IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY	
AND ETHICS IN WASHINGTON,)
Plaintiff,))
v.) Civil Action No. 18-cv-1766 (RBW)
U.S. DEPARTMENT OF JUSTICE,)
Defendant.)))

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR <u>PARTIAL SUMMARY JUDGMENT</u>

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INTRODUCTION

Based almost entirely on a sealed, ex parte declaration, defendant U.S. Department of Justice ("DOJ") has now moved for partial summary judgment arguing it properly invoked Exemption 7(A) of the Freedom of Information Act ("FOIA") to redact information from the 100-page agreed upon sample of documents at issue. Without access to the rationale for those withholdings, plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") has no meaningful ability to respond fully to DOJ's arguments. CREW cannot fully assess the government's claim that the records were compiled for law enforcement purposes given DOJ's reliance on the sealed declaration as support for that assertion. Nor can CREW determine whether DOJ seeks to prevent interference with an actually pending or anticipated enforcement proceeding, a prerequisite DOJ claims to meet through the sealed declaration. Most significantly, CREW cannot determine how the redacted information reasonably would harm law enforcement proceedings, as that information is spelled out only in the sealed declaration. Indeed, DOJ has withheld from CREW and the public even a description of the functional categories of withheld material, which it claims are described in the sealed declaration. While all these holes in the public record normally would be grounds for deferring the motion for further evidentiary development pursuant to Fed. R. Civ. P. 56(d), the Court's Order permitting the sealed, ex parte declaration leaves CREW with no alternative but to attempt a substantive response.

On its face, DOJ's motion suffers from critical flaws. First, DOJ seems confused, if not disingenuous, about the reason why the Court ordered briefing of the applicability of Exemption 7(A) based on a sampling of responsive documents. It was not to determine whether DOJ's proposed processing schedule should be accepted, as DOJ suggests, but rather to determine

whether that process could be short-circuited because DOJ was relying improperly on Exemption 7(A).

More fundamentally, DOJ has not met its burden of proving the documents at issue were generated for a law enforcement purpose within the meaning of Exemption 7(A). The OIG Report itself confirms DOJ was engaged in an administrative investigation solely for the purpose of determining whether former FBI Deputy Director Andrew McCabe should be disciplined for violating internal FBI and DOJ policies, not an investigation of potential criminal activity.

Further, DOJ appears to believe the task before it is simply to redact all information in the sampling not already made public in the report from DOJ's Office of Inspector General ("OIG Report" or "Report of Investigation"). But such redactions are appropriate only if are authorized by one of the FOIA's nine exemptions.

Here, DOJ asserts Exemption 7(A), but that assertion is facially suspect. OIG chose to publicly release the 35-page Report of Investigation, which purported to set forth extensive evidence that Mr. McCabe committed misconduct. This deviated from OIG's ordinary process to publicly release only a one-page "Investigative Summary" that neither identifies the subject of the misconduct inquiry nor contains any non-conclusory representations regarding the underlying evidence. In addition, Mr. McCabe and his legal representatives have already accessed and reviewed the evidentiary materials at issue here; in accordance with applicable law and internal agency policies DOJ and the FBI were required to provide Mr. McCabe with an opportunity to review the evidentiary materials prior to his final disciplinary adjudication. Under these

¹ See OIG, Investigative Findings Involving Administrative Misconduct ("A summary of investigative findings is posted following issuance to the component of our final report of investigation, after the Department, the affected component, and the subject (when appropriate) have been provided with the opportunity to review and comment on the proposed summary"), available at https://oig.justice.gov/reports/inv-findings.htm.

² See, e.g., https://oig.justice.gov/reports/2018/2018-04-10.pdf.

circumstances it is difficult to conceive how disclosing the documents underlying that report would cause any harm to any pending enforcement proceedings.

The redacted documents themselves also raise serious questions about the legitimacy of the redactions. For example, at least some of the redacted information is described in detail in the published OIG Report, yet DOJ appears to have redacted those details under claim of exemption. To the extent DOJ is seeking to protect the mere fact that there is at least one ongoing investigation of Mr. McCabe, such attempt must fail. Mr. McCabe's lawyer has disclosed publicly what was reported nearly a year ago: Mr. McCabe is under investigation by the U.S. Attorney's Office for the District of Columbia based on a referral from DOJ's Inspector General.

Finally, as a procedural matter DOJ's proffered declarant lacks the requisite knowledge and competency to testify to the harm to an ongoing investigation by another law enforcement entity. The declarant is an agent for DOJ's OIG, an entity that conducted and closed its own investigation over a year ago.

Taken as a whole, DOJ has not met its burden of proving that Exemption 7(A) has been properly invoked. Its efforts to redact information that legitimately should be in the public record suggest DOJ is engaged in a sustained effort to prevent the public from learning the truth behind then-Attorney General Jeff Session's decision, egged on by President Donald Trump, to abruptly terminate Mr. McCabe by hiding information that would reveal the flaws, errors, and inconsistencies in that decision.

FACTUAL BACKGROUND

This case concerns an expedited FOIA request CREW sent to the FBI over a year ago on March 19, 2018, seeking all documents related to any investigation or inquiry conducted by the FBI's Office of Professional Responsibility ("OPR") of, involving, or related to Mr. McCabe,

whose termination by Attorney General Sessions was announced late in the evening on March 16, 2018. Complaint ("Compl.") ¶ 12; Sarah N. Lynch, Statement by Attorney General on firing of FBI's McCabe, Reuters, Mar. 17, 2018, available at https://www.reuters.com/article/us-usa-trump-sessions-statement/statement-by-attorney-general-on-firing-of-fbis-mccabe-idUSKCN1GT04O. Mr. McCabe was fired just hours before he was to retire from public service, Compl. ¶ 9, an action that cost this career public servant his pension and ruined what had been up to that point a commendable public service career.

The Attorney General justified the firing by citing investigations by both DOJ's OIG and the FBI's OPR ("FBI-OPR") that reportedly had found that Mr. McCabe had made an unauthorized disclosure to the news media and also that he had displayed a lack of candor, including under oath, on multiple occasions. Lynch, *Reuters*, Mar. 17, 2018.³ Attorney General Sessions offered no evidentiary support for these findings. *Id.* He described OPR's role as "review[ing] the [OIG] report and underlying documents and issu[ing] a disciplinary proposal recommending the dismissal of Mr. McCabe." *Id.* In other words, the OIG Report provided the entire factual support for the Attorney General's termination decision. A month after the firing, the OIG released its report to Congress and the public.⁴ *See* Office of the Inspector General, U.S. Department of Justice, <u>A Report of Investigation of Certain Allegations Relating to Former FBI</u> Deputy Director Andrew McCabe, Feb. 2018 ("OIG Report") (ECF Dkt. 24-4, at 10-48).

³

³ Attorney General Sessions cited Department Order 1202 as the authority for his termination decision. *Id.* Of note, DOJ Department Order 1202 is not publicly available so there is no way to verify whether his exercise of this authority was authorized by or consistent with DOJ rules and orders. Further questions are raised by a document DOJ produced in response to CREW's FOIA request, which describes the Deputy Attorney General, not the Attorney General, as the official with "final decisionmaking authority over adverse disciplinary actions[.]" *See infra* at 6 and Exhibit B hereto.

⁴ See, e.g., Adam Goldman and Nicholas Fandos, <u>Former F.B.I. Deputy Director Is Faulted in Scathing Inspector General Report</u>, New York Times, Apr. 13, 2018, available at https://www.nytimes.com/2018/04/13/us/politics/former-fbi-deputy-director-is-faulted-in-scathing-inspector-general-report.html.

The firing of Mr. McCabe triggered widespread speculation that the decision was a political one made at the urging of President Trump. Compl. ¶ 11. Mr. McCabe's counsel, Michael R. Bromwich, pointed out in a public statement that the timeline for Mr. McCabe's termination "was nothing short of extraordinary" given that the process normally takes "many months, if not longer" yet here "was completed in 23 days." CREW's FOIA request was an effort to better understand the underlying basis for Mr. McCabe's termination and to obtain information that would allow the public to assess the credibility of the allegations of political motivation and the role President Trump may have played in the Attorney General's decision. Compl. ¶ 12. On July 30, 2018, having received no substantive response to its request, CREW filed its complaint in this action (ECF Dkt. 1).

Once in litigation, the Court, based on input from the parties, imposed a processing schedule that anticipated complete production by mid-January 2019. *See* Order, October 3, 2018 (ECF Dkt. 10). The following month under the guise of seeking "clarification," DOJ requested that the Court extend the production schedule by nearly two years to accommodate its newly claimed need to consult with and make referrals to the OIG. *See* Plaintiff's Opposition to Defendant's Motion for Clarification and for Processing Schedule (ECF Dkt. 15). In its motion (ECF Dkt. 14), DOJ represented that nearly half of the responsive documents originated with the OIG.

During a status conference on November 29, 2018, CREW recommended that the parties brief the applicability of FOIA Exemption 7(A) to the OIG documents based on a representative sampling in order to avoid a potentially unnecessary two-year delay. Once DOJ's counsel conceded that "the government anticipates redacting all the publicly available information in

⁵ Statement by Michael R. Bromwich, Counsel to Andrew McCabe ("Bromwich Statement"), *available at* http://www.bromwichgroup.com/wp-content/uploads/2018/04/MRB-statement-041318.pdf.

order not to prejudice the ongoing investigation,"⁶ the Court gave the parties time to identify a sample, recognizing "if FOIA is to be meaningful I think expeditious production within reason has to occur." 11-29-18 Trans. at 26-27. The parties subsequently agreed on the composition of that sample and the Court entered a scheduling order for production and briefing on the Exemption 7(A) issue. *See* Order, Dec. 18, 2018 (ECF Dkt. 17). The schedule was revised in light of the government shutdown. *See* ECF Dkt. 23.

Pursuant to the revised schedule, DOJ produced the 100 pages of sampled OIG documents with significant redactions. Among the documents included in the sampling is a copy of what appears to be a handwritten note from then-head of the FBI's OPR Candice M. Will to FBI Director Christopher Wray and FBI Deputy Director David Bowdich, dated March 7, 2018 – just nine days before Mr. McCabe was fired. The note appears to accompany a letter prepared for Mr. McCabe and his counsel, which Ms. Will describes as "FBI OPR's initial action (first step) in the McCabe WSJ Leak matter." Exhibit B. Ms. Will notes further, "It seems unlikely that this will reach final resolution before Mr. McCabe's March 18 retirement date, but that is up to the DAG [Deputy Attorney General]." Id. Ms. Will's understanding of the length of time it would take DOJ to reach a final decision, which she communicated to FBI Director Wray and Deputy Director Bowdich, confirms Mr. Bromwich's understanding that "the process normally takes "many months, if not longer," Bromwich Statement. She describes the Deputy Attorney General as the one with "final decisionmaking authority over adverse disciplinary actions," Exhibit B, even though it was Attorney General Sessions, not the Deputy Attorney General, who made the decision to terminate Mr. McCabe.

⁶ Transcript of Status Conference, Nov. 29, 2018 ("11-29-18 Trans."), at 22 (attached as Exhibit A).

⁷ A copy of this document is attached as Exhibit B.

DOJ filed a motion for partial summary judgment on March 21, 2019 ("D's SJM") (ECF Dkt. 24). In support of that motion DOJ also filed a motion for leave to file the entire Declaration of OIG Special Agent Stephen F. Lyons ("Lyons Declaration") under seal and *ex parte*. 8 In support of its motion DOJ offered a single sentence, specifically that

[t]he Lyons declaration includes sensitive information that cannot be filed publicly or provided to plaintiff or its counsel without compromising important governmental interests related to potential or ongoing 'enforcement proceedings.'

Defendant's Motion for Leave to File Declaration Under Seal and *Ex Parte* ("D's M.") ¶ 6. Over CREW's objection (*see* ECF Dkt. 28), the Court on March 26, 2019 issued a sealed order granting DOJ's motion to file the Lyons Declaration under seal and *ex parte*.

DOJ's accompanying summary judgment motion relies almost exclusively on the Lyons Declaration in arguing DOJ appropriately invoked Exemption 7(A). First, to support its claim that "the records have been gathered by officials working on enforcement proceedings," DOJ cites the Lyons Declaration. D's SJM at 8. Likewise, to support its claim that disclosing the redacted information "could reasonably be expected to interfere with enforcement proceedings," DOJ relies exclusively on the Lyons Declaration, claiming the declaration "demonstrates that the documents fall into three functionally defined categories, and it explains how information from each category of documents would, if released, interfere with enforcement proceedings." *Id.* at 9.

DOJ also relies on the publicly filed declaration of Ofelia C. Perez to support its claim that the records at issue – derived from the publicly available OIG report – were "originally compiled . . . for law enforcement purposes," D's SJM at 8, and that DOJ met its burden of segregating out non-exempt information, *id.* at 9-10. Ms. Perez characterizes that investigation as

⁸ DOJ provided CREW with a copy of its motion without the attached declaration. The docket sheet reflects the filing of a sealed motion (ECF Dkt. 25).

"the OIG misconduct investigation of McCabe." Declaration of Ofelia C. Perez, ¶ 11 (ECF 24-4, at 7).

DOJ's public filings do not identify the entity currently conducting an investigation. Public reporting, however, confirms that a grand jury under the direction of the U.S. Attorney's Office for the District of Columbia has been engaged in a nearly year-long investigation of Mr. McCabe following a referral from DOJ. See, e.g., Pamela Brown and Laura Jarrett, Justice Dept. watchdog sends McCabe findings to federal prosecutors for possible charges, CNN, Apr. 19, 2018, available at https://cnn.com/2018/04/19/politics/justice-mccabe-criminal-referral/index. html; Karoun Demirjian and Matt Zapotosky, Inspector general referred findings on McCabe to U.S. attorney for consideration of criminal charges, Washington Post, Apr. 19, 2018, available at https://www.washingtonpost.com/world/national-security/inspector-general-referred-findingson-mccabe-to-us-attorney-for-consideration-of-criminal-charges/2018/04/19/a200cabc-43f3-11e8-8569-26fda6b404c7_story.html?utm_term=.fb1f3e0d5fd2. See also Matt Zapotosky, Prosecutors use grand jury just as investigation of Andrew McCabe intensifies, Washington Post, Sept. 6, 2018, available at https://www.washingtonpost.com/world/national-ecurity/prosecutorsuse-grand-jury-as-investigation-of-andrew-mccabe-intensifies/2018/09/06/aa922b2e-b137-11e8-9a6a-565d92a3585d_story.html?utm_term=.0194e747331b; C. Mitchell Shaw, Another Referral for Criminal Investigation of McCabe, The New American, Apr. 20, 2018, available at https://www.thenewamerican.com/usnews/crime/item/28796-another-referral-for-criminalinvestigation-of-mccabe?tmpl=component&print=1 (citing Fox News as the source of reports that DOJ's OIG referred Mr. McCabe to the U.S. Attorney's Office for criminal investigation on April 19, 2018).

ARGUMENT

I. DOJ Critically Misunderstands the Purpose of Briefing the Applicability of Exemption 7(A).

DOJ premises its partial summary judgment motion on the idea that the task it faces is "to help resolve a dispute about the appropriate processing rate." D's SJM, 1. *See also id.* at 5 ("[T]he Court ordered the parties to brief 'the application of Exemption 7(A) to Plaintiff's FOIA request'... to assist it in determining an appropriate production schedule."). Toward that end, DOJ claims "[t]he validity of Defendant's application of Exemption 7(A) to this sample supports the processing schedule proposed by Defendant for documents referred by the FBI to OIG[.]" *Id.* at 2.

Briefing the applicability of Exemption 7(A) at this juncture, however, was not to enable the Court to finalize a processing schedule. Rather, as the Court well understood, the concession of DOJ's counsel that the government intended to redact all the non-publicly available information "in order not to prejudice the ongoing investigation," 11-29-18 Trans. at 22, 9 meant that the applicability of Exemption 7(A) is "something that we probably should litigate now so that we don't as indicated wait until 2020," *id.* As the Court acknowledged, "the American public has a right to know if there was in fact a good basis for it [Mr. McCabe's firing] or whether it was just a sham for the purpose of trying to deny him his retirement." *Id.* at 14-15. Proceeding at the pace advocated by DOJ would deprive the American public of this information in a time-frame that would bring accountability. *Id.* Given the government's concession that it

⁹ The transcript quotes DOJ's counsel as saying, "I do believe the government anticipates redacting all the *publicly available* information," *id.* (emphasis added), but the context of this statement makes it clear counsel actually said – or meant to say – all the non-publicly available information.

intended to categorically invoke Exemption 7(A), the Court properly concluded briefing that issue now made the most sense both in terms of efficiency and accountability.

II. DOJ Has Failed to Carry its Burden of Demonstrating That the Withheld Information Falls Within Exemption 7(A).

Under the express language of the FOIA, the agency bears the burden of proof in justifying its withholdings. *See* 5 U.S.C. § 552(a)(4)(B); *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989) ("[U]nlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action.'" (citing 5 U.S.C. § 552(a)(4)(B)). As applied to FOIA Exemption 7(A), DOJ must demonstrate that all of the withheld material was an "investigatory record compiled for law enforcement purposes." If that element is satisfied DOJ must then demonstrate that releasing the withheld material would cause harm to an ongoing enforcement proceeding. *See FBI v. Abramson*, 456 U.S. 15, 622 (1982). DOJ has not met that burden here.

A. DOJ Has Not Demonstrated That the Withheld Material Was Compiled For a Law Enforcement Purpose Within the Meaning of Exemption 7(A).

As a threshold issue, Exemption 7 applies only to records that were compiled for a law enforcement purpose. 5 U.S.C. § 552(b)(7). Although courts tend to construe this requirement broadly, they have drawn a bright line between investigations of potential criminal activity, which meet the law enforcement purpose test of Exemption 7, and those involving "general agency monitoring," which do not. *Stern v. FBI*, 737 F.2d 84, 90 (D.C. Cir. 1984). Within this structure, "an agency's investigation of its own employees is for 'law enforcement purposes' *only if it focuses 'directly on specifically alleged illegal acts, illegal acts of identified officials, acts which could, if proved, result in civil or criminal sanctions." Id.* at 89 (emphasis added)

(quoting *Rural Housing All. v. U.S. Dep't of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974)). The D.C. Circuit explained in *Rural Housing* that this distinction is necessary because a broader interpretation of law enforcement purpose that sweeps in "[a]ny internal auditing or monitoring [that] conceivably could result in disciplinary action" would defeat one of the FOIA's central purposes: "to provide public access to information concerning the Government's own activities." 498 F.2d at 81. Accordingly,

[t]here can be no question that an investigation conducted by a federal agency for the purpose of determining whether to discipline employees for activity which does not constitute a violation of law is not for 'law enforcement purposes' under Exemption 7.

Stern, 737 F.2d at 90.

