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Description of document: Department of Commerce (DOC) Office of Inspector General (OIG) Report of Investigation 19-0108 - Waste of Government Resources Management Matters - 2020

Requested date: 19-February-2021

Denial date: 30-March-2021

Appeal date: 30-March-2021

Release date: 27-April-2021

Posted date: 13-September-2021

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April 27, 2021

VIA E-MAIL

RE: FOIA Appeal No. DOC-OIG-2021-001240 of FOIA Request No. DOC-OIG-2021-000825

This letter responds to your Freedom of Information Act (FOIA) appeal, dated March 8, 2021 and received by the Department of Commerce, Office of Inspector General (OIG) on March 30, 2021. In that appeal, you challenge the partial denial of your FOIA request number DOC-OIG-2021-000825 with respect to a particular report of investigation.

For the reasons explained below, I am granting your appeal in part and denying your appeal in part. Specifically, while I am upholding the majority of the withholdings in the relevant record, I have identified certain passages where the initial withholdings were overbroad and am releasing that additional information to you.

Initial Request and Determination

In your FOIA request, you sought records that included the final report for OIG investigation no. 19-0108 (ROI 19-0108). The OIG responded to your FOIA request on February 19, 2021. That response provided a link to a copy of ROI 19-0108 that was already posted in the OIG's Electronic FOIA Reading Room (<https://www.oig.doc.gov/Pages/FOIA-Electronic-Reading-Room.aspx>).¹ All twelve (12) pages of that document were partially withheld pursuant to FOIA Exemption 6, 5 U.S.C. § 552(b)(6), which protects information in personnel, medical, or similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; and FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), which protects law enforcement information, the disclosure of which could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Your Appeal

Your appeal challenges the withholding of information from ROI 19-0108 pursuant to FOIA Exemptions 6 and 7(C). You state that "a substantial portion of the document was withheld under exemptions b(6) and b(7)(C)" and that you "believe these withholdings were not all necessary."

¹ As you note in your appeal, the response letter incorrectly described the hyperlink for ROI 19-0108 as being for another investigation number. The OIG sincerely apologizes for that error and appreciates you bringing it to our attention.

You further indicate that that “[i]t appears that the primary reason why information was withheld . . . was for reasons of embarrassment, which is not permissible under the law.” Moreover, you assert that there is a strong public interest in the release of the report because it “concerns a horrifying series of events relating to gross mismanagement . . . and a massive fraud and waste/abuse of public funds.”²

Your appeal does not identify any specific withholdings to which you object or provide any other basis for its conclusion that FOIA Exemptions 6 and 7(C) do not apply here. Rather, as a remedy, you indicate that you are seeking that “the [entire] document be reviewed de novo” and that the appeals official “release as much as possible.”

Appeal Decision

After reviewing ROI 19-0108 and considering your appeal, I conclude that the majority of the withholdings in that document under FOIA Exemptions 6 and 7(C) were appropriate.

FOIA Exemption 6 protects information in personnel, medical, or similar files, where disclosure would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6). The Supreme Court has interpreted “similar files” broadly, applying Exemption b(6) when the requested information “applies to a particular individual.” *U.S. Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). In so doing, the Court expressly rejected limiting the exemption to “a narrow class of files containing only a discrete kind of personal information.” *Id.*

Individuals involved in agency internal investigations have a particularly strong privacy interest in their identifying information contained in investigative files.³ *See Cotton v. Adams*, 798 F. Supp. 22, 26 (D.D.C. 1992) (finding that there would be privacy interests even if an Office of Inspector General’s investigation focused on “seemingly innocuous internal agency matters”). Courts have consistently held that an acknowledgement in this situation would lead to stigmatization, embarrassment, and reputational harm for the named persons. *See, e.g., Senate of the Com. of Puerto Rico on Behalf of Judiciary Comm. v. U.S. Dep’t of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987). This holds true regardless of whether the individual is the target of an investigation or instead is merely mentioned in law enforcement files as a third party, for example as a witness. *Id.* Moreover, the information protected under FOIA Exemption 6 goes beyond mere names and addresses; it encompasses identifying information about individuals from both the viewpoint of the public and those who would have been familiar with the issues described. *See Dep’t of the Air Force v. Rose*, 425 U.S. 352, 380-81 (1976); *see also Cotton*, 798 F. Supp. at 27.

