RESPONSE TO PROPOSED REMOVAL OF ROBERT J. MCCARTHY
August 28, 2007

By memorandum dated August 9, 2007, Regional Solicitor Daniel Shillito proposes Robert McCarthy's removal from Federal Service. *See Agency Record of Decision (ROD) Tab 1* (Proposed Removal Memorandum). Mr. McCarthy is charged with (1) violation of the Trade Secrets Act, 18 USC 1905; and (2) unauthorized use of nonpublic information. Specifically, Mr. McCarthy is accused of disclosing to a *Desert Sun* newspaper reporter a redacted copy of a whistleblower Disclosure Memo previously provided to the Office of the Inspector General (OIG). *ROD Tab 7* (redacted OIG Memo with original date of June 28, 2005).

In addition, he is charged with having "acknowledged" that he provided the *Desert Sun* Reporter with a copy of "an internal BIA e-mail … dated September 12, 2006 … [which] contained information concerning an agency trust management tool which disclosed how the BIA's new system is to manage the receipt, investment, disbursement of funds, etc., generated by Indian leasing assets." *Exhibit A* hereto (BIA e-mail dated September 12, 2006). This document is also included in *ROD Tab 7*.

Mr. Shillito's Memo states "You will be allowed 14 days from the date of your receipt of this letter to reply," and that "You have the right to review all evidence used to support this proposed action." Mr. McCarthy immediately called for the record, as directed, which he finally received (from the Regional Office, which could and should have made it available at the time it issued its Proposed Removal) on August 17, leaving seven days response time. By fax dated August 11, 2007, Mr. McCarthy had requested an extension of the response time to September 7, since he was already scheduled for "vacation leave" and had "made travel plans for the week of August 20." A phone message from the Solicitor's Office said a response would be mailed to Mr. McCarthy's former BIA office (the one he is banished from, as explained below), and that it would grant him an additional four days.

I. Charge 1: Alleged Violation of the Trade Secrets Act.

A. Trade Secrets Act Does Not Apply to Mr. McCarthy's Disclosures

The Trade Secrets Act provides as follows:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties . . . which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to

> the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association . . shall be fined no more than $1000, or imprisoned not more than one year or both; and shall be removed from office or employment. 18 U.S.C. § 1905.

The Trade Secrets Act essentially prohibits the unauthorized disclosure of data protected by Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4*)*. Exemption 4 covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *See, e.g., 9 to 5 Organization for Women Office Workers v. Bd. Of Governors of the Federal Reserve*, 721 F.2d 1, 36-37 (1st Cir. 1983) (because section 1905 only prohibits disclosures not authorized by law, and FOIA authorizes disclosure of all government information not exempted by one of its nine exemptions, only disclosures coming within the nine exemptions can violate the Trade Secrets Act); *Hercules v. Marsh*, 839 F.2d 1027, 1029 (4th Cir. 1988) (prohibitions of 18 USC 1905 co-extensive with FOIA exemption 4).

In this instance, Mr. McCarthy's disclosures fall outside of the coverage of the Trade Secrets act because they 1) did not identify individuals and conveyed no confidential information; 2) do not impair the ability of the government to obtain similar information in the future; and 3) did not cause substantial harm to the submitters' competitive positions.

> 1. *The Information Disclosed Was Not a Trade Secret or Privileged and Confidential Commercial or Financial Information*

Clearly, the information disclosed by Mr. McCarthy was not a "trade secret," which the courts have defined for purposes of Exemption 4 as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983); *see also Appleton v. FDA*, 451 F. Supp. 2d 129, 142 & n.8 (D.D.C. 2006).

Thus, the only possible application of the Trade Secrets Act would be if the information released were "commercial or financial information obtained from a person and privileged or confidential." To qualify under this prong of Exemption 4, the information must be: (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential. *National Parks & Conserv. Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974) ("*Nat'l Parks I*"); see also *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992). If the information was submitted to the government voluntarily, then to be protected the proponent must prove that it is the type of information that it "would customarily not . . . release[] to the public." *Critical Mass*, 975 F.2d at 879. If, however, the information was submitted involuntarily, then it is only considered "privileged or confidential" if it is likely to either (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the submitter's competitive position. *Nat'l Parks I*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 878.

a. *The information disclosed was submitted involuntarily.*

Although the information disclosed by Mr. McCarthy meets neither standard, BIA regulations at 25 CFR 162 mandate that lessees submit extensive commercial and financial information, as do the terms of the leases themselves. "[W]hen the government requires a private party to submit information as a condition of doing business with the government" the submission is deemed "required". *Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 28 (D.D.C. 2000); *Lepelletier v. FDIC*, 977 F. Supp. 456, 460 n.3 (D.D.C. 1997) ("Information is considered 'required' if any legal authority compels its submission, including informal mandates that call for the submission of the information as a condition of doing business with the government."), aff'd in part, rev'd in part & remanded on other grounds, 164 F.3d 37 (D.C. Cir. 1999); *see also Sun-Sentinel Co. v. DHS*, 431 F. Supp. 2d 1258, 1275 (S.D. Fla. 2006) (submission required by agency's contracts). Courts routinely hold that prices submitted in response to a solicitation for a government contract are "required" submissions. *E.g.*, *Canadian Commercial Corp. v. Dep't of the Air Force*, 442 F. Supp. 2d 15, 29 (D.D.C. 2006).

Thus, the submission is involuntary, and in addition to being commercial or financial, obtained from a person, and privileged or confidential, it must also be likely to either (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the submitter's competitive position. Since the information must be submitted by law, the government's ability to collect such information cannot be impaired. Additionally, it is wildly speculative to suggest that the very minimal and general information disclosed could possibly harm anyone's competitive position, especially when the identity of the submitter is unknown.

b. *Disclosure of the information does not impair the government's ability to obtain necessary information in the future.*

To meet the test of the impairment prong requires a showing that the submitting entity would not provide such information in the future if it were subject to public disclosure. See, e.g., *Parker v. Bureau of Land Mgmt.*, 141 F. Supp. 2d 71, 81 (D.D.C. 2001). Protection under the impairment prong is denied when the court determines that disclosure will not, in fact, diminish the flow of information to the agency. *See, e.g., Dow Jones Co. v. FERC*, 219 F.R.D. 167, 178-79 (C.D. Cal. 2002); *Inter Ocean Free Zone, Inc. v. U.S. Customs Serv.*, 982 F. Supp. 867, 871 n.3 (S.D. Fla. 1997); *Ctr. to Prevent Handgun Violence v. U.S. Dep't of the Treasury*, 981 F. Supp. 20, 23 (D.D.C. 1997); *Wiley Rein & Fielding v. U.S. Dep't of Commerce*, 782 F. Supp. 675, 677 (D.D.C. 1992).

