michael D. Olsen
- Position Two: Deputy Assistant Secretary-Indian Affairs (Management), Debbie Clark
- Position Three: Acting Deputy Assistant Secretary-Indian Affairs (Policy and Economic Development), George Skibine
- Position Four: Deputy Assistant Secretary-Indian Affairs (Information Resources Management), Brian Burns



**EXHIBIT 5**

**Memorandum from Solicitor to Secretary, *Redelegation of Duties of Assistant Secretary-Indian Affairs*, January 28, 2005**



## United States Department of the Interior

OFFICE OF THE SOLICITOR

1849 C STREET N.W.  
WASHINGTON, DC 20240

JAN 28 2005

### Memorandum

To: Secretary

From: Solicitor *psw*

Subject: Redlegation of Duties of the Assistant Secretary - Indian Affairs

You have asked for an opinion on whether the duties of the Assistant-Secretary - Indian Affairs ("AS-IA") may be reassigned temporarily to another Departmental official in the event the position becomes vacant and pending confirmation of a successor, in order to ensure continuity of the significant functions of the AS-IA. Our opinion, as discussed below, is that you may temporarily reassign the duties of the AS-IA, except for any duty that is required by either statute or regulation to be performed only by the AS-IA.

### Vacancies Reform Act Background

Although you have indicated a desire to have any AS-IA vacancy filled expeditiously, a background discussion of the methods of filling vacancies on an acting basis is in order. As a position requiring appointment by the President with advice and consent of the Senate (hereinafter "PAS"), the AS-IA is subject to the Vacancies Reform Act, 5 U.S.C. §§ 3345 - 3349d ("the Act"). The Act governs how a vacant PAS position may be filled on a temporary, or "acting," basis. Generally, three categories of persons may serve in an acting capacity: 1) first assistants to the vacant office; 2) PAS officers designated by the President; and 3) certain senior agency employees designated by the President. *See* 5 U.S.C. § 3345. The Act also imposes limits on the amount of time a person can serve in an acting capacity. *See* 5 U.S.C. § 3346.<sup>1</sup>

To ensure compliance with the Act, Congress provided that, unless a qualified individual is performing the functions and duties on an acting basis, a vacant position shall remain vacant and

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<sup>1</sup>In 5 U.S.C. § 3347, the Act recognizes that a statute may expressly authorize an acting official in manner different from that established in the Act. However, the Act also states that a statutory provision providing general authority to the head of an executive agency to delegate or reassign duties statutorily vested in the agency head may not be used to fill a PAS vacancy on a temporary basis. Reorganization Plan Number 3 of 1950, 64 Stat.1262, 43 U.S.C. § 1451. Note. is such an authority and may not be used to fill a vacancy temporarily. However, as discussed below, you may use it to reassign certain duties of the position on a temporary basis.

only the head of the agency may perform the functions and duties assigned exclusively to the position. *See* 5 U.S.C. § 3348. Congress also provided that actions taken in violation of the Act shall have no force and effect. 5 U.S.C. § 3348(d).

We understand that there is no first assistant currently in place who meets the Act's criteria to automatically assume the duties of the position as acting AS-IA. Additionally, we anticipate that the AS-IA position is likely to remain vacant until filled through the PAS confirmation process, or the President designates an acting official in accordance with the Act. Recognizing the extraordinary need to ensure uninterrupted performance of the AS-IA's critically important duties, you are considering reassigning the duties of the AS-IA while the Department pursues filling the vacancy. Accordingly, we turn to a discussion of how you may reassign these duties temporarily consistent with the Act.

### **The Vacancies Reform Act Does Not Prevent Temporary Reassignment of Non-Exclusive Duties of a PAS Position**

Despite its restrictions on filling vacancies, the Act allows you sufficient flexibility to avoid administrative paralysis in managing the Department after a PAS vacancy occurs. Congress recognized that there may be occasions when there would be no one who met the Act's criteria for serving in an acting capacity. Congress also recognized that requiring the agency head to perform all the functions and duties of the vacant PAS position could seriously impair the business of the government. *See* S. Rep. 105-250, at 30-31 (Additional Views). As a result, Congress defined the "functions and duties" that must be performed only by the agency head to include only those functions and duties of the vacant position that are established by statute or regulation *and* that are required by the statute or regulation to be performed only by the official occupying that position. 5 U.S.C. § 3348(a)(2). Accordingly, under the authority of Reorganization Plan No. 3 of 1950, you may redelegate the responsibilities of the AS-IA that are not assigned by statute or regulation exclusively to the AS-IA.<sup>2</sup> This view is consistent with guidance on the Act issued by the Office of Legal Counsel. *See Guidance on Application of Federal Vacancies Reform Act of 1998*, March 22, 1999, Question 48.

### **Statutes and Regulations Affecting Redlegation of AS-IA Functions**

We have evaluated the functions and duties of the AS-IA that are assigned by statute or regulation to the AS-IA to determine whether any of them must be performed only by the AS-IA. This evaluation consisted of reviewing the language of the statute or regulation for any indication, such as use of terms like "only," "exclusively," or "solely," that would reveal a Congressional intent that only the AS-IA may perform the applicable function or duty. Our review revealed that 25 U.S.C. § 2103, providing that the authority to disapprove minerals

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<sup>2</sup>Your use of the Reorganization Plan Number 3 of 1950 authority in this circumstance to temporarily reassign duties does not invoke the Act's restriction on using such authority to in fact fill the vacancy.

agreements may "only be delegated to the Assistant Secretary of the Interior for Indian Affairs." As a result, disapprovals of mineral agreements may not be redelegated, and must be executed only by you.

Some of the relevant statutes, while not assigning a function or duty exclusively to the AS-IA, nonetheless establish limitations on who may permissibly perform the function. These statutes and regulations must be taken into account when determining those to whom the non-exclusive functions and duties of the AS-IA may be reassigned:

1) 25 U.S.C. § 472a, providing that certain determinations relating to application of Indian preference to reassignments to higher grades within BIA may only be delegated to an Under (Deputy) Secretary or Assistant Secretary of the Department.