Here, the large majority of information that was redacted from ROI 19-0108 consists of identifying information about individuals in an investigatory report, compiled in response to a complaint received by the OIG and that also relates to another separate internal agency investigation. I consequently find that there are very strong privacy interests covered by FOIA Exemption 6 in all of the redactions in the responsive record that I am upholding on this administrative appeal.

Where there is a strong privacy interest, as there is here, it must be balanced against the public

² You also claim in your appeal that the ROI addresses “whistle blower retaliation of the worst sort.” However, nothing in the instant ROI involves any sort of allegation of whistleblower retaliation.

³ On appeal, you have not challenged that the records you requested would qualify as “personnel and medical files and similar files” for purposes of Exemption 6 or as records “compiled for law enforcement purposes” for purposes of Exemption 7(C).

interest in disclosure. *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994). The only relevant public interest is “the extent to which disclosure of the information sought would shed light on an agency’s performance of its statutory duties or otherwise let citizens know what their government is up to.” *Id.* at 497. The burden is on the FOIA requester to demonstrate a significant public interest that outweighs the established privacy interests. *Salas v. Office of Inspector Gen.*, 577 F. Supp. 2d 105, 112 (D.D.C. 2008).

Your appeal asserts that there is a strong public interest in knowing about the “gross mismanagement . . . and waste/abuse of public funds” described in ROI 19-0108. I agree that the public has an interest in knowing the basic facts of the waste and mismanagement that the OIG identified. However, the redacted version of the ROI that you challenge already provides the essential facts of what occurred. For example, the redacted ROI names the Department office conducting the internal investigation described (i.e., ITMD), lists the number of employees who were without duties as a result of that investigation, specifies the duration of time the employees were without duties (both individually and collectively) and the amount of taxpayer money at issue, identifies the particular regulatory and policy violations that the OIG found, and includes the fact that the Department eventually did take steps to properly assign duties to these individuals and rate them. Moreover, I am releasing certain additional information from the ROI on this appeal that provides further context as to what occurred.

However, your appeal fails to articulate in any way how release of information that identifies the specific individuals involved will further the public interest. And while there is a public interest in knowing about these Department processes as a general matter, there is a much lesser interest in the acknowledgment of the names or identifying information of the particular parties who are involved in the OIG or ITMD investigation. *See, e.g., McGehee v. Dep't of Justice*, 800 F. Supp. 2d 220, 234 (D.D.C. 2011) (noting that “the relevant question” in public interest analysis “is not whether the public would like to know the names . . . but whether knowing those names would shed light on the [agency's] performance of its statutory duties”).

Given that, I conclude that the privacy interests of individuals at issue here outweigh any public interest in their identities. As the full release of this ROI would squarely threaten those individuals’ privacy interests while adding little to the public’s interest in government misconduct, I conclude that Exemption 6 applies to all the withholdings that I am upholding.

The redactions that I am upholding on appeal are also independently supported under FOIA Exemption 7(C). FOIA Exemption 7(C) protects from disclosure records or information compiled for law enforcement purposes to the extent that such disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). An individual has a well-established privacy interest in whether he is mentioned in an investigative file. *See, e.g., Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990). This holds true even if the individual is not the target of an investigation but instead is merely mentioned in law enforcement files as a third party, for example, as a witness or informant. *See Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995).

As noted above, there is a well-established privacy interest for those individuals identified or described in ROI 19-0108. Moreover, your appeal does not raise a public interest that outweighs these privacy interests. As a result, FOIA Exemption 7(C) also applies to this record.

While I am upholding the majority of the redactions in ROI 19-0108, I recognize that FOIA exemptions must be narrowly construed. *Rose*, 425 U.S. at 361. In reviewing ROI 19-0108, I

did conclude that certain redactions applied under Exemptions 6 and 7(C) were overbroad in scope. Specifically, I identified certain passages where further information of public interest can be released without intruding on the personal privacy interests protected by those exemptions. As a result, the OIG is re-releasing that record after removing portions of redactions that were overbroad. These pages will remain partially redacted under Exemptions 6 and 7(C) to protect the privacy interests of certain named individuals.

