



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

November 16, 2016

The President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-15-3489

Dear Mr. President:

Pursuant to my duties as Special Counsel, I am forwarding a Department of Justice (DOJ) report based on disclosures of wrongdoing at the Office of Justice Programs (OJP), National Institutes of Justice (NIJ), Office of Research and Evaluation (ORE), Washington, D.C. I have reviewed the DOJ report, and in accordance with 5 U.S.C. § 1213(e), provide the following summary of the agency reports, the whistleblower's comments, and my findings.¹ The whistleblower, Ms. Donna J. Davis, who consented to the release of her name, alleged that NIJ employees chronically violated federal rules and regulations governing federal grant processes.

Ms. Davis's allegations were referred to Attorney General Loretta Lynch for investigation pursuant to 5 U.S.C. § 1213(c) and (d). The Office of the Assistant Attorney General investigated the matter. Assistant Attorney General Karol V. Mason was delegated the authority to review and sign the report, and on January 8, 2016, submitted the agency's report to the Office of Special Counsel (OSC). Ms. Davis commented on the report on February 26, 2016. On July 15, 2016, DOJ submitted a supplemental report, and on October 10, 2016, Ms. Davis provided supplemental comments.

The agency substantiated the allegations in part. Ms. Davis alleged that NIJ employees frequently engaged in improper communications with grant applicants and, in doing so, conferred inappropriate competitive advantages. She further alleged that NIJ

¹ The Office of Special Counsel (OSC) is authorized by law to receive disclosures of information from federal employees alleging violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. § 1213(a) and (b). OSC does not have the authority to investigate a whistleblower's disclosure; rather, if the Special Counsel determines that there is a substantial likelihood that one of the aforementioned conditions exists, she is required to advise the appropriate agency head of her determination, and the agency head is required to conduct an investigation of the allegations and submit a written report. 5 U.S.C. § 1213(c). Upon receipt, the Special Counsel reviews the agency report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(e)(2). The Special Counsel will determine that the agency's investigative findings and conclusions appear reasonable if they are credible, consistent, and complete based upon the facts in the disclosure, the agency report, and the comments offered by the whistleblower under 5 U.S.C. § 1213(e)(1).

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managers approved improper research incentives utilized by grant recipients. The report noted that communications between agency employees and grant applicants prior to submission could (and at times did) create an unfair competitive advantage for some applicants and grantees. However, many of the specific examples provided by Ms. Davis could not be substantiated as evidencing such an advantage. The report further indicated that while some of the identified instances constituted permissible conduct under then-current NIJ leadership and policy, these types of communication are now prohibited. The report also substantiated serious issues with the approval of incentives incorporated into grants. In one instance, a grant provided gift cards to parolees as study incentives, an arrangement specifically chosen to circumvent state victim restitution requirement laws. In response, the agency has developed new review processes for communication and incentive approvals to ensure that grants recipients are not able to circumvent such laws.

The report noted that at the time of Ms. Davis's allegations, NIJ leadership encouraged agency employees to ask "clarifying questions" to grant applicants prior to submission. Ms. Davis asserted that these questions were often leading, with employees impermissibly suggesting substantive modifications to applicants prior to awards. This type of communication appeared to violate OMB circular A-110, which mandates that federal grants be awarded in a free and open manner and OJP's own Grant Managers Manual, which prohibits conduct that could give applicants an unfair advantage. The report acknowledged that the use of clarifying questions was an established former practice. It noted that under new NIJ leadership, NIJ Deputy Director Howard Spivak and ORE Director Seri Irazola developed a process that allows senior managers to scrutinize clarifying questions before agency employees send them to applicants to ensure that these questions do not confer an improper competitive advantage on the candidate. However, the report noted that ineffective communication about these policy changes has resulted in confusion and misunderstanding among NIJ employees and leadership and has contributed to the persistence of this problem.