The courts routinely conclude that the benefits associated with submission of particular information make it unlikely that the agency's ability to obtain future such submissions would be impaired. *See, e.g., Lahr v. NTSB*, 453 F. Supp. 2d 1153, 1175 (C.D. Cal. 2006); *N.Y. Pub. Interest Research Group v. EPA*, 249 F. Supp. 2d 327, 33637 (S.D.N.Y. 2003); *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 215 F. Supp. 2d 200,

205 & n.3 (D.D.C. 2002), aff'd in part & rev'd in part on other grounds, 375 F.3d 1182 (D.C. Cir. 2004); *Ctr. for Pub. Integrity v. Dep't of Energy*, 191 F. Supp. 2d 187, 196 (D.D.C. 2002) (no impairment from release of the amounts of unsuccessful bids to buy government land, because "the benefits accruing to bidders from contracting with the federal government make it unlikely that an agency's future contracting ability will suffer"); *McDonnell Douglas Corp. v. NASA*, 981 F. Supp. 12, 15 (D.D.C. 1997) (no impairment from release of contract price information, because "[g]overnment contracting involves millions of dollars and it is unlikely that release of this information will cause [agency] difficulty in obtaining future bids"), *rev'd on other grounds*, 180 F.3d 303 (D.C. Cir. 1999).

In *Washington Post Co. v. HHS*, 690 F.2d at 269, the D.C. Circuit held that an agency must demonstrate that a threatened impairment is "significant," because a "minor" impairment is insufficient to overcome the general disclosure mandate of the FOIA. In a subsequent decision in the *Washington Post* case, the D.C. Circuit suggested held that "information will be withheld only when the affirmative interests in disclosure on the one side are outweighed by the factors identified in National Parks I (and its progeny) militating against disclosure on the other side." *Washington Post*, 865 F.2d 320, 326-27 (D.C. Cir. 1989).

Under the competitive harm prong of the test for confidentiality established in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974), information is "confidential" if disclosure "is likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* The Court of Appeals for the District of Columbia Circuit has "emphasize[d]" that the "'important point for competitive harm in the FOIA context . . . is that it be limited to harm flowing from the affirmative use of proprietary information by competitors'" and that this "'should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement.'" *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983); accord *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1152 & n.158 (D.C. Cir. 1987) (reiterating "policy behind Exemption 4 of protecting submitters from external injury" and rejecting submitter objections that did "not amount to 'harm flowing from the affirmative use of proprietary information by competitors'").

c. *The test for causing substantial harm to the submitter's competitive position is not met here.*

Courts have repeatedly rejected competitive harm claims and even have ordered disclosure when those claims were advanced by agencies on their own, rather than by the submitter. See, e.g., *Wiley Rein & Fielding v. U.S. Dep't of Commerce*, 782 F. Supp. 675, 676 (D.D.C. 1992) (rejecting competitive harm argument, ordering disclosure, and emphasizing that "no evidence" was provided to indicate that submitters objected to disclosure); *Black Hills Alliance v. U.S. Forest Serv.*, 603 F. Supp. 117, 121 (D.S.D. 1984) (finding agency affidavits inadequate, ordering disclosure, and noting that "[i]t is significant that [the submitter] itself has not submitted an affidavit addressing" issue of

competitive harm); *N.Y. Pub. Interest Research Group v. EPA*, 249 F. Supp. 2d 327, 330 (S.D.N.Y. 2003) (rejecting an agency's assertion that disclosure would impair its ability to obtain similar information in the future, ordering disclosure, and noting that the submitter had not provided "any affidavits or taken a position" on the documents at issue).

Evidence of "actual competition and a likelihood of substantial competitive injury" must be shown for purposes of the competitive harm prong. *CNA, 830 F.2d at 1152 ; accord Frazee v. U.S. Forest Serv.*, 97 F.3d 367, 371 (9th Cir. 1996). The D.C. Circuit remanded a decision for further proceedings concerning the existence of "actual competition" and, in doing so, suggested that "a competitive injury is too remote for purposes of Exemption 4 if it can occur only in the occasional renegotiation of long-term contracts." *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999); see also *Hercules, Inc. v. Marsh*, 659 F. Supp. 849, 854 (W.D. Va. 1987) aff'd, 839 F.2d 1027 (4th Cir. 1988). This holding is of particular significance here, in that virtually all Palm Springs Agency leases are for extremely long terms, up to 99 years by statute.

In assessing whether a submitter would suffer competitive harm, courts have held that mere conclusory allegations of harm are unacceptable. See, e.g., *Pub. Citizen*, 704 F.2d at 1291 ("[C]onclusory and generalized allegations of substantial competitive harm . . . cannot support an agency's decision to withhold requested documents."); *Nw. Coal. for Alternatives to Pesticides v. Browner*, 941 F. Supp. 197, 202 (D.D.C. 1996); *Gilda Indus., Inc. v. U.S. Customs & Border Prot. Bureau*, 457 F. Supp. 2d 6, 10 (D.D.C. 2006); *Delta Ltd. v. U.S. Customs & Border Prot. Bureau*, 384 F. Supp. 2d 138, 149 (D.D.C. 2005), reconsideration granted in part on other grounds, 393 F. Supp. 2d 15, 19 (D.D.C. 2005); *Lee v. FDIC*, 923 F. Supp. 451, 455 (S.D.N.Y. 1996) (rejecting competitive harm when the submitter failed to provide "adequate documentation of the specific, credible, and likely reasons why disclosure of the document would actually cause substantial competitive injury"); *GC Micro*, 33 F.3d at 1115.

Similarly, the District Court for the District of Columbia upheld an agency's decision to disclose three broad categories of information incorporated into a government contract -- specifically, "cost and fee information, including material, labor and overhead costs, as well as target costs, target profits and fixed fees"; "component and configuration prices, including unit pricing and contract line item numbers"; and "technical and management information, including subcontracting plans, asset allocation charts, and statements of the work necessary to accomplish certain system conversions" -- based upon the submitter's failure to specifically demonstrate that it would suffer competitive harm from their release. *Martin Marietta*, 974 F. Supp. at 38, 40. In upholding release of this information, the court affirmed the agency's determination that "neither the revelation of cost and pricing data nor proprietary management strategies were likely to result in such egregious injury to [the submitter] as to disable it as an effective competitor for [the agency's] business in the future." *Id.* at 41.