Conclusion

Your appeal is denied in part and granted in part. As noted above, I have reviewed ROI 19-0108 and am re-releasing the twelve (12) pages of that record to you with additional information responsive to your FOIA request. Please see the enclosure to this letter. These pages remain partially redacted under FOIA Exemption 6 and FOIA Exemption 7(C) to protect the privacy interests of individuals. Moreover, the OIG will be re-posting ROI 19-0108 to our FOIA Electronic Reading Room (<https://www.oig.doc.gov/Pages/FOIA-Electronic-Reading-Room.aspx>) to include the additional information that has been released on this appeal.

This is the final decision of the OIG. You have the right to seek judicial review of this partial denial, as provided in 5 U.S.C. § 552(a)(4)(B). Further, the 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road – OGIS
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Web: <https://ogis.archives.gov/>
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

However, OGIS indicates that it has currently adjusted its normal operations due to the COVID-19 pandemic to balance the need of completing its work while also adhering to the recommended social distancing for the safety of its staff. As a result, you may experience a delay in receiving a response to your request. To ensure a more timely response to your inquiry, NARA recommends that you contact OGIS via email at ogis@nara.gov. For the most up to date information, see <https://www.archives.gov/ogis>.

Sincerely,

Wade Green
Counsel to the Inspector General

Enclosure



**OFFICE OF INSPECTOR GENERAL
OFFICE OF INVESTIGATIONS**

REPORT OF INVESTIGATION

CASE TITLE: OSY Investigation of [REDACTED] (OSY/ITMD)	FILE NO.: 19-0108
TYPE OF REPORT: <input type="checkbox"/> Interim <input checked="" type="checkbox"/> Final <input type="checkbox"/> Supplemental	

BASIS FOR INVESTIGATION

The U.S. Department of Commerce (DOC) Office of Inspector General (OIG) initiated this investigation in November 2018 based upon information received from a confidential complainant (Complainant).

In November 2018, the Complainant reported that in [REDACTED]—after the Investigation and Threat Management Division (ITMD), Office of Security (OSY) initiated an investigation into the [REDACTED] [REDACTED]—the federal employees assigned to [REDACTED] were sequestered to different conference rooms within the Herbert C. Hoover Building (HCHB) for a period of approximately 10 months without any duties. The Complainant further alleged that the [REDACTED] employees did not receive performance appraisals for a period of at least 28 months, did not perform the [REDACTED] functions of their job series, and were refused access to the DOC information technology (IT) network.

SUMMARY OF INVESTIGATION

OIG's investigation substantiated that DOC paid a total salary of \$1,179,154 to the eight [REDACTED] employees while they reported to work without duties for a collective total of 127 months. OIG's investigation also revealed that the same eight federal employees reported to the HCHB for a period of more than 28 months, respectively, under no official performance plan, and received no official performance appraisal until years later, in violation of Department Administrative Order (DAO) No. 202-430 §§ 5.01, 6.01 (*Performance Management*

Distribution:	OS
[REDACTED] 2020.06.23 12:44:52 -04'00' Signature of Case Agent: [REDACTED]	[REDACTED] Date: 2020.06.23 13:02:49 -04'00' Signature of Approving Official: [REDACTED]

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System), May 15, 2006, available at www.osec.doc.gov/opog/dmp/daos/dao202_430.html (last visited June 16, 2020),¹ and 5 U.S.C. § 2302(b)(12) (Prohibited Personnel Practices).

METHODOLOGY OF INVESTIGATION

Throughout the course of the investigation, OIG interviewed relevant witnesses, reviewed records, and researched applicable legal standards. The witness interviews included both current and former DOC employees, and some witnesses were interviewed more than once. Two witnesses declined requests to be interviewed, one of which provided only a narrative to summarize their recollection of events. OIG obtained records from the Complainant, witnesses, and relevant DOC offices.

