Description of document:	Department of State Inspector General (OIG) Investigation of Problems at United States Agency for Global Media (USAGM) under Former CEO Michael Pack 2021-2023
Requested date:	14-July-2021
Release date:	02-May-2025
Posted date:	26-May-2025
Source of document:	FOIA Officer Office of General Counsel Office of Inspector General U.S. Department of State 1700 North Moore Street Suite 1400 Arlington, VA 22209 Email: FOIA@stateoig.gov FOIA.gov

Office of Inspector General
United States Department of State

May 2, 2025

SENT VIA EMAIL

Subject: Final Response - Department of State Office of Inspector General Freedom of Information Act Request No. 2021-F-038

This responds to your Freedom of Information Act (FOIA) request to the Department of State (DOS) Office of Inspector General (OIG), dated July 14, 2021, seeking:

> A copy of each report of investigation of problems at USAGM under former CEO Michael Pack, and also the six letters sent to employees [referenced in an NPR article].

Your request was acknowledged by this office on July 22, 2021. Your request was given the FOIA Case number: 2021-F-038.

In response to your request, we conducted a search within DOS-OIG's Office of Investigations and Office of Evaluations & Special Projects. Based on that review, DOS-OIG is providing the following:

__4__ pages are released in full;
__90__ pages are released in part;

OIG redacted from the enclosed documents, names and identifying information of third parties to protect the identities of these individuals. Absent a Privacy Act waiver, the release of such information concerning the third parties named in these records would result in an unwarranted invasion of personal privacy in violation of the Privacy Act. Information is also protected from disclosure pursuant to Exemptions 5, 6, and 7 of the FOIA further discussed below.

Exemption 5, 5 U.S.C. § 552(b)(5)

Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). DOS-OIG is invoking the attorney-client privilege of Exemption 5 to protect information that falls within that privilege's domain.

Exemption 6, 5 U.S.C. § 552(b)(6)

Exemption 6 allows withholding of "personnel and medical files and *similar files* the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (emphasis added). DOS-OIG is invoking Exemption 6 to protect the names of lower-level investigative staff, complainants and/or subjects, third parties, and any information that could reasonably be expected to identify such individuals.

Exemption 7(C), 5 U.S.C. § 552(b)(7)(C)

Exemption 7(C) protects from public disclosure "records or information compiled for law enforcement purposes . . . [if disclosure] could reasonably be expected to cause an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). DOS-OIG is invoking Exemption 7(C) to protect the names of third parties, complainants, and/or subjects and any information contained in these investigative records that could reasonably be expected to identify those individuals.

Appeal

You have the right to appeal this response.[1] Your appeal must be received within 90 calendar days of the date of this letter. Please address any appeal to:

Office of the General Counsel
Office of Inspector General
U.S. Department of State
1700 N. Moore Street
Suite 1400
Arlington, VA 22209
Email: FOIAAppeals@stateoig.gov

[1] For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. 5 U.S.C. 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

Both the envelope and letter of appeal should be clearly marked, "Freedom of Information Act/Privacy Act Appeal." Your appeal letter should also clearly identify DOS-OIG's response. Additional information on submitting an appeal is set forth in the DOS regulations at 22 C.F.R. § 171.15.

Assistance and Dispute Resolution Services

For further assistance and to discuss any aspect of your request you may contact DOS-OIG's FOIA Public Liaison at:

FOIA Officer
Office of General Counsel
Office of Inspector General
U.S. Department of State
1700 North Moore Street
Suite 1400
Arlington, VA 22209
foia@stateoig.gov

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

Sincerely,

Gina Goldblatt

Gina Goldblatt
Government Information Specialist

~~SENSITIVE BUT UNCLASSIFIED~~ June 14, 2021

MEMORANDUM

(b)(6); (b)(7)(C)

FROM: OIG – Jeffrey McDermott, Assistant Inspector General

TO: USAGM – Kelu Chao, Acting Chief Executive Officer

SUBJECT: Report of Investigation Pursuant to Presidential Policy Directive 19
OIG Whistleblower Case 2020-0103 [(b)(6); (b)(7)(C)]

Presidential Policy Directive 19 (PPD-19) prohibits the taking of any action affecting an employee's eligibility for access to classified information as a reprisal for a protected disclosure.[1] PPD-19 requires that every agency have a review process that permits employees to appeal actions affecting eligibility for access to classified information they allege to be in violation of the directive. As part of the review process, the agency Inspector General shall conduct a review to determine whether an action affecting eligibility for access to classified information violated the directive, whether the agency should reconsider the action, and whether corrective action is warranted.

As described below, the Department of State Office of Inspector General (OIG) received a complaint from [(b)(6); (b)(7)(C)] the Deputy Director for Operations (DDO) for the United States Agency for Global Media (USAGM). [(b)(6); (b)(7)(C)] alleged that USAGM suspended his security clearance after he made protected whistleblower disclosures. OIG's investigation found that [(b)(6); (b)(7)(C)] eligibility for access to classified information was suspended after he made protected disclosures, and that the agency did not demonstrate by a preponderance of the evidence that it would have suspended [(b)(6); (b)(7)(C)] security clearance absent his disclosures.

Allegation

On September 29, 2020, counsel for [(b)(6); (b)(7)(C)] along with five other senior management officials from USAGM, filed a complaint with OIG in accordance with PPD-19, alleging that USAGM suspended their security clearances after they raised concerns to their supervisors and USAGM senior leadership. Additionally, [(b)(6); (b)(7)(C)] made disclosures to OIG regarding USAGM

[1] PPD-19 defines a protected disclosure as "a disclosure of information by the employee to a supervisor in the employee's direct chain of command up to and including the head of the employing agency, to the Inspector General of the employing agency or Intelligence Community Element, to the Director of National Intelligence, to the Inspector General of the Intelligence Community, or to an employee designated by any of the above officials for the purpose of receiving such disclosures, that the employee reasonably believes evidences (i) a violation of any law, rule, or regulation; or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."

Chief Executive Officer (CEO) Michael Pack's alleged gross mismanagement of the agency, violations of law, rule, or regulation, and substantial and specific danger to public health or safety.[(b)(6); (b)(7)(C)] disclosures related to USAGM's inaction on J-1 visas, USAGM's freeze on human resources (HR), information technology (IT), and contracting actions, and agency senior leadership's response to COVID-19. OIG reviewed the complaint and determined that it contained sufficient details to allege a violation of the prohibition against retaliation for making a protected disclosure. Consequently, OIG initiated an investigation of the allegations.

Background

In September 2017,[(b)(6); (b)(7)(C)] transferred to USAGM from the Department of State as Chief of Staff to then-CEO John Lansing. He was classified at the GS-15 pay scale level as Chief of Staff through February 2019. In February 2019,[(b)(6); (b)(7)(C)] became the DDO, a Career Reserved Senior Executive Service position that reported directly to USAGM's CEO. In the DDO role,[(b)(6); (b)(6); (b)(7)(C)] had five employees who directly reported to him, and oversaw approximately 250 government employees and hundreds of contractors and locally employed staff at USAGM facilities outside of the United States. He also oversaw most of USAGM's operations, including information technology, broadcast transmissions and operations, facilities, business development/marketing, human resources, contracting, training, security, and risk management.[(b)(6); (b)(7)(C)] also chaired USAGM's Emergency Action Committee, which coordinated the agency's COVID-19 response.

The position of DDO requires a security clearance.[(b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)

[(b)(6); (b)(7)(C)] security file showed five background investigations completed by either the Office of Personnel Management (OPM) or the Department of State from 2007 to 2015.

On June 4, 2020, Mr. Pack was confirmed by the U.S. Senate as the USAGM CEO.[(b)(6); (b)(7)(C)] told OIG that, after Mr. Pack became CEO, he instructed the agency to freeze HR, IT, and contracting actions, effective June 9, 2020. Given[(b)(6); (b)(7)(C)] position overseeing USAGM operations, USAGM's senior staff collectively decided that he would be responsible for implementing Mr. Pack's instruction.[(b)(6); (b)(7)(C)] put together a detailed list of applicable USAGM actions he placed on hold per the instruction and provided it to Mr. Pack's transition team.[2]

[2] On June 17, 2020, Mr. Pack announced changes to the agency reporting structure that resulted in[(b)(6); (b)(7)(C)] reporting to the Chief Operating Officer, a new position created by Mr. Pack to which he appointed[(b)(6); (b)(7)(C)] In addition, all but one of [(b)(6); (b)(7)(C)] direct reports were moved to different reporting chains.

According to [redacted] included on the list of frozen actions were pending Front Office approvals for approximately 30 Voice of America (VOA) employees who needed J-1 visas because they were new, and for approximately 20 employees whose J-1 visas were set to expire. Several weeks passed after Mr. Pack's arrival, but the agency still had not approved any visas. [redacted] was concerned that some journalists who needed their visas faced clear physical danger if they were forced to return to or stay in their countries of residence. For example, one case [redacted] flagged for his supervisor, Chief Operating Officer (COO) [redacted] to raise with senior leadership involved a journalist for VOA in China who was persecuted by the Chinese government and recently had his life threatened. The journalist was unable to fly to the United States until USAGM approved his J-1 visa. [redacted] said he brought his concerns about the visas needing to be approved for the staff's safety to the attention of his supervisor, both orally and in writing, several times from mid-June to early July 2020. The COO confirmed that [redacted] expressed concerns to him and that he, in turn, raised the issue with Chief of Staff [redacted].[3] However, [redacted] received no response to those requests.

In addition to the disclosures [redacted] made to USAGM leadership, [redacted] had a phone conversation with an OIG employee in mid-June, during which he also disclosed concerns about USAGM's inaction on J-1 visas, the freeze on HR, IT, and contracting actions, and agency leadership's response to COVID-19. [redacted] expressed concerns that the freezes were interfering with the agency's ability to move forward with important initiatives. [redacted] said that the continued freeze significantly impacted the agency because broadcasting and transmission relies heavily on contracting. In at least one case, the result was that a radio transmission needed to broadcast the agency's work was dropped because a renewal contract was not approved. In another instance, USAGM's IT office could not deploy an update, which caused technical issues to the website and impacted VOA's audience. [redacted] considered these to be examples of gross mismanagement.

Additionally, [redacted] told OIG that the agency's COVID-19 response was an example of how the new leadership team excluded him from communications on sensitive policy issues and communications related to COVID-19 preparation and response logistics, which were directly related to [redacted] duties leading these agency initiatives. After Mr. Pack's arrival, [redacted] frequently asked for permission, through his supervisor, [redacted] to send information to the staff regarding the requirement to wear masks in the office, and to negotiate with the union regarding COVID-19 protections, but he did not receive a response. According to [redacted] denied [redacted] request because she believed it was an overreaction to COVID-19 and an attempt by staff to avoid coming to the office. [redacted] then

[3] OIG did not interview [redacted] had departed federal service when OIG sent out interview requests, and OIG does not have the ability to compel individuals who have left federal service.

communicated to [(b)(6); (b)(7)(C)] that he considered the senior leadership's failure to adopt a mask policy and to take other COVID-19 precautions to be a substantial and specific danger to the health and safety of agency employees.

On August 12, 2020, [(b)(6); (b)(7)(C)] received a letter, signed by Mr. Pack, suspending his security clearance and placing him on paid administrative leave. The letter stated: "You are hereby notified, pursuant to Executive Order 12968 and other applicable law, policies, and procedures, that I certify it is in the interest of U.S. national security to suspend your security clearance, pending the outcome of an investigation effective immediately."

USAGM Security Clearance Suspension Procedures

USAGM's policy and procedures for suspending security clearances are contained within its directive titled, *Personnel Security Management v.4*, which is largely based on Executive Order 12968.[4] The directive states that the Director of Security "acts as the ultimate authority (or designates an alternate) for the reduction, denial, suspension, or revocation of an individual's eligibility for access to classified national security information and/or an individual's eligibility to be employed in a government position based on a suitability or fitness determination."[5] Within the Office of Security, the Chief of the Personnel Security Division is given the responsibility to suspend security clearances.[6] The directive notes, however, that the CEO "may also exercise authority granted in 5 U.S.C. § 7532 to suspend without pay, and then remove, a USAGM employee when this action is deemed necessary in the interests of national security."

The directive states, "Suspension of a clearance, also known as administrative withholding, is appropriate when a significant question of security eligibility arises. Suspension is warranted, for example, when the security organization receives information indicating possible gross misconduct, criminal conduct, substance abuse, or a serious breach of integrity."[7] Security eligibility is defined as "a determination of eligibility for access to classified information" that "is a discretionary security decision based on judgments by appropriately trained adjudicative personnel."[8] Executive Order 12968 states that "determinations of eligibility for access to classified information shall be based on criteria established under this order."[9] Those criteria

[4] Executive Order 12968, Access to Classified Information, Aug. 4, 1995.

[5] USAGM, *Personnel Security Management v.4*, preface § 6(c)(7).

[6] USAGM, *Personnel Security Management v.4*, preface § 6(d)(7).

[7] USAGM, *Personnel Security Management v.4*, ch. 11, § 10(b)(1).

[8] USAGM, *Personnel Security Management v.4*, appendix 1 (noting that "eligibility shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security.")

[9] Executive Order 12968, Access to Classified Information, Aug. 4, 1995, § 2.1(a).

are the adjudicative guidelines issued by the Office of the Director of National Intelligence (ODNI), which are:

- Allegiance to the United States
- Foreign influence
- Foreign preference
- Sexual behavior
- Personal conduct
- Financial considerations
- Alcohol consumption
- Drug involvement
- Emotional, mental, and personality disorders
- Criminal conduct
- Security violations
- Outside activities
- Misuse of information technology systems.[10]

USAGM's directive further specifies that "upon receipt of information that raises questions concerning the personnel security fitness of an individual, [the Office of Security] shall immediately assess the security factors involved and shall take suitable action to ensure national security interests are protected."[11] In making such a determination, the Office of Security must "consider such factors as the conclusiveness and seriousness of the information developed, the employee's access to classified information, and the opportunity the position affords the employee to commit acts contrary to national security interests." If USAGM decides to suspend a security clearance temporarily pending an investigation and the suspension exceeds 10 days, the employee is entitled to notice in writing with a justification for the suspension.[12] USAGM's policy notes that "retaliation that affects eligibility for access to classified national security information is prohibited" and that USAGM officials shall not take or fail to take, or threaten to take or fail to take, any action affecting an employee's eligibility for access to classified national security information as a reprisal for a protected disclosure.[13]

Despite these policies, OIG found that no one who was trained in the adjudicative guidelines participated in the decision, preparation, or finalization of (b)(6); (b)(7)(C) suspension letter.

[10] SEAD 4: National Security Adjudicative Guidelines, Dec. 10, 2016.

[11] USAGM, *Personnel Security Management v.4*, ch. 12, § 1(b).

[12] USAGM, *Personnel Security Management v.4*, ch. 12, § 2(a).

[13] USAGM, *Personnel Security Management v.4*, ch. 12, § 2(e)(1), (2).

USAGM's directive states that decisions regarding security clearances must be made by "appropriately trained adjudicative personnel" using the adjudicative guidelines.[14] However, in (b)(6); (b)(7)(C) case, no one who was trained in those guidelines, such as the Chief of the Personnel Security Division who ordinarily has the responsibility to suspend security clearances, was even consulted about the suspension.[15] Even if USAGM officials had questions about the ability of its Office of Security, they could have consulted with OPM and ODNI about the suspension, but they did not do so.

Legal Standard

As noted above, PPD-19 prohibits the taking of any action with respect to any employee's security clearance or access determination in retaliation for having made a protected whistleblower disclosure. In 2020, the Inspector General for the Intelligence Community issued procedures for how it would review allegations of retaliation under PPD-19.[16] These procedures specify that a complainant must demonstrate that: (a) he or she made a protected disclosure; (b) the agency took or failed to take, or threatened to take or fail to take, any action with respect to the complainant's security clearance or access determination; and (c) the protected disclosure was a contributing factor in the agency's decision to take or fail to take, or threaten to take or fail to take, the security clearance action.[17]

Although PPD-19 and these procedures do not specify how to determine whether a protected disclosure was a "contributing factor" in the adverse security clearance determination, similar language is used in the Whistleblower Protection Act, codified at 5 U.S.C. § 1221, which prohibits agencies from taking adverse personnel actions in retaliation for protected disclosures. Under the Whistleblower Protection Act, a complainant can establish that his or her protected disclosure was a contributing factor in the alleged retaliatory personnel action through either direct evidence or through circumstantial evidence that the official taking the adverse action knew of the disclosure and the action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the adverse action.[18]

If a complainant can demonstrate that he or she made a protected disclosure that was a contributing factor in the adverse determination, the burden shifts to the agency, which must

[14] USAGM, *Personnel Security Management v.4*, appendix 1.

[15] USAGM, *Personnel Security Management v.4*, preface § 6(d)(7).

[16] Inspector General of the Intelligence Community Instruction 2020.001, *External Review Panel Procedures Pursuant to 50 U.S.C. § 3236 and Presidential Policy Directive/PPD-19* (Dec. 17, 2020).

[17] Instruction 2020.001 § 9(C)(2).

[18] 5 U.S.C. § 1221(e)(1)(A),(B).

"prove by a preponderance of the evidence that it would have taken the same action in the absence of such disclosure, giving the utmost deference to the agency's assessment of the particular threat to the national security interests of the United States in the instant matter."[19] Federal courts have looked to three factors (commonly called the *Carr* factors) when determining whether an agency has met its burden: the strength of the agency's evidence in support of its decision; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.[20] The courts weigh these three factors together to determine whether, as a whole, the agency has met its burden, and a strong showing on one factor may be sufficient.[21]

Complainant's Burden

(b)(6); (b)(7)(C) said he made protected disclosures to USAGM senior leadership and OIG regarding Mr. Pack's gross mismanagement of the agency and substantial and specific dangers to public health or safety. Under PPD-19, a protected disclosure is defined as a disclosure of information by the employee to, among other persons, a supervisor in the employee's chain of command, including the head of the agency, or to the Inspector General of the employing agency, that the employee reasonably believes is a violation of law, rule, or regulation or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.[22] Based on OIG's review of documents and interviews, there is clear evidence that (b)(6); (b)(7)(C) made multiple disclosures that fit the definition of "protected disclosure" both to OIG and to his supervisors.

(b)(6); (b)(7)(C) concerns regarding the impact of the freeze constitute a protected disclosure because they were made to OIG and involved what he reasonably considered to be gross mismanagement. The courts and the Merit Systems Protection Board (MSPB) have defined gross mismanagement as a "management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission."[23] (b)(6); (b)(7)(C) expressed his belief to OIG that the freeze had a significant adverse impact on the agency, which relies heavily on contracting for its broadcasting and transmission. As DDO, (b)(6); (b)(7)(C) was responsible for overseeing these functions and thus was in a position to recognize the significant effect that the freeze was having on the agency's mission.

[19] Instruction 2020.001 § 9(C)(2)(d).

[20] *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (citing *Geyer v. Dep't of Justice*, 7 M.S.P.R. 682, 688, aff'd, 116 F.3d 1497 (Fed. Cir. 1997)).

[21] *Lucchetti v. Dep't of Interior*, 2017 MSPB LEXIS 743, *11 (M.S.P.B. Feb 15, 2017) (*citing Phillips v. Dep't of Transportation*, 113 M.S.P.R. 73, 77 (2010)).

[22] PPD-19 § F(5).

[23] *White v. Dep't of the Air Force*, 391 F.3d 1377, 1382 (Fed. Cir., Dec. 15, 2004).

(b)(6); (b)(7)(C) disclosures regarding J-1 visa delays and COVID-19 protections constitute protected disclosures because they were made to both OIG and to his supervisor (b)(6); (b)(7)(C) and others in his chain of command, such as (b)(6); (b)(7)(C) and her deputy, (b)(6); (b)(7)(C) and the disclosures concerned information that (b)(6); (b)(7)(C) reasonably believed to be a substantial and specific danger to public health or safety.[24] Specifically, (b)(6); cited the case of a specific journalist whose work for VOA made him a target of the Chinese government. With regard to the COVID-19 issues, (b)(6); chaired the Emergency Action Committee, which coordinated the agency's COVID-19 response, and thus understood that wearing masks and social distancing in accordance with the then-current CDC guidance were key to protecting the health of USAGM employees.

While OIG found no direct evidence that (b)(6); (b)(7)(C) disclosure was a contributing factor in the suspension of his security clearance, there is circumstantial evidence that the individuals involved in the suspension of his clearance knew of his disclosures and that they moved to suspend his clearance shortly after he made protected disclosures. (b)(6); (b)(7)(C) told OIG that USAGM leadership knew about his disclosures to OIG because he told (b)(6); (b)(7)(C) (b)(6); that he regularly spoke to OIG as part of his regular duties. Additionally, OIG's review of emails indicated that (b)(6); (b)(7)(C) supervisor forwarded (b)(6); an email about J-1 visas to (b)(6); (b)(7)(C) on July 9, 2020.

While Mr. Pack was the official who signed the letter suspending (b)(6); (b)(7)(C) security clearance, USAGM identified (b)(6); (b)(7)(C) as having participated in the decision. In addition, Mr. Pack told OIG that his staff (particularly (b)(6); (b)(7)(C) and the Acting Vice President for Legal, Compliance, and Risk Management, (b)(6); (b)(7)(C) proposed the suspension of the six complainants' security clearances and that he concurred with their proposal but left the details of the suspensions up to them. (b)(6); (b)(7)(C) were recipients of (b)(6); (b)(7)(C) protected disclosures and participated in the decision to suspend his clearance on August 12, 2020. Accordingly, OIG concludes that there is circumstantial evidence that (b)(6); (b)(7)(C) protected disclosures were a contributing factor in the suspension of his clearance because USAGM officials involved in the suspension were aware of his disclosures and took the action within days of the disclosures, a period of time such that a reasonable person would conclude that the disclosure was a contributing factor in the adverse action.

[24] PPD-19, § F(5)(a). (b)(6); also expressed his belief to OIG that the J-1 visa freeze was a violation of the firewall regulation, 22 C.F.R. part 531, because he believed the decision not to renew journalists' visas improperly interfered with the editorial independence created by the regulation. See 5 C.F.R. § 531.2.

Agency's Burden

Because [(b)(6); (b)(7)(C)] met his burden, USAGM must demonstrate by a preponderance of the evidence that it would have suspended [(b)(6); (b)(7)(C)] clearance even absent his protected disclosures.

As noted above, the courts have traditionally reviewed three factors in determining whether an adverse action resulted from a protected disclosure.[25] The first factor that the courts use to weigh whether an agency has met its burden is the strength of the evidence in support of the adverse action. In examining this factor, OIG examines the evidence supporting the adverse action and whether there were "legitimate reasons" for the personnel action.[26]

The suspension letter cited several reasons for the suspension of [(b)(6); (b)(7)(C)] clearance:

1) USAGM performed the background investigation that granted his security clearance when the agency lacked the proper authority to investigate and perform background checks.
2) As a USAGM senior leader, he failed to take necessary corrective action to remedy personnel and other security concerns.
3) He "knowingly and willfully granted eligibility for, or allowed access to, classified information in violation of the law and its implementing regulations."
4) As the leader with oversight of the Office of Risk Management (ORM), the Security Office, and the Office of Management Services, he relayed the issues raised in OPM reports to USAGM but failed to enact meaningful change to rectify the severe security issues plaguing the agency.
5) The ORM identified him, in his capacity as DDO, as a risk to USAGM.

OIG addresses each of these justifications individually below.

[(b)(6); (b)(7)(C)] Background Investigation

The suspension letter alleged that [(b)(6); (b)(7)(C)] background investigation "was done by USAGM when USAGM lacked the proper authority to investigate and perform background checks." This statement presumably refers to the fact that USAGM performs background checks and grants

[25] *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (citing *Geyer v. Dep't of Justice*, 7 M.S.P.R. 682, 688, aff'd, 116 F.3d 1497 (Fed. Cir. 1997)).

[26] *Baker v. Dep't of Defense*, 2016 MSPB LEXIS 4567 (M.S.P.B Aug. 4, 2016).

clearances based on a delegation of authority from OPM, and that in 2012, USAGM neglected to return the signed memorandum of understanding (MOU) to OPM granting the delegation.

(b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)

In this respect, the suspension letter is factually inaccurate in stating that (b)(6); (b)(7)(C) clearance was done by USAGM when it lacked the proper authority to do so. In fact, (b)(6); (b)(7)(C) clearance was granted by the Department, and there is no question about its authority to investigate and perform background checks. Moreover, ODNI officials told OIG that it was improper for USAGM to suspend (b)(6); (b)(7)(C) clearance on this basis because USAGM must honor the clearance granted by the Department. Thus, USAGM's assertion that (b)(6); (b)(7)(C) clearance must be suspended because it was conducted at a time when USAGM lacked the proper authority is not only false, but an illegitimate basis to suspend his clearance.

Failure to Remedy Personnel Security Concerns

The suspension letter alleged that as the DDO who oversaw ORM, the Security Office, and the Office of Management Services, (b)(6); failed to correct longstanding deficiencies in USAGM's personnel security program and that in failing to do so, "knowingly and willfully granted eligibility for, or allowed access to, classified information in violation of the law and its implementing regulations." USAGM provided several program reviews of USAGM's personnel security program conducted by OPM and ODNI as appendices to the suspension letter. These reviews highlighted numerous deficiencies in USAGM's program and directed it to undertake corrective action to address these deficiencies.

While (b)(6); (b)(7)(C) portfolio as DDO included the above-mentioned offices, he was not appointed to this position until February 2019, while the issues identified by OPM's reviews of USAGM's personnel security and suitability programs were present as far back as 2010. According to (b)(6); (b)(7)(C), the longstanding problems were a result of previous agency leadership not taking the OPM reports as seriously as they should have. However, in the 2 years prior to USAGM suspending his security clearance, (b)(6); (b)(7)(C) noted that the agency "increased resources dedicated to fixing the issues raised by OPM, made doing so a priority, required regular check ins with staff working to fix the issues, and replied to and put plans in place to correct every single OPM [recommendation]." A November 2020 report by McGuireWoods

(which USAGM hired to investigate [(b)(6); (b)(7)(C)] affirmed his assertion, finding that [(b)(6); (b)(7)(C)] "appears to have inherited these longstanding issues. There are instances that show that he was trying to assemble teams to address the security recommendations. It does not appear that he was affirmatively taking actions against the Agency's interests."

Furthermore, any deficiencies in not addressing OPM's recommendations would constitute a performance issue. Performance issues are not included in the adjudicative guidelines and generally are not relevant to the granting or denial of a security clearance. Per USAGM policy, suspension is warranted, for example, when the security organization receives information indicating possible gross misconduct.[27] Despite the August 12, 2020, suspension letter and an October 6 follow-up letter signed by Mr. Pack noting that USAGM was investigating [(b)(6); (b)(7)(C)] nothing in his security file, reviewed by OIG in December 2020, indicated that any investigation was underway related to misconduct. Indeed, when USAGM presented similar facts to two trained security clearance adjudicators in December 2020, they determined that "there are no security issues that fall under the Security Executive Agency Directive (SEAD 4) and Executive Order 12968." The adjudicators determined that "these issues are all performance issues which fall under the Office of Human Resources."

