



CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

June 28, 2022

Bobak Talebian,
Director
Office of Information Policy
U.S. Department of Justice
441 G Street, N.W., 6th Floor
Washington, D.C. 20530

Re: Administrative Appeal of Request No. CRM-301704097

Dear Director Talebian:

Citizens for Responsibility and Ethics in Washington (“CREW”) hereby administratively appeals the determination of the Department of Justice’s (“DOJ”) Criminal Division that to the extent any records responsive to CREW’s Freedom of Information Act (“FOIA”) Request No. CRM-30170409 exist they would be categorically exempt from disclosure pursuant to FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C). As disclosed below, the Criminal Division has failed to meet its burden of showing that its refusal to even acknowledge the existence of responsive records—a “*Glomar*” response—was appropriate and that all responsive documents fall within a categorical exemption.

Procedural Background

By letter sent by email on March 1, 2022, CREW requested two categories of records pertaining to former Secretary of the Interior Ryan Zinke. First, CREW requested all records relating to the findings of the U.S. Department of Interior (“DOI”) Office of Inspector General (“OIG”) that as Secretary Mr. Zinke failed to comply with his ethical obligations by providing services to the Great Northern Veterans Peace Park Foundation (the “Foundation”), providing incomplete and misleading answers to questions from DOI’s Designated Agency Ethics Official in July 2018 concerning his involvement in that Foundation and the 95 Karrow project, and violating the Standards of Ethical Conduct when he misused his official position by directing subordinates to perform during normal working hours activities unrelated to the performance of their official duties. Second, CREW requested all records related to DOJ’s decision in the summer of 2021 to decline prosecuting Mr. Zinke following a referral from the Interior OIG. CREW’s request specified that CREW was not seeking records covered by grand jury secrecy pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure. For your convenience a copy of this request is attached as Exhibit A.

CREW also requested a waiver of fees because the subject of its request concerns the operations of the federal government and disclosing the requested records would contribute to “greater public awareness of alleged malfeasance and possible criminal behavior by the former Secretary and why, despite this apparent malfeasance, DOJ refused to prosecute Zinke.” *Id.* CREW outlined the available public evidence found in the DOI OIG’s public report of February 16, 2022, which included emails showing that while serving as Secretary Zinke “engaged in negotiations with developers of the 95 Karrow project concerning the development of the land owned by the Foundation,” a July 2018 memorandum from DOI ethics officials explaining how Zinke provided them “materially incorrect, incomplete, and misleading answers,” and the OIG’s findings that “Zinke misused his authority to direct subordinates to assist with the development project during working hours.” *Id.*

By letter sent via email on April 5, 2022, the Criminal Division advised CREW that to the extent any non-public responsive documents exist their disclosure, without consent, proof of death, or an overriding public interest, “could reasonable be expected to constitute an unwarranted invasion of personal privacy” pursuant to FOIA Exemption 7(C). The Criminal Division further claimed in its letter that because any responsive records would be “categorically exempt from disclosure” it was “not required to conduct a search for the requested records.” For your convenience a copy of this letter is attached as Exhibit B.

Factual Background

On February 16, 2022, DOI posted on its website a 34-page report of the OIG’s investigation into former Secretary Zinke. The investigation centered on allegations that the former Secretary continued to be involved in a land development project in his hometown of Whitefish, MT [95 Karrow], after he was appointed as Secretary of the Interior and that his continued involvement posed a potential conflict of interest with his official duties. Office of Inspector General U.S. Department of the Interior, Former Secretary Did Not Comply with Ethical Obligations and Duty of Candor, Feb. 16, 2022, at 1 (“OIG Report”), <https://www.oversight.gov/sites/default/files/oigreports/DOI/WebReactFormerSecretaryEthicalNoncompliance.pdf>. As part of its investigation the OIG issued subpoenas to the project’s developers who produced emails and text messages revealing that “Secretary Zinke continued to be involved in Foundation matters while he was Secretary.” *Id.*

After a thorough investigation the OIG concluded that Secretary Zinke “failed to abide by his ethics obligations,” “did not comply with his duty of candor when questioned by the DOI’s then Designated Agency Ethics Official” about this involvement, and “misused his official position” when he “direct[ed] his subordinates to assist him with matters related to the Foundation and the 95 Karrow project.” *Id.* at 1-2. The OIG was unable to substantiate the allegation that the former Secretary had violated federal conflict of interest laws or his obligation to recuse from all official matters involving the Foundation for two years after resigning from the Foundation. *Id.* at 2. *See also id.* at 30.