Courts have rejected challenges under the Trade Secrets Act to far more extensive releases of detailed commercial and financial information pertaining to specific business entities. See, e.g., *Frazee v. U.S. Forest Serv.*, 97 F.3d 367, 373 (9th Cir. 1996) (Operating plan by which plaintiffs obtained permit to operate recreational areas in national forest was not confidential information protected from release to public by Trade Secrets Act, since Exemption 4 of Freedom of Information Act would not protect plan from disclosure.) See also *Acumenics Research & Technology v United States Dep't of Justice*, 843 F2d 800 (4th Cir. 1988) (Technical and unit pricing information which unsuccessful contract bidder requested from one of Department of Justice's contractors does not fall within exemption (4) to Freedom of Information Act and Trade Secrets Act, since allegation that competitive harm would result fails where there were too many unascertainable variables in unit price calculation for competitor to derive accurately contractor's multiplier.)

Protection under the competitive harm prong has been denied when the information is too general in nature. *See, e.g., GC Micro*, 33 F.3d at 1111 (general information on the percentage and dollar amount of work subcontracted out to small disadvantaged businesses that does not reveal "breakdown of how the contractor is subcontracting the work, nor . . . the subject matter of the prime contract or subcontracts, the number of subcontracts, the items or services subcontracted, or the subcontractors' locations or identities").

In addition, courts have refused to find protection under the competitive harm prong of Exemption 4 for the harms flowing from "embarrassing disclosure[s]," *Gen. Elec. Co. v. NRC*, 750 F.2d 1394, 1402 (7th Cir. 1984); or disclosures which could cause "customer or employee disgruntlement. *Pub. Citizen*, 704 F.2d at 1291 n.30 (declaring that competitive harm should "'be limited to harm flowing from the affirmative use of proprietary information by competitors'" and "'should not be taken to mean'" harms such as "'customer or employee disgruntlement'" or "'embarrassing publicity attendant upon public revelations concerning, for example, illegal or unethical payments to government officials'" (quoting law review article)). See also, *CNA*, 830 F.2d at 1154 (declaring that "unfavorable publicity" and "demoralized" employees insufficient for showing of competitive harm); *Ctr. to Prevent Handgun Violence v. U.S. Dep't of the Treasury*, 981 F. Supp. 20, 23 (D.D.C. 1997) (denying competitive harm claim for disclosure that would cause "unwarranted criticism and harassment" inasmuch as harm must "flow from competitors' use of the released information, not from any use made by the public at large or customers"); *Pub. Citizen*, 964 F. Supp. at 415 n.2 (opining that it is "questionable whether the competitive injury associated with 'alarmism' qualifies under Exemption 4," because competitive harm does not encompass "adverse public reaction"); *Badhwar v. U.S. Dep't of the Air Force*, 622 F. Supp. 1364, 1377 (D.D.C. 1985) (concluding that "fear of litigation" insufficient for showing of competitive harm), *aff'd in part & rev'd in part on other grounds*, 829 F.2d 182 (D.C. Cir. 1987).

Moreover, in applying the competitive harm prong, the public interest in disclosure must be balanced against the potential for competitive harm. A court ordered disclosure after finding that disclosure of certain safety and effectiveness data pertaining to a medical

device was "unquestionably in the public interest" and that the benefit of releasing this type of information "far outstrips the negligible competitive harm" alleged by the submitter. *Teich v. FDA*, 751 F. Supp. 243, 253 (D.D.C. 1990); see also *Pub. Citizen*, 964 F. Supp. at 415 (citing *Teich* and stating that "an additional factor that may be considered is whether there is a strong public interest in release of the information").

The Court of Appeals for the Ninth Circuit has cited to *National Parks* and declared that it "agree[d] with the D.C. Circuit" that in making an Exemption 4 determination it "must balance the strong public interest in favor of disclosure against the right of private businesses to protect sensitive information." *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1115 (9th Cir. 1994). The court then held that the agency had entirely failed to meet its burden of showing that disclosure of the very general information at issue was likely to cause "any potential for competitive harm, let alone substantial harm." *Id.*

d. *McCarthy did not disclose the type of information covered by the Trade Secrets Act*

In any event, the information must truly be "commercial or financial" to acquire Exemption 4 protection under any standard. *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002) (rejecting the Department of the Interior's equally specious argument that data pertaining to the location of endangered pygmy owls qualified as "commercial or financial" information). Research designs submitted as part of a grant application were deemed not "commercial," *See Wash. Research Project, Inc. v. HEW*, 504 F.2d 238, 244 (D.C. Cir. 1974). Even documents submitted by the General Electric Company (GE) to EPA supporting GE's alternative Hudson River dredging plan -- which would have been less costly to GE than the plan scheduled to be imposed on it by EPA -- were not "commercial" under Exemption 4. *N.Y. Pub. Interest Research Group v. EPA*, 249 F. Supp. 2d 327, 332-34 (S.D.N.Y. 2003).

The second of Exemption 4's specific criteria is that the information be "obtained from a person." The courts have held, however, that information generated by the federal government itself is not "obtained from a person" and is therefore excluded from Exemption 4's coverage. *See Bd. of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 404 (D.C. Cir. 1980).

Many courts have held that if the information sought to be protected is itself publicly available through other sources, disclosure under the FOIA will not cause competitive harm and Exemption 4 is not applicable. *See, e.g., Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 244 (2d Cir. 2006) (citing *Niagara Mohawk Power*, 169 F.3d at 19); *Anderson v. HHS*, 907 F.2d 936, 952 (10th Cir. 1990); CNA, 830 F.2d at 1154; *Cont'l Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 375 (2d Cir. 1977); *Lepelletier v. FDIC*, 977 F. Supp. 456, 460 (D.D.C. 1997), *aff'd in part, rev'd in part & remanded on other grounds*, 164 F.3d 37 (D.C. Cir. 1999).

Here, the information disclosed by McCarthy pales in comparison to the type of information routinely published by businesses, developers, attorneys, landowners and the BIA itself, with regard to specific Palm Springs leases. Indeed, the agency's press release announcing the 1992 "reforms" concluded with just such an announcement about a new lease just approved on behalf of 28 landowners with investments of nearly $1 billion.

