



CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

July 14, 2021

The Honorable Michael E. Horowitz
Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Request for Investigation of Politicization of Freedom of Information Act Processes

Dear Inspector General Horowitz,

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that your office open a formal investigation into the politicization of the Freedom of Information Act (“FOIA”) administrative and litigation processes at the Department of Justice (“DOJ”) during the last four years. Two recent decisions in a FOIA lawsuit brought by CREW, *Citizens for Responsibility and Ethics in Washington v. Dep’t of Justice*, No. 19-cv-1552 (D.D.C), raise serious questions about whether political leadership at DOJ pressured career officials to engage in potentially sanctionable conduct by hiding the true nature of the contents and purpose of an Office of Legal Counsel (“OLC”) memorandum. That memorandum was part of then-Attorney General William Barr’s efforts to undermine Special Counsel Robert Mueller’s report and the substantial evidence the Special Counsel had amassed concerning then-President Donald Trump’s obstruction of justice.

Far from an isolated incident, this conduct appears to have occurred in other politically charged FOIA lawsuits involving requests for documents that would shed light on President Trump’s misconduct or worse. As in CREW’s case, in those other cases DOJ declarants misrepresented the nature of the documents at issue—misrepresentations that only came to light after the courts conducted *in camera* reviews. And like in CREW’s case, DOJ lawyers argued from those misleading declarations that the documents at issue were exempt from disclosure under the FOIA.

We understand that your office may defer to the Office of Professional Responsibility (“OPR”) on matters of attorney misconduct and that, given the court’s findings of bad faith in *CREW v. DOJ*, OPR is—or should be—investigating the conduct of the agency attorneys involved in that case.¹ But we urge you to investigate whether their apparent misconduct occurred as

¹ It is CREW’s understanding that this matter should already have been referred to OPR. DOJ’s standards of conduct for attorneys provide that “[w]henver a judge or magistrate makes a finding of misconduct by a Department attorney or requests an inquiry by the Department into possible misconduct, the employee shall immediately report the finding or request to the employee’s supervisor and to OPR, regardless of whether the matter is regarded as serious or is the subject of additional litigation.” U.S. Dep’t of Justice, Standards of Conduct, <https://www.justice.gov/jm/jm-1-4000-standards-conduct>.

the result of improper directives or pressure from DOJ's political leadership.² Beyond the *CREW v. DOJ* case, we ask that your office investigate whether similar misconduct or political interference impacted other FOIA requests for documents initially sought from DOJ during the Trump Administration and other FOIA litigation handled by Department attorneys. Finally, we ask you to consider whether the policies and procedures governing the handling of such matters by DOJ's Civil Division and the United States Attorneys' Offices should be revised to prevent similar misconduct in pending and future FOIA requests and litigation.

Background

CREW's FOIA request and lawsuit

This request for investigation stems from DOJ's conduct in response to a FOIA request CREW filed seeking records related to consultations then-Attorney General Barr asserted he had with OLC and other DOJ lawyers in the course of making misleading statements about Special Counsel Mueller's investigation and the report detailing his findings. As the Court explained in its May 3, 2021 Memorandum Opinion and Order in *CREW v. DOJ*, Special Counsel Mueller delivered his Report of the Investigation into Russian Interference in the 2016 Presidential Election to Attorney General Barr on Friday March 22, 2019.³ Instead of immediately sharing the report with Congress and the American people, on March 24, Attorney General Barr sent a four-page letter to congressional leaders purporting to "summarize the principal conclusions" set out in the nearly 400-page Report. Attorney General Barr's letter claimed that the Special Counsel "did not draw a conclusion – one way or the other – as to whether the examined conduct constituted obstruction," and it went on to announce Attorney General Barr's own opinion that "the evidence developed during the Special Counsel's investigation is not sufficient to establish that the President committed an obstruction-of-justice offense."⁴ After Attorney General Barr's letter was released, President Trump declared himself to have been fully exonerated: "No Collusion, No Obstruction, Complete and Total EXONERATION. KEEP AMERICA GREAT!"⁵

