



U.S. Department of Justice

Office of Justice Programs

Office of the Assistant Attorney General

Washington, D.C. 20531

Carolyn N. Lerner
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1730 M Street, NW, Suite 300
Washington, DC 20036-4505

JUL 15 2016

Re: OSC File Number DI-15-3489

Dear Ms. Lerner,

I am responding to your email to the Office of the Deputy Attorney General, dated March 23, 2016, requesting the Department of Justice to provide a supplement to our report of investigation (ROI), dated January 8, 2016, on the matters under consideration in OSC File No. DI-15-3489.

To fulfill its obligations under 5 U.S.C. § 1213(c) and (d), the Department of Justice delegated to me the authority to investigate this matter. At my request, our Office of Audit, Assessment and Management has completed the supplement to our ROI that your office has requested. I have reviewed this supplemental report and continue to conclude that there was no violation of law, rule or regulation; gross mismanagement; gross waste of funds; or abuse of authority. However, as discussed in our ROI, we have identified some significant issues, and my office continues to work diligently to make all necessary improvements to address these concerns.

Thank you for bringing this important matter to our attention. For further assistance, please contact my Chief of Staff, Theron Pride, at 202-514-8110.

Sincerely,

Karol V. Mason
Assistant Attorney General

Enclosure

SUPPLEMENTAL REPORT

I. Background

In an email sent to the Office of the Deputy Attorney General on March 23, 2016, the Office of Special Counsel (OSC) requested that the Department of Justice provide a supplement to its report of investigation (ROI), dated January 8, 2016, on the matters under consideration in OSC File No. DI-15-3489. Specifically, OSC asked, as a supplement to this report that the Department of Justice reply to the following questions:

- Do the Grant Manager's Manual (GMM) and Office of Justice Programs (OJP) Order Enforcing the GMM actually apply to Social Science Analysts (SSAs);
- Are the National Institute of Justice (NIJ) Director Rodriguez's requests to applicants "de facto compliant" with policy because of her position;
- Why SSAs appear to provide assistance to individual applicants despite the GMM's outright prohibition on this activity;
- Why OJP appears to admit in the report that it acts in a manner contrary to the OJP financial guide requiring a pre-award financial review of grant incentives;
- Whether the 2014 NIJ incentives policy violates the GMM and 2 CFR 200 and 220; and
- Why SSAs have been allowed to administer grants where developed relationships appear to violate OJP Office of General Counsel's (OGC) own conflict of interest guidance?

II. Responses to the Additional Questions from the OSC

The additional review required for this supplement was completed by OJP's Office of Audit, Assessment and Management (OAAM). OAAM oversees and ensures compliance with the grants management policies and protocols across the bureaus and program offices within OJP, including the National Institute of Justice. 42 U.S.C. § 3712h. Given OAAM's independent role and function to ensure there are sufficient internal controls within OJP to prevent waste, fraud, and abuse, the Assistant Attorney General for OJP requested that OAAM conduct the necessary review in order to respond to these questions.

A. Do the GMM and OJP Order Enforcing the GMM actually apply to SSAs?

The GMM applies to all OJP grant administration and management activities, setting forth the standard policies, procedures, and time-frames for performing specific activities associated with all stages of the grants management process. Accordingly, the requirements in the GMM apply to all OJP personnel working with grants, including programmatic experts, such as SSAs, who are necessarily involved in the substantive aspects of grant administration.

B. Are NIJ Director Rodriguez' requests to applicants "de facto compliant" with policy because of her position?

As a general matter, the NIJ Director has the authority to delegate the authority vested in her to subordinate officials, and to establish policies and procedures through which her authority flows to govern actions of subordinates. The Director is the ultimate authority with regard to

NIJ's policies and procedures; and she may make exceptions to her own policies/procedures as she may deem appropriate.

The question asked appears to arise from the reference in the ROI at p. 6 regarding Director Rodriguez' answers to questions about her direction to staff to ask for additional information, and whether it "complied" with the NIJ internal "policy" or procedure of vetting such requests (known as "clarifying questions") through management officials. This vetting policy/procedure for asking for additional information was designed to direct the work of the NIJ Director's subordinates by ensuring approval by senior NIJ leadership, whose authority flows from the Director. The Director of NIJ has the ultimate authority under NIJ policies and procedures, and the Director may, in the exercise of her discretion, to direct her staff to seek the information.

C. Why SSAs appear to provide assistance to individual applicants despite the GMM's outright prohibition on this activity?

The GMM does not "prohibit" OJP staff from providing "assistance to individual applicants." It does, however, provide some parameters for OJP staff interactions with applicants to competitive programs that are intended to help ensure the fairness and integrity of the grant-making process.

Communicating with applicants is often necessary to help ensure that program goals and objectives are clearly understood. Under competitive programs, any assistance or information provided to an applicant must be offered to all applicants. Under non-competitive programs, such as formula awards, OJP may provide Technical Assistance (TA). Section 4.7 of the GMM guidance on pre-application assistance is as follows:

Pre-application assistance includes providing general information about program goals and objectives to prospective applicants. Since individual assistance to applicants in a competitive process may create an unfair advantage to other applicants, OJP staff members may not provide individual assistance to competitive applicants. Instead, each [Bureau and Program Office (BPO)] may conduct some level of pre-application assistance using hotline numbers, pre-application conferences, cluster conferences, meetings, conference calls, list serves, or frequently asked questions posted on the BPO and OJP website.