Applying these parameters here yields the conclusion that because the OIG investigation that generated the withheld documents was conducted solely to determine whether to discipline Mr. McCabe for violating internal DOJ polices it did not have a law enforcement purpose within the meaning of FOIA Exemption 7. Even DOJ's declarant concedes that the OIG conducted a "misconduct investigation of McCabe." Declaration of Ofelia C. Perez, ¶ 11 (ECF 24-4, at 7) (emphasis added). The OIG Report itself starts with the description that it is a "misconduct report" that addresses "whether McCabe lacked candor" and "whether any FBI or Department of Justice policies were violated in disclosing non-public FBI information to the WSJ [Wall Street Journal]." OIG report, ECF Dkt. 24-4, 13. The OIG Report concludes that Mr. McCabe's lack of candor under oath violated FBI Offense Code 2.6 (Lack of Candor – Under Oath), while his lack of candor not under oath violated FBI Offense Code 2.5 (Lack of Candor – No Oath). *Id.* at 14. *See also id.* at 29, 30, 31. According to the OIG, these findings made Mr. McCabe "subject to disciplinary action for such misconduct," *id.* at 38 n.11, a conclusion that is reinforced by the

FBI's New Offense Table and Penalty Guidelines (attached as Exhibit C), which expressly state they are "related to the disciplinary process." *Id.*

The OIG Report further concludes that Mr. McCabe's misconduct – defined as his "disclosure of the existence of an ongoing investigation" – "violated the FBI's and the Department's media policy." ECF Dkt. 24-4, 14; *see also id.* at 47 ("We therefore found that his actions violated applicable FBI and Department policies and constituted misconduct."). The OIG Report concludes with the sentence: "The OIG is issuing this report to the FBI for such action that it deems to be appropriate." *Id*.

The OIG Report could not be clearer. The OIG limited its investigation of Mr. McCabe to a consideration of whether he had violated internal DOJ policies and administrative offenses and solely so that the FBI and DOJ could determine whether Mr. McCabe should be subject to disciplinary action. Reinforcing this conclusion, the OIG Report includes a section titled "Relevant Statutes, Policies, and Practices." ECF Dkt. 24-4, 15. Notably, the section includes no statutes – criminal or civil – and instead is limited to a description of the "Offense Codes Applicable to the FBI's Internal Disciplinary Process" and what it describes as "[t]he then-existing FBI Policy on Media Relations[.]" *Id.* Moreover, FBI communications disclosed in response to this Action (and attached as Exhibit D) show that the materials at issue here were "compiled" for the purpose of Mr. McCabe's disciplinary adjudication by FBI-OPR. In short, it is indisputable that OIG conducted an administrative misconduct investigation of Mr. McCabe. The FBI-OPR relied on the report and the underlying evidentiary materials for purposes of adjudicating Mr. McCabe's disciplinary charges. The records sought here – Mr. McCabe's FBI-OPR file – were indisputably "compiled" for purposes of the FBI-OPR disciplinary adjudication.

Although the alleged conduct for which Mr. McCabe was investigated and disciplined "does not constitute a violation of law," *Stern*, 737 F.2d at 90, DOJ argues the OIG investigation at issue here nevertheless had a law enforcement purpose. In support DOJ cites an unpublished opinion, *Jefferson v. U.S. Dep't of Justice*, No. 01-cv-1418 (D.D.C. March 31, 2003), that was affirmed in part on appeal in another unpublished decision, *Jefferson v. U.S. Dep't of Justice*, No. 04-5226 (D.C. Cir. Oct. 26, 2005) (Exhibit 4 to D's SJM). D's SJM at 6 n.2, 8. This reliance is misplaced. *Jefferson* concerned an OIG investigation into allegations that a DOJ employee had failed to comply with a court order. Because the requested records from the OIG investigation "were compiled in connection with an investigation which 'focus[ed] directly on specific alleged illegal acts which could result in civil or criminal sanctions," they were properly considered law enforcement records pursuant to FOIA Exemption 7. Slip op. at 16. ¹⁰ As discussed, those facts are not present here; the OIG Report at issue focused exclusively on alleged misconduct arising from violations of DOJ policies and administrative offenses. Accordingly, the requested records do not fall within the ambit of Exemption 7.

B. DOJ Has Not Justified Redacting All Non-Public Information.

DOJ purports to have employed a rational process that accords with its responsibilities under the FOIA and that involved conducting what it describes as a "time consuming" line-by-line review to ascertain which information from OIG's investigation can be made public. *See*, *e.g.*, D's SJM at 9. A careful review of its filings, however, reveals that DOJ essentially has redacted all information not explicitly included in the publicly released OIG Report, just as it

¹⁰ For similar reasons, DOJ's citation to *Housley v. U.S. Dep't of the Treasury*, 697 F. Supp. 3 (D.D.C. 1988), *see* D's SJM at 9, also is misplaced. There, as in *Jefferson*, the investigated misconduct, if proven, "could have resulted in civil or criminal sanctions under federal law." 697 F. Supp. at 5.

advised this Court in November it would do. Such categorical redactions are, however, facially improper.

As DOJ has explained in its brief, the lengthy period of time it initially requested was necessary because of the "painstaking[]" process OIG must go through to "compare the documents at issue to the 35-page OIG report to *un-redact any otherwise exempt information* that has been publicly acknowledged." D's SJM at 1 (emphasis added). In other words, DOJ started with the proposition that the requested information is exempt and only then determined whether it is not exempt on the basis that the information is expressly contained in the OIG Report. According to DOJ, the publication of the OIG Report has "complicated that task" because its public release required DOJ to make sure it is not redacting information in the report. *Id.* at 4.

DOJ has it backwards. As a starting point, the FOIA is a mandatory disclosure statute and requested information must be disclosed unless it falls within one of the FOIA's exemptions.

DOJ's concession that it redacted everything and then un-redacted to produce only that which is expressly contained in the OIG Report fatally undermines its claim to have faithfully implemented the FOIA's disclosure requirements.

Moreover, the redacted information closely tracks information DOJ already has made public. By DOJ's own description, the FBI referred the documents at issue to the OIG because they were either "compiled or created by OIG during its investigation of former Deputy Director McCabe." D's SJM, 3. DOJ describes that investigation as "a 'misconduct investigation' of McCabe to determine whether he had lacked candor . . and whether he had improperly publicly disclosed an on-going investigation." *Id.* In other words, the now-completed OIG investigation and corresponding report focused exclusively on Mr. McCabe and his conduct, and described in detail the conduct the OIG concluded evidenced a lack of candor and misconduct. Significantly,

the public was afforded access to this wealth of detail and the underlying rationale for the OIG's conclusion with the publication of the OIG Report (ECF Dkt. 24-4, 10-48).

The evidence developed by the OIG that its publicly available report details, the report's clarity and detail on the direction and scope of the OIG's investigation, and the clearly identified subject of its investigation cannot be reconciled with DOJ's invocation of Exemption 7(A) here to purportedly protect information that appears to be no different in kind to that the OIG already has made public. Under comparable circumstances the court in Detroit Free Press. v. U.S. Dep't of Justice, 174 F. Supp. 2d 597 (E.D. Mich. 2001), concluded "[t]he disclosure of such substantial and detailed evidence . . . calls into question the veracity of the FBI's justifications for withholding the documents at issue, raising questions of bad faith." *Id.* at 601. In that case, the disclosure was made by the news media reporting on newly discovered evidence pertaining to the disappearance of James Hoffa, which the FBI still sought to withhold under Exemption 7(A). An even greater question as to the validity of the FBI's invocation of Exemption 7(A) is raised here given that the publicly released details were made directly by the OIG itself, and not a third party. In light of these facts here, as in *Detroit Free Press*, accepting the Lyons Declaration at face value poses a risk that the Court's processes will be used for "governmental obfuscation and mischaracterization[.]" *Id.* (quotation omitted).

C. DOJ Has Not Met Its Burden of Proving Harm to an Ongoing or Anticipated Investigation From the Disclosure of the Redacted Material.

DOJ's claim that revealing further details of OIG's now-closed investigation would cause real harm to any ongoing or anticipated investigation also is not credible. The release of the OIG's detailed report already has provided Mr. McCabe – the purported subject of the ongoing investigation (*see supra* at 6-7) – with "critical insights into [DOJ's] legal thinking and strategy." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1543 (D.C. Cir. 1993), the kind of harm Exemption

7(A) protects against. Disclosure of redacted documents from the now-closed OIG investigation also poses no legitimate risk of "prematurely reveal[ing] the [government's] case." *Judicial Watch v. Dep't of Commerce*, 337 F. Supp. 2d 146, 179 (D.D.C. 2004); that case already is known to Mr. McCabe and the public.

Not only does Mr. McCabe, like the public in general, have access to the published OIG Report, but as the subject of that investigation he was afforded access to the investigative materials through DOJ's administrative processes. When OPR advised Mr. McCabe of its proposed action it also advised him of the procedural protections to which he was subject. *See* Procedural Protections, FBI 18-cv-01766-160 (attached as Exhibit E). Those protections include his right "to review the material which was relied upon by OPR's proposing official, subject to "redact[ions] in accordance with civil discovery policy and procedures." *Id.* Thus, the documents on which OPR relied for its recommendation to terminate Mr. McCabe are the very documents CREW seeks here through its FOIA request and that were provided to Mr. McCabe for his review. In these circumstances, DOJ's underlying rationale for invoking Exemption 7(A) falls apart. *See, e.g., Lion Raisins v. U.S. Dep't of Agriculture*, 354 F.3d 1072, 1085 (9th Cir. 2004) (where plaintiff had copies of the redacted materials "no harm to the government's criminal investigation could possibly result from producing copies[.]"); *see also Scheer v. Dep't of Justice*, 35 F. Supp. 2d 9, 14 (D.D.C. 1999).

¹¹ DOJ produced Exhibit E to CREW in response to the FOIA request at issue.

¹² Another document DOJ produced in response to CREW's FOIA request, attached as Exhibit F, is email correspondence between Mr. McCabe's counsel and OPR arranging for a copy of the file Mr. McCabe was "permitted to use during the course of the official proceedings" to be picked up, thereby confirming Mr. McCabe's access to the evidentiary record.

In sum, there is little to no risk here that revealing the redacted information would somehow undermine DOJ's efforts to gather additional evidence for another, clearly unrelated investigation or any other aspect of its ongoing law enforcement proceeding.¹³

III. OIG Special Agent Lyons is Not Competent to Testify to the Harm to an Ongoing or Anticipated Investigation By Another Entity.

Federal Rule of Civil Procedure 56(c)(4) requires that declarations "used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the . . . declarant is competent to testify on the matters stated." In the FOIA context courts have given agency declarants some leeway in testifying to how the agency processed a request if they are knowledgeable about agency processes because of their job duties. So, for example, a court rejected a hearsay challenge to the affidavit of an individual describing the agency's search who was "responsible for the FBI's compliance with FOIA litigation[.]" *Schrecker v. Dep't of Justice*, 217 F. Supp. 2d 29, 35 (D.D.C. 2002), *aff'd*, 349 F.3d 765 (D.C. Cir. 2003).

The declaration DOJ has proffered here, however, does not fall into this limited exception. According to the very sparse information DOJ has placed in the public record about its declarant, Mr. Lyons is a special agent employed by the OIG. *See* D's SJM at 8. The OIG's investigation is now closed, meaning that Mr. Lyons has no active role in the entity currently conducting an investigation of Mr. McCabe. It necessarily follows that any statements Mr. Lyons makes about the ongoing investigation were derived from second-hand knowledge and therefore

¹³ Public reporting and the recent congressional testimony of Attorney General William P. Barr confirm the pendency of another investigation DOJ's OIG is conducting into "the FISA process in the Russia investigation[.]" Adam Goldman and Charlie Savage, <u>Justice Dept. Watchdog's Review of Russia Inquiry Is Nearly Done, Barr Says, New York Times</u>, Apr. 9, 2019, <u>available at https://www.nytimes.com/2019/04/09/us/politics/russia-investigation-barr.html?smid=nytcore-ios-share</u> (quoting Attorney General Barr). That investigation, however, has no connection to or intersection with the investigation the OIG conducted of Mr. McCabe. Accordingly, disclosure of Mr. McCabe's FBI-OPR disciplinary file could not reasonably impact the OIG's Russia investigation.

are not made by someone "with direct personal knowledge[.]" *Larouche v. Dep't of the Treasury*, No. 91-1655, 2000 WL 80524, at *14 (D.D.C. Mar. 31, 2000); *see also Shaw v.* FBI, 749 F.2d 58, 63 n.2 (D.C. Cir. 1984) (FBI employee in FBI's FOIA section who did not participate in FBI investigations lacked personal knowledge to testify to purpose of the investigations); *Londrigan v. FBI*, 670 F.2d 1164, 1174 (D.C. Cir. 1981) (in Privacy Act case FBI agent who did not participate directly in an investigation was deemed not competent under Fed. R. Civ. P. 56 to testify to details about investigative documents and investigation itself).

Not only does Mr. Lyons have no role in the ongoing investigation, but the OIG must defer to federal prosecutorial authorities in matters related to criminal proceedings. *See, e.g.*, 5 U.S.C. App. 4 ("In carrying out the duties and responsibilities established under this Act, each Inspector General shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law."); *Inspector General Manual*, Vol. III Ch. 207(I) (attached as Exhibit G) ("[a]ll investigations with evidence that appears to support criminal prosecution will be presented to the U.S. Attorney's Office with jurisdiction"). Further, "compelled interviews" can be conducted in such a referral only with "the concurrence or a prosecutorial declination from an Assistant U.S. Attorney." *Id. See also id.* Vol. III Ch. 207(III)(D) ("Once a case has been presented for criminal prosecution, agents will follow the prosecuting attorney's guidance in determining whether sworn statements shall be obtained during any subsequent interviews.") (Exhibit G). In fact, DOJ's Office of Legal Counsel has determined that it would not be lawful for OIG attorneys to "be delegated the Attorney General's authority to conduct criminal proceedings for the Department." OLC

¹⁴ Memorandum Opinion for the Deputy Attorney General from Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *The Department of Justice Inspector General's Access to Information Protected by the Federal Wiretap Act, Rule 6(e) of the Federal Rules of Criminal Procedure, and Section 626 of the*

explained that "[t]he duty to conduct grand jury or other criminal proceedings on behalf of the United States is unrelated to OIG's statutory functions of investigation, auditing, and oversight." *Id.* at 28. Based on this governing authority, Mr. Lyons' testimony cannot be based on any direct involvement in the pending enforcement matter.

In sum, because Mr. Lyons is not speaking from personal knowledge and instead has offered testimony that relates to the harm to an ongoing investigation conducted by another law enforcement entity of which he is not a part he lacks the competency and personal knowledge that Federal Rule of Civil Procedure 56(c)(4) requires.¹⁵

IV. The Redacted Documents Appear Designed To Obscure or Hide the Real Reasons for Mr. McCabe's Termination, Not to Protect an Ongoing Investigation.

In the absence of publicly available information explaining DOJ's Exemption 7(A) redactions, CREW faces an enormous challenge in determining the legitimacy of the redactions. The documents themselves, however, suggest DOJ is misusing the FOIA's exemptions to prevent the public from learning the true facts behind Mr. McCabe's termination. Given that DOJ already has revealed through the detailed comprehensive OIG Report what it investigated, how it conducted that investigation, and why it reached the conclusion that Mr. McCabe had engaged in misconduct and false testimony, it is difficult to comprehend how revealing further details derived directly and exclusively from that closed investigation will legitimately harm

Fair Credit Reporting Act, July 20, 2015, available at https://www.justice.gov/olc/opinion/department-justice-inspector-general-s-access-information-protected-federal-wiretap-act.

¹⁵ Because plaintiff has been denied access to the Lyons Declaration, it is unable to assess the extent to which the declaration falls short on other or related grounds or to evaluate any evidence Mr. Lyons has offered in support of his competency to testify. This and the other gaps in the public record flowing from the sealed Lyons Declaration demonstrate the logic behind the D.C. Circuit's reasoning that sealed, *ex parte* filings like the Lyons Declaration should not be permitted. *See, e.g., Armstrong v. Exec. Office of the President,* 97 F.3d 575, 580 (D.C. Cir. 1996); *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (sealed, *ex parte* filings disfavored because they "ha[ve] the defect that [the court's review] 'is necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure.'") (quoting *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973)).

interests to any ongoing or anticipated enforcement proceeding. On the other hand, the redacted information may call into question the underlying basis for the OIG's conclusions, which in turn were used to justify OPR's termination recommendation and Attorney General Sessions' hasty decision to fire Mr. McCabe.

As an example, the sampling includes three pages of notes from a May 9, 2017 interview, with the majority of the document redacted. *See* ECF Dkt. 24-4, at 103-05. The OIG Report provides an extensive description of this interview and the contemporaneous notes of the interview prepared by the FBI's Inspection Division investigators. *See* ECF Dkt. 24-4, at 27-28. The OIG Report summarizes those notes as consisting of "two and half pages of contemporaneous notes during the interview, almost all of which concerned the October 30 article¹⁶ and the August 12 call between McCabe and PADAG [Principle Associate Deputy Attorney General]." *Id.* at 27. The report goes on to detail what Mr. McCabe told the investigators in that interview. *Id.* at 27-28.

Yet here, however, in response to CREW's FOIA request the OIG has produced only a few lines of those notes. This raises the question of why and how disclosing the remainder of the document – already described in detail in the OIG Report – would interfere with an ongoing or anticipated future investigation. One potential answer is that disclosing the full document may reveal that the characterizations in the OIG Report of both the document and the interview as demonstrating Mr. McCabe's misconduct are incorrect, and that the evidence is, in fact, exculpatory and undermines the decision to terminate Mr. McCabe.

Similarly, the sampling includes two pages of notes from an August 18, 2017 interview, also with significant redactions. *See* ECF 24-4, at 106-07. Once again the OIG Report describes

¹⁶ This refers to an October 30, 2016 article in the *Wall Street Journal* that included what the OIG Report called "certain law enforcement sensitive information[.]" ECF Dkt. 24-4, at 13.

the interview in detail, ECF 24-4, at 32-33, yet in the notes produced here the OIG has redacted much of that detail.

Also included in the sampling is a heavily redacted letter from Mr. McCabe's then-counsel responding to a draft of the OIG Report the Inspector General had shared with them. *See* Dkt. 24-4, at 108-117. Given this context, the Exemption 7(A) redactions to this document make no sense, as they pertain to a now-closed investigation and comments from Mr. McCabe's counsel on that investigation. In this context the redactions raise the very real possibility that they pertain to evidence Mr. McCabe offered that differs from the OIG's conclusions.

