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Mr. Young -

Pursuant to 5 U.S.C. § 1213 (e)(1), I am providing the following comments to the *Report of Investigation* dated March 17, 2016 which was provided by the U.S. Small Business Administration in response to OSC File DI-14-3428:

PROCEDURAL BACKGROUND

The agency's description of how the investigation was initiated is not complete.

The Complainant approached Susan Sundberg in the Ethics Counsel's Office on the morning of June 10, 2014. He advised her that he had some professional ethics concerns as an attorney because his supervisors, Rhett Jeppson and Barb Carson, in the Office of Veterans Business Development (OVBD) were directing him not to discuss data collection practices violating the Paperwork Reduction Act and the Privacy Act with anyone outside the office. She informed him that she was not certain about his professional ethics concerns as an attorney, but he had a duty as a government employee under applicable federal ethics regulations to report this information to the Inspector General's Office and she would inquire into the procedures for making such a report.

When he informed his supervisors that he had a duty to report, the Complainant was terminated within twenty-four hours. The Inspector General's Office opened an investigation into his complaint and he was contacted by Peggy Gustafson on or about June 12, 2014. Adam Kaplan was assigned to the investigation and he began collecting evidence and testimony from the Complainant on or about June 13, 2014. They exchanged twenty-five emails in June of 2014 and the Complainant provided forty-five pages of supporting documents. The Complainant also sent a letter to the Administrator discharging his responsibilities as an attorney under Rule 1.13. Shortly after receiving that letter, the Administrator's Office appears to have intervened and halted the ongoing investigation being conducted by the Inspector General's Office.

Adam Kaplan recommended that the Complainant file a disclosure complaint (Form 12) with the Special Counsel's Office in addition to the prohibited personnel practices complaint (Form 11) he had already filed. The Complainant did so and supplied the Inspector General's Office with a copy of the disclosure complaint on June 17, 2014 - in which he alleged the following:

“The agency is collecting a lot of personally identifiable information for the two-day Boots to Business class, for the eight-week Boots to Business online course, and for the Reboot initiative.

- (1) The collections should have been cleared by OMB. They have not been.
- (2) The participants should have received a privacy statement - informing them whether disclosure was mandatory or voluntary and what it was being used for. They didn't.
- (3) These collections should have been submitted for public notice and comment. They weren't.
- (4) A privacy impact assessment should have been conducted. It wasn't and there are no safeguards to ensure this information is not being misused.

This is in violation of the Privacy Act and the Paperwork Reduction Act.”

The Special Counsel's Office conducted a prohibited personnel practices investigation and then it referred the disclosure complaint to the agency. The Administrator apparently received the referral letter on September 11, 2015. However, rather than allowing the Inspector General's Office to resume its investigation, the Administrator took the matter out of that office's hands and assigned it to the General Counsel's Office on November 2, 2015.

OVERALL ASSESSMENT OF THE REPORT

The report prepared by the General Counsel's Office is not credible, consistent, or complete. It appears that the agency did not do a good faith investigation into the Complainant's disclosures. Instead, it merely used the referral as pretext to conduct advance discovery and develop a legal position in regards to the prohibited personnel practices action that was also pending before the Special Counsel's Office. Specifically, there are a number of material deficiencies in the agency's investigation and its subsequent report:

- (1) The Administrator's Office appears to have intervened and halted the ongoing investigation that was being conducted by the Inspector General's Office - reassigning the matter to the General Counsel's Office.
- (2) The General Counsel's Office deliberately misstated elements of the initial complaint to the Special Counsel's Office that it had in its possession.

- (3) The General Counsel's Office deliberately misrepresented testimony regarding whether participants were required to provide personally identifiable information.
- (4) The General Counsel's Office deliberately limited the scope of its investigation to the Complainant's period of employment to avoid finding that the law had been broken.
- (5) The General Counsel's Office didn't examine e-mail communications that it had in its possession to determine the agency's actual level of control over Syracuse University's data collection practices.
- (6) The General Counsel's Office didn't address the Complainant's allegations regarding the lack of a privacy impact assessment.
- (7) The General Counsel's Office didn't address the Complainant's allegations regarding the Reboot Initiative.
- (8) The General Counsel's Office didn't interview any of corroborating witnesses suggested by the Complainant -- instead relying primarily upon the testimony of government employees who were accused of breaking the law.
- (9) The General Counsel's Office didn't discuss what was being done with all the data that the agency had collected in violation of the Paperwork Reduction Act and the Privacy Act.