On April 18, 2019, Attorney General Barr held a press conference to announce the public release of the Special Counsel's report.⁶ During that conference, Attorney General Barr stated "that the evidence developed by the Special Counsel is not sufficient to establish that the President committed an obstruction-of-justice offense," specifically referencing advice he had received from OLC and other DOJ attorneys.⁷

² Those individuals include but may not be limited to the following former officials: Attorney General Barr; Deputy Attorney General Rod Rosenstein; Chief of Staff, Office of the Attorney General, Brian C. Rabbitt; Principal Associate Deputy Attorney General Edward O'Callaghan; Assistant Attorney General for the Office of Legal Counsel Steven A. Engel; and former Deputy Assistant Attorney General, Office of Legal Counsel Henry C. Whitaker.

³ *CREW v. DOJ*, No. 19-1552, 2021 WL 2652852, at *1 (D.D.C. May 3, 2021).

⁴ Letter from Attorney General William Barr to Senators Lindsey Graham and Dianne Feinstein and Representatives Jerrold Nadler and Doug Collins, Mar. 22, 2019, <https://bit.ly/3As0Cov>.

⁵ See Mike Calia, [Trump responds to Mueller findings: 'No Collusion, No Obstruction, Complete and Total EXONERATION. KEEP AMERICA GREAT!'](https://www.cnn.com/2019/03/24/politics/trump-responds-mueller-findings/index.html), CNBC, Mar. 24, 2019, <https://cnb.cx/3ykVqkr>; *CREW v. DOJ*, 2021 WL 1749763, at *1 n.5

⁶ *Id.* at *2.

⁷ [Read Barr's News Conference Remarks Ahead of the Mueller Report Release](https://www.nytimes.com/2019/04/18/us/politics/barr-remarks-ahead-of-mueller-report.html), *New York Times*, Apr. 18, 2019, <https://nyti.ms/3xgCTpy>.

CREW filed a FOIA request for documents pertaining to that advice on April 18, 2019.⁸ In response to that request, DOJ produced certain records, but withheld two contested documents, including a March 24, 2019 memorandum from OLC to Attorney General Barr, claiming the documents fell within both the deliberative process and attorney-client privileges and therefore were exempt under FOIA Exemption 5. In support of its exemption claims, DOJ filed declarations and pleadings justifying those claims on the ground that Attorney General Barr was involved in a decision-making process that the Special Counsel had “left to [his] purview,” having failed to resolve the question of whether the evidence would support prosecuting the President for obstruction of justice.⁹

These representations were false. In two successive opinions, United States District Court Judge Amy Berman Jackson determined DOJ and its officials had acted in bad faith by misrepresenting the nature and contents of the nine-page OLC memorandum that was the primary focus of the parties’ cross-motions for summary judgment. First, her May 3, 2021 opinion on that motion described DOJ’s supporting affidavits as “so inconsistent with evidence in the record, they are not worthy of credence” and concluded that “DOJ has been disingenuous to this Court with respect to the existence of a decision-making process that should be shielded by the deliberative process privilege.”¹⁰

Second, in a June 14, 2021 order ruling on DOJ’s motion for a stay pending appeal, Judge Jackson rejected subsequent efforts by DOJ litigators to characterize their material misrepresentations as the product of the court’s “confusion” and not any purposeful conduct on their part. Judge Jackson explained:

The Department chose not to tell the Court the purpose of the memorandum or subject it addressed at all, and no amount of apologizing for “imprecision” in the language it did use can cure the impact of that fundamental omission.¹¹

DOJ’s pleadings in this case went well beyond vigorous advocacy and appear to have been in furtherance of efforts by former Attorney General Barr and other leading DOJ officials to misrepresent the nature of the Special Counsel’s findings concerning President Trump’s obstruction of justice and to undermine public confidence in the Special Counsel’s report. The OLC memorandum that DOJ withheld makes clear that Attorney General Barr was not involved in a legitimate prosecutorial decision-making process, having already concluded the President would not be prosecuted. Instead, he used the imprimatur of OLC to support his efforts to spin and undermine the substantial obstruction-of-justice evidence.