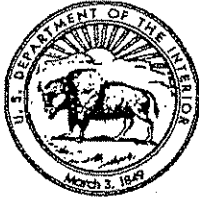
2) 25 U.S.C. § 2006, providing that the Secretary shall vest in the AS-IA all functions relating to Indian education and that the AS-IA shall carry out such functions through the Director of the Office of Indian Education Programs. This language strongly suggests a Congressional intent to make Indian Education functions exclusive in the AS-IA. As a result, while we do not believe you may vest Indian education functions in another employee, we believe that you may require the Director of the OIEP to administratively report to another employee regarding the carrying out of such functions.

We have not identified any regulations that assign duties or functions exclusively to the AS-IA.

Please let me know if you have any questions regarding this memorandum.

**EXHIBIT 6**

**Secretarial Order 3259, dated February 8, 2005, Order 3259  
Amendment No. 1, dated August 11, 2005 and Order 3259  
Amendment No. 2, dated March 31, 2006**



THE SECRETARY OF THE INTERIOR  
WASHINGTON

ORDER NO. 3259

Subject: Temporary Redlegation of Authority of the Assistant Secretary - Indian Affairs

**Sec. 1 Purpose.** The purpose of this Order is to temporarily redelegate all functions, duties, and responsibilities of the Assistant Secretary - Indian Affairs that are not required by statute or regulation to be performed only by the Assistant Secretary - Indian Affairs. It is intended to ensure uninterrupted management and execution of the duties of the Assistant Secretary - Indian Affairs in the interim period before a successor assumes the duties of the position under governing laws and procedures.

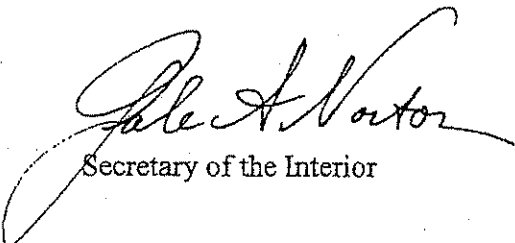
**Sec. 2 Authority.** This Order is issued under the authority of Section 2 of Reorganization Plan No. 3 of 1950 (64 Stat. 1262), as amended.

**Sec. 3 Delegation.** The authority delegated to the Assistant Secretary - Indian Affairs in 209 DM 8, and any other applicable Departmental Manual chapters, is hereby redelegated to the Associate Deputy Secretary, except for those functions or duties that are required by statute or regulation to be performed only by the Assistant Secretary - Indian Affairs. Any functions or duties assigned by statute or regulation exclusively to the Assistant Secretary - Indian Affairs will be performed by me, in accordance with the Vacancies Reform Act, 5 U.S.C. §§ 3345 - 3349d.

**Sec. 4 Revocation.** This Order supersedes and terminates Secretary's Order No. 3252, which had expanded the authority of the Principal Deputy Assistant Secretary - Indian Affairs.

**Sec. 5 Limitation.** Other than as noted in Section 4, this redelegation does not supersede existing delegations of authority to or from the Assistant Secretary - Indian Affairs to subordinate officials, except that such subordinate officials will report to and receive direction from the Associate Deputy Secretary for the duration of the term of this Order.

**Sec. 6 Expiration Date.** This Order is effective on February 13, 2005. It will remain in effect during the anticipated temporary Assistant Secretary - Indian Affairs vacancy. It will automatically expire either upon the confirmation of a new Assistant Secretary - Indian Affairs, or upon the designation of an Acting Assistant Secretary - Indian Affairs in accordance with the Vacancies Reform Act. In the absence of the foregoing actions, it will terminate on August 15, 2005, unless extended, modified, or revoked.

  
Secretary of the Interior

Date: FEB 8 2005



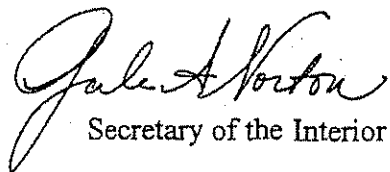
THE SECRETARY OF THE INTERIOR  
WASHINGTON

ORDER NO. 3259, Amendment No. 1 (*Amended material italicized*)

Subject: Temporary Redelegation of Authority of the Assistant Secretary - Indian Affairs

Section 6 of Secretary's Order No. 3259, dated February 8, 2005, is amended to read as follows:

**Sec. 6 Expiration Date.** This Order will remain in effect during the anticipated temporary Assistant Secretary - Indian Affairs vacancy. It will automatically expire either upon the confirmation of a new Assistant Secretary - Indian Affairs, or upon the designation of an Acting Assistant Secretary - Indian Affairs in accordance with the Vacancies Reform Act. In the absence of the foregoing actions, it will terminate on *March 31, 2006*, unless extended, modified, or revoked.

  
Secretary of the Interior

Date: **AUG 11 2005**





THE SECRETARY OF THE INTERIOR  
WASHINGTON

ORDER NO. 3259, Amendment No. 2 (*Amended material italicized*)

Subject: Temporary Redelegation of Authority of the Assistant Secretary - Indian Affairs

Section 6 of Secretary's Order No. 3259, dated February 8, 2005, and amended August 11, 2005, is further amended to read as follows:

**Sec. 6 Expiration Date.** This Order will remain in effect during the anticipated temporary Assistant Secretary - Indian Affairs vacancy. It will automatically expire either upon the confirmation of a new Assistant Secretary - Indian Affairs, or upon the designation of an Acting Assistant Secretary - Indian Affairs in accordance with the Vacancies Reform Act. In the absence of the foregoing actions, it will terminate on *October 1, 2007*, unless extended, modified, or revoked.