DETAILS OF INVESTIGATION

BACKGROUND

DOC established the [REDACTED] in [REDACTED] under Department Organization Order (DOO)² No. [REDACTED]. The order mandated that a Director who would report to the [REDACTED] would head [REDACTED]'s mission was to "[REDACTED]"

In [REDACTED], under DOO No. [REDACTED], the reporting line of authority changed from [REDACTED] to the [REDACTED]. [REDACTED] later, the [REDACTED] signed DOO No. [REDACTED], placing [REDACTED] under the [REDACTED]. In [REDACTED], DOO No. [REDACTED] re-designated [REDACTED] to [REDACTED].

Pursuant to DOO No. [REDACTED], [REDACTED] reported to [REDACTED] and as such, the [REDACTED] rated the Director of [REDACTED]. The Director of [REDACTED] subsequently rated the subordinate [REDACTED] employees.

In [REDACTED], [REDACTED] consisted of 10 federal DOC employees: The Director, [REDACTED]; the Deputy Director, [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; and [REDACTED]. [REDACTED] also had one [REDACTED] detailee, and one [REDACTED] representative. The [REDACTED] was [REDACTED] and the [REDACTED] was [REDACTED].

¹ DOC DAOs are available at www.osec.doc.gov/opog/dmp/daos.html (last visited June 16, 2020).

² Current DOC DOOs are available at www.osec.doc.gov/opog/dmp/doos.html#20 (last visited June 16, 2020).

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In [REDACTED], OIG and ITMD initiated an investigation [REDACTED] based upon a complaint received from [REDACTED]. A confidential source alleged that the [REDACTED]. In accordance with DAO No. 207-10, § 3.05(b) (Dec. 12, 2013) and DAO No. 207-1, § 4.01(a)(6) (June 18, 2014), ITMD would investigate the security violations and the DOC OIG would respond to any allegations of [REDACTED] by DOC officials and/or criminal violations by DOC employees as necessary.

After assessing the allegations reported by the [REDACTED], [REDACTED] ITMD, determined that [REDACTED] alleged to have committed serious security violations and that ITMD [REDACTED]. In [REDACTED] under the authority of [REDACTED] closed [REDACTED] and the [REDACTED] employees were relieved of their duties. Shortly thereafter, the [REDACTED] and [REDACTED] representatives returned to their [REDACTED]. [REDACTED] and [REDACTED]

[REDACTED] reassigned the [REDACTED] functions of [REDACTED] to the ITMD, and delegated [REDACTED] functions to BIS. On [REDACTED], [REDACTED] assigned [REDACTED] as the [REDACTED] [REDACTED] on an interim basis, a position previously held by [REDACTED]

During the [REDACTED] and prior to [REDACTED] on [REDACTED], [REDACTED] became the [REDACTED]. When [REDACTED] at the end of the previous administration, [REDACTED] began performing the non-exclusive duties of the [REDACTED], which [REDACTED] performed until [REDACTED], when [REDACTED] joined the Department as [REDACTED]. [REDACTED] then began serving as [REDACTED].

In [REDACTED], after [REDACTED] began performing the non-exclusive duties of the [REDACTED], [REDACTED] introduced [REDACTED] to [REDACTED] and began to explain [REDACTED] situation. [REDACTED] stated [REDACTED] was unaware and pressed [REDACTED] for more information. [REDACTED] advised that the [REDACTED] was shut down due to an investigation by OSY, which would soon be completed. By [REDACTED], the investigation had not concluded, and the eight [REDACTED] employees were now sitting in a room in the "swing space" of HCHB.

[REDACTED] coordinated with [REDACTED] and [REDACTED] and in [REDACTED], detailed [REDACTED], and [REDACTED]. [REDACTED] and [REDACTED] remained in the swing space of HCHB without any assigned duties.

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At the end of [REDACTED] ITMD reported they required no further assistance from DOC OIG; however, ITMD planned to provide DOC OIG with the results of their investigation. The DOC OIG Special Agent-in-Charge placed its investigation in a "completed" status pending the receipt of relevant results from ITMD.

In [REDACTED] the FOIA backlog diminished, as did the need for all [REDACTED] employees. [REDACTED] and [REDACTED] left [REDACTED] and rejoined the others in the swing space.

One month later, [REDACTED] detailed [REDACTED] to [REDACTED] to assist in the research of [REDACTED] to establish how DOC can better utilize its [REDACTED] resources. From [REDACTED], [REDACTED] detailed [REDACTED] to [REDACTED] to assist with [REDACTED] resource database.

