UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mattachine Society of Washington, D.C. 527 16th St., N.W. Washington, D.C. 20036 Plaintiff, v. **United States Department of Justice** 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530 Defendant.	)	Case No. 1:16-cv-00773 (RCL)

AMENDED COMPLAINT FOR INJUNCTIVE RELIEF
UNDER THE FREEDOM OF INFORMATION ACT

Plaintiff, Mattachine Society of Washington, D.C. ("Mattachine Society" or "MSDC"), by and through its undersigned counsel McDermott Will & Emery LLP, brings this Amended Complaint against Defendant United States Department of Justice ("Defendant" or "DOJ") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *as amended*, to enjoin Defendant from improperly withholding from Plaintiff properly requested records from the DOJ.

PRELIMINARY STATEMENT

1. Sixty-three years ago, recently elected President Dwight D. Eisenhower signed Executive Order 10450 ("EO 10450") and, with the stroke of his pen, provided J. Edgar Hoover's Federal Bureau of Investigation ("FBI") with the legal authority to purge gay and lesbian employees from the federal employment rolls.

2. The pretext for EO 10450 was "to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security." (Ex. 1, Exec. Order No. 10,450 § 2, 18 Fed.

Reg. 2,489 (Apr. 27, 1953).) The grounds for protecting "national security," however, included "[a]ny criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, *sexual perversion*." (*Id.*) (emphasis added).

3. This provision became a "Trojan horse" which gave FBI Director Hoover the jurisdiction to carry out a long running plan to purge homosexuals from serving in the Federal Government.

4. Indeed, the origins of EO 10450 go back to before the election of the new President.

5. In 1950, the Senate Investigations Subcommittee issued a report, entitled "Employment of Homosexual and Other Sex Perverts in Government" to examine the security risks and "methods used in dealing with the problem" of homosexuals in government. Indeed, in its concluding section, the Report stated: "It is the opinion of this subcommittee that those who engage in acts of homosexuality and other perverted sex activities are unsuitable for employment in the Federal government." (Ex. 2, Mem. from K. Johnson to W. Irons, Re: Commission's desire to have a discussion on suitability policy relating to homosexuals, dated Jan. 8, 1965 at 2 ("Johnson-Irons Memo") (quoting Senate Subcommittee of the Committee on Expenditures in the Executive Department report entitled "Employment of Homosexuals and other Sex Perverts in the Government," dated Dec. 15, 1950).) And, the Senate wanted the government to do something about the problem.

6. In 1951, in response to the Senate's call for the government to identify and purge the nation's employment rolls of homosexuals, FBI Director Hoover adopted what he called the "Sex Deviate Program."

7. Under the Sex Deviate Program, Hoover instructed all investigative employees of the FBI to ensure that any information they received during the course of background checks that concerned the employee's sexual orientation be "completely and fully developed."

8. Hoover also conscripted local law enforcement to the cause. In May of 1950, Hoover sent a bulletin to all local law enforcement "to place a notation on the arrest fingerprint card that the subject was an employee of the Federal Government." Copies of these fingerprint cards were sent to the FBI, thereby providing Hoover with a ready database of federal employee arrests for, among other things, "morals charges."

9. In other words, by the time of Eisenhower's election in November 1952, Hoover already was amassing a cache of information to use against homosexual employees of the Federal Government. And he was using state and local police as his deputies to gather it.

10. But there were limits to Hoover's power under the Sex Deviate Program. While he could amass this information about the sexual orientation of federal employees, he lacked the authority to fire them merely based on their sexual orientation.

11. EO 10450 changed everything. With its adoption, the new President legalized the discharge of a federal employee on the basis of "sexual perversion."

12. In the decades that followed, the FBI, with the aid of the United States Civil Service Commission ("CSC"), used EO 10450 to discharge thousands of employees from Federal service based simply on evidence of homosexuality. In the 1950's alone, the government terminated 7,000 to 10,000 federal employees based on suspicions of homosexuality. (Ex. 3, U.S. Merit Systems Protection Board, "Sexual Orientation and the Federal Workplace", report to the President and Congress, May, 2014.)

13. Uncovering the documents concerning the Sex Deviate Program and the implementation of EO 10450 is one of the goals of the Mattachine Society, a non-profit, non-partisan research and educational society that conducts original archival research at private and public repositories across the country. The mission of the MSDC is to uncover the often deleted political histories of lesbian, gay, bisexual and transgender ("LGBT") Americans who faced persecution and discrimination at the hands of federal and state governments for over sixty-five years.

14. For over four years, the MSDC has sought to obtain documentation concerning the adoption and devastating implementation of EO 10450, particularly as it relates to the purging of homosexuals from federal employment.

15. On January 25, 2013, the MSDC submitted a request to the FBI under the FOIA, seeking the production of "any and all internal FBI correspondence or communications regarding Executive Order 10450 and also specifically includes, but not limited to, all files created by and communications to or from Warren E. Burger. The date range for this request is 1950-1990." The President had tasked Burger, who was then a high-ranking DOJ official, with enforcement of EO 10450.

16. The Government's response to the MSDC's FOIA request concerning EO 10450 has been one of delay and obfuscation. Despite the MSDC's repeated requests for documents created over a 40 year period, the DOJ and FBI have produced only 861 pages of documents and withheld 846 pages of documents.

17. As an initial matter, the volume of material that the DOJ and FBI have found does not survive any level of scrutiny. It defies logic to believe that only 1707 pages concerning

EO 10450 were created by the government under a program that lasted 40 years and resulted in terminating the Federal employment of thousands of LGBT Americans.

18. In addition, the DOJ and FBI's claims of privilege are indefensible. Simply as one example, the proposition that some of the requested documents are being withheld on the basis of national security – documents presumably created decades ago – makes no sense. More shocking is the fact that the FBI historically used the same ground of "national security" to withhold documents that it used to purge our nation's employment rolls of LGBT Americans over sixty years ago.

19. The MSDC submitted a valid and enforceable FOIA request about an expansive government program that destroyed the lives of thousands of Americans. Although full equality for LGBT Americans is not yet a reality, most Americans today no longer hold antiquated, prejudicial notions about LGBT Americans or believe that LGBT Americans are less than equal. And, they certainly know that LGBT Americans do not pose a security threat to the United States.

20. Yet, after 60 years, the government is unwilling to come clean. For the reasons set forth in this Complaint, this Court should order the DOJ and the FBI to not only release all materials currently identified about the adoption and ruthless implementation of EO 10450, but also to conduct a thorough review of their files to identify whether any additional materials concerning EO 10450 must be released pursuant to the MSDC's FOIA request.

JURISDICTION AND VENUE

21. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B).

22. Venue in the District of Columbia is proper under 5 U.S.C. § 552(a)(4)(B).

PARTIES

23. The MSDC is a non-profit, non-partisan research and educational society that conducts original archival research at The National Archives, U.S. presidential libraries, the Library of Congress, the FOIA Library of the Federal Bureau of Investigation, the Stonewall National Museum and Archives, and other private and public document repositories across the country. The mission of the MSDC is to uncover the often deleted political histories of LGBT Americans who faced persecution and discrimination at the hands of federal and state governments for over sixty-five years. The MSDC is dedicated to achieving full civil equality for LGBT Americans. In furtherance of these goals, the MSDC requested (and has been refused) access to records of the United States Department of Justice and the FBI. The MSDC is located at 1527 16th St., NW, Washington, D.C. 20036.

24. Defendant United States Department of Justice is an Agency within the meaning of 5 U.S.C. § 552(f), is subject to the requirements of the FOIA, and controls the FBI, which is a component of Defendant. The DOJ is located at 950 Pennsylvania Avenue, NW, Washington DC 20530-0001. Plaintiff sent its FOIA requests to the FBI and the FBI has improperly withheld the records at issue here.

FACTUAL ALLEGATIONS

A. Executive Order 10450 Legalized the Discrimination of Homosexuals

25. On April 27, 1953, under the pretext of protecting national security, President Dwight D. Eisenhower issued EO 10450, declaring that the federal government could deny a citizen employment in "each department or agency of the Government" solely because that person was homosexual. (Ex. 1, Exec. Order No. 10,450 § 2, 18 Fed. Reg. 2,489 (Apr. 27, 1953).)

26. EO 10450 legalized the discrimination of homosexuals. It not only excluded homosexuals from prospective employment, it also served as the justification for government agencies to reopen old "loyalty" investigations previously authorized by President Harry S. Truman under Executive Order 9835 ("EO 9835") to determine whether current employees were homosexual and, if so, to terminate them.

27. In charge of enforcing EO 10450 was then-Assistant Attorney General of the United States, and later, U.S. Supreme Court Chief Justice Warren E. Burger. As the head of the DOJ Civil Division from 1952-1957, Burger was tasked with carrying out the objectives of EO 10450.

B. <u>The FBI's "Sex Deviate Program" As Foundation for EO 10450</u>

28. At the time of Eisenhower's election in November 1952, the FBI already was conducting "loyalty" investigations of all federal government employees, pursuant to EO 9835. (*See* Ex. 4, Exec. Order No. 9835 §§ I, IV(1), 12 Fed. Reg. 1,935 (Mar. 25, 1947).) Under EO 9835, the FBI could not, however, disqualify someone from federal employment based on homosexuality. Therefore, the FBI lacked "investigative jurisdiction" over, in the words of then-FBI Director Hoover, "Sex Deviates." (Ex. 5, Memo. from J. Edgar Hoover to All Investigative Employees, dated Sept. 7, 1951.)

29. In a September 7, 1951 memo entitled "Sex Deviates in United States Government Service," Hoover sought to solve the FBI's problem of its lack of jurisdiction. Hoover directed that in the course of "Loyalty of Government Employee cases," "[w]hen information is received . . . indicating the person under investigation is a sex deviate, this allegation should be completely and *fully developed* and the facts reported." *Id.* at 2 (emphasis added). Hoover also instructed his agents that, "when an allegation is received that a present or former civilian

employee of any branch of the United States Government is a sex deviate, such information is furnished to the [Civil Service Commission]." *Id.* at 1. Thereby placing a "mark" on that individual's employment.

30. Further, Hoover wrote that "[a]ll of the police departments throughout the country were notified . . . to place a notation on the arrest fingerprint card that the subject was an employee of the Federal Government" if a person was arrested for being a sex deviate. *Id.* By the time Eisenhower was elected, Hoover already had amassed a repository of information to use against homosexual employees of the Federal Government. More disturbing, Hoover called on and, in essence, "deputized" state and local departments to gather this information.

31. Hoover used the collected information with terrifying effect. For example, with the Sex Deviate Program in full force, Hoover sought to remove one of Eisenhower's most trusted political advisors, Arthur Vandenberg, Jr. ("Vandenberg"). Vandenberg was the son of a well-known, and highly regarded, United States Senator from Michigan. Vandenberg served as the Chair of "Citizens for Eisenhower" and advised Eisenhower at the Republican convention. (*See* Ex. 6, James M. Haswell, Vandenberg Key Aide of Ike at Convention, Detroit Free Press, July 11, 1952; *see also* Ex. 6, Esther Tufty, It Was Vandenberg Day; Ex. 7, Ltr. from Dwight D. Eisenhower to Arthur Vandenberg, Jr., dated Oct. 11, 1952.) To reward Vandenberg for his efforts, on November 27, 1952, Eisenhower named Vandenberg "Secretary to the President." (Ex. 8, Russell Porter, Vandenberg Jr. Is Selected As Eisenhower's Secretary, N.Y. TIMES, Nov. 27, 1952, at 1.) Before he could serve, however, Vandenberg was subjected to a loyalty investigation by the FBI.

32. During the investigation, the FBI learned that Vandenberg was living with a young man who had been arrested "in Lafayette Park on a morals charge." (Ex. 9, Ltr. from L.B. Nichols to Clyde Tolson, dated Dec. 9, 1952.)

33. On December 30, 1952, during one of his first meetings with the President-elect, Hoover and Eisenhower discussed, among other things, the results of Vandenberg's investigation. In a post-meeting memorandum summarizing the meeting, Hoover noted that he "mentioned the case of Mr. Arthur Vandenberg and outlined briefly to the General some of the angles of the case which we are now investigating." (Ex. 10, Mem. from J. Edgar Hoover to Clyde Tolson et al., dated Jan. 5, 1953 ("Tolson Memo").) The "angle," of course, was Vandenberg's homosexuality.

34. The Tolson Memo further states that Hoover "told the General that Vandenberg had asked that we not interview the young man at present living with Vandenberg until he, Vandenberg, came out of the hospital, to which he had gone for a physical check over the last weekend." (Tolson Memo, at 2). Eisenhower was thus provided with information to conclude that Vandenberg was, in fact, homosexual.

35. This information presented Eisenhower with a unique problem. The President-elect's inner circle included a homosexual, yet there was no legal authority to terminate a known homosexual who was "loyal" and not a security risk. Furthermore, even admitting a sex deviate was a close friend would be a political disaster at the outset of a new administration. Rather than reveal Vandenberg's homosexuality, therefore, Eisenhower told Hoover that, if Vandenberg withdrew from his appointment, Hoover "could inform Vandenberg that no report would be submitted as it would then be a moot question." *Id.*

36. Instead of having his sexual orientation made public, Vandenberg resigned under the guise of being "ill." (Ex. 11, Ltr. from Arthur Vandenberg, Jr. to Dwight D. Eisenhower, dated

Jan. 13, 1953.) In a letter replying to Vandenberg's letter, Eisenhower said that he was "very distressed" about Vandenberg's "health" and informed Vandenberg that "as I know you understand, we have to go ahead with our setup." (Ex. 12, Ltr. from Dwight D. Eisenhower to Arthur Vandenberg, Jr., dated Jan. 17, 1953.)

37. Three weeks later, Vandenberg wrote back, informing Eisenhower that he was "ready and anxious to go to work." (Ex. 13, Ltr. from Arthur Vandenberg, Jr. to Dwight D. Eisenhower, dated Feb. 6, 1953.) But Eisenhower was not prepared to have a homosexual in the White House. He ignored Vandenberg's request, pretending that Vandenberg remained ill.

