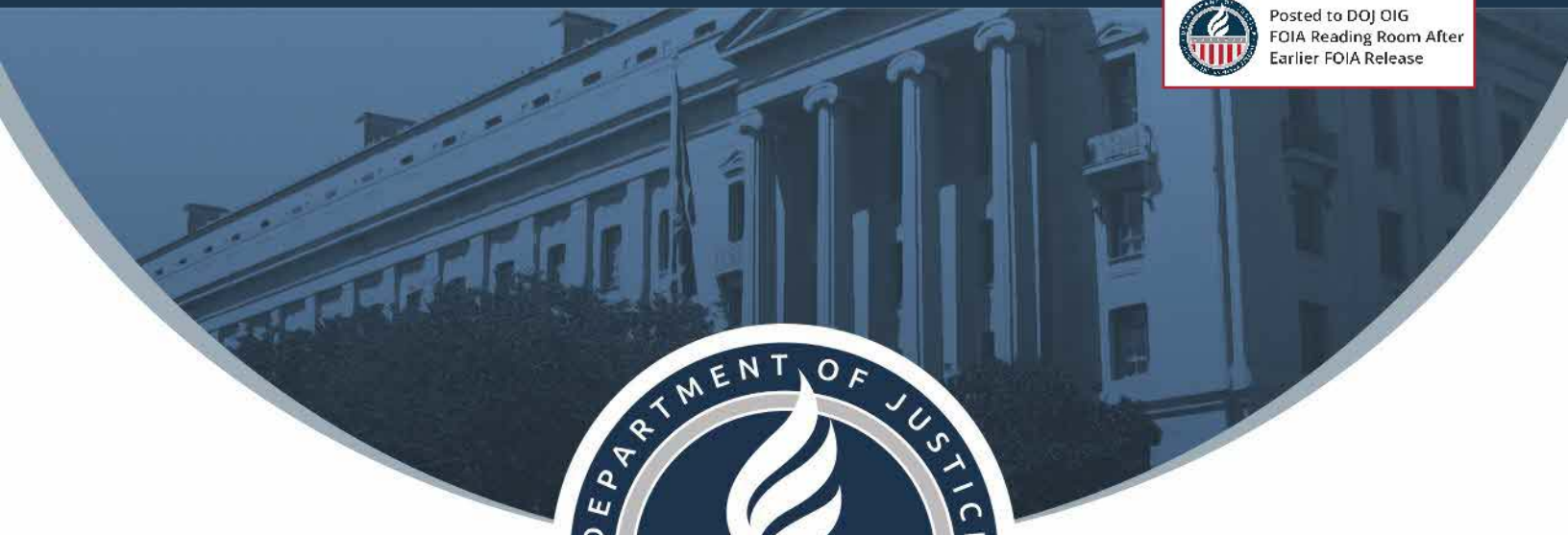

# A Report of Misconduct by Former DOJ

(b)(6); (b)(7)(C)

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OVERSIGHT AND REVIEW DIVISION

APRIL 2021

## I. Introduction

On [redacted] the Office of the Inspector General (OIG) informed [redacted] that the OIG was seeking to interview [redacted] in connection with an ongoing OIG misconduct investigation. [redacted] failed to respond to multiple requests by the OIG for [redacted] to provide dates and times [redacted] would be available for an interview. On [redacted] the OIG informed [redacted] that [redacted] was being compelled to appear for an interview on [redacted] at 10 a.m., and provided instructions to [redacted] about where to appear. The OIG also provided [redacted] with its standard form that explained, among other things, that neither [redacted] answers nor any evidence gained by reason of [redacted] answers could be used against [redacted] in a criminal proceeding, and that [redacted] refusal to answer the OIG's questions could subject [redacted] to disciplinary action. At [redacted] request, the OIG agreed to change the date of the compelled interview twice—once to allow [redacted] to obtain counsel and once to accommodate [redacted] responsibilities [redacted]. The compelled interview was ultimately set for [redacted] at 10 a.m., the day before [redacted] last day as a Department employee.

On [redacted], the day before the scheduled interview, [redacted] attorney notified the OIG that [redacted] would not appear for [redacted] compelled interview on [redacted] but offered that [redacted] would consider appearing for a voluntary OIG interview in [redacted] after [redacted] had left the Department. The OIG responded by informing [redacted] counsel that as a Department employee, [redacted] was obligated to appear for the interview, and that [redacted] failure to appear would constitute misconduct. [redacted] failed to appear for the compelled interview as scheduled. The OIG thereafter offered [redacted] the opportunity to cure [redacted] failure to appear for the compelled interview by agreeing to voluntarily participate in an interview after [redacted] separation from Department employment.[1] [redacted] declined to do so.