The facts underlying the OIG’s conclusions include the following:

- In his pre-confirmation ethics agreement Secretary Zinke committed to resign from the Foundation and to no longer be involved in Foundation matters (OIG Report at 4);
- Despite this commitment he continued to communicate and negotiate on behalf of the Foundation with the developers of the 95 Karrow project (*id.* at 5);
- Those communications included discussions about Secretary Zinke’s desire to build or operate a microbrewery in conjunction with the 95 Karrow project (*id.* at 12);
- Secretary Zinke worked with one of the developers on developing a response to news media inquiries about his involvement with the Foundation and the 95 Karrow project (*id.* at 13);
- Secretary Zinke had his staff use government resources to further Foundation matters and the 95 Karrow project (*id.* at 17).

The OIG Report also noted:

We referred our findings to the U.S. Department of Justice (DOJ), which declined prosecution of this matter in the summer of 2021.

Id. at 2.

The Criminal Division Improperly Invoked A Glomar Response

By refusing at the outset to process any aspect of CREW’s request the Criminal Division failed to meet its most basic obligations under the FOIA and relied improperly on both a *Glomar* response and Exemption 7(C) to justify this approach. In the context of Exemption 7(C), an agency’s refusal to even acknowledge the existence of responsive records—the case here—is appropriate only where disclosing their existence is itself “information protected by Exemption 7(C).” *Bartko v. Dep’t of Justice*, 898 F.3d 51, 64 (D.C. Cir. 2018). In the context of a criminal investigation courts have recognized that the government’s mere acknowledgment that it has investigative records regarding a specified individual implicates that individual’s privacy interest “in keeping secret the fact that they were subjects of a law enforcement investigation.” *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995). In such circumstances a *Glomar* response may be appropriate. *Id.* at 893. But a *Glomar* response is not appropriate where the subject of a FOIA request already has been publicly associated with the agency’s law enforcement investigation. *CREW v. Dep’t of Justice*, 746 F.3d 1082, 1091-92 (D.C. Cir. 2014).

That is the precise situation here. The public version of the OIG’s report examining Mr. Zinke’s conduct states explicitly that the OIG referred the matter to DOJ, which declined to prosecute. Through the report of the OIG DOI confirmed publicly and officially Mr. Zinke’s status as the subject of a criminal referral. Thus, DOJ’s mere revelation that it has documents responsive to CREW’s FOIA request would not further implicate Secretary Zinke’s privacy interests. Accordingly, the Criminal Division erred in asserting a *Glomar* response and must therefore “acknowledge the existence of any responsive records it holds.” *Boyd v. Dep’t of Justice*, 475 F.3d 381, 389 (D.C. Cir. 2007).

*The Criminal Division Improperly Relied On Exemption 7(C)
to Categorically Withhold All Responsive Documents*

Exemption 7(C) exempts from compelled disclosure records “compiled for law enforcement purposes” where disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). In determining whether this privacy exemption applies a court must balance the privacy interest against the public interest in citizens being “informed about ‘what their government is up to.’” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762, 772-73 (1989) (internal citation omitted). Information that “sheds light on an agency’s performance of its statutory duties falls squarely within” the public interest, *id.* at 773; indeed, it is the “only relevant public interest in the FOIA balancing analysis[.]” *CREW v. Dep’t of Justice*, 746 F.3d at 1093 (citation omitted).

Courts have recognized an overriding public interest in “matters of substantive law enforcement policy[.]” *Reporters Comm.*, 489 U.S. at 766 n.18. That interest is heightened further where, as here, the investigation implicates a prominent public official, *CREW v. Dep’t of Justice*, 746 F.3d at 1094, who is alleged to have engaged in serious misconduct. *Kimberlin v. Dep’t of Justice*, 139 F.3d 944, 949(D.C. Cir. 1998). Mr. Zinke occupied a position of high public trust as a member of President Trump’s cabinet, accountable directly to the President. As DOI’s OIG concluded Mr. Zinke abused his position of trust in multiple ways. As a result, there is a clear and overriding public interest in DOJ’s decision not to charge a former cabinet official for his serious abuse of his office to advance his own personal interests to the clear detriment of the public interest and his knowing provision of “incorrect, incomplete, and misleading answers” to questions by agency ethics officials, OIG Report at 30, potentially compromising the efficacy of their investigation.