Date:

*March 31, 2006*

*Gale A. Norton*  
Secretary of the Interior

**EXHIBIT 7**

**The Department of the Interior's Congressional and  
Legislative Affairs Office Fax Log Sheet for January 31, 2005**

FAX LOG - CONGRESSIONAL AND LEGISLATIVE AFFAIRS

Month of Jan 2005

OUTGOING 2

Total: 84

| DATE | TO/FAX No. IF NOT AUTODIAL | SUBJECT   | # of Pages | Senator/Representative/Tribal |
|------|----------------------------|---|------------|-------------------------------|
| 5    | Soc - IA                   | Copy of Andrew Gurney Fed Reg Memo  | 1          |                               |
| 6    | L. Blain                   | Copy of Jennings letter about re HMD/BIA  | 16         |                               |
| 7    | Windy Sneed                | Info re Delaware Title/CO RM 715 code.  | 4          |                               |
| 7    | 505 523 6589               | Response to 1/7/05 letter request <sup>of title</sup> regarding <del>services</del> | 28         | Sen. Arnesen                  |
| 7    | 228-5765                   | Update on Standing Rock Agency  | 2          | Sen. Tim Wirth                |
| 7    | 228-5429                   | "   | 2          | Sen. Thune                    |
| 7    | 225-5823                   | "   | 2          | Rep. Henshell                 |
| 7    | 224-7776                   | "   | 2          | Sen. Conrad                   |
| 7    | 224-1193                   | "   | 2          | Sen. Lugar                    |
| 7    | 226 8893                   | "   | 2          | Rep. Pomeroy                  |

FAX LOG - CONGRESSIONAL AND LEGISLATIVE AFFAIRS

Month of Jan

OUTGOING 8

| DATE | TO/FAX No. IF NOT AUTODIAL | SUBJECT                                    | # of Pages | Senator/Representative/Titl |
|------|----------------------------|--|------------|-----------------------------|
| 28   | Rep Peters                 | Media Advisory - AS 1A in <del>Pharm</del> | 2          |                             |
| 28   | Rep Kayser                 | "  | 2          |                             |
| 28   | Rep Flake                  | "  | 2          |                             |
| 28   | Rep Emanuel                | "  | 2          |                             |
| 28   | Rep Collier                | "  | 2          |                             |
| 28   | HS Res                     | "  | 2x2        | Mem                         |
| 28   | SC1A                       | "  | 2x2        | Mem                         |
| 31   | Sci-TA                     | Legislation Update - 1/28/05               | 7          |                             |
| 31   | SC1A                       | 1/31/05 Press Release - AS-TA Analysis     | 5x2        |                             |
| 31   | HS Res                     |  | 5x2        |                             |

\* \* \*

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LAW OFFICES OF  
**COWDERY, ECKER & MURPHY, L.L.C.**

750 MAIN STREET

HARTFORD, CONNECTICUT 06103-2703

www.cemlaw.com

WILLIAM J. GULLOTTA

TELEPHONE (860) 278-5555

FACSIMILE (860) 249-0012

WRITER'S E-MAIL:  
wgullotta@cemlaw.com

December 6, 2007

**VIA EMAIL & CERTIFIED MAIL;  
RETURN RECEIPT REQUESTED**

Ms. Sue Ellen Sloca  
FOIA Officer  
U.S. Department of the Interior  
Office of the Secretary  
MS-120, SIB  
1951 Constitution Avenue, NW  
Washington, DC 20240  
Email: [osfoia@nbc.gov](mailto:osfoia@nbc.gov)

Re: Freedom of Information Act Request

Dear Ms. Sloca:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* for the following documents: **All documents referring to Michael D. Olsen as the Acting Principal Deputy Assistant Secretary – Indian Affairs created between 9/11/04 and 10/5/05.**

Pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(III), I am willing to pay reasonable charges for the search for and duplication of records responsive to this request.

I respectfully note your Office's obligations under the Freedom of Information Act to provide all responsive documents; to respond in a timely fashion; and if you deny all or any part of this request, to cite the specific exemption you think justifies your refusal to release the information and notify me of the appeal procedures available under the law. Please note that I expect you to release all segregable portions of otherwise exempt material, and reserve the right to appeal your decision to withhold any of the information I have requested.

COWDERY, ECKER & MURPHY, L.L.C.

United States Department of Interior  
December 6, 2007  
Page 2

Please contact me with any questions you may have about this request or if you need additional information.

Thank you for your anticipated assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "W. J. Gullotta", with a long horizontal flourish extending to the right.

William J. Gullotta



D



# United States Department of the Interior

OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20240



IN REPLY REFER TO:  
7202.4-OS-2008-00112

December 7, 2007

DEC 10 2007

**Via Certified Mail/Return Receipt (7007 0710 0001 9880 3928)**

Mr. William J. Gullotta  
Law Offices of Cowdery, Ecker & Murphy, L.L.C.  
750 Main Street  
Hartford, Connecticut 06103-2703

Dear Mr. Gullotta:

On December 6, 2007, you filed a Freedom of Information Act (FOIA) request, seeking:

“All documents referring to Michael D. Olsen as the Acting Principal Deputy Assistant Secretary – Indian Affairs created between 9/11/04 and 10/5/05.”

Your request was received in the Office of the Secretary FOIA office on December 7, 2007, and assigned control number **OS-2008-00112**. Please cite this number in any future communications with our office regarding your request.

With respect to your request:

1. We have classed your request as a “commercial-use request.” As a “commercial-use requester,” you are expected to pay for the cost of searching for responsive records, the cost of reviewing responsive records found for a release determination, and the cost of duplication of responsive records released. As a matter of policy, however, the Department of the Interior does not bill requesters for FOIA fees incurred in processing requests when their fees do not exceed \$30.00, because the cost of collection would be greater than the fee collected. (See 43 C.F.R. §2.18 (a)).
2. As it is currently worded, your request is far too broad to be accepted for processing under the FOIA. You are asking for “all documents referring to Michael D. Olsen as the Acting Principal Deputy Assistant Secretary – Indian Affairs created between 9/11/04 and 10/5/05.” This assumes, however, that the Department of the Interior maintains its files on all of its employees either by their name or job title. Please be advised that this is not the case.