Risk Management Issues

The suspension letter also noted that ORM identified [(b)(6); (b)(7)(C)] in his capacity as DDO, as a risk to USAGM. The USAGM fiscal year 2019 (FY19) Enterprise Risk Profile attached to the letter identified 1) security, 2) grantee network oversight, 3) HR operations, 4) inadequate building/infrastructure/equipment, and 5) press freedom/internet censorship as areas of highest agency risk. While these fell under [(b)(6); (b)(7)(C)] portfolio as DDO, the FY19 Enterprise Risk Profile assigned the Director of Management Services, [(b)(6); (b)(7)(C)], as the risk owner of security and HR operations. One of the other documents USAGM attached to the suspension letter it sent to [(b)(6); (b)(7)(C)] was referred to as a "risk profile drafted by ORM." This document detailed the reasons that security and HR presented agency risk and how, as [(b)(6); (b)(7)(C)] supervisor, [(b)(6); (b)(7)(C)] bore responsibility for not requiring her to implement an [d]execute corrective action plans to mitigate the risks. However, the risk profile did not address the three risk areas for which the DDO was identified as the risk owner, yet it concluded that [(b)(6); (b)(7)(C)] failed in multiple ways to fulfill his responsibility as Deputy Director of Operations. As a result, he put the Agency's mission, its personnel, and indeed national security at tremendous risk."

As part of this investigation, OIG interviewed the Chief Risk Officer and the Risk and Regulatory Compliance Officer to discuss the impetus of the risk assessments about individual employees

[27] USAGM, *Personnel Security Management v.4*, ch. 11, § 10(b)(1).

that were written and attached to the suspension letters. The Chief Risk Officer explained to OIG that his supervisor [(b)(6); (b)(7)(C)] tasked ORM with writing risk profiles related to the six complainants' job functions, the OPM and ODNI reviews, and "anything you heard" about them regardless of whether they could verify the information.[28] [(b)(6); (b)(7)(C)] tasked ORM with completing the risk profiles very quickly, using information already known to the drafters. The Chief Risk Officer said that ORM had never written risk documents on individuals prior to this exercise. The Risk and Regulatory Compliance Officer who took the lead on authoring the risk profile for [(b)(6); (b)(7)(C)] said the information she included in the risk profile was based on things she heard through office gossip.

Because of [(b)(6); (b)(7)(C)] selection of the employees as to whom risk profiles were to be prepared and her indifference as to whether the information to be included was truthful, OIG finds that the risk profiles are pretextual and were simply created to support the predetermined decision to suspend the clearances of the individuals, rather than a legitimate reason for the suspensions. Regardless, identifying [(b)(6); (b)(7)(C)] as a risk owner and describing his shortcomings in that role is at most a performance deficiency and thus not a legitimate reason to suspend a security clearance.

The second *Carr* factor examines the existence and strength of any motive to retaliate on the part of the individuals who were involved in the decision. OIG found some evidence of a motive to retaliate regarding [(b)(6); (b)(7)(C)] disclosures. USAGM received significant negative press regarding the failure to renew the visas of journalists, the subject of one of [(b)(6); (b)(7)(C)] disclosures.[29] In addition, several members of Congress had reached out to USAGM to express concern about the visas. Emails indicate that USAGM leadership bristled at this criticism. For example, on July 14, 2020, [(b)(6); (b)(7)(C)] and the Public Affairs advisor prepared talking points for the CEO that referred to such criticism as "nonsensical" and questioned: "Why are non-U.S. citizens being brought to the U.S. to report on 'significant American thought and institutions' back to the rest of the world?"

Likewise, OIG found evidence that [(b)(6); (b)(7)(C)] expressed disdain at [(b)(6); (b)(7)(C)] concerns about COVID-19 protections. On August 5, 2020, she emailed [(b)(6); (b)(7)(C)] and referred to the proposal of an agency mask policy as "highly inappropriate." She stated, "I will not clear anything that includes such language, and no one is authorized to do so, nor to negotiate terms related to so-called 'enforcement' of mask or social distancing guidelines. Also,

[28] ORM was tasked with writing seven risk profiles. The seventh risk profile was used to support the clearance suspension of another whistleblower who did not file a complaint with OIG.

[29] See, e.g., Kylie Atwood, "US global media agency seeks to kick out international journalists," CNN, July 10, 2020; James Crump, "Trump appointee cutting visas for 10 journalists with dozens more at risk," *The Independent*, July 10, 2020; Pranshu Verma and Edward Wong, "Trump Appointee Might Not Extend Visas for Foreign Journalists at V.O.A.," *The New York Times*, July 12, 2020.

as we have discussed many times, I want to ensure that we're erring on the side of bringing back staff as quickly as possible . . . It's not at all clear to me that the team working on this is proceeding accordingly." The context of the conversation makes apparent that she was referring to (b)(6); (b)(7)(C) and the COVID-19 team that he was leading.

(b)(5) Attorney-Client

(b)(5) Attorney-Client

Shortly after these exchanges, (b)(6); (b)(7)(C) began their effort to suspend the security clearance of (b)(6); (b)(7)(C) as well as those of the other five complainants.

Thus, OIG finds that there was a reasonably strong motive to retaliate against (b)(6); (b)(7)(C) especially given (b)(6); (b)(7)(C) awareness of his concerns and she and her colleagues reaction to such concerns.

OIG's review of the third *Carr* Factor— any evidence that the agency took similar actions against employees who are not whistleblowers but who are otherwise similarly situated— found some evidence that the agency did not take similar action against similarly-situated employees who were not whistleblowers. For example, one rationale (albeit false) for (b)(6); (b)(6); suspension was that USAGM adjudicated his clearance without proper authority. USAGM conducted background investigations for hundreds of other employees during the years when there was no signed delegation memorandum, yet the security clearances of only seven employees (all of whom were whistleblowers) were suspended.[31]

OIG's examination of the three factors found that even though USAGM cited five different reasons to suspend the security clearance of (b)(6); (b)(7)(C) none of them relate to the adjudicative guidelines and thus do not constitute a legitimate basis for the suspension. Likewise, OIG found some evidence of a retaliatory motive and no evidence that USAGM took comparable action against individuals who were similarly situated but were not whistleblowers. Accordingly, USAGM cannot meet its burden to demonstrate by a preponderance of the evidence that it would have suspended (b)(6); (b)(7)(C) security clearance absent his protected disclosures.

[30] 5 C.F.R. § 359.406.

(b)(6); (b)(7)(C)

Conclusion

(b)(6); (b)(7)(C) made several protected disclosures to OIG in June 2018 and to USAGM officials from June 2020 through August 2020 when he raised concerns about the agency's inaction regarding J-1 visas to journalists, the CEO's freeze on HR, IT, and contracting actions, and agency senior leadership's response to COVID-19. Shortly thereafter, USAGM suspended his security clearance.

USAGM could not demonstrate by a preponderance of the evidence that it would have suspended (b)(6); (b)(7)(C) clearance absent his protected disclosures. The five reasons cited in (b)(6); (b)(6); (b)(7)(C) suspension letter bear no relation to the adjudicative guidelines and USAGM failed to follow its own directive for suspending a clearance. In addition, OIG found some evidence of retaliatory motive by individuals involved in the suspension and no evidence that USAGM took action against similarly situated individuals who were not whistleblowers.

Pursuant to PPD-19, OIG may recommend that the agency reconsider the employee's Eligibility for Access to Classified Information and "take other corrective action to return the employee, as nearly as practicable and reasonable, to the position such employee would have held had the reprisal not occurred."

Prior to the completion of this investigation, USAGM reconsidered (b)(6); (b)(7)(C) eligibility for access to classified information and restored (b)(6); (b)(7)(C) security clearance. Nonetheless, USAGM should also consider other corrective action, including but not limited to formally rescinding the suspension letter and awarding him attorney's fees and other reasonable compensatory damages.

~~SENSITIVE BUT UNCLASSIFIED~~ June 14, 2021

MEMORANDUM

FROM: OIG – Jeffrey McDermott, Assistant Inspector General (b)(6); (b)(7)(C)

TO: USAGM – Kelu Chao, Acting Chief Executive Officer

SUBJECT: Report of Investigation Pursuant to Presidential Policy Directive 19
OIG Whistleblower Case 2020-0104 (b)(6); (b)(7)(C)

Presidential Policy Directive 19 (PPD-19) prohibits the taking of any action affecting an employee's eligibility for access to classified information as a reprisal for a protected disclosure.[1] PPD-19 requires that every agency have a review process that permits employees to appeal actions affecting eligibility for access to classified information they allege to be in violation of the directive. As part of the review process, the agency Inspector General shall conduct a review to determine whether an action affecting eligibility for access to classified information violated the directive, whether the agency should reconsider the action, and whether corrective action is warranted.

As described below, the Department of State (Department) Office of Inspector General (OIG) received a complaint from (b)(6); (b)(7)(C) who is the Chief Strategy Officer (CSO) at the U.S. Agency for Global Media (USAGM). (b)(6); (b)(7)(C) alleged that his security clearance was suspended after having made protected whistleblower disclosures. OIG's investigation found that (b)(6); (b)(7)(C) eligibility for access to classified information was suspended after he made protected disclosures and that USAGM did not demonstrate by a preponderance of the evidence that (b)(6); (b)(7)(C) security clearance would have been suspended absent his disclosures.

Allegation

On September 29, 2020, counsel for (b)(6); (b)(7)(C) along with five other senior management officials from USAGM, filed a complaint with OIG in accordance with PPD-19 alleging that

[1] PPD-19 defines a protected disclosure as "a disclosure of information by the employee to a supervisor in the employee's direct chain of command up to and including the head of the employing agency, to the Inspector General of the employing agency or Intelligence Community Element, to the Director of National Intelligence, to the Inspector General of the Intelligence Community, or to an employee designated by any of the above officials for the purpose of receiving such disclosures, that the employee reasonably believes evidences (i) a violation of any law, rule, or regulation; or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."

USAGM suspended their security clearances after they raised concerns to their supervisors and USAGM senior leadership. (b)(6); (b)(7)(C) told OIG that he raised various concerns that certain budget reductions and reallocations violated the law, placed USAGM-affiliated journalists in physical danger, or constituted gross mismanagement. (b)(6); (b)(7)(C) also asserted that an external communications ban constituted gross mismanagement. (b)(6); (b)(7)(C) told OIG that he made these disclosures to then-USAGM Deputy Chief of Staff, (b)(6); (b)(7)(C) and then-Chief Operating Officer (COO), (b)(6); (b)(7)(C) alleged that the suspension of his clearance was in retaliation for these disclosures. OIG reviewed his complaint and determined that it contained sufficient details to allege a violation of the prohibition against retaliation for making a protected disclosure. Consequently, OIG initiated an investigation of the allegations.

Background

(b)(6); (b)(7)(C) transferred to USAGM from the Department in July 2018 as a Senior Advisor for Global Strategy and Innovation. He became Acting CSO in October 2018. He was appointed to the position on a permanent basis in November 2019. In his role as CSO, (b)(6); (b)(7)(C) manages USAGM's relationship with broadcasters from other governments and with other U.S. agencies, including the Office of Management and Budget (OMB). (b)(6); (b)(7)(C) had oversight responsibility for three offices: the Office of Internet Freedom (OIF), the Office of Policy and Research (OPR), and the Office of Policy (OP).

The position of CSO requires a Top Secret security clearance. (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)

Michael Pack was confirmed by the U.S. Senate on June 4, 2020, as the Chief Executive Officer (CEO) of USAGM. (b)(6); (b)(7)(C) reported directly to the CEO until June 17, 2020, when Chief of Staff (b)(6); (b)(7)(C) emailed (b)(6); (b)(7)(C) and other senior career USAGM staff members with new reporting structures. Under this new rubric, (b)(6); (b)(7)(C) was assigned to report to the COO, (b)(6); (b)(7)(C) In addition, his responsibilities for OPR were assigned to a different individual.

[2] On June 23, 2020, (b)(6); also filed a complaint with the OIG hotline concerning some of these issues. While OIG found no evidence to suggest anyone at USAGM was aware of his complaint, he cited and quoted the statutory basis for his belief that the reduction in the Office of Policy Research's budget required congressional approval in the complaint. In addition, (b)(6); (b)(6); also made several disclosures regarding these concerns to staff of various members of Congress. OIG found some evidence to suggest that (b)(6); lawful communications with these individuals may have contributed to the suspension of his security clearance, thereby implicating his rights to furnish information to Congress protected by 5 U.S.C. § 7211. However, because these communications are not protected under PPD-19, OIG's analysis and conclusions focus on (b)(6); similar communications with (b)(6); (b)(7)(C) which are, as explained elsewhere in this report, protected.

(b)(6); (b)(7)(C) told OIG that he raised several issues that concerned him between June and August 2020. He raised concerns about the potential threats to the safety of USAGM journalists and others posed by Mr. Pack's apparent resistance to funding the Open Technology Fund (OTF). (b)(6); (b)(7)(C) explained that OTF supported technological tools that allowed USAGM journalists to communicate over encrypted and anonymous platforms. (b)(6); (b)(7)(C) was familiar with these issues because of his oversight of OIF, which oversees and assesses OTF and its projects, and was particularly concerned about OTF's ability to support internet freedom tools in Hong Kong amidst the then-ongoing conflict between pro-democracy groups in Hong Kong and the Chinese government.

(b)(6); (b)(7)(C) told OIG that he expressed these concerns about OTF funding to his new supervisor, (b)(6); (b)(7)(C) by phone and through emails in mid-July 2020. Later in July, (b)(6); (b)(6); received an email that stated that USAGM Vice President for Legal, Compliance, and Risk Management (b)(6); (b)(7)(C), who had been detailed to the role from the Department and reported directly to Mr. Pack, was the only "USAGM individual authorized to communicate with OTF."

(b)(6); (b)(7)(C) told OIG that he also raised concerns about budget reductions to OPR, which he believed required congressional notification. On August 5, 2020, (b)(6); (b)(7)(C) emailed (b)(6); (b)(6); and flagged for him the approximately $1.4 million cut to OPR's budget and urged him to raise his concerns to USAGM leadership. (b)(6); (b)(7)(C) was concerned that removing the funds would violate appropriations law and that the lack of funds would negatively affect USAGM operations. (b)(6); (b)(7)(C) did not respond to this email. (b)(6); (b)(7)(C) recalled that (b)(6); (b)(7)(C) raised concerns to him about OPR's funding and that he had relayed this concern in a meeting (b)(6); (b)(7)(C) had with the USAGM leadership team.

Finally, (b)(6); (b)(7)(C) raised concerns to (b)(6); (b)(7)(C) about other actions taken by Mr. Pack that he believed constituted gross mismanagement. As noted above, on June 17, 2020, (b)(6); (b)(6); emailed the senior career USAGM staff and realigned the reporting structures of almost all the individuals on the email. She also wrote that "until further notice, no actions are to be taken, and no external communications are to be made, without explicit approval" from one of the political appointees brought on by Mr. Pack. According to (b)(6); (b)(7)(C) prohibiting external communications in this manner was very problematic because USAGM officials needed to be able to coordinate with the Department and with journalists. In addition, as time went on, (b)(6); (b)(7)(C) grew increasingly concerned that non-responsiveness to partners and stakeholders was creating an exceedingly negative and an unfair impression of his staff. Moreover, his staff were unable to respond or fulfill standard requests made by the Department and others or perform their job functions. (b)(6); (b)(7)(C) recalled an incident in which USAGM journalists in Russia were feeling pressure because the Russian government drafted legislation which would have required that they be labeled as a foreign agent. Because Mr. Pack restricted external communication, (b)(6); (b)(7)(C) staff had initially been unable to communicate with the

Department about the issue.[3] [redacted] said when this issue occurred, [redacted] finally paid attention to his concern and allowed his staff to work with the Department to address the problem.[4]

[redacted] told OIG that he also raised concerns about mismanagement to [redacted], the Deputy Chief of Staff. On June 11, 2020, a freeze was announced regarding certain actions, including obligations for new contracts or extensions of contract, hiring and promotions, and technical migrations. According to [redacted] during the senior staff meeting on June 19, 2020, he raised to [redacted] what he described as "urgent concerns" about this spending freeze.[5] He said that he also raised concerns about OTF funding to [redacted] during this meeting.

On August 12, 2020, [redacted] received a letter, signed by Mr. Pack, suspending his security clearance and placing him on paid administrative leave. The letter stated: "You are hereby notified, pursuant to Executive Order 12968 and other applicable law, policies, and procedures, that I certify it is in the interest of U.S. national security to suspend your security clearance, pending the outcome of an investigation effective immediately." On February 2, 2021, [redacted] security clearance was restored, and he was reinstated to his previous position as USAGM CSO.

USAGM Security Clearance Suspension Procedures

USAGM's policy and procedures for suspending security clearances are contained within its directive titled, *Personnel Security Management v.4*, which is largely based on Executive Order 12968.[6] The directive states that the Director of Security "acts as the ultimate authority (or designates an alternate) for the reduction, denial, suspension, or revocation of an individual's eligibility for access to classified national security information and/or an individual's eligibility to be employed in a government position based on a suitability or fitness determination."[7] Within the Office of Security, the Chief of the Personnel Security Division is given the responsibility to

[3] On July 24, 2020, Radio Free Europe/Radio Liberty (RFE/RL)'s Acting President sent an email to [redacted] requesting his assistance with this issue, given his relationship with the Department. In her email, she explained that the restrictions target RFE/RL and VOA and there had been discussions within RFE/RL as to whether they would have to consider closing their bureau in Russia if the new restrictions became law. [redacted] forwarded this email to [redacted] on the same day and asked to reach out to the Department.

[4] [redacted] acknowledged to OIG that the communications ban was problematic but did not specifically recall discussing it with [redacted] but generally recalled there having been an issue about this related to Russia. He also said that he had at a minimum, discussed his own concerns regarding the communications ban at senior staff meetings that would have included Mr. Pack and other relevant decision-makers.

[5] While [redacted] did not recall specifically discussing these concerns with [redacted], she noted that "everyone" raised concerns about the spending freeze, and she could only assume that [redacted] did as well.

[6] Executive Order 12968, Access to Classified Information, Aug. 4, 1995.

[7] USAGM, *Personnel Security Management v.4*, preface § 6(c)(7).

suspend security clearances.[8] The directive notes, however, that the Chief Executive Officer "may also exercise authority granted in 5 U.S.C. § 7532 to suspend without pay, and then remove, a USAGM employee when this action is deemed necessary in the interests of national security."

The directive states, "Suspension of a clearance, also known as administrative withholding, is appropriate when a significant question of security eligibility arises. Suspension is warranted, for example, when the security organization receives information indicating possible gross misconduct, criminal conduct, substance abuse, or a serious breach of integrity."[9] Security eligibility is defined as "a determination of eligibility for access to classified information" that "is a discretionary security decision based on judgments by appropriately trained adjudicative personnel."[10] Executive Order 12968 states that "determinations of eligibility for access to classified information shall be based on criteria established under this order."[11] Those criteria are the adjudicative guidelines issued by the Office of the Director of National Intelligence (ODNI), which are:

- Allegiance to the United States
- Foreign influence
- Foreign preference
- Sexual behavior
- Personal conduct
- Financial considerations
- Alcohol consumption
- Drug involvement
- Emotional, mental, and personality disorders
- Criminal conduct
- Security violations
- Outside activities
- Misuse of information technology systems.[12]

USAGM's directive further specifies that "upon receipt of information that raises questions concerning the personnel security fitness of an individual, [the Office of Security] shall immediately assess the security factors involved and shall take suitable action to ensure

[8] USAGM, *Personnel Security Management v.4*, preface § 6(d)(7).

[9] USAGM, *Personnel Security Management v.4*, ch. 11, § 10(b)(1).

[10] USAGM, *Personnel Security Management v.4*, appendix 1 (noting that "eligibility shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security.")

[11] Executive Order 12968, Access to Classified Information, Aug. 4, 1995, § 2.1(a).

[12] SEAD 4: National Security Adjudicative Guidelines, Dec. 10, 2016.

national security interests are protected."[13] In making such a determination, the Office of Security must "consider such factors as the conclusiveness and seriousness of the information developed, the employee's access to classified information, and the opportunity the position affords the employee to commit acts contrary to national security interests." If USAGM decides to suspend a security clearance temporarily pending an investigation and the suspension exceeds 10 days, the employee is entitled to notice in writing with a justification for the suspension.[14] USAGM's policy notes that "retaliation that affects eligibility for access to classified national security information is prohibited" and that USAGM officials shall not take or fail to take, or threaten to take or fail to take, any action affecting an employee's eligibility for access to classified national security information as a reprisal for a protected disclosure.[15]

Despite these policies, OIG found that no one who was trained in the adjudicative guidelines participated in the decision, preparation, or finalization of [(b)(6); (b)(7)(C)] suspension letter. USAGM's directive states that decisions regarding security clearances must be made by "appropriately trained adjudicative personnel" using the adjudicative guidelines.[16] However, in [(b)(6); (b)(7)(C)] case, no one who was trained in those guidelines, such as the Chief of the Personnel Security Division who ordinarily has the responsibility to suspend security clearances, was even consulted about the suspension.[17] Even if USAGM officials had questions about the ability of its Office of Security, they could have consulted with the Office of Personnel Management (OPM) and ODNI about the suspension, but they did not do so.

Legal Standard

As noted above, PPD-19 prohibits the taking of any action with respect to any employee's security clearance or access determination in retaliation for having made a protected whistleblower disclosure. In 2020, the Inspector General for the Intelligence Community issued procedures for how it would review allegations of retaliation under PPD-19.[18] These procedures specify that a complainant must demonstrate that: (a) he or she made a protected disclosure; (b) the agency took or failed to take, or threatened to take or fail to take, any action with respect to the complainant's security clearance or access determination; and (c) the protected disclosure was a contributing factor in the agency's decision to take or fail to take, or threaten to take or fail to take, the security clearance action.[19]

[13] USAGM, *Personnel Security Management v.4*, ch. 12, § 1(b).

[14] USAGM, *Personnel Security Management v.4*, ch. 12, § 2(a).

[15] USAGM, *Personnel Security Management v.4*, ch. 12, § 2(e)(1), (2).

[16] USAGM, *Personnel Security Management v.4*, appendix 1.

[17] USAGM, *Personnel Security Management v.4*, preface § 6(d)(7).

[18] Inspector General of the Intelligence Community Instruction 2020.001, *External Review Panel Procedures Pursuant to 50 U.S.C. § 3236 and Presidential Policy Directive/PPD-19* (Dec. 17, 2020).

[19] Instruction 2020.001 § 9(C)(2).

Although PPD-19 and these procedures do not specify how to determine whether a protected disclosure was a "contributing factor" in the adverse security clearance determination, similar language is used in the Whistleblower Protection Act, codified at 5 U.S.C. § 1221, which prohibits agencies from taking adverse personnel actions in retaliation for protected disclosures. Under the Whistleblower Protection Act, a complainant can establish that his or her protected disclosure was a contributing factor in the alleged retaliatory personnel action through either direct evidence or through circumstantial evidence that the official taking the adverse action knew of the disclosure and the action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the adverse action.[20]

If a complainant can demonstrate that he or she made a protected disclosure that was a contributing factor in the adverse determination, the burden shifts to the agency, which must "prove by a preponderance of the evidence that it would have taken the same action in the absence of such disclosure, giving the utmost deference to the agency's assessment of the particular threat to the national security interests of the United States in the instant matter."[21] Federal courts have looked to three factors (commonly called the *Carr* factors) when determining whether an agency has met its burden: the strength of the agency's evidence in support of its decision; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.[22] The courts weigh these three factors together to determine whether, as a whole, the agency has met its burden, and a strong showing on one factor may be sufficient.[23]

Complainant's Burden

(b)(6); (b)(7)(C) presented evidence that he made protected disclosures by appropriately raising concerns with his first-line supervisor (b)(6); (b)(7)(C) and one of the decisionmakers in suspending the clearances (b)(6); (b)(7)(C) about the funding for OTF and its potential implications for the safety of USAGM journalists, the need to notify Congress regarding changes to OPR's budget, and the effect of the communications ban. Under PPD-19, a protected disclosure is defined as a disclosure of information by the employee to, among other persons, a supervisor in the employee's chain of command that the employee reasonably believes is a violation of

[20] 5 U.S.C. § 1221(e)(1)(A),(B).

[21] Instruction 2020.001 § 9(C)(2)(d).

[22] *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (citing *Geyer v. Dep't of Justice*, 7 M.S.P.R. 682, 688, aff'd, 116 F.3d 1497 (Fed. Cir. 1997)).

[23] *Lucchetti v. Dep't of Interior*, 2017 MSPB LEXIS 743, *11 (M.S.P.B. Feb 15, 2017) (*citing Phillips v. Dep't of Transportation*, 113 M.S.P.R. 73, 77 (2010)).

law, rule, or regulation or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.[24]

Based on OIG's review of documents and interviews, there is clear evidence that (b)(6); (b)(7)(C) made disclosures that fit the definition of "protected disclosure" because he made them to a supervisor in his chain of command. Furthermore, the concerns about OTF funding constitute a protected disclosure because (b)(6); (b)(7)(C) reasonably believed that they related to a substantial and specific danger to public health or safety; in this instance, the safety of USAGM journalists. Reasonable belief means that the whistleblower actually believes in the impropriety of the conduct at issue and that belief is objectively reasonable, meaning a person similarly situated would also find the actions to be unlawful or improper.[25] Given his role, (b)(6); (b)(7)(C) was knowledgeable about the internet freedom tools supported by OTF and the role that they played in ensuring journalist safety. (b)(6); (b)(7)(C) concern about the need to notify Congress regarding the decision to reduce the funding for OPR was also reasonable. Based on a plain reading of the statute's congressional notification provision and the facts known to him at the time, it was reasonable for (b)(6); (b)(7)(C) to believe that the budget reductions to OPR required congressional notification and not doing so would violate the law. Likewise, OIG finds that (b)(6); (b)(6); belief that the freeze on various actions and the implementation of the external communications ban constituted gross mismanagement was also reasonable because he believed that these actions created substantial risk to the agency mission.[26] For example, (b)(6); (b)(6); told OIG that the freeze undermined critical agency missions and that the communications ban effectively prevented his staff from fulfilling and responding to even simple requests from the Department and created a misapprehension among key stakeholders that they were nonresponsive, which further risked the agency's ability to accomplish its mission. In addition, OIG notes that this ban on external communications prohibited employees from contacting OIG with concerns about wrongdoing, which is a violation of the Inspector General Act.[27]

While OIG found no direct evidence that (b)(6); (b)(7)(C) disclosures were a contributing factor in the suspension of his security clearance, there is circumstantial evidence that the individuals involved in the suspension of his clearance knew of his disclosures and that they moved to suspend his clearance shortly after he made protected disclosures.