DOJ has now appealed the court’s order requiring the disclosure of the OLC memorandum in full and has made a partial disclosure of the portion of the memorandum that its declarants and attorneys intentionally chose not to describe. Regardless of how the D.C. Circuit rules on the merits of the government’s appeal, this case raises important issues about the ability of courts and FOIA litigants to rely on the agency declarations that lie at the heart of

⁸ [CREW requests OLC views on whether Trump obstructed justice](https://bit.ly/3wibVfR), CREW, Apr. 18, 2019, <https://bit.ly/3wibVfR>.

⁹ *CREW v. DOJ*, 2021 WL 1749763, at *10 (quoting Decl. of Vanessa R. Brinkmann at ¶ 11). See also Def.’s Mem. in Supp. of Mot. [Dkt. # 15-2] at 14–15 (“Moreover, because any determination as to whether the President committed an obstruction-of-justice offense was left to the purview of the Attorney General, the memorandum is clearly pre-decisional.”) (internal quotations, brackets, and citations omitted).

¹⁰ *CREW v. DOJ*, 2021 WL 1749763, at *14.

¹¹ Order, *CREW v. DOJ*, No. 19-cv-1552 (D.D.C.), June 14, 2021 (internal citation omitted), ECF No. 35.

all FOIA litigation. And any appeal will not resolve the question of whether primary responsibility for DOJ's decisions and representations to the court rests solely with the declarants and litigation counsel for this case. The Department's senior political leaders had equities in the materials at issue and an obvious motive to cover-up the mechanisms by which DOJ misrepresented Special Counsel Mueller's findings to Congress and the American people.

Other FOIA Cases Raising Similar Concerns

Unfortunately, this case does not appear to be an isolated instance. CREW is aware of at least two other politically charged FOIA cases brought during the Trump Administration and litigated by DOJ where the declarants' descriptions of the documents at issue were demonstrably false, as revealed by the courts' *in camera* review of the documents. In *CREW v. GSA*, a FOIA lawsuit seeking documents related to the controversial decision not to relocate the FBI headquarters—a decision largely attributed to President Trump, whose luxury hotel is just down the block—the court's *in camera* review revealed that “the unredacted version of th[e] email [at issue] does not align with GSA's description in its *Vaughn* index.” No. 18-2071, 2021 WL 1177797, at *8 (D.D.C. Mar. 29, 2021). Significantly, like the most recent *CREW v. DOJ* decision, the document in fact failed to “include any ‘recommendations’ or ‘consultation,’ much less any ‘deliberation’ about the course of the project.” *Id.* Similarly, in *New York Times v. OMB*, which sought impeachment-related documents, the court's *in camera* review revealed “obvious differences between the affiants' description of the nature and subject matter of the documents, and the documents themselves.” No. 19-3562, 2021 WL 1329025, at *8 (D.D.C. Mar. 29, 2021).

Grounds for Investigation

As DOJ's Inspector General, you have authority to “investigate allegations of criminal wrongdoing or administrative misconduct by a person who is the head of any agency or component of the Department of Justice.”¹² The Inspector General also has authority to “keep the head of such establishment and the Congress fully and currently informed, by means of the reports required by section 5 and otherwise, concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by such establishment, to recommend corrective action concerning such problems, abuses, and deficiencies, and to report on the progress made in implementing such corrective action.”¹³

The Department of Justice and its employees are entrusted with the solemn responsibility of representing the American people and their government in cases of extraordinary importance for our republic. In the context of litigation under the FOIA, the candor of DOJ's representations is critical because in most cases, DOJ attorneys and declarants are the only ones who have access to the withheld records. In FOIA litigation, courts typically accord agency declarations a presumption of good faith,¹⁴ and FOIA plaintiffs rarely, if ever, are

¹² 5 U.S.C. App. 3 § 8E.

