

February 12, 2016

FOIA/PA Appeals Unit  
DHS-OIG Office of Counsel  
STOP 0305  
245 Murray Lane, SW  
Washington, DC 20528-0305

Re: OIG Freedom of Information Act Appeal (No. 2014-032)

To whom it may concern:

This letter appeals the December 17, 2015, determination (see Attachment A) denying POGO's request for documents set forth in its August 31, 2006, FOIA request. The FOIA request sought documents and records pertaining to former FEMA Director of Recovery Operations Daniel A. Craig, specifically:

1. Communications, including but not limited to reports, letters, memoranda, and e-mails written from and to Daniel A. Craig, then-Director of the Recovery Division, and any employee or agent of Shaw, Fluor, Bechtel, or CH2M Hill pertaining to contracts mentioned above;
2. Communications, including but not limited to reports, letters, memoranda, and e-mails written from and to Daniel A. Craig, then-Director of the Recovery Division, and any employee or agent of Shaw, Fluor, Bechtel, or CH2M Hill pertaining to post-government employment;
3. Records pertaining to Mr. Craig's resignation from FEMA;
4. Records pertaining to all conflicts of interest and ethics statutes and regulations (including all recusal and disqualification statements, exit plans, advisory opinions, and like ethics opinions) for Mr. Craig.

After seven years, FEMA referred 39 pages of records to DHS-OIG, which received that referral on December 4, 2013. The final DHS-OIG response to POGO, now over nine years in the making, indicates that the 39 pages of records, as they pertain to a third party, are being withheld under Exemptions (b)(6) and (b)(7)(C). It also indicates that these records may be released after "a clear demonstration that the public interest in disclosure outweighs the personal privacy interest and significant public benefit would result from the disclosure of the requested records."

POGO believes there is significant public interest at stake in the disclosure of these records, as they pertain to a high-ranking government official seeking employment with the contractors he was overseeing. Furthermore, POGO holds that the records sought do not constitute an unwarranted invasion of privacy as they relate not only to professional and business activities, but to those of a high-ranking

government official—a position of public trust that inherently limits the privacy of the individual. The courts “favor disclosure under the FOIA balancing test when a government official’s actions constitute a violation of the public trust...” *Cochran v. United States*, 770 F.2d 949, 956 (11<sup>th</sup> Cir. 1985).

## **Exemption (b)(6)**

### Public Interest

Daniel A. Craig, former Director of FEMA’s Recovery Division, has been implicated as potentially having abused his authority in assigning contracts in order to curry favor with contractors he sought employment with. If substantiated, this would prove to be a gross violation of the public trust. The disclosure of the 39 pages of requested records would serve the public interest in potentially validating the public’s concerns regarding Mr. Craig’s conduct and furthering the general public’s understanding of government operations as they relate to contracting in the aftermath of natural disasters.

“In virtually all cases...disclosure of the information adduced in an agency investigation [of employee misconduct] serves the public interest at least to the extent that it sheds light on the agency’s performance of its official duties...The higher the rank of the public official alleged to have engaged in misconduct, the greater the legitimate public interest in disclosure is likely to be.” *Providence Journal Co. v. Dep’t of Army*, 981 F.2d 552, 568 (1<sup>st</sup> Cir. 1992)

Congressional testimony by Matt Jadacki, then-Special Inspector General of Gulf Coast Hurricane Recovery (see Attachment B), raises additional concerns about the Katrina recovery contracting process. In his official statement, Mr. Jadacki highlights several instances where the handling of the four major contracts “provides a basis for charges of bias or favoritism.” Not only was there a lack of source selection documentation, but also a lack of any kind of objective evaluation criteria determining which of the four companies selected received larger or smaller contracts. In this case, suspicion is clearly justified. And as Mr. Craig was seeking—or planning to seek—employment with The Shaw Group (and others, per his own disclosure—see Attachment C), there are clear grounds for concern of bias or favoritism. The fact that Mr. Craig, in his very next job, did indeed lobby the DHS on behalf of The Shaw Group (see Attachment D) begs a question to which the public deserves an answer.

### Personal Privacy

The requested records primarily relate to the professional activities of Mr. Craig, and thus do not significantly impinge on his personal privacy. As determined in *Cohen v. EPA*, 575 F. Supp. 425, 429 (D.D.C. 1983), “The privacy exemption does not apply to information regarding professional or business activities.” Interactions with contractors (Items #1 and #2) are clearly business activities, and information pertaining to either Mr. Craig’s resignation or any documented conflicts of interest or ethics statutes (Items #3 and #4) are very clearly professional, rather than personal, in nature.

Any personal information that truly would be an unwarranted invasion of privacy, such as Social Security Numbers, addresses, telephone numbers, or any other intimate or personal details can easily be segregated and removed from the substantive content of the records pertaining to Daniel A. Craig. Courts have ruled that an agency must provide “[a]ny reasonably segregable portion...after deletion of the portions which are exempt.” § 552(b)

## **Exemption (b)(7)(C)**

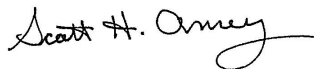
The records that we seek do not directly pertain to any official investigation. While the emails and communications listed above may have been collected in an investigation, they remain distinct from it. We have not requested the results of any investigative report, and as such the release of the requested documents will not reveal any investigative interest in Mr. Craig.

While the Supreme Court has ruled that “a third party’s request for law enforcement records or information about a private citizen can be reasonably expected to invade that citizen’s privacy,” the records we seek pertain to Mr. Craig’s activities as a public servant, not as a private citizen. Furthermore, as stated in the preceding paragraph, we have not requested any law enforcement records. Ethics and advisory opinions, exit plans, and the other communication and documentation we have requested are routine and unrelated to any potential law enforcement action. As the response we received noted (see Attachment A), the 39 pages of records were referred to the DHS OIG by FEMA “for processing and direct response.” These particular records were therefore not gathered from an investigation by the OIG but were referred by FEMA.

The balancing test applied to Exemption (b)(6) is therefore sufficient justification to release the documents, and Exemption (b)(7)(C) is inapplicable in this situation, regardless of whether or not Mr. Craig was the subject of any law enforcement activities.

Please contact us if this request requires further clarification. I can be reached at (202) 347-1122 or via email at [scott@pogo.org](mailto:scott@pogo.org). Thank you for your prompt attention to this matter.

Sincerely,



Scott Amey  
General Counsel