As stated above, Mr. Pack was the official who signed the letter suspending (b)(6); (b)(7)(C) security clearance, and (b)(6); (b)(7)(C) told OIG that Mr. Pack was aware that (b)(6); (b)(7)(C) had

[24] PPD-19 § F(5).

[25] *Craine v. NSF*, 687 Fed. Appx. 682, 691 (10th Cir. Apr. 26, 2017).

[26] The courts have defined gross mismanagement as a "management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission." See *White v. Dep't of the Air Force*, 391 F.3d 1377, 1382 (Fed. Cir., Dec. 15, 2004).

[27] 5 U.S.C. App. § 7(c).

raised concerns regarding the spending freeze. [(b)(6); (b)(7)(C)] also told OIG that he raised several of his concerns with [(b)(6); (b)(7)(C)] who was one of the individuals that USAGM stated had "provided advice or guidance regarding the decision [to suspend the clearances] or participated in its execution." [(b)(6); (b)(7)(C)] made his disclosures to [(b)(6); (b)(7)(C)] between June and August 2020, including one a week prior to the suspension of his clearance.[28]

Accordingly, OIG concludes that there is circumstantial evidence that [(b)(6); (b)(7)(C)] protected disclosures were a contributing factor in the suspension of his clearance because USAGM officials involved in the suspension were aware of his disclosures and moved to suspend his clearance within days of his disclosures, a period of time such that a reasonable person would conclude that the disclosure was a contributing factor in the adverse action. Therefore, [(b)(6); (b)(7)(C)] has met his burden by demonstrating that he made protected disclosures, USAGM took an adverse action regarding his clearance, and the protected disclosures were a contributing factor in the adverse action.

Agency's Burden

Because [(b)(6); (b)(7)(C)] met his burden, USAGM must demonstrate by a preponderance of the evidence that it would have suspended [(b)(6); (b)(7)(C)] clearance even absent his protected disclosures.

As noted above, the courts have traditionally reviewed three factors in determining whether an adverse action resulted from a protected disclosure.[29] The first factor that the courts use to weigh whether an agency has met its burden is the strength of the evidence in support of the adverse action. In examining this factor, OIG examines the evidence supporting the adverse action and whether there were "legitimate reasons" for the personnel action.[30]

The suspension letter cited several reasons for the suspension of [(b)(6); (b)(7)(C)] clearance:

1) The background investigation which granted his security clearance was done by USAGM when USAGM lacked the proper authority to investigate and perform background checks.
2) As a USAGM senior leader, he failed to take necessary corrective action to remedy personnel and other security concerns.
3) He "knowingly and willfully granted eligibility for, or allowed access to, classified information in violation of the law and its implementing regulations."

[28] [(b)(6); (b)(7)(C)] acknowledged to OIG that, although she did not recall [(b)(6); (b)(7)(C)] specifically raising concerns to her, it was likely that he had raised to her concerns about the spending freeze.

[29] *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (citing *Geyer v. Dep't of Justice*, 7 M.S.P.R. 682, 688, aff'd, 116 F.3d 1497 (Fed. Cir. 1997)).

[30] *Baker v. Dep't of Defense*, 2016 MSPB LEXIS 4567 (M.S.P.B Aug. 4, 2016).

4) The Office of Risk Management identified him, in his capacity as CSO, as a risk to USAGM.

OIG addresses each of these justifications individually below.

(b)(6); (b)(7)(C) Background Investigation

The suspension letter alleged that (b)(6); (b)(7)(C) background investigation "was done by USAGM when USAGM lacked the proper authority to investigate and perform background checks." This statement presumably refers to the fact that USAGM performs background checks and grants clearances based on a delegation of authority from the OPM, and that in 2012, USAGM did not return the signed memorandum of understanding (MOU) to OPM granting the delegation.

As noted previously, (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) However, because of deficiencies in USAGM's personnel security program, OPM and ODNI did instruct it to have the Defense Counterintelligence and Security Agency (DCSA) reinvestigate some of the clearances that were granted by USAGM, including that of (b)(6); (b)(7)(C) At the time of his suspension, DCSA had already completed a reinvestigation of his security clearance and the re-adjudication was almost complete.

Nonetheless, the uncertainty surrounding USAGM's authority to investigate and adjudicate clearances is not a legitimate basis to suspend (b)(6); (b)(7)(C) clearance. At no point did OPM or ODNI direct USAGM to suspend the clearances while the reinvestigations were pending. Furthermore, as noted above, (b)(6); (b)(7)(C) investigation had already been completed by DCSA at the time of his suspension and his re-adjudication was pending, yet no one from USAGM reached out to DCSA to ascertain if any adverse issues were found and if the re-adjudication would be imminent.

Failure to Remedy Personnel Security Concerns

The suspension letter alleged that (b)(6); (b)(7)(C) failed to correct longstanding deficiencies in USAGM's personnel security program and that in failing to do so, he "knowingly and willfully granted eligibility for, or allowed access to, classified information in violation of the law and its implementing regulations." USAGM provided several program reviews of USAGM's personnel security program conducted by OPM and ODNI as appendices to the suspension letter. These reviews highlighted numerous deficiencies in USAGM's program and directed it to undertake corrective action to address these deficiencies.

However, according to [redacted] position description, the position of CSO is not responsible for or in any way involved in managing the personnel security program. Thus, the CSO role had no bearing on the personnel security issues at USAGM, the vast majority of which predated [redacted] USAGM tenure. Given this, USAGM's allegation that [redacted] failed to correct personnel security concerns is likewise not a legitimate basis to suspend his security clearance.[31]

Risk Management Issues

The suspension letter also noted that the Office of Risk Management (ORM) identified [redacted] in his capacity as CSO, as a risk to USAGM. In support of this assertion, the suspension letter attached a document titled "CSO Risk," purporting to contain a risk profile for [redacted] However, rather than an analysis of risk, the document instead contained two claims of improper hiring practices, which the document itself noted required additional support to substantiate, and a discussion of various issues surrounding OTF, many of which predate [redacted] tenure.

USAGM's Chief Risk Officer prepared this document. According to this official, [redacted] first contacted him on July 24, 2020, and instructed him to prepare an analysis of the risk presented by several employees. A few days later, [redacted] added [redacted] to that list. [redacted] told him to include any negative information that he had heard about the individuals regardless of whether he could verify the information. [redacted] told him to add even rumors that he "heard in the halls."

First, the CSO Risk document asserted that [redacted] had hired an unspecified "close family friend" to work at an unspecified position at USAGM. The document specifically noted, in boldface type, that this allegation "need[ed] to be corroborated with HR documents." [redacted] denied having engaged in this conduct and the ORM official confirmed to OIG that he did not have firsthand knowledge of this allegation and did not know whether it was true. The risk document also asserted that [redacted] had acted improperly in allowing another USAGM employee to be transferred into a senior advisory role under him. The document contended this employee was transferred because he had made "misogynistic remarks" and had mistreated "female subordinates," but did not allege that [redacted] was aware of or complicit in this conduct. The document also noted, again in boldface type, that this allegation also

[31] Even if [redacted] was responsible for managing the personnel security program, any deficiencies in doing so would constitute a performance issue. Performance issues are not included in the adjudicative guidelines and generally are not relevant to the granting or denial of a clearance. Indeed, when USAGM presented this same set of a facts to two trained security clearance adjudicators in December 2020, they determined that "there are no security issues that fall under the Security Executive Agency Directive (SEAD 4) and Executive Order 12968." The adjudicators determined that "these issues are all performance issues which fall under the Office of Human Resources."

required the further support of "HR documents." USAGM officials performed no follow-up work to ascertain if the allegations contained in the purported risk profile had any basis in fact before relying upon them to suspend [(b)(6); (b)(7)(C)] clearance. The use of office gossip and uncorroborated statements substantially diminish the evidentiary weight of the CSO Risk document.

Finally, the document alleged that "OTF creates risks to the Agency including funding projects that fall outside the scope of the Appropriations Act, such as by focusing on funding civil society internet freedom activities." However, the document does not explain how, if at all, [(b)(6); (b)(7)(C)] in his capacity as CSO contributed to or mitigated these risks. In fact, the document only discusses [(b)(6); (b)(7)(C)] role by noting that OIF oversees OTF and is part of [(b)(6); (b)(7)(C)] portfolio. The supporting documentation for the alleged OTF risk contains information that reveals the OTF issues began in 2002, 16 years before [(b)(6); (b)(7)(C)] began working at USAGM, and most of the events it describes occurred in 2017 or earlier, before [(b)(6); (b)(7)(C)] became the Acting CSO in October 2018. Importantly, the supporting documentation does not mention [(b)(6); (b)(7)(C)] by name or title and instead attributes issues with OTF and OIF to the former USAGM CEO, the General Counsel, and the CEO of OTF. Thus, with respect to OTF, the CSO Risk document supporting documentation in no way ties [(b)(6); (b)(7)(C)] to a purported OTF risk.

Even if the information identifying [(b)(6); (b)(7)(C)] as contributing to OTF's problems was accurate, the issues discussed in the document are, at most, performance or policy issues which are not pertinent to the adjudicative guidelines and thus not a legitimate reason for the suspension of a clearance.

With respect to the second *Carr* factor—the existence and strength of any motive to retaliate on the part of the individuals who were involved in the decision—OIG found some evidence of motive on the part of individuals responsible for the decision to suspend [(b)(6); (b)(7)(C)] clearance. For example, in August 2020, [(b)(6); (b)(7)(C)] both of whom were key decisionmakers in the decision to suspend [(b)(6); (b)(7)(C)] clearance, discussed how to respond to several congressional inquiries via email. Many of these inquiries concerned the subjects of [(b)(6)] [(b)(6); (b)(7)(C)] disclosures, such as the funding of OTF and the lack of congressional notification for funding decisions. [(b)(6); (b)(7)(C)] appeared to be dismissive of the concerns implicit in the congressional questions. For example, in response to one of the questions regarding allegations of the withdrawal of funds from OTF, she replied, "#fakenews." To another inquiry regarding the lack of congressional notification for funding decisions, she cast doubt on the underlying assumption of the question, referring to "so called reprogramming." The negative reaction of USAGM officials to congressional concerns that were largely similar to those that they knew were also raised by [(b)(6); (b)(7)(C)] suggests they had a similar reaction to his concerns and there may have been at least some retaliatory motive in the decision to suspend [(b)(6); (b)(7)(C)] clearance.

(b)(5) Attorney-Client

(b)(5) Attorney-Client . Shortly after these exchanges, (b)(6); (b)(7)(C) began their effort to suspend the security clearance of (b)(6); (b)(7)(C) as well as those of the other five complainants.

OIG's analysis of the third *Carr* Factor— evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated—also suggests that the suspension of (b)(6); (b)(7)(C) clearance was retaliatory. For example, the background investigations of hundreds of other employees were conducted during the years when there was not a signed delegation MOU, yet the security clearances of only seven employees (all of whom were whistleblowers) were suspended.[33]

OIG's examination reveals that even though USAGM cited four different reasons to suspend the security clearance of (b)(6); (b)(7)(C) none of them relate to the adjudicative guidelines and thus do not constitute a legitimate basis for the suspension. Likewise, OIG found some evidence of a retaliatory motive and no evidence that USAGM took comparable action against individuals who were similarly situated but were not whistleblowers. Accordingly, USAGM cannot meet its burden to demonstrate by a preponderance of the evidence that it would have suspended (b)(6); (b)(7)(C) security clearance absent his protected disclosures.

Conclusion

(b)(6); (b)(7)(C) made several protected disclosures to USAGM officials when he raised concerns about the lack of funding for OTF, the spending freeze, budget reductions and reallocations, and the impacts of the communications ban. Shortly thereafter, USAGM suspended his security clearance.

USAGM could not demonstrate by a preponderance of the evidence that it would have suspended his clearance absent his protected disclosures. The four reasons cited in (b)(6); (b)(7)(C) suspension letter bear no relation to the adjudicative guidelines and USAGM failed to follow its own directive for suspending a clearance. In addition, OIG found evidence of retaliatory motive by individuals involved in the suspension and no evidence that USAGM took action against similarly situated individuals who were not whistleblowers.

[32] 5 C.F.R. § 359.406.

(b)(6); (b)(7)(C)

Pursuant to PPD-19, OIG may recommend that the agency reconsider the employee's Eligibility for Access to Classified Information and "take other corrective action to return the employee, as nearly as practicable and reasonable, to the position such employee would have held had the reprisal not occurred."

Prior to the completion of this investigation, USAGM reconsidered (b)(6); (b)(7)(C) eligibility for access to classified information and restored (b)(6); (b)(7)(C) security clearance. Nonetheless, USAGM should also consider other corrective action, including but not limited to formally rescinding the suspension letter and awarding him attorney's fees and other reasonable compensatory damages.

~~SENSITIVE BUT UNCLASSIFIED~~ June 14, 2021

MEMORANDUM

FROM: OIG – Jeffrey McDermott, Assistant Inspector General (b)(6); (b)(7)(C)

TO: USAGM – Kelu Chao, Acting Chief Executive Officer

SUBJECT: Report of Investigation Pursuant to Presidential Policy Directive 19
OIG Whistleblower Case 2020-0105 (b)(6); (b)(7)(C)

Presidential Policy Directive 19 (PPD-19) prohibits the taking of any action affecting an employee's eligibility for access to classified information as a reprisal for a protected disclosure.[1] PPD-19 requires that every agency have a review process that permits employees to appeal actions affecting eligibility for access to classified information they allege to be in violation of the directive. As part of the review process, the agency Inspector General shall conduct a review to determine whether an action affecting eligibility for access to classified information violated the directive, whether the agency should reconsider the action, and whether corrective action is warranted.

As described below, the Department of State (Department) Office of Inspector General (OIG) received a complaint from (b)(6); (b)(7)(C), who serves as the Executive Director at the U.S. Agency for Global Media (USAGM). (b)(6); (b)(7)(C) alleged that her security clearance was suspended after having made protected whistleblower disclosures. OIG's investigation found that (b)(6); (b)(7)(C) eligibility for access to classified information was suspended after she made protected disclosures and that USAGM did not demonstrate by a preponderance of the evidence that (b)(6); (b)(7)(C) security clearance would have been suspended absent her disclosures.

Allegation

On September 29, 2020, counsel for (b)(6); (b)(7)(C) along with five other senior management officials from USAGM, filed a complaint with OIG in accordance with PPD-19, alleging that USAGM suspended their security clearances after they raised concerns to their designated supervisors and USAGM management. (b)(6); (b)(7)(C) told OIG that she raised a concern about a

[1] PPD-19 defines a protected disclosure as "a disclosure of information by the employee to a supervisor in the employee's direct chain of command up to and including the head of the employing agency, to the Inspector General of the employing agency or Intelligence Community Element, to the Director of National Intelligence, to the Inspector General of the Intelligence Community, or to an employee designated by any of the above officials for the purpose of receiving such disclosures, that the employee reasonably believes evidences (i) a violation of any law, rule, or regulation; or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."

contractor performing inherently governmental functions, in violation of federal law. She stated that she raised this concern first to USAGM Vice President for Legal, Compliance, and Risk Management (b)(6); (b)(7)(C) and then to Chief Executive Officer (CEO) Michael Pack, Chief of Staff (b)(6); (b)(7)(C) and Deputy Chief of Staff (b)(6); (b)(7)(C) alleged that the suspension of her security clearance was in retaliation for her disclosures to these individuals.

OIG reviewed the complaint and determined that it contained sufficient details to allege a violation of the prohibition against retaliation for making a protected disclosure. Consequently, OIG initiated an investigation of the allegations.

Background

(b)(6); is a career civil servant who has worked at USAGM and its predecessors since 1992. In June 2019, (b)(6); was promoted to the Senior Executive Service (SES) as the Executive Director of USAGM. Her responsibilities include managing USAGM's internal workflow and official communications with other federal agencies; directing management functions and facilitating the CEO's responsibilities for formulating, coordinating, and communicating major policy decisions; leading the front office operations; and overseeing the Executive Secretariat office.

The position of Executive Director requires a Top Secret security clearance. (b)(6); (b)(7)(C) (b)(6); (b)(7)(C)

On June 4, 2020, Michael Pack was confirmed as USAGM's CEO. As Executive Director, (b)(6); (b)(7)(C) reported directly to the CEO until June 17, 2020, when (b)(6); (b)(7)(C) sent an email to USAGM senior management (including (b)(6); revoking various delegations and reassigning career staff. (b)(6); was assigned to report to (b)(6); (b)(7)(C) effective immediately. (b)(6); (b)(6); (b)(7)(C) Senior Advisor to the USAGM CEO, assumed (b)(6); (b)(7)(C) position after his departure in July 2020.

According to (b)(6); she first raised a concern about what she believed to be a violation of law during a meeting with (b)(6); (b)(7)(C) and Mr. Pack's special assistant in late June 2020. During this meeting, she raised concerns that a contractor (as opposed to a federal employee) was performing inherently governmental functions, such as approving and certifying the timesheets of front office staff and authorizing purchases of office supplies and equipment for the CEO's Office. (b)(6); believed that these were inherently governmental functions and that contractors were prohibited by law, regulation, and policy from performing them. According to

(b)(6); (b)(7)(C) responded that he would contact (b)(6); (b)(7)(C) for guidance about these issues.

(b)(6); (b)(7)(C) said that she also raised her concerns about the contractor performing inherently governmental functions during an August 7, 2020, meeting with Mr. Pack, (b)(6); (b)(7)(C) and (b)(6); (b)(7)(C) According to (b)(6); (b)(7)(C) Mr. Pack stated that he and his team would review the timekeeping issue.[2]

During his OIG interview, Mr. Pack acknowledged that there had been objections to many of the changes he attempted to implement during his tenure but denied any knowledge of specific concerns raised by (b)(6); (b)(7)(C) or any of the other alleged whistleblowers in this matter. However, Mr. Pack also acknowledged that members of his senior political staff, including (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) initially identified the individuals whose clearances should be suspended. Mr. Pack said he "assumed" that any purported whistleblower disclosures had not been a factor in their selections but did not articulate any steps he took to confirm this. OIG was unable to interview (b)(6); (b)(7)(C) .[3]

On August 12, 2020, (b)(6); (b)(7)(C) received a letter, signed by Mr. Pack, suspending her security clearance and placing her on paid administrative leave. The letter stated: "You are hereby notified, pursuant to Executive Order 12968 and other applicable law, policies, and procedures, that I certify it is in the interest of U.S. national security to suspend your security clearance, pending the outcome of an investigation effective immediately." On January 4, 2021, (b)(6); (b)(7)(C) was informed that she was required to return to duty on January 18, 2021, and presumably, her security clearance was reinstated.

USAGM Security Clearance Suspension Procedures

USAGM's policy and procedures for suspending security clearances are contained within its directive titled, *Personnel Security Management v.4*, which is largely based on Executive Order 12968.[4] The directive states that the Director of Security "acts as the ultimate authority (or designates an alternate) for the reduction, denial, suspension, or revocation of an individual's eligibility for access to classified national security information and/or an individual's eligibility to be employed in a government position based on a suitability or fitness determination."[5] Within the Office of Security, the Chief of the Personnel Security Division is given the responsibility to

[2] (b)(6); (b)(7)(C) told OIG that she did not recall (b)(6); specifically raising concerns about the contractor performing inherently governmental functions, but she did remember discussions about whether this contractor could certify timesheets.

[3] (b)(6); had departed federal service when OIG sent out interview requests, and OIG does not have the ability to compel individuals who have left federal service. (b)(6); did not respond to OIG's request for an interview. (b)(6); (b)(7)(C) agreed to an interview but asked that it be held after she departed federal service to accommodate her schedule. Shortly after departing federal service, she rescinded her agreement to sit for the interview.

[4] Executive Order 12968, Access to Classified Information, Aug. 4, 1995.

[5] USAGM, *Personnel Security Management v.4*, preface § 6(c)(7).

suspend security clearances.[6] The directive notes, however, that the Chief Executive Officer "may also exercise authority granted in 5 U.S.C. § 7532 to suspend without pay, and then remove, a USAGM employee when this action is deemed necessary in the interests of national security."

The directive states, "Suspension of a clearance, also known as administrative withholding, is appropriate when a significant question of security eligibility arises. Suspension is warranted, for example, when the security organization receives information indicating possible gross misconduct, criminal conduct, substance abuse, or a serious breach of integrity."[7] Security eligibility is defined as "a determination of eligibility for access to classified information" that "is a discretionary security decision based on judgments by appropriately trained adjudicative personnel."[8] Executive Order 12968 states that "determinations of eligibility for access to classified information shall be based on criteria established under this order."[9] Those criteria are the adjudicative guidelines issued by the Office of the Director of National Intelligence (ODNI), which are:

- Allegiance to the United States
- Foreign influence
- Foreign preference
- Sexual behavior
- Personal conduct
- Financial considerations
- Alcohol consumption
- Drug involvement
- Emotional, mental, and personality disorders
- Criminal conduct
- Security violations
- Outside activities
- Misuse of information technology systems.[10]

USAGM's directive further specifies that "upon receipt of information that raises questions concerning the personnel security fitness of an individual, [the Office of Security] shall immediately assess the security factors involved and shall take suitable action to ensure

[6] USAGM, *Personnel Security Management v.4*, preface § 6(d)(7).

[7] USAGM, *Personnel Security Management v.4*, ch. 11, § 10(b)(1).

[8] USAGM, *Personnel Security Management v.4*, appendix 1 (noting that "eligibility shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security.")

[9] Executive Order 12968, Access to Classified Information, Aug. 4, 1995, § 2.1(a).

[10] SEAD 4: National Security Adjudicative Guidelines, Dec. 10, 2016.

national security interests are protected."[11] In making such a determination, the Office of Security must "consider such factors as the conclusiveness and seriousness of the information developed, the employee's access to classified information, and the opportunity the position affords the employee to commit acts contrary to national security interests." If USAGM decides to suspend a security clearance temporarily pending an investigation and the suspension exceeds 10 days, the employee is entitled to notice in writing with a justification for the suspension.[12] USAGM's policy notes that "retaliation that affects eligibility for access to classified national security information is prohibited" and that USAGM officials shall not take or fail to take, or threaten to take or fail to take, any action affecting an employee's eligibility for access to classified national security information as a reprisal for a protected disclosure.[13]

Despite these policies, OIG found that no one who was trained in the adjudicative guidelines participated in the decision, preparation, or finalization of [redacted] suspension letter. USAGM's directive states that decisions regarding security clearances must be made by "appropriately trained adjudicative personnel" using the adjudicative guidelines.[14] However, in [redacted] case, no one who was trained in those guidelines, such as the Chief of the Personnel Security Division who ordinarily has the responsibility to suspend security clearances, was even consulted about the suspension.[15] Even if USAGM officials had questions about the ability of its Office of Security, they could have consulted with the Office of Personnel Management (OPM) and ODNI about the suspension, but they did not do so.

Legal Standard

As noted above, PPD-19 prohibits the taking of any action with respect to any employee's security clearance or access determination in retaliation for having made a protected whistleblower disclosure. In 2020, the Inspector General for the Intelligence Community issued procedures for how it would review allegations of retaliation under PPD-19.[16] These procedures specify that a complainant must demonstrate that: (a) he or she made a protected disclosure; (b) the agency took or failed to take, or threatened to take or fail to take, any action with respect to the complainant's security clearance or access determination; and (c) the protected disclosure was a contributing factor in the agency's decision to take or fail to take, or threaten to take or fail to take, the security clearance action.[17]

[11] USAGM, *Personnel Security Management v.4*, ch. 12, § 1(b).

[12] USAGM, *Personnel Security Management v.4*, ch. 12, § 2(a).

[13] USAGM, *Personnel Security Management v.4*, ch. 12, § 2(e)(1), (2).

[14] USAGM, *Personnel Security Management v.4*, appendix 1.

[15] USAGM, *Personnel Security Management v.4*, preface § 6(d)(7).

[16] Inspector General of the Intelligence Community Instruction 2020.001, *External Review Panel Procedures Pursuant to 50 U.S.C. § 3236 and Presidential Policy Directive/PPD-19* (Dec. 17, 2020).

[17] Instruction 2020.001 § 9(C)(2).

Although PPD-19 and these procedures do not specify how to determine whether a protected disclosure was a "contributing factor" in the adverse security clearance determination, similar language is used in the Whistleblower Protection Act, codified at 5 U.S.C. § 1221, which prohibits agencies from taking adverse personnel actions in retaliation for protected disclosures. Under the Whistleblower Protection Act, a complainant can establish that his or her protected disclosure was a contributing factor in the alleged retaliatory personnel action through either direct evidence or through circumstantial evidence that the official taking the adverse action knew of the disclosure and the action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the adverse action.[18]

If a complainant can demonstrate that he or she made a protected disclosure that was a contributing factor in the adverse determination, the burden shifts to the agency, which must "prove by a preponderance of the evidence that it would have taken the same action in the absence of such disclosure, giving the utmost deference to the agency's assessment of the particular threat to the national security interests of the United States in the instant matter."[19] Federal courts have looked to three factors (commonly called the *Carr* factors) when determining whether an agency has met its burden: the strength of the agency's evidence in support of its decision; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.[20] The courts weigh these three factors together to determine whether, as a whole, the agency has met its burden, and a strong showing on one factor may be sufficient.[21]

Complainant's Burden

Based on its investigation, OIG determined that [(b)(6);] made protected disclosures when she raised concerns with Mr. Pack and other senior officials about a contractor performing inherently governmental functions in violation of federal law. Under PPD-19, a protected disclosure is defined as a disclosure of information by the employee to, among other persons, a supervisor in the employee's chain of command, including the head of the agency, that the employee reasonably believes is a violation of law, rule, or regulation or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.[22] Based on OIG's review of documents and interviews, there is clear evidence

[18] 5 U.S.C. § 1221(e)(1)(A),(B).

[19] Instruction 2020.001 § 9(C)(2)(d).

[20] *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (citing *Geyer v. Dep't of Justice*, 7 M.S.P.R. 682, 688, aff'd, 116 F.3d 1497 (Fed. Cir. 1997)).

[21] *Lucchetti v. Dep't of Interior*, 2017 MSPB LEXIS 743, *11 (M.S.P.B. Feb 15, 2017) (*citing Phillips v. Dep't of Transportation*, 113 M.S.P.R. 73, 77 (2010)).

