
Agency Report 2



DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
104 ARMY PENTAGON
WASHINGTON DC 20310-0104

USDC:OIG:OSC:2008-011

November 21, 2008

Ms. Catherine A. McMullen
Chief, Disclosure Unit
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

Re: Whistleblower Investigation—Fort Bragg Office of the
Inspector General (OSC File Nos. DI-06-1645 and DI-06-1904)

Dear Ms. McMullen:

The Department of the Army appreciates the opportunity to provide its recommendations to the Office of Special Counsel (OSC) regarding the release of its report in the above referenced case.

Background –

On December 21, 2007, the Department of the Army submitted to the OSC its report in the captioned case.

We understand that the report has been processed to the stage at which its release outside OSC is required. The report submitted by the Army to OSC contains the names and other identifying information of witnesses. The Army interposes no objection to OSC's disclosure of the report, in its entirety, to the complainant, the President, and to Congress for review provided that none of these entities release the report to the public. We understand, however, that the OSC places copies of reports in an open reading room for review by the general public. Pursuant to the rationale set forth below, the copy of the report made available to the public should be redacted in compliance with the Privacy Act, as reflected in Enclosure 1.

Analysis Pertaining to the Redaction of Department of the Army Information -

The Office of Special Counsel (OSC) is required to make available to the public reports from heads of agencies made under 5 U.S.C. § 1213(g)(1), but only to the extent that these reports do not contain any information, the disclosure of which is prohibited by law. 5 U.S.C. § 1219(a), (b). The Privacy Act (PA) prohibits an agency from disclosing any record which is contained in a system of records, except pursuant to the prior written consent of the individual to whom the record pertains or in those cases in which an exception applies. 5 USC § 552a(b). As discussed below, it appears as though OSC's investigative case files, to include the instant file, are contained in a system of records regulated by the PA. Therefore, under our reading of the statute, records made available to the public under § 1219 may be released only to the extent that disclosure is consistent with the PA.

OSC's system notice indicates that OSC's investigation case files are contained in a PA system of records. *See* OSC/GOVT-1, OSC Complaint, Litigation and Political Activity Files. This suggests that OSC would not render its investigative case files public absent either the consent of the individual to whom the record pertains, or an exception that allows for disclosure without consent.

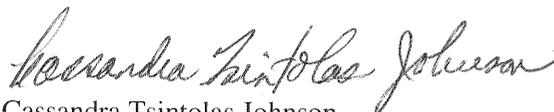
In this case, there is no indication that the consent of the individuals named in the report will be sought. Absent such consent, the only exception we have identified that might permit the disclosure of the OSC record to the general public is that of a routine use. The OSC system notice governing this system of records contains a routine use permitting the disclosure of these files to the public in only the following circumstances: 1) the matter under investigation has become public knowledge; 2) the Special Counsel determines that disclosure is necessary to preserve confidence in the integrity of the OSC investigative process or is necessary to demonstrate accountability of OSC officers, employees, or individuals covered by this system; or 3) the Special Counsel determines that there exists a legitimate public interest, except to the extent that the Special Counsel determines that disclosure would constitute an unwarranted invasion of personal privacy.

At this point, we are not aware that the investigation has become public knowledge nor does it appear to us that disclosure would be necessary to demonstrate the integrity of the OSC. Therefore, under our view of the PA, the OSC may disclose this investigative file if it determines that there is a legitimate public interest in doing so. However, if you choose to do so, we recommend that the record be redacted to ensure that its release would not constitute an unwarranted invasion of personal privacy.

We have redacted these reports in a manner that is designed to protect the privacy of the individuals involved in and associated with this investigation. Because the language of the applicable PA routine use mirrors the language of the Freedom of Information Act's (FOIA) exemption (b)(6), we have relied upon FOIA principles in redacting the report. Additionally, we have relied upon several DoD policy memoranda that have interpreted exemption (b)(6) of the FOIA to permit the redaction of information that personally identifies DoD personnel. (Enclosure 3).

We note that recently, the Department of the Army and the OSC were sued in Federal Court by the individual subject of an OSC investigative case file that was released publicly, in its entirety, by OSC. (Enclosure 4). The plaintiff in this case alleges that this public release violated his rights under the PA. We believe that limiting public release of the redacted report in the instant case complies with the PA, fulfills the mandate of OSC accountability to the public as set forth in your constituting statute, and minimizes litigation risk to both Army and OSC.

We appreciate the opportunity to present the Department of the Army's views on these matters. Should you have any questions, please do not hesitate to contact me at 703-614-3500.



Cassandra Tsintolas Johnson
Associate Deputy General Counsel
(Human Resources)

Enclosures