> e. *The* Cobell *court found the Agency's invocation of the Trade Secrets Act with regard to Indian trust information "groundless" and sanctioned the Agency for seeking to withhold the information.*

The agency should be particularly embarrassed to claim the Trade Secrets Act as the basis for its charges against Mr. McCarthy when this very same agency has been sanctioned by the court in the *Cobell* Indian trust fund litigation for making similar arguments with respect to the Trade Secrets Act. See *Cobell v. Norton*, 206 F.R.D. 27 (D.D.C. 2002); *Cobell v. Norton*, 231 F. Supp. 2d 295 (D.D.C. 2002).

In its first opinion on this matter, the court awarded sanctions against the government for seeking a protective order protecting "confidential" Indian trust information on the basis of the Trade Secrets Act.

> Plaintiffs seek sanctions based on defendants' motion for a protective order filed January 21, 2000. In that motion, defendants argued that a blanket protective order covering all documents responsive to Paragraph 19 of the First Order for Production of Information was necessary in light of the **Trade Secrets** Act (18 U.S.C. § 1905), the Indian Mineral Development Act ("IMDA"), and certain Interior Department regulations. After providing the parties the opportunity to brief the matter, the Special Master issued a Report and Recommendation [444] on March 7, 2000. In his Report and Recommendation, the Special Master found that defendants' motion for a protective order should be denied with respect to the **Trade Secrets** Act and Department of Interior regulations, but granted insofar as the IMDA protects confidential geological information of nonparty tribes. The Court formally adopted, without objection, the Special Master's Report and Recommendation on March 29, 2000.
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> On May 16, 2000, the Special Master filed a separate Report and Recommendation Concerning Sanctions. After a thorough review of the parties' memoranda, the relevant case law, and the record of the case, the Special Master stated that "I find the evidence both clear and convincing that sanctions are warranted. Neither the facts nor the law 'substantially justifies' Defendants' reliance on the **Trade Secrets** Act, on the Indian Mineral Development Act as it applies to individual Indians, or on the cited Interior Department regulations.
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> ……..

> The Court agrees. . . . The Special Master explicitly stated that his conclusion regarding sanctions was based on his findings that:
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> (1) defendants' position that the **Trade Secrets** Act warranted the imposition of a protective order was groundless in light of the overwhelming case law to the contrary and defendants' concession that they knew of no precedent holding otherwise; (2) defendants' contention that the IMDA, as it applies to individual Indians, compelled judicial protection was patently frivolous as underscored by defendants' March 31, 2000 letter admitting that, 'there has yet to be an IMDA agreement that includes individuals;' (3) the regulations cited by defendants in support of their motion proved to have no relevance whatsoever to the records in issue; (4) defendants' failure to bring these matters to the Court's attention for more than three years led to unnecessary delays in production; and (5) defendants' stated goal of limiting the unfettered disclosure of confidential information appears to have been selectively targeted at plaintiffs as evidenced by the unrestricted access to IIM data given the PRT/ISI contractors prior to March 21, 2000.
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> Report and Recommendation Concerning Sanctions at 16-17. Thus, even without considering the fifth reason articulated by the Special Master for imposing sanctions, the Court finds (as did the Special Master in his Opinion of June 28, 2000) that there are still several reasons for imposing sanctions against the government. Consistent with this conclusion, it is hereby ORDERED that defendants pay 75% of plaintiffs' reasonable expenses, including attorneys' fees, arising from their opposition to defendants' motion for protective order…

Cobell, 206 F.R.D. at 28-29 (internal citation omitted).

The court revisited this issue several months later, when it again discussed the frivolous nature of the government's actions, as it awarded attorneys fees and costs to the plaintiffs for their efforts in response to motions related to the agency's Trade Secrets Motion. *Cobell*, 231 F. Supp. 2d at 299-300, 305.

B. The Agency Fails to Indicate How McCarthy Violated the Trade Secrets Act

The Agency bears the burden of demonstrating how Mr. McCarthy violated a legal standard. With respect to the specific conduct cited in the proposal to terminate, the Agency fails to meet that burden:

Specification 1 alleges that the paragraph at bottom of p. 2 and ending on page 3 provides "information sufficient to identify the property and parties…". Although neither the property nor the parties are identified, the agency contends this information may be deduced due to the description of how it was purchased out of bankruptcy, that it is a hotel located a few blocks from the BIA office, and that it indicates the amount spent on remodeling. Aside from the fact that there are numerous hotels located within a few blocks of the BIA office, all of the above information was contained in a separate news article about the property, which is where Mr. McCarthy learned of it! *Exhibit* D(April 23, 2005 *Desert Sun* news article). Additionally, bankruptcies are a matter of public record. The fact that there was no on-site monitoring and BIA was oblivious of the amount in arrears is an indictment of BIA, not a trade secret of the hotel. There is no confidential commercial or financial information.

Specification 2 alleges that in the "first full paragraph on page 3 and beginning with 'the lessee stopped…'" the memo provides "information sufficient to identify the property …". This specification confuses two separate paragraphs. The first property is not identified by name, location, size, type or in any other manner. The second property, an un-named "gas station", is described neither by location nor in any other way in which it could be identified. There is no confidential commercial or financial information.

Specification 3 alleges that the "third full paragraph on page 3 and beginning with 'Indian landowners requested PSA …'" provides "information sufficient to identify the property and parties …". Although the memo discloses the property to be a convention center and the lessee to be the City of Palm Springs, all of this is a matter of public record, as is the fact that the City recently spent $35 million on improvements, and negotiated a sale of adjacent property for a hotel, all as previously reported in the *Desert Sun*. *E.g., Exhibit E* (*Desert Sun* news article and advertisements from citizens groups opposing various developments on Indian lands in downtown Palm Springs.) The owners are unidentified. No confidential commercial or financial information is disclosed.

Specification 4 alleges that the "last paragraph on page 3 … and beginning with 'Thirty years ago …'", provides "information sufficient to identify the property and parties …". All of the information complained about had previously been reported in the *Desert Sun* and none identifies any properties or parties (although prior news accounts and coverage of litigation involving BIA named the parties). *E.g., Exhibit F* (Desert Sun article). No confidential commercial or financial information is disclosed.