By the end of [REDACTED] [REDACTED] and [REDACTED] were in [REDACTED] working a [REDACTED] detail, [REDACTED] was detailed to research DOC [REDACTED] functions, and [REDACTED] employees ([REDACTED], [REDACTED], [REDACTED], and [REDACTED]) were in the swing space; [REDACTED] of whom ([REDACTED] and [REDACTED]) had no duties since [REDACTED].

After DOC announced the [REDACTED] [REDACTED] inundated the BIS.³ [REDACTED] and [REDACTED] coordinated with [REDACTED] for assistance with the [REDACTED] so [REDACTED] coordinated with [REDACTED] authorized the [REDACTED] employees for the [REDACTED] Exclusion Mission and [REDACTED] detailed [REDACTED], [REDACTED], [REDACTED], and [REDACTED] to process [REDACTED].

The [REDACTED] employees have remained in these details since [REDACTED].

In [REDACTED], [REDACTED] referred three [REDACTED] employees to [REDACTED], U.S. Department of Justice (DOJ), Washington, D.C., for the offense of 18 U.S.C. § 1001 (Statements or entries generally), pursuant to violations committed during the conduct of the investigation. In [REDACTED], DOJ declined prosecution of these employees and [REDACTED] referred ITMD's findings back to DOC Human Resources Management for action deemed appropriate. As of [REDACTED], ITMD's investigation into [REDACTED] is still ongoing. Once completed, [REDACTED] will refer all ITMD's findings of security violations to the DOJ.

³ See generally [REDACTED] (last visited Feb. 19, 2020).

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Allegation: The DOC OIG's investigation determined that DOC paid a salary of \$1,179,154 to eight [REDACTED] employees while they sat without duties for a collective total of 127 months.

Interviews with the [REDACTED] employees revealed that between [REDACTED]—the date when all the [REDACTED] employees were actively detailed—the eight [REDACTED] employees reported to the HCHB without duties for a collective total of 127 months: [REDACTED] and [REDACTED] for 10 months; [REDACTED] and [REDACTED] for 14 months; [REDACTED] for 19 months; [REDACTED] for 18 months; and [REDACTED] and [REDACTED] reported to the HCHB with no duties from [REDACTED]—a total of 21 months.

A pay analysis conducted by OIG determined that DOC paid a salary totaling \$1,179,154.87 to these employees during these months. This amount did not account for employee benefits, retirement contributions, transportation subsidies, or other peripheral overhead costs.

Testimony from [REDACTED] employees indicated that on the day ITMD shutdown the [REDACTED] [REDACTED] and for the next 2 days, a member of OSY monitored the [REDACTED] employees while they sat in a conference room on the fifth floor of HCHB. The next week OSY removed the monitor and the [REDACTED] employees continued to sit and wait for ITMD's investigation.

[REDACTED] employees told OIG that during the months without duties, they sat and watched Netflix videos, read books, put together puzzles, or played on their smartphones; one [REDACTED] employee stated [REDACTED] made "gummy bear art."

[REDACTED] refused requests for interviews; however, did provide a narrative of the events as [REDACTED] remembered them. In [REDACTED] summary, [REDACTED] recalled that "[REDACTED] limited involvement with regard to the [REDACTED] closure as it related to the [REDACTED] employees was merely to answer questions from the affected [REDACTED] employees about the conditions of the conference room in which they sat—for example, what newspapers they could access, when they could use their phones, what snacks they could eat and their schedules." [REDACTED] also stated that [REDACTED] did not have "the information to provide guidance to these [REDACTED] employees about the nature or timing of the underlying investigation" nor was [REDACTED] "privity to most of the specifics of the investigation or [REDACTED] decision-making process related to them."

OIG later learned that although [REDACTED] was the [REDACTED] sat in, as an [REDACTED] representative for DOC, on interviews ITMD conducted, as part of their investigation into the [REDACTED] employees, with the following individuals: [REDACTED]; [REDACTED]; [REDACTED]; and [REDACTED] their support staff.