Pre-application communication provides OJP staff with the opportunity to work with potential applicants to help improve the quality of applications to support OJP's programmatic goals and objectives, which include fostering customer service and building capacity in the field to develop and implement authorized programs that improve justice systems. OJP must always be careful to communicate in a way that does not create an unfair advantage for one or some applicants over others, ensuring that such communication is fair, consistent, and transparent.

In this case, as explained in the ROI, the communications the SAAs had with applicants in the awards referred to by the whistleblower's report were made in the context of NIJ's longstanding "clarifying questions" practice. As explained, NIJ leadership had re-examined this

process over the past year and a half, decided that NIJ staff need guidance to assist them in handling these questions, and has since developed a vetting process for such communications, which would also ensure consistency with the GMM policy.

D. Why OJP appears to admit in the report that it acts in a manner contrary to the OJP financial guide requiring a pre-award financial review of grant incentives?

OJP has not “admitted” that it “act[ed] contrary to the OJP financial guide” in its review of grant incentives. The statement from the ROI — “A grant applicant’s proposal to use incentives as part of a research plan is reviewed *only during the final budget review, after the grant has been awarded*” — quoted by the whistleblower and that appears to give rise to this question, should not be understood to mean that OJP/NIJ did not review incentives for the grants cited by the whistleblower. The ROI did not find any instances of a failure to review. It appears there may be a misunderstanding by the whistleblower as to what is required.

Although the *Financial Guide*¹ does not specifically address the review of “incentives,” it requires the review of costs. Incentives are treated as costs, along with any other type of cost that could be included in an application budget request; thus, approvals of incentives would be considered during the application process and approved during the budget review process. OJP tries to verify expected expenditures and approve the budgets of all applications that will be funded before the awards are made. But when a budget is not approved before an award is made, which occurs in many cases, OJP issues a *Conditional Financial Clearance Memorandum* and applies a condition to the award that withholds all funds until the budget is actually approved. In these instances, the budget approval would occur after the award is made.

Accordingly, the process for approving a budget remains the same, regardless of its timing against an award. The same rigor and analysis of the request for incentives used to approve budgets before an award is made would apply during the budget approval process after the award is made. The Conditional Clearance Memorandum and withholding of funds condition is OJP’s effective mechanism to ensure unallowable costs are not incurred on an award before a budget is approved and funds made available to recipients. Only once the budget is approved (including any incentive requests made therein), is the condition on the award removed and funds released to the recipient.

¹ For purposes of this supplemental response, a shortened title (that is, *Financial Guide*) is used to refer to the reference manual OJP publishes for recipients (and subrecipients) to help them with the financial and administrative management of OJP grant and cooperative agreement awards. Until all active OJP awards made before calendar year 2015 are wrapped up, OJP and its award recipients (and subrecipients) are in a time of transition. During this time of transition, some awards (including multiple awards addressed in the excerpted whistleblower documentation forwarded to OJP) are still affected by the grants financial and administrative requirements in effect prior to DOJ’s implementation (by DOJ regulation 2 C.F.R. Part 2800) of 2 C.F.R. Part 200. As a result, OJP still maintains and uses two editions of this manual – namely, the OJP [2014 Financial Guide](#) and the [DOJ 2015 Grants Financial Guide](#).

In short, the timing of the financial review and approval is irrelevant as a practical matter (*i.e.*, whether it occurs before or after award) and in any event is not contrary to the Financial guide or the GMM.

E. Whether the 2014 NIJ incentives policy violates the GMM and 2 CFR 200 and 220?

The “NIJ incentives policy” does not violate the GMM, nor does it violate either 2 C.F.R. Part 200 or 2 C.F.R. Part 220.² Moreover, the GMM is silent on incentives. (Generally-speaking, the treatment of particular items of cost would not be the type of topic covered in the GMM; applicable federal cost principles and, in appropriate circumstances, the *Financial Guide*, address such matters.)

F. Why SSAs have been allowed to administer grants where developed relationships appear to violate OJP OGC’s own conflict of interest guidance?

OJP is unaware of and has been given no evidence of any circumstances in which SSAs have violated OJP’s conflict of interest guidance.

The OJP Ethics Office covers the topic of conflict of interest issues comprehensively in ethics trainings for all OJP staff. In each of these trainings, the impermissibility of grant managers’ having too close a relationship with grantee staff (such that they could appear to have (or could actually have) a lack of objectivity in making decisions) has been extensively discussed. In addition, the training includes specific instruction that if any employee were to see evidence indicating that any individual may be violating any of the ethics requirements or other procedures, that employee has a duty to report such apparent violations to an appropriate authority, which could include NIJ management, OJP management, the OJP designated ethics officer, the OIG, or the OSC. No instances of any violations similar to what is asserted by this question have been provided to the OJP Ethics Office as a result of these trainings.

III. Summary

Based on its findings in the initial ROI and these additional areas inquired of by OSC, OJP remains convinced that there was no violation of law, rule or regulation, gross mismanagement, gross waste of funds, or abuse of authority. As discussed in the ROI, OJP’s investigation identified some areas related to how NIJ has previously managed grants where some clarifications or realignment may be advisable. OJP and NIJ continue to work diligently to make all improvements as may be necessary.

² With respect to federal cost principles, additional federal cost principles, other than those detailed in 2 C.F.R. Part 200 may apply to the various awards discussed in the report. As one example, grantee American Indian Development Associates, LLC, a for-profit entity, would have been required to follow the cost principles in subpart 31.2 of the Federal Acquisition Regulation (the “F.A.R.”).