38. The myth persisted in the press as well. On or about April 14, 1953, The New York Times reported that Vandenberg requested Eisenhower withdraw his appointment because "he had been suffering from stomach ulcers and did not know how long the ailment would continue." (Ex. 14, Vandenberg Forgoes U.S. Post, N.Y. TIMES, Apr. 14, 1953, at 38.)

C. President Eisenhower Issues EO 10450, Using the Sex Deviate Program to Purge Homosexuals from Government

39. In the spring of 1953, sixty-three years ago, Eisenhower issued EO 10450. The pretext for EO 10450 was "to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security." (Ex. 1, Exec. Order No. 10,450 § 2, 18 Fed. Reg. 2,489 (Apr. 27, 1953).)

40. Section 8(1)(iii) of EO 10450 stated, in relevant part, that:

> The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to . . . [a]ny criminal, infamous, dishonest, *immoral, or notoriously disgraceful conduct*, habitual use of intoxicants to excess, drug addiction, *sexual perversion.*

Id. § 8(1)(iii) (emphasis added).

41. EO 10450 also leveraged the collection of arrest finger print cards collected through Hoover's Sex Deviate Program. *Id.* § 3(a) ("[I]n no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the [FBI]) . . . .").

42. The stated rationale of EO 10450 – "national security" – was, in many ways, pretext. EO 10450 was a ruse designed to purge the government of certain types of people, including homosexuals. In an article dated February 24, 1954, The New York Times reported that of 590 people separated from the State Department, "[n]inety-nine involved 'homosexual deviations' as the principal factor, and 278 similar cases were under investigation with no determinations yet made." (Ex. 15, New U.S. Jobs Went to Half Of State Department 'Risks', N.Y. TIMES, Feb. 24, 1954 at 1, 42.)

43. In short, the government used EO 10450 repeatedly to discriminate against homosexuals in the workplace and set an example that the States would soon follow.

44. The animus embedded in EO 10450 – that homosexuals were not fit for employment in the Federal government – filtered throughout government agencies and, importantly, the United States Civil Service Commission. It, in essence, gave tacit permission to the CSC to implement its own measures to purge homosexuals from federal employment.

45. In 1956, the CSC issued a "Suitability Rating Examiners Handbook," instructing its examiners on how to evaluate whether an individual's sexual orientation barred government employment. (Ex. 2, Johnson-Irons Memo, at 3.) "Proof" of homosexuality included "credible information from reliable sources concerning an individual's reputation and conduct." *Id.*

46. The Handbook also provided guidelines for "processing" cases of previously debarred homosexual employees. In those cases, "a careful and thorough examination must be made to determine whether complete rehabilitation has been effected." *Id.* Evidence of

"rehabilitation" from "sexual deviation" included "severance of association with persons known or suspected of being sexual deviates," "discontinuing the frequenting of places known to be 'hangouts' or residences of sexual deviates," and "the attitude and reputation of the person since corrective action was taken." *Id.* But to remove any doubt, the Handbook stated, "[p]ersons about whom there is evidence that they are homosexuals or sexual perverts . . . *are not suitable for Federal employment*." *Id.* at 2 (emphasis added).

47. The exclusion of homosexuals from federal employment continued through the 1960s. In a memorandum to John Steele, Glenn Stahl wrote that the "[CSC] set[s] homosexuality apart from other forms of immoral conduct and take[s] a much more severe attitude toward it." (Ex. 16, Mem. from John W. Steele to O. Glenn Stahl, dated Nov. 17, 1964 ("Steele Memo") at 2.) When it came to other acts of "immoral conduct," the CSC would take into account the seriousness of the conduct. Not the case for homosexuality: the CSC would "automatically find the individual [that has engaged in homosexual acts] unsuitable for Federal employment *unless there is evidence of rehabilitation.*" *Id.* (emphasis in original).

48. This led to subjective determinations of an individual's suitability "depending on the strength of the reviewing official's personal aversion to homosexuality," with some examiners concluding "once a homo, always a homo":

> Really, we do not apply Commission policy at all; *we apply our own individual emotional reactions and moral standards*. Our tendency to 'lean over backwards' to rule against a homosexual is simply a manifestation of the revulsion which homosexuality inspires in the normal person. What it boils down to is that most men look upon *homosexuality as something uniquely nasty, not just as a form of immorality*.

Id. at 3 (emphasis added).

49. Less than a year later, representatives of the CSC met with members of the MSDC to discuss the federal government's policy on the suitability of persons "who are shown to have engaged in homosexual acts." (Ex. 17, Ltr. from John Macy to MSDC, dated Feb. 25, 1966.)

50. In its official response, the CSC used language of disgust and animus to justify the exclusion of homosexuals from government employment:

> Pertinent considerations here are the *revulsion of other employees* by homosexual conduct and the consequent disruption of service efficiency, the *apprehension caused other employees* of homosexual advances, solicitations, or assaults, *the unavoidable subjection of the sexual deviate* to erotic stimulation through on-the-job use of common toilet, shower, and living facilities, the *offense to members of the public who are required to deal with a known or admitted sexual deviate* to transact Government business, the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, particularity among the youth, and the use of Government funds and authority in furtherance of conduct offensive both to the mores and the law of our society.

Id. at 2 (emphasis added).

51. "To be sure," the letter concluded, "if an individual applicant were to publicly proclaim that he engages in homosexual conduct, that he prefers such relationships, that he is not sick, or emotionally disturbed, and that he simply has different sexual preferences . . . the Commission would be required to find such an individual unsuitable for Federal employment." *Id.* at 4.

52. Multiple documents uncovered by the MSDC refer to this letter as the CSC's "official policy" on the employment of homosexuals.

D. The Mattachine Society's FOIA Request

53. The MSDC's goal is to uncover documents concerning EO 10450 as a way to educate the public and preserve this important chapter in the history of the LGBT community.

54. On or about January 25, 2013, the MSDC submitted a FOIA request (Ex. 18, the "Request") to the FBI seeking the production of documents concerning EO 10450 dated from January 1, 1950 through December 31, 1990. In addition to this request, the MSDC also specifically sought all files in the FBI's possession created by and communications to or from Warren Burger concerning EO 10450.

55. For more than two years, the MSDC's request was met with silence from the Federal Government. After this seemingly interminable delay, on April 17, 2015, the FBI responded to the Request stating that "539 pages were reviewed and 253 pages are being released." (Ex. 19, Ltr. from D. Hardy, dated Apr. 17, 2015 (the "FBI Letter").)

56. The FBI claimed that certain documents should not be disclosed because they were protected from disclosure by other federal statutes (*see* 5 U.S.C. § 552(b)(3) (citing Federal Rule of Criminal Procedure 6(e) [protecting grand jury materials]) and that disclosure could reveal the identity of confidential sources (*see* 552(b)(7)(D)). Additional pages of documents were sent to other government agencies for review.

57. On May 5, 2015, MSDC received a letter from the Defendant DOJ, National Security Division which released approximately 45 additional pages. The DOJ stated that it had "reviewed these records and are releasing them in part." (Ex. 20, Ltr. from K. Tiernan, dated May 5, 2015 (the "DOJ Letter").)

58. The DOJ claimed that the following exemptions, pursuant to 5 U.S.C. § 552, justified the withholding of documents responsive to the Request: personal privacy (§ 552(b)(6)) and personal privacy of records compiled for law enforcement purposes (§ 552(b)(7)(C)).

59. On May 12, 2015, MSDC received a letter from the FBI which stated, in part, that "552 pages were reviewed and 169 pages are being released." (Ex. 21, Ltr. from D. Hardy, dated May 12, 2015 (the "Second FBI Letter").

60. In the Second FBI Letter, the FBI claimed that the following exemptions, pursuant to 5 U.S.C. § 552 and 5 U.S.C. § 552a, justified the withholding of documents responsive to the Request: personal privacy (§ 552(b)(6)); personal privacy of records compiled for law enforcement purposes (§ 552(b)(7)(C)); and information compiled in anticipation of a civil action (5 U.S.C. § 552a(d)(5)).

61. On June 12, 2015, the MSDC appealed the determinations of the FBI and the DOJ and requested that the withheld information be released pursuant to the Request (Ex. 22, the "Appeal").

62. On June 22, 2015, the MSDC received an additional letter from the FBI responding to the Request stating that an additional "476 pages were reviewed and 254 pages are being released." (Ex. 23, Ltr. from D. Hardy to L. Linsky, dated June 22, 2015 (the "Third FBI Letter").)

63. The FBI claims that the following exemptions, pursuant to 5 U.S.C. § 552, justified the withholding of documents responsive to the Request: classified information for national security purposes (§ 552(b)(1)); grand jury materials (§ 552(b)(3) (citing 50 U.S.C. § 403g)); personal privacy of records compiled for law enforcement purposes (§ 552(b)(7)(C)); and information concerning a confidential source (§ 552(b)(7)(D)).

64. The FBI indicated that additional documents were sent to other Government agencies for review, such as the Office of Information Policy ("OIP"). In addition, the FBI indicated that it was consulting with another agency concerning the Request.

65. On August 13, 2015, the MSDC again appealed the determinations of the FBI and the DOJ arguing that the FBI's search was inadequate and requested that additional information be released pursuant to the Request (Ex. 24, the "Second Appeal").

66. On September 2, 2015, the OIP sent a letter to Lisa Linsky ("Linsky"), counsel for the Mattachine Society, stating that one document, totaling six pages had been referred to the OIP by the FBI for review as to whether it could be released. This letter states that all six pages are being withheld under Exemption 5 of FOIA, 5 U.S.C. § 552(b)(5), the "deliberative process privilege."

67. On September 28, 2015, the OIP sent another letter, this time stating that 75 pages had been referred to the OIP by the FBI. This letter states that eight more documents, totaling 32 pages were withheld under Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), the deliberative process privilege. The OIP further stated that the remaining 38 pages did not pertain to EO 10450 and, thus, were withheld. The OIP also stated that it was referring two documents, totaling five pages to the National Security Division.

68. On October 20, 2015, the MSDC appealed OIP's determination with respect to the documents referred to in both the September 2 Letter and the September 28 Letter, requested that the OIP reconsider its application of the claimed exemption, and that the appeal be consolidated with the prior Appeal to streamline the administrative process.

69. On October 30, 2015, the FBI sent Ms. Linsky, acting on behalf the MSDC, a letter which stated, in part, that "140 pages were reviewed and 140 pages are being released." (Ex. 25, Ltr. from D. Hardy, dated October 30, 2015 (the "Fourth FBI Letter"). For reasons never explained by the FBI, only 134 pages were released along with the Fourth FBI Letter and not, as the FBI claimed, 140 pages.

70. In the Fourth FBI Letter, the FBI claimed that the following exemptions, pursuant to 5 U.S.C. § 552, justified the withholding of documents responsive to the Request: personal privacy (§ 552(b)(6)); personal privacy of records compiled for law enforcement purposes (§ 552(b)(7)(C)); and information concerning a confidential source (§ 552(b)(7)(D)).

71. On December 10, 2015, the MSDC again appealed the determinations of the FBI and the DOJ arguing, among other things, that the FBI's had failed to provide sufficient information to evaluate the propriety of the exemptions claimed by the FBI and that the MSDC was entitled to more than conclusory and generalized allegations of exemptions. (Ex. 26, the "Third Appeal").

72. On February 25, 2016, DOJ denied the MSDC's outstanding appeals. (*See* Ex. 27, Ltr. from S. O'Neill to L. Linsky, dated Feb. 25, 2016.) DOJ explained that the Initial Request ("IR") Staff "properly withheld 38 pages in full because they are protected from disclosure under the FOIA pursuant to 5 U.S.C. § 552(b)(5), the deliberative process privilege. This provision concerns certain inter- and intra-agency records protected by the deliberative process privilege and the attorney client privilege." *Id*. The response also explained that the MSDC was not entitled to itemizations of each withheld document. Lastly, the DOJ found that the IR Staff "properly determined that 38 additional pages are not responsive to your client's request." *Id*.

73. MSDC comes now for relief under 5 U.S.C. § 552(a)(4)(B) to appeal Defendant's response (including all of the responses to the MSDC's appeals as discussed above) its FOIA requests.

COUNT I

74. Plaintiff MSDC incorporates herein by reference all of the allegations contained in paragraphs 1 through 73.

75. FOIA provides that "[o]n complaint, the district court of the United States . . . in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B), *amended by* OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

76. On or about February 25, 2016, Defendant DOJ affirmed the determinations of the IR Staff thereby making its action final. The DOJ went on to state that if the MSDC is "dissatisfied with my action on your appeal, the FOIA permits your client to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

77. Defendant DOJ has failed to conduct an adequate search for the agency records relating to Executive Order 10450.

78. Plaintiff has exhausted the applicable administrative remedies with respect to Defendant DOJ's failure to conduct an adequate search for the requested records.

79. On information and belief, the requested agency records have been improperly withheld in that the FOIA requires their disclosure and Defendant failed to conduct an adequate search for said agency records.

COUNT II

80. Plaintiff incorporates herein by reference all of the allegations contained in paragraphs 1 through 79.

81. FOIA provides that "[o]n complaint, the district court of the United States . . . in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B), *amended by* OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

82. On or about February 25, 2016, Defendant DOJ affirmed the determinations of the IR Staff thereby making its action final. The DOJ went on to state that if the MSDC is "dissatisfied with my action on your appeal, the FOIA permits your client to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

83. Defendant United States DOJ has wrongfully withheld the requested agency records pertaining to Executive Order 10450 by relying on FOIA exemptions 1, 3, 5, 6, 7(C), and 7(D) as well as 5 U.S.C. § 552a(d)(5). *See* 5 U.S.C. § 552(b)(1) (classified information for national security purposes); 5 U.S.C. § 552(b)(3) (grand jury materials); 5 U.S.C. § 552(b)(5) (the deliberative process privilege); 5 U.S.C. § 552(b)(6) (personal privacy), 5 U.S.C. § 552(b)(7)(C) (personal privacy of records compiled for law enforcement purposes); 5 U.S.C. § 552(b)(7)(D) (information concerning a confidential source); and 5 U.S.C. § 552a(d)(5) (information compiled in anticipation of a civil action).