Mr. William J. Gullotta

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The Department of the Interior maintains its records in a vastly decentralized environment. This means that it does not have a large, single, computerized database that contains all of its information. Each individual bureau and office within the Department maintains its own files, often in manual (paper) form. And since all of these individual components of the Department are located, physically, in hundreds of different locations scattered across the United States and abroad, our files, too, are equally scattered. For this reason, it is not possible for us to conduct a single automated search of all our files for "all documents referring to Michael D. Olsen as the Acting Principal Deputy Assistant Secretary – Indian Affairs created between 9/11/04 and 10/5/05."

As such, your request is far too broad to be processed under the FOIA. Unless you are able to cite which particular documents you are seeking, we are unable to process your request.

3. Please note that the time frame for processing your request will not begin until all issues regarding the scope of your request have been resolved. According to our regulations, if we do not receive the necessary clarification from you regarding the scope of your request, within 20 workdays from the date you receive this letter, we will assume that you are no longer interested in pursuing your request, and we will close our files on it. See 43 C.F.R. §2.8 (a)(3).

If you have any questions regarding any of the issues discussed in this letter, you may contact Ray McNerney by phone at 202-565-1076, by fax at 202-219-2374, by e-mail at [osfoia@nbc.gov](mailto:osfoia@nbc.gov), or by mail at U.S. Department of the Interior, 1951 Constitution Avenue, N.W., MS 116 – SIB, Washington, D.C. 20240. Within the Office of the Secretary, we are committed to providing you, our customer, with the highest quality of service possible.

Sincerely,



Sue Ellen Sloca  
Office of the Secretary  
FOIA Officer

*PRIVACY ACT notice: Before you choose to contact us, electronically, there are a few things you should know. The information you submit, including your electronic address, may be seen by various people. We will scan a copy of your request into our electronic OS FOIA administrative/image file. We will key the information that you provide to us into our electronic OS FOIA tracking file. We may share it with other individuals, both within and without the Department, involved in Freedom of Information Act administration. You may be contacted by any of these individuals. In other limited circumstances, including requests from Congress or private individuals, we may be required by law to disclose some of the information you submit. Also, e-mail is not necessarily secure against interception. If your communication is very sensitive, or includes personal information like your bank account, charge card, or social security number, you might want to send it by postal mail, instead.*

E

LAW OFFICES OF  
**COWDERY, ECKER & MURPHY, L.L.C.**

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www.cemlaw.com

WILLIAM J. GULLOTTA

TELEPHONE (860) 278-5555

FACSIMILE (860) 249-0012

WRITER'S E-MAIL:

wgullotta@cemlaw.com

December 13, 2007

**VIA EMAIL & CERTIFIED MAIL;  
RETURN RECEIPT REQUESTED**

Ms. Sue Ellen Sloca  
FOIA Officer  
U.S. Department of the Interior  
Office of the Secretary  
MS-120, SIB  
1951 Constitution Avenue, NW  
Washington, DC 20240  
Email: osfoia@nbc.gov

Re: Freedom of Information Act Request # OS-2008-00112

Dear Ms. Sloca:

Your classification of the request referred to above as "far too broad" is, sadly, not surprising. Here again, as with this firm's recent FOIA request to the Department, rather than take obvious steps to produce a reasonable response, your office has taken a position that is transparently designed to complicate or delay the document-production process. You no doubt will recall that your office's last effort to withhold materials from this firm was found to have been "unlawful." See Cowdery, Ecker & Murphy v. United States Department of the Interior, 511 F. Supp. 2d 215, 221 (D. Conn. 2007). (A copy of that decision is enclosed for your convenience.) I doubt the Judge would welcome a further expenditure of his time over this latest, even less persuasive objection by your office.

To try to suggest that the above-referenced FOIA request would require a search of the records of the entire Department is plainly disingenuous. That suggestion neither fairly characterizes our request, nor recognizes the scope of the search FOIA requires of the Department. Your complaint that "it is not possible for us to conduct a single automated search of all our files"

COWDERY, ECKER & MURPHY, L.L.C.

United States Department of Interior  
December 13, 2007  
Page 2

for documents responsive to our FOIA request is irrelevant. FOIA demands more than a single automated computer search. FOIA requires your Department to make a good faith effort to search where responsive records are reasonably expected to be found. See, e.g., Keys v. Department of Homeland Security, 510 F. Supp. 2d 121, 126 (D.D.C. 2007) (“Because an agency’s search must be reasonable, but not exhaustive, the agency need only search those record systems that are likely to produce responsive documents.”) Your letter notes that “[e]ach individual bureau and office within the Department maintains its own files....” Because our request seeks records related to the Acting Principal Deputy Assistant Secretary – Indian Affairs, it is unquestionably reasonable to search the records of the Bureau of Indian Affairs (“BIA”). To hide behind a suggestion either that our request would leave you with no idea of where to begin to search, or that you would have to search the entire Department, is simply untenable.

Our request is limited: We are seeking records in which Michael D. Olsen is referred to in the document with the title Acting Principal Deputy Assistant Secretary – Indian Affairs or any variation thereof. We are seeking those records for a very defined period of less than 13 months. Thus, both the hard copy search and the computer search of BIA’s records can be highly targeted.

As you no doubt well know, FOIA is not intended to be an adversarial process; FOIA creates a governmental obligation to reasonably provide certain information to its citizens. Your office has independent legal obligations under FOIA that are unrelated to any goals other Department employees may have in pending litigation. While we have no desire to bring yet another FOIA matter to the Court when there should be no need to waste the Court’s time, understand that we will not hesitate to do so if your office continues to obstruct rather than to assist, as FOIA commands. See 5 U.S.C. § 552(a)(3)(A). If we are required to pursue judicial relief again and, as expected, the Court finds the Department to again be engaged in improperly withholding information, we will this time seek relief under 5 U.S.C. § 552(a)(4)(E) & (F). You should start the 20-day processing time frame immediately, and you should search the BIA for responsive records without further delay.