Beyond these specific documents, the OIG Report offers an assessment of the credibility of Mr. McCabe's statements to investigators and how the OIG evaluated each piece of information it obtained during the course of its investigation. This level of detail is hardly surprising in a document comprising the sole factual record underlying DOJ's very controversial firing of Mr. McCabe. Now, however, DOJ is hiding behind Exemption 7(A) to prevent the public from doing its own comparison of the evidence the OIG assembled during its investigation and the characterization of that evidence by the OIG in explaining its conclusion that Mr. McCabe committed misconduct. ¹⁷ This is an improper use of Exemption 7(A) that this Court should not permit.

¹⁷ Irregularities in some of the documents DOJ included in its sampling further support this conclusion. For example, DOJ produced what purports to be an FBI Inspection Division ("INSD") agent's handwritten notes memorializing a May 9, 2017 interview of Mr. McCabe. *See* ECF Dkt. 24-4, 103-05. The notes are not authenticated, nor are they officially recorded in or appended to an FBI Form 302 per normal FBI procedures. Yet they comprise part of what the OIG Report characterizes as "substantial" evidence that Mr. McCabe "knowingly and intentionally" told INDS in May [2017] that he did not know who authorized the disclosure to the *Wall Street Journal* that was under

CONCLUSION

For the foregoing reasons, DOJ's motion for partial summary judgment should be denied.

Respectfully submitted,

/s/ Anne L. Weismann Anne L. Weismann (D.C. Bar No. 298190)

Adam J. Rappaport

(D.C. Bar No. 479866)

Citizens for Responsibility and Ethics

in Washington

1101 K Street, N.W., Suite 201

Washington, D.C. 20005

Phone: (202) 408-5565

Facsimile: (202) 588-5020

Dated: April 12, 2019 Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,)	
Plaintiff,)	
v.)	Civil Action No. 18-cv-1766 (RBW)
U.S. DEPARTMENT OF JUSTICE,)	
Defendant.)	
	/	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR <u>PARTIAL SUMMARY JUDGMENT</u>

EXHIBIT LIST

Exhibit A	Hearing Transcript, November 29, 2018
Exhibit B	FOIA documents: note from OPR Candace Will
Exhibit C	FBI's New Offense Table and Penalty Guidelines Related to Disciplinary Process
Exhibit D	FOIA documents: INSD Case Opening Forms
Exhibit E	FOIA documents: Procedural Protections
Exhibit F	FOIA documents: email correspondence between McCabe Counsel and OPR
Exhibit F	Portions of DOJ Inspector General Manual

EXHIBIT A

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Court Reporter: Cathryn J. Jones, RPR Official Court Reporter Room 6521, U.S. District Court 333 Constitution Avenue, N.W.

Washington, D.C. 20001

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24 Proceedings recorded by machine shorthand, transcript produced by computer-aided transcription.

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PROCEEDINGS

THE DEPUTY CLERK: Your Honor, this is In Re:
Citizens For Responsibility and Ethics In Washington versus
the U.S. Department of Justice, Civil Action No. 18-1766.
Ask the parties to step forward and identify yourselves for
the record, please.

MS. WEISMANN: Good morning, your Honor, Anne Weismann on behalf of the plaintiffs, Citizens For Responsibility and Ethics In Washington.

THE COURT: Good morning.

MR. SANDBERG: Good morning, your Honor, Justin Sandberg for the Department of Justice, and with me at counsel table is Madeline Hensler from the Department of Justice, Office of Inspector General.

THE COURT: Good morning.

In reference to the motion that's been filed related to the production of documents requested by the plaintiff, I did order a certain number be provided on a monthly basis. And I did that anticipating that we were talking about the FBI, had not considered the fact that OIG even though there had been an investigation obviously regarding these matters, I did not appreciate that it would be documents that OIG would have to process, so my order was intended to apply to the FBI.

But I know the government says there are only two

1 | individuals at OIG who do this, is that right, the reviews?

2 MR. SANDBERG: So yes, your Honor. With respect

3 to the actual review of documents there are two individuals.

There are other government information specialists who help

5 | with intake and running the database, but with respect to

the actual review there are two information specialists.

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7 And they do when necessary seek advice from subject matter

experts, investigators and attorneys in the office who were

9 | involved in creating some of the documents, but in terms of

10 | the first level of review in doing the bulk of the work it

does fall upon those two individuals as I understand it.

THE COURT: And how many other requests for productions are they working on besides this one? Do you know?

MR. SANDBERG: I had the annual statistics for the last year. I don't know precisely how many they're working on right now. I do know that -- I do have some information

THE COURT: I think I really need to know that because obviously I'd have to take into consideration other workloads that they have in deciding what I'm going to order. Because I mean it's problematic considering the length of time it's going to take if they're only producing or reviewing 50 documents per month. I mean, I'm not unsympathetic to the barrage that I know the government is

facing because in addition to the number of FOIA cases I have, I know those are spread throughout my court, so I know there has been a barrage of applications made because of a lot of things taking place over the last several years.

But on the other hand, you know, Congress in its wisdom enacted this legislation. I think it's important legislation, and I think it's sort of undermine if the production doesn't occur within some reasonable period of time.

MR. SANDBERG: I understand that, your Honor. And certainly, you know, the OIG is endeavoring to do it as quickly as possible. And so with respect to the two information specialists; one of them is currently working on closing out the ten oldest FOIA requests as other active FOIA requests that he or she, I don't know which, I think she is working on. Also reviewing those *Giglio* requests that we mentioned where prosecutors submit to OIG requests for information about whether there's any derogatory information about Federal law enforcement officers which they then have to turn over to the other side, if necessary.

THE COURT: So they do that work also?

MR. SANDBERG: They do that work also which is quite time sensitive. She's also reviewing administrative subpoena packages, preparing an annual report for the counsel's inspector general's integrity and efficiency. And

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the other government information specialist is working on a 1200-page FOIA multiple 2018 FOIA request, has ten pending Giglios due tomorrow, training other employees and so forth.
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And I would also add with respect to the FOIA certainly we recognize that the speed of review is an important factor in sort of satisfying the purpose of the statute, but it's also important to recognize obviously that Congress carved out exemptions, and the agencies have to have an opportunity to, you know, redact or remove information that's necessary to protect the interests that Congress recognized needed protected such as interest in not prejudicing ongoing enforcement actions.

THE COURT: So at the rate that you're saying documents can be processed completion wouldn't occur until when?

MR. SANDBERG: And I do want to clarify one thing, you said 50 documents, it's actually 50 pages.

THE COURT: Okay.

MR. SANDBERG: I don't want there to be any misunderstanding. I believe we said in 20, mid-2020, I believe we said.

MS. WEISMANN: July 2020.

MR. SANDBERG: Yes, so it says July 2020 for the documents referred to OIG.

THE COURT: I'll hear from plaintiff's counsel.

MS. WEISMANN: Thank you, your Honor. I certainly respect that the Court's order did not expressly deal with referrals and consultations. I would note, however, that during that hearing that we had before this Court,

Mr. Sandberg referenced the fact that there were going to have to be referrals and consultations, but at no time then until really last week did he ever suggests that the schedule would have to be modified to accommodate them.

And, in fact, what he represented in his proposed schedule was that by mid-February 2019, we would have received all nonexempt documents.

We are where we are now. Although we respectfully submit the government has not acted in due haste both in terms of processing and in terms of informing us in this court what the status of these referrals are.

So the issue now is they're claiming they can only process at a rate of 50 pages a month. I have a couple of things to say on that, your Honor. First, there is really no legitimate reason why they could not seek help from other offices within the Department of Justice. They noted in their motion for clarification that because of the independence of the Inspector General's office they didn't generally do this.

But here, we are talking about processing a closed investigative file. And so we don't think there's any

really good legitimate reason why they could not get resources from other parts of the Justice Department. The FBI has now been freed up from processing at least a 1,000 pages that its referred over, so that's the first point.

The second point I would make, your Honor, we know that in at least one other FOIA matter that Mr. Sandberg is handling the OIG has agreed to process -- I don't know the volume, but they agreed to process at a rate of hundred pages a month. So this notion that it has to be 50 pages and that's all they can do isn't borne out by the facts.

And I guess the final, not the final point, but one concern that we have, your Honor, and we feel very much like we have been misled, and we are here today with a proposal that production be delayed until July 2020. There were a number of references in the government's papers and today as well, of the fact of a pending enforcement investigation, matter. If the intent of the Justice Department is to excerpt an Exemption 7, because there's an ongoing investigation, let's get that in the open now.

I don't want to wait and come back in three months and have the wool pulled over our eyes once again, and be told you're getting nothing because there is an ongoing enforcement proceeding. If that is going to be the basis for withholding documents let's find that out now and figure out how to deal with it. Let's not waste more time on sort

of a charade of processing documents. That's the first point.

The second point I would note is that the government in justifying the pace suggests that there's such a need for care here, but let's look at what we're talking about. We're talking about a closed investigation on which the attorney general essentially relied and the Office of Professional Responsibility relied to justify terminating the number two person at the FBI just a day and a half before he was scheduled to retire.

So it's hard to imagine what kind of equities need to be protected here. There's no privacy interests that Mr. McCabe has that the government needs to protect. I mean we'll submit right now we have no interest in personal phone numbers, anything really personal to Mr. McCabe.

The fact of the investigation is very ***well known, and our real fear here if I may be candid, your Honor, is that we believe that the Justice Department has misrepresented publicly the basis for Mr. McCabe's termination. And we believe the documents that, that are being withhold, yet to be processed will demonstrate that. And we can think of no legitimate exemptions that we apply as I said if the government is going to rely on Exemption 7, let's get that out of the way for now, and figure out if it's something that we can brief now or deal with now. But

let's not wait until July 2020 and have me come back here and say guess what, we got nothing because the government asserted Exemption 7.

So we have a number of procedural and substantive concerns with how the government is proceeding. And of course, we're sympathetic to the fact that you know we're in this position, and it's your job, your Honor, to sort of sort out and we're dealing with finite resources. But I think with some creativity we can come up with some resources that would increase the pace at which these documents are processed.

THE COURT: I don't know if your representations about why you believe the termination occurred is based upon speculation or substance of something of substance, but what is your objective in trying to acquire this information, which is something I think I have to take into account in deciding to what extent I require the government to produce more than what they said they can produce.

MS. WEISMANN: Well, our objection as we put in our complaint is to find the real reasons for the termination. We know at the time that Mr. McCabe was terminated the president was putting enormous pressure on the attorney general. He was publicly ridiculing and making very negative statements about Mr. McCabe. As I said it happened a day and a half before his retirement.

I was at the Justice Department for over 20 years, and the first thing that struck me was it was a fairly, extraordinary the way it was handled. And what was given as a justification was an OPR investigation. However, the timing makes it clear that OPR relied significantly, if not exclusively, on the inspector general investigation that was conducted. And so I mean that's why here we believe the vast majority of documents and the responsive to our requests are OIG documents. They originated from the OIG, or they were shared by the inspector general which is why we're so frustrated that this need for referral wasn't identified in the first instance.

So we believe why we filed this request is to find out the true reasons because we don't believe the full story has been told. It's our understanding that only selected portions of the evidence that was before the IG were made public by the Justice Department in justifying Mr. McCabe's termination. And in fact, if we could get access to the full breath of material that was before the IG there would be some exculpatory material in there as well.

THE COURT: Any response?

MR. SANDBERG: Yes, your Honor. Thank you. We did anticipate the need for coordination. Did not know the nature or scope of the coordination at the time this was addressed previously, and to be frank, I had anticipated it

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would be in the nature of consultation and would not affect the schedule. I would not come to this court and represent something I knew was not possible.

As for sort of the timeliness with which we've informed plaintiff, we informed plaintiff in about mid-October that their, which was a couple of weeks after your Honor's order, that their, that there would be a need for further consultations, and that the schedule that would post potential scheduling issues that we should discuss. And we didn't get into details about how, sort of whether there'd be a delay or not, but we did say there's potential schedule issues essentially and we should discuss it so that there's no misunderstanding. As of November 1st, we explicitly told counsel that OIG's review after we'd gathered more information we determined OIG's review would take significantly longer, and that we would not be able to process at the same rate as the FBI in order to have document production done by January, so we did tell counsel that as quickly as we sort of had the facts available for us to do that.

With regard to seeking help from other offices there's two points; one is when documents are referred in general they're referred because the entity receiving them is better able to review them and make the necessary redactions, that they have the equities. These were

documents created at OIG. And while the initial level processors process a bunch of documents and aren't particularly familiar with them, as I said there are subject matter experts who are in that office who they will talk to about certain things that they have questions about.

And as to the independence point the Office of the Inspector General obviously believe its independence is a very important thing to preserve. And that goes to also not relying on other entities to do its work for it.

Ms. Weismann said there are other persons at the Department of the Justice, but obviously the inspector general when necessary investigates other parts of the Department of Justice, so there's an important not just symbolic but there's a real importance to this independence and to it relying on itself to do this work.

As for the other case in which the, she's referring to the Synder FOIA case where Office of the Inspector General is reviewing a hundred pages a month. The first thing to say they are different, they're not the same documents. It's a different document, and the nature of review is different. Here, because these documents relate to information that was publicly disclosed and pending enforcement investigations there's a need to redact, but also to make sure that we don't redact stuff information that's publicly available through the report. So it's more

time consuming process to not only redact within the cross

check against publicly available information, including

information that was in the OIG's report to make sure that

they're not redacting information that they have made public

already. And that is not a factor in the other case.

There's no need to review for the public domain question to

see if the information has already been released.

With respect to Ms. Weismann's reference that there's just a closed investigation, obviously, we referenced, there are pending ongoing, and in our paper I think we said investigations. I now understand there are more than one investigation that these documents potentially relate to, so there are ongoing investigations that these documents potentially relate to.

As for the invocation of exemptions, you know, that is not done in the abstract in FOIA. Exemptions are invoked over documents and concrete documents, and then they are, you know, defended at summary judgment. It certainly is likely that Exemption 7 will be invoked over some or all of the documents involved, but it's not something that can be sort of discussed in the abstract, and that's not how it's handled in FOIA. And the last point is that this is not a decision that is in a black box. The Office of Inspector General, which is an independent entity within the Department of Justice, while it did not make the decision to

1 | remove Mr. McCabe it did issue a report about the conduct.

The conduct involved, and I believe conduct referenced by the attorney general's removal. And this independent agency issued a 39 page report including sort of references to supporting material about their findings of the conduct and in this case misconduct of Mr. McCabe.

If your Honor has anything --

THE COURT: Well, the decision to terminate

Mr. McCabe was predicated on the inspector general report,

or work done by OPR?

MR. SANDBERG: I don't remember whether the attorney general's decision memo references the work done by the inspector general, but I believe he did reference the same conduct as I recall. The same conduct or similar conduct that the inspector general investigated and relayed the information in its report.

know, there may have been good reason to have terminated Mr. McCabe considering what was alleged he did, but the matter in which it was done and the precipitous matter in which it was done I think raises some suspicion that you would fire somebody the day before they are ready to retire, and maybe there was good reason for that. I think the American public has a right to know if there was in fact a good basis for it or whether it was just a sham for the

purpose of trying to deny him his retirement.

And if we go at the pace that's being requested who knows what's going to happen in the 2020 election, but if we go at that pace documents aren't made available until when it would occur based upon 50 pages per month. And if there is some impropriety in reference to his termination then the administration doesn't suffer any consequences if the current administration doesn't win reelection.

So that is a concern to me. And it seems to me that this information should be made available at some point prior to when the next administration or the current administration remains in power, so that the American public knows you know whether there was some impropriety in reference to his precipitous termination. So I just think that whatever the pace is it has to be done at a pace considering the nature of what's being requested and why it's being requested, at a pace that would result in this information being made available prior to when the next election would occur. So if there is some impropriety the American public would know about that.

I'm not saying there is, I don't know. I would hope that my government acted in good faith when it made the termination decision, but obviously the American public has a right to know whether that is in fact the case.

MR. SANDBERG: Yes, your Honor, a couple of

points. I appreciate the interest in the public's right to know clearly. We appreciate that. You know, the documents aren't going to come out all at once. It is a rolling production, so it's not as if they're all being held until July 2020. They would be produced in a rolling fashion to the extent they're nonexempt documents.

A couple more points is about I think their request I think we said covered about 2200 pages in total, and the parts that aren't being referred to OIG are being produced by, are being processed and to the extent they're nonexempt produced by the FBI and that is moving along and we'll be able to move along at a quicker schedule because of the FBI's processing abilities.

I think the third thing I say is that, you know, there's a strong arm of the law that you don't sort of presume government misconduct. I don't think that the presumption should be a basis for requesting OIG to sort of process it at a rate that is infeasible for it especially considering two factors. One, these ongoing investigations that there's also an important interest in not prejudicing these ongoing investigations. And two --

THE COURT: What investigations are ongoing at this time?

MR. SANDBERG: I can't detail ongoing investigations. It's not something I can do, but there

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     are -- as I've been told there are ongoing investigations.
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    And the other important --
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               THE COURT: Would that be a potential predicate
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     for the documents being purportedly exempt?
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               MR. SANDBERG: In whole and in part, yes. I don't
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     know to what extent and to which documents and how it would
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     apply, but yes, certainly --
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               THE COURT: And are those the enforcement
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    proceedings that plaintiff's counsel references? Is that
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     the same? Are we talking about the same?
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               MR. SANDBERG: I think plaintiff said that the OIG
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     investigation was closed as I recall, but I think I
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     referenced, previously referenced the enforcement
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    proceedings that were ongoing.
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               THE COURT: Well, what about her suggestion that
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     we address the exemption issue related to potential or
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     ongoing investigations first? Does that make any sense?
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              MR. SANDBERG: I don't think it does. I mean,
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     exemptions are invoked over specific documents, and specific
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     information and it's not litigated in the abstract. Now
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exemptions are invoked over specific documents, and specific information and it's not litigated in the abstract. Now maybe you know if we have a batch, an early batch of documents you know that we think will be similar to other ones we can sort of litigate it then. Litigating it completely in a vacuum I have not heard, and I don't think that that would be feasible. I also — obviously that

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doesn't change the OIG's capacity I guess unless it's determined that there are some nature of exemptions that aren't required to be invoked.

I did want to go to the last point which was that as I noted earlier the OIG did issue a report, a public report, an independent entity OIG issued a public report about Mr. McCabe's conduct, in this case misconduct which they identified. And obviously, that information was in the OPR file, and the attorney general explicitly relied on the FBI's recommendations. So I don't, I do think we have evidence that should assuage some of your Honor's concerns in that regard.

If your Honor has no further questions.

THE COURT: Is there any way that the plaintiff can identified any specific type of documents that you're most concerned about and conceivably those could be given priority in reference to what is being reviewed first?

MR. SANDBERG: Well, we did try to, we did engage with plaintiff and ask plaintiff if there was a way to narrow, and plaintiff did narrow by offering to not seek newspaper clippings, which frankly doesn't take that much time to review anyways. In terms of prioritizing, I don't recall whether we specifically addressed prioritizing to the extent OIG has documents I think we could prioritize. I think they largely are transcripts. There are a few other

documents. There are a few emails and a few investigative notes, but I think they largely are all transcripts.