84. Plaintiff has exhausted the applicable administrative remedies with respect to Defendant DOJ's wrongful withholding of the requested records.

85. On information and belief, the requested agency records have been improperly withheld in that the FOIA requires their disclosure and they do not fall within any of FOIA's exemptions from required disclosure, including but not limited to those exemptions cited by Defendant.

WHEREFORE, Plaintiff MSDC requests that this Court:

(1) Order Defendant DOJ to conduct further searches of its agency records for documents responsive to the FOIA requests;

(2) Order Defendant DOJ to process immediately the requested records in their entirety, including but not limited to those that have been withheld by the FBI (as

detailed above);

(3) Order Defendant DOJ, upon completion of such processing, to disclose the requested records in their entirety and make copies available to Plaintiff MSDC;

(4) Award Plaintiff MSDC its costs and attorneys' fees on this action; and

(5) Award such other and further relief as the Court shall deem just and proper.

Dated: September 9, 2016
Washington, D.C.

Respectfully Submitted,

/s/ Paul M. Thompson

Paul M. Thompson
D.C. Bar No. 973977
Irene A. Firippis
DC Bar No. 1029548
McDermott Will & Emery LLP
The McDermott Building
500 North Capitol Street, N.W.
Washington, DC 20001
Telephone: +1 202 756 8032

Attorneys for Plaintiff
Mattachine Society of Washington, D.C.

Of Counsel:

Lisa A. Linsky (*admitted pro hac vice*)
Michael R. Huttenlocher (*admitted pro hac vice*)
Lisa Gerson (*admitted pro hac vice*)
Krista Meany (*admitted pro hac vice*)
Ashley Evans (*admitted pro hac vice*)
McDermott Will & Emery LLP
340 Madison Avenue
New York, New York 10173-1922
Telephone: +1 212 547 5400

Exhibit 1

18 FR 2489, Exec. Order No. 10450, 1953 WL 49889(Pres.)

EXECUTIVE ORDER 10450

SECURITY REQUIREMENTS FOR GOVERNMENT EMPLOYMENT

April 27, 1953

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U. S. C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U. S. C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U. S. C. 118 j); and the act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1, *et seq.*), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

SECTION 1. In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237[FN1] of April 26, 1951, the provisions of that act shall apply to all other departments and agencies of the Government.

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

SEC. 3. (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation: *Provided*, that upon request of the head of the department or agency concerned, the Civil Service Commission may, in its discretion, authorize such less investigation as may meet the requirements of the national security with respect to per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States. Should there develop at any stage of investigation information indicating that the employment of any such person may not be clearly consistent with the interests of the national security, there shall be conducted with respect to such person a full field investigation, or such less investigation as shall be sufficient to enable the head of the department or agency concerned to determine whether retention of such person is clearly consistent with the interests of the national security.

(b) The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted: *Provided*, that a person occupying a sensitive position at the time it is designated as such may continue to occupy such position pending the completion of a full field investigation, subject to the other provisions of this order: *And provided further*, that in case of emergency a sensitive position may be filled for a limited period by a person

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with respect to whom a full field preappointment investigation has not been completed if the head of the department or agency concerned finds that such action is necessary in the national interest, which finding shall be made a part of the records of such department or agency.

SEC. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has been conducted a full field investigation under Executive Order No. 9835[FN2] of March 21, 1947, and, after such further investigation as may be appropriate, shall re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not been adjudicated under a security standard commensurate with that established under this order.

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950.

SEC. 7. Any person whose employment is suspended or terminate under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security, which finding shall be made a part of the records of such department or agency: *Provided*, that no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Civil Service Commission that such person is eligible for such employment.

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:
(1) Depending on the relation of the Government employment to the national security:
(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, sexual perversion, or financial irresponsibility.

(iv) An adjudication of insanity, or treatment for serious mental or neurological disorder without satisfactory evidence of cure.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

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(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to the deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(b) The investigation of persons entering or employed in the competitive service shall primarily be the responsibility of the Civil Service Commission, except in cases in which the head of a department or agency assumes that responsibility pursuant to law or by agreement with the Commission. The Commission shall furnish a full investigative report to the department or agency concerned.

(c) The investigation of persons (including consultants, however employed), entering employment of, or employed by, the Government other than in the competitive service shall primarily be the responsibility of the employing department or agency. Departments and agencies without investigative facilities may use the investigative facilities of the Civil Service Commission, and other departments and agencies may use such facilities under agreement with the Commission.

(d) There shall be referred promptly to the Federal Bureau of Investigation all investigations being conducted by any other agencies which develop information indicating that an individual may have been subjected to coercion, influence, or pressure to act contrary to the interests of the national security, or information relating to any of the matters described in subdivisions (2) through (7) of subsection (a) of this section. In cases so referred to it, the Federal Bureau of Investigation shall make a full field investigation.

SEC. 9. (a) There shall be established and maintained in the Civil Service Commission a security-investigations index covering all persons as to whom security investigations have been conducted by any department or agency of the Government under this order. The central index established and maintained by the Commission under Executive Order No. 9835 of March 21, 1947, shall be made a part of the security-investigations index dex. The security-investigations index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted an investigation concerning the person involved or has suspended or terminated the employment of such person under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950.

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(b) The heads of all departments and agencies shall furnish promptly to the Civil Service Commission information appropriate for the establishment and maintenance of the security-investigations index.

(c) The reports and other investigative material and information developed by investigations conducted pursuant to any statute, order, or program described in section 7 of this order shall remain the property of the investigative agencies conducting the investigations, but may, subject to considerations of the national security, be retained by the department or agency concerned. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except, with the consent of the investigative agency concerned, to other departments and agencies conducting security programs under the authority granted by or in accordance with the said act of August 26, 1950, as may be required for the efficient conduct of Government business.

SEC. 10. Nothing in this order shall be construed as eliminating or modifying in any way the requirement for any investigation or any determination as to security which may be required by law.

SEC. 11. On and after the effective date of this order the Loyalty Review Board established by Executive Order No. 9835 of March 21, 1947, shall not accept agency findings for review, upon appeal or otherwise. Appeals pending before the Loyalty Review Board on such date shall be heard to final determination in accordance with the provisions of the said Executive Order No. 9835, as amended. Agency determinations favorable to the officer or employee concerned pending before the Loyalty Review Board on such date shall be acted upon by such Board, and whenever the Board is not in agreement with such favorable determination the case shall be remanded to the department or agency concerned for determination in accordance with the standards and procedures established pursuant to this order. Cases pending before the regional loyalty boards of the Civil Service Commission on which hearings have not been initiated on such date shall be referred to the department or agency concerned. Cases being heard by regional loyalty boards on such date shall be heard to conclusion, and the determination of the board shall be forwarded to the head of the department or agency concerned: *Provided*, that if no specific department or agency is involved, the case shall be dismissed without prejudice to the applicant. Investigations pending in the Federal Bureau of Investigation or the Civil Service Commission on such date shall be completed, and the reports thereon shall be made to the appropriate department or agency.

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked. For the purposes described in section 11 here of the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective ate of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency.

SEC. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable them to establish and maintain an appropriate employee-security program.

SEC. 14. (a) The Civil Service Commission, with the continuing advice and collaboration of representatives of such departments and agencies as the National Security Council may designate, shall make a continuing study of the manner in which this order is being implemented by the departments and agencies of the Government for the purpose of determining:
(1) Deficiencies in the department and agency security programs established under this order which are inconsistent with the interests of, or directly or indirectly weaken, the national security.

(2) Tendencies in such programs to deny to individual employees fair, impartial, and equitable treatment at the hands of the Government, or rights under the Constitution and laws of the United States or this order.

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Information affecting any department or agency developed or received during the course of such continuing study shall be furnished immediately to the head of the department or agency concerned. The Civil Service Commission shall report to the National Security Council, at least semiannually, on the results of such study, and shall recommend means to correct any such deficiencies or tendencies.

(b) All departments and agencies of the Government are directed to cooperate with the Civil Service Commission to facilitate the accomplishment of the responsibilities assigned to it by subsection (a) of this section.

SEC. 15. This order shall become effective thirty days after the date hereof.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,*April 27, 1953*.

Footnotes

1 3 CFR, 1951 Supp., p. 430.
FN2 3 CFR, 1947 Supp.

End of Document

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Exhibit 2

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UNITED STATES GOVERNMENT

Memorandum

U.S. CIVIL SERVICE COMMISSION

Subject: Commission's desire to have a discussion on suitability policy relating to homosexuals

Date: January 8, 1965

In Reply Refer To: INP:HPC:ojn

Your Reference:

From: Kimbell Johnson

To: Warren B. Irons

Last October Chairman Macy issued a memorandum in which he stated his wish to have a Commission meeting concerning the above subject. This meeting has now been scheduled for January 12, 1965. You asked me to submit to you material relating to this subject.

Our policy on homosexuality has gone through a fairly long process of evaluation and refinement. In order to shed light on this process I propose in this memorandum to trace the highlights leading to the development of our present policy on this matter.

1. Policy prior to 1945 -- Homosexuality -- not distinguished from other immoral conduct.

Prior to 1945 we rated some cases related to homosexuality under our general standards on immoral conduct. Homosexual conduct was not then referred to specifically as a type of immoral conduct.

2. Policy statement of November 11, 1945 -- Homosexuals not suitable for Federal employment and debarment is applicable.

Page C2.01.05 of the Organization and Policy Manual, transmitted by Manual Letter 455 of November 11, 1945, read as follows:

> Homosexuals are not considered suitable persons for Federal employment. Examples of evidence acceptable as proof by the Commission are court records or convictions for some form of perversion, statement to that effect by the employee to co-workers or to his physician, admittance to a hospital for that reason, admission by the employee to a Commission representative or other reliable source of information. In the absence of proof, such persons must be considered acceptable for Federal employment insofar as suspicion of homosexuality is concerned.

Page C2.04.03 of the same letter stated:

> Homosexuals are not considered suitable persons for Federal employment and generally debarment is applicable when proof of homosexuality is present.

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U.S. GOVERNMENT PRINTING OFFICE: 1963—O-694-124

CSC FORM 631
NOVEMBER 1961

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3. Statement of Senate Subcommittee in 1950 that homosexuals are unsuitable for Federal employment.

The Senate Subcommittee of the Committee on Expenditures in the Executive Department made a study of the employment of homosexuals in the Federal service. We worked closely with this subcommittee in running down the status of homosexuals who, according to information gathered by the subcommittee, were still employed in the Federal service. In the report of the subcommittee entitled "Employment of Homosexuals and other Sex Perverts in the Government" published December 15, 1950, the following conclusion was stated:

> There is no place in the United States Government for persons who violate the laws or the accepted standards of morality, or who otherwise bring disrepute to the Federal service by infamous or scandalous personal conduct. Such persons are not suitable for Government positions and in the case of doubt the American people are entitled to have errors of judgment on the part of their officials, if there must be errors, resolved on the side of caution. It is the opinion of this subcommittee that those who engage in acts of homosexuality and other perverted sex activities are unsuitable for employment in the Federal Government. This conclusion is based upon the fact that persons who indulge in such degraded activity are committing not only illegal and immoral acts, but they also constitute security risks in positions of public trust.

4. Issuance in November 1956 of a Suitability Rating Examiners Handbook -- IN 204, in which guides as to acceptable evidence of homosexuality were established as well as guides for handling cases of persons previously rated ineligible and debarred on homosexual grounds.

In November 1956 we issued for the first time a Suitability Rating Examiners Handbook. In it we revised in part the material which had formerly been in Chapter C2 of the Organization and Policy Manual. Our general guides on homosexuality in the handbook then read as follows:

> Homosexuality, sexual perversion, lewdness and lascivious conduct -- A person whose conduct brings reproach or shame to, reflects discredit upon, or disgraces him, is not suitable for Federal employment. Persons about whom there is evidence that they are homosexuals or sexual perverts, or who engaged in lewd or lascivious conduct are not suitable for Federal employment. In acting on such cases, the Commission will consider:
>
> (1) Arrest records, court records or convictions for some form of homosexuality, perversion or other lewd or lascivious conduct.

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(2) The person's statement or reliable medical evidence that he is a homosexual or that he engages in lewd, lascivious or perverted conduct.

(3) Credible information from reliable sources concerning an individual's reputation and conduct.

Also in the original version of IN-204 we included general guides concerning the processing of cases involving homosexuality or sexual perversion for which debarment had previously been imposed. These guides are still in the present Suitability Rating Examiners Handbook and read as follows:

> In cases involving sexual deviation when the previous decision was ineligibility and debarment for an appropriate period this guide is directly applicable. The previous evidence may be considered in a subsequent case but in and of itself may not form the basis for further adverse action. In such cases a careful and thorough investigation must be made to determine whether complete rehabilitation has been effected. Among acceptable evidence of rehabilitation are:
>
> (1) Severance of association with persons known or suspected of being sexual deviates;
>
> (2) Discontinuing the frequenting of places known to be "hangouts" or residences of sexual deviates;
>
> (3) Seeking and obtaining competent medical assistance, and
>
> (4) The attitude and reputation of the person since corrective action was taken.

5. Interbureau study of 1960 of rating problems including homosexuality which culminated in a high level panel review of all cases involving immorality, including homosexual conduct, in which removal action is contemplated plus a simplification of the definition of immoral conduct and restatement of the general guides on homosexuality.

In February 1960, you appointed a committee under the Chairmanship of Mr. Oganovic to look into the whole matter of suitability ratings to identify problem areas, and to consider what approaches could be used in solving the various problems raised. Members of the committee were Messrs. Blann, Foley, Meloy and Stahl. Technical advice and staff assistance were provided the Committee by me and Hugh Crowe. One of the problem areas identified and discussed at length by the committee in morals cases was the possible lack of objectivity and presence of bias in instances of persons rating morals cases. The committee recommended that we revise our instructions on rating cases involving

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immorality and further recommended that in all morals cases, when removal is contemplated, the cases should be reviewed, prior to final action by a responsible panel of three members at a level no lower than GS-13. These recommendations were approved by you and the Commissioners. The revised instructions as they relate to immoral conduct and homosexuality or sexual perversion were incorporated in a July 1960 revision of the Suitability Rating Examiners Handbook.