Sincerely,



William J. Gullotta

WJG:  
Enclosure

F





# United States Department of the Interior

OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20240



IN REPLY REFER TO:  
7202.4-OS-2008-00112

December 14, 2007

Mr. William J. Gullotta  
Law Offices of Cowdery, Ecker & Murphy, L.L.C.  
750 Main Street  
Hartford, Connecticut 06103-2703

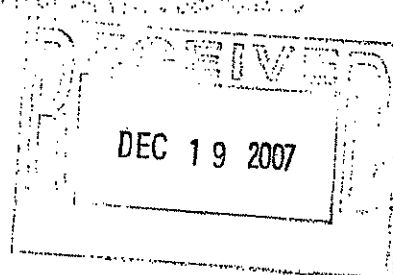
Dear Mr. Gullotta:

On December 6, 2007, you filed Freedom of Information Act (FOIA) request **OS-2008-00112**, seeking:

"All documents referring to Michael D. Olsen as the Acting Principal Deputy Assistant Secretary – Indian Affairs created between 9/11/04 and 10/5/05."

On December 7, 2007, we acknowledged your request, advised you of your fees status under the FOIA, and asked you to provide us with additional clarification regarding the scope of your request. Toward that end, we suggested that you cite which particular documents you were seeking, since your request for "all documents referring to Michael D. Olsen as the Acting Principal Deputy Assistant Secretary – Indian Affairs" could reasonably be construed to be asking us to search every component of the Department of the Interior for such documents.

However, your letter dated December 13, 2007, which was received in this office on the same day, notes that your request is "limited" and "BIA's records can be highly targeted." Accordingly, we are referring your request to the Bureau of Indian Affairs for a search of its files and direct response to you on behalf of the Department of the Interior. You may expect to hear from it shortly with respect to the outcome of its file search(es). If you do not, you may write or call its



Mr. William J. Gullotta

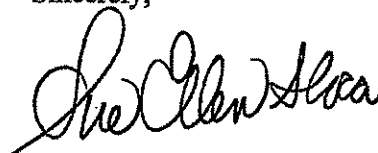
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FOIA Officer listed on the attached directory, printed from the Department's website located at [www.doi.gov](http://www.doi.gov), or file an appeal for non-response with the Department's Freedom of Information Act Appeals Officer.<sup>1</sup>

This completes the Office of the Secretary's response to your request.

If you have any questions regarding the Office of the Secretary's response to your request, or any of the issues discussed in this letter, you may contact Ray McInerney by phone at 202-565-1076, by fax at 202-219-2374, by e-mail at [osfoia@nbc.gov](mailto:osfoia@nbc.gov), or by mail at U.S. Department of the Interior, 1951 Constitution Avenue, N.W., MS 116 – SIB, Washington, D.C. 20240. Within the Office of the Secretary, we are committed to providing you, our customer, with the highest quality of service possible.

Sincerely,



Sue Ellen Sloca  
Office of the Secretary  
FOIA Officer

Enclosure

*PRIVACY ACT notice: Before you choose to contact us, electronically, there are a few things you should know. The information you submit, including your electronic address, may be seen by various people. We will scan a copy of your request into our electronic OS FOIA administrative/image file. We will key the information that you provide to us into our electronic OS FOIA tracking file. We may share it with other individuals, both within and without the Department, involved in Freedom of Information Act administration. You may be contacted by any of these individuals. In other limited circumstances, including requests from Congress or private individuals, we may be required by law to disclose some of the information you submit. Also, e-mail is not necessarily secure against interception. If your communication is very sensitive, or includes personal information like your bank account, charge card, or social security number, you might want to send it by postal mail, instead.*

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<sup>1</sup> You may file an appeal for non-response by writing to the FOIA Appeals Officer, U.S. Department of the Interior, 1849 C Street, N.W., MS – 6556, MIB, Washington, D.C. 20240. Your appeal letter must be marked, both on its envelope and at the top of its first page, with the legend "FREEDOM OF INFORMATION APPEAL." Your appeal letter should be accompanied by a copy of this letter, along with a statement attesting to the fact that you have not yet received a response from the agency component to which your request was referred. *Please allow this party ample time to process this referral before filing an appeal: a minimum of 30 working days plus a reasonable allowance for postal mail delivery.*

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## FOIA Contacts

### Headquarters

| Bureau                         | Name & Address   | Phone, Fax & Email  |
|--------------------------------|--|---|
| Department (FOIA Policy)       | Alexandra Mallus<br>MS-5312, MIB<br>1849 C Street, NW<br>Washington, DC<br>20240   | 202/208-5342<br>Fax: 202/208-6867   |
|                                | Miriam Brown-Lam<br>Acting Departmental<br>Privacy Officer<br>MS-5312, MIB<br>1849 C Street, NW<br>Washington, DC<br>20240 | 202/208-2588<br>Fax: 202/513-0794   |
| Department (FOIA Appeals Only) | Ms. Darrell Strayhorn<br>MS-6556, MIB<br>1849 C Street, NW<br>Washington, DC<br>20240                                      | 202/208-5339<br>Fax: 202/208-6677   |
| Office of the Secretary        | Sue Ellen Sloca<br>MS-116, SIB<br>1951 Constitution Ave, NW<br>Washington, DC<br>20240                                     | 202/208-6045<br>202/513-0765<br>Fax: 202/219-2374<br>E-mail: osfoia@nbc.gov |