¹³ 5 U.S.C. App. 3 § 4(a)(5).

¹⁴ See, e.g., *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991).

allowed to conduct discovery and then only on issues of bad faith.¹⁵ As a result, FOIA plaintiffs have no vehicle by which to test the sufficiency of the facts set forth in agency declarations, and even when those declarations are deemed insufficient to carry the government's burden of proof, courts usually allow the agency in question to submit supplemental declarations.¹⁶ Plaintiffs litigating FOIA matters and courts hearing FOIA lawsuits must rely on DOJ declarants and attorneys to accurately describe the nature and contents of the withheld records. Quite simply, for FOIA litigation to work, DOJ and its officers must be honest.

Here, however, DOJ undermined that system when it submitted false and misleading declarations that mischaracterized both the nature of the OLC memo at issue and the supposed harm to DOJ should the court order disclosure. As the district court found, contrary to DOJ's representations, Attorney General Barr was not engaged in a decision-making process that would support DOJ's claim that the OLC memo was protected from disclosure by the deliberative process privilege, nor, contrary to DOJ's arguments, was OLC offering legal advice.¹⁷ Had the court not conducted an *in camera* review of the memorandum at issue, its true contents and purpose might never have come to light.

The conduct of the then-Attorney General, Deputy Attorney General, Assistant Attorney General for the Office of Legal Counsel, and their staff warrant investigation to determine if they bear ultimate responsibility for DOJ's conduct in the handling of this request and associated litigation. It would be an obvious miscarriage of justice if DOJ failed to investigate whether Department leadership pressured career officials to advance legally and factually flawed arguments to a United States district court and risk sanctions.

In each of the three cases we cite above, DOJ's conduct magnified the harm to the FOIA process, the court's processes, and requesters. Not only did DOJ attorneys fail to act as a brake on the submission of false and misleading declarations, but they crafted legal arguments that embraced and advanced those falsities. Accountability failed at all levels within the Department, seriously eroding and undermining the agency's credibility in this and future FOIA litigation.

Conclusion

For the reasons detailed above, CREW respectfully requests that you investigate whether there was inappropriate political interference in DOJ's handling of CREW's FOIA request and associated litigation. Specifically, we request that you investigate whether senior political officials improperly influenced the factual and legal submissions DOJ made to support its FOIA exemption claims or directed career officials to engage in potentially sanctionable conduct. In addition, you should review whether similar interference by political appointees impacted DOJ's handling of other politically sensitive FOIA requests and related litigation. As outlined above, there are at least two other cases in which a court's *in camera* review of documents withheld under the FOIA revealed serious misrepresentations by agency declarants and DOJ litigators defending those agencies. Finally, you should evaluate DOJ

¹⁵ See, e.g., *Jarvik v. CIA*, 741 F. Supp. 2d 106, 122 (D.D.C. 2010) ("Even if an agency's affidavits regarding its search are deficient, courts generally do not grant discovery but instead direct the agency to supplement its affidavits."); *Wheeler v. CIA*, 271 F. Supp. 2d 132, 139 (D.D.C. 2003).

¹⁶ *Id.*

¹⁷ *CREW v. DOJ*, 2021 WL 1749763, at *11-12, 17-18.

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policies and procedures for handling such FOIA requests to determine if they should be revised to prevent similar misconduct in the future. The possibility that the conduct in this case is not an aberration and that declarants in other cases have also made material misrepresentations regarding the contents of records that have been requested by members of the public raises very serious concerns that go well beyond the *CREW v. DOJ* case.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Noah Bookbinder', with a long horizontal flourish extending to the right.

Noah Bookbinder
President

cc: Jeffrey Ragsdale, Counsel, Office of Professional Responsibility,
U.S. Department of Justice