Interviews with [REDACTED] determined that [REDACTED] advised [REDACTED] of the Security Personnel Division that due to the investigation, the [REDACTED] employees needed to maintain their security clearances, however, they did not have a "need to know" for classified information. [REDACTED] stated [REDACTED] made

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recommendations to [REDACTED] that OCIO give [REDACTED] employees new DOC email accounts, as ITMD seized their older ones as part of ITMD's investigation. [REDACTED] recalled one conversation where [REDACTED] told [REDACTED] to coordinate with [REDACTED] as to what work the [REDACTED] employees were to perform.

Email reviews and interviews disclosed there were serious concerns over what information the [REDACTED] employees could access due to the sensitive nature of ITMD's investigation. [REDACTED] indicated [REDACTED] felt conflicted about trying to find meaningful work for the [REDACTED] employees to do. [REDACTED] understood that the [REDACTED] employees could not be without duties, however, because of the allegations levied against the [REDACTED] employees, there were serious security risks to consider. When asked about those risks, [REDACTED] told the OIG, "As a matter of fact, I'm sure we were the most risk-averse voices in the conversation. Risk from a security standpoint. The other risk we talked about was the employee relations risk. . . . And I will just tell you that the security risk was going to outweigh, in my mind, the employee relations risk." In one email chain from [REDACTED], [REDACTED] coordinated with [REDACTED] and [REDACTED] for assistance in assigning the [REDACTED] employees to a detail for [REDACTED]. [REDACTED] concluded the [REDACTED] employees were able to work on the detail as long as their workspace met certain security elements. The detail never materialized and when asked, [REDACTED] could not recall the reason why.

Allegation: DOC OIG substantiated that eight federal employees reported to the HCHB for more than 28 months under no official performance plan, and received no official performance appraisal until years later, which violates DAO No. 202-430, § 5.01 (Performance Management System) and 5 U.S.C. § 2302(b)(12) (Prohibited Personnel Practices).

The OIG found sufficient evidence to substantiate that the [REDACTED] employees were under no official performance plan and did not receive a performance appraisal for at least 28 months. [REDACTED] and [REDACTED] went 28 months without a performance appraisal; [REDACTED], [REDACTED], [REDACTED], and [REDACTED] went 29 months without a performance appraisal; and [REDACTED] went 31 months without a performance appraisal.

The eight [REDACTED] employees received their CD-430 (*Performance Management Record*) and, in [REDACTED], signed their performance plan for fiscal year (FY) [REDACTED] appraisal period (i.e., October 1, [REDACTED] through September 30, [REDACTED]). All of the [REDACTED] employees received a "mid-year review" in April [REDACTED].

The [REDACTED] employees did not receive their FY [REDACTED] performance summary ratings until [REDACTED]. FYs [REDACTED] and [REDACTED] performance appraisals were combined into one performance record, which the employees signed between [REDACTED] and [REDACTED] of [REDACTED].

In [REDACTED], [REDACTED] prepared the FY [REDACTED] performance summary rating for [REDACTED], wherein he placed the following note: "[REDACTED]"

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[REDACTED]

[REDACTED]”

[REDACTED] prepared the FY [REDACTED] performance summary ratings for [REDACTED] subordinate employees. The summary rating narrative portion of their CD-430s was blank. [REDACTED], [REDACTED], [REDACTED], and [REDACTED] signed the CD-430s for FY [REDACTED] in [REDACTED] while [REDACTED] signed in [REDACTED] [REDACTED] refused to sign.

In [REDACTED] [REDACTED] prepared a memorandum and CD-430(d) hybrid performance summary rating for [REDACTED] detailing [REDACTED] performance and achievements from [REDACTED], through [REDACTED]. [REDACTED] signed [REDACTED] rating on [REDACTED].

To cover FYs [REDACTED], [REDACTED] prepared similar performance summary rating memorandums for [REDACTED], [REDACTED], [REDACTED], and [REDACTED], describing the [REDACTED] closure and summarizing each employee's performance or accomplishments within their assigned details. The memorandum also included this paragraph to explain the delay in filing the evaluation: “Because of its closure, [REDACTED], Office of Human Resources Management, directed, with Office of the General Counsel concurrence, that performance plans would not be opened on [REDACTED] employees for fiscal years [REDACTED]. Consequently, this combined FYs [REDACTED] performance appraisal uses an adjective rating methodology, with the ratings based on [the employee's] performance of the unclassified duties performed during this period under the [REDACTED] supervision.” [REDACTED] further prepared a summary rating portion of a CD-430. [REDACTED], [REDACTED], and [REDACTED], signed their FYs [REDACTED] performance rating in [REDACTED].