[22] PPD-19 § F(5).

that [redacted] made a disclosure that fit the definition of protected disclosure to a supervisor in her chain of command. [redacted] stated that, during a meeting in late June 2020, she raised concerns to [redacted] then her first line supervisor, that a contractor was certifying the timesheets of Federal employees and making purchases of office supplies and equipment in violation of the Federal Acquisition Regulation (FAR).[23] [redacted] told [redacted] that he would raise these issues with [redacted] stated that she again raised these concerns to Mr. Pack, [redacted] during a meeting on August 7, 2020. These conversations constitute protected disclosures because she raised them to a supervisor and others in her chain of command, and because they concerned information [redacted] reasonably believed constituted violations of federal regulations. [redacted] reasonably believed that a contractor certifying the timesheets violated the FAR because, according to [redacted] the contractor approached her for help because the contractor knew that she could not perform inherently governmental functions.

While OIG found no direct evidence that [redacted] disclosures were a contributing factor in the suspension of her security clearance, there is circumstantial evidence that the individuals involved in the suspension of her clearance knew of her disclosure and that they moved to suspend her clearance shortly after she made the protected disclosures. As stated above, Mr. Pack was the official who signed the letter suspending [redacted] security clearance, and [redacted] disclosed her concern about the contractor performing inherently governmental functions to Mr. Pack, at an August 7, 2020, meeting, less than a week before he signed the letter. In addition, USAGM identified [redacted] as having participated in the decision to suspend [redacted] security clearance. Mr. Pack told OIG that his staff, particularly [redacted] proposed the suspension of the six complainants' security clearances and that he concurred with their proposal, but left the details of the suspensions up to them. Both Mr. Pack and [redacted] were among the recipients of [redacted] protected disclosures, and they participated in the decision to suspend her clearance on August 12, 2020, shortly after her disclosure.

Accordingly, OIG concludes that there is circumstantial evidence that [redacted] disclosures were a contributing factor in the suspension of her clearance because USAGM officials involved in the suspension were aware of her disclosures and took the action within days of the disclosures, a period of time such that a reasonable person would conclude that the disclosures were a contributing factor in the adverse action.

[23] The FAR states that agencies may not use third-party contractors for the performance of inherently governmental functions, including the direction and control of federal employees and determining what supplies or services are to be acquired by the Government. 48 C.F.R. 7.503(c)(7), (20).

Agency's Burden

Because (b)(6); (b)(7)(C) met her burden, USAGM must demonstrate by a preponderance of the evidence that it would have suspended (b)(6); (b)(7)(C) clearance even absent her protected disclosures.

As noted above, the courts have traditionally reviewed three factors in determining whether an adverse action resulted from a protected disclosure.[24] The first factor that the courts use to weigh whether an agency has met its burden is the strength of the evidence in support of the adverse action. In examining this factor, OIG examines the evidence supporting the adverse action and whether there were "legitimate reasons" for the personnel action.[25]

The suspension letter cited several reasons for the suspension of (b)(6); (b)(7)(C) clearance:

1) Her background investigation was conducted by USAGM when USAGM lacked the proper authority to investigate and perform background checks.
2) In her senior leadership role, she failed to take necessary corrective action to remedy personnel and other security concerns identified during the OPM and ODNI reviews, and she "knowingly and willfully granted eligibility for, or allowed access to, classified information in violation of the law and its implementing regulations.
3) The Office of Risk Management (ORM) identified her, in her capacity as Executive Director, as having substantial involvement in creating risk within the agency.

OIG addresses each of these justifications individually below.

(b)(6); (b)(7)(C) Background Investigation

The suspension letter alleged that (b)(6); (b)(7)(C) background investigation "was done by USAGM when USAGM lacked the proper authority to investigate and perform background checks." This statement presumably refers to the fact that USAGM performs background checks and grants clearances based on a delegation of authority from the OPM, and that in 2012, USAGM did not return the signed memorandum of understanding (MOU) to OPM granting the delegation.

(b)(6); (b)(7)(C)

[24] *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (citing *Geyer v. Dep't of Justice*, 7 M.S.P.R. 682, 688, aff'd, 116 F.3d 1497 (Fed. Cir. 1997)).

[25] *Baker v. Dep't of Defense*, 2016 MSPB LEXIS 4567 (M.S.P.B Aug. 4, 2016).

Under the principles governing federal security clearances, as well as USAGM's Personnel Security Management policy, a security clearance generally remains valid unless the employee separates from service or an adverse action is taken to suspend or revoke the clearance, even if a reinvestigation does not occur in a timely fashion. As such, any doubt about the validity of USAGM's ability to perform background checks was not a legitimate reason to suspend (b)(6); (b)(7)(C) clearance. Furthermore, at no point, did OPM or ODNI direct USAGM to suspend any clearances that had been granted because of the fact of the unsigned MOU. Thus, USAGM's assertion that (b)(6); (b)(7)(C) clearance must be suspended because it was conducted at a time when USAGM lacked the proper authority is an illegitimate basis to suspend her clearance.

Failure to Remedy Personnel Security Concerns

The suspension letter alleged that (b)(6); had failed to correct longstanding deficiencies in USAGM's personnel security program and that in failing to do so, she "knowingly and willfully granted eligibility for, or allowed access to, classified information in violation of the law and its implementing regulations." USAGM provided several program reviews of USAGM's personnel security program conducted by OPM and ODNI as appendices to the suspension letter. These reviews highlighted numerous deficiencies in USAGM's program and directed it to undertake corrective action to address these deficiencies.

According to (b)(6); (b)(7)(C) position description, she was responsible for "coordinating the workflow of the agency internally, and standing up and overseeing an Executive Secretariat staff, among other Executive Secretary functions." The position of Executive Secretariat is not responsible for managing the personnel security program, which reports to a separate executive, the Director of Management Services. According to (b)(6); the only role that she played relating to the deficiencies identified by OPM and ODNI was an administrative role, limited to tasking the underlying issues to the responsible offices. Given this administrative role, USAGM's allegation that (b)(6); failed to correct personnel security concerns is likewise not a legitimate basis to suspend her security clearance.[26]

Risk Management Issues

The suspension letter also noted that the Office of Risk Management (ORM) identified (b)(6); (b)(7)(C) (b)(6); in her capacity as Executive Director, as a risk to USAGM. However, USAGM's Fiscal Year

[26] Even if (b)(6); was responsible for managing the personnel security program, any deficiencies in doing so would constitute a performance issue. Performance issues are not included in the adjudicative guidelines and generally are not relevant to the granting or denial of a clearance. Indeed, in December 2020, USAGM presented this same set of facts to two trained security clearance adjudicators who determined that "there are no security issues that fall under the Security Executive Agency Directive (SEAD 4) and Executive Order 12968." The adjudicators determined that "these issues are all performance issues which fall under the Office of Human Resources."

(FY) 2019 and FY 2020 Enterprise Risk Profiles do not include the Executive Secretariat office or its activities as an identified risk among the enterprise risks to USAGM. In fact, the "Risk Response Plans" for Fiscal Year 2019 included the creation of the Executive Secretariat as a risk mitigation effort "to improve Agency business processes and workflows and diminish stove-piping."

In support of the assertion that ORM identified [redacted] as a risk to USAGM, the suspension letter included a document titled "Executive Secretariat – Risk Analysis", purporting to contain a risk profile for [redacted] According to USAGM's Chief Risk Officer, [redacted] first contacted him on July 24, 2020, and instructed him to prepare an analysis of the risk presented by several of the complainants and another individual and then subsequently expanded that list to include [redacted] and the remaining complainants. [redacted] told him to include any negative information that he had heard about the individuals regardless of whether he could factually verify the information. [redacted] told him to add even rumors that he "heard in the halls." This ORM official assigned the drafting of [redacted] risk analysis to his colleague, who told OIG that she obtained information about [redacted] from [redacted] subordinate and did not corroborate the information. The ORM official sent [redacted] the Risk Analysis document for [redacted] on August 4, 2020. He then sent her a revised and final version of the Risk Analysis on August 11, 2020, after, as will be discussed in further detail with respect to the second *Carr* factor below, [redacted] asked for "harsher language" to be added to the Risk Analysis document.

The Risk Analysis document primarily focuses on concerns with [redacted] management style. The Risk Analysis alleged that [redacted] actions have contributed to "low staff morale and give a harmful perception of the front office." The only reference to the Enterprise Risk Profiles is not specific to [redacted] or her office. For example, the document states that "[redacted] actions directly contributed to risks on both the FY19 and FY20 Enterprise Risk Profiles, 'Resistance to change/Improved business processes' and 'Workforce Risk-Leadership and Retention', respectively. Both risks are the direct results of executive leaders like [redacted] not adopting and/or adapting to improved business processes, data-driven decision-making, and effective leadership skills. Furthermore, [redacted] lack of transparency, silo-focused workstyle, and counterproductive management habits will continue to plague the Agency until these risks are fully mitigated." However, as noted above, much of the information in the Risk Analysis was based on office gossip and uncorroborated statements from [redacted] subordinate, which diminishes the weight of the evidence. Even if the information was true, neither [redacted] office nor [redacted] as an individual were included in the Fiscal Year 2019 and Fiscal Year 2020 Risk Profiles. At most, the issues discussed in the Risk Analysis document are performance issues, which as noted earlier, are not pertinent to the adjudicative guidelines and thus not a legitimate reason for the suspension of a clearance.

The second *Carr* factor examines the existence and strength of any motive to retaliate on the part of the individuals who were involved in the decision. OIG found some evidence that CEO Pack and his team had motive to retaliate against [(b)(6);]. Shortly after [(b)(6);] August 7 disclosure, [(b)(6); (b)(7)(C)]contacted the ORM official who drafted [(b)(6);]Risk Analysis and requested that ORM revise her Risk Analysis to add "harsher language" about [(b)(6); (b)(7)(C)] leadership and how she was "inhibiting the Front Office from doing their job," and to add that [(b)(6); (b)(7)(C)]should be removed from her position.[27] The ORM official revised the Risk Analysis document to include the recommendation that [(b)(6);] be removed as directed by [(b)(6); (b)(7)(C)]and USAGM included this version as an attachment to [(b)(6);] suspension letter.

(b)(5) Attorney-Client

[(b)(5) Attorney-Client] Shortly after these exchanges, [(b)(6); (b)(7)(C)] Newman began their effort to suspend the security clearance of [(b)(6);], as well as those of the other five complainants.

OIG's analysis of the third *Carr* Factor— evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated—also suggests that the suspension of [(b)(6);] clearance was retaliatory. For example, the background investigations of hundreds of other employees were conducted during the years when there was not a signed delegation memorandum, yet the security clearances of only seven employees (all of whom were whistleblowers) were suspended.[29]

OIG's examination of the three *Carr* factors found that even though USAGM cited several different reasons to suspend the security clearance of [(b)(6);]none of them relate to the adjudicative guidelines and thus do not constitute a legitimate basis for the suspension. Likewise, OIG found some evidence of a retaliatory motive and no evidence that USAGM took comparable action against individuals who were similarly situated but were not whistleblowers. Accordingly, USAGM cannot meet its burden to demonstrate by a preponderance of the evidence that it would have suspended [(b)(6);] security clearance absent her protected disclosures.

[27] The ORM official's initial Risk Analysis draft recommended that [(b)(6);]and the Executive Secretariat portfolio should be reviewed to determine whether the [office] still serves the same purpose now that the Board has been dissolved."

[28] 5 C.F.R. § 359.406.

(b)(6); (b)(7)(C)

Conclusion

(b)(6); (b)(7)(C) made protected disclosures in June and August 2020 when she raised a concern to her supervisor and to Mr. Pack and other senior officials regarding a contractor performing inherently governmental functions in violation of federal law. Shortly thereafter, USAGM suspended her security clearance.

USAGM could not demonstrate by a preponderance of the evidence that it would have suspended her clearance absent her protected disclosures. The reasons cited in (b)(6); (b)(7)(C) security clearance suspension letter bear no relation to the adjudicative guidelines and USAGM failed to follow its own directive for suspending a clearance. In addition, OIG found some evidence of retaliatory motive by individuals involved in the suspension and no evidence that USAGM took action against similarly situated individuals who were not whistleblowers.

Pursuant to PPD-19, OIG may recommend that the agency reconsider the employee's eligibility for access to classified information and "take other corrective action to return the employee, as nearly as practicable and reasonable, to the position such employee would have held had the reprisal not occurred."

Prior to the completion of this investigation, USAGM reconsidered (b)(6); (b)(7)(C) eligibility for access to classified information and restored (b)(6); (b)(7)(C) security clearance. Nonetheless, USAGM should also consider other corrective action, including but not limited to formally rescinding the suspension letter and awarding her attorney's fees and other reasonable compensatory damages.

Office of Inspector General
United States Department of State

~~SENSITIVE BUT UNCLASSIFIED~~ June 14, 2021

MEMORANDUM

(b)(6); (b)(7)(C)

FROM: OIG – Jeffrey McDermott, Assistant Inspector General

TO: USAGM – Kelu Chao, Acting Chief Executive Officer

SUBJECT: Report of Investigation Pursuant to Presidential Policy Directive 19
OIG Whistleblower Case 2020-0106 [(b)(6); (b)(7)(C)]

Presidential Policy Directive 19 (PPD-19) prohibits the taking of any action affecting an employee's eligibility for access to classified information as a reprisal for a protected disclosure.[1] PPD-19 requires that every agency have a review process that permits employees to appeal actions affecting eligibility for access to classified information they allege to be in violation of the directive. As part of the review process, the agency Inspector General shall conduct a review to determine whether an action affecting eligibility for access to classified information violated the directive, whether the agency should reconsider the action, and whether corrective action is warranted.

As described below, the Department of State Office of Inspector General (OIG) received a complaint from [(b)(6); (b)(7)(C)] the Director of Management Services for the U.S. Agency for Global Media (USAGM). [(b)(6); (b)(7)(C)] alleged that USAGM suspended her security clearance after she made protected whistleblower disclosures. OIG's investigation found that [(b)(6);] [(b)(6);] eligibility for access to classified information was suspended after she made protected disclosures, and that USAGM did not demonstrate by a preponderance of the evidence that it would have suspended [(b)(6); (b)(7)(C)] security clearance absent her disclosure.

Allegation

On September 29, 2020, counsel for [(b)(6); (b)(7)(C)] along with five other senior management officials from USAGM, filed a complaint with OIG in accordance with PPD-19, alleging that USAGM suspended their security clearances after they raised concerns to their designated supervisors and USAGM leadership. [(b)(6); (b)(7)(C)] told OIG that she specifically raised concerns

[1] PPD-19 defines a protected disclosure as "a disclosure of information by the employee to a supervisor in the employee's direct chain of command up to and including the head of the employing agency, to the Inspector General of the employing agency or Intelligence Community Element, to the Director of National Intelligence, to the Inspector General of the Intelligence Community, or to an employee designated by any of the above officials for the purpose of receiving such disclosures, that the employee reasonably believes evidences (i) a violation of any law, rule, or regulation; or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."

regarding journalist visa renewals, improper Schedule C hiring, and the public disclosure of USAGM security vulnerabilities to the USAGM Chief of Staff, [(b)(6); (b)(7)(C)] and Deputy Chief of Staff, [(b)(6); (b)(7)(C)] her second- and first-line supervisors, respectively.

[(b)(6); (b)(7)(C)] alleges that the suspension of her security clearance was in retaliation for her complaints to the Chief of Staff and Deputy Chief of Staff. OIG reviewed the complaint and determined that it contained sufficient details to allege a violation of the prohibition against retaliation for making a protected disclosure. Consequently, OIG initiated an investigation of the allegations.

Background

[(b)(6); (b)(7)(C)] was a career civil servant who had worked at USAGM and its predecessors since 1982. [(b)(6); (b)(7)(C)] held various positions under several administrations during her time at USAGM. In late 2015, [(b)(6); (b)(7)(C)] assumed the position of Director of Management Services, a newly created senior management role that combined the oversight of USAGM offices responsible for the Offices of Human Resources, Contracts, Security, Civil Rights, Administration, and Workforce Support and Development. As Director of Management Services, [(b)(6); (b)(7)(C)] managed approximately 100 USAGM employees.

The position of Director of Management Services requires a Top Secret security clearance. (b)(6); (b)(7)(C)

The U.S. Senate confirmed Michael Pack as USAGM Chief Executive Officer (CEO) on June 4, 2020. On June 17, 2020, Mr. Pack's Chief of Staff, [(b)(6); (b)(7)(C)] sent an email to USAGM senior staff to announce changes to the leadership structure and revoke prior delegations of CEO authority. [(b)(6); (b)(7)(C)] as Director of Management Services, now reported to the Deputy Chief of Staff, [(b)(6); (b)(7)(C)] The email also cautioned staff that "no actions are to be taken" and "no external communications are to be made" without "explicit approval" from the Chief Operating Officer; Vice President for Legal, Compliance, and Risk Management; Deputy Chief of Staff; or Chief of Staff.

(b)(6); (b)(7)(C) told OIG that in late June 2020, she approached (b)(6); (b)(7)(C) regarding several J-1 visa extension requests that needed CEO approval.[2] (b)(6); (b)(7)(C) explained that the USAGM Office of Management Services routinely sought CEO approval prior to renewal of visa extensions, but that generally these requests were *pro forma*. (b)(6); (b)(7)(C) said she approached (b)(6); (b)(7)(C) when she did not receive the expected CEO approval. They told (b)(6); (b)(7)(C) that leadership did not have enough information about J1 visa renewals to decide on the extension requests. (b)(6); (b)(7)(C) explained to (b)(6); (b)(7)(C) that the employees seeking renewal had no performance or security concerns that might have precluded extension approvals and that journalists awaiting J-1 visa extensions could be endangered if they were forced to return to their home countries. (b)(6); (b)(7)(C) gave an example of a Pakistani journalist living in the U.S. who risked grave danger if sent back to Pakistan, which could occur if the CEO refused to approve the necessary paperwork. Additionally, (b)(6); (b)(7)(C) said she told (b)(6); (b)(7)(C) that visa renewal delays could negatively impact USAGM's credibility and its ability to recruit foreign journalists in the future.

(b)(6); (b)(7)(C) said when she was unable to get the needed approval after discussions with Ms. (b)(6); (b)(7)(C), she raised the issue with (b)(6); (b)(7)(C) USAGM's Chief Operating Officer (COO), and with her former supervisor, the Deputy Director for Operations. On July 9, 2020, (b)(6); (b)(7)(C) sent an email to the Deputy Director for Operations, which was shared with USAGM senior leadership, expressing urgent concern for a Chinese journalist whose work for Voice of America had made him a target of the Chinese government and whose life had been threatened. This journalist's transfer to the U.S. was already approved by the Department of State, but the transfer could not occur until the USAGM CEO approved the J-1 visa. (b)(6); (b)(7)(C) said that despite repeated discussions with (b)(6); (b)(7)(C) no CEO approval was forthcoming. Both (b)(6); (b)(7)(C) confirmed to OIG that (b)(6); (b)(7)(C) had raised concerns regarding the J-1 visa renewals.[3]

(b)(6); (b)(7)(C) told OIG that she also raised concerns with (b)(6); (b)(7)(C) about the improper use of the Schedule C hiring authority.[4] (b)(6); (b)(7)(C) said (b)(6); (b)(7)(C) asked her to complete documentation and processing for four new Schedule C hires in early August 2020, but (b)(6); (b)(7)(C) and her staff were unable to process the request because USAGM did not have OPM approval. (b)(6); (b)(7)(C) said she spoke directly to a contact at OPM and was told that OPM approval was pending. (b)(6); (b)(7)(C) said she relayed the update to (b)(6); (b)(7)(C) and told them paperwork would have to wait until approval. However, (b)(6); (b)(7)(C) said Ms.

[2] A J-1 visa is a classification of a visa for individuals participating in an approved program, such as teaching, instructing, studying consulting, or those who possess a special skill.

[3] OIG was unable to interview (b)(6); (b)(7)(C) who had departed from federal service during this investigation.

[4] Schedule C employees are those who are excepted from the competitive service because they have policy-determining responsibilities or are required to serve in a confidential relationship to a key official. Schedule C appointments require advance approval from the White House Office of Presidential Personnel and the Office of Personnel Management (OPM).

(b)(6); (b)(7)(C) ignored this warning, and she believed the new hires began working without proper OPM approval. (b)(6); (b)(7)(C) said she did not know whether OPM ultimately granted approval.

Finally, (b)(6); (b)(7)(C) said OPM provided CEO Pack with a follow-up review of the USAGM suitability program in July 2020. According to the OPM report, "these reviews are conducted on, among others, agencies to which OPM has granted delegated investigative authority to conduct their own investigations and/or adjudications and agencies with a documented history of performance concerns." (b)(6); (b)(7)(C) explained to OIG that the report detailed security vulnerabilities at USAGM. On August 4, 2020, CEO Pack issued a press release regarding the findings that included a link to the OPM report, making public these deficiencies. (b)(6); (b)(7)(C) explained that USAGM normally would not publish a report about internal security procedures. (b)(6); (b)(7)(C) emailed (b)(6); (b)(7)(C) on August 4, 2020, expressing her serious concern about this public release because she believed that the release could increase USAGM's vulnerability to "bad actors."

On August 12, 2020, (b)(6); (b)(7)(C) received a letter, signed by CEO Pack, suspending her security clearance and placing her on paid administrative leave. The letter says: "I certify it is in the interest of U.S. national security to suspend your security clearance, pending the outcome of an investigation effective immediately." (b)(6); (b)(7)(C) (b)(6); (b)(7)(C)

USAGM Security Clearance Suspension Procedures

USAGM's policy and procedures for suspending security clearances are contained within its directive entitled, *Personnel Security Management v.4*, which is largely based on Executive Order 12968.[6] The directive states that the Director of Security "acts as the ultimate authority (or designates an alternate) for the reduction, denial, suspension, or revocation of an individual's eligibility for access to classified national security information and/or an individual's eligibility to be employed in a government position based on a suitability or fitness determination."[7] Within the Office of Security, the Chief of the Personnel Security Division is given the responsibility to suspend security clearances.[8] The directive notes, however, that the CEO "may also exercise authority granted in 5 U.S.C. § 7532 to suspend without pay, and then remove a USAGM employee when this action is deemed necessary in the interests of national security."

(b)(6); (b)(7)(C)

[6] Executive Order 12968, Access to Classified Information, Aug. 4, 1995.

[7] USAGM, *Personnel Security Management v.4*, preface § 6(c)(7).

[8] USAGM, *Personnel Security Management v.4*, preface § 6(d)(7).

The directive states, "Suspension of a clearance, also known as administrative withholding, is appropriate when a significant question of security eligibility arises. Suspension is warranted, for example, when the security organization receives information indicating possible gross misconduct, criminal conduct, substance abuse, or a serious breach of integrity."[9] Security eligibility is defined as "a determination of eligibility for access to classified information" that "is a discretionary security decision based on judgments by appropriately trained adjudicative personnel."[10] Executive Order 12968 states that "determinations of eligibility for access to classified information shall be based on criteria established under this order."[11] Those criteria are the adjudicative guidelines issued by the Office of the Director of National Intelligence (ODNI), which are:

- Allegiance to the United States
- Foreign influence
- Foreign preference
- Sexual behavior
- Personal conduct
- Financial considerations
- Alcohol consumption
- Drug involvement
- Emotional, mental, and personality disorders
- Criminal conduct
- Security violations
- Outside activities
- Misuse of information technology systems.[12]

USAGM's directive further specifies that "upon receipt of information that raises questions concerning the personnel security fitness of an individual, [the Office of Security] shall immediately assess the security factors involved and shall take suitable action to ensure national security interests are protected."[13] In making such a determination, the Office of Security must "consider such factors as the conclusiveness and seriousness of the information developed, the employee's access to classified information, and the opportunity the position

[9] USAGM, *Personnel Security Management v.4*, ch. 11, § 10(b)(1).

[10] USAGM, *Personnel Security Management v.4*, appendix 1 (noting that "eligibility shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security.")

[11] Executive Order 12968, Access to Classified Information, Aug. 4, 1995, § 2.1(a).

[12] SEAD 4: National Security Adjudicative Guidelines, Dec. 10, 2016.

[13] USAGM, *Personnel Security Management v.4*, ch. 12, § 1(b).

affords the employee to commit acts contrary to national security interests." If USAGM decides to suspend a security clearance temporarily pending an investigation and the suspension exceeds 10 days, the employee is entitled to notice in writing with a justification for the suspension.[14] USAGM's policy notes that "retaliation that affects eligibility for access to classified national security information is prohibited" and that USAGM officials shall not take or fail to take, or threaten to take or fail to take, any action affecting an employee's eligibility for access to classified national security information as a reprisal for a protected disclosure.[15]

Despite these policies, OIG found that no one who was trained in the adjudicative guidelines participated in the decision, preparation, or finalization of [(b)(6); (b)(7)(C)]suspension letter. USAGM's directive states that decisions regarding security clearances must be made by "appropriately trained adjudicative personnel" using the adjudicative guidelines.[16] However, in [(b)(6); (b)(7)(C)]case, no one who was trained in those guidelines, such as the Chief of the Personnel Security Division who ordinarily has the responsibility to suspend security clearances, was even consulted about the suspension.[17] Even if USAGM officials had questions about the ability of its Office of Security, they could have consulted with OPM and ODNI about the suspension, but they did not do so.

Legal Standards

As noted above, PPD-19 prohibits the taking of any action with respect to any employee's security clearance or access determination in retaliation for having made a protected whistleblower disclosure. In 2020, the Inspector General for the Intelligence Community issued procedures for how it would review allegations of retaliation under PPD-19.[18] These procedures specify that a complainant must demonstrate that: (a) he or she made a protected disclosure; (b) the agency took or failed to take, or threatened to take or fail to take, any action with respect to the complainant's security clearance or access determination; and (c) the protected disclosure was a contributing factor in the agency's decision to take or fail to take, or threaten to take or fail to take, the security clearance action.[19]

Although PPD-19 and these procedures do not specify how to determine whether a protected disclosure was a "contributing factor" in the adverse security clearance determination, similar language is used in the Whistleblower Protection Act, codified at 5 U.S.C. § 1221, which

[14] USAGM, *Personnel Security Management v.4*, ch. 12, § 2(a).

[15] USAGM, *Personnel Security Management v.4*, ch. 12, § 2(e)(1), (2).

[16] USAGM, *Personnel Security Management v.4*, appendix 1.

[17] USAGM, *Personnel Security Management v.4*, preface § 6(d)(7).

[18] Inspector General of the Intelligence Community Instruction 2020.001, *External Review Panel Procedures Pursuant to 50 U.S.C. § 3236 and Presidential Policy Directive/PPD-19* (Dec. 17, 2020).