DISCUSSION OF THE REPORT

(1) The Administrator's Office appears to have intervened and halted the ongoing investigation that was being conducted by the Inspector General's Office - reassigning the matter to the General Counsel's Office.

As noted in the Procedural History, the Complainant originally approached Susan Sundberg in the Ethics Counsel's Office on the morning of June 10, 2014. The Inspector General's Office opened an investigation into the Complainant's allegations and he was contacted by Peggy Gustafson on or about June 12, 2014. Adam Kaplan was assigned to the investigation and he began collecting evidence and testimony from the Complainant on or about June 13, 2014. They exchanged twenty-five emails in June of 2014 and the Complainant provided forty-five pages of supporting documents. However, at some point, the Administrator's Office appears to have intervened and halted the ongoing investigation.

If this is the case, it would be a violation of Section 3(a) of the Inspector General Act of 1978 (Pub.L. 95-452) which reads:

“. . . Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.”

Adam Kaplan recommended that the Complainant file a disclosure complaint (Form 12) with the Special Counsel's Office in addition to the prohibited personnel practices complaint (Form 11) he had already filed. The Complainant did so and supplied the Inspector General's Office with a copy of the disclosure complaint on June 17, 2014. However, when the disclosure complaint was referred to the agency on September 11, 2015, the Administrator did not allow the Inspector General's Office to resume its investigation. Instead, she took the matter out of that office's hands and assigned it to the General Counsel's Office on November 2, 2015.

This is a curious decision because the General Counsel's Office's core competency is not conducting independent investigations, but developing the agency's legal positions. It would be the office responsible for representing the agency on the related prohibited personnel practices action that was also pending before the Special Counsel's Office. This decision became even more curious when the General Counsel's Office also assigned an attorney who had previously worked for the Special Counsel's Office as a Presidential Management Fellow - not in the disclosures section, but in the prohibited personnel practices section.

The agency's report does not disclose that the Inspector General's Office started an investigation and collected an extensive body of evidence and testimony from the Complainant before that investigation appears to have been halted at the request of the Administrator's Office. It does not provide any explanation for why the investigation by the Inspector General's Office was terminated or why the matter was taken out of their hands and assigned to the General Counsel's Office. It does not address what checks and controls were put in place to prevent influence by / on the work being conducted by those in the General Counsel's Office representing the agency on the related prohibited personnel practices action that was also pending before the Special Counsel's Office.

(2) The General Counsel's Office deliberately misstated elements of the initial complaint to the Special Counsel's Office that it had in its possession.

On p. 11 and p. 18-19 of the agency's report, the General Counsel's Office suggests that the Complainant changed his position during the interview after making different allegations to the Special Counsel's Office. This is inaccurate.

When the Complainant filed a disclosure complaint (Form 12) with the Special Counsel's Office, he provided the Inspector General's Office with a copy of that document on June 17, 2014. The General Counsel's Office had a copy of that document. On November 18, 2015, the Complainant informed Sherrie Abramowitz that the Inspector General's Office started an investigation and Adam Kaplan had collected an extensive body of evidence and testimony. In her response on November 20, 2015, she said that the investigators would get the file from him.

In the disclosure complaint (Form 12) that he provided to Adam Kaplan, the Complainant clearly stated, “The agency is collecting a lot of personally identifiable information for the two-day Boots to Business class, for the eight-week Boots to Business online course, and for the Reboot initiative.” At no point did he suggest that any information was collected prior to the showing of the Introductory Video component. His position has remained the same throughout the course of the entire investigation.

The General Counsel’s Office appears to have deliberately misstated elements of the initial complaint in its report in an effort to cast doubt on the Complainant’s testimony.

(3) The General Counsel’s Office deliberately misrepresented testimony regarding whether participants were required to provide personally identifiable information.

On p. 12, the General Counsel’s Office misrepresents the Complainant’s testimony. They quote his statement as: “It wasn’t clear whether they had to fill it out or not... We are not clear across all the different places whether they were required or not to fill it out.”

However, the entire statement from p. 6 of the Complainant’s Affidavit was:

Q: “Were private individuals required to provide their demographic information in order to participate in the two-day in-person component of the Boots to Business Program?”