They read in part as follows:

1. A responsible panel of three persons of known maturity and good judgment at a level not lower than grade GS-13 will review all cases where

   a. A question of immorality is involved.... (pages 1 and 2 of IN-204).

And further:

Definition

This section of the handbook concerns itself with immoral conduct as reflected in sexual behavior.

General Guides

Homosexuality and sexual perversion -- Persons about whom there is evidence that they are homosexuals or sexual perverts are not suitable for Federal employment. In acting on such cases, the Commission will consider:

(1) Arrest records, court records or convictions for some form of homosexuality or sexual perversion.

(2) The person's statement or reliable medical evidence that he is a homosexual.

(3) Credible information from reliable sources concerning an individual's reputation and conduct relating to homosexuality or sexual perversion (p. 31, IN-204).

6. Revision of instructions in July 1963 to provide clearly that evaluations must be based on homosexual acts as distinguished from homosexual tendencies.

There had been some criticism that our general guides on homosexuality did not distinguish clearly between homosexual tendencies and overt homosexual acts. In order that there could be no misunderstanding on

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this point, in July 1963 we changed our general guides on the subject in the Suitability Rating Examiners Handbook to read as follows:

> General Guides
>
> Homosexuality and sexual perversion -- Persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts with them, without evidence of rehabilitation, are not suitable for Federal employment. In acting on such cases the Commission will consider arrest records, court records, or records of conviction for some form of homosexuality or other credible information indicating that the individual has engaged in or solicited others to engage in such acts with him. Evidence showing that a person has homosexual tendencies, standing alone, is insufficient to support a rating of unsuitability on the ground of immoral conduct.

7. Implementation of policy on homosexuals.

We have made continuous efforts to see that the general guides on this subject were followed by all rating officers of the Commission. For example, in February 1960 you directed me, in view of the number of basic changes in the rating guides recommended by Mr. Oganovic's committee, to visit each region separately to explain in detail and to discuss fully the impact of these changes on our rating actions. In carrying out this directive I was careful to emphasize the importance of the panel review by persons in GS-13 or above of questions of immorality and the necessity of achieving objectivity and lack of bias in such cases. I was supported in this task by instructions already in our Suitability Rating Examiners Handbook such as the following:

> Persons authorized to analyze, make recommendations and take final rating actions must be selected with care. Maturity of judgment, objectivity, freedom from personal bias and the possession of good common sense are essential prerequisites for performance of this function.

Also, the rating examiner "should not establish in his own mind an unreasonably high, artificial, or ideal standard and consider all applicants who do not measure up to this standard as being unqualified." (p. 32, In-204).

The guides on homosexuality were stressed in our latest round of refresher training courses for investigators as well as in our post-audit of regional office cases. In August 1963 we issued special instructions on conducting special interviews which included a section on homosexuality as follows:

> Homosexuality is another special area that is causing concern. There have been many instances in which the matter is presented

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as "The Commission has information that you are a homosexual," or "The Commission has received information that you have engaged in homosexual acts." This has been done even when there is specific information in file of such nature that it can be used without violating a pledge of confidence. The disqualification may be immoral or criminal conduct. The first illustration presumes immoral conduct without actually alleging it; the second, while slightly better, does not indicate whether the acts occurred yesterday or twenty years ago. The first illustration is completely inadequate from a rating standpoint unless an admission is offered or volunteered. A question such as "The Commission has received information that you have recently and in the past engaged in homosexual acts." with such specifics as may be permissible, is preferred.

8. Conclusion

In this memorandum I have attempted to point out the highlights leading to the development of our present policy on this subject. On the whole these developments show that our policy has been subject to frequent scrutiny and has not been inflexible, that is, it has been changed as a need for change has been demonstrated. We have made every provision, including provision for high level panel review prior to final action in removal cases, to insure that our evaluations in these cases will be objective and not subject to an individual evaluator's bias. It is no doubt true that in the course of developing our present policy we may have taken action in some cases which we would not now take under our present guides. It is doubtless equally true that we have not been able to take removal action in other cases in which such action was justified because of our inability to identify specifically sources of information. These sources would be for the most part confessions or statements of witnesses who participated in overt acts but who would not allow their testimony to be used in personal hearings or letters of interrogatory.

Exhibit 3

Sexual Orientation *and the* Federal Workplace

Policy and Perception

A Report to the President and Congress of the United States
by the U.S. Merit Systems Protection Board
MAY 2014

THE CHAIRMAN

U.S. MERIT SYSTEMS PROTECTION BOARD
1615 M Street, NW
Washington, DC 20419-0001

The President
President of the Senate
Speaker of the House of Representatives

Dear Sirs:

In accordance with the requirements of 5 U.S.C. § 1204(a)(3), it is my honor to submit this U.S. Merit Systems Protection Board (MSPB) report, *Sexual Orientation and the Federal Workplace: Policy and Perception*. The purpose of our study was to examine Federal employee perceptions of workplace treatment based on sexual orientation, review how Federal workplace protections from sexual orientation discrimination evolved, and determine if further action is warranted to communicate or clarify those protections.

Since 1980, the U.S. Office of Personnel Management has interpreted the tenth Prohibited Personnel Practice (5 U.S.C. § 2302(b)(10)), which bars discrimination in Federal personnel actions based on conduct that does not adversely affect job performance, to prohibit sexual orientation discrimination. As this prohibition has neither been specifically expressed in statute nor affirmed in judicial decision, it has been subject to alternate interpretations. Executive Order 13087 prohibited sexual orientation discrimination in Federal employment but provided no enforceable rights or remedies for Federal employees who allege they are the victims of sexual orientation discrimination. Any ambiguity in the longstanding policy prohibiting sexual orientation discrimination in the Federal workplace would be resolved by legislation making that prohibition explicit. Such legislation could grant Federal employees who allege they are victims of sexual orientation discrimination access to the same remedies as those who allege discrimination on other bases.

Federal employee respondents to MSPB surveys perceived that sexual orientation discrimination occurred about as often as discrimination based on national origin and marital status or violations of veteran's preference. Lesbian, gay, bisexual, and transgender (LGBT) Federal employee perceptions of the workplace are generally less positive than their colleagues. We found, however, that in some agencies for at least some issues, LGBT employee perceptions were as positive as those of other employees. We recommend that Federal agencies review their management policies to ensure they are inclusive and fair to all employees and that agencies better communicate the prohibitions against sexual orientation discrimination in the Federal workplace.

Respectfully,

Susan Tsui Grundmann

Enclosure

U.S. Merit Systems Protection Board

Susan Tsui Grundmann, *Chairman*

Anne M. Wagner, *Vice Chairman*

Mark A. Robbins, *Member*

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Deputy Director
James J. Tsugawa

Project Manager
Doug Nierle

Project Analysts
J. Peter Leeds, Ph.D.
Sharon Roth

U.S. Merit Systems Protection Board

The U.S. Merit Systems Protection Board (MSPB) is an independent, quasi-judicial executive branch agency. Its mission is to protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices. MSPB carries out its statutory responsibilities primarily by adjudicating Federal employee appeals and by conducting studies of the Federal merit systems.

Occasionally, MSPB study topics overlap with matters that may come before it in its adjudicatory role. This report is issued solely under MSPB's studies function—neither its findings nor its recommendations are an official opinion of MSPB in its adjudicatory role.

Table of Contents

Executive Summary i

Historical Foundations: Discrimination to Accommodation 1

Background 1

Legislative Investigation 3

Civil Service Policy 9

Judicial Response 12

Steps Toward Inclusion 17

Change in Civil Service Policy 17

Prohibited Personnel Practices 18

Executive Order 13087 22

Federal Employee Benefit Programs 23

The Tenth Prohibited Personnel Practice: Employee Perceptions 27

Discrimination Based on Off-Duty Conduct 27

Discrimination Based on Sexual Orientation 28

Relationship to Employee Engagement 29

Communicating the Policy of Non-Discrimination 31

LGBT Employee 2012 FEVS Results 33

LGBT Employee Demographics 34

LGBT Employee Perceptions of the Federal Workplace 36

The Current State of Protection from Sexual Orientation Discrimination 45

Recommendations 49

Appendix: Methods 53

Executive Summary

Background

Prior to 1975, Federal Government policy considered an individual's sexual orientation when determining suitability for Federal employment. Although we will never know the exact number of individuals who were denied employment or who had their employment terminated based on their actual or assumed sexual orientation, one estimate places this number between 7,000 and 10,000 in the 1950's alone. It is impossible to determine the number of individuals who may not have sought Federal employment due to the knowledge that their sexual orientation made them ineligible for selection.

The tenth Prohibited Personnel Practice (PPP) (5 U.S.C. § 2302(b)(10)) codified in 1978 bars discrimination in Federal personnel actions based on conduct that does not adversely affect job performance. This prohibition was first interpreted to bar sexual orientation discrimination in 1980 by the U.S. Office of Personnel Management (OPM). As this prohibition has been neither specifically expressed in statute nor affirmed in judicial decision, it has been subject to alternate interpretations.

An executive order signed in 1998 affirmed the policy of non-discrimination based on sexual orientation in Federal employment. As this executive order was only a statement of policy, it provided no enforceable rights for employees who believed they had been discriminated against due to their sexual orientation.

In 2012, OPM's annual Federal Employee Viewpoint Survey (FEVS) for the first time asked Federal employees to self-identify their sexual orientation. The resulting large-scale data set presents an opportunity to examine lesbian, gay, bisexual, and transgender[1] (LGBT) employee perceptions of the Federal workplace for the first time.

[1] "Transgender" is an umbrella term that groups together a variety of people whose gender identity differs from their birth sex (Pew Research Center, *A Survey of LGBT Americans—Attitudes, Experiences and Values in Changing Times*, Washington, D.C., June 13, 2013, p. 15). Issues faced by transgender individuals in the workplace are frequently included in research regarding lesbian, gay, and bisexual (LGB) individuals. Although some data that we present include the perceptions of transgender employees and our recommendations may also pertain to those individuals, the focus of this report is on sexual orientation. Issues relating to transgender employees in the workplace are sufficiently different from those facing LGB employees as to require separate, focused research.

Study Purpose

The purpose of MSPB's inquiry was to:

- Review the evolution of Federal employment policy based on sexual orientation;
- Examine the perceptions of Federal employees of workplace treatment based on sexual orientation;
- Examine the perceptions of LGBT Federal employees of their workplace and how these perceptions differ, if at all, from perceptions of other employees; and
- Determine if further action is warranted to communicate or clarify Federal workplace protections from sexual orientation discrimination.

Findings

There are encouraging signs that the history of sexual orientation discrimination discussed in this report is being overcome. For example, LGBT employees appear to be represented in the supervisory, managerial, and executive ranks in the same proportion as they are in the overall Federal workforce. In addition, similar percentages of heterosexual and LGBT Federal employees agree that PPPs are not tolerated in the workplace.

Federal Employee Perceptions of Sexual Orientation Discrimination.

In a 2010 MSPB survey of Federal employees, three percent of respondents reported that sexual orientation discrimination had occurred in their workplace. This was a similar percentage of employees who perceived other PPP's had occurred including discrimination based on national origin or marital status and violations of veteran's preference laws. An additional one percent of respondents to the survey reported being the direct target of sexual orientation discrimination.

As we would expect, employees who perceived themselves to be the target of such discrimination were far less engaged in their work than other employees. Employees who perceived such discrimination had occurred but were not personally affected by the discrimination were also less engaged in their work than employees who did not believe such discrimination had occurred. That sexual orientation discrimination may affect individuals beyond the direct targets of such discrimination reinforces the importance of keeping the workplace free from this practice.

In response to the 2010 MSPB survey, 81 percent of supervisory respondents and 68 percent of non-supervisory respondents agreed that their organizations have made it clear that they prohibit sexual orientation discrimination. This means that almost one-fifth of supervisors and almost one-third of non-supervisors did not agree that their agencies have made it clear that they prohibit discrimination based on sexual orientation.

LGBT Federal Employee Perceptions of the Workplace.

OPM has previously reported that, according to 2012 FEVS results, LGBT Federal employee perceptions of the workplace are generally less positive than those of other employees. Our further analysis of 2012 FEVS data revealed that, in some agencies for at least some workplace issues LGBT employee perceptions were as positive about the workplace as those of their heterosexual colleagues. This suggests that agencies may be able to create more inclusive cultures, resulting in a more positive atmosphere in the workplace.

Recommendations

Although the interpretation that the tenth PPP prohibits sexual orientation discrimination in the Federal workplace has been generally accepted, it remains an interpretation. Any ambiguity in the longstanding policy prohibiting sexual orientation discrimination would be resolved by legislation making that prohibition explicit. Such legislation could grant Federal employees who allege they are victims of sexual orientation discrimination access to the same remedies as those who allege discrimination on other bases.

Given the differences we found in workplace perceptions between LGBT and heterosexual employees within different agencies, agencies should review their management programs, policies, and procedures to ensure that they are inclusive and fair to all employees. The disparity we found among different groups of employees regarding the extent to which they believe their organization has made it clear that it prohibits sexual orientation discrimination suggests that agencies can improve their communication of that prohibition to employees.

Historical Foundations: Discrimination to Accommodation

This chapter summarizes the institutionalized sexual orientation discrimination that Federal employees experienced in the past. We begin with this historical view to educate the Federal employees who may be unaware of this history. The following chapter outlines the steps that have been taken to correct these discriminatory employment policies.

Background

Although the public campaign against employing gays and lesbians in the Federal civil service during the 1950's and 1960's may be the best known example of sexual orientation discrimination in Federal employment, that era certainly was not the beginning of such discrimination. For instance, the founder of the earliest documented homosexual[2] rights organization in America was dismissed from the Post Office Department in 1925 for being homosexual.[3]

By the middle of the twentieth century, the Federal Government had long required its employees to be of good moral character—a standard that excluded known homosexuals,[4] who were commonly referred to during this period as "sexual perverts" or "moral perverts."[5] Homosexuality was classified as a mental disorder by the American Psychiatric Association until it was removed from its Diagnostic and Statistical Manual of Mental Disorders in 1973.[6]

[2] In this historical discussion, we use the term "homosexual" as it was the norm at the time and used by our many sources. In other chapters, we use the terms "LGBT," "lesbian," "gay," and "bisexual," as today "homosexual" is seen by some as an outdated term that, historically, was used to "pathologize" gay and lesbian individuals (University of California, Davis LGBT Resource Center Glossary at www.lgbtcenter.ucdavis.edu/lgbt-education/lgbtqia-glossary).

