



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

May 10, 2023

The President
The White House
Washington, DC 20510

Re: OSC File Nos. DI-20-1086, DI-20-1087, DI-20-1088, DI-20-1157, DI-20-1158, DI-20-1159, DI-20-1160, DI-20-1161, DI-20-1162, DI-21-0015, DI-21-0031, DI-21-0255

Dear Mr. President:

I am forwarding to you a report transmitted to the U.S. Office of Special Counsel (OSC)¹ by the U.S. Agency for Global Media (USAGM)² in response to the Special Counsel's referral of disclosures of wrongdoing at the agency made by eleven whistleblowers. Six of the whistleblowers—members of USAGM's Senior Executive Service (SES) at the time of the events referred for investigation—consented to the disclosure of their names:

[REDACTED]

[REDACTED]. The remaining five whistleblowers chose to remain anonymous. I have reviewed the agency report and

¹ See 5 U.S.C. § 1213(c) and (e). On December 2, 2020, the Special Counsel referred whistleblower allegations to former Chief Executive Officer (CEO) Michael Pack to investigate pursuant to 5 U.S.C. § 1213(c) and (d). On February 16, 2021, the Special Counsel supplemented the allegations to be investigated in a letter to then-Acting CEO Kelu Chao. CEO Amanda Bennett delegated authority to former Deputy Director Brian Conniff to review and sign the final agency report.

² USAGM, formerly known as the Broadcasting Board of Governors, oversees six entities—two federal broadcasting networks—the Voice of America (VOA) and the Office of Cuba Broadcasting—and four non-profit (i.e., non-federal) grantees—Radio Free Europe/Radio Liberty (RFE/RL), Radio Free Asia (RFA), the Middle East Broadcasting Networks (MBN), the Open Technology Fund (OTF). USAGM Structure, <https://www.usagm.gov/who-we-are/organizational-chart/> (last visited January 20, 2023). All but the latter are international broadcasting networks. *Id.* OTF works in tandem with the USAGM networks to support the development of and access to internet freedom tools. USAGM Open Technology Fund, <https://www.usagm.gov/networks/otf/> (last visited January 20, 2023). According to the agency's website, "[e]very week, more than 410 million listeners, viewers and internet users around the world turn on, tune in and log onto U.S. international broadcasting programs," which are provided in dozens of languages. USAGM Structure, <https://www.usagm.gov/who-we-are/organizational-chart/> (last visited January 20, 2023).

whistleblower comments and, pursuant to 5 U.S.C. § 1213(e), have determined that the report contains the information required by statute and that its findings appear reasonable.

Allegations

The whistleblowers alleged that former USAGM leadership, under the direction of then-Chief Executive Officer (CEO) Michael Pack, engaged in conduct that constitutes a violation of law, rule, or regulation; an abuse of authority; gross mismanagement; a substantial and specific danger to public health and safety; and a gross waste of funds.³ USAGM retained an external review team of subject-matter experts to investigate the allegations. The agency's final report, compiled by the review team, reflects the findings of the review team's independent investigation and incorporates the findings of separate investigations by the U.S. Department of State Office of Inspector General (State OIG) and the U.S. Government Accountability Office.

The report, which partially substantiated the allegations referred, found that during his less-than-eight-month tenure CEO Pack was responsible for numerous improper activities, some of which the report determined rose to the level of an abuse of authority, gross mismanagement, a gross waste of funds, or a violation of law, rule, or regulation.

Major Findings of Wrongdoing⁴

1. Whistleblower Retaliation Against Career USAGM Executives

The report concluded that CEO Pack abused his authority and retaliated against career USAGM executives who engaged in whistleblowing. Specifically, it found that CEO Pack abused his authority by suspending the security clearances of the six SES whistleblowers, as well as that of a seventh non-SES employee, and placed them on administrative leave without a legitimate basis. The six senior executives alleged that their security clearance suspensions were in retaliation for making protected disclosures—allegations substantiated by State OIG investigations and whose findings were adopted by the agency. After taking these retaliatory actions, the report found that CEO Pack then hired a private law firm to provide post-hoc justifications for the suspensions. The report suggested that Pack used the mechanism of suspension of security clearances (as opposed to removing the executives by other means) to circumvent otherwise available procedural protections and legal restrictions on removal of executives.