A: “The lack of the privacy statement is that it was never really clear what they were told. It wasn’t clear whether they had to fill it out or not. The one pager says this is our authority for collecting it. That’s the purpose of the privacy statement. We are not clear across all the different places whether they were required or not to fill it out. There was a lot of pressure from OVBD to district offices to make sure people fill it out. During calls, it was [said] they need to fill them out, to track the data, to report it to Congress. [Whether] a veterans officer was told that he had to fill it out, or whether it was passed around, whether the people on base said no, I’m not going to let you pass this around, that varied case by case because there wasn’t a lot of guidance. Some cases where the transition [or] where the district office raised some concerns, where there wasn’t a clearance number [and they] said I don’t want to fill this out, the AA would get on the phone and tell them it isn’t your decision and I’m an SES, follow your instructions, you expressed your concern, but do what I’m telling you.”

The General Counsel’s Office avoided taping or transcribing any of the testimony. However, it is clear from the synopsis in the Complainant’s affidavit that the quote in the report is not an accurate

representation of the full context of the Complainant's statement. The General Counsel's Office pulled two sentences out of a paragraph to make a completely contradictory point.

When it was evident that there was a discrepancy between Craig Heilman's testimony and the Complainant's testimony about whether participants were required to provide their information on the sign-in sheets, the General Counsel's Office should have asked witnesses who were on the calls with the veterans officers and who could have corroborated / refuted the conflicting stories. They could have asked Brian Goodrow or any of the veterans officers.

However, the General Counsel's Office chose not to ask the next logical question in order to avoid finding deliberate attempts to circumvent the law over objections from personnel in the field. Instead, they chose to deliberately misrepresent the Complainant's testimony in the report.

(4) The General Counsel's Office deliberately limited the scope of its investigation to the Complainant's period of employment to avoid finding that the law had been broken.

On p. 20, the General Counsel's Office concluded:

“The Investigators did not find evidence indicating that the data collected from the Sign-In Sheets was retrieved by name or other personal identifier during the time period at issue As a result, the Investigators believe that SBA complied with the letter of law with respect to the Privacy Act.” [Emphasis added.]

There is no “period at issue.” The Complainant did not allege violations of law confined to any specific period. Nor did he allege that the agency had completed all of the steps necessary to consummate a violation of the law prior to his termination. His disclosure was that the agency was breaking the law. The agency was in the process of collecting personally identifiable information for entry into a system of records.

There were e-mails from the Office of the Secretary of Defense in August of 2012 outlining performance measures which would require the agency to contact / track program participants - the number of program participants opening and operating small businesses and being solvent after two years in operation. In his testimony before the U.S. House Small Business Committee on April 30, 2014, Rhett Jeppson promised the Members that he would be able to produce that information in one year. Working with Stan Fujii, the Complainant wrote a statement of work for Boots to Business program support which included personnel for data entry. The Complainant is also aware that e-mails were sent out in February of 2012 by the agency's contractors - noting that they were entering all of the personally identifiable information that had been collected into a database. The Complainant is also aware that the agency's contractors were told to stop work on that project at some point due to legal concerns.

It is clear that the agency was in the process of putting a system of records in place. Indeed, part of the reason the Complainant was terminated was because he told his supervisors that they could not use all of the data they had collected because no Privacy Statement has been provided to the program's participants.

The General Counsel's Office deliberately limited the scope of its investigation to avoid making an adverse finding. They should have examined the e-mails they had in their possession. They should have asked specific questions to people like Michael Schoeneck, Brian Goodrow, and Kim McClellan instead of relying upon the recollections of those accused of violating the law. They should have interviewed the contractors hired to provide program support. They should have determined what other steps were taken by the agency after the Complainant was terminated.

However, the General Counsel's Office did not conduct a complete investigation. It did not want to find any evidence of illegal conduct. And, the statement that the investigators could not find any evidence that all of the steps necessary to consummate breaking the law were taken "during the time period at issue" is disingenuous and misleading. There is no time period at issue.

(5) The General Counsel's Office didn't examine e-mail communications that it had in its possession to determine the agency's actual level of control over Syracuse University's data collection practices.

In its analysis of the Complainant's allegations pertaining to Syracuse University's data collection practices, the General Counsel's Office limited its investigation to the Notice of Award and the recollection of those accused of violating the law. However, as attorneys, they should know that the nature of the agency's relationship with Syracuse University is not determined by the Notice of Award, but by the conduct of the parties. Moreover, the investigators do not appear to have reviewed the terms of the agency's cooperative agreement with Syracuse University.

On p. 5 of a *Memorandum of Additional Proposed Terms and Deliverables Re: Award Dated 9/20/2010*, the agency noted:

"SBA shall also have the ultimate right to own, use and control all web domain names, websites and related content and data related to the USMC Pilot and the Program, and shall also have the right to direct their use at any time, and from time to time."