[19] Instruction 2020.001 § 9(C)(2).

prohibits agencies from taking adverse personnel actions in retaliation for protected disclosures. Under the Whistleblower Protection Act, a complainant can establish that his or her protected disclosure was a contributing factor in the alleged retaliatory personnel action through either direct evidence or through circumstantial evidence that the official taking the adverse action knew of the disclosure and the action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the adverse action.[20]

If a complainant can demonstrate that he or she made a protected disclosure that was a contributing factor in the adverse determination, the burden shifts to the agency, which must "prove by a preponderance of the evidence that it would have taken the same action in the absence of such disclosure, giving the utmost deference to the agency's assessment of the particular threat to the national security interests of the United States in the instant matter."[21] Federal courts have looked to three factors (commonly called the *Carr* factors) when determining whether an agency has met its burden: the strength of the agency's evidence in support of its decision; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.[22] The courts weigh these three factors together to determine whether, as a whole, the agency has met its burden, and a strong showing on one factor may be sufficient.[23]

Complainant's Burden

(b)(6); (b)(7)(C) told OIG that she made protected disclosures to USAGM senior leadership regarding what she believed to be CEO Pack's gross mismanagement of the agency and issues related to substantial and specific dangers to public health or safety. Under PPD-19, a protected disclosure is defined as a disclosure of information by the employee to, among other persons, a supervisor in the employee's chain of command, including the head of the agency, that the employee reasonably believes is a violation of law, rule, or regulation or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.[24] Based on OIG's review of documents and interviews, there is clear evidence

[20] 5 U.S.C. § 1221(e)(1)(A), (B).

[21] Instruction 2020.001 § 9(C)(2)(d).

[22] *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (citing *Geyer v. Dep't of Justice*, 7 M.S.P.R. 682, 688, aff'd, 116 F.3d 1497 (Fed. Cir. 1997)).

[23] *Lucchetti v. Dep't of Interior*, 2017 MSPB LEXIS 743, *11 (M.S.P.B. Feb 15, 2017) (*citing Phillips v. Dep't of Transportation*, 113 M.S.P.R. 73, 77 (2010)).

[24] PPD-19 § F(5).

that [(b)(6); (b)(7)(C)] made disclosures that fit the definition of "protected disclosure."[25] Additionally, based on circumstantial evidence, these disclosures were a contributing factor to the suspension of [(b)(6); (b)(7)(C)] security clearance.

[(b)(6); (b)(7)(C)] concerns regarding J-1 visa renewals constitute a protected disclosure under PPD-19 because she brought forth the concerns to her supervisors, [(b)(6); (b)(7)(C)] that involved what she reasonably considered to be a substantial and specific danger to public health or safety. [(b)(6); (b)(7)(C)] specifically cited delays impacting a journalist targeted by the Chinese government and a Pakistani journalist who feared persecution if forced to return to her home country. These specific examples demonstrate a reasonable belief that these journalists and others may be subject to danger due to J-1 visa renewal delays. Additionally, [(b)(6); (b)(7)(C)] told OIG that recruiting foreign journalists was critical to USAGM programming and delays in the visa renewals by CEO Pack were acts of gross mismanagement. Gross mismanagement is a "management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission."[26] [(b)(6); (b)(7)(C)] said, based on her 39 years of experience with USAGM, such delays would cause harm to USAGM's reputation, making it difficult to hire journalists in the future.[27] As Director of Management Services, [(b)(6); (b)(7)(C)] was responsible for offices that hired journalists and handled J-1 visa approvals and would recognize the impact delays would have on USAGM's ability to accomplish its mission.

[(b)(6); (b)(7)(C)] concern regarding CEO Pack's disclosure of internal security vulnerabilities was also a protected disclosure. [(b)(6); (b)(7)(C)] raised the concerns to her supervisors, [(b)(6); (b)(7)(C)] [(b)(6); (b)(7)(C)], and she had a reasonable belief that CEO Pack's disclosure of the OPM report was an act of gross mismanagement and had the potential to create a substantial and specific danger to public health or safety. [(b)(6); (b)(7)(C)] said that releasing the report of the OPM suitability program review could expose USAGM to "bad actors" who would prey on its security vulnerabilities.[28] The OPM report did not include sensitivity markings but does include a caution

[25] [(b)(6);] told OIG that she also talked to the Deputy Chief of Staff and Chief of Staff about hiring concerns using Schedule C authority. Emails reviewed by OIG show that [(b)(6);] did discuss Schedule C hiring and noted that USAGM needed OPM approval to move forward. However, nothing in the emails shows [(b)(6);] raising any concerns that would rise to the level of a protected disclosure and the Deputy Chief of Staff said she did not recall [(b)(6);] raising concerns regarding Schedule C hiring.

[26] *White v. Dep't of the Air Force*, 391 F.3d 1377, 1382 (Fed. Cir., Dec. 15, 2004). Gross mismanagement must be more than de minimis wrongdoing or negligence and does not include management decisions that are merely debatable. *See Wood v. Dep't of Defense*, 100 M.S.P.R. 133, P11 (Sept. 1, 2005).

[27] A whistleblower does not need to prove the actual violation (that the mismanagement did adversely impact the agency's mission) but that the matter disclosed was one which a reasonable person in her position believes evidences gross mismanagement. *See Mogyorossy v. Dep't of the Air Force*, 96 M.S.P.R. 652, 658 (Aug. 19, 2004).

[28] [(b)(6);] email states: "I want to register my concerns over the release of the report from OPM's follow-up review of USAGM's suitability program....To provide details about deficiencies in our program to the public increases the likelihood that sensitive information may fall into the hands of 'bad actors,' or those that may have an interest in using our vulnerabilities for their own interests."

label for distribution[29] and a header that notes its exemption from public disclosure under the Freedom of Information Act (FOIA) due to law enforcement privilege.[30] The report specifically cites an exemption for information compiled for law enforcement purposes that would disclose techniques or procedures that could reasonably be expected to risk circumvention of the law or could reasonably be expected to endanger the life or physical safety of any individual.[31] Given [(b)(6); (b)(7)(C)]role in overseeing the Office of Security, she was thus able to recognize the impact of the public release of sensitive security information. Additionally, the OPM report that CEO Pack released contained FOIA markings indicating that it would be exempt from public disclosure because of the risk of circumvention of the law and danger to life and safety. Therefore, [(b)(6); (b)(7)(C)]belief was reasonable.

While OIG found no direct evidence that [(b)(6); (b)(7)(C)]disclosure was a contributing factor in the suspension of her security clearance, there is circumstantial evidence that the individuals involved in the suspension of her clearance knew of her disclosures and that they moved to suspend her clearance shortly after she made protected disclosures.

As noted above, CEO Pack signed [(b)(6); (b)(7)(C)]notice of the suspension of her security clearance. Mr. Pack told OIG that his staff had recommended suspending the security clearances of the six complainants and that he concurred with their proposal but left the details of the suspensions up to them.[32] Mr. Pack identified the staff involved as [(b)(6); (b)(7)(C) [(b)(6); (b)(7)(C)]identified by CEO Pack as a decisionmaker in the security clearance suspensions, was in [(b)(6); (b)(7)(C)]s chain of command and the direct recipient of her protected disclosures. [(b)(6); (b)(7)(C)]raised concerns about J-1 visas in late June 2020 and the release of the OPM suitability program review in early August 2020. CEO Pack, based on advice from his team, suspended [(b)(6); (b)(7)(C)]clearance on August 12, 2020. Accordingly, OIG concludes that there is circumstantial evidence that [(b)(6); (b)(7)(C)]protected disclosures were contributing factors in the suspension of her clearance because USAGM officials involved in the suspension were aware of her disclosures and took the action within days of her disclosures. Therefore, [(b)(6); (b)(7)(C)]has met her burden by providing

[29] The first page of the OPM report notes: "CAUTION – This report has been distributed to Federal officials who are responsible for the administration of the reviewed program. This report is not to be released to the public or other personnel who do not have a valid "need-to-know" without prior approval of an authorized OPM or agency official."

[30] FOIA provides the public with access to federal agency records. FOIA authorizes agencies to withhold information in order to protect against certain harms, such as disclosing law enforcement techniques.

[31] FOIA Exemptions 7(E) & 7(F).

[32] Mr. Pack told OIG that he thought the complainants, to include [(b)(6);]were put on administrative leave to investigate the failures identified in the OPM suitability program review and that suspension of the security clearances was just part of administrative leave. However, Mr. Pack's understanding was incorrect. The complainants were put on administrative leave *because* of the suspensions of their security clearance, as their positions required active Top Secret clearances.

[33] OIG did not interview the staff identified by CEO Pack. [(b)(6); (b)(7)(C)]had departed federal service when OIG sent out interview requests, and OIG does not have the ability to compel individuals who have left federal service. Both Ms. [(b)(6); (b)(7)(C)]agreed to interviews and OIG scheduled meetings based on the availability of the interviewees, but these individuals subsequently refused to sit for these interviews after departing from federal service.

evidence that she made protected disclosures, USAGM took an adverse action regarding her clearance, and that the protected disclosures were a contributing factor in the adverse action.

Agency's Burden

Because (b)(6); (b)(7)(C) met her burden, USAGM must prove by a preponderance of the evidence that it would have taken the same action in the absence of (b)(6); (b)(7)(C) disclosures. OIG must give the utmost deference to the agency's assessment of the threat to the national security interests of the United States.

As noted above, the courts have traditionally reviewed three factors in determining whether an adverse action resulted from a protected disclosure.[34] The first factor is the strength of the agency's evidence in support of its personnel action. In examining this factor, OIG examines the evidence supporting the adverse action and whether there were "legitimate reasons" for the personnel action.[35]

The August 12, 2020 letter cited several reasons for the suspension of [(b)(6); (b)(7)(C)] clearance:

1) The background investigation which granted her security clearance was done by USAGM when USAGM lacked the proper authority to investigate and perform background checks.
2) As a USAGM senior leader, she failed to take necessary corrective action to remedy personnel and other security concerns.
3) She "knowingly and willfully granted eligibility for, or allowed access to, classified information in violation of the law and its implementing regulations."
4) The Office of Risk Management identified [(b)(6); (b)(7)(C)] in her capacity as Director of Management Services, as a risk to USAGM.

OIG addresses each of these justifications below.

[(b)(6); (b)(7)(C)] Background Investigation

The suspension letter alleged that [(b)(6); (b)(7)(C)] background investigation "was done by USAGM when USAGM lacked the proper authority to investigate and perform background checks." This statement presumably refers to the fact that USAGM performs background checks and grants clearances based on a delegation of authority from OPM, and that in 2012, USAGM

[34] *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (citing *Geyer v. Dep't of Justice*, 7 M.S.P.R. 682, 688, aff'd, 116 F.3d 1497 (Fed. Cir. 1997)).

[35] *Baker v. Dep't of Defense*, 2016 MSPB LEXIS 4567 (M.S.P.B Aug. 4, 2016).

had not returned the signed memorandum of understanding (MOU) granting the delegation to OPM.

(b)(6); (b)(7)(C)

Under the principles governing federal security clearances, as well as USAGM's Personnel Security Management policy, a security clearance generally remains valid unless the employee separates from service or an adverse action is taken to suspend or revoke the clearance, even if a reinvestigation does not occur in a timely fashion.[36] Thus, any doubt about the validity of USAGM's ability to perform background checks was not a legitimate reason to suspend (b)(6); (b)(7)(C) clearance. Even if the 2013 investigation was deemed to be invalid, she had long held a security clearance that was approved when the agency properly investigated under delegated authority, which would remain valid. Furthermore, at no point did OPM or ODNI direct USAGM to suspend the clearances of any employees on the basis of the unsigned MOU. While OPM and ODNI did instruct USAGM that some of the clearances that were granted during this time had to be reinvestigated due to deficiencies in its personnel security program, (b)(6); (b)(7)(C) clearance notably was not on the list of clearances that had to be reinvestigated.

Failure to Remedy Personnel Security Concerns

The suspension letter alleged that (b)(6); (b)(7)(C) had failed to correct longstanding deficiencies in USAGM's personnel security program and that, in failing to do so, "knowingly and willfully granted eligibility for, or allowed access to, classified information in violation of the law and its implementing regulations." USAGM provided several program reviews of USAGM's personnel security program conducted by OPM and ODNI as appendices to the suspension letter. These reviews highlighted numerous deficiencies in USAGM's program and directed it to undertake corrective action to address these deficiencies.

As Director of Management Services, (b)(6); (b)(7)(C) oversaw the operations of several offices, including Human Resources and Security. USAGM's personnel security and suitability functions are divided between these two offices. The letter suspending (b)(6); (b)(7)(C) clearance points to deficiencies found in the OPM and ODNI reviews as reasons to question (b)(6); (b)(7)(C) eligibility for security clearance. Although (b)(6); (b)(7)(C) was responsible for managing the personnel security program, failure to address the deficiencies identified in the program review would constitute mismanagement, possibly even neglect of duty. However, performance issues,

[36] USAGM, *Personnel Security Management v.4*, ch. 11, § 7(b)(3).

including mismanagement, are not included in the adjudicative guidelines and generally are not relevant to the granting or denial of a clearance. Indeed, in December 2020, USAGM presented similar facts to two trained security clearance adjudicators who determined that "there are no security issues that fall under the Security Executive Agency Directive (SEAD 4) and Executive Order 12968." The adjudicators determined that "these issues are all performance issues which fall under the Office of Human Resources."[37] It is also important to note that despite the August 12th suspension letter and an October 6th follow-up letter signed by CEO Pack stating that USAGM was investigating [(b)(6); (b)(7)(C)] nothing in [(b)(6); (b)(7)(C)] security file, reviewed by OIG in December 2020, indicated that any investigation was underway related to her eligibility for access to classified information.

[(b)(6); (b)(7)(C)] was a member of the senior executive schedule (SES), and while career SES members may be removed from federal service for misconduct, such as neglect of duty, or removed from the SES for performance, these actions are prohibited within the first 120 days of an appointment of a new agency head or a non-career supervisor.[38] The decisionmakers in the complainants' clearance suspensions were aware of the prohibition against removing career SES members. Based on emails reviewed by OIG, [(b)(5) Attorney-Client], [(b)(5) Attorney-Client]

Shortly after these email exchanges, [(b)(6); (b)(7)(C)] began their effort to suspend the security clearances of the six complainants, including [(b)(6); (b)(7)(C)]

Risk Management Issues

The suspension letter also noted that the Office of Risk Management (ORM) identified [(b)(6); (b)(7)(C)] in her capacity as the Director of the Office of Management Services, as having substantial involvement to creating risk within the agency.

USAGM's fiscal year 2019 Enterprise Risk Profile identified security and human resources operations as areas of highest agency risk and assigned the Director of Management Services as the risk owner. The suspension letter attached a document titled "OMS Risk – Security," which detailed the reasons that security had the highest agency risk and how [(b)(6); (b)(7)(C)] had dealt with the assessment. The document notes that after meeting with ORM in 2019 to discuss risk mitigation efforts, [(b)(6); (b)(7)(C)] and her team were nonresponsive to ORM's request to engage in risk monitoring in 2020. The document assigns responsibility to [(b)(6); (b)(7)(C)] in her role as

[37] USAGM did not have the security clearance adjudicators review documents directly related to [(b)(6);] suspension because of her retirement. However, the other five whistleblowers who filed complaints with OIG had nearly identical concerns listed in their suspension letters.

[38] 5 C.F.R. § 359.406.

Director, for the security-related findings in the OPM and ODNI reviews of the suitability program. The document concludes with recommendations on how [(b)(6); (b)(7)(C)] should resolve some of the identified deficiencies to mitigate the risk.

As part of this investigation, OIG interviewed the Chief Risk Officer to discuss the impetus of the risk assessments written about individual employees and attached to the suspension letters. The officer explained to OIG that his supervisor, [(b)(6); (b)(7)(C)] tasked his office with writing risk profiles related to certain individuals' job functions, the OPM and ODNI reviews, and "anything you heard" about the individuals regardless as to whether they could verify the information. [(b)(6); (b)(7)(C)] tasked ORM with completing the risk profiles very quickly, using information already known to the drafters. The Chief Risk Officer said the office had never written risk documents on individuals prior to this exercise. Because of [(b)(6); (b)(7)(C)] selection of the employees as to whom risk profiles were to be prepared and her indifference as to whether the information to be included was truthful, OIG finds that the risk profiles are pretextual and were simply created to support the predetermined decision to suspend the clearances of the individuals, rather than a legitimate reason for the suspensions.

The second *Carr* factor examines the existence and strength of any motive to retaliate on the part of the individuals who were involved in the decision. OIG found some evidence that [(b)(6); (b)(7)(C)] [(b)(6);] disclosures served as a motive to retaliate. USAGM received significant negative press regarding the failure to renew the visas of journalists, the subject of one of [(b)(6); (b)(7)(C)] disclosures.[39] In addition, several members of Congress had reached out to USAGM to express concern about the visas. Emails indicate that USAGM bristled at this criticism. For example, on July 14, 2020, [(b)(6); (b)(7)(C)] and the Public Affairs advisor prepared talking points for the CEO that referred to such criticism as "nonsensical" and questioned: "Why are non-U.S. citizens being brought to the U.S. to report on 'significant American thought and institutions' back to the rest of the world?" In his interview with OIG, CEO Pack told OIG that he knew that a lot of the staff at USAGM shared this criticism, although he was not aware of any specific employees who raised such concerns. Nonetheless, OIG finds that there was a reasonably strong motive to retaliate against [(b)(6); (b)(7)(C)] especially given [(b)(6); (b)(7)(C)] awareness of [(b)(6); (b)(7)(C)] [(b)(6); (b)(7)(C)] concerns and she and her colleagues reaction to such concerns.

OIG's review of the third *Carr* Factor— any evidence that the agency took similar actions against employees who are not whistleblowers but who are otherwise similarly situated— found some evidence that the agency did not take similar action against similarly-situated employees who were not whistleblowers. For example, one rationale for [(b)(6); (b)(7)(C)]

[39] See, e.g., Kylie Atwood, "US global media agency seeks to kick out international journalists," CNN, July 10, 2020; James Crump, "Trump appointee cutting visas for 10 journalists with dozens more at risk," *The Independent*, July 10, 2020; Pranshu Verma and Edward Wong, "Trump Appointee Might Not Extend Visas for Foreign Journalists at V.O.A.," *The New York Times*, July 12, 2020.

suspension was that USAGM adjudicated her clearance without proper authority. USAGM conducted background investigations for hundreds of other employees during the years when there was no signed delegation memorandum, yet the security clearances of only seven employees (all of whom were whistleblowers) were suspended.[40] Likewise, other offices and functions were listed as enterprise risks in the USAGM Enterprise Risk Document, including Information Technology and Congressional Affairs, yet no action was taken against the security clearances of the officials in charge of these offices.

OIG's examination of the *Carr* factors found that even though USAGM cited four different reasons to suspend [(b)(6); (b)(7)(C)]security clearance, none of them relate to the adjudicative guidelines as to constitute a legitimate basis for the suspension. In addition, there is some evidence of a retaliatory motive and that similarly situated individuals who were not whistleblowers did not face similar treatment. Thus, OIG concludes that USAGM did not meet its burden to demonstrate by a preponderance of the evidence that it would have suspended [(b)(6); (b)(7)(C)]security clearance absent her protected disclosures.

Conclusion

[(b)(6); (b)(7)(C)]made protected disclosures to the Chief of Staff, a supervisor in her chain of command, and a decisionmaker in the security clearance suspension when she raised concerns about J-1 visa extensions and the public disclosure of USAGM security vulnerabilities. Shortly thereafter, USAGM suspended her security clearance.

USAGM could not demonstrate by a preponderance of the evidence that it would have suspended [(b)(6); (b)(7)(C)]clearance absent her protected disclosures. The four reasons cited in [(b)(6); (b)(7)(C)]suspension letter bear no relation to the adjudicative guidelines and USAGM failed to follow its own directive for suspending a clearance. In addition, OIG found some evidence of retaliatory motive by individuals involved in the suspension and no evidence that USAGM took action against similarly situated individuals who were not whistleblowers.

Pursuant to PPD-19, OIG may recommend that the agency reconsider the employee's eligibility for access to classified information and "take other corrective action to return the employee, as nearly as practicable and reasonable, to the position such employee would have held had the reprisal not occurred."

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Nonetheless, USAGM should consider corrective action, including but not limited to formally rescinding the suspension letter and awarding her attorney's fees and other reasonable compensatory damages.

~~SENSITIVE BUT UNCLASSIFIED~~ June 14, 2021

MEMORANDUM

(b)(6); (b)(7)(C)

FROM: OIG – Jeffrey McDermott, Assistant Inspector General

TO: USAGM – Kelu Chao, Acting Chief Executive Officer

SUBJECT: Report of Investigation Pursuant to Presidential Policy Directive 19
OIG Whistleblower Case 2020-0107 [(b)(6); (b)(7)(C)]

Presidential Policy Directive 19 (PPD-19) prohibits the taking of any action affecting an employee's eligibility for access to classified information as a reprisal for a protected disclosure.[1] PPD-19 requires that every agency have a review process that permits employees to appeal actions affecting eligibility for access to classified information that they allege to be in violation of the directive. As part of the review process, the agency Inspector General shall conduct a review to determine whether an action affecting eligibility for access to classified information violated the directive, whether the agency should reconsider the action, and whether corrective action is warranted.

As described below, the Department of State (Department) Office of Inspector General (OIG) received a complaint from [(b)(6); (b)(7)(C)] General Counsel to United States Agency for Global Media (USAGM). [(b)(6); (b)(7)(C)] alleged that his security clearance was suspended after he made protected whistleblower disclosures. OIG determined that [(b)(6); (b)(7)(C)] eligibility for access to classified information was suspended after he made protected disclosures and that USAGM did not demonstrate by a preponderance of the evidence that it would have taken the same action absent his disclosure.

Allegation

On September 29, 2020, counsel for [(b)(6); (b)(7)(C)] along with five other senior management officials from USAGM, filed a complaint with OIG in accordance with PPD-19, alleging that USAGM management suspended their security clearances after they raised concerns to their designated supervisors and USAGM management. According to [(b)(6); (b)(7)(C)] he raised

[1] PPD-19 defines a protected disclosure as "a disclosure of information by the employee to a supervisor in the employee's direct chain of command, up to and including the head of the employing agency, to the Inspector General of the employing agency or Intelligence Community Element, to the Director of National Intelligence, to the Inspector General of the Intelligence Community, or to an employee designated by any of the above officials for the purpose of receiving such disclosures, that the employee reasonably believes evidences (i) a violation of any law, rule, or regulation; or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."

concerns to USAGM's top leadership about the failure to reinstate J-1 visas for Voice of America (VOA) journalists,[2] the Chief Executive Officer's (CEO) lack of compliance with his ethics agreement, and a possible violation of the rules of professional responsibility by the Acting Vice President for Legal, Compliance, and Risk Management (VP Legal).

Background

(b)(6); (b)(7)(C) is a career civil servant who was a legal advisor under a special appointment at the Department from 2011 until 2013. In October 2013, he joined USAGM as the Lead Fiscal Appropriations Counsel and held a variety of legal positions; in 2017 he became the agency's General Counsel (GC).[3] (b)(6); (b)(7)(C) also served as USAGM's Acting Deputy Director from November 2019 until June 2020, after which (b)(6); (b)(7)(C) returned to the GC position full time.

The position of General Counsel requires a Top-Secret security clearance. According to Mr. (b)(6); (b)(7)(C)

On June 4, 2020, Michael Pack was confirmed by the U.S. Senate as CEO, and on June 17, Mr. Pack's Chief of Staff, (b)(6); (b)(7)(C) sent an email to USAGM senior staff announcing changes to the leadership structure. As a result of the changes, (b)(6); (b)(7)(C) reported to the VP Legal. The email also cautioned staff that "no actions are to be taken" and "no external communications are to be made" without "explicit approval" from the Chief Operating Officer, VP Legal, Deputy Chief of Staff, or Chief of Staff.

On July 8, 2020, the VOA's Chief of Indonesian Service requested assistance from USAGM attorneys regarding a journalist whose J-1 visa Certificate of Eligibility for Exchange Visitor Status was going to expire. The email noted additional examples of impending visa expirations for journalists. On July 10, (b)(6); (b)(7)(C) forwarded the email to the Acting VOA Director. He also provided his assessment of legal and non-legal risks, such as physical harm, the journalists might endure if they were sent back to countries with repressive regimes. (b)(6); (b)(7)(C) recommended that the visa extension requests be renewed immediately and noted he had discussed it with his chain of command. On the same date, July 10, the Acting VOA Director forwarded (b)(6); (b)(7)(C) email with his consent to (b)(6); (b)(7)(C) the Chief Operating Officer, and emphasized the J-1 visa issue "has become one of most urgent challenges facing VOA." On July 11, (b)(6); (b)(7)(C) forwarded the emails to (b)(6); (b)(7)(C) then-

[2] A J-1 visa is a classification of a visa for individuals participating in an approved program, such as teaching, instructing, studying consulting, or those who possess a special skill.

[3] The General Counsel also serves as the agency's Designated Agency Ethics Official (DAEO). The DAEO is an employee who is designated by the head of an agency to administer the provisions of Title I of the Ethics in Government Act of 1978, as amended, and 5 C.F.R. part 2634 within an agency. According to the U.S. Office of Government Ethics, for DAEO's to be effective they must assess ethics risks, identify employees at risk, and deliver training and counseling to those employees that is directly responsive to the risk those employees face.

supervisor and to (b)(6); (b)(7)(C) the Deputy Chief of Staff. (b)(6); (b)(7)(C) told OIG he could not understand why the front office was not approving the J-1 visa extensions and that he had told colleagues he would have to share his concerns with OIG. (b)(6); (b)(7)(C) expressed to others her anger about (b)(6); (b)(7)(C) involvement in the issue.

On July 22, 2020, (b)(6); (b)(7)(C) emailed (b)(6); (b)(7)(C) a political appointee from the Department who was detailed to USAGM and who became (b)(6); (b)(7)(C) supervisor and Acting VP Legal, about various ethics issues. In the email, (b)(6); (b)(7)(C) told (b)(6); (b)(7)(C) that Congress had raised questions about Mr. Pack's apparent lack of adherence to his ethics requirement to divest himself from his video production company. (b)(6); (b)(7)(C) as the DAEO, had participated in Mr. Pack's ethics briefings and expressed concerns about his compliance with the agreement.

On July 23, 2020, in email correspondence between (b)(6); (b)(7)(C) Department of Justice (DOJ) attorneys regarding litigation between the Open Technology Fund (OTF)[4] and USAGM, (b)(6); (b)(7)(C) noted a credible allegation that (b)(6); (b)(7)(C) had conducted an "inspection" of OTF's office and, in doing so, forced OTF's vice president to answer questions without legal counsel present. (b)(6); (b)(7)(C) expressed concern and stated that her actions violated rules of professional responsibility for attorneys, specifically Rule 4.2 "Communication with Person Represented by Counsel" as support. Later the same day, (b)(6); (b)(7)(C) replied in an email communication that (b)(6); (b)(7)(C) was "not in a position to comment on the veracity of these claims or what transpired." (b)(6); (b)(7)(C) told OIG that Ms. (b)(6); called him and told him she was displeased with the comments he made to the DOJ attorneys.