### Bureaus / Offices

|  |   |  |
|--|---|--|
| Fish & Wildlife Service<br><a href="#">Region/Field Contacts</a> | Johnny Hunt<br>Terl Jackson<br>Division of Information Resources & Technology Management (IRTM)<br>Arlington Square<br>4401 North Fairfax | 703/358-2504/2501<br>703/358-2257<br>Fax: 703/358-2251<br>E-mail: r9foia@fws.gov |
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|  | Drive<br>Mailstop #340<br>Arlington, VA 22203   |  |
| Geological<br>Survey<br><u>Region/Field</u><br><u>Contacts</u>                       | Debbie Kimball<br>12201 Sunrise<br>Valley Drive<br>MS-807, National<br>Center<br>Rm 2C314<br>Reston, VA 20192 | 703/648-7158<br>Fax: 703/648-6853<br>Email: foia@usgs.gov  |
| Bureau of<br>Indian Affairs<br>(Policy)  | Bob Harnage<br>BIA - Office of<br>Information Policy<br>625 Herndon<br>Parkway<br>Herndon, VA 20170           | 703/735-4413<br>Fax: 703/735-4416  |
| (Requests)   | Laura Cloud<br>MS-3071, MIB<br>1849 C Street, NW<br>Washington, DC<br>20240                                   | 202/208-4542<br>Fax: 202/208-6597<br>Email: Offline<br>Alternative: submit a FAX<br>request to: 202-208-6597 |
| Bureau of Land<br>Management<br>(Policy)   | Laura Bell<br>Room 725<br>(WO-560)<br>1849 C Street, NW,<br>Washington, D.C.<br>20240                         | 202/452-5013<br>Fax: 202/452-5002<br>Email: wo_foia@blm.gov  |
| Bureau of Land<br>Management<br>(Requests)<br><u>Region/Field</u><br><u>Contacts</u> | Barbara Brown<br>Room 725 (WO-560)<br>1849 C St., NW<br>Washington, D.C.<br>20240                             | 202/452-0314<br>Fax: 202/452-5002<br>Email: wo_foia@blm.gov  |
| Office of<br>Inspector<br>General  | Sandra Evans<br>MS-5341, MIB<br>1849 C Street, NW<br>Washington, DC<br>20240                                  | 703-487-5436<br>Fax: 703/487-5406<br>Email: foia@doioig.gov  |
| Minerals<br>Management<br>Service<br><u>Region/Field</u><br><u>Contacts</u>          | Ginny Morgan<br>MS-2200, Atrium<br>Bldg.<br>Herndon, VA 20170   | 703/787-1689<br>Fax: 703/787-1922<br>Email: mmsfoia@mms.gov  |
| Bureau of<br>Reclamation   | Casey Snyder<br>Bureau of   | Voice: (303) 445-2048<br>Fax: (303) 445-6575   |

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| <u>Region/Field<br/>Contacts</u>                                | Reclamation FOIA<br>Officer<br>PO Box 25007, 84-<br>21300<br>Denver CO 80225-<br>0007   | Toll Free Voice: (888) 231-<br>7749<br>Toll Free Fax: (888) 808-<br>5104<br>E-mail: borfoia@usbr.gov               |
| National Park<br>Service<br><u>Region/Field<br/>Contacts</u>    | Diane Cooke<br>(ORG CODE 2550)<br>Office of the Chief<br>Information Officer<br>(OCIO)<br>1849 C Street, N.W.<br>MailStop: 1201 Eye<br>Street, 8th Floor<br>Washington, DC<br>20240 | 202/354-1925<br>Fax: 202/371-5584<br>Email: <a href="#">web form</a>   |
| Office of the<br>Solicitor                                      | Christina Bartlett<br>MS-6556, MIB<br>1849 C Street, N.W.<br>Washington, DC<br>20240  | 202/208-6221<br>Fax: 202/208-5206<br>Email: Offline  |
| Office of<br>Surface Mining<br><u>Region/Field<br/>Contacts</u> | Willie Chism<br>MS-130, SIB<br>1951 Constitution<br>Ave., N.W.<br>Washington, DC<br>20240   | 202/208-2961<br>Fax: 202/219-3092<br>E-mail:<br><a href="mailto:efoiarequest@osmre.gov">efoiarequest@osmre.gov</a> |

The Department of the Interior FOIA Office toll-free telephone number is 1-888-603-7119.

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*U.S. Department of the Interior*  
*This is an Official Government Website*  
*Freedom of Information Act*  
<http://www.doi.gov/foia/>  
[doiffoia@ios.doi.gov](mailto:doiffoia@ios.doi.gov)  
*Last Updated on 12/11/07*

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LAW OFFICES OF  
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WILLIAM J. GULLOTTA

TELEPHONE (860) 278-5555

FACSIMILE (860) 249-0012

WRITER'S E-MAIL:

wgullotta@cemlaw.com

January 17, 2008

**VIA CERTIFIED MAIL;  
RETURN RECEIPT REQUESTED**

Ms. Laura Cloud  
U.S. Department of Interior  
Bureau of Indian Affairs  
Mail Stop Room 3657-MIB  
1849 C Street, NW  
Washington, DC 20240

Re: Freedom of Information Act Requests  
Control # OS-2008-00100 and Control # OS-2008-00112

Dear Ms. Cloud:

I write to inquire about the status of two Freedom of Information Act requests this law firm made in November and December of 2007. Your office has not yet responded to either.

The first request sought the following documents: **All documents, including, but not limited to, all correspondence, memos, email, reports, and notices signed and/or created by Michael D. Olsen as Acting Principal Deputy Assistant Secretary – Indian Affairs between 9/11/04 and 10/5/05.** This request was originally delivered to the Department of the Interior (“DOI”) on November 27, 2007. The DOI assigned Control # OS-2008-00100 to this request, and then referred it to your office on November 29, 2007. A copy of the original request is attached hereto. Today is January 17, 2008, and, although more than twenty days have passed, see 5 U.S.C. § 552(a)(6)(A), this firm still has not received a response from your office.

The second request sought: **All documents referring to Michael D. Olsen as the Acting Principal Deputy Assistant Secretary – Indian Affairs created between 9/11/04 and 10/5/05.** This request was originally sent to the DOI on December 6, 2007, and was acknowledged by the



COWDERY, ECKER & MURPHY, L.L.C.

Bureau of Indian Affairs

January 17, 2008

Page 2

DOI on December 7, 2007. A copy of this request is attached hereto. The DOI then assigned Control # OS-2008-00112 to this request and forwarded it to your office on December 13, 2007. As such, twenty-three days, excluding holidays and weekends, have passed since this request was forwarded to your office. Again, this firm has received no response from your office.

I respectfully note your office's obligations under the Freedom of Information Act to provide all responsive documents; to respond in a timely fashion; to make records promptly available; and, if you deny all or any part of this request, to cite the specific exemption you think justifies your refusal to release the information and notify me of the appeal procedures available under the law. Please note that I expect you to release all segregable portions of otherwise exempt material, and reserve the right to appeal your decision to withhold any of the information I have requested.