Specification 5 alleges that the "last paragraph on page 4 … and beginning with 'PSA has delayed …'", provides "information sufficient to identify the property and parties …". The item discloses no properties or parties, other than the identities of the

municipalities involved, which is a matter of public record. The mention of the number of parcels involved is not the type of information protected by the Trade Secrets Act, especially when the properties and their owners are unidentified, nor would the fact that it would be a multi-million dollar sale be anything but public record, or a surprise to anyone even vaguely familiar with real estate prices in California. No confidential commercial or financial information is disclosed.

Specification 6 alleges that the "first full paragraph on page 5 and beginning with 'Lessee proposed a …'", provides "information sufficient to identify the property and parties …". Neither the property nor the parties are identified by location, name or in any other way ("xxxminiums" numbering in the tens of thousands in Palm Springs, Cathedral City and Rancho Mirage). BIA's use of appraisals is prescribed by regulation, as is the requirement that BIA not approve below market rents. No confidential commercial or financial information is disclosed.

Specification 7 alleges that the "second full paragraph on page 5 and beginning with PSA and PRO …", provides "information sufficient to identify the property and parties …". It should be obvious that all specific sizes of acreages are adjacent to other specific sizes of acreage. The un-named lessee's agreement to assume liability for defaulted public improvements bonds is a matter of public record and was in fact approved by the City Council in open session. The quite general discussion of lease terms is meaningless when the regulations require appraised value, and in any event neither the parties nor the property are identified. No confidential commercial or financial information is disclosed.

II. Charge 2: Alleged Unauthorized Use of Nonpublic Information.

"Charge 2"does not identify any statute that allegedly prohibits the disclosures which are otherwise protected by the Whistleblower Protection Act (WPA).

Specification 1 alleges that Mr. McCarthy has acknowledged that he gave the reporter a copy of "an internal BIA e-mail … dated September 12, 2006 … [which] contained information concerning an agency trust management tool which disclosed how the BIA's new system is to manage the receipt, investment, disbursement of funds, etc., generated by Indian leasing assets." (*Exhibit A.*)

Specification 2 alleges that Mr. McCarthy acknowledged giving the reporter a copy of the redacted memo discussed above.

A. No Evidence E-Mail Was Given to Reporter

Assuming the agency means to refer to Mr. McCarthy's memo of April 20, 2007, nothing therein indicates that he gave the Sept. 12, 2006 e-mail to the reporter. The Agency bears the burden of proving this specification and point to nothing in its ROD to support this allegation. As noted above, the Agency has provided no evidence that McCarthy provided the e-mail to the reporter, and there is no evidence that he did. If he had, it

would be a protected WPA disclosure as it also evidences gross mismanagement and violation of duties to manage and protect Indian trust assets.

The agency's description of the document as a "trust management tool" is a questionable characterization, at best. Rather, it is a blatant admission that the agency doesn't know who owes it how much money for which Indian leases or when such payments might be due, or even if and when or in what amount payments have been made.

The Trust Asset Accounting Management System (TAAMS) accounting system, still not in operation, is being put forth as the solution to the problems in the Indian trust accounting systems that are the subject of the *Cobell* case. The e-mail constitutes a confession that TAAMS would not help the agency with these problems, and thus evidences gross mismanagement of a central agency responsibility.

After having essentially shut down its Palm Springs office for weeks, supposedly to prepare for implementation of TAAMS, the e-mail bluntly acknowledges that even after the conversion, the agency would still lack essential information to properly track and implement the terms of Palm Springs Area Indian leases.

B. Disclosures Are Protected Under the WPA

The administrative law judge in Mr. McCarthy's Merit System Protection Board proceeding has ruled that disclosure of the same document which is the basis for this proposed dismissal, McCarthy's June 28, 2005 submission to the Office of Inspector General which was later submitted in redacted form to the *Desert Sun*, is protected under the Whistleblower Protection Ac (WPA), 5 U.S.C. 2308(b). Specifically, the judge found that McCarthy's disclosures evidenced gross mismanagement, violation of duties to manage and protect Indian trust assets, and violations of federal statutes and regulations and were protected because they were not made in the normal course of McCarthy's job duties.[1] Although Mr. McCarthy has petitioned for review of certain aspects of the ALJ's Initial Decision, the ruling in his favor concerning the protected status of his disclosure has not been appealed and thus is *res judicata*.

[1] McCarthy v. Department of Interior, S-F-1221-06-0380-W-1 (April 3, 2007) at 5, 6., hereinafter "Initial Decision."

C. Disclosures Are Protected by the First Amendment

Disciplinary action may not be taken against McCarthy based on his disclosures to the *Desert Sun*, because he did so as a private citizen and his speech as such is protected by the First Amendment. The Supreme Court has recently reconfirmed that "public employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1957 (2006). "So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." 126 S. Ct. 1958. The Court reaffirmed its earlier holding in *Pickering v. Board of Education*, 391 U.S. 563 (1968), that a teacher's letter to a local newspaper addressing issues including the funding policies of his school board was protected by the First Amendment. 126 S. Ct. at 1957. The Supreme Court held in *Pickering* that this type of speech did not hinder the employer's efficient and effective operation because it did not "impede[] the teacher's performance of his daily duties in the classroom or . . . interfere[] with the regular operation of the schools generally." 391 U.S. at 572-73. Likewise, McCarthy's disclosures to the newspaper were statements as a citizen about matters of public concern, and did not interfere with the performance of his job duties or interfere with the operation of the Agency generally.

A public employee's speech in his capacity as a private citizen is no less protected because the subject matter is related to his employment duties. To the contrary, "[t]he Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion." *Ceballos*, 126 S. Ct. at 1958. In *Pickering*, the Court noted that the speech of the teacher was especially valuable because "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." 391 U.S. at 572. As the Supreme Court stated in a later case:

> Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. See 391 U.S. at 572. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.

San Diego v. Roe, 543 US 77, 82 (2004). Likewise here, because of McCarthy's position and his particular duties and expertise concerning the management of Indian trust assets, he was especially knowledgeable about the issues addressed in the *Desert Sun* article. The First Amendment protects his interest in speaking freely as well as the public's interest in receiving his informed opinion.