On August 12, 2020, (b)(6); (b)(7)(C) received a letter, signed by Mr. Pack, suspending his security clearance and placing him on administrative leave. The letter stated: "I certify it is in the interest of U.S. national security to suspend your security clearance, pending the outcome of an investigation effective immediately." (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)

USAGM Security Clearance Suspension Procedures

USAGM's policy and procedures for suspending security clearances are contained within its directive titled, *Personnel Security Management v.4*, which is largely based on Executive Order 12968.[5] The directive states that the Director of Security "acts as the ultimate authority (or designates an alternate) for the reduction, denial, suspension, or revocation of an individual's eligibility for access to classified national security information and/or an individual's eligibility to be employed in a government position based on a suitability or fitness determination."[6] Within the Office of Security, the Chief of the Personnel Security Division is given the responsibility to

[4] The Open Technology Fund (OTF) is a non-profit organization that seeks to advance internet freedom, particularly in countries in with repressive leadership.

[5] Executive Order 12968, Access to Classified Information, Aug. 4, 1995.

[6] USAGM, *Personnel Security Management v.4*, preface § 6(c)(7).

suspend security clearances.[7] The directive notes, however, that the CEO "may also exercise authority granted in 5 U.S.C. § 7532 to suspend without pay, and then remove, a USAGM employee when this action is deemed necessary in the interests of national security."

The directive states, "Suspension of a clearance, also known as administrative withholding, is appropriate when a significant question of security eligibility arises. Suspension is warranted, for example, when the security organization receives information indicating possible gross misconduct, criminal conduct, substance abuse, or a serious breach of integrity."[8] Security eligibility is defined as "a determination of eligibility for access to classified information" that "is a discretionary security decision based on judgments by appropriately trained adjudicative personnel."[9] Executive Order 12968 states that "determinations of eligibility for access to classified information shall be based on criteria established under this order."[10] Those criteria are the adjudicative guidelines issued by the Office of the Director of National Intelligence (ODNI), which are:

- Allegiance to the United States
- Foreign influence
- Foreign preference
- Sexual behavior
- Personal conduct
- Financial considerations
- Alcohol consumption
- Drug involvement
- Emotional, mental, and personality disorders
- Criminal conduct
- Security violations
- Outside activities
- Misuse of information technology systems.[11]

USAGM's directive further specifies that "upon receipt of information that raises questions concerning the personnel security fitness of an individual, [the Office of Security] shall immediately assess the security factors involved and shall take suitable action to ensure national security interests are protected."[12] In making such a determination, the Office of Security must "consider such factors as the conclusiveness and seriousness of the information developed, the employee's access to classified information, and the opportunity the position

[7] USAGM, *Personnel Security Management v.4*, preface § 6(d)(7).

[8] USAGM, *Personnel Security Management v.4*, ch. 11, § 10(b)(1).

[9] USAGM, *Personnel Security Management v.4*, appendix 1 (noting that "eligibility shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security.")

[10] Executive Order 12968, Access to Classified Information, Aug. 4, 1995, § 2.1(a).

[11] SEAD 4: National Security Adjudicative Guidelines, Dec. 10, 2016.

[12] USAGM, *Personnel Security Management v.4*, ch. 12, § 1(b).

affords the employee to commit acts contrary to national security interests." If USAGM decides to suspend a security clearance temporarily pending an investigation and the suspension exceeds 10 days, the employee is entitled to notice in writing with a justification for the suspension.[13] USAGM's policy notes that "retaliation that affects eligibility for access to classified national security information is prohibited" and that USAGM officials shall not take or fail to take, or threaten to take or fail to take, any action affecting an employee's eligibility for access to classified national security information as a reprisal for a protected disclosure.[14]

Despite these policies, OIG found that no one who was trained in the adjudicative guidelines participated in the decision, preparation, or finalization of [(b)(6); (b)(7)(C)]suspension letter. USAGM's directive states that decisions regarding security clearances must be made by "appropriately trained adjudicative personnel" using the adjudicative guidelines.[15] However, in [(b)(6); (b)(7)(C)] case, no one who was trained in those guidelines, such as the Chief of the Personnel Security Division who ordinarily has the responsibility to suspend security clearances, was even consulted about the suspension.[16] Even if USAGM officials had questions about the ability of its Office of Security, they could have consulted with OPM and ODNI about the suspension, but they did not do so.

Legal Standard

As noted above, PPD-19 prohibits the taking of any action with respect to any employee's security clearance or access determination in retaliation for having made a protected whistleblower disclosure. In 2020, the Inspector General for the Intelligence Community issued procedures for how it would review allegations of retaliation under PPD-19.[17] These procedures specify that a complainant must demonstrate that: (a) he or she made a protected disclosure; (b) the agency took or failed to take, or threatened to take or fail to take, any action with respect to the complainant's security clearance or access determination; and (c) the protected disclosure was a contributing factor in the agency's decision to take or fail to take, or threaten to take or fail to take, the security clearance action.[18]

Although PPD-19 and these procedures do not specify how to determine whether a protected disclosure was a "contributing factor" in the adverse security clearance determination, similar language is used in the Whistleblower Protection Act, which prohibits agencies from taking adverse personnel actions in retaliation for protected disclosures.[19] Under the Whistleblower Protection Act, a complainant can establish that his or her protected disclosure was a contributing factor in the alleged retaliatory personnel action through either direct evidence or

[13] USAGM, *Personnel Security Management v.4*, ch. 12, § 2(a).

[14] USAGM, *Personnel Security Management v.4*, ch. 12, § 2(e)(1), (2).

[15] USAGM, *Personnel Security Management v.4*, appendix 1.

[16] USAGM, *Personnel Security Management v.4*, preface § 6(d)(7).

[17] Inspector General of the Intelligence Community Instruction 2020.001, *External Review Panel Procedures Pursuant to 50 U.S.C. § 3236 and Presidential Policy Directive/PPD-19* (Dec. 17, 2020).

[18] Instruction 2020.001 § 9(C)(2).

[19] 5 U.S.C. § 1221.

through circumstantial evidence that the official taking the adverse action knew of the disclosure and the action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the adverse action.[20]

If a complainant can demonstrate that he or she made a protected disclosure that was a contributing factor in the adverse determination, the burden shifts to the agency, which must "prove by a preponderance of the evidence that it would have taken the same action in the absence of such disclosure, giving the utmost deference to the agency's assessment of the particular threat to the national security interests of the United States in the instant matter."[21] Federal courts and the Merit Systems Protection Board (MSPB)[22] have looked to three factors (commonly called the *Carr* factors) when determining whether an agency has met its burden: the strength of the agency's evidence in support of its decision; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.[23] The courts weigh these three factors together to determine whether, as a whole, the agency has met its burden, and a strong showing on one factor may be sufficient.[24]

Complainant's Burden

Based on its investigation, OIG determined that (b)(6); (b)(7)(C) made several protected disclosures. For example, on July 11, (b)(6); (b)(7)(C) sent an email to the head of Voice of America that raised concerns about the non-renewal of J-1 visas for journalists. The email noted "the risk of physical harm to journalists sent back to repressive countries." This email was forwarded with his consent to (b)(6); (b)(7)(C) then-supervisor and Chief of Staff (b)(6); (b)(7)(C) This email constitutes a protected disclosure because it was made to a supervisor in (b)(6); (b)(6); (b)(7)(C) chain of command and concerned information that (b)(6); (b)(7)(C) reasonably believed to be a substantial and specific danger to public health or safety.[25] (b)(6); (b)(7)(C) email cited threats to a specific journalist, which demonstrated his reasonable belief that other journalists may be subject to the same risks.

Similarly, on July 22, 2020, (b)(6); (b)(7)(C) sent an email to his supervisor, (b)(6); (b)(7)(C) that raised concerns about Mr. Pack's compliance with his ethics agreement. He stated that "there were some questions from the hill on Mr. Pack's ethics agreement . . . I shared those concerns that not all resignations had been made." As part of his ethics agreement, Mr. Pack was required to resign from certain positions he held prior to his federal service, and (b)(6); (b)(7)(C)

[20] 5 U.S.C. § 1221(e)(1)(A),(B).

[21] Instruction 2020.001 § 9(C)(2)(d).

[22] The Merit Systems Protection Board interprets the Whistleblower Protection Act in cases of alleged retaliation against Federal employees. 5 U.S.C. § 1221(a).

[23] *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (citing *Geyer v. Dep't of Justice*, 7 M.S.P.R. 682, 688, aff'd, 116 F.3d 1497 (Fed. Cir. 1997)).

[24] *Lucchetti v. Dep't of Interior*, 2017 MSPB LEXIS 743, *11 (M.S.P.B. Feb 15, 2017) (*citing Phillips v. Dep't of Transportation*, 113 M.S.P.R. 73, 77 (2010)).

[25] PPD-19, § F(5)(a).

as USAGM's Designated Agency Ethics Official, was responsible for briefing Mr. Pack on his ethical obligations and ensuring that he understood what was needed to comply with them. (b)(6); (b)(7)(C) email constitutes a protected disclosure because it was made to a supervisor in (b)(6); (b)(7)(C) chain of command and concerned information that (b)(6); (b)(7)(C) reasonably believed to be a violation of a law, rule, or regulation, specifically the federal regulations requiring federal officials to enter into and comply with ethics agreements.[26]

On July 23, 2020, (b)(6); (b)(7)(C) sent an email to several colleagues at USAGM, including (b)(6); (b)(7)(C), as well as attorneys at the DOJ, that raised concerns that (b)(6); (b)(7)(C) may have violated Rule 4.2 of the Rules of Professional Conduct because she purportedly communicated with the leadership of a USAGM grantee that was currently in litigation with USAGM. This email constitutes a protected disclosure because it was made to a supervisor in (b)(6); (b)(7)(C) chain of command and concerned information that (b)(6); (b)(7)(C) reasonably believed to be a violation of a law, rule, or regulation, specifically the ethics rules that bind all attorneys licensed to practice law.[27]

While OIG found no direct evidence that (b)(6); (b)(7)(C) disclosure was a contributing factor in the suspension of his security clearance, there is circumstantial evidence that the individuals involved in the suspension of his clearance knew of his disclosures and that they moved to suspend his clearance shortly after he made protected disclosures.

While Mr. Pack was the official who signed the letter suspending (b)(6); (b)(7)(C) security clearance, USAGM identified both Chief of Staff (b)(6); and VP Legal (b)(6); (b)(7)(C) as having participated in the decision.[28] In addition, Mr. Pack told OIG that his staff, particularly Ms. (b)(6); (b)(7)(C) proposed the suspension of the six complainants' security clearances and that he concurred with their proposal, but left the details of the suspensions up to them. Both (b)(6); (b)(7)(C) were recipients of (b)(6); (b)(7)(C) protected disclosures, and they participated in the decision to suspend his clearance on August 12, 2020, mere days after his disclosures. Indeed, on July 26, 2020 (three days after (b)(6); (b)(7)(C) disclosure about her alleged violation of the ethics rules), (b)(5) Attorney-Client (b)(5) Attorney-Client (b)(5) Thus, (b)(6); (b)(7)(C) met his burden by showing that he made a protected disclosure that was a contributing factor in the adverse action taken against his security clearance.

[26] 5 C.F.R. subpart H.

[27] PPD-19, § F(5)(a). While (b)(6); (b)(7)(C) disclosure was made to the person accused of wrongdoing, federal law generally permits a protected disclosure to be made to a "a person who participated in an activity that the employee or applicant reasonably believed to be [wrongdoing.]" 5 U.S.C. § 2302(f)(1)(A).

[28] OIG did not interview (b)(6); (b)(7)(C) had departed federal service when OIG sent out interview requests, and OIG does not have the ability to compel individuals who have left federal service. (b)(6); (b)(7)(C) agreed to an interview but asked that it be held after she departed federal service to accommodate her schedule. Shortly after departing federal service, she rescinded her agreement to sit for the interview.

Agency's Burden

Because [(b)(6); (b)(7)(C)] met his burden, USAGM must demonstrate by a preponderance of the evidence that it would have suspended [(b)(6); (b)(7)(C)] clearance even absent his protected disclosures.

The first factor that the courts use to weigh whether an agency has met its burden is the strength of the evidence in support of the adverse action. In examining this factor, OIG examines the evidence supporting the adverse action and whether there were "legitimate reasons" for the personnel action. [29]

The suspension letter cited several reasons for the suspension of [(b)(6); (b)(7)(C)] clearance:

1) The background investigation which granted his security clearance was done by USAGM when USAGM lacked the proper authority to investigate and perform background checks.
2) As a USAGM senior leader, he failed to take necessary corrective action to remedy personnel and other security concerns.
3) He "knowingly and willfully granted eligibility for, or allowed access to, classified information in violation of the law and its implementing regulations."
4) His request for an "exemption" to 5 C.F.R. part 1400 that "ignored the serious security concerns of OPM and ODNI which was inconsistent with the law and internal policy."
5) The Office of Risk Management identified him, in his capacity as General Counsel, as a risk to USAGM.
6) His attempt to remove the Office of General Counsel (OGC) as an identified risk in USAGM's risk profile.
7) "Numerous complaints and reports" about his behavior, including allegations from colleagues regarding anger, lack of veracity, potential conflict of interest, and other ethical issues, and unprofessional conduct.

OIG addresses each of these justifications individually below.

[(b)(6); (b)(7)(C)] Background Investigation

The suspension letter alleged that [(b)(6); (b)(7)(C)] background investigation "was done by USAGM when USAGM lacked the proper authority to investigate and perform background checks." This statement presumably refers to the fact that USAGM performs background checks and grants clearances based on a delegation of authority from the Office of Personnel Management (OPM), and that in 2012, USAGM did not return the signed memorandum of understanding (MOU) granting the delegation to OPM.

(b)(6); (b)(7)(C)

[29] *Baker v. Dep't of Defense*, 2016 MSPB LEXIS 4567 (M.S.P.B Aug. 4, 2016).

(b)(6); (b)(7)(C)

However, the uncertainty surrounding USAGM's authority to investigate and adjudicate clearances alone is not a legitimate basis to suspend (b)(6); (b)(7)(C) clearance. At no point did OPM or ODNI direct USAGM to suspend the clearances of any employees on the basis of the unsigned MOU. While OPM and ODNI did instruct USAGM that some of the clearances that were granted during this time had to be reinvestigated due to deficiencies in its personnel security program, (b)(6); (b)(7)(C) clearance notably was not on the list of clearances that had to be reinvestigated.

Failure to Remedy Personnel Security Concerns

The suspension letter alleged that (b)(6); (b)(7)(C) had failed to correct longstanding deficiencies in USAGM's personnel security program and that in failing to do so, "knowingly and willfully granted eligibility for, or allowed access to, classified information in violation of the law and its implementing regulations." USAGM provided several program reviews of USAGM's personnel security program conducted by OPM and ODNI as appendices to the suspension letter. These reviews highlighted numerous deficiencies in USAGM's program and directed it to undertake corrective action to address these deficiencies.

According to (b)(6); (b)(7)(C) position description, his role was to "serve[] as legal advisor to [USAGM], rendering authoritative legal opinions, oral and written, on an exceptionally broad range of complex legal issues and problems requiring knowledge and experience in many diverse legal practice areas." The position of General Counsel is not responsible for managing the personnel security program, which reports to a separate executive, the Director of Management Services. The only role that the Office of General Counsel played related to the deficiencies identified by OPM and ODNI was reviewing the legal sufficiency of USAGM's response to those reviews. Given this minor advisory role, USAGM's allegation that (b)(6); (b)(7)(C) failed to correct personnel security concerns is, likewise, not a legitimate basis to suspend his security clearance.

Furthermore, even if (b)(6); (b)(7)(C) was responsible for managing the personnel security program, any deficiencies in doing so would constitute a performance issue. Performance issues are not included in the adjudicative guidelines and generally are not relevant to the granting or denial of a clearance. Indeed, in December 2020, USAGM presented this same set of a facts to two trained security clearance adjudicators who determined that "there are no security issues that fall under the Security Executive Agency Directive (SEAD 4) and Executive Order 12968." The adjudicators determined that any deficiencies by (b)(6); (b)(7)(C) "are all performance issues which fall under the Office of Human Resources."

Exemption Request

The suspension letter alleges that [(b)(6); (b)(7)(C)] "wrote an 'exemption' request which ignored the serious security concerns of OPM and ODNI which was inconsistent with the law and internal policy." This charge relates to a May 8, 2018, letter signed by the then-CEO to OPM and ODNI that requested a waiver of 5 C.F.R. part 1400. This regulation states that "All positions must be evaluated for a position sensitivity designation commensurate with the responsibilities and assignments of the position as they relate to the impact on the national security, including but not limited to eligibility for access to classified information."[30] The regulation requires that agencies use OPM's Position Designation System to designate the sensitivity level of each position.[31]

The letter in question (purportedly drafted by [(b)(6); (b)(7)(C)] notes that USAGM did not want to use the Position Designation System, but rather wanted to designate every position in the agency as at minimum a "national security position" because "of the ability of the occupant of each position to potentially bring about a materially adverse effect upon the national security." The letter notes that this is necessary because unlike many agencies, USAGM hires foreign nationals and must assess their loyalty and foreign influence. OPM disagreed with this approach, noting in its most recent review that "failure to consistently designate agency positions at the proper level using established standards may result in investigating employees at a higher level than required, subjecting them to unnecessary scrutiny and placing undue financial burden on the agency."

Thus, the waiver that USAGM sought would have actually required more stringent vetting of employees than they would have normally received. Thus, the waiver did not "ignore" the serious security concerns but, rather, sought to have a minimum position level for USAGM employees, potentially offering a more robust vetting. Furthermore, a genuine disagreement about the applicability of the law is not a legitimate basis to suspend [(b)(6); (b)(7)(C)] security clearance under the adjudicative guidelines.

Risk Management Issues

The suspension letter also noted that the Office of Risk Management identified [(b)(6); (b)(7)(C)] in his capacity as General Counsel, as a risk to USAGM and that he used his position to remove OGC as an identified risk in the final Fiscal Year (FY) 2019 Enterprise Risk Profile.

USAGM's draft FY 2019 Enterprise Risk Profile lists OGC as an identified risk among 16 enterprise risks to USAGM, stating: "Legal guidance and counsel is critical to USAGM's operations, especially in the highly-regulated areas of employment, civil rights, policy, information technology, contracts and security; however, the lack of engagement by OGC staff has led to delayed, little, or zero guidance to internal requests, creating a risk of litigation and

[30] 5 C.F.R. § 1400.101(b).

[31] 5 C.F.R. § 1400.201(b).

non-compliance which costs the Agency valuable resources, including time, money, and brand equity."

However, this draft risk profile deals with an office, rather than (b)(6); (b)(7)(C) personally, and could be affected by any number of factors, many of which are outside of OGC's and (b)(6); (b)(7)(C) control, such as a lack of resources or a high demand for legal advice. At most, the risks identified relate to a performance issue which, as noted earlier, is not pertinent to the adjudicative guidelines and thus not a legitimate reason for the suspension of a clearance.

The request to remove OGC from the risk profile was based on concerns about the accuracy of the description of the risk, as well as changed circumstances, such as the addition of four new attorneys to improve OGC's customer service. Similar concerns were shared by other members of the Risk Management Council, and it does not appear that the request to remove OGC even came from (b)(6); (b)(7)(C) personally. USAGM's Enterprise Risk Management Report describes the identification of risks as a deliberative process in which risks are added and removed throughout the process as stakeholders express their opinions.[32] The discussion of whether an individual risk should be listed is an integral part of the risk management process and ultimately is a decision made by the USAGM Risk Management Council members, of which (b)(6); (b)(7)(C) was one of eleven. As such, it is not a legitimate basis on which to suspend a security clearance.

Complaints about (b)(6); (b)(7)(C) Conduct

(b)(6); (b)(7)(C)

However, the appendices to the suspension letter includes only two such complaints, both solicited by (b)(6); (b)(7)(C) which appear to be a collection of rumors and gossip.

The first complaint was prepared by two officials from USAGM's Office of Risk Management. According to one of the officials, (b)(6); (b)(7)(C) contacted him on July 24, 2020, and instructed him to prepare an analysis of the risk presented by (b)(6); (b)(7)(C) and three other USAGM senior officials and requested the analysis by the following day. (b)(6); (b)(7)(C) told him to include any negative information that he had heard about the individuals regardless of whether he could factually verify the information. (b)(6); (b)(7)(C) told them to add even rumors that they "heard in the halls."

The document that the two officials sent to (b)(6); (b)(7)(C) mentions the personnel security deficiencies already addressed, as well as an allegation that the authors heard that (b)(6); (b)(6); (b)(7)(C) was not truthful in his job application" because he listed that he worked as an attorney at the Department when he did not. However, a cursory review of (b)(6); (b)(7)(C) security clearance file would have shown this allegation to be false, as it included a review of

[32] In fact, three identified risks (including the OGC risk) were eventually removed from the December 2018 draft when compared to the final April 2019 FY 2019 Enterprise Risk Profile, and several other material changes were also made.

his Department personnel file listing his position as "Franklin Fellow/Attorney-Advisor."

The second complaint appended to the suspension letter is a memorandum to (b)(6); (b)(7)(C) by a current USAGM employee who interned in OGC. On July 27, 2020, Ms. (b)(6); (b)(7)(C) asked the employee to compile the memo. This complaint contains a collection of allegations, primarily about (b)(6); (b)(7)(C) management of OGC, that the drafter heard from "first-hand and second-hand accounts" and of which he acknowledged that he did "not have direct knowledge." USAGM officials performed no follow-up work to ascertain if these allegations had any basis in fact before relying upon them to suspend (b)(6); (b)(7)(C) clearance. Even if some of the concerns about (b)(6); (b)(7)(C) management ability are accurate, these would be performance issues, which as noted earlier, are not included in the adjudicative guidelines and thus not legitimate bases for which to suspend a clearance.

With respect to the second *Carr* factor—the existence and strength of any motive to retaliate on the part of the individuals who were involved in the decision—OIG found strong evidence of motive on the part of individuals responsible for the decision to revoke (b)(6); (b)(7)(C) clearance. For example, (b)(6); (b)(7)(C) who proposed the idea of suspension and drafted the suspension letter, responded to (b)(6); (b)(7)(C) July 23 protected disclosure regarding her compliance with Rule 4.2 with an email noting that (b)(6); (b)(7)(C) is not in a position to comment on the veracity of these claims or what transpired." Her email asserted that she was not subject to Rule 4.2 because only the Department of Justice attorneys who were officially representing USAGM in the litigation were subject to the rule and chastised (b)(6); (b)(7)(C) "I would advise we speak directly before making any more assumptions without facts."

(b)(5) Attorney-Client

(b)(5) Attorney-Client Shortly after these exchanges, Ms. (b)(6); (b)(7)(C) began their effort to suspend the security clearance of (b)(6); (b)(6); (b)(7)(C) as well as those of the other five complainants.

(b)(6); (b)(7)(C) appears to have continued her efforts to punish (b)(6); (b)(7)(C) for making protected disclosures even after the suspension of his clearance. On August 27, 2020, she drafted a memorandum to (b)(6); (b)(7)(C) threatening to discipline him for statements that he made in news articles asserting that the suspension of his clearance was "pretextual" and constituted "retaliation."[34]

OIG's analysis of the third *Carr* Factor— evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated—also suggests

[33] 5 C.F.R. § 359.406.

[34] It is unclear if USAGM ever sent this memorandum to (b)(6); (b)(7)(C), but its drafting is relevant to (b)(6); (b)(7)(C) motive.

that the suspension of (b)(6); (b)(7)(C) clearance was retaliatory. For example, the background investigations of hundreds of other employees were conducted during the years when there was not a signed delegation memorandum, yet the security clearances of only seven employees (all of whom were whistleblowers) were suspended.[35]

Likewise, other offices and functions were listed as enterprise risks in the draft USAGM Enterprise Risk Profile, including Information Technology and Human Resources, and many had much higher risk scores than OGC. However, no action was taken against the security clearances of the officials in charge of these offices.

Finally, USAGM did not suspend the security clearances of all employees for which they had received complaints about their conduct. For example, in September 2020, USAGM learned that a judge had granted a protective order against a senior advisor to the CEO after he allegedly made threats against a family member. On September 16, 2020, the Senate Foreign Relations Committee sent Mr. Pack a letter raising concerns about this employee. Although this situation is not directly comparable to the conduct concerns alleged about (b)(6); (b)(7)(C) it is far more serious and also falls more squarely within the adjudicative guidelines than the work-related allegations against (b)(6); (b)(7)(C) .[36] Yet, no action was taken to suspend the senior advisor's security clearance.

OIG's examination of the three *Carr* factors found that even though USAGM cited seven different reasons to suspend the security clearance of (b)(6); (b)(7)(C) none of them relate to the adjudicative guidelines and thus do not constitute a legitimate basis for the suspension. Likewise,
OIG found strong evidence of a retaliatory motive and no evidence that USAGM took comparable action against individuals who were similarly situated but were not whistleblowers. Accordingly, USAGM cannot meet its burden to demonstrate by a preponderance of the evidence that it would have suspended (b)(6); (b)(7)(C) security clearance absent his protected disclosures.

Conclusion

(b)(6); (b)(7)(C) made several protected disclosures to USAGM officials in July 2020 when he raised concerns about the agency's inaction regarding J-1 visas to journalists, compliance with the Rules of Professional Conduct, and compliance with the CEO's ethics agreement. Shortly thereafter, USAGM suspended his security clearance.

USAGM could not demonstrate by a preponderance of the evidence that it would have

(b)(6); (b)(7)(C)

[36] For example, Guideline E (Personal Conduct) lists "any disruptive, violent, or other inappropriate behavior" as potentially disqualifying and Guideline I (Psychological Conditions) lists "violent" behavior as disqualifying.

suspended his clearance absent his protected disclosure. The seven reasons cited in [(b)(6); (b)(7)(C)] [(b)(6); (b)(7)(C)] suspension letter bear no relation to the adjudicative guidelines and USAGM failed to follow its own directive for suspending a clearance. In addition, OIG found strong evidence of retaliatory motive by individuals involved in the suspension and no evidence that USAGM took action against similarly situated individuals who were not whistleblowers.

Pursuant to PPD-19, OIG may recommend that the agency reconsider the employee's Eligibility for Access to Classified Information and "take other corrective action to return the employee, as nearly as practicable and reasonable, to the position such employee would have held had the reprisal not occurred."

Prior to the completion of this investigation, USAGM reconsidered [(b)(6); (b)(7)(C)] eligibility for access to classified information and restored his security clearance. Nonetheless, USAGM should also consider other corrective action, including but not limited to formally rescinding the suspension letter, and awarding him attorney's fees and other reasonable compensatory damages.