This statement contradicts the testimony offered by Rhett Jeppson and Craig Heilman on p. 21 of the agency's report and it corroborates Brian Goodrow's testimony that SBA would have "total control" over the information collected by Syracuse University.

Moreover, the Complainant is aware of several e-mails between Michael Schoeneck and the agency in May of 2013 where Syracuse University was directed to add fields to collect additional information on program participants - specifically, the base and the class date where / when the participants completed the two-day class.

(6) The General Counsel's Office didn't address the Complainant's allegations regarding the lack of a privacy impact assessment.

In his disclosure (Form 12), the Complainant alleged:

“A privacy impact assessment should have been conducted. It wasn't and there are no safeguards to ensure this information is not being misused.”

The agency had this document in its possession. It also had a letter the Complainant sent to the Administrator on June 12, 2014 and a one-page summary of issues surrounding the agency's data collection practices - both of which mention this issue. However, the General Counsel's Office completely ignores this issue.

On p.8 of his testimony, the Complainant noted:

“The paper documents were sitting around unsecured. Really anybody who walked by could pick up a stack of forms and walk off with them. The program manager didn't know what he had or how he had it organized. On the share drive I don't think it was password protected [to limit] access to the files. I had access and other people in OVBD. Brian Goodrow had access. [On] the share drive at SBA, if you start clicking on files, if it is not password protected, anyone can get access. Tying that to Federal regulations, that is one of the reasons a Privacy [Impact] Assessment is necessary. You're supposed to do a formalized assessment when you have this PII. Anyone who had any access was free to access these documents. Anyone can pick it up and take it off to their cubicle.”

Copies of these documents were maintained in some district offices. They were sent to headquarters by mail, fax, and e-mail. And, the Complainant is also aware that e-mails were sent out in February of 2012 by the agency's contractors - calling for the district offices to attach scanned copies of the documents to the sharepoint site so that the information could be entered into a database.

The General Counsel's Office failed to investigate this issue.

(7) The General Counsel's Office didn't address the Complainant's allegations regarding the Reboot Initiative.

In his disclosure (Form 12), the Complainant alleged:

“The agency is collecting a lot of personally identifiable information for the two-day Boots to Business class, for the eight-week Boots to Business online course, and for the Reboot initiative.” [Emphasis added.]

The agency had this document in its possession. It also had a letter the Complainant sent to the Administrator on June 12, 2014 and a one-page summary of issues surrounding the agency’s data collection practices - both of which mention this issue. However, the General Counsel’s Office again completely ignores this issue and it appears to be another area where it deliberately limited the scope of its investigation to avoid making an adverse finding.

This is troublesome because this is an issue where there was ample physical evidence in the possession of the agency. Complainant alleged that he participated in a phone conversation on June 10, 2014 where the agency gave specific directions to Syracuse University regarding the data collection practices that were to be employed for the Reboot Initiative. On p. 7 of his testimony, the Complainant noted:

“. . . what brings it back under the rules and regulations is that Syracuse wasn’t doing this on their own. They were doing it upon very specific guidance from OVBD. I sat on a call with Barb Carson, Brian Goodrow, and Stan Fujii and Syracuse, and we were going through the information being collected; what fields they had to fill out and what they could omit. And so it was the data being collected by Syracuse was being driven by SBA and OVBD. The government was actually telling the grantee this is the information we want you to collect, these will be mandatory and options. There are court cases out there that say they are an instrument of the government.”

The Complainant is aware that there were a number of e-mails sent back and forth between the agency and Syracuse University. The grantee provided spreadsheets with registered participants personally identifiable information to the agency so that they could generate check-in lists, name tags, and table tents, so that they could reach out to / follow up with program participants, and so that they could even conduct background investigations for access to the event at the Eisenhower Executive Office Building.

The Complainant is also aware of a meeting in April of 2015 (with notes sent out by e-mail later) where the process for data collection was described and where the meeting’s participants discussed concerns that they might lose visibility on program participants if there were ever problems at SBA because it had not gone through OMB’s clearance process.

All of this information is in the agency's possession. However, the General Counsel's Office did not conduct a complete investigation. It did not want to find any evidence of illegal conduct. So, it deliberately limited the scope of its investigation to avoid making an adverse finding.

(8) The General Counsel's Office didn't interview any of corroborating witnesses suggested by the Complainant – instead relying primarily upon the testimony of government employees who were accused of breaking the law.