[REDACTED] prepared a similar hybrid FY [REDACTED] performance summary rating for [REDACTED] and [REDACTED], which they both signed in [REDACTED].

The [REDACTED] employees told OIG that on [REDACTED]—the day of the [REDACTED] shutdown—[REDACTED] along with other members of ITMD, ordered everyone to exit the [REDACTED] and escorted them to an adjacent conference room. Within an hour of the shutdown, [REDACTED] reported ITMD's actions to [REDACTED] and [REDACTED], both of whom responded that they were aware of the shutdown.

Although [REDACTED] rated the [REDACTED] of [REDACTED] provided testimony that [REDACTED] had “no role in the decision-making process” and that [REDACTED] made the decision to close the [REDACTED] [REDACTED] and, therefore, relieved the employees of their duties.

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The [REDACTED] employees recalled that approximately 3 weeks after the [REDACTED] shutdown, [REDACTED] met with them to, as they described, show leadership support, but they never saw [REDACTED] again. [REDACTED]

When asked if [REDACTED] discussed performance appraisals for the [REDACTED] employees, [REDACTED] told OIG that [REDACTED] did not “recall being involved in any of those conversations” related to completing performance appraisals for the [REDACTED] employees. [REDACTED] reasoned that since “we, collectively” removed the [REDACTED] employee’s ability to complete their performance plan, conducting a performance review would be “pretty hard to do.”

[REDACTED] confirmed that in [REDACTED], [REDACTED] reached out to [REDACTED] and [REDACTED], for guidance on completing the performance appraisals for FYs [REDACTED], as well as the FY [REDACTED] performance plans for the [REDACTED] employees.

[REDACTED] told OIG that [REDACTED] office became involved with the [REDACTED] employees in [REDACTED]. [REDACTED] requested HR guidance in retrieving [REDACTED] employees’ personal belongings from the [REDACTED]. Afterwards, [REDACTED] entered into discussions with [REDACTED]. [REDACTED] also stated that prior to [REDACTED], neither [REDACTED] nor [REDACTED] consulted the Office of Human Resources pertaining to the [REDACTED] employees.

According to DAO No. 202-430 ((May 15, 2006) *Performance Management System*), § 5.01, “Performance management is an inherent responsibility for those in leadership positions.” Sections 5.01(a)-(e) define individuals in the performance management process and their responsibilities. “Heads of Operating Units” are to ensure “fair and consistent application of this regulation in compliance with governing laws, rules, and regulations.” Approving officials are to ensure “that performance plans are linked to organizational goals; approve performance plans created by the rating officials; and approve final performance ratings and awards.” *Id.* Rating officials “ensure that employees are informed of the Department’s mission and the organization’s goals and objectives; develop performance plans for individual employees; conduct progress reviews; conduct final appraisals and prepare the final ratings; provide copies of the rating of record at the end of the appraisal cycle to employees; and recommend recognition as appropriate.” *Id.* It is the responsibility of the rated employee to “[p]articipate in development of performance plans; document work accomplishments for both the progress review(s) and the final appraisal; and participate in the progress review(s) and the final appraisal process.” *Id.* The Human Resources Office is to “[c]ommunicate to supervisors, employees, and appropriate exclusive bargaining unit representatives the purpose and procedures of the performance management system and its relationship to the overall management of human capital.” *Id.*

Failing to provide a performance evaluation violates 5 U.S.C. § 2302(b)(12) (Prohibited Personnel Actions). 5 U.S.C. 2302(b)(12) stipulates that it is a prohibited personnel action to “take or fail to take any other personnel action if the taking of or failure to take such action

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violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.” A performance evaluation under Chapter 43 of Title 5 of the U.S. Code is a “personnel action.” *Id.* § 2302 (a)(2)(A)(viii). Here, failing to provide performance evaluations over a period of fiscal years violates DAO 202-430 concerning the merit system principles of 5 U.S.C. § 2301, including but not limited to that “[t]he Federal work force should be used efficiently and effectively” and “[e]mployees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.”