We found that [redacted] failure to appear for a compelled interview on [redacted] violated [redacted] obligation to cooperate with an OIG investigation under 28 C.F.R. § 45.13 and Justice Manual § 1-4.200.

Unless otherwise noted, the OIG applies the preponderance of the evidence standard in determining whether Department personnel have committed misconduct. The Merit Systems Protection Board applies this same standard when reviewing a federal agency's decision to take adverse action against an employee based on such misconduct. *See* 5 U.S.C. § 7701(c)(1)(B); 5 C.F.R. § 1201.56(b)(1)(ii).

[1] The Inspector General Act of 1978, as amended, does not provide the OIG with the authority to compel non-Department employees, including former employees, to participate in interviews.

## II. Background

(b)(6); (b)(7)(C)

## III. Applicable Regulations and Policies

Under federal regulations and Department policy, DOJ employees are obligated to cooperate with OIG investigations upon being informed that their statements will not be used against them in a criminal proceeding.

Section 45.13 of Title 28 of the Code of Federal Regulations states that Department employees "have a duty to, and shall, cooperate fully with the Office of the Inspector General...and shall respond to questions posed during the course of an investigation upon being informed that their statement will not be used to incriminate them in a criminal proceeding." The regulation further states that refusal to cooperate with an OIG investigation "could lead to disciplinary action."[2]

Justice Manual Section 1-4.200 likewise provides, in relevant part, that "all Department employees have an obligation to cooperate with...OIG misconduct investigations (28 C.F.R. § 45.13) and must respond truthfully to questions posed during the course of an investigation upon being informed that their statements will not be used to incriminate them in a criminal proceeding." The Justice Manual notes that "employees who refuse to cooperate" with an OIG misconduct investigation after having received the appropriate assurances "may be subject to formal discipline, including removal." The Justice Manual also states that "employees are obligated to cooperate and respond truthfully even if their statements can be used against them in connection with employment matters." [3]

## IV. OIG Findings and Analysis

### A. Factual Findings

On (b)(6); (b)(7)(C) at 10:17 a.m., an Investigative Counsel from the OIG (OIG Counsel) spoke with (b)(6); (b)(7)(C) by telephone to request (b)(6); (b)(7)(C) participation in an interview in connection with an ongoing OIG administrative investigation concerning allegations of misconduct arising from official duties. OIG Counsel identified the topic of

[2] 28 C.F.R. § 45.13.

[3] Justice Manual § 1-4.200, https://www.justice.gov/jm/jm-1-4000-standards-conduct#1-4.200.

the investigation, informed [redacted] that the OIG considered [redacted] a subject in it, and stated that the OIG's preference would be to conduct [redacted] interview the following [redacted] stated that [redacted] would have to look at [redacted] schedule and get back to the OIG. The phone call lasted approximately 2 minutes.

At 1:34 p.m. on [redacted] called OIG Counsel seeking more information about the scope of the investigation and to obtain OIG Counsel's email address for the purpose of providing documents the OIG had previously requested from [redacted][4] [redacted] stated that [redacted] still had to look at [redacted] schedule and would get back to OIG Counsel about [redacted] availability for an interview on [redacted] This phone call lasted approximately 1 minute.

On [redacted] 4, at 12:56 p.m., OIG Counsel sent [redacted] an email asking again whether [redacted] was available for an interview on [redacted] and if not, whether [redacted] might propose some other dates and times that [redacted] was available. At 2:49 p.m., [redacted] responded that [redacted] was unavailable on [redacted] and would "circle back on scheduling." [redacted] also asked another question about the scope of the OIG's investigation. OIG Counsel responded by email at 3:53 p.m., answering [redacted] question about the scope of the investigation and stating, "Keep me posted on your schedule. If you want to propose a few dates/times, that might help us narrow down a window that works for everyone." [redacted] did not respond by email or phone to OIG Counsel's [redacted] email.