³ See OSC's Referral and Supplemental Referral letters to USAGM, dated December 2, 2020, and February 16, 2021, respectively.

⁴ The report's major findings of wrongdoing are summarized in the body of the letter. In addition, the report described numerous other actions taken by CEO Pack or his leadership staff as legally or ethically problematic. For instance, the report found that the agency failed to maintain federal employment records for at least ten individuals who held positions in the Front Office, including significant and sensitive positions, thereby violating federal rules requiring agencies to document an individual's employment status and service and creating concerns about the legality or validity of various actions.

2. Violation of Federal Recordkeeping Regulations

The report also found that Acting Vice President for Legal, Compliance, and Risk, [REDACTED], in an effort to keep secret her communications regarding planned actions against these career executives, violated National Archives and Records Administration regulations⁵ on federal recordkeeping by using an encrypted messaging application and setting a disappearing message timer.

3. Violations of the Privacy Act

Later, with CEO Pack's approval, his senior advisor, [REDACTED], emailed the investigative dossiers on the six senior executives to newly appointed network board members who were also active journalists. The report found that these Privacy Act⁶ violations came just before CEO Pack's expected departure due to a change in administration and were taken contrary to legal advice from the private law firm that created the dossiers.

4. Wasteful Retention of Private Law Firm and Ineffective Investigations

Apart from the use of the private law firm to conduct pretextual, retaliatory investigations, the report found that the retention of the firm (and later a legal consultancy) amounted to gross mismanagement and a gross waste of funds that violated a USAGM directive. The report highlighted that the agency paid \$1.6 million to entities with no expertise in federal employment or security law for work routinely performed by federal employees. Much of the money was spent on ineffective investigations that failed to adhere to applicable quality standards and produced no information relevant to security clearance adjudications—the ostensible purpose of the investigations.

5. Contracting Irregularities

Per the report, the method of contracting for these legal services was also problematic. Mr. Pack relied on a provision of law that allows the CEO to procure certain services without complying with the Federal Acquisition Regulation (FAR).⁷ But the report suggested that the context, purpose, and historical use of those statutory exemptions, as well as an internal agency directive, indicated that the exemptions were inapplicable to this situation.⁸ Moreover, the report noted that because both this contract and a related contract were entered into

⁵ 36 C.F.R. Part 1230 – Unlawful or Accidental Removal, Defacing, Alteration, or Destruction of Records.

⁶ 5 U.S.C. § 552a.

⁷ 22 U.S.C. § 6204(a)(10).

⁸ *See Id.*; “Directive Memo: Awarding Federal Acquisition Regulation (FAR) Exempt Special Agreements,” (FESA Directive) U.S. Agency for Global Media, August 6, 2019. The report also found that Mr. Pack violated USAGM's FESA Directive by failing to obtain the Senior Procurement Executive's determination that the services contracted for met the “catch all” exemption.

without the benefit of a contracting specialist and lacked normal contracting oversight various irregularities and potential Anti-Deficiency Act violations⁹ occurred.¹⁰

6. Abusive Debarment Attempt

The report further found that CEO Pack abused his authority by attempting to debar the Open Technology Fund which would have prevented it from receiving federal funds for a period of, typically, three years. Per the report, the weak justifications offered to support the debarment and the sequence of events surrounding these efforts indicated that the actions were motivated by animus against OTF rather than a desire to protect the public interest.