With respect to the use of improper incentives, the report noted that prior to October 2014, no official review policy for incentives existed. The only guidelines, which were found on NIJ's website, indicated that incentives were "generally unallowable" but could be approved if they appeared reasonable and were properly justified. The report included an analysis of a 2014 grant proposal submitted by the University of Texas at El Paso that NIJ Deputy Director Howard Spivak reviewed and approved. The incentive proposed providing \$34,666 to parolees in gift cards, to circumvent Texas victim restitution requirements. The grantee specifically detailed this improper rationale in budget documents and again in communication with NIJ employees. Despite Mr. Spivak's unsuccessful request to delete language rationalizing the use, he approved the incentive. The report acknowledged that NIJ should not award federal funds to an applicant knowing that the recipient plans to circumvent state law.

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The report noted that under NIJ grant approval processes, incentives were only reviewed after a grant had been awarded. As such, grants have been awarded with incentives featuring high cash values, such as college course credit for students and \$150 cash awards given directly to girls ages 12-17 without parental consent. While subsequent internal discussions with OGC and NIJ management resulted in the modification or removal of these incentives, the awarding of grants with unapproved incentives appears to violate the above-referenced guidelines.

In response, Mr. Spivak and NIJ staff developed a policy requiring that grant applications address a number of questions relating to proposed incentives. In addition, the policy states that incentives given to vulnerable populations may be given particular scrutiny. The report noted that while a revised policy has been implemented, other issues remain. Specifically, Mr. Spivak is still the single point of review for incentives, without any checks or balances. The report explained that this leaves NIJ vulnerable to the perception of bias or unfairness.

During the course of the investigation, Ms. Davis declined to be interviewed by the DOJ attorney assigned to investigate the matter. Ms. Davis objected, because the DOJ attorney worked in OJP's Office of General Counsel, which, she asserted, issued legal opinions concerning some of the conduct at issue and was thereby complicit in the allegations discussed above. Accordingly, because DOJ did not interview Ms. Davis, the agency did not provide additional information regarding the examples featured in OSC's original referral letter.

In comments to the report, Ms. Davis asserted that DOJ did not interview many key employees during the course of the investigation. She explained that the agency conducted interviews with employees in only one out of three grant management divisions and did not interview former NIJ directors who supervised the unit during grant application cycles prior to 2014. Ms. Davis also questioned a number of agency policy interpretations in the report. Specifically, she noted that grant management policy manuals prohibit NIJ employees from providing assistance to individual grant applicants, and that it appears that NIJ did not conduct required pre-award financial reviews of grant incentives, in violation of OJP financial guidelines.

In response to these comments, DOJ informed OSC that all relevant employees were interviewed to obtain a complete account of the issues involved. In a supplemental report provided to OSC, DOJ stated that grant management manuals do not prohibit NIJ staff from providing assistance to individual applicants; rather, these documents set parameters for staff interactions with applicants to ensure the fairness of the grant-making process. The supplemental report further explained that during the time period at issue in these allegations, the practice of asking clarifying questions without prior management vetting was permissible under unit policy. In addition, the supplemental report stated that agency policy treats incentives as grant "costs," which are reviewed during the

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application process. Therefore, the investigation did not find any instance where an incentive was not properly reviewed. In supplemental comments, Ms. Davis asserted that these conclusions were “deficient at best and contradictory at worst” and called on the DOJ Office of Inspector General to investigate the matter.

In sum, the agency acknowledged that pre-award communications between agency employees and grant applicants created an unfair competitive advantage in the award process. It also confirmed irregularities with the approval of grant incentives. Despite these findings, the agency concluded that these problems did not constitute a violation of law, rule, or regulation, or gross mismanagement. The report appeared to reach this conclusion, because previous NIJ leadership endorsed these practices, despite their apparent impropriety. The creation of any unfair advantage in a free and open merit-based award process involving large sums of government grant money is unacceptable. In addition, the fact that NIJ approved a grant when it was on notice that the grant recipient intended to circumvent state law reflects serious mismanagement. For these reasons, I have determined that while the reports meet all statutory requirements, the agency’s findings are not reasonable.

As required by 5 U.S.C §1213(e)(3), I have sent copies of the agency reports and Ms. Davis’s comments to the Chairmen and Ranking Members of the Senate and House Judiciary Committees. I have also filed copies of the agency reports and Ms. Davis’s comments in OSC’s public file, which is available online at www.osc.gov. This matter is now closed.

Respectfully,



Carolyn N. Lerner

Enclosures