On [redacted] at 4:26 p.m., OIG Counsel called [redacted] Department mobile number; the call went to voicemail, but an automated voice said that [redacted] voice mailbox was full. Three minutes later, while OIG Counsel was drafting an email to [redacted] about the attempted call, OIG Counsel received an incoming telephone call from the same number that OIG Counsel had just called attempting to reach [redacted] OIG Counsel answered, "Hello?," at which point there was a brief pause, then the caller hung up. At 4:36 p.m., OIG Counsel sent [redacted] an email noting that [redacted] had attempted to call [redacted] but found that [redacted] voicemail was full, and stating, "I just wanted to circle back with you about scheduling an interview. We're hoping to get you on the calendar for some time before the end of next week [redacted] We're relatively flexible on schedule, so if you want to give us a date/time or two that work best for you, we should be able to make something work. Please let me know." [redacted] did not respond to that email or call OIG Counsel with a proposed interview date.

On Friday, [redacted], at 9:03 a.m., OIG Counsel attempted again to reach [redacted] by phone but received the same automated message that [redacted] voice mailbox was full.

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[4] The OIG had sent [redacted], a document request pertaining to this investigation on [redacted] and documents show that [redacted] forwarded that request to two colleagues [redacted] Accordingly, [redacted] was aware of the OIG's investigation since at least that date.

At 9:05 a.m., OIG Counsel sent [redacted] an email with the subject line, "OIG Interview—5 p.m. Deadline." The body of the email read, in full:

> [redacted]—
>
> As you know, the OIG has been trying to arrange a voluntary interview with you at a date and time that works for your schedule. You have not yet provided us any timeframes that might work for you and have not responded to my most recent phone calls or emails. If we do not hear from you by **5 p.m. ET today** [redacted], we are prepared to compel you to appear for an interview on [redacted] **at 10 a.m.** If you prefer to appear for a voluntary interview the week of [redacted] please let me know your preferred date and time by 5 p.m. ET today.
>
> Sincerely,
>
> [OIG Counsel]

(Emphasis in original.) [redacted] did not respond to that communication by email or phone.

On [redacted] at 11:16 a.m., OIG Counsel sent [redacted] an email with the subject line, "OIG Interview [redacted] at 10 a.m.—please acknowledge receipt of this email by 5 p.m. today." That email stated:

> Pursuant to the Inspector General Act of 1978, as amended, and in light of your lack of response to my email on Friday, you are instructed to appear for an interview on [redacted] **at 10 a.m.** The interview will take place in the OIG Conference Room in RFK Main Justice, unless you elect to appear via video conference, which is an option we are providing in light of the COVID-19 situation.

(Emphasis in original.) Attached to the email was a "Kalkines form," which the email told [redacted] "explains your rights and responsibilities with respect to this interview."[5] Specifically, the form advised [redacted] that (1) [redacted] had "a duty to reply to the questions posed to [redacted] during this interview and agency disciplinary action, including dismissal, may be undertaken if [redacted] refuse[d] to answer or fail[ed] to reply fully and truthfully"; and (2) "neither [redacted] answers nor any information or evidence gained by reason of [redacted] answers can be used against [redacted] in any criminal proceeding," but [redacted] answers or evidence resulting from them "may be used in the course of agency disciplinary proceedings," and [redacted] could be criminally prosecuted for "knowingly and willfully provid[ing] false statements

[5] "Kalkines" refers to *Kalkines* v. *United States*, 473 F.2d 1391 (1973), in which the U.S. Court of Claims held that a government employee can be removed for refusing to respond to questions in an administrative investigation so long as "he is adequately informed both that he is subject to discharge for not answering and that his replies (and their fruits) cannot be employed against him in a criminal case." *Id.* at 1393.

or information." The email asked [redacted] to "please confirm by 5 p.m. today that you have received this email" and stated that [redacted] should contact OIG Counsel if [redacted] has any questions.

[redacted] called OIG Counsel at 1:07 p.m. that afternoon; the call lasted 11 minutes. [redacted] asserted that [redacted] had not seen OIG Counsel's [redacted] email, that [redacted] had "no problem" appearing for an interview voluntarily, and that the "only reason" for [redacted] delay in getting back to OIG Counsel regarding [redacted] schedule was that [redacted] had been contemplating hiring a lawyer.[6] OIG Counsel asked [redacted] whether the scheduled interview time of [redacted] at 10 a.m. worked for [redacted] told OIG Counsel that [redacted] would have to check [redacted] schedule and would call back as soon as [redacted] could.

