



U.S. Department of Justice
Office of Professional Responsibility

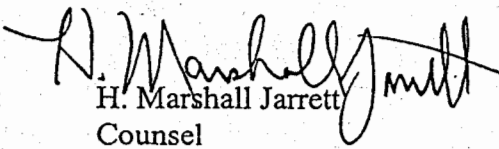
Washington, D.C. 20530

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MEMORANDUM

JUN 17 2002

TO: Kenneth L. Wainstein
Director
Executive Office for United States Attorneys

FROM: 
H. Marshall Jarrett
Counsel

SUBJECT: Report of Investigation into Misconduct Allegations
Concerning Unauthorized Disclosure of Information

INTRODUCTION AND SUMMARY

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I. STATEMENT OF FACTS

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According to [

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II.

RESPONSES

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IV. ANALYSIS

A. OPR's Analytical Framework

A subject of an OPR inquiry may be found to have engaged in professional misconduct if he or she intentionally violates or acts in reckless disregard of a law, Department rule or regulation, or applicable standard of conduct. Even if a subject does not commit professional misconduct, he or she may nevertheless be found to have exercised poor judgment or to have made a mistake.

1. Intentional Misconduct

A Department attorney engages in intentional misconduct when he or she (1) engages in conduct with the purpose of obtaining a result that the applicable obligation or standard unambiguously prohibits, or (2) engages in conduct knowing its natural or probable consequence is a result that the obligation or standard unambiguously prohibits.

2. Reckless Disregard

An attorney acts in reckless disregard of an obligation or standard when he or she (1) knows or should know of the obligation or standard, (2) knows or should know that his or her conduct involves a substantial likelihood that he or she will violate the obligation or standard, and (3) nonetheless engages in the conduct, which is objectively unreasonable under the circumstances.

3. Poor Judgment

If OPR concludes that the attorney did not commit professional misconduct, OPR determines whether the attorney exercised poor judgment or made a mistake. An attorney exercises poor judgment when, faced with alternative courses of action, the attorney chooses a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that a Department

attorney may act inappropriately and thus exhibit poor judgment even though the attorney may not have intentionally violated or acted in reckless disregard of a clear obligation or standard.

B. Applicable Legal Standards

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2. The Privacy Act, 5 U.S.C. 552a

Pursuant to the Privacy Act, "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, * * * except * * * with the prior written consent of, the individual to whom the record pertains * * * ." 5 U.S.C. § 552a(b).

Individuals are subject to criminal penalties for violating the nondisclosure provisions of the Privacy Act. The Act provides that, "Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than \$5,000." 5 U.S.C. § 552a(i)(1).

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3. DOJ's Privacy Act Regulations

The DOJ Privacy Act regulations require “[e]ach component [to] establish administrative and physical controls to prevent unauthorized access to its system of records [and] to prevent the unauthorized disclosure of records * * * .” 28 C.F.R. § 16.51(a). Components are also required to ensure that “[r]ecords are not disclosed to unauthorized persons or under unauthorized circumstances in either verbal or written form.” 28 C.F.R. § 16.51(a)(4). In addition, each component is expected to “have procedures that restrict access to records to only those individuals within the Department who must have access to those records in order to perform their duties and that prevent inadvertent disclosure of records.” 28 C.F.R. § 16.51(b). DOJ employees are expected to “[m]aintain and use records with care to prevent the unauthorized or inadvertent disclosure of a record to anyone.[.]” 28 C.F.R. § 16.54(i).

4. The Freedom of Information Act, 5 U.S.C. 552

Pursuant to the FOIA, any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are otherwise protected from disclosure by law. 5 U.S.C. § 552.

5. DOJ's FOIA Regulations

The DOJ FOIA regulations require that requests for access to DOJ records be made in writing directly to the component that maintains the records. 28 C.F.R. § 16.3(a). The regulations further provide that in making “a request for records about another individual, either a written authorization signed by that individual permitting disclosure of those records to you or proof that the individual is deceased * * * will help the processing of [the] request.” *Id.* When a component receives a request for a record, it must determine whether another component or agency is better able to

determine whether the record is exempt from disclosure under the FOIA, and if so, to refer the matter to the other component or agency or respond to the request after consultation with the other component or agency. 28 C.F.R. § 16.4(c).

6. United States Attorney's Manual

Section 3-17.120 of the U.S. Attorney's Manual (USAM), entitled "FOIA Operations Within the Justice Department," provides in pertinent part:

Requests for access to records under the FOIA should be directed to the component of the Department which maintains the records.

* * *

Departmental policy is that the originating component of any intra-Departmental document has the final decision on whether or not a document should be disclosed. This means, for example, that the decision to disclose a Federal Bureau of Investigation (FBI) investigative report is to be made by the FBI.

Under USAM Section 3-17.130, upon the receipt of a FOIA request by a United States Attorney's Office, its receipt should be immediately acknowledged and the requester informed that his/her correspondence has been forwarded to the FOIA/PA Unit of the Executive Office for United States Attorneys (EOUSA). Pursuant to 28 C.F.R. § 16.4(c), EOUSA is then expected to process the request, and make necessary referrals of the request to the appropriate component or the Justice Management Division if the identity of the component is not apparent from the description of the records being sought.

7. 5 C.F.R. 2635.703

The federal regulation governing the use of nonpublic information is set forth at 5 C.F.R. § 2635.703 and provides:

(a) *Prohibition.* An employee shall not engage in a financial transaction using nonpublic information, nor allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure.

(b) *Definition of nonpublic information.* For purposes of this section, *nonpublic information* is information that the employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public. It includes information that he knows or reasonably should know:

(1) Is routinely exempt from disclosure under 5 U.S.C. 552 or otherwise protected from disclosure by statute, Executive order or regulation;

(2) Is designated as confidential by an agency; or

(3) Has not actually been disseminated to the general public and is not authorized to be made available to the public on request.

V. DISCUSSION

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[] had engaged in recent credit activity (suggesting [] was alive) through a Choicepoint database search, that [] was probably alive and that the file should not be released. FBI [] requested a review [] to determine the existence of any record of a Choicepoint database search. FBI [] advised DOJ OPR that "no such record was found," but further stated that no such record is required to be maintained. FBI [] also asked Choicepoint to conduct a review of its internal records to determine whether [] performed a credit check of [] A representative of Choicepoint advised the FBI that the security parameters of its database do not permit Choicepoint to make such an inquiry.

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¹² As mentioned above, the DOJ FOIA regulations require requests for access to DOJ records be made in writing directly to the component that maintains those records. 28 C.F.R. § 16.3(a).

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CONCLUSION AND RECOMMENDATION

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¹⁴See the discussion contained on pp. 19-20 and 26-27.

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cc: David Margolis
Associate Deputy Attorney General

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