~~SENSITIVE BUT UNCLASSIFIED~~ June 14, 2021

MEMORANDUM

(b)(6);
(b)(7)(C)

FROM: OIG – Nicole Matthis, Deputy Assistant Inspector General

TO: USAGM – Kelu Chao, Acting Chief Executive Officer

SUBJECT: Report of Investigation Pursuant to Presidential Policy Directive 19
OIG Whistleblower Case 2020-0108 [(b)(6); (b)(7)(C)]

Presidential Policy Directive 19 (PPD-19) prohibits the taking of any action affecting an employee's eligibility for access to classified information as a reprisal for a protected disclosure.[1] PPD-19 requires that every agency have a review process that permits employees to appeal actions affecting eligibility for access to classified information they allege to be in violation of the directive. As part of the review process, the agency Inspector General shall conduct a review to determine whether an action affecting eligibility for access to classified information violated the directive, whether the agency should reconsider the action, and whether corrective action is warranted.

As described below, the Department of State (Department) Office of Inspector General (OIG) received a complaint from [(b)(6); (b)(7)(C)] Chief Financial Officer (CFO) at the U.S. Agency for Global Media (USAGM). [(b)(6); (b)(7)(C)] alleged that his security clearance was suspended after having made protected whistleblower disclosures. OIG's investigation found that [(b)(6); (b)(7)(C)] eligibility for access to classified information was suspended after he made protected disclosures, that his protected disclosures were a contributing factor to his security clearance suspension, and that the agency did not demonstrate by a preponderance of the evidence that it would have suspended [(b)(6); (b)(7)(C)] security clearance absent his disclosures.

Allegation

On September 29, 2020, counsel for [(b)(6); (b)(7)(C)] along with five other senior management officials from USAGM, filed a complaint with OIG in accordance with PPD-19 alleging that USAGM suspended their security clearances after they raised concerns. In [(b)(6); (b)(7)(C)] case,

[1] PPD-19 defines a protected disclosure as "a disclosure of information by the employee to a supervisor in the employee's direct chain of command up to and including the head of the employing agency, to the Inspector General of the employing agency or Intelligence Community Element, to the Director of National Intelligence, to the Inspector General of the Intelligence Community, or to an employee designated by any of the above officials for the purpose of receiving such disclosures, that the employee reasonably believes evidences (i) a violation of any law, rule, or regulation; or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."

the complaint stated that he raised concerns about gross mismanagement and violations of law, rule or regulation to OIG and USAGM leadership. [(b)(6); (b)(7)(C)] alleged that USAGM thereafter suspended his security clearance in retaliation for his complaints to OIG and USAGM senior leaders.

OIG reviewed the complaint and determined that it contained sufficient details to allege a violation of the prohibition against retaliation for making a protected disclosure. Consequently, OIG initiated an investigation of the allegations.

Background

[(b)(6); (b)(7)(C)] was first appointed as the CFO of the Broadcasting Board of Governors (BBG),[2] a career position in the Senior Executive Service (SES), in February 2016.[3] On October 1, 2019, [(b)(6); (b)(7)(C)] became the interim Chief Executive Officer (CEO) of USAGM pending a Presidentially appointed, Senate confirmed CEO. On, June 4, 2020, the Senate confirmed Michael Pack as USAGM's CEO, and he took his Oath of Office on June 8, 2020. Upon Mr. Pack's appointment, [(b)(6); (b)(7)(C)] resumed his role as CFO.

The position of CFO requires a Top Secret Security clearance. [(b)(6); (b)(7)(C)] security file indicates that he has held multiple security clearances throughout his federal career. Immediately prior
(b)(6); (b)(7)(C)

After Mr. Pack arrived at USAGM, he instructed the agency to freeze human resources (HR), information technology (IT), and contracting actions, effective June 9, 2020. In addition, he appointed or detailed several new senior leaders to the agency. In a June 17, 2020, email, the new Chief of Staff, [(b)(6); (b)(7)(C)] revoked all prior delegations of CEO authority and informed [(b)(6); (b)(7)(C)] that effective immediately, he would report to USAGM Chief Operating Officer, [(b)(6); (b)(7)(C)] email also informed [(b)(6); (b)(7)(C)] among others, that "until further notice, no actions are to be taken, and no external communications are to be made, without explicit approval from the Chief Operating Officer; Vice President for Legal, Compliance, and Risk Management; Deputy Chief of Staff; or Chief of Staff." According to [(b)(6); [(b)(6);] while [(b)(6); (b)(7)(C)] was technically his immediate supervisor, several other individuals that were part of Mr. Pack's leadership team participated in meetings with him. These individuals included: [(b)(6); (b)(7)(C)] Deputy Chief of Staff [(b)(6); (b)(7)(C)], and Acting Vice President for Legal, Compliance, and Risk [(b)(6); (b)(7)(C)]

[2] BBG was the predecessor agency to USAGM.

[3] In November 2016, [(b)(6);] left BBG and joined the U.S. Centers for Disease Control and Prevention, but rejoined BBG as the CFO in August 2017.

During his interview, [redacted] confirmed that he made several disclosures to OIG and that he listed his disclosures in a document provided to OIG. One of the disclosures noted in [redacted] document was a July 17, 2020, disclosure to OIG that [redacted] was exerting pressure on him to ignore financial management controls and withhold funding from the Office of Cuba Broadcasting (OCB). [redacted] believed withholding funds could force USAGM to commit an Antideficiency Act violation.[4] [redacted] document listed 22 other specific concerns raised to OIG in July and August 2020.

During his interview, [redacted] told OIG he did not tell USAGM management that he spoke to OIG but that he raised the same concerns with USAGM senior leaders around the same time that he had disclosed them to OIG. When asked how USAGM management would have known about his disclosures to OIG, [redacted] responded that he did not know but that he may have mentioned it to them indirectly during his last meeting the week or week and a half before Mr. Pack suspended his clearance.

In his complaint, [redacted] noted that he made eight disclosures to USAGM leadership both orally and/or in writing. On July 13, 2020, [redacted] emailed [redacted] with concerns regarding Mr. Pack's mass firing of network heads, the impact Mr. Pack's spending freeze on USAGM's ability to continue functioning properly, violations of USAGM's *Firewall and Highest Standards of Professional Journalism* (Firewall) regulation[5], and the targeting of J-1 visa holders. On July 16, 2020, [redacted] emailed [redacted] separately about the same concerns he had raised to [redacted] and additionally raised concerns about the impoundment of funds and health and safety issues related to COVID-19. On July 17, 2020, [redacted] emailed [redacted] to express concerns that the continued funding freeze would negatively impact USAGM's ability to perform its mission. On July 21, 2020, [redacted] emailed [redacted] to express concerns about her interactions with the Open Technology Fund and how her actions would jeopardize financial controls for USAGM. On unspecified dates during this time, [redacted] raised concerns of a potential Antideficiency Act violation if USAGM continued to delay the transfer of funds to a grantee. [redacted] also told [redacted] that they could not lawfully transfer approximately $3.5 million between federal grantees without first notifying Congress and the Office of Management and Budget. Lastly, on August 12, 2020, in a meeting with several USAGM leaders, [redacted] conveyed his concerns regarding the spending freeze's impact on USAGM operations and alleged that USAGM had misled a federal court regarding its intentions regarding funding for a grantee.

On August 12, 2020, [redacted] along with six other USAGM career employees, received a letter, signed by Mr. Pack, suspending his security clearance and placing him on administrative leave. The letter stated: "I certify it is in the interest of U.S. national security to suspend your security clearance, pending the outcome of an investigation effective immediately." Mr. Pack

[4] The day before, July 16, [redacted] expressed this same concern to [redacted]

[5] USAGM published its *Firewall and Highest Standards of Professional Journalism* regulation on June 15, 2020, (codified at 22 C.F.R. Part 531). USAGM later rescinded this regulation effective December 10, 2020. *See* 85 Fed. Reg. 79,427 (Dec. 10, 2020). Nevertheless, the regulation was in effect at the time of [redacted] disclosures.

told OIG that his staff recommended suspending the security clearances of the six complainants and that he concurred with their proposal but left the details of the suspensions up to them. Mr. Pack identified [(b)(6); (b)(7)(C)][6] as the staff involved in the security clearance suspensions.[7]

USAGM subsequently retained an outside law firm to conduct a further review. On December 21, 2020, adjudicators from USAGM's Office of Security reviewed the report on [(b)(6); (b)(7)(C)] prepared by the law firm and determined that all the issues identified, which were similar to the issues used by USAGM to suspend [(b)(6); (b)(7)(C)] clearance, were performance based, unrelated to issues of national security as set forth in Security Executive Agency Directive (SEAD) 4 and Executive Order 12968.

USAGM Security Clearance Suspension Procedures

USAGM's policy and procedures for suspending security clearances are contained within its directive titled, *Personnel Security Management v.4*, which is largely based on Executive Order 12968.[8] The directive states that the Director of Security "acts as the ultimate authority (or designates an alternate) for the reduction, denial, suspension, or revocation of an individual's eligibility for access to classified national security information and/or an individual's eligibility to be employed in a government position based on a suitability or fitness determination."[9] Within the Office of Security, the Chief of the Personnel Security Division is given the responsibility to suspend security clearances.[10] The directive notes, however, that the Chief Executive Officer "may also exercise authority granted in 5 U.S.C. § 7532 to suspend without pay, and then remove, a USAGM employee when this action is deemed necessary in the interests of national security."

The directive states, "Suspension of a clearance, also known as administrative withholding, is appropriate when a significant question of security eligibility arises. Suspension is warranted, for example, when the security organization receives information indicating possible gross misconduct, criminal conduct, substance abuse, or a serious breach of integrity."[11] Security eligibility is defined as "a determination of eligibility for access to classified information" that "is a discretionary security decision based on judgments by appropriately trained adjudicative personnel."[12] Executive Order 12968 states that "determinations of eligibility for access to

[6] [(b)(6);] was the Senior Advisor for Strategy, Research and Operations and [(b)(6);] was a Senior Advisor.

[7] OIG did not interview the staff identified by CEO Pack. [(b)(6); (b)(7)(C)] had departed federal service when OIG sent out interview requests, and OIG does not have the ability to compel individuals who have left federal service. Both Ms. [(b)(6); (b)(7)(C)] agreed to interviews and OIG scheduled meetings based on the availability of the interviewees, but these individuals subsequently refused to sit for these interviews after departing from federal service.

[8] Executive Order 12968, Access to Classified Information, Aug. 4, 1995.

[9] USAGM, *Personnel Security Management v.4*, preface § 6(c)(7).

[10] USAGM, *Personnel Security Management v.4*, preface § 6(d)(7).

[11] USAGM, *Personnel Security Management v.4*, ch. 11, § 10(b)(1).

[12] USAGM, *Personnel Security Management v.4*, appendix 1 (noting that "eligibility shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security.")

classified information shall be based on criteria established under this order."[13] Those criteria are the adjudicative guidelines issued by the Office of the Director of National Intelligence (ODNI), which are:

- Allegiance to the United States
- Foreign influence
- Foreign preference
- Sexual behavior
- Personal conduct
- Financial considerations
- Alcohol consumption
- Drug involvement
- Emotional, mental, and personality disorders
- Criminal conduct
- Security violations
- Outside activities
- Misuse of information technology systems.[14]

USAGM's directive further specifies that "upon receipt of information that raises questions concerning the personnel security fitness of an individual, [the Office of Security] shall immediately assess the security factors involved and shall take suitable action to ensure national security interests are protected."[15] In making such a determination, the Office of Security must "consider such factors as the conclusiveness and seriousness of the information developed, the employee's access to classified information, and the opportunity the position affords the employee to commit acts contrary to national security interests." If USAGM decides to suspend a security clearance temporarily pending an investigation and the suspension exceeds 10 days, the employee is entitled to notice in writing with a justification for the suspension.[16] USAGM's policy notes that "retaliation that affects eligibility for access to classified national security information is prohibited" and that USAGM officials shall not take or fail to take, or threaten to take or fail to take, any action affecting an employee's eligibility for access to classified national security information as a reprisal for a protected disclosure.[17]

Despite these policies, OIG found that no one who was trained in the adjudicative guidelines participated in the decision, preparation, or finalization of (b)(6); (b)(7)(C) suspension letter. USAGM's directive states that decisions regarding security clearances must be made by "appropriately trained adjudicative personnel" using the adjudicative guidelines.[18] However, in

[13] Executive Order 12968, Access to Classified Information, Aug. 4, 1995, § 2.1(a).

[14] SEAD 4: National Security Adjudicative Guidelines, Dec. 10, 2016.

[15] USAGM, *Personnel Security Management v.4*, ch. 12, § 1(b).

[16] USAGM, *Personnel Security Management v.4*, ch. 12, § 2(a).

[17] USAGM, *Personnel Security Management v.4*, ch. 12, § 2(e)(1), (2).

[18] USAGM, *Personnel Security Management v.4*, appendix 1.

(b)(6); (b)(7)(C) case, no one who was trained in those guidelines, such as the Chief of the Personnel Security Division who ordinarily has the responsibility to suspend security clearances, was even consulted about the suspension.[19] Even if USAGM officials had questions about the ability of its Office of Security, they could have consulted with OPM and ODNI about the suspension, but they did not do so.

Legal Standard

As noted above, PPD-19 prohibits the taking of any action with respect to any employee's security clearance or access determination in retaliation for having made a protected whistleblower disclosure. In 2020, the Inspector General for the Intelligence Community issued procedures for the review of allegations of retaliation under PPD-19. These procedures specify that a complainant must demonstrate that: (a) he or she made a protected disclosure; (b) the agency took or failed to take, or threatened to take or fail to take, any action with respect to the complainant's security clearance or access determination; and (c) the protected disclosure was a contributing factor in the agency's decision to take or fail to take, or threaten to take or fail to take, the security clearance action.[20]

Although PPD-19 and these procedures do not specify how to determine whether a protected disclosure was a "contributing factor" in the adverse security clearance determination, similar language is used in the Whistleblower Protection Act, codified at 5 U.S.C. § 1221, which prohibits agencies from taking adverse personnel actions in retaliation for protected disclosures. Under the Whistleblower Protection Act, a complainant can establish that his or her protected disclosure was a contributing factor in the alleged retaliatory personnel action through either direct evidence or through circumstantial evidence that the official taking the adverse action knew of the disclosure and the action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the adverse action.

If a complainant can demonstrate that he or she made a protected disclosure that was a contributing factor in the adverse determination, the burden shifts to the agency, which must "prove by a preponderance of the evidence that it would have taken the same action in the absence of such disclosure, giving the utmost deference to the agency's assessment of the particular threat to the national security interests of the United States in the instant matter."[21] Federal courts have looked to three factors (commonly called the *Carr* factors) when determining whether an agency has met its burden: the strength of the agency's evidence in support of its decision; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly

[19] USAGM, *Personnel Security Management v.4*, preface § 6(d)(7).

[20] Inspector General of the Intelligence Community Instruction 2020.001, § 9(C)(2).

[21] *Id.*

situated.[22] The courts weigh these three factors together to determine whether, as a whole, the agency has met its burden, and a strong showing on one factor may be sufficient.

Complainant's Burden

As noted previously, the first element under a complainant's burden of proof in PPD-19 cases is whether the complainant made a protected disclosure. Under PPD-19, a protected disclosure is defined as a disclosure of information by the employee to, among other persons, a supervisor in the employee's chain of command, up to and including the head of the agency, or to the Inspector General of the employing agency, that the employee reasonably believes is a violation of law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.[23] OIG found evidence that (b)(6); (b)(7)(C) made several disclosures that constitute a protected disclosure under PPD-19.

In mid-July 2020 through approximately mid-August 2020, (b)(6); made several oral and written disclosures to his supervisory chain and OIG concerning what he believed to be gross mismanagement and violations of USAGM's Firewall. For example, in a July 13 email to (b)(6) (b)(6); and almost identical emails to (b)(6); (b)(7)(C) on July 16, (b)(6); (b)(7)(C) noted, "I think the Hill's concerns are not OCB-specific in most cases and are fairly obvious concerns, same as mine and likely leadership's, so easy to enumerate." (b)(6); then enumerated the following concerns which he believed USAGM senior leaders would have to address:

> —Explanation for the mass firings of the network heads and the general strategy going forward. (Also the recent firing of Bay Fang).
> —The impact of the continuing freeze on contracting actions, personnel actions, and technical migrations (particularly on the federal side, but also during the time the freeze applied to the grantees). Impacts on health and safety related to covid or otherwise.
> —Governance issues at USAGM including violations of the firewall, such as the removal of Steve Springer as standards editor of VOA; the makeup of the grantee boards, etc.
> —The status of the lawsuit with the Open Technology Fund and the qualifications of the Acting CEO at this boutique organization.
> —The current status of OTF's grant agreement and various work they fund, including impacts on human rights activists, journalists/sources worldwide, and including protesters in Hong Kong. (The July funding still has not gone out).

[22] *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (citing *Geyer v. Dep't of Justice*, 7 M.S.P.R. 682, 688, aff'd, 116 F.3d 1497 (Fed. Cir. 1997)).

[23] PPD-19 § F(5).

—The status of the J-1 visas; threats to journalists who may need to return home; impact on operations; and the reasons for conducting the reviews.

In addition, according to [(b)(6); (b)(7)(C)] he met with Mr. Pack, [(b)(6); (b)(7)(C)] [(b)(6);] on or about July 30, 2020. At the meeting, [(b)(6); (b)(7)(C)] pointed out that people on the leadership team were causing significant delays on a variety of contracting, personnel, and operational activities within the agency. He noted that the delays were extremely detrimental to the functions of the agency and greatly impaired its mission and that of its grantees.

[(b)(6); (b)(7)(C)] made another protected disclosure on or about July 21, 2020, when he told OIG that USAGM's new CEO failed to timely approve grant amendments, including to the Middle East Broadcasting Networks, which had not received its April, May, and June funding after months of waiting. According to [(b)(6); (b)(7)(C)] this inaction created a growing cash-flow crisis for the grantee. Moreover, in a July 29, 2020, email to OIG, [(b)(6); (b)(7)(C)] raised concerns regarding "firewall violations and impacts on the journalism based on resource allocation."

These statements qualify as protected disclosures under PPD-19 because [(b)(6); (b)(7)(C)] reasonably believed them to be evidence of gross mismanagement and violations of law, rule, or regulation. Gross mismanagement is defined as "a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission."[24] [(b)(6); (b)(7)(C)] repeatedly expressed his concern that USAGM leadership's actions and inaction greatly impaired the mission of the agency; thus, falling squarely within the definition of allegations of gross mismanagement. [(b)(6);] also repeatedly expressed concern that USAGM risked violating the Antideficiency Act violation.[25] Similarly, [(b)(6); (b)(7)(C)] made disclosures regarding what he believed to be a violation of an agency regulation; namely, USAGM's Firewall regulation. [(b)(6); (b)(7)(C)] belief that these actions evidenced gross mismanagement and a violation of an agency regulation is reasonable given his positions in USAGM. As an interim CEO and CFO of USAGM,[26] [(b)(6);] had knowledge and experience in all the areas of concern he cited and had insight into the effect of the actions of its new leaders.

The second element is whether the agency took or failed to take, or threatened to take or fail to take, any action with respect to the complainant's security clearance or access determination. In this case, USAGM suspended [(b)(6); (b)(7)(C)] security clearance on August 12, 2020.

The last element of a complainant's burden in PPD-19 cases is whether the complainant's protected disclosure was a contributing factor in the agency's decision to take or fail to take, or

[24] *Kavanagh v. M.S.P.B.*, 176 F. App'x 133, 135 (Fed. Cir. Apr. 10, 2006).

[25] While a disclosure concerning a not-yet-realized violation of law is not protected as a "violation of law, rule, or regulation," [(b)(6);] concerns regarding the risk of an Antideficiency Act violation can be categorized as concerns regarding gross mismanagement.

[26] According to the position description, as the CFO [(b)(6);] is responsible for overseeing USAGM's budgeting, finance, and grant management functions.

threaten to take or fail to take, the security clearance action. While OIG found no direct evidence that [redacted] disclosures were a contributing factor in the suspension of his security clearance, there is evidence that the individuals involved in the suspension of his clearance knew of his disclosures and that they moved to suspend his clearance shortly after he made protected disclosures. USAGM identified Mr. Pack, [redacted] among others, as being involved in the decision to suspend [redacted] security clearance suspension, and they were all recipients of his protected disclosures. These officials all participated in the decision to suspend [redacted] security clearance within days or at most a month of receiving his protected disclosures. The short period of time between [redacted] protected disclosures and the suspension of [redacted] security clearance is such that a reasonable person would conclude that there is a connection between the security clearance suspension and the protected disclosures. Therefore, OIG concludes that there is circumstantial evidence that [redacted] protected disclosures were a contributing factor in USAGM's decision to suspend his clearance.

As set forth above, [redacted] met his burden of proof under PPD-19 by demonstrating that he made a protected disclosure, that the agency took a security clearance action against him, and that his protected disclosure was a contributing factor in the agency's decision to take the security clearance action.

Agency's Burden

Because [redacted] met his burden of proof, USAGM must demonstrate, by a preponderance of the evidence, that it would have taken the same action in the absence of [redacted] disclosures.

As noted above, the courts have traditionally reviewed three factors in determining whether an adverse action resulted from a protected disclosure. The first factor that the courts use to weigh whether an agency has met its burden is the strength of the evidence in support of the adverse action.[27] In examining this factor, OIG examines the evidence supporting the adverse action and whether there were "legitimate reasons" for the personnel action.[28]

The suspension letter cited several reasons for suspending [redacted] clearance:

1) The background investigation which granted [redacted] security clearance was done by USAGM when USAGM lacked the proper authority to investigate and perform background checks.
2) As a USAGM senior leader, [redacted] failed to take necessary corrective action to remedy personnel and other security concerns identified by OPM and ODNI.

[27] *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (citing *Geyer v. Dep't of Justice*, 7 M.S.P.R. 682, 688, aff'd, 116 F.3d 1497 (Fed. Cir. 1997)).

[28] *Baker v. Dep't of Defense*, 2016 MSPB LEXIS 4567 (M.S.P.B Aug. 4, 2016).

3) [(b)(6); (b)(7)(C)] "knowingly and willfully granted eligibility for, or allowed access to, classified information in violation of the law and its implementing regulations."
4) [(b)(6); (b)(7)(C)] failed to correct issues identified in an OIG report for Fiscal Year 2019.
5) The Office of Risk Management identified [(b)(6); (b)(7)(C)] in the capacity as Acting CEO and later CFO, as responsible for ensuring corrective action was taken to mitigate and address the personnel security concerns identified in the OPM report, and he did not sufficiently act to remedy the problems.

OIG addresses each of the letter's justifications below.

[(b)(6); (b)(7)(C)] Background Investigation

The suspension letter claimed that [(b)(6); (b)(7)(C)] security clearance was suspended because his background investigation "was done by USAGM (formerly BBG) when USAGM lacked the proper authority to investigate and perform background checks." This statement presumably refers to the fact that OPM delegated authority to BBG to conduct background investigations via a memorandum of understanding (MOU), and that in 2012, USAGM neglected to return the signed renewal of the MOU to OPM granting the delegation.

[(b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
] Under the principles governing federal security clearances, as well as USAGM's Personnel Security Management policy, a security clearance generally remains valid unless the employee separates from service or an adverse action is taken to suspend or revoke the clearance, even if a reinvestigation does not occur in a timely fashion.[29] As such, any doubt about the validity of USAGM's ability to perform background checks was not a legitimate reason to suspend [(b)(6); (b)(7)(C)] clearance.

Even if the 2017 investigation was deemed to be invalid, there is no question about the authority of the Department, which investigated his clearance prior to BBG/USAGM, to investigate clearances. At no point did OPM or ODNI direct USAGM to suspend the clearances of any employees that had been granted because of the fact of the unsigned MOU. Thus, USAGM's claim that it suspended [(b)(6); (b)(7)(C)] security clearance because it lacked authority to conduct [(b)(6); (b)(7)(C)] background investigation was not a legitimate reason to suspend his clearance.

Failure to Remedy Personnel Security Concerns

The suspension letter alleged that [(b)(6); (b)(7)(C)] failed to correct or ensure the correction of longstanding deficiencies in USAGM's personnel security program and that he "knowingly and willfully granted eligibility for, or allowed access to, classified information in violation of the law and its implementing regulations."[30] USAGM provided several program reviews of USAGM's

[29] USAGM, *Personnel Security Management v.4*, ch. 11, § 7(b)(3).
[30] This section addresses reasons 2, 3 and 5, as cited in [(b)(6);] security clearance suspension letter together.

personnel security program conducted by OPM and ODNI, and what it called a "USAGM Office of Risk Management Risk Profile" as appendices to the suspension letter. These reviews highlighted numerous deficiencies in USAGM's program and directed it to undertake corrective action to address these deficiencies. The risk profile claimed that [(b)(6); (b)(7)(C)] as CFO and interim CEO was ultimately responsible for the personnel security failings.

The USAGM CFO is responsible for overseeing USAGM's budgeting, finance, and grant management functions. USAGM's personnel security and suitability functions fall within the purview of another senior leader, the Director of the Office Management Services. As CFO, [(b)(6); (b)(7)(C)] had no authority whatsoever to correct or ensure the correction of these personnel security concerns and did not have authority to grant eligibility for or allow access to classified information.

[(b)(6); (b)(7)(C)] was the interim CEO from October 2019 to June 2020. While he was the agency head during this transition period, his failure, as an acting official in the span of half a year, to resolve longstanding problems that challenged the agency for years would at best constitute a performance issue. Performance issues are not included in the adjudicative guidelines and generally are not relevant to the granting or denial of a security clearance. Per USAGM policy, suspension is warranted, for example, when the security organization receives information indicating possible gross misconduct. Despite the August 12, 2020, suspension letter and an August 24 follow up letter signed by Mr. Pack noting that USAGM was investigating [(b)(6); (b)(7)(C)] nothing in his security file reviewed by OIG indicated that any investigation was underway related to gross misconduct. Indeed, when USAGM presented similar facts to two trained security clearance adjudicators in December 2020, they determined that "there are no security issues that fall under [SEAD 4] and Executive Order 12968." The adjudicators determined that "these issues are all performance issues which fall under the Office of Human Resources."

Based on the above, USAGM cannot legitimately claim that it suspended [(b)(6); (b)(7)(C)] security clearance because he failed to correct or ensure the correction of longstanding deficiencies in USAGM's personnel security program, or that he knowingly and willfully granted eligibility for, or allowed access to, classified information in violation of the law and its implementing regulations.

OIG Report for Fiscal Year 2019

The suspension letter also alleged that [(b)(6); (b)(7)(C)] had knowledge of the severe issues identified in OIG's *Inspector General Statement on the U.S. Agency for Global Media's Major Management and Performance Challenges for Fiscal Year 2019* (USAGM FY19 Management Challenges Report) but failed to correct them. The report, issued in December 2019, is a retrospective look at issues revealed during OIG's oversight work.[31]

[31] The suspension letter does not specify whether [(b)(6); (b)(7)(C)] failed to correct the management challenges, as CFO or interim CEO.