At 3:35 p.m. that afternoon, OIG Counsel reached out to [redacted] by email to thank [redacted] for providing the OIG some documents, which [redacted] had emailed OIG Counsel during their phone call earlier, and to remind [redacted] to please let OIG Counsel know as soon as possible whether [redacted] at 10 a.m. worked for an interview. [redacted] responded by email at 3:54 p.m. with several questions about the nature of the investigation, stating that "since I am considering whether to obtain counsel," the OIG's answers to the questions "will help inform my decision whether to do so—which, in turn, will impact scheduling the interview and our communication." OIG Counsel sent [redacted] an email answering [redacted] questions at 7:06 p.m.[7] OIG Counsel's email informed [redacted] that the OIG was still planning to conduct the interview of [redacted] that [redacted] at 10 a.m., but noted that the OIG would try to work with [redacted] if [redacted] preferred a different time. The email also asked that, if [redacted] decided to retain an attorney, [redacted] have the attorney contact the OIG as soon as possible, and noted that the attorney "is obviously welcome to attend the interview."

[redacted] responded by email at 7:15 p.m. the next evening, [redacted] stating that [redacted] was "happy to cooperate but would like to consult a lawyer" and requesting "a week or so to schedule and have that consultation" before revisiting a date to schedule the interview. OIG Counsel responded to [redacted] by email at 9:38 p.m., stating that, in light of [redacted] request to postpone the interview to allow [redacted] time to consult counsel, the OIG

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[6] OIG Counsel asked [redacted] specifically to clarify whether [redacted] was saying [redacted] intended to retain counsel or only that [redacted] had considered doing so. [redacted] responded that others in the Department had told [redacted] that people under investigation by the OIG sometimes retain counsel, but that [redacted] decided that doing so was not necessary here because the matter under investigation was "silly" and "very straightforward."

[7] Two of the questions [redacted] asked concerned topics [redacted] and OIG Counsel had already discussed by phone (the nature of the investigation and whether [redacted] was a witness or a subject). [redacted] third question was a request for documentation to help [redacted] prepare for the interview; OIG Counsel responded that the OIG does not typically send interviewees documents in advance of their interviews, but that the emails and documents pertaining to the matter under investigation were already in [redacted] possession.

was willing to reschedule the interview to [redacted], at 10 a.m.[8] The email explained that the OIG was "unable to grant [redacted] request for a week or two to consult counsel for two reasons": first, because the OIG anticipated that [redacted] would likely be leaving the Department soon, which would impact its ability to conduct [redacted] interview, and second, because [redacted] had been on notice since [redacted] that [redacted] was a subject of an OIG investigation and that the OIG was seeking to interview [redacted]. The email summarized the history of the OIG's attempts to schedule a voluntary interview with [redacted] and stated, "Given this back and forth, we have been more than accommodating on scheduling and have also given you ample time to consult and retain a lawyer if you wished to do so."

[redacted] responded by email to OIG Counsel at 10:35 p.m. [redacted] email stated that it had been less than 2 weeks since the OIG had informed [redacted] that [redacted] was the subject of an OIG investigation; that, as [redacted] had "been responsible for and consumed by highly significant matters at the Department" during that time; that "during this particularly intense time at the Department" [redacted] had "done [redacted] best to grasp a better understanding of what an IG investigation entails" by "ask[ing] people within the Department about process, etc."; and that, through those conversations, [redacted] learned that DOJ employees sometimes retain counsel for OIG interviews and that, to decide whether to retain counsel, [redacted] needed the information [redacted] requested the previous evening "in writing." [redacted] email concluded, "I will do my best to research and consult with a lawyer in the time period you have laid out. I cannot participate in an interview on [redacted]. I will circle back tomorrow."

On [redacted], at 9:50 a.m., [redacted] sent an email to OIG Counsel stating that [redacted] had "consulted with private counsel about the interview" and that [redacted] lawyer would reach out to the OIG that day. [redacted] email provided the name of [redacted] attorney but no other identifying or contact information. At 6:38 p.m. that evening, OIG Counsel sent [redacted] an email stating that the OIG had not heard from [redacted] lawyer and requesting that [redacted] identify [redacted] lawyer's firm and provide [redacted] contact information, noting that there appeared to be multiple attorneys in the D.C. metro area with the same name as the attorney whose name [redacted] had provided earlier that day.

On [redacted], at 9:17 a.m., OIG Counsel received a call from [redacted] attorney, who stated that [redacted] had retained [redacted] as counsel "late last night." OIG Counsel informed [redacted] lawyer that the OIG had compelled [redacted] for an interview and that it was scheduled for [redacted] at 10 a.m. At 10:51 a.m., OIG Counsel sent a follow-up email to [redacted] attorney reiterating this information and attaching the Kalkines form that the OIG had previously provided [redacted] as well as a standard OIG non-disclosure agreement for the attorney to sign before the interview.