III. Proposed Termination Occurred in Connection with Mr. McCarthy Being Called as a Witness in the *Cobell* Case

On August 8, 2007, McCarthy notified Melinda Loftin, the Designated Agency Ethics Official for the Department of Interior, that he had been contacted by an attorney representing the *Cobell* class, indicating that he had been identified as a potential witness in the *Cobell* litigation. The very next day, the Agency proposed McCarthy's removal. The proximity in time between these events, and the fact that McCarthy's disclosure to the *Desert Sun*, which is the purported basis for the proposed removal, occurred four months earlier in April, 2007, strongly suggests that the Proposed Removal is in fact a response to McCarthy being identified as a potential witness in the *Cobell* case. McCarthy's disclosures to Interior officials, the Office of Inspector General and the *Desert Sun* all put the Agency on notice that if called as a witness in *Cobell*, McCarthy would be likely to present testimony that is highly critical of the Agency's management of Indian trust assets. The Proposed Removal appears to be an attempt to intimidate McCarthy and prevent his testimony or to retaliate for it if it cannot be prevented.

IV. Proposing and Deciding Officials Should Be Replaced

A. Proposing Official Implicated in Disclosed Agency Misconduct

The Regional Solicitor who brings these charges held the position of Palm Springs Field Solicitor for over a decade, during which time the mismanagement McCarthy disclosed was supposed to have been cleaned up, pursuant to an OIG audit and promises made by the Department. Indeed, Mr. Shillito was placed into the newly created position for precisely that reason, yet there is no sign that he ever did a single thing to address the mismanagement documented by OIG 15 years ago, and disclosed by Mr. McCarthy two years ago.

Indeed, the record on file in the MSPB appeal documents beyond dispute that as Regional Solicitor, Mr. Shillito refused Mr. McCarthy's requests for over two years to even acknowledge the existence of mismanagement, unlawful conduct, or extensive liability and harm to trust assets at the Palm Springs Agency. It also documents that Mr. Shillito has directed over two years of continuing retaliation against Mr. McCarthy, which evidences the personal animus that motivates his proposed action.

The agency acknowledges that a 1992 audit found, among other things, that the Palm Springs agency:

> (1) approved leases that contained fees below fair market value and that did not contain escalation clauses for lease fee adjustments; (2) did not collect lease fees in a timely manner; and (3) did not ensure that lessees complied with the terms and conditions of the leases. As a result, from 1983 to 1992, Indian landowners did not realize lease fees totaling approximately $2.1 million and may not realize

an additional $3.8 million in lease fees over the remaining terms of the leases. *ROD Tab 23*.

The OIG recommended that the Department:

1. Require area and field office directors to ensure that leases are approved at fair market value and that they include escalation clauses for inflation;
2. Assign a solicitor or legally qualified personnel to assist Palm Springs Field Office personnel in performing a detailed review of all lease files at the Palm Springs Area Office and to bring lessees into compliance with lease terms; and
3. Develop and implement compliance and collection policies and procedures to administer business leasing activities.

The Department concurred in all three recommendations. In fact, the agency promised even more reforms. In a press release dated October 9, 1992, the agency announced actions it was taking to address "serious abuses in the leasing program," claiming that "the recent establishment of a Field Solicitor's Office in Palm Springs will assist BIA considerably by providing legal advice in lease negotiations and administration. Dan Shillito opened the new Palm Springs Field Solicitor's office on September 7, 1992."

The press release goes on to promise "Development and implementation of compliance and collection policies and procedures to improve business leasing activities. Default letters will be automatically generated as soon as a default occurs, which will expedite the process and reduce errors." The Department even announced a "Six Point Plan to Improve Administration of The Palm Springs Leasing Program." At the top of the list was a promise to "totally automate the lease compliance activities." *Exhibit G* (press release and "Six Point Plan"). As disclosed by Mr. McCarthy, the agency failed to live up to its promises throughout Mr. Shillito's tenure, both as Field Solicitor and as supervising Regional Solicitor.

B. Deciding Official Is Not Impartial

In addition to the statutory requirements set out in subchapter II of chapter 75, providing sufficient notice of the basis for an agency's proposed action against an employee also implicates due process requirements guaranteed by the 5th Amendment to the U.S. Constitution. *U.S. Const. amend. V* ("No person shall ... be deprived of life, liberty, or property, without due process of law."); *see, LaChance v. Erickson*, 522 U.S. 262, 266 (1998).

The Board has stated that "fundamental due process requires that the tenured public employee have 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.'" *Barresi v. U.S. Postal Service*, 65 M.S.P.R. 656, 666 (1994) (quoting *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985)).

Due process mandates that the decision-maker be impartial, and that notice be sufficiently detailed to provide a meaningful opportunity to be heard. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970). General notice is insufficient. *Cheney v. Department of Justice*, 479 F.3d 1343, 1353 (Fed. Cir. 2007).

As a matter of due process, Mr. Jensen should be disqualified from making any decision on the proposed action. Upon information and belief, as the agency official with lead responsibility for all *Cobell*-related matters he colluded with Mr. Shillito to frame the charges. Indeed, immediately after reading the *Desert Sun* article, Mr. Shillito's first instinct was to go to Mr. Jensen with a whole slew of ideas to punish Mr. McCarthy, ranging from reporting him to state bar disciplinary authorities and taking disciplinary action for alleged violation of the Privacy Act and attorney-client privilege, and most significantly, for unauthorized release of "Cobell trust data/information." Exercising only a tad more discretion, under the circumstances, Mr. Jensen suggested they continue this discussion by telephone. *Exhibit H* (April 18 and 19, 2007 e-mail).

Mr. Jensen's actions since then indicate the decision has already been made, and that Mr. McCarthy in reality is being given no opportunity to respond to the charges. As noted above, upon receipt of the proposed action, Mr. McCarthy immediately requested both the record and an extension of time to respond. Mr. Jensen's response, sent to Mr. McCarthy's former workplace, deliberately misstates the terms of the request and its rationale, including its plain statement that Mr. McCarthy would be traveling during his vacation period, and granting a minimal extension of only 4 days. In addition, as explained above, the ROD was intentionally withheld to minimize any opportunity to examine it carefully before responding. Accordingly, the record shows that the agency violated Mr. McCarthy's rights to due process. *See, e.g., Lamour and Rosebery v. Dept. of Justice*, 2007 MSPB 185 (August 10, 2007).

V. Mr. McCarthy Discharged His Ethical Obligations as an Attorney

A memorandum from David Bernhardt, the Solicitor of the Interior, dated October 5, 2006, states that all employees "have an obligation to report fraud, waste, abuse, and corruption or other violations of law or regulation," and that "the obligation to report such activities does not necessarily conflict with a lawyer's duty not to disclose information obtained in confidence from a client." *Exhibit I* (memorandum from the Solicitor, dated October 5, 2006).