CONCLUSION

The DOC OIG’s investigation determined that DOC paid a salary of \$1,179,154 to eight [REDACTED] employees while they sat without duties for a collective total of 127 months, and further, substantiated the allegation that those same [REDACTED] employees reported to the HCHB for more than 28 months under no official performance plan, and received no official performance appraisal until years later, which violated DAO No. 202-430, § 5.01 (Performance Management System) and 5 U.S.C. § 2302(b)(12) (Prohibited Personnel Practices).

[REDACTED] neglected [REDACTED] responsibility to fulfill the inherent duties of [REDACTED] position as the [REDACTED], and [REDACTED]. After [REDACTED] was shuttered, [REDACTED] made no effort to secure details for the [REDACTED] employees or complete their performance plans. [REDACTED] representation of the DOC during ITMD’s questioning of SES employees contradicted [REDACTED] narrative that [REDACTED] was not “privy to most of the specifics of the investigation”. This also created a perception of a lack of impartiality, as [REDACTED] were the subject of ITMD’s investigation.

After authorizing the closure of [REDACTED] and reassigning its duties to other employees, [REDACTED] made minimal effort to secure detail work for the [REDACTED] employees, nor did [REDACTED] ensure the employees received performance appraisals. In [REDACTED] own words, [REDACTED] stated in reference to finding the [REDACTED] employees meaningful work, “We were talking about it. I don’t know if we were trying hard to find them meaningful work, but we were -- talking about -- we can’t just leave these people sitting doing nothing all day long.” [REDACTED] also related that completing performance plans on the [REDACTED] employees would be “pretty hard to do”, yet the [REDACTED] stated no one contacted [REDACTED] division about the [REDACTED] employees until [REDACTED] – approximately 18 months after the closure of [REDACTED].

In direct contrast, [REDACTED] made efforts to secure meaningful work and complete performance plans for the [REDACTED] employees. After learning of the [REDACTED] employee’s situation, [REDACTED] worked to secure work details for all the employees, arranged for the employees’

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access to the DOC IT network, consulted with HR to complete performance reviews, and met with the employees regularly to address personal and professional concerns.

As of [REDACTED], [REDACTED] remained closed and the ITMD investigation was still open. [REDACTED], [REDACTED], and [REDACTED] were still processing [REDACTED]. [REDACTED] and [REDACTED] remained in [REDACTED] working the FOIA detail, and [REDACTED] continued to research DOC [REDACTED] functions. [REDACTED] stated that DOC's HR office conducted suitability reviews on four [REDACTED] employees and [REDACTED] has drafted a proposal to restructure the "oversight and reporting structures of OSY, OCIO, and [REDACTED] research concluded that "[T]he transformation of the relationships between OSY, OCIO, and [REDACTED] must be planned, organized, and overseen by personnel possessing the innate knowledge of the interrelated offices and missions, as well as the foresight to understand how the offices can work together to achieve joint, interconnected, and successful mission outcomes."

OIG is referring this matter to the DOC Office of the Secretary.

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4	IRF—Basis for Investigation (Nov. 28, 2018)
5	IRF—Interview Confidential Complainant 1 ()
6	IRF— Security Clearance Renewal ()
7	IRF—Analysis of Employee Pay through (Dec. 18, 2018)
8	IRF—Initial Case Activities (Dec. 18, 2018)
11	IRF—Document Review, Working Capital, and Mission Brief (Feb. 22, 2019)
12	IRF—Document Review, Email ()
13	IRF—Document Review, ITMD Issues ()
14	IRF—Document Review, Documents (Feb. 25, 2019)
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CMS DOCUMENT No.	DESCRIPTION
31	IRF— [REDACTED] Interview ([REDACTED])
32	IRF—Processing of Emails (June 20, 2019)
33	IRF— [REDACTED] Emails ([REDACTED])
34	IRF— [REDACTED] 2nd Interview ([REDACTED])
35	IRF— [REDACTED] Interview ([REDACTED])
36	IRF— [REDACTED] Interview ([REDACTED])
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