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[8] OIG Counsel's email advised [redacted] that the interview would be compelled and attached another Kalkines form explaining [redacted] rights and responsibilities with respect to the interview.

On [redacted] at 1:59 p.m., [redacted] lawyer called OIG Counsel to ask if the OIG could reschedule [redacted] compelled interview, stating that the scheduled time of 10 a.m. [redacted] conflicted with [redacted] OIG Counsel responded that the OIG would be willing to move [redacted] interview to either later in the day on [redacted] or to 10 a.m. [redacted] lawyer stated that [redacted] would likely be safer in case [redacted] had obligations [redacted]. OIG Counsel agreed but asked [redacted] lawyer to confirm that date and time by the end of the day. At 2:35 p.m., OIG Counsel left [redacted] attorney a voicemail stating that the OIG would also be willing to conduct [redacted] interview any time [redacted] if that worked better for [redacted] schedule. The OIG did not hear from [redacted] attorney again that day nor over the weekend.

On [redacted], at 1:10 p.m., [redacted] attorney emailed OIG Counsel with "a further update on [redacted] availability for an interview." Specifically, [redacted] attorney stated that [redacted] "schedule will now not permit an interview this week, as [redacted] intends to depart from the Department on [redacted]." [redacted] lawyer noted that departing on [redacted] had "been [redacted] plan for some time [redacted]" but stated that it had "become clear over the past few days that [redacted] work commitments during this truncated week...will not permit time for an interview." [redacted] attorney stated that [redacted] "is open to being interviewed after [redacted] has departed [redacted] employment from the Department [redacted]" and offered to "discuss" further with OIG Counsel if the OIG "remain[s] interested in interviewing [redacted]."

OIG Counsel responded to [redacted] attorney by email at 4:34 p.m. OIG Counsel's email described the OIG's multiple attempts to schedule a voluntary interview with [redacted] as well as its agreement to reschedule [redacted] compelled interview twice at [redacted] request. The email continued:

> As I am sure you are also aware, both federal regulations (28 C.F.R. 45.13) and Justice Department policy (Justice Manual 1-4.200) require DOJ employees to cooperate with OIG misconduct investigations and to respond truthfully to questions posed during the course of an investigation upon being informed that their statements will not be used to incriminate them in a criminal proceeding, which we have done. We are proceeding with our scheduled, compelled interview at 10 a.m. tomorrow. If [redacted] does not appear for [redacted] scheduled interview tomorrow, we can only conclude that [redacted] is unwilling to satisfy [redacted] obligation as a Department employee to cooperate with this OIG investigation. We will reconsider whether such a conclusion is warranted if [redacted] does in fact agree to speak with us in a timely fashion after [redacted] has left the Department but before our investigation is complete.

[redacted] attorney responded by email at 4:56 p.m., reiterating that [redacted] "will not attend the interview tomorrow given the press of [redacted] other quite time sensitive responsibilities." [redacted] attorney also stated that [redacted] did "not think it [was] accurate to say [redacted] is not cooperating with your inquiry" given [redacted] representation that [redacted] is open to an interview after [redacted] has departed" and "is willing to consider an interview [redacted]."

On [redacted] two OIG Investigative Counsels reported to the OIG Conference Room in Main Justice for [redacted] scheduled, compelled interview at 10 a.m. [redacted] did not appear for [redacted] interview. At 10:31 a.m., OIG Counsel sent [redacted] lawyer an email that stated: "My colleague and I reported to Main Justice today for [redacted] compelled interview.... [redacted] did not appear for [redacted] interview. The Inspector General considers [redacted] failure to appear to be misconduct. [redacted] can cure this misconduct by voluntarily appearing for, and cooperating with, an interview the week of [redacted]." The email asked [redacted] lawyer to advise OIG Counsel if [redacted] wished to appear for an interview in [redacted] and, if so, what date [redacted] would prefer. At 10:48 a.m., [redacted] lawyer sent OIG Counsel an email stating that [redacted] "disagree[d]" with OIG Counsel's "characterization" that [redacted] client had committed "'misconduct,'" and that [redacted] "must take this mischaracterization into account" in advising [redacted] client on whether the OIG's inquiry appeared to be "fair and independent." The email stated that [redacted] lawyer would "be back in touch [redacted]."