So, you know, if plaintiff says that presumedly they will want transcripts I don't know how much that will change things.

THE COURT: Is there any priority that you can give to which documents you think are conceivably most important so that they could focus on reviewing those documents first?

MS. WEISMANN: Right. Yes, your Honor. We've already given that priority, so I don't understand Mr. Sandberg's response.

THE COURT: What was that priority?

MS. WEISMANN: I'm looking for the email. As I recall he asked us, you know, we said, we did narrow. We eliminated public records, newspaper clippings and the like. I believe and I apologize, I'm having trouble finding the email memorializing this, that we had indicated we did want things like transcripts first, so we're happy to engage in further discussion on this.

If I can be heard on just a couple of points that Mr. Sandberg made that I think are important for this Court to keep in mind. One is that he's referenced throughout today that it appears that the process of the IG's engaging now is to segregate out publicly available information from

non-publicly available information. And if the intent is to withhold all the non-publicly information, and we don't really understand how they could legitimately do that, you know. Let's just deal with that now and deal with --

THE COURT: I didn't understand him to say that.

MS. WEISMANN: Well, he suggested at a minimum their focus seems to be on just identifying publicly available information. As far as these, you know, as yet undocumented now it's two apparently outside investigations that are going on, the documents we seek pertain to a closed investigation. The Justice Department, the IG published a report that talked about, that described its investigation. So it's hard to understand what harm could be done to any pending other inquiries by disclosing the underlying documents.

And we think the real harm here is not to any ongoing investigation, but because what the report didn't account for is evidence that's in their files that's exculpatory, and if we're right we think the public deserves to know that and it's hard to under -- so, you know, we're all dealing in the dark, but some facts are known. The IG investigation is closed. The IG made public its report of its investigation. It referenced a lot of underlying documents. Those documents have not been made public.

If in fact all they do is support the IG

investigation it's difficult to understand what possible interests could exists that would need protection through an exemption. And if, in fact, as we said the government instead plans to rely on Exemption 7, we think it can be litigated. It's not really in the abstract. It's relating to all the underlying documents for the IG investigation that the Justice Department has not yet made public.

position that any of the documents that you're seeking if they relate to the reason for the firing, and therefore, relate to the ongoing investigations that they would categorically take the position that those are exempt, I would tend to agree with you, but I don't think they can take that position. It seems to me they have to be able to take a specific position regarding information containing individual documents, and can't make a blanket position that just because documents relate to an investigation that that means they can't be produced. I don't think they can take that position. It seems to me too broad.

MS. WEISMANN: I completely agree with you, your Honor. My fear is that's exactly what we are going to get. I just don't want to wait until July 2020 before we address that question.

THE COURT: Is the government intending to take that categorical position? I never heard that position ever

taken, and I don't think that would be an appropriate exemption claim under the statute?

MR. SANDBERG: I don't know what the approach would be with respect to all documents, but yes, your Honor, I believe that with respect some documents the government anticipates again I'm not certain, but I do believe the government anticipates redacting all the publicly available information in order not to prejudice the ongoing investigation.

I don't want there to be any misconceptions. As I understand it we do intend to take that position with respect to some of the documents.

THE COURT: So should we litigate that issue then?

Seems to me if that's your position that it's something that

we probably should litigate now so that we don't as

indicated wait until 2020, and that's the position that

you're still taking that you're taking now?

MR. SANDBERG: I still do think it would be more appropriate to litigate that at least with respect to a sample of the documents because there might even be, and I don't know, there might be information we need to submit in camera about why we take that position with respect to a specific document. I don't know, and I think doing that as a sample might be difficult but at least feasible. I think that doing it totally --

THE COURT: How many documents do you think you need in order to have an adequate sample?

MR. SANDBERG: That's a fair question, your Honor.

I don't know. I think we can do it based on at least -- I

don't know that it's a fair question at least a couple

months' worth of production. Or maybe there's a way to do

it -- maybe this is something that we could address in a

post hearing brief in the next several days about if your

Honor wants to brief that at the front end the best way to

brief that at the front end. I don't want to stand here and

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THE COURT: It seems to it me based upon what you candidly indicated about what the scope of the exemption would be in reference to at least some of the documents that that's something that we should it seems to me address, why delay it. But I do agree you probably need some sample of documents in order to be able to articulate why these type of documents in their total would have to be subject to the exemption based upon the ongoing investigation. And again, I just don't know how many pages you would need in order to have an adequate sample.

MR. SANDBERG: I don't either. But I think if your Honor would allow it, I think if you allowed us to file a brief in the next several days that would give us a chance to think about it and come back and give your best idea --

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               THE COURT: Why don't we come back for further
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     discussion on this issue. Because I am at least at this
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     point inclined to agree with plaintiff's counsel that
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     considering the scope of what you say you're going to claim
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     as an Exemption 7 exemption that we probably should try and
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     address that issue. You may be totally correct that you
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     have a right to do that, but I think we should at least
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     address that. How much time do you think you'd need?
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               MR. SANDBERG: To come up with a proposal for how
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     to best address it?
               THE COURT: Yes. I would not be available until
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     the week of the 17th of December, because I'll be presiding
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     over a trial out in Pittsburgh.
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               MR. SANDBERG: I'm sorry?
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               THE COURT: I wouldn't be available until the week
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     of the 17th, because I'll be presiding over a trial out in
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    Pittsburgh.
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               MR. SANDBERG: Oh, that's ample time for us to
     determine a way at least to move, to propose a path forward.
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               THE COURT: I could -- the 18th is available in
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     the afternoon at 2:15.
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               MS. WEISMANN: That works for us, your Honor.
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               If I could just make a suggestion in the interim.
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    As I understand from how the government has described to us
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     the documents there are certain categories. And as I think
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Mr. Sandberg said today the bulk of them are transcripts, so if we're looking for a sample it might make sense to pick some, unless they anticipate that they're going to claim exemptions only with respect to one category, to pick some pages from each category so that makes it more representative sampling.

You know, I have a hard time believing we need a large volume for sampling. I think we just need to understand the context.

THE COURT: Well, I'd ask that you all confer with each other and see if you can come up with some proposal as to what would be the best way to move forward. I am you know, I think inclined to agree with you regarding what the government has admitted that this issue probably should be addressed sooner than later, and then we can see how we move forward.

Like I say I do have some concerns about -- not being unsympathetic to the government's plight. I have a lot of these cases with a lot of other agencies and we're just inundated with FOIA requests because of things that have been taking place with the current administration. And I'm not unsympathetic to the overload that the agencies are experiencing because of the number of FOIA requests that we're dealing with.

But on the other hand, like I say if FOIA is to be

meaningful I think expeditious production within reason has to occur. If it doesn't occur then I think the objective of the statute is undermine. And I think that's especially important in the context of a situation like this where there are questions about whether there were inappropriate reasons taken by the administration for doing what it did. And when those type of allegations exists whether they're true or not, I think the America public has a right to know whether the allegations have any merit. So I might be inclined to require that some greater number of documents be produced so that production is completed at some point prior to when the next election occurred, so if there is some wrongdoing or not, the American public has a right it seems to me to know about that.

We can address that at some point later. Because I do agree with the government that it's important for the Office of Inspector General to maintain independence to a certain degree, to a significant degree actually, because they do investigate things that are taking place within the Department of Justice. And I think it's important that separation within reason occur because otherwise the actions taken by OIG won't be credible if it's found there is just you know doing the bidding of the department as compared to conducting independent investigations which I hope and believe that they try and do.

So I don't think it would be feasible to have individuals from other parts of the Department of Justice working on this matter because then I think that does dilute the independence that OIG has to have. But I do know in the context at least other agencies again, I don't know if this is something plausible as far as OIG is concerned, that they have hired in other cases. I've had contract people to come in to assist because of the workload, and I think that's something the government needs to think about.

Because I think this is a very important issue, and I just don't know if I'm going to be inclined to agree that the 50 page production is adequate considering how long it would take for the completion to occur. So the government I'd ask you to think about the idea of conceivably hiring some outside help to try and you know provide a greater production amount so that we can get this done prior to 2020. But I'll see you all on the 18th.

MS. WEISMANN: Thank you, your Honor. In meantime we will work together to see if we can agree on a subset.

THE COURT: Thank you.

[Thereupon, the proceedings adjourned at 11:40

22 a.m.]

1	CERTIFICATE
2	I, Cathryn J. Jones, an Official Court Reporter
3	for the United States District Court of the District of
4	Columbia, do hereby certify that I reported, by machine
5	shorthand, the proceedings had and testimony adduced in the
6	above case.
7	I further certify that the foregoing 27 pages
8	constitute the official transcript of said proceedings as
9	transcribed from my machine shorthand notes.
10	In witness whereof, I have hereto subscribed my
11	name, this the 10th day of December, 2018.
12	
13	/s/_Cathryn J. Jones
14	Cathryn J. Jones, RPR Official Court Reporter
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EXHIBIT B

FEDERAL BUREAU OF INVESTIGATION FOI/PA DELETED PAGE INFORMATION SHEET

FOIPA Request No.: 1399934-000 CivilAction No.: 18-cv-1766

Total Withheld Page(s) = 749

Bates Page Reference	Reason for Withholding
	(i.e., exemptions with coded rationale, duplicate, sealed by order of court, etc.)
18-cv-01766-1274 – 18-cv- 01766-1290	Consultation to Other Government Agency "OGA"
18-cv-01766-1292 – 18-cv- 01766-1366	(b)(6)-1, (b)(7)(C)-1
18-cv-01766-1368 – 18-cv- 01766-1450	(b)(6)-1, (b)(7)(C)-1
18-cv-01766-1452 – 18-cv- 01766-1469	(b)(6)-1, (b)(7)(C)-1
18-cv-01766-1475 – 18-cv- 01766-1484	Consultation to Other Government Agency "OGA"
18-cv-01766-1486 – 18-cv- 01766-1489	Consultation to Other Government Agency "OGA"
18-cv-01766-1494 – 18-cv- 01766-1496	Consultation to Other Government Agency "OGA"
18-cv-01766-1497 – 18-cv- 01766-1535	Consultation to Other Government Agency "OGA"
18-cv-01766-1541 – 18-cv- 01766-1605	Consultation to Other Government Agency "OGA"
18-cv-01766-1608 18-cv-01766-1610 – 18-cv- 01766-1704	Consultation to Other Government Agency "OGA" Duplicate to Bates Pages 18-cv-01766-41 - 18-cv-01766-135
18-cv-01766-1705 – 18-cv- 01766-1831	Duplicate to Bates Pages 18-cv-01766-136 - 18-cv-01766-262
18-cv-01766-1832 – 18-cv- 01766-1880	Duplicate to Bates Pages 18-cv-01766-468 - 18-cv-01766-516
18-cv-01766-1881 – 18-cv- 01766-1936	Duplicate to Bates Pages 18-cv-01766-263 - 18-cv-01766-318
18-cv-01766-1937 – 18-cv- 01766-1946	Duplicate to Bates Pages 18-cv-01766-359 - 18-cv-01766-368
18-cv-01766-1947 – 18-cv- 01766-2039	Duplicate to Bates Pages 18-cv-01766-744 - 18-cv-01766-836

- X Deleted Page(s) X
- X No Duplication Fee X
- X For this Page X

HEREIN IS UNCLASSIFIED DATE 07-30-2018 BY

NSICG b6 -1 b7C -1

U.S. Department of Justice Federal Bureau of Investigation

Director Wray and Deputy Director Brodiel, This is FBI OPR's initial action the attached letter (but not the sel Report of Investigation) will vous be provided to the McCale letter and ROI will now also but is up to the DAG.

EXHIBIT C

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 07-24-2009 BY 65179 DMH/MJS

(Rey. 01-31-2003)

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE Date: 09/30/2004

To: All Divisions Attn: EADs

ADs

FBIHQ, Manuals Desk.

All Field Offices Attn: ADICS SACs

. All Legats

From: Director's Office

OPR

Approved By: Mueller Robert S III

Pistole John S

Drafted By: Will Candice M

Mershon Mark J

Case ID #: 66F-HQ-A1455078 (Pending)

66F-HQ-C1384970 (Pending)

Title: NEW OFFENSE TABLE AND PENALTY GUIDELINES RELATED TO THE DISCIPLINARY PROCESS

Synopsis: To provide all Divisions, Field Offices, and Legats with the newly created Offense Table and Penalty Guidelines, effective 10/01/2004, related to the disciplinary process.

Enclosure(s): Offense Table; Preamble to the Penalty Guidelines;
and Penalty Guidelines.

Details: Based upon recommendations of the Bell/Colwell Commission, implementation teams were established by the Inspection Division (INSD), the Office of Professional Responsibility (OPR), and the Office of General Counsel (OGC) to prepare the enclosed Table/Guidelines. The new Offense Table and Penalty Guidelines will become effective on 10/01/2004, and will apply to all internal disciplinary investigations opened or initiated on or after 10/01/2004. The new Table/Guidelines can be found on OPR's website.

The new Offense Table and Penalty Guidelines are intended to aid employees in determining the types of behavior that constitute misconduct and the range of penalties for engaging in such behavior. The OPR and the INSD intend for the Bureau's disciplinary process to be transparent, and will take every action to remove any perceived secrecy in the process, while ensuring the privacy of affected employees. Most

FBI022361CBT

To: All Divisions From: Director's Office

Re: '66F-HQ-A1455078, 09/30/2004

discipline will fall under the median penalty range. be times, however, when the attendant mitigating or aggravating circumstances result in the imposition of a penalty outside of the median range. Examples of mitigation and aggravation, although certainly not meant to be all inclusive, are identified in the Penalty Guidelines. It is important for employees to keep in mind that the Penalty Guidelines are exactly that -guidelines. There may be instances where the misconduct is so egregious that the appropriate sanction falls outside of these parameters. In such circumstances, the AD of OPR will not be restricted to the penalties identified in the enclosed Penalty Guidelines, but will have the latitude to issue sanctions outside of those identified. The disciplinary process is inherently difficult; however, it is our intention to improve the transparency, predictability, efficiency and fairness of the process by providing employees with the attached Offense Table and Penalty Guidelines.

This policy statement supersedes any/all prior policy statements, manual provisions and instructions relative to the disciplinary process.

Any questions regarding the contents of this communication should be directed to OPR at 202-324-4993 or 202-324-5417, Room 11112 FBIHQ.

7

To: All Divisions From: Director's Office

Re: 66F-HQ-A1455078, 09/30/2004

LEAD(s):

Set Lead 1: (Info)

ALL RECEIVING OFFICES

Please disseminate to all personnel.

2

FBI022363CBT

FBI0000048

W

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 07-24-2009 BY 65179 DMH/MJS

To: All Divisions From: Director's Office

Re: 66F-HQ-A1455078, 09/30/2004

Offense Table

- The listed offenses apply to all FBI personnel, regardless of position or bitle "He" or This is a gender pentral term and applies to both males and temales.
- The term "on duty" refere to the time-period when an employee is performing any official duty or actung in an official capacity, whether or not helds being paid at the time (e.g., misconduct occurring while an employee is driving a Bureau yengle home at the end of his shift is considered "on duty" for administrative disciplinary purposes.
- The For the purposes of time table, the term "OPR Inquiry" encompasses all 26% classifications (OPR Matters).
 The terms "OPR Investigator" and OPR Personnel is include those and viduals charged with investigating and/or adjudicating as 26% matter.
- 💌 🖖 See the Penalty Guidelines for examples of mirigating and aggravating factors for each offense:

INVESTIGATIVE MISCONDUCT

1.1 Asset/CW/Informant (Source) - Failure to Report Criminal Activity Failing to timely inform the appropriate FBI official of a source's unauthorized criminal activity about which the employee knows, or reasonably should know, based upon all available information. Criminal activity includes all violations of the law.					
Charles of		Mitigated: Censure - 5 Days	Penalty: 7 Days	Aggravated: 10 Days - Dismissal	
	1.2 Asset/CW/Informant (Source) - Improper Financial Relationship	a favor/gift to or accepting a favor	r/gift from a source; paying a s ft, or service from a source. Thi	receiving money from a source; giving purce for a favor, gift, or service; or, includes financial benefits, favors, and oyee's relationship with the source. Aggravated: 10 Days - Dismissal	
A Comment of the Comm	1.3 Asset/CW/Informant (Source) Improper Intervention on Behalf Of	Without authorization, aiding, protecting, harboring, or shielding a source, or any attempt to aid, protect, harbor, or shield a source from law enforcement or legal obligations. Mitigated: Censure - 5 Days Penalty: 7 Days Aggravated: 10 Days - Dismissal			

9/16/2004

All Divisions From Director's Office 66F-HQ-A1455078, 09/30/2004

Re:

1.4 Asset/CW/Informant (Source) - Improper Personal Relationship	Engaging in a social, romantic, or intimate relationship or association with a source. Social relationships/associations involve any contact beyond that reasonably necessary for the completion of an investigative mission or beyond that which is authorized. An employee can be disciplined for: (1) engaging in an improper personal relationship, or (2) without authorization, engaging in conduct that would cause the reasonably prudent person to believe that there is an improper relationship. ***See 3/27/01 Memorandum to All Employees regarding "Personal Relationship Policy" for additional information. Mitigated: Censure - 5 Days Penalty: 7 Days Aggravated: 10 Days - Dismissal	
1.5 Asset/CW/Informant (Source) - Violation of Operational Guidelines and Policies, Other	Knowingly or recklessly failing to enforce or comply with an FBI or Department of Justice (DOJ) operational guideline or policy, not specifically delineated in any of the other "Asset/CW/Informant" offense codes provided herein, which falls outside the parameters of performance. ***See 2/02/04 Memorandum to All Special Agents in Charge regarding revisions to Manual of Investigative Operations and Guidelines (MIOG), Part I, § 270: Mitigated: Reprimand - 3 Days Penalty: 5 Days Aggravated: 7 - 30 Days	
1.6 Investigative Deficiency - Improper Handling of Document(s) or Property in the Care, Custody, or Control of the Government	Failing to properly seize, identify, package, inventory, verify, record, document, control, store, secure, or safeguard documents or property under the care, custody, or control of the government, to include evidence, non-evidentiary items, and seized property which is held by the government. This offense includes the unauthorized or improper use, loss, damage, destruction, or improper disposal of documents or property, to include ELSUR (electronic surveillance) materials. Mitigated: Reprimand - 3 Days Penalty: 5 Days Aggravated: 7 - 30 Days	
1.7 Investigative Deficiency - Misconduct Related to Judicial Proceedings	During the investigative or litigative phases of a criminal or civil case, engaging in conduct that dishonors, disgraces, discredits, or otherwise brings the integrity or reliability of the FBI into question. (This does not apply to conduct involving falsification issues covered under 2.1, "Lack of Candor/Lying.") Mitigated: Censure - 5 Days Penalty: 7 Days Aggravated: 10 Days - Dismissal	
1.8 Investigative Deficiency - Violation of Operational Guidelines and Policies, Other	Knowingly or recklessly failing to enforce or comply with an FBI or DOJ operational guideline or policy not specifically delineated in any of the other "Investigative Deficiency" offense codes provided herein, which falls outside the parameters of performance. Mitigated: Reprimand - 3 Days Penalty: 5 Days Aggravated: 7 - 30 Days	