Finally, even if the requested records contain some information for which a privacy interest outweighs the public interest in disclosure, the Criminal Division was required under the FOIA to still disclose all non-exempt, segregable portions of the records. 5 U.S.C. § 552(b). *See also CREW v. Dep’t of Justice*, 746 F.3d at 1096 (that some information in the requested investigatory records may be exempt “does not justify the blanket withholding of all responsive documents.”). The Criminal Division’s assertion of a blanket withholding without conducting a search and releasing all non-exempt material violates its statutory obligations under the FOIA.

Conclusion

For all of these reasons, the Criminal Division’s initial determination that without consent, proof of death, or an overriding public interest it could not release any documents or even acknowledge the existence of responsive records plainly is in error and must be reversed. We therefore request that you order the Criminal Division to process CREW’s request and withhold information pursuant to FOIA Exemption 7(C) only after weighing any privacy interest against the compelling public interest in disclosure. Please direct any communications about this appeal to me at liheanachor@citizensforethics.org.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Laura Iheanachor". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Laura Iheanachor
Staff Counsel

Enclosures:

1. CREW's March 1, 2022 FOIA Request
2. EPA's April 5, 2022 Final Response



CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

Amanda M. Jones
Chief, FOIA/PA Unit
Criminal Division
Suite 1127, Keeney Building
Washington, D.C. 20530
crm.foia@usdoj.gov

March 1, 2022

Re: Freedom of Information Act Request

Dear FOIA Officer:

Citizens for Responsibility and Ethics in Washington (“CREW”) submits this request for records pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and U.S. Department of Justice (“DOJ”) regulations.

Specifically, CREW requests:

1. All records relating to U.S. Department of Interior Office of Inspector General (“Interior OIG”) referral to DOJ concerning its finding that former Secretary of the Interior Ryan Zinke: (1) failed to comply with ethical obligations not to manage services associated with the Great Northern Veterans Peace Park Foundation (“Foundation”) as set forth in his ethics agreement, recusal memorandum and accompanying documents; (2) provided incorrect, incomplete and misleading answers to DOI’s Designated Agency Ethics Official in July 2018 concerning his continued involvement with the Foundation and the 95 Karrow project; and (3) violated the Standards of Ethical Conduct when he misused his official position to direct his subordinates to perform activities that were not related to the performance of their official duties during normal working hours.¹
2. All records relating to DOJ’s summer 2021 decision to decline prosecution of Ryan Zinke following Interior OIG’s referral, including but not limited to records reflecting the final decision not to prosecute Zinke and the rationale

¹ Office of Inspector General U.S. Department of the Interior, [Former Secretary Did Not Comply with Ethical Obligations and Duty of Candor](https://www.oversight.gov/sites/default/files/oig-reports/DOI/WebReactFormerSecretaryEthicalNoncompliance.pdf), Feb. 16, 2022, <https://www.oversight.gov/sites/default/files/oig-reports/DOI/WebReactFormerSecretaryEthicalNoncompliance.pdf> (“Interior OIG report”).
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for that decision.² Specifically, CREW requests records not covered by grand jury secrecy pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure.

Please search for responsive records regardless of format, medium, or physical characteristics. We seek records of any kind, including paper records, electronic records, audiotapes, videotapes, photographs, data, and graphical material. Our request includes without limitation all correspondence, letters, emails, text messages, facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions. Our request also includes any attachments to emails and other records, and anyone who was cc'ed or bcc'ed on any emails.

If it is your position any portion of the requested records is exempt from disclosure, CREW requests that you provide it with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). If some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. See 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document. See *Mead Data Central v. U.S. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

Please be advised that CREW intends to pursue all legal remedies to enforce its rights under FOIA. Accordingly, because litigation is reasonably foreseeable, the agency should institute an agency wide preservation hold on all documents potentially responsive to this request.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A) and agency regulations, CREW requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures likely will contribute to a better understanding of relevant government procedures by CREW and the general public in a significant way. See *id.* § 552(a)(4)(A)(iii). Moreover, the request primarily and fundamentally is for non-commercial purposes. See, e.g., *McClellan Ecological v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

On February 16, 2022, Interior OIG stated in a public report that DOJ declined to prosecute the former Secretary of the Interior following a referral by the Interior OIG concerning its investigation finding that Zinke misused his position to advance commercial development projects with which he was affiliated and failed to uphold his duty of candor when questioned by DOI ethics officials about the details of his involvement.³ OIG's investigation uncovered emails showing that while serving as Secretary of the Interior, Zinke engaged in negotiations with developers of the 95 Karrow

² *Id.*

³ *Id.*; Rina Torchinsky, [U.S. investigation finds that former Interior Secretary Ryan Zinke misused position](https://www.npr.org/2022/02/16/1081180054/ryan-zinke-interior-investigation-ig-report), NPR, February 16, 2022, <https://www.npr.org/2022/02/16/1081180054/ryan-zinke-interior-investigation-ig-report>.