On [redacted], at 9:36 a.m., OIG Counsel sent [redacted] lawyer an email stating: "[redacted] I am circling back about scheduling an interview with [redacted]. We'd like to interview [redacted] within the next few weeks. I think it would be helpful to discuss over the phone, so please give me a call when you can." [redacted] lawyer did not respond to that email or otherwise communicate with OIG Counsel.

On [redacted], at 10:45 a.m., OIG Counsel emailed [redacted] lawyer again, stating: "Just checking in again in case my email got lost in the shuffle; [redacted]. We are still interested in talking to [redacted] about this matter. Please give me a call at your earliest convenience so we can discuss." [redacted] lawyer responded by email at 2:21 p.m., stating: "Thank you for your note. We have discussed with our client and [redacted] does not believe [redacted] has anything to discuss about this topic. [redacted] would refer you to the Department for any relevant records that might inform your inquiry."

On [redacted] at 4:15 p.m., OIG Counsel sent [redacted] lawyer an email advising [redacted] of three points in light of [redacted] previous communication. First, the email noted that, if [redacted] elected not to speak with the OIG, [redacted] would not be allowed to review the draft report in the underlying investigation before it is issued. Second, the email stated that [redacted] participation in an interview would permit [redacted] an opportunity to explain certain records the OIG had obtained. Third, the email reminded [redacted] lawyer that "the Inspector General considers [redacted] failure to appear for [redacted] compelled interview, while still a DOJ employee, to constitute misconduct." The email noted that [redacted] could "cure that

misconduct by participating in, and cooperating with, an interview with us in the near future" and warned that, "if [redacted] does not, [redacted] failure to cooperate with an OIG investigation will be noted in an OIG report." OIG Counsel's email concluded: "Please do not hesitate to reach out if you would like to discuss further or if [redacted] would like to reconsider [redacted] decision.... If we do not hear from you by COB on [redacted], we'll understand that to mean that [redacted] decision not to speak with us stands." [redacted] lawyer did not respond to OIG Counsel's [redacted] email or otherwise communicate with the OIG again regarding this matter.

## B. Analysis

We concluded that [redacted] violated federal regulations and DOJ policy by failing to appear for a compelled OIG interview on [redacted] after the OIG informed [redacted] that [redacted] statements would not be used against [redacted] in a criminal proceeding. As noted above, 28 C.F.R. § 45.13 and Justice Manual § 1-4.200 require DOJ employees to cooperate with OIG investigations "upon being informed that their statements will not be used to incriminate them in a criminal proceeding." The employee's obligation to cooperate includes responding truthfully to questions posed to them during the course of the investigation.[9]

Here, the OIG advised [redacted] both directly and through [redacted] attorney, that any statements [redacted] provided to the OIG would not be used against [redacted] in a criminal proceeding. Specifically, the Kalkines form that the OIG provided to [redacted] and to [redacted] attorney stated, "Neither your answers nor any information or evidence gained by reason of your answers can be used against you in any criminal proceeding." OIG Counsel also reiterated this assurance in [redacted] email to [redacted] lawyer. Having been informed that [redacted] statements would not be used against [redacted] in a criminal proceeding, [redacted] was obligated, as a DOJ employee, to "cooperate fully" with the OIG's investigation and to answer truthfully questions the OIG posed to [redacted].[10] The OIG instructed [redacted] to appear for an interview on [redacted] at 10 a.m., after rescheduling the interview twice as an accommodation to [redacted] [redacted] failed to appear. In doing so, [redacted] violated [redacted] obligation as a DOJ employee to cooperate with the OIG. Although the OIG offered [redacted] the opportunity to cure that violation by appearing voluntarily for an interview after [redacted] had left the Department, [redacted] through [redacted] counsel, declined to do so, and the OIG is unable to compel a former employee to participate in an OIG interview.

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[9] See 28 C.F.R. § 45.13; Justice Manual § 1-4.200.

[10] 28 C.F.R. § 45.13; see also Justice Manual § 1-4.200. OIG Counsel specifically alerted [redacted] lawyer to the regulation and the Justice Manual provision in [redacted] email to [redacted]

## V. Conclusion

(b)(6); (b)(7)(C) violated 28 C.F.R. § 45.13 and Justice Manual § 1-4.200 by failing to cooperate with an OIG investigation while a DOJ employee, (b)(6); (b)(7)(C) resigned from the Department during the course of the underlying OIG investigation and therefore is not subject to disciplinary action by the Department. We have provided a copy of this report (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) and the Office of Professional Responsibility for any action they deem appropriate.