7. Abusive Changes to Grantee Network Governance

Additionally, the report found that CEO Pack abused his authority when, shortly before vacating his position, he had recently appointed grantee board members vote on revised grant agreements and grantee bylaws that barred the removal of grantee network leaders and board members for two years except for a felony or misdemeanor requiring imprisonment. The report determined that Mr. Pack's effort to hinder the removal of the grantee board members and network heads that he had appointed had the potential to "impede[] good governance of the grantee networks for no plausible public policy reason." Moreover, because no advance notice was given, there was no opportunity for the grantees to voice—let alone address—concerns raised by their general counsels that the changes to grant language might violate state laws under which the non-profit grantees are incorporated; the International Broadcasting Act of 1994;¹¹ and the Office of Management and Budget's Uniform Guidance.

8. Actions Inconsistent with Respect for Networks' Journalistic Independence

Another troubling finding, given the mission of the agency, was the report's conclusion that Mr. Pack took actions inconsistent with the statutory mandate that he respect the networks' journalistic independence and integrity, often referred to as a "firewall." The report emphasized that, historically, journalistic independence has been key to the fulfillment of USAGM's mission—a principle ultimately enshrined into law by the International Broadcasting Act of 1994.¹² The report explained that although recent changes to the law created a greatly empowered CEO with the hope of streamlining agency operations—it still retained the longstanding statutory firewall to ensure the continued credibility of agency journalists and

⁹ See 31 U.S.C. § 1341(a)(1).

¹⁰ These included an unauthorized commitment of funds with open-ended indemnification by the agency; no firm contract price or ceiling price on hourly services or variable quantities; a failure to ensure sufficient funds were available; and excessive costs.

¹¹ 22 U.S.C. §§ 6201 *et seq.*

¹² See 22 U.S.C. §§ 6202, 6204.

broadcasters as sources of independent news and information. The report notes that the law does not clearly define the parameters of the CEO's authority.

The report found that Mr. Pack acted inconsistently with the firewall in various ways. First, the report noted that CEO Pack's repeal of a new agency regulation, *Firewall and Highest Standards of Professional Journalism*,¹³ sent the message that he was not committed to the agency's mission or journalistic independence. Second, the report found that CEO Pack's reassignment of VOA's Standards Editor for four months without backfilling the position, increased the risk of journalistic lapses and constituted gross mismanagement. Third, with regard to pressuring RFA's president to remove its Executive Editor, the report found that CEO Pack acted inconsistently with his statutory obligation to respect the professional integrity and independence of RFA rather than committing gross mismanagement or an abuse of authority because he did not take the removal action himself. Fourth, the report identified a number of incidents in which CEO Pack exercised oversight in a manner suggestive of political bias. Fifth, the report highlighted [REDACTED] efforts to have the Director of VOA's Persian Service removed, which the report suggested was due in part to disagreement with the Service's editorial choices.¹⁴

9. Restriction of Employee Communications

A final significant finding highlighted by the report was that Mr. Pack, who restricted employee communications with outside parties, failed to exempt legally protected disclosures, as required by law.¹⁵

10. Actions Not Rising to Level of Gross Mismanagement or Abuse of Authority

The report found that the following did not rise to the level of gross mismanagement or an abuse of authority:

- Terminating the presidents of the USAGM-funded networks and OTF;
- Dismissing and replacing the board members that governed the networks and designating himself as the Chairman;
- Revoking all delegated authority from various members of USAGM's SES and reassigning those authorities to political appointees;
- Removing the Executive Editor of RFA;

¹³ 85 Fed. Reg. 36150 (June 15, 2020), repealed by 85 Fed. Reg. 79427 (Dec. 10, 2020). This rule was in effect from June 11, 2020, until October 26, 2020.

¹⁴ The report alluded to the following news article: Brian Hook, *Why are US taxpayers funding a 'Voice of the Mullahs' in Iran?*, New York Post, May 27, 2020, available at <https://nypost.com/2020/05/27/why-are-us-taxpayers-funding-a-voice-of-the-mullahs-in-iran/>.

¹⁵ 5 U.S.C. § 2302(b)(13).