To:	All	Divisions	From	Director's	Office.
Re:	66F-	HQ-A145507	8, 09/3	30/2004	

18/05-E		
PART 3	2. INTEGRITY/ETHICAL MISC	ONDUCT
•	2.1 False/Misleading Information - Employment/Security Document(s)	Knowingly providing false or misleading information in an employment-related or security-related document; or, signing or attesting to the truthfulness of information provided in an employment-related or security-related document in reckless disregard of the accuracy or completeness of pertinent information contained therein. Employment/security documents include, but are not limited to, the Employment. Application (FD-140); Security Reinvestigation Questionnaire (FD-814) and other security clearance forms; Government Employees Training Act (GETA) forms (SF-182); training records; Candidate Qualification form (FD-954); report of medical history; marriage, roommate, and foreign travel forms; and, other documents/forms which impact hiring, retention, transfer, promotion, and award decisions.
E B	ν,	Mitigation: Censure - 5 Days Penalty: 7 Days Aggravation: 10 Days - Dismissal
EBIOSSAGCBT	2.2 False/Misleading Information - Fiscal Matter(s)	Knowingly providing false or misleading information in a fiscal-related document; or, signing or attesting to the truthfulness of the information provided in a fiscal-related document in reckless disregard of the accuracy or completeness of the pertinent information contained therein. Documents involving fiscal matters include, but are not limited to, Time & Attendance (T&A) records, travel vouchers, disbursement/expenditure forms, draft requests, expense forms, supporting documentation for leave purposes, insurance forms, benefits forms, and transfer documents.
	[Mitigation: Censure - 7 Days Penalty: 10 Days Aggravation: 15 Days - Dismissal
FBI0000051	2.3 False/Misleading Information - Investigative Activity	Knowingly providing false or misleading information in an investigative document; or, signing or attesting to the truthfulness of information provided in an investigative document in reckless disregard of the accuracy or completeness of the pertinent information contained therein. Documents involving investigative activity include, but are not limited to, FD-302s, inserts, evidence control documents, LHMs, ECs, and documentation of informant matters. Mitigation: Censure - 21 Days Penalty: 30 Days Aggravation: 45 Days - Dismissal

9/16/2004

10:	ALL	DIVIS.	LONS	From	Director	S	UIIICE
Re:	66F-	-HQ-A1	45507	8, 09/3	30/2004		
	v		•				

2.4 False/Misleading Information - Other Official Matter(s)	Knowingly providing false or misleading information in an official FBI document or an official document of another governmental agency; or, signing or attesting to the truthfulness of information provided in an official FBI document or an official document of another governmental agency in reckless disregard of the accuracy or completeness of the pertinent information contained therein. This applies to documents executed either on-duty or off-duty. **Mitigation:** Consumers** Days** Penalty** 7 Days** Magravation** 10 Days** Dismissal.**
	Mitigation: Censure - 5 Days Penalty: 7 Days Aggravation: 10 Days - Dismissal
2.5 Lack of Candor/Lying - No Oath	Knowingly providing false information when making a verbal or written statement, not under oath, to a supervisor, another Bureau employee in an authoritative position, or another governmental agency, when the employee is questioned about his conduct or the conduct of another person. "False information" includes false statements; misrepresentations; the failure to be fully forthright; or the concealment or omission of a material fact/information. Mitigation: Reprimand - 5 Days Penalty: 7 Days Aggravation: 10 Days - Dismissal
2.6 Lack of Candor/Lying - Under Oath	Knowingly providing false information in a verbal or written statement made under oath." False information" includes false statements, misrepresentations, the failure to be fully forthright; or the concealment or omission of a material fact/information. Mitigation: N/A Penalty: Dismissal Aggravation: None
	information" includes false statements, misrepresentations, the failure to be fully forthright; or the concealment or
Under Oath 2.7 Misuse of Position - Abuse	information" includes false statements, misrepresentations, the failure to be fully forthright; or the concealment or omission of a material fact/information. Mitigation: N/A Penalty: Dismissal Aggravation: None Exceeding the limits of FBI authority to further a personal, unofficial, or unauthorized interest.
Under Oath 2.7 Misuse of Position - Abuse	information" includes false statements, misrepresentations, the failure to be fully forthright; or the concealment or omission of a material fact/information. Mitigation: N/A Penalty: Dismissal Aggravation: None Exceeding the limits of FBI authority to further a personal, unofficial, or unauthorized interest. ***See Title 5, Code of Federal Regulations (CFR), § 2635.702 for additional information.

All Divisions From Director's Office 66F-HQ-A1455078, 09/30/2004

Re:

2.9 Misuse of Position - Impersonating an Agent	Misrepresenting oneself as a Special Agent (in good standing) in order investigation, or database search, or to receive a benefit generally conforcement.		
	Mitigated: Censure - 5 Days Penalty: 7 Days	Aggravated: 10 Days - Dismissal	
2.10 OPR Matter - Failure to Cooperate	Failing or refusing to fully participate in an OPR inquiry. ***See MIOG, Part II, §§13-22.13.1 and 13-22.14 for additional information. Mitigated: N/A Penalty: Dismissal	Aggravated: N/A	
2.11 OPR Matter - Obstruction	Taking any action to influence, intimidate, impede or otherwise obstraction. **Penalty: 10 Days**	ruct the OPR process. Aggravated: 15 Days - Dismissal	
2.12 Violation of Ethical Guidelines	Engaging in any activity or conduct prohibited by the uniform Standa Executive Branch (5 CFR Part 2635), the supplemental regulations (5 policy. Prohibited conduct involves, but is not limited to, issues such as confi employment/activities, and gifts.	CFR Part 3801), DOJ or FBI	
	*** See Executive Order 12674; 5 CFR Part 2635; 5 CFR Part 3801; 5 U.S.C.	63110: 18 U.S.C 66203, 205, 208, and	
	209; the Manual of Administrative Operations and Procedures (MAOP) Part I, s for additional information.		

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PROPERTY RELATED MISC	ONDUCT	
8.1 Damage, Destruction, or mproper Disposal of Covernment Property	Without proper authority, damaging, destroying, or disposing of any government document(s) or property. (This does not include the destruction or wrongful disposal of the type of property and documents covered in 1.6, "Investigative Deficiency Improper Handling of Document(s) or Property.")	DIA
i i k	Mitigated: Reprimand - 3 Days Penalty: 5 Days Aggravated: 7 - 14 Days	
1.2 Loss of Badge and/or redentials	Loss or theft of an FBI Special Agent Badge or FBI credentials resulting from employee's failure to adequately safeguard the property.	DIA
	Mitigated: N/A ; Penalty: Censure Aggravated: 3 - 10 Days	
3.3 Loss of Government Property or Document(s) of a Sensitive/Valuable Nature	Loss or theft of government property (including documents) resulting from the employee's failure to adequately safeguard an item, deemed by an appropriate authority to be of a sensitive or valuable nature. (This does not include the loss of the type of property and documents covered in 1.6 "Investigative Deficiency Improper Handling of Document(s) or Property.")	DIA
. ' \	Mitigated: Reprimand - 3 Days Penalty: 5 Days Aggravated: 7 - 14 Days	
8.4 Loss of Weapon	Loss or theft of a Bureau-issued or Bureau-approved weapon resulting from employee's failure to adequately safeguard the property.	DIA
. 1	Mitigated: N/A Penalty: 5 Days Aggravated: 7 - 14 Days	١.

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Re:

3.5 Misuse of FBI Database(s)/Unauthorized Access	Without authorization, accessing an FBI or other government database or record. (This does not include the disclosure of such information to others, which is covered in 4.9, "Unauthorized Disclosure – Classified/Law-Enforcement Sensitive/Grand Jury Information" or 4.10, "Unauthorized Disclosure – Sensitive Information.")	DIA
7	Mitigated: Reprimand - 3 Days Penalty: 5 Days Aggravated: 7 - 14 Days	
3.6 Misuse of Government Computer(s)	Using a government computer for personal, unofficial, or unauthorized use. This does not apply to "de minimis" use, where the cost to the government is negligible, as long as the use is not otherwise objectionable (e.g., pornography). ***See 5 CFR §2635.704; 28 CFR §45.4;	DIA
	Mitigated: Reprimand - 3 Days Penalty: 5 Days Aggravated: 7 - 14 Days	
3.7 Misuse of Government Credit Card (Theft) - Gasoline or Automotive-Related Expenses	Using, or permitting the use of, a Government Credit Card (GCC) to purchase gasoline or an automotive-related part or service for personal use. This matter is treated as a theft since all of these purchases are direct billed to the FBI. Mitigated: 15 - 30 Days Penalty: Dismissal Aggravated: None	
3.8 Misuse of Government Credit Card - Personal Use	Using, or permitting the use of, a Government Credit Card (GCC) for personal purchases, rentals, services, and/or cash advances; failing to pay the balance in a timely manner; or, failing to apply a voucher reimbursement to the corresponding GCC debt. (This does not apply to purchases covered under 3.7, "Misuse of GCC - Gasoline or Automotive-Related Expenses.") Mitigated: Censure - 5 Days Penalty: 7 Days Aggravated: 10 Days - Dismissal	
3.9 Misuse of Government Vehicle or Aircraft, Non-Title 31	Using a government-owned or leased passenger motor vehicle or aircraft, or the equipment therein, regardless of the employee's intent, for an unofficial purpose; or, transporting an unauthorized passenger in a motor vehicle or aircraft for an unofficial purpose. ***See 41 CFR §301-10.201; MAOP, Part I, §§1-3.1, 1-3.1.1, and 1-3.1.2; and, the May 15, 1997, Memorandum to all Special Agents in Charge re: Misuse of Bureau Vehicles Policy Clarification for additional information and exceptions to the general rule. Mitigated: Reprimand - 3 Days Penalty: 5 Days Aggravated: 7 - 14 Days	

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Re.	-	.66F-	HO- 21455078	1 09/3	0/2004		

3.10 Misuse of Government Vehicle or Aircraft, Title 31	Knowingly, or with reckless disregard, using a government-owned or leased passenger motor vehicle or aircraft for an unofficial or purely personal purpose, i.e., a purpose other than the facilitation of government work or the execution of the FBI's mission. ***See 31 U.S.C. §§1344 and 1349(b); 41 CFR §301-10.201; MAOP, Part I, §§1-3.1, 1-3.1.1, and 1-3.1.2; or, the May 15, 1997, Memorandum to all Special Agents in Charge re: Misuse of Bureau Vehicles Policy Clarification for additional information and exceptions to the general rule.				
	Mitigated: N/A	Penalty: 30 Days	Aggravated: 45 Days - Dismissal	ļ	
3.11 Misuse of Government Property, Other				DIA 	
	Mitigated: Reprimand	Penalty: Censure	Aggravated: 3 - 10 Days		

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	UCT ested; criminally charged; or convicted; bishese of Physes to be adjudicated pirsuant to an administrative; Inding : However; aggravan law en proements involvement, arrest, charge's standiciment; and conviction	ng-
4.1 Assault/Battery	Attempting or offering to inflict bodily harm on another using unlawful force or violence; or, inflicting bodily harm on another using unlawful force or violence. Mitigated: Censure - 5 Days Penalty: 7 Days Aggravated: 10 Days - Dismissal	
4.2 Drugs - Use or Possession	Knowingly and consciously ingesting, injecting, inhaling, or possessing an illegal controlled substance or anabolic steroid, on or off duty, after entering on duty (EOD). (This does not apply to the possession of controlled substances for official purposes.) ***See 21 U.S.C. §812 for a list of controlled substances. Mitigated: N/A Penalty: Dismissal Aggravated: N/A	
4.3 DUI/DWI - Government Vehicle	Operating or being in actual physical control of any government vehicle while intoxicated or impaired by alcohol or a controlled substance. Impairment can be evidenced by a chemical analysis (breathalyzer and/or blood test), or credible observations of law enforcement personnel or other witnesses if no law enforcement personnel are present. Mitigated: N/A Penalty: 45 Days Aggravated: Dismissal	
4.4 DUI/DWI - Privately Owned Vehicle	Operating or being in actual physical control of any privately owned vehicle while intoxicated or impaired by alcohol or a controlled substance. Impairment can be evidenced by a chemical analysis (breathalyzer and/or blood test), or credible observations of law enforcement personnel or other witnesses if no law enforcement personnel are present. Mitigated: N/A Penalty: 30 Days Aggravated: 45 Days - Dismissal	

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Re:

4.5 Fraud/Theft	Taking, obtaining, or withholding, by any means, from the possession of the government, or another owner, any money, property, or article of value of any kind, with the intent to deprive or defraud the government, or another owner, of the use and benefit of the property or with the intent to appropriate it for personal use or for the use of another entity or person other than the owner. (This does not include conduct covered under any of the offense codes included in Part 3.)	*5
	Mitigated: 15 - 30 Days Penalty: Dismissal Aggravated: N/A	
4.6 Indecent/Lascivious Acts	Inappropriately acting in a manner to appeal to or gratify the sexual desires of the employee, his victim, or both; or, indecently exposing a body part to public view. (This does not apply to sexual assault or any sexually-related conduct rising to the level of a felony offense, as determined by the jurisdiction in which the act occurred, which is covered under 4.7 "Other Felonies.") If a local, state, or foreign jurisdiction lawfully permits any type of indecent/lascivious act described herein, this offense code will nevertheless be applied if the act is contrary to a law the FBI is chartered to enforce.	*
	Mitigated: 3 - 7 Days Penalty: 10 Days Aggravated: 15 Days - Dismissal	
4.7 Other Felonies	Engaging in an act, other than one which has been specifically delineated in another offense code, which is considered a felony in the jurisdiction in which the act occurred. (This does not apply to perjury, which is covered under 2.1 "Lack of Candor/Lying.") Mitigated: 3 - 10 Days Penalty: 14 Days Aggravated: 30 Days - Dismissal	
<u> </u>	Mitigated: 3 - 10 Days Penalty: 14 Days Aggravated: 30 Days - Dismissal	
4.8 Other Misdemeanors	Engaging in an act, other than one which has been specifically delineated in another offense code, which is considered a misdemeanor in the jurisdiction in which the act occurred. Mitigated: Reprimand - 5 Days Penalty: 7 Days Aggravated: 10 Days - Dismissal	
4.0. Upputhovinad Disalesuus		
4.9 Unauthorized Disclosure - Classified/Law-Enforcement Sensitive/Grand Jury Information	Without authorization, disclosing or attempting to disclose classified or law enforcement sensitive material, or Grand Jury information. ***See the Federal Rules of Criminal Procedure, Rule 6(e), The Grand Jury - Recording and Disclosure of Proceedings for additional information regarding the Grand Jury.	•
N N	Mitigated: Censure - 7 Days Penalty: 10 Days Aggravated: 15 Days - Dismissal	
4.10 Unauthorized Disclosure - Sensitive Information	Without authorization, disclosing or attempting to disclose the FBI's, or another agency's, sensitive material.	,

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5. GENERAL MISCONDUCT		
5.1 Alcohol/Substance Abuse - Under the Influence While On Duty	Without authorization, consuming a beverage containing alcohol while on duty or during a break; consuming alcohol prior to reporting for duty to the extent that it has an effect on the employee's workplace or performance; or, using a prescribed medicine in a manner inconsistent with the prescribing physician's instructions, having an effect on the employee's workplace or performance.	DIA
5.2 Dereliction of Supervisory Responsibility	Mitigated: Reprimand - 3 Days Penalty: 5 Days Aggravated: 7 - 14 Days A supervisor (or employee acting in an authorized supervisory capacity) failing to exercise reasonable care in the execution of his duties or responsibilities, disregarding his duties or responsibilities, or significantly deviating from appropriate methods of supervision. Mitigated: Reprimand - 3 Days Penalty: 5 Days Aggravated: 7 - 14 Days	
5.3 Discrimination	Engaging in conduct for or against another person based on that person's protected status (race, color, religion, national origin, sex, disability, age, parental status or sexual orientation). Mitigated: 3 - 5 Days Penalty: 7 Days Aggravated: 10 Days - Dismissal	
5.4 Disruptive Behavior	Engaging in inappropriate verbal or physical conduct, while on official business or in an FBI space or vehicle, which is disruptive or negatively impacts the workplace. Mitigated: Reprimand Penalty: Censure Aggravated: 3 - 10 Days	DIA

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5.5 Fallure to Honor Just Debts/Regulatory Obligations	Without valid justification, failing to satisfy an uncontested, lawful debt or to fulfill a legal or regulatory obligation. (This does not apply to debts involving government credit cards, which are covered under 3.7 "Misuse of Government Credit Card - Gasoline or Automotive-Related Expenses" and 3.8 "Misuse of Government Credit Card - Personal Use.") The failure to satisfy the debt or fulfill the obligation must be characterized by deceit, evasion, false promises or other indicators of a deliberate nonpayment or gross indifference towards the just debt/obligation. Mitigated: Reprimand - 3 Days Penalty: 5 Days Aggravated: 7 - 30 Days	•
5.6 Failure to Perform Prescribed Duties	Disregarding, declining, or failing to perform a particular task or duty, after the employee was given a general or specific order/instruction.	DIA .
	Mitigated: Reprimand Penalty: Censure Aggravated: 3 - 10 Days	
5.7 Failure to Report - Administrative	Failing to inform the appropriate FBI official or supervisor, in a timely manner, about an administrative matter which the employee knew, or should have known, was required by FBI or DOJ regulation or policy to be reported.	DÍA
v	Mitigated: Reprimand Penalty: Censure Aggravated: 3 - 10 Days	
5.8 Failure to Report - Criminal/Serious	Failing to report to the appropriate FBI official or supervisor, in a timely manner, any serious misconduct the employee committed; any arrest, summons, contact with law enforcement, or involvement in the court system by the employee; or, any serious misconduct or criminal conduct committed by another employee of which the employee was aware.	DIA
2	Mitigated: Censure - 3 Days Penalty: 5 Days Aggravated: 7 - 14 Days	
5.9 Improper Relationship - Criminal Element	Without authorization, engaging in an ongoing social, romantic, or intimate relationship or association with a person the employee knew, or should have known, is involved in criminal activities. (This does not apply to relationships and associations covered under 1.4 "Asset/CW/Informant (Source) - Improper Personal Relationship" or an on-going relationship an employee maintains with his minor child's other parent.) Social relationships or associations involve any contact beyond that reasonably necessary for the completion of an investigative mission or beyond that which is authorized. ***See 03/27/2001, Memorandum to All Employees regarding "Personal Relationship Policy" for additional information.	
	Mitigated: Censure - 5 Days Penalty: 7 Days Aggravated: 10 Days - Dismissal	