Please contact me with any questions you may have about this request or if you need additional information.

Thank you for your anticipated assistance.

Sincerely,



William J. Gullotta

WJG:kl

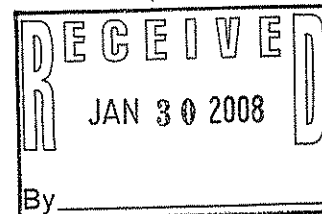
Enclosures

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## United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, D.C. 20240



JAN 25 2008

Mr. William J. Gullotta  
Law Offices of Cowdery, Ecker & Murphy, L.L.C.  
750 Main Street  
Hartford, Connecticut 06103-2703

Dear Mr. Gullotta:

On December 6, 2007, you filed a Freedom of Information(FOIA) request, seeking:

"All documents referring to Michael D. Olsen as the Acting Principle Deputy Assistant Secretary-Indian Affairs, created between 9/11/04 and 10/5/05."

Your request was received in the Assistant Secretary-Indian Affairs on January 15, 2007 and assigned control number "**08175**". Please cite this number in any future communications with our office regarding your request.

You have to date, received several communications directly for the Office of the Secretary in an attempt to narrow the scope of the information you desire. Please be assured we wish to gather this information as quickly as possible. But without understanding exactly the nature of your request, we are unable to compile this for you. We have approximately 10 boxes measuring 24" x 16", plus several file cabinets in which to research. It would be extremely useful if you provided us with the particular subject matter you are interested in.

This specificity is requested in accordance with DOJ Freedom of Information Act Guide, March 2007 Edition under "Procedural Requirements", pages 69-72, and Department of Interior 383 DM 15, 3.5, copies of which are included with this letter.

If you consider this response to be a denial of your request, under 43 CFR 2.28(a)(2), you may file an appeal by writing to:


U. S. Department of the Interior  
Office of the Solicitor  
(ATTN: FOIA Appeals Office)  
1849 C Street, NW, MS-6556  
Washington, DC 20240

Your appeal must be received no later than 30 workdays after the date of this letter. The appeal should be marked, both on the envelope and the face of the appeal letter, with the words "FREEDOM OF INFORMATION APPEAL." Your appeals should be accompanied by a copy of

your original request and this letter, along with any information you have which leads you to believe that responsive records do in fact exist, including where they might be found, if the location is known to you.

Should you have any further questions, please contact Donna Gill at 202-219-0430.

Sincerely,

*for* 

Debbie L. Clark  
Assistant Secretary-Indian Affairs  
(Management)

Attachments

File: FC08175  
cc: FOIA Officer  
OS-2008-00112



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WRITER'S E-MAIL:  
wgullotta@cemlaw.com

**FREEDOM OF INFORMATION APPEAL**

February 11, 2008

**BY FEDERAL EXPRESS**

FOIA Appeals Officer  
U.S. Department of the Interior  
1849 C Street, N.W.  
MS 6556-MIB  
Washington, DC 20240

Re: **Freedom of Information Act Request (OS-2008-00112) and  
Control Number 08175**

Dear FOIA Appeals Officer:

On December 6, 2007, this office submitted a FOIA request to the Department of the Interior ("DOI") seeking copies of "[a]ll documents referring to Michael D. Olsen as the Acting Principal Deputy Assistant Secretary – Indian Affairs created between 9/11/04 and 10/5/05." See Tab 1 (FOIA Request, dated December 6, 2007). This request was assigned control number **OS-2008-00112**. After a brief series of correspondence, which is described below, the request was improperly denied. This letter is an appeal of DOI's blanket withholding of the documents requested by this request. For the reasons set forth below, DOI's withholding of these documents violates the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* The request at issue includes a very limited time frame, and the documents sought are reasonably and adequately described, as FOIA requires.

COWDERY, ECKER & MURPHY, L.L.C.

FOIA Appeals Officer  
U.S. Dep't of the Interior  
February 11, 2008  
Page 2

### BACKGROUND

On December 7, 2007, DOI acknowledged receipt of our FOIA request, but indicated it needed further clarification. See Tab 2 (DOI Response I, dated December 7, 2007.) On December 13, 2007, I responded. See Tab 3 (FOIA Clarification, dated December 13, 2007.) My response apparently satisfied the need for clarification because, one day later on December 14, 2007, DOI referred my request to the Bureau of Indian Affairs ("BIA"). See Tab 4 (DOI Response II, dated December 14, 2007.) BIA thereafter failed to respond to this FOIA request within the 20-work day time frame imposed under the applicable rules and regulations.<sup>1</sup> In fact, this office received a response only after I wrote yet another letter, on January 17, 2008, to request an update on the status of this, and another, request. See Tab 6 (FOIA Update, dated January 17, 2008.) On January 25, 2008, the BIA denied the FOIA request at issue. See Tab 5 (Denial, dated January 25, 2008.)

DOI is currently a defendant in a lawsuit brought by the Schaghticoke Tribal Nation ("STN"), a client of this law firm, which sought and was temporarily granted federal recognition.<sup>2</sup> See Schaghticoke Tribal Nation v. Kempthorne, 3:06 CV 81 (PCD) (D. Conn. 2006). Undoubtedly motivated by that litigation, DOI has already improperly obstructed a prior FOIA request by this law firm. That request sought the performance reviews of James E. Cason. After filing a FOIA appeal, which received no administrative decision, this law firm filed a civil lawsuit seeking to enforce the provisions of the FOIA. See Cowdery, Ecker & Murphy v. Department of the Interior, 511 F. Supp. 2d 215 (2007) (Tab 7). In that case, Judge Stefan R. Underhill "declare[d] the withholding of the performance reviews [was] unlawful and order[ed] the Department to disclose the unredacted performance reviews to [Cowdery, Ecker & Murphy] forthwith." Id. at 221. The Department's continued abuse of the FOIA process appears destined to bring this matter, too, before Judge Underhill.

### DISCUSSION

DOI and BIA failed to provide an adequate justification for the denial of our request, and their decision is contrary to law, arbitrary, and capricious. The purpose of FOIA is "to open agency action to the light of public scrutiny." United States Dep't of Justice v. Reporters Comm.