[3] Gregory B. Lewis, "Lifting the Ban on Gays in the Civil Service: Federal Policy Toward Gay and Lesbian Employees since the Cold War," *Public Administration Review*, September/October 1997, p. 387. This organization was the Society for Human Rights founded by Henry Gerber and chartered by the State of Illinois on December 10, 1924 (Jonathan Katz, *Gay American History—Lesbians and Gay Men in the U.S.A.*, Thomas Y. Crowell Company, New York, 1976, pp. 385-393; and St. Sukie de la Croix, *Chicago Whispers: A History of LGBT Chicago Before Stonewall*, The University of Wisconsin Press, Madison, 2012, pp. 82-84).

[4] Lewis, op. cit., p. 387.

[5] See, for example, David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government*, The University of Chicago Press, Chicago, 2006, p. 6.

[6] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 1952, pp. 38-39. In 1975, the American Psychological Association adopted a resolution supporting this change (J.J. Conger, "Proceedings of the American Psychological Association, Incorporated for the Year 1974: Minutes of the Annual Meeting of the Council of Representatives," *American Psychologist*, June 1975, pp. 620-651). Today, all major professional mental health organizations have affirmed that homosexuality is not a mental disorder (American Psychiatric Association website, www.psychiatry.org/lgbt-sexual-orientation).

In the 1950's, many highly-placed Government and political leaders of both major parties believed that sexual subversion paralleled political subversion. For example, in a 1950 newsletter, the Republican National Chairman asserted that "sexual perverts" who had infiltrated the Government were "perhaps as dangerous as the actual Communists." The Chairman said he was elevating the "homosexual angle" to the national political level partially due to the difficulties encountered by newspapers and other commentators "in adequately presenting the facts while respecting the decency of their American audience." If not for these difficulties, "the country would be more aroused over this tragic angle."[7]

Some officials believed the country was already very concerned. In July 1950, three of President Truman's top advisors warned him that the country was more concerned about homosexuals in the Federal civil service than about Communists.[8] Perhaps the country had been paying attention to the debates in Congress, where the issue was frequently discussed on both the House and Senate floors. The issue received so much Congressional attention that one Congressman commented, "I do not know what homosexuals are, but I never saw anybody get as much free advertising in the Congress of the United States in all of my life."[9]

Federal Bureau of Investigation (FBI) Director J. Edgar Hoover also associated communism with homosexuality. According to one historian, the connection seemed self-evident to Director Hoover—both Communists and homosexuals "had clandestine and compartmented lives. They inhabited secret underground communities. They used coded language. Hoover believed, as did his peers, that both were uniquely susceptible to sexual entrapment and blackmail by foreign intelligence services."[10]

These beliefs were undoubtedly fueled by the exposure of a Soviet spy ring within the British intelligence and diplomatic services in 1951. The five members of the ring had been recruited by the Soviet Union while they were either teachers or students at Cambridge University in the 1930's and had risen to important posts in the British Government during World War II. Some of the group were stationed in America with access to the Central Intelligence Agency (CIA) and the Pentagon. When the first two members of the ring were exposed, they were able to disappear behind the Iron Curtain. Two of the group were homosexual and one was bisexual.[11]

[7] "Perverts Called Government Peril," *The New York Times*, April 19, 1950, p. 25.

[8] Johnson, op. cit., p. 2.

[9] Id., p. 6. The Congressman was Representative George Christopher of Missouri.

[10] Tim Weiner, *Enemies: A History of the FBI*, Random House Trade Paperback, 2013, p. 175.

[11] Id., pp. 174-175. See also, Julian E. Barnes, "The Third Man," *U.S. News and World Report*, January 27-February 3, 2003, pp. 61-62; and Andrew Pierce and Stephen Adams, "Anthony Blunt: Confessions of Spy Who Passed Secrets to Russia During the War," *The Telegraph*, July 22, 2009. The members of the ring were Donald Maclean, Guy Burgess, John Cairncross, Kim Philby, and Anthony Blunt. Although two members of the group defected in 1951, suspicion was cast on the remaining members until the last of the group confessed to his involvement in 1964.

Consequently, anti-homosexual fervor was fed by the fear of Communism which laid the groundwork for the purges of homosexual employees within the Federal civilian service, beginning in earnest in 1950 and continuing throughout the Cold War.[12] Examples of the efforts of both the legislative and executive branches to rid the civil service of homosexuals are discussed below, as is the judicial response to those efforts. (See **Figure 1** for a timeline of the events that are discussed in this report.)

Legislative Investigation

The Subcommittee on Investigations, Senate Committee on Expenditures in the Executive Departments, released a report entitled *Employment of Homosexuals and Other Sex Perverts in Government*[13] in December 1950. That inquiry was spurred in part by the testimony of a State Department official earlier that year before a Senate appropriations subcommittee that 91 "sex perverts" had been allowed to resign from that Department in the previous 3 years.[14] The Subcommittee on Investigations was alarmed to discover that some of these employees had actually found employment with other Federal agencies.

The Subcommittee on Investigations had three objectives in launching their inquiry: (1) to determine the number of homosexuals and other "sex perverts" employed by the Government; (2) to consider reasons why homosexuals were unsuitable for employment; and (3) to examine whether the methods used to keep homosexuals out of Government jobs were effective.[15] The subcommittee findings in these three areas are summarized below.

Number of Homosexuals Employed.

At the time of the Subcommittee on Investigations' report, the U.S. Civil Service Commission (CSC) functioned as the centralized personnel management instrument of the Federal civilian service. CSC regulations had been in effect for many years providing that "criminal, infamous, dishonest, immoral or notoriously disgraceful conduct, which include[d] homosexuality, or other types of sex perversion," were sufficient grounds for denying appointment to, or removing individuals from, the Federal service.[16]

[12] Randolph W. Baxter, "'Homo-Hunting' in the Early Cold War: Senator Kenneth Wherry and the Homophobic Side of McCarthyism," *Nebraska History*, Fall 2003, p. 119.

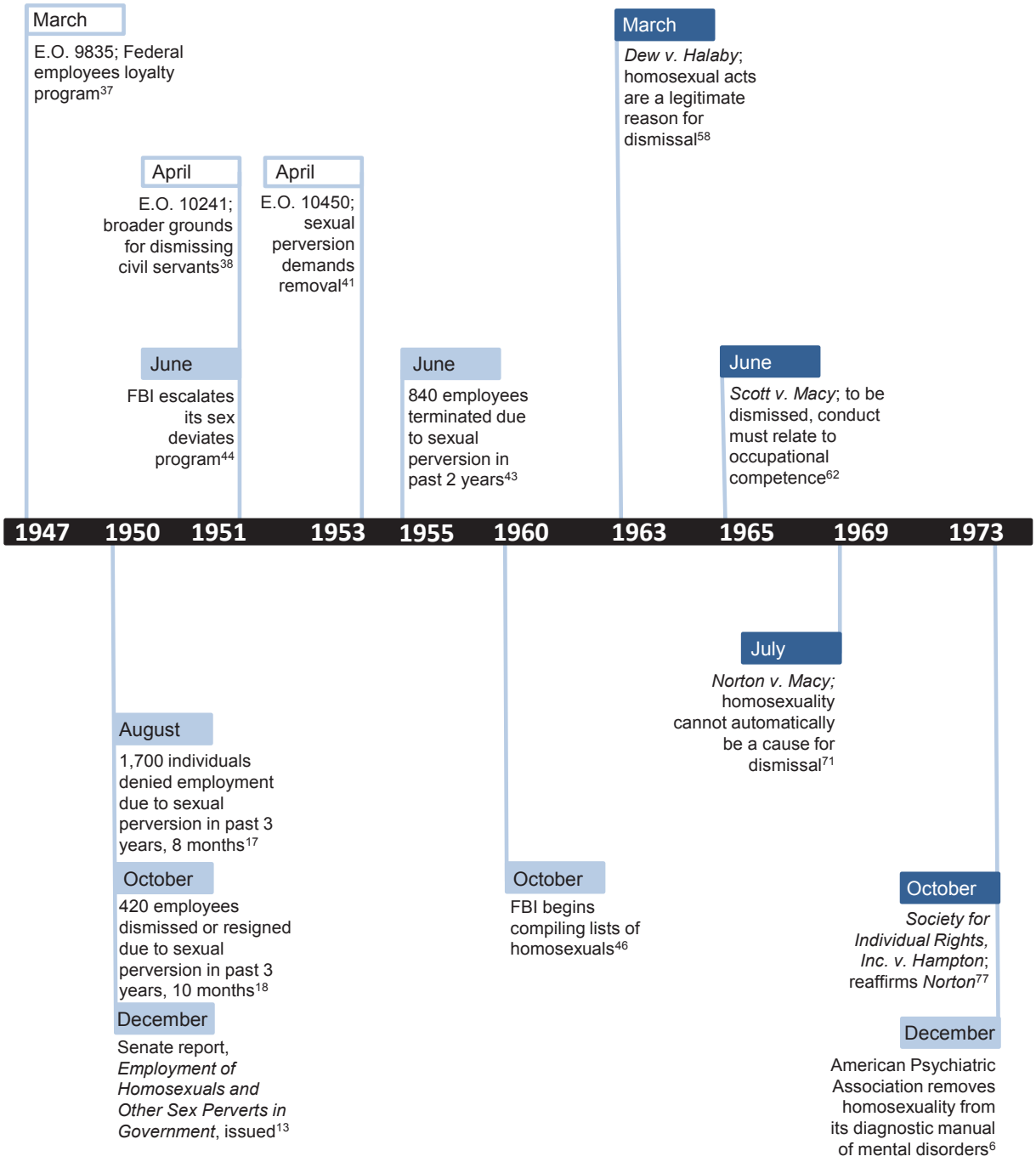
[13] S. Rep. No. 81-241 (1950).

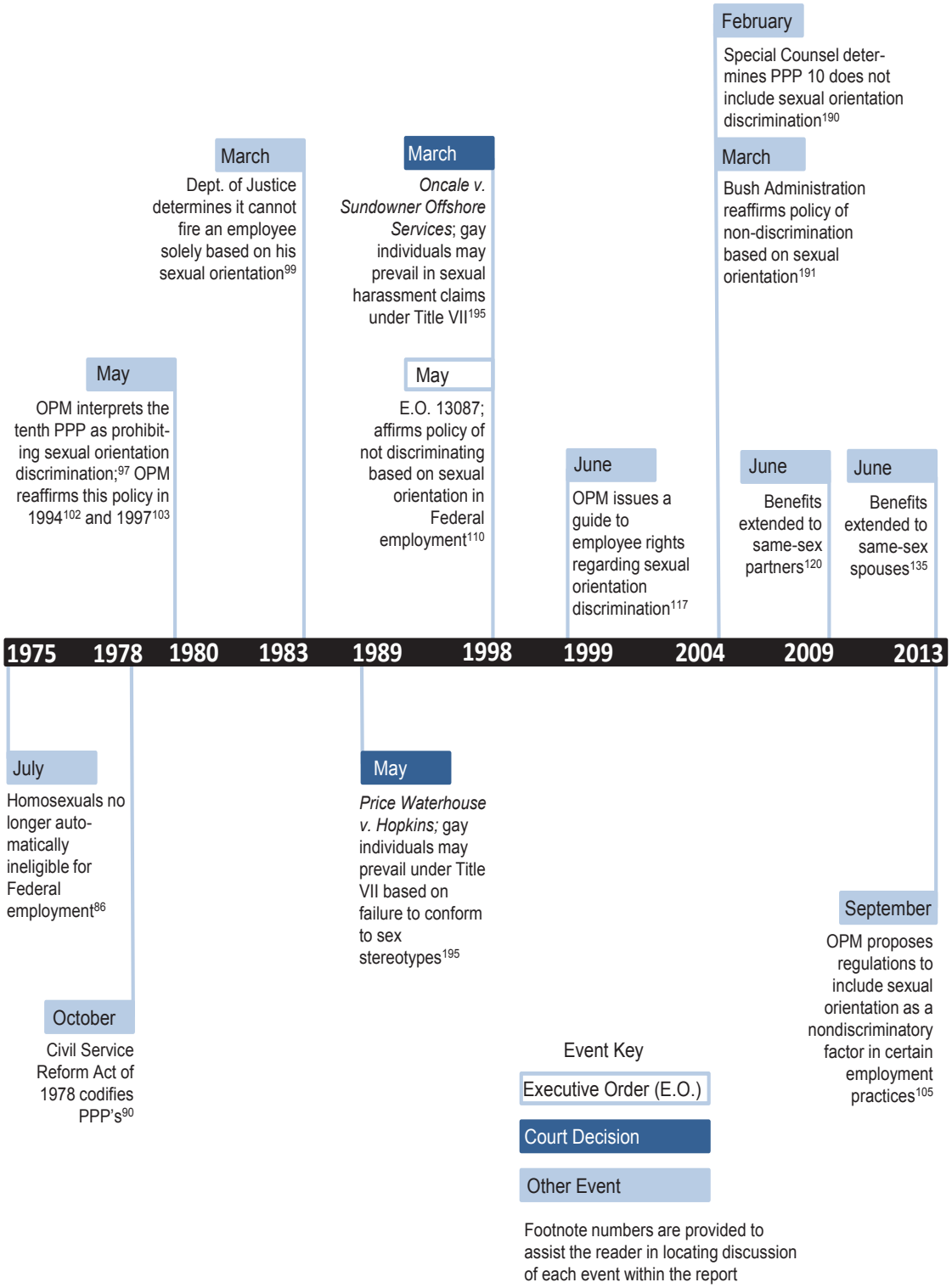
[14] Lewis, op. cit., p. 388. See also Johnson, op. cit., p. 17. Twenty-two of these 91 employees found employment in other agencies. Following these hearings, the U.S. Civil Service Commission initiated investigations on these 22 employees and obtained resignations in all but 1 case (Johnson, op. cit., p. 81).