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Re:

5.10 Improper Relationship - Superior/Subordinate	Engaging in or seeking a romantic or intimate relationship with a superior/subordinate, which violates the strictures of the FBI's Personal Relationships Policy as it pertains to FBI executives, managers, supervisors, and other persons serving or acting in positions of authority. ***See 03/27/2001, Memorandum to All Employees regarding "Personal Relationship Policy" for additional information.	
. ,	Mitigated: Censure - 5 Days Penalty: 7 Days Aggravated: 10 Days - Dismissal	
5.11 Insubordination	l	DIA/ DIO
•	Mitigated: Censure - 5 Days Penalty: 7 Days Aggravated: 10 Days - Dismissal	
5.12 Military Reserve Matter	Engaging in conduct contrary to FBI regulations concerning reserve status, drilling, and military leave. ***See 12/12/2002 Memorandum to all Special Agents re: Military Reserve Matters; and, the Leave Policy Manual, for additional information.	
	Mitigated: Reprimand Penalty: Censure Aggravated: 3 - 10 Days	
5.13 Misuse of Weapon/Safety Violation	Handling, displaying, operating, controlling, carrying, storing, or otherwise treating a weapon, explosive, or incendiary device in a manner inconsistent with the use and safety protocols and procedures established by the FBI and federal regulatory agencies.	
	Mitigated: Censure - 5 Days Penalty: 7 Days Aggravated: 10 Days - Dismissal	
5.14 Misuse of Weapon - Accidental Discharge	Causing the unintentional discharge of a weapon.	DIA
Accidental discharge	Mitigated: N/A Penalty: 3 Days Aggravated: 5 - 14 Days	
5.15 Misuse of Weapon - Intentional Discharge	Purposefully or willfully discharging a weapon in violation of the deadly force policy.	
The monar Discharge	Mitigated: 5 - 14 Days Penalty: 30 Days Aggravated: 45 Days - Dismissal	
5.16 Retaliation	Engaging (or threatening to engage) in conduct, directly or indirectly, to "get even" with another person for taking action that adversely affected the employee or that the employee perceived as having an adverse effect.	
	Mitigated: 3 - 5 Days Penalty: 7 Days Aggravated: 10 Days - Dismissal	

OIG-REQ 02/18/05-PART 3

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Re:

5.17 Security Violation - Failure to Secure Space, Sensitive Equipment/Materials	에 있는데 보고 있는데 보고 되었다면 보고 있는데 보	DIA/ DIO
	Mitigated: Reprimand - 3 Days Penalty: 5 Days Aggravated: 7 - 14 Days	
5.18 Security Violation - Other	Engaging in an activity or conduct in violation of a regulation or policy promulgated by the FBI, DOJ, or another authoritative agency, which has not been specifically delineated in another offense code, outside the parameters of performance. Mitigated: Reprimand - 3 Days Penalty: 5 Days Aggravated: 7 - 14 Days	DIA
5.19 Sexual Misconduct - Consensual	Engaging in sexual, intimate, or romantic activity with a willing partner(s) in an inappropriate location (such as government spaces, government vehicles), or while on duty. Mitigated: Censure - 5 Days Penalty: 7 Days Aggravated: 10 Days - Dismissal	•
5.20 Sexual Misconduct - Non-consensual	Making unwelcome or unwanted sexual advances, requesting sexual favors, or engaging in other verbal or physical conduct of a sexual nature. ***See the Civil Rights Act of 1964, Title VII, § 703, for additional information. Mitigated: Censure - 5 Days Penalty: 7 Days Aggravated: 10 Days - Dismissal	
5.21 Unprofessional Conduct - Off Duty	Engaging in conduct, while off duty, which dishonors, disgraces, or discredits the FBI; seriously calls into question the judgement or character of the employee; or, compromises the standing of the employee among his peers or his community. (This applies to misconduct not otherwise delineated in a specific offense code.)	
, 1	Mitigated: Reprimand - 3 Days Penalty: 5 Days Aggravated: 7 Days - Dismissal	
5.22 Unprofessional Conduct -	Engaging in conduct, while on duty, which dishonors, disgraces, or discredits the FBI; seriously calls into question the judgement or character of the employee; or, compromises the standing of the	:
On Duty .	employee among his peers or his community. (This applies to misconduct not otherwise delineated in a specific offense code.)	

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The second second	Failing to enforce or comply with an FBI, DOJ, Office of Personnel Management, or other federal administrative or operational guideline or policy not specifically delineated in any offense code, which falls outside the parameters of performance.		DIA/ DIO
W. C.		Mitigated: Reprimand - 3 Days Penalty: 5 Days Aggravated: 7 - 30 Days	.

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FEDERAL BUREAU OF INVESTIGATION PENALTY GUIDELINES

The Penalty Guidelines are used in assessing the appropriate penalties for common types of misconduct. While the Guidelines do not specifically name every possible offense, they do provide the general categories of misconduct for which employees may be disciplined. The absence of a specific regulation covering an act does not mean that such an act is condoned, permissible, or would not result in disciplinary action. These Guidelines supercede all previously published tables, listings, and applicable policies regarding disciplinary offenses.

Purpose and Progressive Nature of Discipline: Disciplinary penalties are imposed to correct behavior and teach the employee and others that certain actions are inappropriate for an employee of the FBI. Discipline also serves to enforce the expected high standards of conduct for the Bureau. Although not specifically reflected in the Guidelines, discipline is usually progressive in nature and, therefore, subsequent misconduct is treated with increasing severity. However, while the concept of progressive discipline is appropriate for most types of infractions, some offenses (such as theft or lack of candor) are so egregious that a single instance is sufficient to warrant removal.

Factors Considered When Determining a Penalty. Many factors are considered in determining the penalty to impose, including the nature of the misconduct and its consequences, as well as the position and record of the employee. Of particular importance are the mitigating and/or aggravating factors in each case. Aggravating factors which apply to all offense categories include supervisory or high-grade status, prior disciplinary record, prior warning/advisement not to commit the misconduct, media attention or public awareness, repetitive misconduct in a single case, and failure to report. Mitigating factors common to all categories include self reporting, efforts to remedy the wrongdoing, acknowledgment of wrongdoing, limited employee experience, and a long period of unblemished service. At times, a consideration that is mitigating in one case may be aggravating in another. For example, limited employee experience may tend to ameliorate an employee's conduct in many instances, but may aggravate it in cases involving multiple instances of misconduct during a short tenure. In some cases, the aggravating and mitigating factors will warrant selecting a penalty at the upper or lower range, or even outside the range of penalties provided.

Other matters formally considered by OPR prior to disciplinary action being imposed in serious cases of misconduct (those involving a likely penalty of dismissal, demotion, or suspension of more than 14 days) are the "Douglas Factors." Not all of these factors are pertinent in every case. Selection of an appropriate penalty must thus involve a balancing of the relevant considerations. The "Douglas Factors" are:

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- 1. The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- 2. the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
 - 3. the employee's past disciplinary record;
- 4. the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- 5. the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
- 6. consistency of the penalty with those imposed upon other employees for the same or similar offenses;
 - 7. consistency of the penalty with any applicable agency table of penalties;
 - 8. the notoriety of the offense or its impact upon the reputation of the agency;
- 9. the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
 - 10. potential for the employee's rehabilitation;
- 11. mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment or bad faith, malice or provocation on the part of others involved in the matter; and
- 12. the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the emgloyee or others.

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Explanation of the Penalty Guidelines

Offenses: The Penalty Guidelines are (like the Offense Table) arranged into five separate categories of offenses, which are Investigative Misconduct; Integrity/Ethical Misconduct; Property Related Misconduct; Illegal/Criminal Conduct; and General Misconduct. Within each category, the offenses are listed in alphabetical order.

ω Investigative Misconduct: Misconduct associated with the investigative process, to include misconduct involving assets, informants, and Cooperating Witnesses. Also includes investigative deficiencies, including the improper handling of documents and property; and misconduct during judicial proceedings.

Ethical/Integrity Misconduct: Includes falsification and lack of candor/lying. Also includes the misuse of position; failure to cooperate in, and obstruction of, an OPR inquiry; and the violation of ethics regulations and guidelines.

Property Related Misconduct: Offenses pertaining to the loss of government property, including thefts of property due to employee negligence in safeguarding the property; the damage, destruction, or improper disposal of government property; the misuse of government property, such as computers and motor vehicles; and the misuse of government credit cards. Also encompasses unauthorized access to government property, to include databases.

Illegal/Criminal Conduct: Offenses typically or frequently charged by law enforcement as violations of the criminal code (local, State, or Federal), to include: assault, drug offenses, DWI, fraud/theft, indecent/lascivious acts, other felony and misdemeanor offenses, and the unauthorized disclosure of information. These types of offenses fall within this category even if not charged by local authorities. For example, a failed drug urinalysis would fall under this category, even though no criminal charges are filed. Similarly, domestic violence and assaults are included in this category, even though a party may not be arrested or charged.

General Misconduct: The General Misconduct offenses include a broad range of offenses, such as: alcohol-related misconduct (w/the exception of DWIs); failure to report; dereliction; sexual misconduct; discrimination; disruptive behavior; failure to honor just debts; improper relationships; misuse of weapons; insubordination; retaliation; security violations; unprofessional conduct; and the violation of miscellaneous rules and regulations.

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The different levels of discipline are designated as follows: Mitigated Levels of Discipline: Range; Normal Penalty; and Aggravated Range. Within each category, disciplinary penalties for the specified offenses are provided. Penalties expressed in terms of "days" (e.g., 3 days) refer to calendar days of suspension without pay. Although demotion is not specifically designated as a penalty in the Guidelines, demotion may be assessed in appropriate cases involving serious misconduct.

In adjudicating a case, one would begin at the Normal Penalty and, depending upon an assessment of the facts and circumstances of the case and whether mitigating/aggravating factors are present, the level of discipline could go up or down. Some of the more common aggravating and mitigating factors for each offense (by no means an exhaustive listing) are often listed in the grids depicting the aggravated and mitigated ranges. On certain occasions, the facts and circumstances of a case may call for the application of a penalty that is outside of the ranges indicated, and it is possible for any offense to rise to the level of dismissal under appropriate circumstances. Penalties below the Mitigated Range or above the Aggravated Range must be personally approved, for reasons specified in writing, by the Assistant Director, OPR, or the Assistant Director, Inspection Division (for delegated cases), or the Assistant Director, Administrative Services Division (for cases on appeal). Moreover, the Director, FBI; retains the discretion to review and correct disciplinary determinations within his authority, either in favor of or to the disadvantage of an employee, when the Director considers it necessary to correct an injustice or to prevent harm to the FBI. This power of correction is not intended as an additional level of appeal and will not be routinely exercised.

Combination of Penalties: In cases where more than one offense is substantiated against an employee, the penalties for the respective offenses will normally be added together. However, in adjudicating cases, OPR will exercise care in assessing multiple penalties where the substantiated charges are essentially restatements of the same act of misconduct. For example, where an Agent loses both his weapon and his laptop in one incident, penalties will not be separately assessed for the loss of the weapon and the loss of the laptop. Similarly, where an employee makes an unauthorized disclosure of classified information, penalties will not be separately assessed for the unauthorized disclosure and a security violation. In such cases, the greater of the two penalties will normally be applied, unless the facts of the case otherwise advise.

Senior Executive Service (SES) Suspensions: By federal regulation, members of the SES may not receive a disciplinary suspension of less than 15 days. Accordingly, where the Guidelines indicate a suspension of less than 15 days for an offense, that sanction cannot be imposed on an SES employee. When an assessment of a case with reference to the Guidelines concludes that a non-SES employee would have received a punishment of more than a three-day suspension, but less than a 15-day suspension, an SES employee will receive a minimum of a 15-day suspension. If a non-SES employee would have received a three-day suspension in a given case, an SES employee may receive either a letter of

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censure or a minimum of a 15-day suspension, as determined by weighing the facts and circumstances of the case against the heightened behavioral and managerial expectations associated with SES personnel.

Revised 9/16/04, 9:25 a.m.

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DOJOIG 007190

EXHIBIT D

FEDERAL BUREAU OF INVESTIGATION FOI/PA DELETED PAGE INFORMATION SHEET

FOIPA Request No.: 1399934-000 CivilAction No.: 18-cv-1766

Total Withheld Page(s) = 181

Bates Page Reference	Reason for Withholding		
	(i.e., exemptions with coded rationale, duplicate, sealed by order of court, etc.)		
18-cv-01766-9 –	(b)(6)-1, (b)(7)(C)-1		
18-cv-01766-11			
18-cv-01766-14 –	(b)(6)-1, (b)(7)(C)-1		
18-cv-01766-17			
18-cv-01766-20 -	Direct Referral to Department of Justice/ Office of Inspector		
18-cv-01766-40	General		
18-cv-01766-369 –	Direct Referral to Department of Justice/ Office of Inspector		
18-cv-01766-521	General		

	HEREIN IS UNCLASSIFIED DATE 04-05-2018 BY	NSICG.
INSD CAS	SE OPENING FORM	b6 -1 b7C -1
DATE OPENED:	Critical Case #:	
FULL INQUIRY	BUFILE#. 263D-HQ-	<u> </u>
FBI INVESTIGATION	CASE SUPERVISOR: AUC	b6 -1 b7C -1
NON-DELEGATED		
DATE REPORTED: 3/14/2018	DATE OF EVENT:	
COMPLAINANT/SOURCE: Director's	Office	
EMPLOYEE: MCCABE, ANDREW	G.	b6 -1 b7C -1
DIVISION: 00	NOTIFICATION? No	•

ALLEGATION:

released sensitive information to the Wall Street Journal and lacked

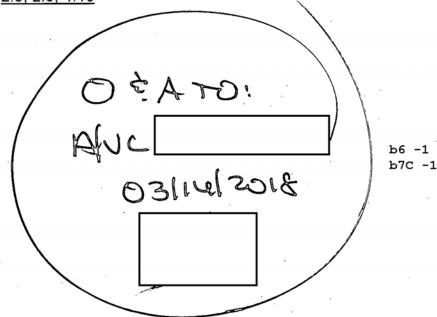
candor not under oath and under oath when questioned about it in

violation of Offense Codes 4.10 (Unauthorized Disclosure -

Sensitive Information); 2.5 (Lack of Candor/Lying - No Oath); and

2.6 (Lack of Candor/Lying - Under Oath).

VIOLATION CODES: 2.5, 2.6, 4.10



ALL INFORMATION CONTAINED

UC IPbase 1:18-cv-01766-RBW	Document 32-5	Fijed 04/12/19	OLA to 11 Page 4 θββ4/201	u (2.5, 2.6,
A/UC IIU or IPU	0/2011	10-		
	263-WD	~V &		

Case 1:18-cv-01766-RBW Do	HEREIN IS UNCLASSIFIED
(INSD) (FBI) b6 -1 b7C -1	DATE 04-05-2018 BY NSICG b6 -1 b7C -
From: HINCKLEY, SCOTT M Sent: Wednesday, March 1 To: Cc: Subject: RE: new case UNC	14, 2018 2:55 PM DO) (FBI) (INSD) (FBI) CLASSIFIED D6 -1 b7c -1
SentinelCaseId: NON-RECORD	OIG/DOJ Review:Date: FBI INVEST:OIG/DOJ INVEST:
Classification: UNCLASSIFIED	FBI INVEST:OIG/DOJ I
Copy. File jacket being prepared. Thanks.	
Scott M. Hinckley Inspection Division Chief - Internal Investigations Section	
b6 -1 b7C -1	
From (DO) (FBI) Sent: Wednesday, March 14, 2018 12:16 PM To: HINCKLEY, SCOTT M. (INSD) (FBI)	b6 -1 b7c -1
Subject: new case UNCLASSIFIED	
Classification: UNCLASSIFIED	=======================================
As discussed, please open a new 262 number based on	the OlC's report, detect February 2010, 174, 174, D
Investigation of Certain Allegations Relating to Former Deputy Director McCabe lacked candor under oath and	the OIG's report, dated February 2018, titled "A Report of FBI Deputy Director Andrew McCabe." The report alleges that I not under oath when questioned regarding disclosures to the 6 and 2.5. Additionally, the report alleges that Deputy Director set Journal, in violation of FBI Offense Code 4.10.
OPR received the OIG report on February 28, 2018.	
Thank you.	
b6 -1 b7C -1	
- ** * * * · · ·	

Case 1:18-cv-01766-RBW Document 32-5 Filed 04/12/19 Page 6 of 8

.Unit Chief, AU-II Office of Professional Responsibility Office Samsung:	b6 -1 b7C -1		
======================================	======================================		: ·*.
Classification: UNCLASSIF	======================================	======================================	

ALL INFORMATION CONTAINED Case 1:18-cv-01766-RBW Document 32-5 Filed 04/12/19 IPage Tof 8 FIED NSICG b6 -1 b7C −1 INSPECTION DIVISION INTERNAL INVESTIGATIONS SECTION ROUTING SLIP **INSD Front Office (Room** Internal Investigations Unit (Room ☐ UC ☐ AD Nancy McNamara b6 -1 CRA ☐ Sec. b7C -1 ☐ DAD Ronald Twersky \square SSA b6 -1 SSA ☐ Sec. b7C -1 SSA SSA **Internal Investigations Section (Room** \square SSA b6 -1 ☐ MAPA ☐ SC Scott M. Hinckley b7C -1 **Initial Processing Unit (Room** ≟ SSA SSA \square UC b6 -1 Office of Inspector General (Room b7C -1 \square SMAPA ☐ ASAC Jim M. Kirdar \square MAPA b6 -1 \square MAPA b7C -1 b6 -1 Office of Professional Responsibility \square CRS b7C -1 CRS Adjudication I CRS b6 -1 \square UC b7C -1 djud<u>ication II</u> b6 -1 b7C -1 b6 -1 -b7C -1b6 -17 For Signature From: b7C -1 For Action Room For Comment Internal Investigations Section ☐ For Information Only Inspection Division (Revised 12/21/2016) b6 -1 b7C -1 FBI 18-cv-01766-18

Picked up from

NSD INITIAL

b6 -1

b7c -1

FBI 18-cv-01766-19

EXHIBIT E

FEDERAL BUREAU OF INVESTIGATION FOI/PA DELETED PAGE INFORMATION SHEET

FOIPA Request No.: 1399934-000 CivilAction No.: 18-cv-1766

Total Withheld Page(s) = 749

Bates Page Reference	Reason for Withholding		
	(i.e., exemptions with coded rationale, duplicate, sealed by order of court, etc.)		
18-cv-01766-1274 – 18-cv- 01766-1290	Consultation to Other Government Agency "OGA"		
18-cv-01766-1292 – 18-cv- 01766-1366	(b)(6)-1, (b)(7)(C)-1		
18-cv-01766-1368 – 18-cv- 01766-1450	(b)(6)-1, (b)(7)(C)-1		
18-cv-01766-1452 – 18-cv- 01766-1469	(b)(6)-1, (b)(7)(C)-1		
18-cv-01766-1475 – 18-cv- 01766-1484	Consultation to Other Government Agency "OGA"		
18-cv-01766-1486 – 18-cv- 01766-1489	Consultation to Other Government Agency "OGA"		
18-cv-01766-1494 – 18-cv- 01766-1496	Consultation to Other Government Agency "OGA"		
18-cv-01766-1497 – 18-cv- 01766-1535	Consultation to Other Government Agency "OGA"		
18-cv-01766-1541 – 18-cv- 01766-1605	Consultation to Other Government Agency "OGA"		
18-cv-01766-1608	Consultation to Other Government Agency "OGA"		
18-cv-01766-1610 – 18-cv- 01766-1704	Duplicate to Bates Pages 18-cv-01766-41 - 18-cv-01766-135		
18-cv-01766-1705 – 18-cv- 01766-1831	Duplicate to Bates Pages 18-cv-01766-136 - 18-cv-01766-262		
18-cv-01766-1832 – 18-cv- 01766-1880	Duplicate to Bates Pages 18-cv-01766-468 - 18-cv-01766-516		
18-cv-01766-1881 – 18-cv- 01766-1936	Duplicate to Bates Pages 18-cv-01766-263 - 18-cv-01766-318		
18-cv-01766-1937 – 18-cv- 01766-1946	Duplicate to Bates Pages 18-cv-01766-359 - 18-cv-01766-368		
18-cv-01766-1947 – 18-cv- 01766-2039	Duplicate to Bates Pages 18-cv-01766-744 - 18-cv-01766-836		

- X Deleted Page(s) X
- X No Duplication Fee X
- X For this Page X

HEREIN	IS UNCLA	SSI <u>FIED</u>		
DATE 07	7-30-2018	BY	1SICG b 6	· -1

Will, Candice M. (DO) (FBI)

From:

Will, Candice M. (DO) (FBI)

Sent:

Tuesday, March 06, 2018 12:44 PM

To:

'Bromwich, Michael R.';

b6 -3 b7C -3

ъ7C -1

Cc: Subject:

FBI NDAs

Attachments:

Attorney Nondisclosure Agreement.pdf; Employee Nondisclosure Agreement.pdf

Dear Mr. Bromwich and Mr. Bruce,

Attached please find two nondisclosure agreements, one for you to execute and one for your client to execute. Please return them to me at your earliest convenience. Thank you.