The conduct of Mr. Shillito and the rest of the Department in retaliating against Mr. McCarthy is not only unlawful, it also violates ethical and professional rules, the very oath of office these officials took to uphold the constitution and the law, and the government's trust obligation to the Indian landowners. The Supreme Court has recognized the extraordinary nature of the government's fiduciary duty in its management of Indian trust resources. "Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

Although the Regional Solicitor is concerned with the impact on the agency of Mr. McCarthy's disclosures (ignoring the fact that those impacts should include long-overdue reform), it is a general principle of trust law that "the trustee is under a duty to administer the trust solely in the interest of the beneficiaries." Restatement (Third) of Trusts: Prudent Investor Rule sec. 170(1) (1992). The trustee may not place its own interests over those of the beneficiary, or administer trust property "for the purpose of advancing an objective other than the purposes of the trust." *Id.* at Sec. 170, Comment q. *See also*, A. Scott, Law of Trusts sec. 170 (1967).

The duty of loyalty is "the most fundamental duty of the trustee." Uniform Trust Code sec. 802, Comment (2001). *See also NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981) ("a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust"). "A trustee of land is ordinarily under a duty to lease or manage it so that it is likely to produce trust accounting income…". *Id*. at sec. 181, Comment b.

The trustee's administrative duties include the duty to "keep and render clear and accurate accounts with respect to administration of the trust," Restatement (Second) of Trusts sec. 172 (1959), the duty to furnish to the beneficiaries of the trust "complete and accurate information as to the nature and amount of trust property," *id.* sec. 173, and the duty to pay income to the beneficiaries at reasonable intervals, *id*. sec. 182.

"If the breach of trust causes a loss, including any failure to realize income, capital gain, or appreciation that would have resulted from proper administration, the beneficiaries may surcharge the trustee for the amount necessary to compensate fully for the consequences of the breach." Restatement (Third) of Trusts: Prudent Investor Rule sec. 205, Comment a (1992).

The leading case on the administrative duties of the government as trustee, and its liability for mismanagement of trust assets, is *United States v. Mitchell*, 463 U.S. 206 (1983), where the Court invoked common law trust principles in determining the nature of the government's trust responsibility and its liability for breach. The Court found that, "the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians," and "thereby establish a fiduciary relationship." *Id*. at 224. Additionally, courts "must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary." *Id*. at 330.

More recently, in *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001), the court of appeals found the Secretary of the Interior again breached a fiduciary duty by failing to perform and provide an adequate accounting of trust assets. The court found the duty to perform and provide an accounting was grounded in "basic common law trust principles." *Id*. at 1103.

The courts have also recognized that the attorney client-privilege does not apply to prevent disclosure to beneficiaries of communications between a trustee and its counsel concerning management and administration of the trust. Under the fiduciary exception, it

is the Indian beneficiary of the trust, not the trustee, who is the real client in interest and to whom the duty of loyalty is owed. *See, e.g., Cobell v. Norton*, 213 F.R.D. 1, 11-12 (D.D.C. 2003) ("[A] document … is not protected from disclosure even if it also satisfies the elements of some other privilege, such as the work [] product privilege"). *See also Cobell v. Norton,* 212 F.R.D. 24, 28 (D.D.C. 2002).

Very specific statutory and regulatory trust management duties with respect to leasing of Indian trust lands are set forth at 25 U.S.C. 415, and in excruciating detail at 25 C.F.R. Part 162. Mr. McCarthy has extensive knowledge and expertise in the matter of the BIA and its trust responsibilities, as noted by Mr. Shillito, in his citation to Mr. McCarthy's article, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU Journal of Public Law 1 (2004). Ironically, however, Mr. Shillito asserts that Mr. McCarthy's disclosures harm rather than benefit the beneficiaries, when, in fact, the opposite is plainly the case.

In addition to the unique trust obligations discussed above, the courts have long-recognized the special duties of a government lawyer to serve the ends of justice. "Unlike a private practitioner, the loyalties of a government lawyer … cannot and must not lie solely with his or her client agency." *In re: Bruce R. Lindsey*, 148 F.3d 1100, 1108 (U.S. App. D.C. 1998). The Professional Ethics Committee of the Federal Bar Association has described the public trust of the federally employed lawyer as follows: "the lawyer's employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the governmental organization of which he is a part." *Lindsey*, 148 F.3d at 1109, citing *Federal Bar Association Ethics Committee, The Government Client and Confidentiality: Opinion 73-1, 32 FED. B.J. 71, 72 (1973).* The interest of a government lawyer and his client ". . . is not that it shall win a case, but that justice shall be done." *Lindsey*, 148 F.3d at 1109, n. 4, citing *Berger v. United States*, 295 U.S. 78 (1935). In keeping with these interests, government lawyers must "seek justice" and avoid unfair settlements or results. *Lindsey*, 148 F.3d at 1109, n. 4, citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14 (1980).

Throughout his government service, Mr. McCarthy has striven to fulfill these ideals, nor more so than in the actions at issue here.

VI. Proposed Penalty Is Inappropriate

A. Past Performance

The Regional Solicitor acknowledges Mr. McCarthy has "no prior record of formal discipline." Indeed, Mr. McCarthy has received nothing but positive performance reviews and routinely been cited for special awards. *Exhibit J* (awards). In fact, the Regional Solicitor had insisted that Mr. McCarthy was indispensable to the operation of the BIA Palm Springs Agency, in rationalizing his refusal to consider requests for relocation.

As the MSPB Judge stated in his Initial Decision:

> I find that the agency has established, by persuasive contemporaneous evidence, that it appropriately considered the appellant's desire to relocate, but permissibly took into account other legitimate managerial considerations in deciding not to award him the transfers he sought, in large part because of his value to the agency in the Pacific Southwest Region generally, and specifically in the position he already encumbered.

Initial Decision. at 14.

B. Disciplinary and Work Record

Mr. Shillito cites Mr. McCarthy's alleged "inability to get along with BIA members of the Palm Springs Agency." The MSPB record is replete with uncontested and irrefutable evidence that the BIA staff actively shunned Mr. McCarthy beginning the day after the initial disclosures, even writing anonymous false attacks on his character that the agency chose to file in the MSPB record. Indeed, the record shows that BIA staff routinely entered Mr. McCarthy's private office and removed privileged documents that are directly related to his disclosures to the Office of Inspector General. Yet the record contains not even the slightest hint of evidence that Mr. McCarthy ever treated any member of the BIA staff with disrespect or anything other than professional courtesy, notwithstanding the daily harassment and shunning that was directed at him.