[15] S. Rep. No. 81-241, op. cit., p. 1.

[16] Id., p. 8.

Figure 1. Timeline of major events discussed in this report.




February
Special Counsel determines PPP 10 does not include sexual orientation discrimination[190]
March
Bush Administration reaffirms policy of non-discrimination based on sexual orientation[191]
March
Dept. of Justice determines it cannot fire an employee solely based on his sexual orientation[99]
March
Oncale v. Sundowner Offshore Services; gay individuals may prevail in sexual harassment claims under Title VII[195]
May
OPM interprets the tenth PPP as prohibiting sexual orientation discrimination;[97] OPM reaffirms this policy in 1994[102] and 1997[103]
May
E.O. 13087; affirms policy of not discriminating based on sexual orientation in Federal employment[110]
June
OPM issues a guide to employee rights regarding sexual orientation discrimination[117]
June
Benefits extended to same-sex partners[120]
June
Benefits extended to same-sex spouses[135]
1975
1978
1980
1983
1989
1998
1999
2004
2009
2013
July
Homosexuals no longer automatically ineligible for Federal employment[86]
May
Price Waterhouse v. Hopkins; gay individuals may prevail under Title VII based on failure to conform to sex stereotypes[195]
October
Civil Service Reform Act of 1978 codifies PPP's[90]
September
OPM proposes regulations to include sexual orientation as a nondiscriminatory factor in certain employment practices[105]
Event Key
Executive Order (E.O.)
Court Decision
Other Event
Footnote numbers are provided to assist the reader in locating discussion of each event within the report

Based on these regulations, according to CSC records, the Subcommittee on Investigations inquiry revealed that between January 1947 and August 1950 approximately 1,700 applicants were denied Federal employment because they had a record of homosexuality or other "sex perversion."[17] In addition, from January 1947 through October 1950 civilian agencies handled 574 cases involving charges of homosexuality or other types of "sex perversion" among Federal employees. Of these 574 employees, 207 had been dismissed and 213 had resigned from Federal employment. The remainder of the cases were either pending or the charges were not substantiated.[18]

The subcommittee report took Federal agencies to task for not addressing the issue of homosexuals in the Federal service more proactively. Of the 574 cases mentioned above, only 192 arose in the 3 years prior to the widespread publicity given to the issue by the appropriations subcommittee in April 1950. In the 7 months after those hearings, 382 cases were handled. According to the subcommittee, "These figures clearly indicate[d] that many of the civilian agencies of the Government were either negligent or otherwise failed to discover many of the homosexuals in their employ until after this situation was brought to light as the result of Congressional action."[19]

Suitability of Homosexuals.

The Subcommittee on Investigations determined that "homosexuals and other sex perverts were not proper persons to be employed in Government for two reasons—first, they [were] generally unsuitable, and second, they constitute[d] security risks."[20] Much rhetoric revolved around the security risk it was believed that homosexuals posed to the Government. Experts testified before Congress that "moral perverts" were bad security risks because they were susceptible to blackmail due to the threat of exposure of their moral weakness.[21] Even absent security issues, the subcommittee report indicated it believed that homosexuals were inherently unsuitable for Federal employment.

In describing the unsuitability of homosexuals for Government employment, the Subcommittee on Investigations asserted that it was generally believed that those who engaged in acts of perversion lacked the emotional stability of other persons and those perversions weakened the moral fiber to such an extent that they were not suitable for positions of responsibility.[22] In addition, the subcommittee believed homosexuals tended to surround themselves with other homosexuals, and if such a person were to attain a position where he could influence hiring in the Federal service, "it is almost inevitable that he will attempt to place other homosexuals

[17] Id., p. 9.
[18] Id., pp. 7-8.
[19] Id., p. 8.
[20] Id., p. 3.
[21] Lewis, op. cit., p. 388.
[22] S. Rep. No. 81-241, op. cit., p. 4.

in Government jobs."[23] Finally, the subcommittee's investigation concluded that "perverts will frequently attempt to entice normal individuals to engage in perverted practices," and other employees should not be subjected to such influences while in Government service.[24] In short, "One homosexual can pollute a Government office."[25]

Some questioned whether homosexuals alone deserved this intense focus, given that many people could be deemed unsuitable for Federal service based either on security or general concerns. In a series of *New York Post* articles in July 1950, the Senate Minority Leader examined this topic. When told that some observers would consider promiscuous heterosexuals security risks, or that reckless gamblers or alcoholics might be entangled by blackmail, the Senator responded, "You can stretch the security risk further if you want to, but right now I want to start with the homosexuals. When we get through with them, then we'll see what comes next."[26]

Methods to Keep Homosexuals Out of the Civil Service.

According to the Subcommittee on Investigations, Federal agencies were not doing enough to remove "sex perverts" from the civil service for a variety of reasons. The subcommittee contended that agencies and personnel officers were acting without regard to the CSC rules, there was confusion about how such cases should be handled, and some officials actually condoned employing homosexuals, especially in cases where their activities were carried out in ways that did not result in public scandal or notoriety. It was the subcommittee's determination that officials who adopted this last viewpoint "based their conclusions on the false premise that what a Government employee did outside of the office on his own time, particularly if his actions did not involve his fellow employees or his work, was his own business."[27]

One of the CSC rules that agencies were apparently disregarding was the requirement that the real reason that an employee resigned or was dismissed be recorded in the employee's personnel file. Some agencies that fired or removed homosexuals concealed the fact that such persons were hired in the first place by not noting the real reason for their dismissal in the personnel file—nor did the agencies notify the CSC (as required) of the real reason for the dismissal. Thus, a homosexual might be forced out of one department but remain able to obtain employment in another. The subcommittee noted that the CSC had recently expanded its program of inspecting agency personnel files to prevent this type of violation.[28]

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[23] Id.

[24] Id.

[25] Id.

[26] Katz, op. cit., p. 96. The Senator was Kenneth Wherry of Nebraska who led the Senate appropriations subcommittee investigative effort referenced earlier in this chapter.

[27] S. Rep. No. 81-241, op. cit., p. 10.

[28] Id., pp. 10-11.

A method that the Subcommittee on Investigations identified as being underused in the effort to prevent the employment of homosexuals in the Federal Government was the use of police records to identify such persons. During the 1960's, 49 of the 50 States prohibited private, consensual homosexual activity—only Illinois allowed such conduct between adults.[29] The subcommittee noted that the FBI had recently obtained all available police records of persons charged with perverted sex offenses within the District of Columbia and furnished that information to the CSC. In addition, the FBI had begun furnishing to the CSC the criminal records of all persons arrested throughout the country on charges of sex perversion who were known to be Federal civil servants. The CSC then forwarded the information to the employing agencies and followed up with the agencies to determine what action had been taken in each case.[30]

The question of whether homosexual Federal employees were being dismissed solely for breaking laws is a difficult one. As we have seen, the major issues the subcommittee seemed to have with homosexual employees centered on security risk and general unsuitability—not law breaking. Criminal conduct was certainly a basis for disqualification from Federal employment, but the CSC applied this standard based on public mores. For example, as recently as 1969, the CSC declined to apply the standard to fornication and adultery because it believed a large portion of society did not regard these offenses as morally repugnant.[31] Likewise, the CSC investigated lesbianism less vigorously than male homosexuality because, in the CSC's opinion, the public found lesbianism considerably less repugnant.[32] In any event, Federal employees in Illinois (where homosexual acts between consenting adults had been decriminalized) were also disqualified from the civil service. Therefore, the fact that homosexual acts were criminalized does not seem to be the controlling factor that barred participants in such acts from Federal employment.[33]

Although the subcommittee report pointed out that the CSC and other Federal agencies were to follow certain procedures in removing "sex perverts" or other undesirable employees from the Federal service, the hysteria of the era is evident in one of its conclusions:

> There is no place in the United States Government for persons who violate the laws or the accepted standards of morality, or who otherwise bring disrepute to the Federal service by infamous or scandalous personal conduct. Such persons are not suitable for Government positions and in the case of doubt the American people are entitled to have errors of judgment on the part of their officials, if there must be errors, resolved on the side of caution.[34]

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[29] "Government Employment and the Homosexual (*Norton v. Macy, Morrison v. State Board of Education*)," *St. John's Law Review*, December 1970, p. 303. In 1961, Illinois became the first State to abandon its sodomy law when it adopted a comprehensive revision to its criminal code. That revision followed the 1955 recommendations of the American Law Institute, a group of distinguished law professors and lawyers (*Lawrence v. Texas*, 539 U.S. 558 (2003)).

[30] S. Rep. No. 81-241, op. cit., p. 13.

[31] "Government-Created Employment Disabilities of the Homosexual," *Harvard Law Review*, June 1969, p. 1742.

[32] Id.

[33] Id.

[34] S. Rep. No. 81-241, op. cit., p. 19.

Even though this particular investigation resulted only in a more efficient bureaucratic response and not additional legislation barring homosexuals from Federal employment does not mean that Congress never used the power of legislation to prod the bureaucratic efforts along. As early as 1946, Congress had attached what came to be known as "McCarran riders" to agency appropriations bills. This gave the heads of those agencies absolute discretion to dismiss any Federal employee if it was "deemed necessary in the interest of national security." Adding McCarran riders to some agency appropriations was specifically designed to help those agencies remove homosexuals.[35] In 1950 Congress extended this summary dismissal power to 11 Federal agencies and authorized the President to extend it further if he deemed necessary.[36]

Civil Service Policy

Pressure to rid the civil service of homosexuals also emanated from within the executive branch. In response to this pressure, efforts to purge homosexual employees increased with prominent roles played by the CSC and the FBI. A brief overview of these CSC and FBI efforts will be examined below, after a discussion of the executive orders that came to require those efforts.

Executive Orders.

The effort to weed disloyal or subversive persons out of the civil service began on March 21, 1947, when President Truman signed Executive Order 9835, *Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government*. This executive order prompted the largest Government investigation up to that point in American history. In implementing Executive Order 9835, the FBI ran background checks on more than two million Government employees. It launched deep investigations into the personal lives and political beliefs of more than 14,000 of those employees. The program would unearth no Soviet spies in the Government, but the hunt for the disloyal and subversive spread throughout the American political system.[37]

Under pressure from those in Congress who believed he was soft on Communists in the Government, President Truman issued Executive Order 10241 in April 1951, which made it easier to question a civil servant's loyalty, and thus easier to remove them.[38] Previously, under Executive Order 9835, to dismiss an individual, there had to be "reasonable grounds for belief that the person [was] disloyal." Under Executive Order 10241, there only had to be a "reasonable doubt" of loyalty. The earlier order implied the need for an official to have an

[35] Johnson, op. cit., pp. 83-84; quoting Senators Homer Ferguson of Michigan and Styles Bridges of New Hampshire and Congressmen John J. Rooney of New York and Arthur Miller of Nebraska.

[36] Id., p. 84.

[37] Weiner, op. cit., p. 149.

[38] Landon R. Y. Storrs, *The Second Red Scare and the Unmaking of the New Deal Left*, Princeton University Press, Princeton, 2013, p. 111. Executive Order 10241 was titled, *Amending Executive Order No. 9835 Entitled, "Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government."*

actual belief of disloyalty, while the latter order only required some doubt, without that doubt rising to the level of belief.[39] Nearly 3,000 Federal employees who had been cleared under the old standard had their cases reopened as a result of this new standard.[40]

Two years later, President Eisenhower instituted a stringent standard for retention in Executive Order 10450, *Security Requirements for Government Employees*, which he signed on April 27, 1953. He ordered that the Federal Government could only employ and retain employees when it was "clearly consistent with the interests of national security." Executive Order 10450 also, for the first time, listed sexual perversion as a condition that demanded removal from the Federal service.[41] During the first year that Executive Order 10450 was in effect, 618 civil servants were terminated or resigned in accordance with its requirements due to sex perversion.[42] An additional 222 Federal employees were terminated or resigned due to sex perversion during the second year that the executive order was in effect.[43]

Federal Bureau of Investigation Activities.

To deal with the perceived threat that homosexuals posed to the Government, the FBI escalated its Sex Deviates Program in mid-1951. As part of this program, the FBI contacted universities and police departments across the country to alert them to the subversive homosexual threat. They sought to drive "homosexuals from every institution of government, higher learning, and law enforcement in the nation. The FBI's files on American homosexuals grew to 300,000 pages over the next 25 years before they were destroyed."[44]

At an October 1960 National Security Council meeting, President Eisenhower spent almost an hour discussing with Director Hoover how the Government could be cleansed of the homosexual threat once and for all. The meeting followed closely on the heels of the defection of two National Security Agency (NSA) code breakers to the Soviet Union. The code breakers were rumored to be homosexuals—an assumption that was unsupported by NSA records declassified 50 years later. At the meeting, it was agreed that the FBI would develop and maintain a central list of homosexuals against which inquiries could be directed concerning current Government employees or individuals who might apply for Government jobs.[45]

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[39] Compare Executive Order 9835 Part V ("The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for *belief that the person involved is disloyal* to the Government of the United States.") with Executive Order 10241 ("The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, there is a *reasonable doubt as to the loyalty of the person* involved to the Government of the United States."). (Italics added.)

[40] Storrs, op. cit., p. 111.

[41] Lewis, op. cit., p. 389.

[42] The actual period of time covered was May 28, 1953, through June 30, 1954. U.S. Civil Service Commission, *1954 Annual Report*, Washington, D.C., 1954, p. 135.

[43] Terminations or resignations for sex perversion totaled 840 for the time period May 28, 1953, through June 30, 1955. "Risk Dismissals are Put at 3,614," *The New York Times*, September 27, 1955, p. 30.

[44] Weiner, op. cit., pp. 175-176.

[45] Id., pp. 213-214.