Candice M. Will Assistant Director Office of Professional Responsibility Federal Bureau of Investigation 1025 F Street, Suite 410

Washington, DC 20004

(office)

b6 -1

(<u>ce</u>ll)

b7C -1

2630-40-



HEREIN IS UNCLASSIFIED DATE 07-30-2018 BY

rsicg b6 -1 b7C -1



NONDISCLOSURE AGREEMENT

1,	, an attorney licensed to practice in the state of
(Name of Attorney)	•
, as co	onsideration for being granted access to certain FBI-related
(State)	
information in connection with my legal representation o	of Federal Bureau of Investigation (FBI) employee,
(News of Funtaria)	, as to Administrative Inquiry
(Name of Employee)	
263-HQ-, agree as follows: (File Number from Notification Form)	
l will not disclose orally, in writing, or by any o	ther means, to any party other than the Director, FBI; Internal
Investigations Section/Inspection Division, FBI; the Offi	ce of Professional Responsibility (OPR), FBI; the Office of the General
Counsel, FBI; the United States Attorney General; the O	ffice of the Inspector General, Department of Justice (DOJ); OPR, DOJ;
or otherwise as required by law, court order, or subpoena	(and then under seal to the extent permitted by law) - without the
prior written authorization of the FBI - any information	on or material derived from or relating to FBI files or any other FBI-
related information acquired by virtue of my legal repres	entation of this matter.
I may, however, disclose such information to me	embers and employees of my law firm or office pursuant to my legal
responsibilities in this matter, but only based upon a need	to know and provided that all persons who receive this information
first shall be shown a copy of this nondisclosure agreeme	ent and, in a written and signed Certificate such as that annexed hereto,
state that he or she has read this nondisclosure agreement	t and agrees to be bound by the terms thereof. I agree to retain such
certificates until the conclusion of this matter and shall m	nake such certificates available to the FBI upon request.
I further agree that all documents released by the	e FBI in this matter remain the property of the FBI and that,
upon the conclusion of this matter or at the FBI's earlier i	request, I will return all such documents and any copies of them to the FBI
I acknowledge that the unauthorized disclosu	re of the aforementioned information would violate this agreement,
might additionally violate federal law, regulations or ${\bf j}$	•
•	
(Signature of Attorney)	(Date)

EU SI J LIZUR		
HEREIN	IS	UNCLASSIFIED

NSICG **b6 -1**



CERTIFICATE

· I,	<u> </u>	, acknowledge that I have reviewed the
	(Printed Name)	v
Nondisclosure Agreemen	t between the Federal Bureau of Investigation	and
	_	(Name of Primary Attorney)
executed on	, and agree to be bound by the ter	ms thereof.
(Date of	Agreement)	
	•	
(Signa	ture)	(Today's Date)

J_{ISICC} b6 -1



FBI DISCIPLINARY PROCESS: DISCLOSURE OF INFORMATION TO ATTORNEYS

The FBI recognizes that, for you to receive effective assistance of counsel during an administrative inquiry, it may be necessary for you to disclose to your attorney information or materials derived from FBI files or obtained by virtue of your employment with the Bureau. Because much FBI information is by its nature very sensitive, the FBI and its employees have an obligation to protect that information from unauthorized disclosure to persons outside the FBI, even to attorneys representing FBI employees.

You are therefore reminded that, during the course of this process, you continue to be bound by federal laws and regulations prohibiting the unauthorized disclosure of FBI information and by the terms of the agreement you signed when you became an FBI employee in which you agreed never to divulge, publish, reveal or otherwise disclose any information or material from or relating to FBI files or any other information acquired by virtue of your official employment, duties, or status, without the written permission of the Director.

The following is a list of the types of FBI information you may not disclose to your attorney without prior authorization and the procedures you should use to obtain the necessary authorization to release the information to your attorney.

- Classified information, whether marked or unmarked, whether written or oral, that is classified pursuant to the provisions of the Executive Order 12958.
- 2. Information protected from disclosure by the Privacy Act, which includes information in FBI files retrievable by an individual's name or other identifying data, including information pertaining to other FBI employees.
- Information that reveals sensitive law enforcement, intelligence, or counterintelligence techniques, sources or methods; or that reveals the sensitive, confidential or proprietary techniques, sources, or methods of other agencies or government entities.
- 4. Information that would reveal grand jury material protected from disclosure by Rule 6(e) of the Federal Rules of Criminal Procedure.
- 5. Information that would reveal the identity of a confidential source or informant.
- 6. Information that relates to any sensitive operational details or the substantive merits of any ongoing or open investigation, inquest, probe, prosecution, appeal or case.
- 7. Information consisting of the proprietary information of another entity, including trade secrets.
- Information pertaining to wiretaps or intercepts protected or regulated by Title III (18 U.S.C. §§ 2510-2520).
- 9. Information pertaining to currency transaction reports regulated or protected by 31 U.S.C. §§ 5311-5319.
- 10. Tax return information regulated or protected by 26 U.S.C. § 6103.
- 11. Information, the disclosure of which is prohibited by any other Federal statute or regulation.
- 12. Information, the disclosure of which would divulge opinions, recommendations, and advice generated in the decision-making process of the federal government.

Will, Candice M. (DO) (FBI)			HEREIN IS UNCLASSIFIED DATE 07-30-2018 BY	NSICG 56 -1 57C -3
From: Sent: To: Cc:	Will, Candice M. (DO) (Fi Wednesday, March 07, 2	-	ael R. b6 -3 b7C -3	
Subject:	Re: FBI NDAs			
Γhanks, Eric. We will mail you	our package tomorrov	v. Candice		
		:		
From: Original message From: Date: 3/7/18 6:28 PM (GMT-05) To: "Will, Candice M. (DO) (F)	ъ7С -3 5:00)	b6 −1 b7C −1], "Bromwich, M	ichael R."	
Cc: Subject: RE: FBI NDAs		b6 -3 b7с -3		
Ms. Will,				
Thank you for your assistance. Att	ached you will find my s	igned NDA relating	g to this matter.	
Best,	•	:		
Eric				
Eric B. Bruce (Washington DC) (New York)) b6 -3 b7C -3			
KOBRE & KIM LLP vww.kobrekim.com				
New York London Hong Konslands BVI	g Shanghai Seoul	Washington DC	San Francisco Miami Ca	yman ⁻

----Original Message---From: Will, Candice M. (DO) (FBI) [mailto]
Sent: Wednesday, March 07, 2018 10:55 AM To: Bromwich, Michael R. Cc: Eric Bruce
Subject: RE; FBI NDAs

b6 -1

b7C -1

b6 -3 b7C -3 b7C -1

Dear Mr. Bromwich and Mr. Bruce,

I am sending something out today. I will wait until I receive your executed NDAs to forward the materials to you. Because your client is already bound by the FBI's confidentiality rules by virtue of his employment, I will go ahead and send the package to him. Thank you.

Candice Will

Original Message	_ b6 -3
From: Bromwich, Michael R. [mailto:	ь7с -3
Sent: Wednesday, March 07, 2018 9:58 AM	b6 -1
To: Will, Candice M. (DO) (FBI)	b7C −1
Cq	□ _{b6 -3}
Subject: Re: FBI NDAs	— Б6 -3 Б7С -3

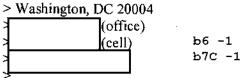
Thanks very much for this. We will provide the NDA to our client. I will execute this and send it back to you when I return to D.C. tomorrow.

Best.

MRB

> On Mar 6, 2018, at 11:44 AM, Will, Candice M. (DO) (FBI) <	wrote:	b6 -1 b7C -1
		D/C -I

- > Dear Mr. Bromwich and Mr. Bruce,
- > Attached please find two nondisclosure agreements, one for you to execute and one for your client to execute. Please return them to me at your earliest convenience. Thank you.
- > Candice M. Will
- > Assistant Director
- > Office of Professional Responsibility
- > Federal Bureau of Investigation
- > 1025 F Street, Suite 410



- > < Attorney Nondisclosure Agreement.pdf> < Employee Nondisclosure
- > Agreement.pdf>

This e-mail message is from Kobre & Kim LLP, a law firm, and may contain legally privileged and/or confidential information. If the reader of this message is not the intended recipient(s), or the employee or agent responsible for delivering the message to the intended recipient(s), you are hereby notified that any dissemination, distribution or copying of this e-mail message is strictly prohibited. If you have received this message in error, please notify the sender immediately and delete this e-mail message and any attachments from your computer without retaining a copy.

11S-3 (2005-05-25)



NONDISCLOSURE AGREEMENT

(Name of Attorney)
D.C. + New York, as consideration for being granted access to certain FBI-related (State)
information in connection with my legal representation of Federal Bureau of Investigation (FBI) employee,
Andrew McCa be , as to Administrative Inquiry (Name of Employee)
263-HO- (File Number from Notification Form), agree as follows:
I will not disclose orally, in writing, or by any other means, to any party other than the Director, FBI; Internal
Investigations Section/Inspection Division, FBI; the Office of Professional Responsibility (OPR), FBI; the Office of the General
Counsel, FBI; the United States Attorney General; the Office of the Inspector General, Department of Justice (DOJ); OPR, DOJ;
or otherwise as required by law, court order, or subpoena (and then under seal to the extent permitted by law) - without the
prior written authorization of the FBI - any information or material derived from or relating to FBI files or any other FBI-
related information acquired by virtue of my legal representation of this matter.
I may, however, disclose such information to members and employees of my law firm or office pursuant to my legal
responsibilities in this matter, but only based upon a need to know and provided that all persons who receive this information
first shall be shown a copy of this nondisclosure agreement and, in a written and signed Certificate such as that annexed hereto,
state that he or she has read this nondisclosure agreement and agrees to be bound by the terms thereof. I agree to retain such
certificates until the conclusion of this matter and shall make such certificates available to the FBI upon request.
I further agree that all documents released by the FBI in this matter remain the property of the FBI and that,
i turner agree that an documents released by the ribi till this highest femalli the property of the ribi and that,

upon the conclusion of this matter or at the FBI's earlier request, I will return all such documents and any copies of them to the FBI.

might additionally violate federal law, regulations or policy, and could form the basis for legal action.

I acknowledge that the unauthorized disclosure of the aforementioned information would violate this agreement,

HEREIN I	S UNCLASS:	TIED	_		
DATE 07-	30-2018 B	ć <u> </u>	NSICC	b 6	-1
			J	5.70	-



CERTIFICATE

Ι,		, acknowled	, acknowledge that I have reviewed the	
Nondisclosure Agreement b	(Printed Name) etween the Federal Bureau of Inve		_	
executed on(Date of Agr	, and agree to be bound		(Name of Primary Attorney)	
-	,			
ignatur-	y —	(Today's 1	Date)	

Case 1.10-CV-U1/00-RD	W Document 32-0	FILEU U4/112/113/OREASON -COMPA1M
		HERRIN ET MIRRER

Will, Candice M. (DO) (FBI)				. ъ7c -
From:	Will, Candice M. (DO) (FBI)	· ·		
Sent: To:	Wednesday, March 07, 2018 10:55 AM 'Bromwich, Michael R.'		1.6 2	

DATE 07-30-2018 BY

Dear Mr. Bromwich and Mr. Bruce,

I am sending something out today. I will wait until I receive your executed NDAs to forward the materials to you. Because your client is already bound by the FBI's confidentiality rules by virtue of his employment, I will go ahead and send the package to him. Thank you.

Candice Will

Cc:

Subject:

```
b6 -3
----Original Message----
                                                                   b7C -3
From: Bromwich, Michael R. [mailto
Sent: Wednesday, March 07, 2018 9:58 AM
                                                                   b6 -1
                                                                   . b7C -1
To: Will, Candice M. (DO) (FBI)
                                                                         b6 -3
Ccl
                                                                         b7C -3
Subject: Re: FBI NDAs
```

RE: FBI NDAs

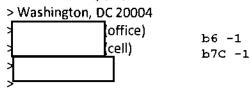
Thanks very much for this. We will provide the NDA to our client. I will execute this and send it back to you when I return to D.C. tomorrow.

Best.

MRB

>

- b6 -1 > On Mar 6, 2018, at 11:44 AM, Will, Candice M. (DO) (FBI) wrote: b7C -1
- > Dear Mr. Bromwich and Mr. Bruce,
- > Attached please find two nondisclosure agreements, one for you to execute and one for your client to execute. Please return them to me at your earliest convenience. Thank you.
- > Candice M. Will
- > Assistant Director
- > Office of Professional Responsibility
- > Federal Bureau of Investigation
- > 1025 F Street, Suite 410



- > < Attorney Nondisclosure Agreement.pdf > < Employee Nondisclosure
- > Agreement.pdf>

MSICG **b6** -1

b6 -3

b7C -3

PROCEDURAL PROTECTIONS

- (1) This Statement of Proposed Action provides you thirty calendar days' advance written notice of the proposed action.
- (2) You may contact and use an attorney to assist in the disciplinary matter, subject to limitations imposed by law and regulation regarding the disclosure of classified or sensitive information. The FBI will not be responsible for payment of any attorney's fee or other expense you incur in connection with an attorney's representation of your interests associated with a disciplinary matter or an appeal of a disciplinary sanction.
- (3) You have ten calendar days from the date of receipt of this notice to make a written request to review the material which was relied upon by OPR's proposing official. Copies of such material will be redacted in accordance with civil discovery policy and procedures. These documents are the property of the FBI and will be made available for review for a reasonable amount of time by you and/or your attorney within the FBI office space and control. You may take notes, but you may not make copies.

4) You and/or your attorney may prov	ide a written resp	onse to the prop	osed action	on. Your	
written response may include affidavits	or other docume	nts of choice, an	d it may i	identify	
vitnesses or documentary sources of ex	culpatory eviden	ce.1 Your writte	n respons	se must be	÷
submitted within ten calendar days after	r your receipt of t	the proposed acti	ion or afte	er you hav	/e
been provided access to the material de-	scribed in (3) abo	ove, whichever o	ccurs late	r. Due to	mail
lelays associated with security procedu	ires, you must ser	i <u>d your response</u>	by facsing	nile to OF	'n,
Adjudication Unit [I or II] at	OI		or by ema	ail to Unit	Ĺ
Chief	at	_			b6

y630-40b7C -1

You are admonished not to discuss this matter with anyone other than the Inspection Division's Internal Investigations Section (IIS), OPR, the Human Resources Branch's Office of Disciplinary Appeals (ODA), the Security Division, the FBI's Employee Assistance Program, the FBI's Ombudsman, or an attorney who has signed the appropriate Nondisclosure Agreement. Neither you, your attorney, nor anyone acting on your behalf should contact any witness or potential witness about this inquiry without first obtaining approval from IIS (during the investigative stage of the proceedings), OPR (during the adjudicatory stage of the proceedings), or ODA (during the appeal). This prohibition applies to persons from whom you would like to solicit a character reference. If you would like OPR to consider a character reference, provide the undersigned OPR Unit Chief with the person's name, position, and contact information. OPR will determine whether a character reference from the listed individuals would enhance the investigative record and, if so, OPR will solicit the character reference. Absent exceptionally compelling circumstances, OPR will not solicit a character reference from a subordinate on behalf of a supervisor. If you believe additional witnesses need to be interviewed or other additional evidence needs to be obtained, you may direct that request to IIS (during the investigative stage of the proceedings) or include the request in your written response to OPR (during the adjudicatory stage of the proceedings). If you contact any witness or potential witness during the adjudicatory stage without OPR permission, you can expect to be referred to HS for Obstruction of Administrative Matter. If counsel does so, counsel and counsel's firm can expect to be prohibited from reviewing the investigative file, submitting a written response, and participating in the oral presentation to OPR. In addition, you are admonished that any redacted materials or other FBI documents you review in connection with this inquiry are the property of the FB!, and you are prohibited from photocopying or removing such documents from FBI space. You may take notes concerning the content of such material, but those notes may be used only to facilitate your participation in this disciplinary inquiry and for no other purpose.