The Regional Solicitor offers essentially one specific incident involving several memoranda that alleged Mr. McCarthy had been "discourteous" in his own written communications with the BIA Superintendent and the Regional Solicitor. Having refused to speak to Mr. McCarthy for several months prior, Mr. Shillito claims that Mr. McCarthy used a "disrespectful tone" in memoranda to the Superintendent dated November 17 and 26, 2006; that Mr. McCarthy was "discourteous" in a contemporaneous memo addressed to the Regional Solicitor. He then cites his own memorandum of November 29, 2006, supposedly documenting these claims. *Exhibit K* (<u>all</u> of the correspondence relevant to this allegedly "discourteous" incident.)

The agency may not rely on such self-serving correspondence, containing entirely unproven and baseless allegations, in support of its charges. Moreover, a careful reading of the correspondence in question shows no discourtesy, but rather the efforts of a conscientious government attorney repeatedly trying to call attention to ongoing violations of law and mounting threats of liability, matters the Regional Solicitor and the Superintendent preferred to disregard, in their effort to create the appearance of "discourtesy".

Indeed, even if the charge in this case was "discourteous conduct", which it is not, the maximum penalty for such a first offense is a written reprimand to a five day suspension. However, Mr. Shillito never sought to "counsel" him with regard to the matters he refers

to here. Rather, the memoranda in question were written solely as a pretext for later being able to claim some record of misconduct, however slight, given Mr. McCarthy's otherwise impeccable record.

C. No Stacking of Penalties

The agency must prove all elements of the charged misconduct. Here, the agency must prove both a violation of the Trade Secrets Act and unauthorized use of nonpublic information. An agency's charge may not be split in two when it is based on a single alleged act. *See, e.g., Acox v. USPS*, 76 MSPR 111, 114 (1997). There is no evidence whatsoever to sustain either charge, and the agency has misstated the facts in particular with respect to its claim that Mr. McCarthy acknowledged providing a certain "e-mail memo" to a *Desert Sun* reporter. The other specification of Charge 2 therefore merges with the first charge, alleged violation of the Trade Secrets Act. *See, e.g., Gunn v. USPS*, 63 MSPR 513 (1994); *Wolack v. Dept. of the Army*, 53 MSPR 251 (1992); *Delgado v. Dept. of the Air Force*, 36 MSPR 685, 688 (1988).

The consequence of merging two charges into one is that the Board must determine the maximum reasonable penalty that may be imposed for the single charge, if indeed there was any infraction at all. *Barcia v. Department of the Army*, 47 MSPR 423, 430 (1991). As a result, the Board should mitigate any agency-imposed penalty.

D. Potential for Rehabilitation and Availability of Alternative Sanctions

The Regional Solicitor essentially argues that because Mr. McCarthy has asserted his right to be free from retaliation in appeals to the MSPB, appeals that are still pending, Mr. McCarthy has therefore not admitted that he "did anything wrong," thus Mr. McCarthy is allegedly "not a good candidate for rehabilitation."

Mr. Shillito cites no reason why a lesser penalty is not appropriate for the alleged infraction. He also implies, with no hint of evidence, that Mr. McCarthy has "collaterally damaged [his] opportunity to work with other clients." This is simply a false statement. Since being removed from BIA work, Mr. McCarthy has successfully handled dozens of cases for the Bureau of Land Management, almost all of which included litigation in administrative forums or federal courts, and he has completed more than a dozen title opinions for the Fish & Wildlife Service. Indeed, the agency had assigned Mr. McCarthy to work exclusively on such cases, and even to have office support from the local BLM Field Office, before abruptly canceling all such arrangements in anticipation of issuing the present charges.

E. Consistency with Table of Penalties

After stating that the Department's Table of Penalties allows for a penalty as minimal as a written reprimand or a 5-day suspension, the Regional Solicitor presumes to impose the maximum penalty with no attempt at establishing a rationale.

F. Consistency with Other Penalties

Mr. Shillito claims Mr. McCarthy's actions are "unprecedented" and therefore he did not consider this factor. In fact, the allegations against Mr. McCarthy pale in comparison to allegations against Mr. Shillito himself: shirking his duty for over fifteen years to protect trust assets, of committing numerous unlawful acts of retaliation, and of committing perjury in the process. All of those allegations are still at issue in pending appeals.

Allegations against officials in the Office of the Solicitor and the BIA (which have been all but acknowledged), constitute gross mismanagement, unlawful conduct, and breach of trust. The liabilities to which these officials have exposed the Department run easily into the many millions of dollars.

One need not look far in this affair to see other illegal conduct by agency officials that has been excused with a wink and a nod. The BIA superintendent admitted to the OIG that he and other agency officials engaged in illegal conduct in accepting prohibited gifts from lessees, who stood to profit from decisions by these officials. Yet no apparent action was taken in these instances.

G. Public Benefit of Mr. McCarthy's Actions

Finally, to show that an adverse action such as this promotes the efficiency of the service, the agency must establish a nexus between an employee's alleged misconduct and the efficiency of the service. *Dunnington*, 956 F.2d at 1155, 1158. The nexus requirement, for the purpose of whether an agency has shown that its action promotes the efficiency of the service, means there must be a clear and direct relationship between the articulated grounds for an adverse action and either the employee's ability to accomplish his duties satisfactorily or some other legitimate government interest. *Merritt v. Department of Justice*, 6 M.S.P.R. 585, 596
(1981), *modified by Kruger v. Department of Justice*, 32 M.S.P.R. 71, 76 n.3 (1987). In this case, the agency offered no such evidence, other than its unsupported allegations.

Mr. McCarthy, on the other hand, has provided extensive evidence that his actions were not only protected by the WPA, but essential to the performance of his professional obligations to expose unlawful agency conduct and protect Indian trust assets.

Conclusion

For the foregoing reasons, we ask that this proposed discharge against Mr. McCarthy be withdrawn in its entirety.

Respectfully submitted,

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Public Employees for Environmental Responsibility
(PEER)
Counsel for Robert J. McCarthy

DATED: _____