Like the personnel security deficiencies, the management challenges reported by OIG have been longstanding difficulties for USAGM. For example, the report indicated various issues related to USAGM's grant management dating back to fiscal year 2013. (b)(6); (b)(7)(C) alleged failure to correct longstanding issues in the approximate 6 months he was interim CEO, is, at most, a performance concern. Further, while some of the management challenges, such as financial management and grant management, fell within (b)(6); (b)(7)(C) responsibility as CFO, any deficiencies noted would likewise constitute performance issues. Performance concerns are not legitimate reasons to suspend a clearance.

Therefore, none of the reasons cited as a basis for the suspension constitute a legitimate reason for an adverse security clearance action, and as such the strength of the evidence in support of the adverse action is weak. USAGM did not follow its own policies when effectuating the suspension which also negatively impacts its legitimacy.

The second *Carr* factor courts is the existence and strength of any motive to retaliate on the part of the individuals who were involved in the decision. OIG found strong evidence of a motive to retaliate regarding (b)(6); (b)(7)(C) disclosures. USAGM received significant negative press regarding the failure to renew the J-1 visas of journalists, the subject of one of (b)(6); (b)(7)(C) (b)(6); disclosures. Also, several members of Congress had reached out to USAGM to express concern about the visas. Emails indicate that USAGM bristled at this criticism. For example, on July 14, 2020, (b)(6); (b)(7)(C) and the Public Affairs advisor prepared talking points for the CEO that referred to such criticism as "nonsensical" and questioned: "Why are non-U.S. citizens being brought to the U.S. to report on 'significant American thought and institutions' back to the rest of the world?"

(b)(5) Attorney-Client

Shortly after these exchanges, (b)(6); (b)(7)(C) began their effort to suspend the security clearance of (b)(6); (b)(7)(C) as well as those of the other five complainants.

Another example is that on August 11, 2020, (b)(6); (b)(7)(C) sent an email to (b)(6); (b)(7)(C) expressing concerns regarding instructions (b)(6); (b)(7)(C) gave to grantees. According to (b)(6); (b)(6); (b)(7)(C) ordered several USAGM grantees to return Office Internet Freedom (OIF) money it had been provided during fiscal year 2019. As a result, the grantees sent paper checks to USAGM. (b)(6); (b)(7)(C) informed (b)(6); (b)(7)(C) via email that (b)(6); (b)(7)(C) instructions were outside of USAGM's normal financial internal controls and likely would raise questions by USAGM's financial auditors (b)(6); (b)(7)(C) noted that while (b)(6); (b)(7)(C) and the CEO wanted the money quickly, research was needed to determine the appropriate next steps.

[32] 5 C.F.R. § 359.406.

(b)(6); (b)(7)(C) forwarded (b)(6); (b)(7)(C) email to (b)(6); (b)(7)(C) immediately after receiving it. (b)(6); (b)(7)(C) told (b)(6); (b)(7)(C) that after receiving the email, Ms. (b)(6); (b)(7)(C) called him and said, (b)(6); (b)(7)(C) just needs to do his fucking job!" The following day, (b)(6); (b)(7)(C) sent a colleague a message that stated, "Told (b)(6); (b)(7)(C) to deposit [the checks] in treasury and allocate the funds for OIF. Of course, he's being a pain." In the same message, she asks the colleague the process for putting an employee on investigative leave.

USAGM appears to have continued its efforts to punish (b)(6); (b)(7)(C) for making protected disclosures even after the suspension of his clearance. On August 27, 2020, (b)(6); (b)(7)(C) drafted a memorandum to (b)(6); (b)(7)(C) threatening to discipline him for statements that he made in news articles asserting that the suspension of his clearance constituted "retaliation" for reporting instances of gross mismanagement and violations of law.[33] On September 23, 2020, (b)(6); (b)(7)(C) an advisor to the CEO, emailed a Department of Justice attorney and raised concerns that (b)(6); (b)(7)(C) was going to testify before Congress on the following day and "may allege some form of retaliation." (b)(6); (b)(7)(C) asked for the attorney's advice as to how to discipline (b)(6); (b)(7)(C) for his testimony.

Thus, there is strong evidence that the officials involved in the decision to suspend (b)(6); (b)(7)(C) security clearance had motive to retaliate.

The final *Carr* factor examines any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. OIG found some evidence that the agency did not take similar action against similarly situated employees who were not whistleblowers. For example, one rationale for (b)(6); (b)(7)(C) security clearance suspension was that USAGM did not have authority to conduct his background investigation. USAGM conducted background investigations for hundreds of other employees during the years when there was no signed delegation MOU, yet the security clearances of only seven employees (all of whom were whistleblowers) were suspended.[34] Likewise, USAGM did not suspend the security clearances of other officials who were responsible for other management challenges noted by OIG, such as information security.

OIG's examination reveals that even though USAGM cited five different reasons to suspend the security clearance of (b)(6); (b)(7)(C) none of them relate to the adjudicative guidelines and thus do not constitute a legitimate basis for the suspension. Likewise, OIG found strong evidence of a retaliatory motive and no evidence that USAGM took comparable action against individuals who were similarly situated but were not whistleblowers. Accordingly, USAGM did not meet its burden to demonstrate by a preponderance of the evidence that it would have suspended (b)(6); (b)(7)(C) (b)(6); security clearance absent his protected disclosures.

[33] It is unclear if USAGM ever sent this memorandum to (b)(6); but its drafting is relevant to (b)(6); (b)(7)(C) motive.

[34] OIG found evidence that the employee whose security clearance was suspended but did not file a whistleblower complaint also made protected disclosures and thus qualifies as a whistleblower.

Conclusion

(b)(6); (b)(7)(C) made several protected disclosures to OIG and his supervisory chain in July and August 2020 raising concerns of alleged gross mismanagement and violations of USAGM's Firewall regulation. Shortly thereafter, USAGM suspended his security clearance.

USAGM could not demonstrate by a preponderance of the evidence that it would have suspended (b)(6); (b)(7)(C) clearance absent his protected disclosures. The five reasons cited in (b)(6); (b)(7)(C) suspension letter bear no relation to the adjudicative guidelines and USAGM failed to follow its own directive for suspending a clearance. In addition, OIG found strong evidence of retaliatory motive by individuals involved in the suspension and no evidence that USAGM took action against similarly situated individuals who were not whistleblowers.

Pursuant to PPD-19, OIG may recommend that the agency reconsider the employee's Eligibility for Access to Classified Information and "take other corrective action to return the employee, as nearly as practicable and reasonable, to the position such employee would have held had the reprisal not occurred."

Prior to the completion of this investigation, USAGM reconsidered (b)(6); (b)(7)(C) eligibility for access to classified information and restored (b)(6); (b)(7)(C) security clearance. Nonetheless, USAGM should also consider other corrective action, including but not limited to formally rescinding the suspension letter and awarding him attorney's fees and other reasonable compensatory damages.

Office of Inspector General
United States Department of State

~~Sensitive But Unclassified~~

Case Closing Memorandum

To: INV FILE

From: (b)(6); (b)(7)(C) Assistant Special Agent in Charge

Thru: Elisabeth Kaminsky, Assistant Special Agent-in-Charge

Thru: Elisabeth Kaminsky, Special Agent-in-Charge

Subject: Closing Memorandum for C2021025, Amended

SUBJECTS

1. Name: Pack, Michael
   Associated Entity: U.S. Agency for Global Media
   Grade/Position: Executive Service / Chief Executive Officer
   Address: (b)(6); (b)(7)(C)

2. Name: (b)(6); (b)(7)(C)
   Associated Entity: U.S. Department of State / U.S. Agency for Global Media Detailee
   Grade/Position: GS-15 / Senior Adviser /
   Acting Vice President for Legal, Compliance, and Risk
   Address: (b)(6); (b)(7)(C)

3. Name: (b)(6); (b)(7)(C)
   Associated Entity: U.S. Agency for Global Media
   Grade/Position: Senior Executive Service / Chief Operations Officer
   Address: (b)(6); (b)(7)(C)

4. Name: (b)(6); (b)(7)(C)
   Associated Entity: U.S. Agency for Global Media
   Grade/Position: GS-15 / Director of the Office of Contracts/

Senior Procurement Executive
Address: (b)(6); (b)(7)(C)

5. Name: (b)(6); (b)(7)(C)
Associated Entity: U.S. Agency for Global Media
Grade/Position: GS-14 / Supervisory Contracting Officer
Address: (b)(6); (b)(7)(C)

6. Name: UltraReach Internet Corp.
Address: 1712 Pioneer Avenue, #1089, Cheyenne, Wyoming
DUNS: 83-162-8743

7. Name: (b)(6); (b)(7)(C)
Associated Entity: UltraReach Internet Corporation
Position: Owner
Address: (b)(6); (b)(7)(C)

8. Name: (b)(6); (b)(7)(C)
Associated Entity: The Lantos Foundation for Human Rights & Justice
Position: President
Address: (b)(6); (b)(7)(C)

9. Name: (b)(6); (b)(7)(C)
Associated Entity: Hudson Institute
Position: Director
Address: (b)(6); (b)(7)(C)

Statutes, Regulations, Policies:
18 USC § 371 - Conspiracy to commit offense or to defraud United States
18 USC § 1031 - Major fraud against the United States
41 USC § 3301 - Full and Open Competition
FAR Part 3 - Improper Business Practices and Personal Conflicts of Interest
FAR Part 6.101(a) Policy - Full and Open Competition
FAR Part 15.3 - Source Selection
2 CFR 200.319 - Full and Open Competition
Consolidated Appropriations Act, 2020, Public Law 116-94, 133 Stat. 2534

(AGENT'S NOTE: This CCM was amended due to an oversight that the case was presented to the Department of Justice, Criminal Division, Public Integrity Section for prosecution. The original CCM failed to mentioned the DOJ referral. (**Attachment 1**))

BASIS FOR INVESTIGATION

OIG received a hotline complaint alleging former U.S. Agency for Global Media Chief Executive Officer Michael Pack, former Chief Operations Officer [(b)(6); (b)(7)(C)] and the Office of Contracts committed contract fraud and violated the Consolidated Appropriations Act by making an award to UltraReach Internet Corporation and reappropriated $20 million given to the Open Technology Fund to pay for it. It was further alleged that Pack did so based on improper relationships with [(b)(6); (b)(7)(C)] President, Lantos Foundation for Human Rights & Justice, and [(b)(6); (b)(7)(C)] Director, Hudson Institute.

DETAILS OF THE INVESTIGATION

OIG opened this investigation based on information indicating former U.S. Agency for Global Media (USAGM) Chief Executive Officer (CEO) Michael Pack, former Chief Operations Officer (COO) [(b)(6); (b)(7)(C)] and the Office of Contracts (CON) committed contract fraud and violated the Consolidated Appropriations Act by making an award to UltraReach Internet Corporation (UltraReach) and reappropriated $20 million given to the Open Technology Fund to pay for it. It was further alleged that Pack did so based on improper relationships with human rights advocates, [(b)(6); (b)(7)(C)] President, Lantos Foundation for Human Rights & Justice, and [(b)(6); (b)(7)(C)] Director, Hudson Institute.

OIG conducted interviews, reviewed USAGM email accounts, reviewed contracts, and reviewed the Consolidated Appropriations Act and Federal Acquisition Regulations (FAR), among other documents and USAGM records. OIG attempted to interview Pack; former Acting Vice President for Legal, Compliance, and Risk [(b)(6); (b)(7)(C)] and Director of the Hudson Institute [(b)(6); (b)(7)(C)] Each declined or failed to respond to requests for an interview.

UltraReach Award

OIG reviewed the UltraReach contract. UltraReach was awarded Basic Ordering Agreement 951700-20-G-0162 on August 4, 2020. UltraReach was subsequently awarded Task Order 951700-21-K-0011 on November 4, 2020, which had an initial period of performance of one month with three-month option periods thereafter. USAGM only exercised Option Period 1,

signed November 30, 2020, with a period of performance December 1, 2020, through February 28, 2021. USAGM did not exercise Option Period 2. USAGM paid UltraReach a total of $249,000 for all periods of performance.

OIG interviewed Senior Procurement Executive (SPE) (b)(6); (b)(7)(C) who said (b)(6); (b)(7)(C) told him it was Pack's priority to make a new award for internet freedom tools. (b)(6); and (b)(6); (b)(7)(C) discussed various options for making an award. Afterwards, CON reinstated expired basic ordering agreements with the intent of issuing individual task orders against them. Once the solicitation was sent out and proposals were received, the technical evaluation team determined UltraReach's proposal was not sufficient as it did not meet the technical specifications, including that the mobile platform was in beta form, UltraReach did not have a completed security audit, it did not offer landing pages, and the price was too high. Ultimately, the technical evaluation team recommended to not award a contract to UltraReach. CON proceeded to make an award to Advanced Circuiting, Inc (ACI) and Psiphon after negotiating their rates down and notified UltraReach of its unsuccessful offer.

According to the statement of work for Basic Ordering Agreement 951700-20-G-0162, the vendor was required to provide separate customized versions of the client software for each of the following USAGM broadcasting services, localized in a language per C.2.14 (or in exercised option C.2.15), each of which loads a distinct default URL as provided by the COR: Voice of America (VOA) Chinese, VOA Persian News Network, VOA English, Radio Free Asia (RFA) Mandarin, RFA Cantonese. The vendor was also required to configure each customized version of the mobile application so that upon startup by the end user the mobile application automatically loads the computer's default web browser, and displays a pre-roll video as designated by the COR. The Contractor shall prepare customized versions of the client software and mobile application for each of the USAGM broadcast services as specified in C.2.16 (and in exercised option C.2.17), with a customized start page for each version as provided by the COR.

Chief Risk Officer (b)(6); (b)(7)(C) as the former Office of Internet Freedom (OIF) Director, helped the USAGM front office facilitate acquisitions related to internet freedom tools. In his interview, (b)(6); said (b)(6); (b)(7)(C) unexpectedly called (b)(6); after the awards were made to ACI and Psiphon and told him to fund both open and closed-source internet freedom tools. (b)(6); explained that UltraReach was the only closed-source tool available and (b)(6); (b)(7)(C) said to fund it.

OIG interviewed Supervisory Contracting Officer (b)(6); (b)(7)(C) who said that approximately one month after notifying UltraReach of its unsuccessful offer, (b)(6); told CON to make an award to UltraReach. According to (b)(6); Pack gave the instruction to make the award. (b)(6) said he spoke with (b)(6); afterward and they "all knew UltraReach was not qualified." (b)(6); told (b)(6); to move

forward with the award anyway because that is what the "front office" wanted. (b)(6); said, "I know we shouldn't have done it." (b)(6) reiterated he spoke with both (b)(6); (b)(7)(C) about the request and they both said the "front office" wanted the award. When asked if (b)(6) violated the FAR when he made the award, (b)(6) said, "I did." OIG was unable to corroborate this statement in its review of the FAR.

OIG reviewed the FAR, specifically Parts 3, which covers conflicts of interest; 6, which covers full and open competition; and 15.3, which covers source selection. According to the FAR, the source selection authority has the authority to make an independent judgment on source selection after making a comparative assessment of proposals received against the source selection criteria and including any reports or analyses prepared by others, such as a technical evaluation.

In his interview, (b)(6); said that even if Pack had not directed the award be made to UltraReach, if USAGM needed UltraReach's services it could have still made the award in the same way. (b)(6); explained that the award did not prejudice another vendor, meaning it did not affect an award being made to another company, so it was not improper.

In OIG's review of the contract, we determined that although USAGM CON made an initial notice of unsuccessful offer to UltraReach, CON renegotiated UltraReach's bid and then made the award to UltraReach at the re-negotiated rate. Insofar as the technical deficiencies highlighted by the technical evaluation team, UltraReach completed a security audit in May 2020 on behalf of the Department's Bureau of Democracy, Human Rights, and Labor (DRL) for similar work performed via a DRL grant. UltraReach underwent a separate and unrelated Google security audit on their mobile application in March 2022.

Upon interviewing UltraReach's owner and founder (b)(6); (b)(7)(C) OIG learned UltraReach's mobile platform was in beta form on purpose in order to prevent user overload and that the contracting officer's representative (COR) was required to provide the landing pages and UltraReach was required to provide access to them.

In his interview, (b)(6); said UltraReach had English and Chinese landing pages since a majority of its original users were based in China. (b)(6) also said he agreed to provide access to the additional, requested landing pages, but it was USAGM's responsibility to create and provide them to UltraReach in the respective languages of the countries they wanted to have access. (b)(6); said USAGM never provided him the landing pages for UltraReach to implement. (b)(6) further explained that under the USAGM contract, it was UltraReach's responsibility to provide access to the pages and USAGM's obligation was to promote them and track the users.

A review of Pack and (b)(6); (b)(7)(C) USAGM email revealed a July 29, 2020, email from (b)(6); (b)(7)(C) to (b)(6); directing (b)(6); to provide a report with "A brief statement on OIF will provide an open bid process to find and fund a more broad array of technology including closed technology which serve the mission fully." In a July 31, 2020, email from (b)(6); (b)(7)(C) to (b)(6); (b)(6); (b)(7)(C) wrote that USAGM wanted to award both closed and open-source technology to attract that broadest pool of candidates.

Additionally, in an August 14, 2020, email from (b)(6); to (b)(6); (b)(7)(C) recommended USAGM add additional vendors to the BOA for a broader spectrum of awards and for future award cycles. In an August 18, 2020, email from (b)(6); (b)(7)(C) wrote, "CEO Pack is committed to funding as many internet firewall circumvention tools as possible, He is inclined to do both an RFP [request for proposal] and to expand the BOA."

(AGENT'S NOTE: UltraReach was awarded Basic Ordering Agreement 951700-20-G-0162 on August 4, 2020. UltraReach was subsequently awarded Task Order 951700-21-K-0011 on November 4, 2020, which had an initial period of performance of one month with three-month option periods thereafter. USAGM only exercised Option Period 1, signed November 30, 2020, with a period of performance December 1, 2020, through February 28, 2021.)

OIG did not find evidence that Pack or (b)(6); (b)(7)(C) attempted to influence any contracting actions for any reason other than to expand USAGM's current internet freedom programs. OIG did not find evidence that USAGM violated full and open competition requirements in its award to UltraReach. OIG did not find evidence that (b)(6); was directly involved in the UltraReach contract award, technical evaluation, or contract funding. (b)(6); left USAGM in August 2020.

Consolidated Appropriations Act

OIG reviewed the 2019-2021 Consolidated Appropriations Act and determined that while the act did call for a security audit to be completed, it did not require that one had to be completed prior to an award being made. Allegations also alleged that an award could not be made to UltraReach because UltraReach used closed-source methodology. However, the Consolidated Appropriations Act of 2019, which was the relevant statute at the time of award, did not call for only open-source internet freedom tools. It was not until the Consolidated Appropriations Act of 2021, signed into law on December 27, 2020, that it was stipulated funding could only be made available for open-source tools.

UltraReach completed a security audit on behalf of DRL between April and May 2020 with no critical findings. According to (b)(6); the completion of the audit was delayed because the auditor attempted to provide DRL a report with UltraReach's proprietary source code in it. (b)(and the auditor eventually came to an agreement and the final report did not contain the source code.

(AGENT'S NOTE: There were two reports. One clean report that did not contain the source code and one full report with the source code.) UltraReach underwent a separate and unrelated Google security audit on their mobile application in March 2022.

Re-appropriation of OTF Funding

In the review of Pack and (b)(6); (b)(7)(C) USAGM email accounts, OIG found that in August 2020 (b)(6); (b)(7)(C) issued letters from Pack requesting the return of grant funds from the Middle East Broadcasting Network (MBN), Radio Free Asia (RFA), and Radio Free Europe/Radio Free Liberty (RFE/RL).

The review also revealed a letter from RFA with an enclosed check in the amount of $2,910,038.10. On August 11, 2020, MBN gave USAGM a check for $500,000. On August 13, 2020, RFE/RL proposed to return $129,000, which (b)(6); (b)(7)(C) replied, "At the direction of CEO Pack, USAGM accepts RFE/RL's proposal to return $129,000." RFE/RL Comptroller (b)(6); (b)(7)(C) subsequently requested the wire transfer information to expedite the payment. These amounts were also reflected in a Microsoft Word document drafted by (b)(6); (b)(7)(C) titled "OMB Draft."

USAGM Office of Management Services Attorney Advisor (b)(6); (b)(7)(C) Director of Budget (b)(6); (b)(7)(C) and Deputy Chief Financial Officer (b)(6); (b)(7)(C) informed (b)(6); (b)(7)(C) and other senior staff (b)(5) Attorney-Client
(b)(5) Attorney-Client

(b)(5) Attorney-Client

OIG's review of (b)(6); (b)(7)(C) and Pack's USAGM email accounts also revealed a September 15, 2020, email exchange between (b)(6); (b)(7)(C) and Pack where (b)(6); (b)(7)(C) informed Pack that OMB granted the USAGM apportionment of previously unused and unobligated grant funds, and USAGM could use the funds for internet freedom projects through the OIF. (AGENT'S NOTE: An apportionment is an OMB-approved plan to use budgetary resources.)

Pack's Relationship with the (b)(6); (b)(7)(C)

Pack declined OIG's request to interview him.

OIG interviewed (b)(6); who indicated she did not know Pack prior to his nomination and the majority of their contact was via email and solely focused on their mutual agenda of internet freedom and firewall circumvention. OIG did not find anything contradictory to (b)(6); (b)(7)(C) statements in its review of Pack's USAGM email accounts, USAGM documents, or interviews.

(b)(6); (b)(7)(C) failed to respond to multiple requests for interview. However, a review of Pack's USAGM email accounts did not reveal anything beyond a professional relationship. In a January 2020 email in response to (b)(6); request for a meeting, Pack wrote, "Let me state some ground rules at the outset. I will not make any commitments or promises beyond what I have already stated in response to the QFRs from the Senate Foreign Relations Committee. The purpose of the meeting must be limited to briefing me and providing information."

DISPOSITION

On May 17, 2022, this case was declined for prosecution by the Department of Justice, Criminal Division, Public Integrity Section Trial Attorney (b)(6); (b)(7)(C) OIG did not develop evidence that an administrative violation occurred and therefore this matter is closed to file.

Prepared By:

(b)(6); (b)(7)(C)

Assistant Special Agent in Charge

Signed on: 03/30/2023 03:45:36 PM

Approved By:

Elisabeth Kaminsky

Elisabeth Kaminsky

Special Agent in Charge

Signed on: 03/30/2023 04:12:11 PM

ATTACHMENTS

1) UltraReach CCM

Office of Inspector General
United States Department of State

~~Sensitive But Unclassified~~

Case Closing Memorandum

To: INV FILE

From: (b)(6); (b)(7)(C) Special Agent

Thru: (b)(6); (b)(7)(C) Assistant Special Agent-in-Charge

Thru: Elisabeth Heller, Special Agent-in-Charge

Subject: Closing Memorandum for P2021033

SUBJECT

Name: (b)(6); (b)(7)(C)
Associated Entity: U.S. Agency for Global Media, Voice of America, South and Central Asia Division, Washington, DC
Grade/Position: Former Senior Advisor
Address: (b)(6); (b)(7)(C)

Statutes, Regulations, Policies:
5 U.S.C. § 552a(i)(3)- Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

BASIS FOR INVESTIGATION

OIG obtained information that on January 19, 2021, (b)(6); (b)(7)(C) former Senior Advisor, U.S. Agency for Global Media (USAGM), Voice of America (VOA), allegedly violated the Privacy Act of 1974. (b)(6); (b)(7)(C) emailed five USAGM's Grantee Boards of Directors members who were also

active private journalists. The e-mail contained official reports of investigations related to alleged misconduct by senior level officials within USAGM. The email contained four attachments including three zip files and one PDF file. The attachments were labeled; "Investigative Summary Memos." (zip), (b)(5) Report." (zip), "OTF." (zip), "USAGM – Referrals." (PDF).

DETAILS OF THE INVESTIGATION

OIG reviewed the complaint and found that on January 19, 2021, (b)(6); sent an email with the subject line "USAGM Materials" to seven non-U.S. Government email addresses, specifically:

(b)(6); (b)(7)(C)

In addition, OIG found that Delancey carbon copied the email address (b)(6); (b)(7)(C) on the email. The USAGM Office of General Counsel told OIG that the (b)(6); (b)(7)(C) email address was used by former USAGM Chief Executive Officer Michael Pack.

OIG found that on January 19, 2019, Pack appointed (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) to the Board of Directors for three USAGM grantees; Radio Free Europe/Radio Liberty (RFE/RL), Radio Free Asia (RFA), and Middle East Broadcasting Networks (MBN). (b)(6); was appointed as chairwomen, and (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) were all appointed as directors of all three boards.

OIG reviewed the attachments sent to the non-government e-mail addresses and found the attachments were investigative reports related to allegations of misconduct that involved, (b)(6); (b)(7)(C)

On February 16, 2021, USAGM's Chief Information Officer (b)(6); (b)(7)(C) determined the breach was too small to report to the U.S. Department of Homeland Security (DHS).

On February 23, 2021 and March 2, 2021 USAGM Office of General Counsel (OGC) sent privacy act violation notices to all five recipients. The notices advised each recipient they received an unauthorized release of agency records and instructed each recipient to destroy the electronic files by permanent deletion, to return hard copies to the USAGM OGC, and to provide contact information of entities or individuals to whom they may have provided or disclosed the information.

On March 2, 2021, USAGM OGC received an affirmation from [(b)(6); (b)(7)(C)] and an e-mail from [(b)(6); (b)(7)(C)] attorney advising the affirmation for [(b)(6);] was sent via mail service to USAGM OGC. On March 22, 2021, USAGM OGC received an e-mail from [(b)(6);] attorney stating [(b)(6);] deleted the file. To date, USAGM has not received affirmations from [(b)(6); (b)(7)(C)]

DISPOSITION

On March 19, 2021, this preliminary investigation was presented to Assistant United States Attorney (AUSA) Joseph Cooney, Chief of Public Corruption, United States Attorney's Office, Washington, D.C. AUSA Cooney declined prosecution.

As this matter was referred to OIG by USAGM OGC and USAGM OGC reported to OIG that USAGM was addressing issues related to the potential PII breach in accordance with DHS and U.S. Office for Personnel Management directives, OIG took no further action. This preliminary investigation is closed.

Prepared By:

(b)(6); (b)(7)(C)

Special Agent

Signed on: 05/10/2021 11:32:37 AM

Approved By:

Elisabeth Heller

Elisabeth Heller

Special Agent in Charge

Signed on: 05/11/2021 07:22:38 AM

ATTACHMENTS