On p. 16 of his testimony, the Complainant suggested talking to Stan Fujii, Brian Goodrow, Adam Kaplan, and Kim McClellan. However, the General Counsel's Office failed to talk to three of these four witnesses – instead relying primarily on people accused of breaking the law.

Stan Fujii could have corroborated the phone conversation with Syracuse University. On p. 16-17 of his testimony, the Complainant noted:

“Barb Carson and Rhett Jeppson said not to talk to anyone about it, and we had the Tuesday teleconference, with Stan and Barb, with Syracuse, and we started going line by line on how information is being collected. They went around and asked if anyone has any concerns. I said I have issues, since you've given me instructions, I will raise them with you after the meeting. And she said if [I had] concerns, raise them. So we wrapped up the teleconference, I met with her and I said I've already talked to you about my concerns. This teleconference with Syracuse, by discussing their data collection, what forms need to be mandatory and voluntary, this point in time is the moment that a court or general counsel's office would say brought us back under the Paperwork Reduction Act because we are giving them advice on how to collect the data. And it's my opinion that we need to address this issue. And afterwards I gave Stan a head's up that there were issues with this and I wanted to make sure, that I thought he was a personal friend of mine, that he needed to know in case he started to get pressure from someone to do this. Because the data collection was illegal and [in] the privacy act there are criminal penalties.”

Stan Fujii also questioned Rhett Jeppson about the Complainant's termination a few days later and he was told that they had to let the Complainant go because he was “pressing Barb too hard” on an issue.

Adam Kaplan conducted the initial investigation when the Complainant reported the issue to the Inspector General's Office. And, Kim McClellan had also raised the issue repeatedly in the past. On p. 15 of his testimony, the Complainant stated:

“I handed her a copy of all of the materials. She was very supportive. I’m so glad you’re bringing this issue to their attention and there are actually criminal charges. And, they have completely ignored me. She was solidly behind me on this issue.”

The General Counsel’s Office should have probably also interviewed Michael Schoeneck at Syracuse University and the Boots to Business program support contractors who were brought on after the Complainant was terminated.

However, the General Counsel’s Office did not conduct a complete investigation. It did not want to find any evidence of illegal conduct. So, it deliberately limited the scope of its investigation to avoid making an adverse finding.

(9) The General Counsel’s Office didn’t discuss what was being done with all the data that the agency had collected in violation of the Paperwork Reduction Act and the Privacy Act.

On p. 17 of the agency’s report, the General Counsel’s Office claims:

“Complainant’s PRA concerns have been adequately addressed by SBA’s actions. Therefore, no further Agency action is required.”

On p. 24 of the agency’s report, the General Counsel’s Office claims:

“Complainant’s Privacy Act concerns have been adequately addressed by SBA’s actions. Therefore, no further Agency action is required.”

However, the General Counsel’s Office has not addressed what happened to any of the data that the agency had collected in violation of the Paperwork Reduction Act and the Privacy Act. So, the agency has hardly adequately addressed the Complainant’s concerns. Indeed, part of the reason the Complainant was terminated was because he told his supervisors that they could not use all of the data they had collected because no Privacy Statement has been provided to the program’s participants.

The Complainant is aware that the program manager has been telling people that the previous data collections have been “grandfathered” in. The Complainant is also aware that e-mails were sent out in February of 2012 by the agency’s contractors – noting that they were entering all of the personally identifiable information that had been collected into a database.

Yet, the General Counsel’s Office does not disclose this information. Nor does it discuss it in its report. If it did so, the General Counsel’s Office might have to acknowledge that the agency had broken the law by putting a system of records into operation prior to securing proper clearance and approval. It would have to show that OMB had expressly “grandfathered” in the previous data

collections. And, it might have been put in a position where it would show that the agency was still breaking the law.

Rather than taking that risk, the General Counsel's Office deliberately limited the scope of its investigation to avoid making an adverse finding.

CONCLUSION

Based on these material deficiencies, the report prepared by the General Counsel's Office is not credible, consistent, or complete. It appears that the agency did not do a good faith investigation into the Complainant's disclosures. Instead, it merely used the referral as pretext to conduct advance discovery and develop a legal position in regards to the prohibited personnel practices action that was also pending before the Special Counsel's Office.

I respectfully request that the Special Counsel remand the matter back to the agency - with instructions that the Administrator allow the Inspector General to continue its investigation and address the issues raised in these comments.

Very Respectfully,

A handwritten signature in blue ink that reads "Nicholas A. Harrison". The signature is written in a cursive style.

Nicholas A. Harrison
Complainant