- Prohibiting several USAGM offices critical to USAGM’s mission from communicating with outside parties without the Front Office’s express knowledge and consent;
- Freezing all agency hiring, contracting, and information technology migrations;
- Repurposing congressionally appropriated funds; and
- Refusing to approve applications or renewals of the J-1 visas of non-U.S. citizen journalists participating in the agency’s authorized Exchange Visitor Program.

Nevertheless, the report indicated that many of these (and other) actions were troubling and associated with negative consequences to agency operations. There have since been changes in the law,¹⁶ as well as rehabilitative efforts by the agency, prompted by concerns raised by many of the above actions.

Agency Corrective Actions

USAGM has taken or committed to take various corrective actions to address the wrongdoing and deficiencies identified in the report.¹⁷ For example, the agency rescinded the problematic security clearance suspensions and related proposed removals of the six SES members and sent Privacy Act violation notices with requested mitigation measures to the five individuals who received the investigative dossiers. Regarding the firewall, the agency published the rescinded firewall regulations internally, has held meetings and trainings on the firewall, and anticipates updating firewall regulations via a Federal Register Notice once the draft regulations can be reviewed and approved by the newly created Advisory Board.¹⁸ To address contracting deficiencies, the agency amended its FESA Directive to reinforce sound contract management practices, such as requiring a contracting officer be assigned to every contract. In addition, the agency resumed reviewing and approving requests for hiring and procurements. The agency also took various actions relating to the grantees, such as withdrawing the OTF debarment proposal and restoring funding and revising and reissuing grant agreements with felony removal clauses. More generally, the agency took measures to improve employee engagement. Also referenced in the agency’s letter setting out its corrective actions were its efforts to address longstanding issues with personnel security and suitability programs, which were tangential to some of the issues referred and discussed in the agency’s report.

¹⁶ The William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283, January 1, 2021, circumscribed the CEO’s authority relating to the appointment and removal of network heads, the selection of grantee board members, and established an International Broadcasting Advisory Board (Advisory Board) with functions such as to advise the CEO to ensure respect for the professional integrity and editorial independence of USAGM networks, broadcasters, and grantees. See 22 U.S.C. §§ 6204, 6205.

¹⁷ See USAGM’s report transmittal letter to OSC, dated December 30, 2022.

¹⁸ The President has nominated six individuals to serve on the Advisory Board and their nominations are pending before the Senate Foreign Relations Committee.

Whistleblower Comments

The Government Accountability Project provided comments on behalf of the whistleblowers who wished to remain unnamed for purposes of commenting on the report. The whistleblowers found many of the report's findings to be reasonable. However, they also indicated that further investigation would likely show additional wrongdoing by CEO Pack and his associates. For example, they highlighted issues with the agency's contractual relationship with a private law firm and indicated that there appeared to be evidence that the contract could have involved criminal conduct warranting a referral to the U.S. Department of Justice.

Special Counsel's Determination

I have determined that the report contains the information required by statute and that its findings appear reasonable. The report largely substantiated the deeply troubling conduct disclosed by the whistleblowers. However, I am heartened by the steps that the agency has taken to restore its operations and its reputation. I also commend the eleven whistleblowers in this case, many of whom experienced retaliation for speaking out, for their steadfast commitment to the important mission of the agency to inform, engage, and connect people around the world in support of freedom and democracy.

As required by 5 U.S.C. § 1213(e)(3), OSC has sent copies of the agency report, this letter, and the whistleblowers' comments to the Chairs and Ranking Members of the House Foreign Affairs Committee and the Senate Foreign Relations Committee. OSC has also filed redacted copies of these documents and a copy of our original referral letter in our public file, which is available at www.osc.gov. This matter is now closed.

Respectfully,

A handwritten signature in black ink, appearing to read "Henry J. Kerner". The signature is fluid and cursive, with a long horizontal stroke at the end.

Henry J. Kerner
Special Counsel

Enclosures