Even though the Sex Deviates Program collected information about homosexuals and Executive Order 10450 banned homosexuals from Federal service, equating this "sexual perversion" with membership in the Communist Party, sabotage, espionage, mental illness, and drug addiction as behaviors constituting dangers to national security, there had never before been a central list at the FBI of American homosexuals. Now there was.[46]

U.S. Civil Service Commission Policies.

CSC policy regarding the suitability of homosexuals for Federal employment echoed the findings of the Senate Subcommittee on Investigations. Throughout the 1960's, the application for Federal employment asked all applicants, "Have you ever had, or have you now, homosexual tendencies?"[47] Suitability determinations seemed to hinge on how notorious the CSC believed the homosexual conduct under question was. In 1966, the Chairman of the CSC stated its policy for determining suitability for employment:

> Persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts with them, without evidence of rehabilitation, are not suitable for Federal employment. In acting on such cases the Commission will consider arrest records, court records, or records of conviction for some form of homosexual conduct or sexual perversion; or medical evidence, admissions, or other credible information that the individual has engaged in or solicited others to engage in such acts with him. Evidence showing that a person has homosexual tendencies, standing alone, is insufficient to support a rating of unsuitability on the ground of immoral conduct.[48]

The Chairman also stated that determinations of suitability for employment encompassed the total impact that an applicant had on the job. Among the pertinent considerations regarding the suitability of homosexuals were the revulsion of other employees by homosexual conduct and the resulting disruption of service efficiency; the apprehension of other employees of homosexual advances or assaults; the offense to members of the public who were required to transact business with known "sexual deviates;" the possibility that Government offices would be used to foster homosexual activity, particularly among the youth; and that Government funds or authority would be used to further conduct that was offensive to both the mores and laws of society.[49]

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[46] Id., pp. 214-215.

[47] Johnson, op. cit., pp. 196. This question was asked on the Report of Medical History (Standard Form 89) portion of the application for employment.

[48] Letter from John W. Macy, Jr., Chairman, U.S. Civil Service Commission, to The Mattachine Society of Washington, (Feb. 25, 1966), p. 1. As cited in *Perry v. Schwarzenegger*, 704 F.Supp. 2d 921, 1004 (N.D. Cal. 2010) and accessed at www.kamenypapers.org.

[49] Id., p. 2.

The CSC, the Chairman asserted, applied the standard against criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct uniformly to all suitability investigations. That is, as long as sexual behavior among consenting adults remained truly private, it was not the subject of an inquiry.[50] If an applicant's sexual behavior, be it homosexual or heterosexual, became public by any means, however, an inquiry into suitability could be warranted.[51] If, for example, an applicant for employment proclaimed that he engaged in homosexual conduct, the CSC would be required to find him unsuitable for Federal employment.[52] "The same would be true of an avowed adulterer, or one who engages in incest, illegal fornication, prostitution, or other sexual acts which are criminal and offensive to our mores and our general sense of propriety."[53] It is ironic that when "once their secretiveness had made homosexuals potential blackmail victims, now their very openness created a danger."[54]

The CSC's Director of Personnel Investigations stated in a 1969 interview that homosexual employees had never been found to be less efficient than their heterosexual counterparts. Their exclusion from employment was because many people continued to regard the presence of homosexual employees in the civil service as repugnant and the CSC disqualified them to retain public confidence. That official predicted, however, that there might come a time when the general public might view homosexuals without repugnance—then, and only then, would the CSC admit homosexuals to the civil service.[55]

Judicial Response

During the 1950's, the courts followed the doctrine that "since Federal employment was not a right, the Government could impose essentially any conditions it chose on that employment."[56] Veterans who happened to be homosexuals had an additional protection in that they could not be dismissed unless their dismissal promoted the efficiency of the service. The courts typically gave great deference to Federal Government agencies in determining exactly what promoted or harmed efficiency.[57]

For example, in *Dew v. Halaby*,[58] the U.S. Court of Appeals for the District of Columbia Circuit upheld the dismissal of a veteran who had worked as an air traffic controller for almost 2 years before the agency discovered evidence of prior specific homosexual acts—in the files of

[50] Id., p. 3.
[51] Id.
[52] Id.
[53] Id.
[54] Johnson, op. cit., p. 204.
[55] *Harvard Law Review*, op. cit., pp. 1741-1742.
[56] Lewis, op. cit., p. 391.
[57] Id.
[58] 317 F.2d 582 (D.C. Cir. 1963).

an earlier CIA security clearance investigation. Dew was allowed to resign from the CIA, after which he received an appointment with the Civil Aeronautics Board. The acts for which Dew was dismissed occurred 8 years prior to his removal—when he was 18 or 19 years old.[59]

The Board of Appeals and Review of the CSC concurred with Dew's removal, reasoning that it was in the public interest and promoted the efficiency of the service to remove "employees who have committed such acts and who would not have been selected for appointment had the facts been known prior to appointment."[60] The Appeals Examiner observed that even though it is possible that Dew's "homosexual acts might have no relation to his competence and ability to perform the duties of his position…To require employees to work with persons who have committed acts that are repugnant to the established and accepted standards of decency and morality can only have a disrupting effect upon the morals and efficiency of any organization."[61] The District of Columbia Circuit Court agreed with this assessment.

By 1965, however, at least one court had begun to rethink the latitude that the Government had in proscribing who was and who was not suitable for employment. In *Scott v. Macy*,[62] the District of Columbia Circuit Court found that, "It does not at all follow that because the Constitution does not guarantee a right to public employment, [the Government] may resort to any scheme for keeping people out of such employment…One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law."[63]

Scott had completed a Federal civil service examination and was notified that he had qualified for certain positions subject to further investigation. During this investigation, Scott refused to comment on information in the CSC's possession that indicated he was a homosexual, stating the issue was not pertinent to his job performance. Subsequently, the CSC disqualified Scott for employment for immoral conduct. Scott requested specification of how, when, and where he had conducted himself immorally in order to answer the broad allegation of "immoral conduct." The Board of Appeals and Review of the CSC responded only that "the record disclosed convincing evidence that you have engaged in homosexual conduct, which is considered contrary to generally-recognized and accepted standards of morality."[64]

The District of Columbia Circuit Court ruled that by excluding Scott from the vast field of Federal employment due to an "immoral conduct" charge, the CSC had also stigmatized him in such a way as to jeopardize his ability to find employment elsewhere. The CSC "must at

[59] Id. at 583.

[60] Id. at 587.

[61] Id.

[62] 349 F.2d 182 (D.C. Cir. 1965).

[63] Id. at 183.

[64] Id. at 182-183.

least specify the conduct it finds 'immoral' and state why that conduct related to 'occupational competence or fitness.'"[65] Although the Court ruled for Scott in this instance, the ruling did not preclude the CSC from excluding Scott from eligibility for employment based on some more specific grounds rather than the vague finding of "immoral conduct."[66]

The CSC attempted to do just that—by disqualifying Scott from consideration for employment for his refusal to give testimony in response to the issue of his alleged homosexuality. Scott once again appealed to the District of Columbia Circuit Court, which again ruled in his favor. The majority of the Court was unconvinced that his failure to give testimony—and not his alleged homosexuality—was the reason that the CSC actually disqualified Scott.[67] The Court's decision restored Scott to his original status, as one eligible to be considered for Federal employment.[68]

In its decision, the Court commented on the CSC rules and regulations governing the suitability of homosexuals for public service. The Court found at least three inconsistencies with the CSC's policy that homosexuals were not suitable for Federal employment. First, it appeared to the Court that any homosexual act or solicitation was disqualifying except if one abandoned the practice at some point. Second, in appraising an applicant's conduct, the CSC included a number of pertinent considerations, including "the total impact of the applicant upon the job," which, to the Court, seemed consistent not only with past but also with present and continuing homosexual acts. Finally, the Court noted that the CSC stated that:

> such acts, even though wholly private in nature, are contrary to the criminal laws in virtually all jurisdictions, and that, of necessity therefore, they must be considered to be "immoral conduct." Under this last, it would appear that the only relevant consideration, as contrasted with those which have just been enumerated, is whether an applicant has been or is now committing homosexual acts. The [CSC] then is at some pains to deny that it either does, or can, inquire into private sexual conduct. In its words, "as long as it remains truly private, that is, it remains undisclosed to all but the participants, it is not the subject of an inquiry." But where for some reason it attracts public notice, the [CSC] will ask, and presumably will disqualify, if either there is a refusal to respond or an admission of a homosexual act. Qualification for Federal employment thus appears to turn not upon whether one is a law violator but whether one gets caught.[69]

[65] Id. at 184-185.

[66] Id. at 185.

[67] *Scott v. Macy*, 402 F.2d 644, 647 (D.C. Cir. 1968).

[68] Id. at 645.

[69] Id. at 649.

The CSC policy regarding the suitability of this one type of law breaker seemed to conflict with the way it viewed violations of criminal law in general. That is, to determine suitability, the CSC took into account a variety of matters concerning the law breaking, including the nature and seriousness of the offense, how long ago it occurred, whether it was an isolated or repeat offense, the age of the offender at the time, and the type of position for which the person was applying. "Accordingly, after all the facts [had] been gathered and evaluated, if the applicant [was] considered a good risk offender, his application [would] be rated eligible."[70]

In 1969 the District of Columbia Circuit Court ruled in *Norton v. Macy*[71] that, because it found no reasonable connection between the evidence presented of Norton's alleged homosexual acts and the efficiency of the service, Norton (who was a veteran) had been unlawfully discharged.[72] The mere fact that an employee was a homosexual or had participated in homosexual acts was no longer presumed to automatically harm the efficiency of the service. The Court found that the "notion that it could be an appropriate function of the Federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity."[73] The Court found, however, that there were still a number of ways homosexual conduct might affect the efficiency of the service, including the potential for blackmail, especially where classified information was involved. Moreover, homosexuality "may in some circumstances be evidence of an unstable personality unsuited for certain kinds of work." In addition, according to the Court, if an employee were to make offensive overtures on the job or if his conduct was notorious, the reaction of other employees or the public would be at least broadly relevant to the efficiency of the service.[74]

The decision in *Norton* had little immediate effect on either the CSC or other courts, as both continued to find a routine connection between homosexuality and harm to the efficiency of the service.[75] The CSC complained that the *Norton* decision had placed an "unwarranted burden on the executive branch" by requiring it to prove a connection between employees' off-duty conduct and their Government duties.[76] It was not until 1973 that a class action suit (*Society for Individual Rights, Inc. v. Hampton*)[77] provided the impetus for CSC policies to change. In that case, the U. S. District Court for the Northern District of California followed the holding in *Norton* that employees who were discharged solely because they were homosexuals were discharged improperly.[78] The Court rejected the CSC's view that employing such persons

[70] Id. U.S. Civil Service Commission Federal Personnel Manual System, Section 2-4(a) (2), Inst. 85, Jan. 27, 1967; as referenced in the decision.

[71] 417 F.2d 1161 (D.C. Cir. 1969).

[72] Id. at 1162.

[73] Id. at 1165.

[74] Id. at 1166.

[75] Lewis, op. cit., p. 392.

[76] Johnson, op. cit., p. 209.

[77] 63 F.R.D. 399 (N.D. Cal. 1973), *aff'd on other grounds*, 528 F.2d 905 (9th Cir. 1975).

[78] Id. at 400.

would bring the Government service into "public contempt." The Court held that neither the CSC nor its Board of Appeals and Review had even tried to meet the standard for dismissal set forth in *Norton*—that an employee could only be dismissed for immoral behavior if the behavior actually impaired the efficiency of the service.[79]

There are few reliable figures regarding the number of employees dismissed from, or applicants denied entry to, Federal employment due to their homosexuality beyond those presented in this chapter. One estimate places the number of real or suspected homosexuals who lost their civil service jobs in the 1950's between 7,000 and 10,000.[80] It is unlikely that we will ever know how many people were affected by these policies.[81] In *Society for Individual Rights, Inc.*, the CSC was asked to disclose the number of persons who had been discharged annually from the Federal service solely on the grounds of homosexual conduct. The CSC declined to provide that number, claiming that the request was "burdensome and oppressive." The Court interpreted this response to mean that the number of persons discharged on this basis per year was so large that it would be burdensome and oppressive to count them in order to answer what the Court believed to be a proper interrogatory.[82]

[79] Id. at 401. For an example of the separation of an employee based on off-duty misconduct that adversely affected the efficiency of the service being upheld, see *Brown v. Department of the Navy*, 229 F.3d 1356 (Fed. Cir. 2000).

[80] Baxter, op. cit., p. 128.

[81] Lewis, op. cit., p. 389.

[82] *Society*, 63 F.R.D. at 402.

Steps Toward Inclusion

The changing posture of the courts concerning the employment of homosexuals in the Federal Government paralleled what the CSC perceived as a gradual change in public attitudes. For example, in a 1971 editorial, *The Washington Post* observed that the barring of homosexuals from sensitive Federal jobs due to the fear of blackmail had often been a pretext for denying them employment. Homosexuals had valuable gifts and insights to bring to Federal employment, the editorial continued, so their persecution was as senseless as it was unjust. Private sexual behavior was none of the Government's business as long as it did not affect an employee's independence and reliability, and, like anyone else, homosexuals had "a right to privacy, a right to opportunity, and a right to serve their country."[83]

Changes in CSC hiring policies regarding sexual orientation that occurred in the 1970's are described below. Subsequent developments in Federal employment policies (also discussed below) included protections afforded employees under the PPPs codified in 1978, a 1998 executive order affirming the Federal policy of not discriminating based on sexual orientation, and recent changes to expand the availability of certain benefits to the same-sex domestic partners and spouses of Federal employees.

Change in Civil Service Policy

As the opinions of the courts began to change in the late 1960's and into the 1970's, the CSC moved to change its policies regarding hiring homosexual individuals. The CSC noted, however, that although public attitudes about what consenting adults did in private were changing, Federal employees did not have the right to debauch their fellow workers, debase their agencies, or bring disgrace to the Government.[84]

In 1971 the CSC observed that the emergence in the law of protections for private conduct protected people who would have been terminated for that same conduct just a few years before. The CSC harkened back to a time when "'living in sin' was widely considered to be exactly that. Employers didn't approve of it at all—it was bad for the organization's reputation—and employees who got caught got out, on request, more or less as a matter of course. Things are different now." The CSC warned, however, that these changes in attitudes or opinions did "not mean that indiscreet, promiscuous, notorious, criminal, or illegal conduct will not support disciplinary actions. It will and does."[85]

[83] "Fairness for Homosexuals," *The Washington Post*, February 2, 1971, p. A14.