- (5) In addition to, or in lieu of, submitting a written response, you may request an oral presentation which, at your election, will be made telephonically, in person, or by video teleconference to the Assistant Director of OPR. You must request an oral presentation, in writing, within ten calendar days after your receipt of the proposed action or after you have been provided access to the material described in (3) above, whichever occurs later. Upon receipt of your written request for an oral presentation, OPR will provide you at least fifteen days' notice of the presentation date. If you are submitting a written response in addition to making an oral presentation, the oral presentation will be scheduled for a date after the deadline date for OPR's receipt of your written response. During your presentation, you and/or your attorney may present oral testimony or evidence, including any information, affidavits, and other documentation deemed pertinent to your case. The testimony of witnesses is not allowed. Any travel and/or attorney costs incurred as part of your oral presentation are your responsibility. For WebTA, employees in duty status may treat a reasonable amount of file review time, and the time spent during the oral hearing, as part of their official duties and record it as regular hours. Employees in duty status may also treat up to one hour prior to the hearing and up to one hour after the hearing as part of their official duties if that time is actually spent preparing for the hearing or discussing the hearing with counsel. Employees in non-duty status are not entitled to use official time to review their file or attend their oral presentation.
- (6) You will receive a written decision letter from the AD, OPR, after consideration of any oral and written responses to the proposed action, fully stating the reasons for the decision. This decision letter will be delivered to you as soon as practicable following completion of the disciplinary process described above.

EXHIBIT F

FEDERAL BUREAU OF INVESTIGATION FOI/PA DELETED PAGE INFORMATION SHEET

FOIPA Request No.: 1399934-000 CivilAction No.: 18-cv-1766

Total Withheld Page(s) = 745

Bates Page Reference	Reason for Withholding
	(i.e., exemptions with coded rationale, duplicate, sealed by
	order of court, etc.)
18-cv-01766-2040 -	Referral Consultation
18-cv-01766-2067	
18-cv-01766-2068	Duplicate to 18-cv-01766-2051
18-cv-01766-2069 –	Duplicate to 18-cv-01766-2056 – 18-cv-01766-2057
18-cv-01766-2070	
18-cv-01766-2071 -	Duplicate to 18-cv-01766-2052 – 18-cv-01766-2055
18-cv-01766-2074	
18-cv-01766-2075 -	Duplicate to 18-cv-01766-2049 – 18-cv-01766-2050
18-cv-01766-2076	
18-cv-01766-2077 –	Referral Consultation
18-cv-01766-2082	
18-cv-01766-2083 -	Duplicate to 18-cv-01766-2080 – 18-cv-01766-2082
18-cv-01766-2085	
18-cv-01766-2086 –	Referral Consultation
18-cv-01766-2087	
18-cv-01766-2088 -	Duplicate to 18-cv-01766-2086 – 18-cv-01766-2087
18-cv-01766-2089	
18-cv-01766-2090 –	Referral Consultation
18-cv-01766-2092	
18-cv-01766-2093 -	Duplicate to 18-cv-01766-2090 – 18-cv-01766-2092
18-cv-01766-2095	
18-cv-01766-2096	Referral Consultation
18-cv-01766-2097	Duplicate to 18-cv-01766-2096
18-cv-01766-2098 –	Referral Consultation
18-cv-01766-2099	
18-cv-01766-2100 -	Duplicate to 18-cv-01766-2062 – 18-cv-01766-2066
18-cv-01766-2109	
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Case 1:18-cv-01766-RBW Document 32-7 Filed 04/12/19 Page 4 of 11

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Case 1:18-cv-01766-RBW Document 32-7 Filed 04/12/19 Page 5 of 11

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 09-04-2018 BY NSICG

Will, Candice M. (DO) (FBI)		DATE 09-04-2018 BY	NSICG b6 -
From: Sent: To:	Michael Bromwich Tuesday, March 20, 2018 1:21 PM Will, Candice M. (DO) (FBI)		b6 -3 b7C -3
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Case 1:18-cv-01766-RBW Document 32-7 Filed 04/12/19 Page 6 of 11

We can package up the original items we received from you and make them available to one of your team to pick up this afternoon. Please just let us know what time they will be here and the items will be waiting. If

they are unable to come today, suggest we shoot for Thursday of	r Friday given the impending snowstorm.
Many thanks,	
Duit	
Eric	
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Eric B. Bruce	
(Washington DC) b6 -3	
. b7c −3 (New York)	
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KOBRE & KIM LLP	
www.kobrekim.com	
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From: Will, Candice M. (DO) (FBI) [mailto	b7C -1
Sent: Tuesday, March 20, 2018 1:02 PM To: Bromwich, Michael R.	Michael Bromwich 56 -3
; Eric Bruce	b7c −3
Subject: McCabe Matter	
Good afternoon, Michael and Eric,	
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We are in the process of ensuring the file is complete and ready to be placed in storage. As part of that, I must retrieve all copies. I can send someone to your office (just let me know which office) to pick up

Candice

This e-mail message is from Kobre & Kim LLP, a law firm, and may contain legally privileged and/or confidential information. If the reader of this message is not the intended recipient(s), or the employee or agent responsible for delivering the message to the intended recipient(s), you are hereby notified that any dissemination, distribution or copying of this e-mail message is strictly prohibited. If you have received this message in error, please notify the sender immediately and delete this e-mail message and any attachments from your computer without retaining a copy.

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Case 1:18-cv-01766-RBW Document 32-7 Filed 04/12/19 Page 9 of 11

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From:	Will, Candice M. (DO) (FBI)	·		
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Good afternoon, Michael and Eric,

We are in the process of ensuring the file is complete and ready to be placed in storage. As part of that, I must retrieve all copies. I can send someone to your office (just let me know which office) to pick up the redacted file you were permitted to use during the course of the official proceedings. Thank you.

Bromwich, Michael R.; 'Michael Bromwich';

McCabe Matter

Candice

To:

Subject:

Case 1:1	8-cv-01766-RBW Document 32-7 Filed 04/12/19 Page 11 of 11
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•	Serial # of Originating Document
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	To Be Returned Yes No
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	☐ Yes No
	Federal Taxpayer Information (FTI) Yes No
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	(Communication Enclosing Material)
	Description: Original notes re interview of
Section 1	Redacted 263 case file

EXHIBIT G

U.S. Department of JusticeOffice of the Inspector General

INSPECTOR GENERAL MANUAL

Volume III - Investigations Chapter 207 - Management of Investigations

b) (7)(E)

B. <u>Authority</u>. OIG Special Agents are authorized to administer oaths and request information under oath, pursuant to the Inspector General Act, title 5 U.S.C. app. § 6(a)(5).

- C. <u>Non-Criminal Cases</u>. Agents will take sworn statements (written affidavits or audio or audio-video recorded) from persons who have direct evidence concerning the allegations in investigations that originate as non-criminal cases or in criminal cases in which prosecution has been declined. This includes subjects as well as relevant witnesses.
 - (1) Sworn statements in non-criminal cases are especially important because they are generally admissible as evidence in administrative proceedings if the witness is not available to testify.
 - (2) Sworn statements can be essential to the component agency when a subject employee chooses to have a case decided by a third party, who will have only the record, that is, the investigative report and exhibits, on which to base a decision.
- D. <u>Criminal Cases</u>. Once a case has been presented for criminal prosecution, agents will follow the prosecuting attorney's guidance in determining whether sworn statements shall be obtained during any subsequent interviews. Sworn statements of witnesses may become problematic at trial, particularly when grand jury testimony is also involved.
- E. <u>Sworn Statement Formats: Written Affidavit</u>. A sworn statement normally will be a handwritten or typed, signed declaration or statement of fact, made under oath before affixing the affiant's signature that is, a written narrative affidavit. Prepare the written affidavit at the time of the interview, using OIG Form III-207/3 (Affidavit) (*SharePoint Forms: IG Manual*).
 - (1) The preferred method of taking a sworn statement is an affidavit written in narrative format, prepared by the interviewing agent. However, if the interviewee refuses to provide a statement unless the interviewee writes his or her own affidavit, then the agent may allow the interviewee to do so. Before the affidavit is sworn to, the agent must assure that all relevant issues are addressed and that the interviewee is dissuaded from providing self-serving statements when contradictory evidence exists.
 - (2) The items to be completed on the affidavit form are self-explanatory. The following items, however, should be given special attention:

U.S. Department of Justice

INSPECTOR GENERAL MANUAL

Office of the Inspector General

Volume III - Investigations
Chapter 207 - Management of
Investigations

- 207.1 <u>Policy</u>. This chapter establishes the policies, procedures, and standards by which the Office of the Inspector General (OIG) will conduct and manage investigations.
- 207.2 <u>Reference</u>. This chapter is issued under the Inspector General Act of 1978 (Public Law (Pub. L.) 95-452, October 12, 1978; 5 U.S.C. App.), as amended, and Attorney General Order 2492-2001. Rehabilitation Act of 1973.
- 207.3 <u>Scope</u>. The provisions of this chapter apply to all employees of the OIG Investigations Division (INV).
- 207.4 Opening Investigations.
 - A. <u>Geographic Areas</u>. The field office responsible for the geographic area where the majority of relevant witnesses or evidence are located will generally open and conduct the investigation. This is generally where the predicating incident or event occurred. If there is sufficient reason for a different field office (including the OIG Fraud Detection Office) to conduct the investigation, the Special Agent in Charge (SAC), Operations Branch I or Operations Branch II, INV Headquarters, will coordinate with the field office SACs involved.
 - B. <u>Headquarters Coordination Responsibility</u>. The SAC, Operations Branch II, INV Headquarters, is responsible for coordinating all OIG investigations involving the Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), and Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) subjects or programs. The SAC, Operations Branch I, INV Headquarters, is responsible for coordinating OIG investigations involving all other Department of Justice (DOJ) component agencies, offices, boards, and divisions.
 - C. <u>Investigations Data Management System</u>. The online Investigations Data Management System (IDMS) performs data compilation and case tracking functions. When a SAC or higher official decides that a complaint should be investigated, the complaint will be given a disposition of "I" (Investigation) in IDMS. (See the Inspector General Manual (IGM), Volume III, Chapter 205, "Handling Complaints" (III-205), for case opening criteria.)
 - (1) All investigations will be recorded (opened) in IDMS using one of three opening status codes: "OPCR," criminal case; "OPAD," administrative case (non-criminal); or "OPIN," open initiative.
 - (2) Special Agents (SAs) and Assistant Special Agents in Charge (ASACs) will ensure that completion of all applicable fields in IDMS is consistent with policy and contemporaneous with the development of the information.

 Refer to the IDMS Users' Manual for detailed information.

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or generated that do not contain information of value to a specific investigative query of (b) (7)(E) data and documentation will be handled in accordance with IGM Volume I, Chapter 222, "Standards for Safeguarding Sensitive But Unclassified Information."

- I. <u>Security Incidents</u>. The SAC, Operations Branch I, INV Headquarters, will immediately contact BOP concerning all security incidents that could affect access connections, BOP systems or networks, or BOP data.
- 207.24 <u>Special Procedures Regarding the Management of Investigations of Allegations of Sexual</u>
 Abuse in Confinement Settings.
 - A. <u>Training</u>.
 - (1) All investigations of sexual abuse in confinement settings, including BOP and USMS facilities and contract facilities, will be conducted by Special Agents who have completed special training in sexual abuse investigations. Training is currently available on SharePoint. The training taken by personnel will be documented and recorded by the INV Investigative Support Branch.
 - (2) For additional resources and educational materials from the National Resource Center for the Elimination of Prison Rape, visit www.prearesourcecenter.org.
 - B. <u>Standards</u>. The investigating agents will gather and preserve direct and circumstantial evidence, (b) (7)(E)
 - C. Victim Safety.
 - (1) The first priority at all times must be the safety of the inmate victim.

Although inmate housing assignments are the responsibility of the component, OIG agents should be aware of relevant regulations when working with the component.

(2) PREA victim safety protocols call for the separation of the victim and a staff subject; therefore, Office of Enforcement Operations (OEO) approval generally will not be granted for any operation involving face-to-face contact

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INSPECTOR GENERAL MANUAL

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between the victim and the staff member. Under no circumstances will unmonitored fixed cameras be installed and operated by the OIG in "private" areas (that is, interior offices) where sexual activity is suspected. During joint investigations with other agencies, it is the responsibility of the case agent to verify that the use of inmates and any technical operations are authorized, regardless of which agency submits the use of prisoner request to OEO.

- D. <u>Victim Advocates</u>. Requests for victim advocates will be honored. (See IGM 111-226, Interview Procedures.)
- E. <u>Use of Polygraph</u>. No inmate who alleges sexual abuse will be required to submit to a polygraph examination as a condition for proceeding with an investigation of the allegation.
- F. Refusal of Victim to Cooperate. The refusal of a victim to cooperate with the investigation will not be the sole basis for terminating an investigation, provided that sufficient evidence exists or may be developed from other sources to build a credible criminal or administrative case
- G. <u>Departure of Subject or Victim</u>. The departure of the alleged abuser or victim from the employment or control of the facility or agency will not provide a basis for terminating an investigation.
- H. <u>Proving Contact</u>. Investigating agents will pursue available leads to detect any inappropriate contact between the staff member and the inmate victim, including emails, letters, texts, telephone calls, social media, photographs, financial transactions, and so forth. Investigators will attempt to identify aliases, alias e-mail accounts, and third parties used to further contact between the staff member and the victim. Agents will utilize subpoenas as necessary to further these goals.
- I. <u>Presentation for Prosecution</u>. All investigations with evidence that appears to support criminal prosecution will be presented to the U.S. Attorney's Office with jurisdiction. No compelled interviews will be conducted in connection with such a case without the concurrence or a prosecutorial declination from an Assistant U.S. Attorney.
- J. <u>Administrative Investigations</u>. All investigations in which prosecution was declined or resulted in a misdemeanor conviction without the voluntary resignation of the subject will be completed administratively. The component will be provided with a report of investigation that explains the basis for any findings of administrative violations and includes citations to the respective policies. The report will include compelled interviews of the subjects unless the subjects admitted to the violations during voluntary interviews memorialized with affidavits or audio recordings.
- K. <u>Processing Non-DOJ PREA Allegations</u>. Processing is prescribed in IGM III-205.12A and B and as follows:

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY)
AND ETHICS IN WASHINGTON,)
Plaintiff,))
v.) Civil Action No. 18-cv-1766 (RBW)
U.S. DEPARTMENT OF JUSTICE,))
Defendant.))

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS

Pursuant to Local Civil Rule 7(h), plaintiff respectfully submits this response to defendant's statement of material facts.

1. On March 19, 2018, Plaintiff submitted a FOIA request to the FBI for "all documents related to any investigation or inquiry conducted by the FBI's Office of Professional Responsibility ('OPR') of, involving, or relating to former FBI Deputy Director Andrew McCabe, who was fired by Attorney General Jeff Sessions on March 16, 201[8]."

This paragraph is not disputed.

This paragraph is not disputed.

- 2. On or about April 3, 2018, the FBI completed its search.
- 3. On or about April 4, the FBI began processing Plaintiff's FOIA request to determine what information could be released and what information, if any, was exempt from release under the Freedom of Information Act.

This paragraph is not disputed.

4. In the course of its review of the OPR file, the FBI identified various documents that were compiled or created by the U.S. Department of Justice's Office of Inspector General ("OIG") during its investigation of former FBI Deputy Director Andrew McCabe.

This paragraph is not disputed.

5. OIG had conducted a "misconduct investigation" of McCabe to determine whether he had lacked candor when questioned under oath by FBI agents and OIG investigators, whether he had lacked candor in a discussion with the FBI director, and whether he had improperly publicly disclosed an on-going investigation.

This paragraph is a characterization of an OIG report, the contents of which speak for themselves. Plaintiff does not dispute that the OIG conducted a "misconduct investigation" of Mr. McCabe.

6. The FBI contacted OIG to coordinate the processing of the documents created or compiled by OIG, as required by 28 C.F.R. § 16.4(d).

The factual allegations in this paragraph are not disputed. This paragraph sets forth a statement of law as to the requirements of 28 C.F.R. § 16.4(d), which is not a statement of material fact to which plaintiff must respond.

- 7. Ultimately, the records were referred to OIG for it to respond directly to Plaintiff.

 This paragraph is not disputed.
- 8. Between October 31 and December 12, 2018, the FBI referred to OIG the responsive records that had been created or compiled by OIG.

This paragraph is not disputed.

9. OIG determined, in the course of processing the records, that significant portions of the records are covered by Exemption 7(A) of the FOIA.

This paragraph is disputed to the extent it implies a legal conclusion that portions of the records at issue are covered by Exemption 7(A), which is not a material fact to which plaintiff must respond.

10. At this stage, the parties are litigating the application of Exemption 7(A) to a sample of documents agreed to by the parties.

This paragraph is not disputed.

11. The records fall into three functionally defined categories.

Plaintiff can neither confirm nor dispute this paragraph because it relies entirely on the Declaration of Stephen F. Lyons, which has been filed under seal and *ex parte*.¹

12. The Lyons declaration establishes that the material redacted from the documents in each category would, if released, risk interfering with ongoing and potential future enforcement proceedings.

This paragraph sets forth a conclusion of law, not a statement of material fact to which plaintiff must respond. To the extent this paragraph is construed as a statement of fact plaintiff can neither confirm nor dispute this paragraph because it relies entirely on the Lyons Declaration, which has been filed under seal and *ex parte*.

13. The materials in the sample had been gathered by those working on enforcement proceedings prior to the invocation of Exemption 7(A) over the sample documents.

Plaintiff can neither confirm nor dispute this paragraph because it relies entirely on the Lyons Declaration, which has been filed under seal and *ex parte*.

14. No reasonably segregable, non-exempt information has been withheld.

¹ Plaintiff notes that in its Statement of Material Facts defendant refers to this declaration as from Steven F. Lyons, while in its motion to file the declaration under seal it refers to it as from Stephen F. Lyons. Without access to the declaration, plaintiff can neither confirm nor deny the proper spelling of the declarant's first name.

This paragraph sets forth a conclusion of law, not a statement of material fact to which

plaintiff must respond. To the extent this paragraph is construed as a statement of fact plaintiff

can neither confirm nor dispute this paragraph because it relies in part on the Lyons Declaration,

which has been filed under seal and ex parte.

15. OIG has compared the sample documents against the McCabe OIG Report to

release any information that would otherwise be exempt, but which has been publicly

acknowledged.

This paragraph is disputed to the extent it implies the legal conclusion that any withheld

information is properly exempt from disclosure under the FOIA. Plaintiff does not dispute that in

determining which information to disclose in the sampled documents OIG looked only to the

McCabe OIG Report.

16. The process of comparing the otherwise exempt material to the McCabe OIG

Report was a labor-intensive and time-consuming one that required OIG to conduct a careful

analysis of the underlying material.

This paragraph does not set forth a fact material to the resolution of defendant's motion

for partial summary judgment.

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Respectfully submitted,

/s/ Anne L. Weismann

Anne L. Weismann

(D.C. Bar No. 298190)

Adam J. Rappaport

(D.C. Bar No. 479866)

Citizens for Responsibility and Ethics

in Washington

1101 K Street, N.W., Suite 201

Washington, D.C. 20005

Phone: (202) 408-5565

Facsimile: (202) 588-5020

Attorneys for Plaintiff

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