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project concerning the development of land belonging to the nonprofit Great Northern Veterans Peace Park Foundation, which Zinke helped to establish in 2007. As detailed in a July 2018 memorandum from DOI ethics officials, when questioned about his alleged involvement in the development project, Zinke provided “materially incorrect, incomplete, and misleading answers” about his role.⁴ Further, OIG investigators found that Zinke misused his authority to direct subordinates to assist with the development project during work hours.⁵ The requested records are likely to contribute to greater public awareness of alleged malfeasance and possible criminal behavior by the former Secretary and why, despite this apparent malfeasance, DOJ refused to prosecute Zinke.

CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the public’s right to be aware of the activities of government officials, to ensuring the integrity of those officials, and to highlighting and working to reduce the influence of money on politics. CREW uses a combination of research, litigation, and advocacy to advance its mission. CREW intends to analyze the information responsive to this request and to share its analysis with the public through reports, press releases, or other means. In addition, CREW will disseminate any documents it acquires from this request to the public through its website, www.citizensforethics.org. The release of information obtained through this request is not in CREW’s financial interest.

CREW further requests that it not be charged search or review fees for this request pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) because CREW qualifies as a member of the news media. See *Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989) (holding non-profit a “representative of the news media” and broadly interpreting the term to include “any person or organization which regularly publishes or disseminates information to the public”).

CREW routinely disseminates information obtained through FOIA to the public in several ways. For example, CREW’s website receives hundreds of thousands of page views every month. The website includes blogposts that report on and analyze newsworthy developments regarding government ethics, corruption, and money in politics, as well as numerous reports CREW has published to educate the public about these issues. These reports frequently rely on government records obtained through FOIA. CREW also posts the documents it obtains through FOIA on its website. Under these circumstances, CREW satisfies fully the criteria for a fee waiver.

Conclusion

If you have any questions about this request or foresee any problems in fully releasing the requested records, please contact me at (202) 408-5565 or liheanachor@citizensforethics.org. Also, if CREW’s request for a fee waiver is denied, please contact our office immediately upon making such a determination.

Where possible, please produce records in electronic format. Please send the

⁴ *Interior OIG report*.

⁵ *Id.*

requested records to me at either liheanachor@citizensforethics.org or Laura Iheanachor, Citizens for Responsibility and Ethics in Washington, 1331 F St. NW, Suite 900, Washington, D.C. 20004.

Sincerely,

A handwritten signature in black ink, appearing to read "Laura Iheanachor". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Laura Iheanachor
Staff Counsel



U.S. Department of Justice

Criminal Division

Office of Enforcement Operations

Washington, D.C. 20530

VIA Electronic Mail

April 5, 2022

Ms. Laura Iheanachor
Citizens for Responsibility and
Ethics in Washington
liheanachor@citizensforethics.org

Request No. CRM-301704097
Subject: Referral to DOJ from Interior OIG,
Former Secretary Ryan Zinke

Dear Ms. Iheanachor:

The Criminal Division acknowledges receipt of your Freedom of Information Act request dated March 1, 2022. Your request was received in this Office on March 1, 2022. In that request, you asked for access to records concerning the above-mentioned subject. Your request has been assigned file number CRM-301704097. You should refer to this number in any future correspondence with this Office.

To the extent that non-public responsive records exist, without consent, proof of death, or an overriding public interest, disclosure of law enforcement records concerning an individual could reasonably be expected to constitute an unwarranted invasion of personal privacy. See 5 U.S.C. § 552(b)(7)(C). Because any non-public records responsive to your request would be categorically exempt from disclosure, this Office is not required to conduct a search for the requested records.

As to your request for a fee waiver, your request is moot as there are no fees associated with this request.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may contact our FOIA Public Liaison at the (202) 616-0307 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with the Criminal Division's determination in response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, 441 G Street, NW, 6th Floor, Washington, D.C. 20530, or you may submit an appeal through OIP's FOIA STAR portal by creating an account on the following website: <https://www.justice.gov/oip/submit-and-track-request-appeal>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,



Christina Butler
Acting Chief
FOIA/PA Unit