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<sup>1</sup> The Office of the Assistant Secretary – Indian Affairs claims that it did not receive our request until January 15, 2008. See Tab 5. Nevertheless, DOI's earlier letter to this firm indicates that our request was, in fact, forwarded to the Bureau of Indian Affairs on December 14, 2007. See Tab 4.

<sup>2</sup> DOI later issued a highly-disputed second decision denying STN's petition for recognition. This denial is the subject of the above-referenced lawsuit.

COWDERY, ECKER & MURPHY, L.L.C.

FOIA Appeals Officer  
 U.S. Dep't of the Interior  
 February 11, 2008  
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for Freedom of the Press, 489 U.S. 749, 756 (1989). In making a request under the FOIA, a requester need only “reasonably describe[]” the records sought. 5 U.S.C. § 552(a)(3)(A). While the law provides relief for an agency that receives an unduly burdensome or vague request, this law firm’s request simply does not rise to that level.<sup>3</sup> Furthermore, even where a request is broad or burdensome, that fact, in and of itself, does not entitle an agency to deny the request on the basis that the requester did not reasonably describe the records sought. See Ruotolo, 53 F.3d at 10 (holding that a request that required the search of 803 files was not unreasonably burdensome); see also DOJ FOIA Update, Vol. IV, No. 3, at 5<sup>4</sup> (“The sheer size or burdensomeness of a FOIA request, in and of itself, does not entitle an agency to deny that request on the ground that it does not ‘reasonably describe’ records within the meaning of 5 U.S.C. § 552 (a)(3)(A).”) “[T]he identification standard should not be used to obstruct public access to agency records”. S. Rep. No. 93-854, 93d Cong., 2d Sess. 10 (1974).

In DOI’s final communication regarding this matter, Ms. Debbie Clark of the office of the Assistant Secretary – Indian Affairs stated that “without understanding exactly the nature of your request, we are unable to compile this for you,” and that “[i]t would be extremely useful if you provided us with the particular subject matter you are interested in.” Tab 5. Our request seeks documents related to one person, Michael D. Olsen, and only those documents wherein Mr. Olsen has been referred to as the Acting Principal Deputy Assistant Secretary – Indian Affairs. Furthermore, the time period of this request is strictly limited. We are not being coy or evasive, but there is simply no other description that can be provided. We request all documents containing any variation of the above-mentioned reference to Mr. Olsen within the period from 9/11/04 through 10/5/05. “The legislative history of the FOIA defines a reasonable description of

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<sup>3</sup> “It is unreasonably burdensome to request information that would require ‘a page-by-page search through the 84,000 cubic feet of documents in the [CIA] Records Center.’” Ruotolo v. Department of Justice, Tax Div., 53 F.3d 4, 9 (2d Cir. 1995), quoting Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978), cert. denied, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980). Similarly, by way of example, it would be unreasonable under FOIA to request a search of every file in the possession of the Internal Revenue Service to look for any reference to Scientology, Church of Scientology v. IRS, 792 F.2d 146, 151 (D.C.Cir.1986), or to seek review of approximately 3,500,000 files of patents and 1,000,000 other files, Irons v. Schuyler, 465 F.2d 608, 611-12 (D.C.Cir.), cert. denied, 409 U.S. 1076, 93 S.Ct. 682, 34 L.Ed.2d 664 (1972). Likewise, it has been held beyond the scope of FOIA to require a search of the files of approximately 5,000 criminal cases in response to a general request for data to be culled from documents which have not been created. See Krohn v. Dep’t of Justice, 628 F.2d 195, 198 (D.C. Cir.1980).

<sup>4</sup> Available at: [http://www.usdoj.gov/oip/foia\\_updates/Vol\\_IV\\_3/page5.htm](http://www.usdoj.gov/oip/foia_updates/Vol_IV_3/page5.htm) (last visited on February 4, 2008).



COWDERY, ECKER & MURPHY, L.L.C.

FOIA Appeals Officer  
U.S. Dep't of the Interior  
February 11, 2008  
Page 4

records as one that enables 'a professional employee of the agency who [is] familiar with the subject area of the request to locate the record with a reasonable amount of effort.'" Ruotolo, 53F.3d at 10, quoting H.R.Rep. No. 93-876, 93rd Cong., 2d Sess. 6 (1974). The simple, time-limited request presented here surely meets that standard.

Ms. Clark's response is pretext for further delay. To be sure, "agencies routinely conduct searches for records on an individual's name." Peyton v. Reno, No. Civ. A. 98-1457, 1999 WL 674491, at \*1 (D.D.C. July 19, 1999). Indeed, Ms. Clark has already identified "approximately 10 boxes measuring 24" x 16", plus several file cabinets in which to research." BIA Denial at Tab 5. This law firm is simply asking BIA to begin and complete the requested search by reviewing the files already identified and any others that might contain responsive documents, preparing all responsive documents for copying, and producing them to this law firm.

In the event this appeal is denied, DOI is required to provide a written response describing the reasons for the denial, the names and titles of each person responsible for the denial, and the procedures required to invoke judicial assistance in this matter. See 5 U.S.C. § 552(a)(6)(A)(ii). I also take this opportunity to remind you of 5 U.S.C. § 552(a)(4)(F), which mandates an investigation by the Special Counsel of the Merit Systems Protection Board in cases of suspected "arbitrary or capricious" withholding under the FOIA. Such proceedings by the MSPB Special Counsel are initiated automatically after a court (a) orders the production of agency records improperly withheld, (b) assesses attorney's fees and litigation costs, and (c) makes an additional written finding that the circumstances surrounding the withholding raise questions whether the agency personnel acted arbitrarily or capriciously with respect to the withholding.

As this firm's request is now two months old, I am sure you understand that time is of the essence in this matter. If this appeal is denied or DOI's response is not forthcoming within 20 working days, I reserve my right under FOIA to seek judicial review, including the award of attorney's fees.

I await your prompt reply.

Sincerely,



William J. Gullotta

WJG:  
Enclosures