[84] U.S. Civil Service Commission, *Challenge and Change: 85th Annual Report*, Washington, D.C., 1968, p. 38.

[85] U.S. Civil Service Commission, *A Pace Setting Year for Personnel Management: 88th Annual Report*, Washington, D.C., 1971, pp. 48-49.

It was not until July 1975 that the CSC announced a new approach to determining the suitability of homosexual applicants for Federal employment. The CSC stated that the new guidelines were a significant change from past policies and were a result of court decisions requiring that persons not be disqualified from Federal employment based solely on homosexual conduct. The new guidelines applied the same standards to evaluating sexual conduct, whether heterosexual or homosexual. Although applicants could no longer "be found unsuitable based on unsubstantiated conclusions concerning possible embarrassment for the Federal service, a person may be dismissed or found unsuitable where the evidence exists that sexual conduct affects job fitness."[86]

This change in policy was not absolute, however—the CIA and FBI were exempted from its requirements. Even with this limitation, at least one observer pointed out that the greatest impact of the new guidelines was likely to be the influence they had on other employers, both public and private, across the country.[87]

Prohibited Personnel Practices

On October 13, 1978, President Carter signed into law the Civil Service Reform Act (CSRA) of 1978.[88] The CSRA was the first major overhaul of the Federal personnel system since the creation of the CSC almost 100 years earlier.[89] For the first time, the CSRA codified a set of Merit System Principles (MSPs). Federal personnel management would henceforth be administered in accordance with these MSPs. In addition, the CSRA statutorily defined 11 PPPs that, if not avoided, would undermine the integrity of the merit system.[90]

The Tenth Prohibited Personnel Practice.

One PPP enumerated by the CSRA was a prohibition on discriminating against Federal employees or applicants for conduct which was not directly related to their job duties. The tenth PPP states:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority… discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing

[86] "Homosexual Hiring is Revised by U.S.," *The New York Times*, July 4, 1975, p. 45.

[87] "Shedding Blinders," *The New York Times*, July 16, 1975, p. 36.

[88] Pub. L. No. 95-454, 92 Stat. 1111.

[89] Office of Special Counsel, U.S. Merit Systems Protection Board, *Protecting the Integrity of the Merit System: A Legislative History of the Merit System Principles, Prohibited Personnel Practices and the Office of the Special Counsel*, 1985, p. vii.

[90] Two additional PPPs have since been defined, one by the Veterans Employment Opportunity Act of 1998 (Pub. L. No. 105-339, 112 Stat. 3182) and one by the Whistleblower Protection Enhancement Act of 2012 (Pub. L. No. 112-199, 126 Stat. 1465).

> in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States.[91]

Neither the Administration's original version of the bill nor the Senate's version included this particular PPP—the House of Representatives amended the bill to add it. A conference report that explained how the differing Senate and House versions of the bill were reconciled noted that, as with conduct, convictions that had no bearing on an employee's or applicant's duties or performance could not be the basis for discrimination.[92] The original House version of the tenth PPP defined only certain types of convictions that could be considered in determining suitability or fitness—those for any crime of violence or moral turpitude.[93] Thus, as first drafted, the only convictions that could be taken into account when determining fitness or suitability were those for violent offenses or for a wide range of offenses that might include homosexuality.[94] The language in the bill was changed from "any crime of violence or moral turpitude" to "any crime" by the conference committee.[95]

The CSRA also altered the structure of the administration of Federal civilian personnel management. It abolished the CSC and designated the newly created MSPB as its successor agency. The CSRA transferred most of the original functions of the CSC to the newly created OPM.[96] MSPB retained only those functions of the former CSC relating to hearing and adjudicating employee appeals. The CSRA established an Office of Special Counsel (OSC) within MSPB to operate as its independent investigative and prosecutorial arm. The 1989 Whistleblower Protection Act made OSC an independent agency created to receive, investigate, and prosecute allegations of PPPs.

After passage of the CSRA and the enumeration of the PPPs, OPM Director Alan K. Campbell issued a memorandum which affirmed that Federal employees were prohibited from discriminating based on conduct that did not adversely affect job performance. That 1980 memorandum stated that Federal employees or applicants for employment were protected from actions based on or inquiries into matters such as religious, community, or social affiliations or sexual orientation.[97] The tenth PPP and OPM's interpretation of that PPP to bar sexual orientation discrimination rejected the Subcommittee on Investigations' earlier conclusion that it was a "false premise that what a Government employee did outside of the office on his own time, particularly if his actions did not involve his fellow employees or his work, was his own business."[98]

[91] 5 U.S.C. § 2302(b)(10).

[92] S. Rep. No. 95-1272, p. 131 (1978) (Conf. Rep.).

[93] H.R. 11280 95th Cong. (1978), § 2302(b)(10).

[94] See for example: Margot Canady, "'Who is a Homosexual?' The Consolidation of Sexual Identities in Mid-Twentieth-Century American Immigration Law," *Law and Social Inquiry*, Spring 2003, p. 359.

[95] S. Rep. No. 95-1272, op. cit., p. 131.

[96] Office of the Special Counsel, op. cit., p. 121.

[97] Lewis, op. cit., p. 393.

[98] S. Rep. No. 81-241, op. cit., p. 10.

An early example of an agency arriving at a similar conclusion for its internal operations occurred at the U.S. Department of Justice in March 1983. At that time, the Assistant Attorney General for Legal Counsel issued a memorandum opinion stating that an Assistant United States Attorney (AUSA) "may not be terminated solely on the basis of his homosexuality, in the absence of a reasonable showing that his homosexuality has adversely affected his job performance."[99] The opinion noted that the authority to remove the AUSA was limited, in part, by the tenth PPP,[100] and that it was doubtful that a nexus could be demonstrated between the AUSA's homosexuality and his job performance because the AUSA had consistently received superior performance ratings.[101]

In 1994 Director James B. King reiterated OPM's policy stance, writing that "OPM has long taken the position that [the tenth PPP] applies directly to discrimination on the basis of sexual orientation."[102] In 1997 OPM again advised agencies that Federal employees were protected against actions taken for non-job related conduct including sexual orientation. OPM recommended that agencies issue a strong management statement that clearly defined this policy, communicate to employees the avenues of redress available if they believed they were subject to discriminatory actions, and review this policy in orientation sessions for new employees.[103]

Federal employees or applicants who believe they have been the subject of a PPP, including sexual orientation discrimination, can file a complaint with OSC. OSC examiners determine whether such complaints contain evidence of a prohibited activity warranting further inquiry. If OSC investigators find sufficient evidence to prove a violation, OSC can seek corrective action, disciplinary action, or both. If OSC is unable to obtain corrective action voluntarily, it may also be obtained by OSC through litigation before MSPB.[104]

In 2013, as a part of its ongoing retrospective analysis of existing regulations, OPM proposed changes to certain nondiscriminatory provisions found in Title 5 of the Code of Federal Regulations.[105] These proposed changes were based partly on OPM's interpretation of 5 U.S.C. § 2302(b)(10) to update and provide consistency among various nondiscrimination provisions. The proposed regulations would include sexual orientation as a nondiscriminatory factor in

[99] Theodore B. Olson, "Termination of an Assistant United States Attorney on Grounds Related to His Acknowledged Homosexuality," *Opinions of the Office of Legal Counsel of the United States Department of Justice*, Volume 7, 1983, p. 46.

[100] Id., p. 47.

[101] Id., p. 46.

[102] Lewis, op. cit., p. 393.

[103] Rosalie A. Cameron Memorandum for Directors of Personnel, "Policy Statement on Discrimination on the Basis of Conduct Which Does Not Adversely Affect the Performance of Employees or Applicants for Employment," March 10, 1997.

[104] 5 U.S.C. § 1214(b) and (h). See also OSC Form 53 (March 2008). For an example of such a complaint, see OSC Press Release PR03 13, "U.S. Office of Special Counsel Secures Corrective and Disciplinary Action in Case of Federal Job Applicant Denied Job Because of His Homosexuality," June 20, 2003. Accessed at www.osc.gov.

[105] Nondiscrimination Provisions (Proposed rule), 78 Fed. Reg. 54,434 (September 4, 2013).

competitive Federal employment practices, agency merit promotion programs, the selection of Federal employees for training and to receive student loan repayments, and in the operation of merit personnel systems in accordance with the Intergovernmental Personnel Act of 1970. The changes would provide uniform nondiscrimination provisions to the extent permitted by law and, as such, would provide no new avenues of redress for allegations of discrimination.

The Twelfth Prohibited Personnel Practice.

Regarding what is today the twelfth PPP, the Senate report for S. 2640, which became the CSRA, stated that the PPP prohibits:[106]

> [A]ny other action which violates any law rule, or regulation implementing, or relating to, the merit system principles constitutes a prohibited personnel practice. This provision was added by the committee in order to make unlawful those actions which are inconsistent with merit system principles, but which do not fall within the [other] categories of personnel practices. Such actions may lead to appropriate discipline. For example, should a supervisor take action against an employee or applicant, without having proper regard for the individual's privacy or constitutional rights, such an action could result in dismissal, fine, reprimand, or other discipline for the supervisor.[107]

OSC has interpreted the twelfth PPP as protecting an employee from adverse actions if such actions are taken because the employee exercised a constitutional right. In *Special Counsel v. Lynn*, OSC sought disciplinary action against two Department of Agriculture officials under 5 U.S.C. § 2302(b)(10) and (12) for proposing and deciding to remove an employee for exercising his First Amendment rights. MSPB ultimately dismissed the complaint at OSC's request because the employing agency implemented discipline on its own, rendering any OSC action duplicative.[108]

The recognition of constitutional rights regarding sexual orientation has evolved since passage of the CSRA and now includes the right to engage in sexual conduct with members of the same sex.[109] Thus, in addition to the tenth PPP, the twelfth PPP may also be pertinent to the rights of lesbian, gay, and bisexual Federal employees.

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[106] 5 U.S.C. § 2302(b)(12).

[107] S. Rep. 95-969, pp. 22-23 (1978 U.S.C.C.A.N. 2723, 2745).

[108] *Special Counsel v. Lynn*, 29 M.S.P.R. 666, 668-670 (1986). At the time of this case, what is now 5 U.S.C. § 2302(b)(12) was numbered (b)(11).

[109] See *Lawrence*, 539 U.S. at 567 (holding that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."). MSPB has not yet received a case in which the constitutional right to such private conduct has been raised with respect to 5 U.S.C. § 2302(b)(12).

Executive Order 13087

On May 28, 1998, President Clinton signed Executive Order 13087, *Further Amendment to Executive Order 11478, Equal Employment Opportunity in the Federal Government*, the first executive order to state the policy of non-discrimination based on sexual orientation in Federal employment.[110] By 1998 most individual Federal agencies had issued policies that prohibited such discrimination.[111] The executive order provided a uniform policy by adding sexual orientation to the list of categories for which discrimination in Federal employment was prohibited (e.g., race, color, religion, sex, national origin, disability, and age).[112]

Executive Order 13087 set the stage for positive action by all units of the Federal Government to ensure that the Federal workplace was free from sexual orientation discrimination.[113] It did not, however, establish enforceable rights or remedies for employees who believed they had been discriminated against, such as the ability to proceed before the Equal Employment Opportunity Commission (EEOC). Those rights can only be granted through legislation.[114] To underscore this point, President Clinton issued another executive order in May 2000, amending Executive Order 11478 by stating that no rights or benefits were conferred "enforceable in law or equity against the United States or its representatives."[115] Although some agencies have developed parallel equal employment opportunity (EEO) complaint procedures that allow Federal employees to file EEO complaints based on allegations of sexual orientation discrimination within their agencies,[116] as noted, such complaints cannot proceed on that basis before EEOC.

In June 1999 OPM Director Janice R. Lachance issued guidance to agencies entitled *Addressing Sexual Orientation Discrimination in Federal Civilian Employment—A Guide to Employees' Rights*. This guidance discussed Executive Order 13087 and gave Federal employees information on how they could obtain assistance if they believed they had been discriminated against based on their sexual orientation. The avenues OPM reviewed for such assistance were rooted in 5 U.S.C. § 2302(b)(10) and mirror those discussed in this chapter.[117]

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[110] An earlier executive order signed by President Clinton barred denying security clearances to Federal employees or contractors based solely on their sexual orientation. See Executive Order 12968, *Access to Classified Information,* August 2, 1995.

[111] Statement on Signing an Executive Order on Equal Employment Opportunity in the Federal Government, 34 Weekly Comp. Pres. Docs. 994 (May 28, 1998).

[112] As provided for by Executive Order 11478, August 8, 1969.

[113] Equal Employment Opportunity Commission Fact Sheet FSE/16, *Discrimination Based on Sexual Orientation, Status as a Parent, Marital Status and Political Affiliation*, accessed at www.eeoc.gov/eeoc/publications/index.cfm.

[114] Statement on Signing an Executive Order on Equal Employment Opportunity in the Federal Government, op. cit.

[115] Executive Order 13152, *Further Amendment to Executive Order 11478, Equal Employment Opportunity in Federal Government*, May 2, 2000.

[116] Equal Employment Opportunity Commission Fact Sheet FSE/16, op. cit.

[117] Accessed at www.chcoc.gov/transmittals.

Federal Employee Benefit Programs

In 2007 the first Senate-confirmed openly gay United States ambassador resigned his post because he believed the principles of equality that his country promoted abroad were not being implemented at home. The ambassador's partner was not eligible for training that the State Department provided to ambassadorial spouses, the department did not bear the cost of his partner's transportation to his placements abroad, and his partner did not receive other benefits and allowances given to spouses of other ambassadors.[118]

In June 2009, President Obama issued a memorandum intended to address the conditions the ambassador cited as reasons for his resignation and to promote the workplace equality of all LGBT Federal employees.[119] The memorandum announced that certain Federal benefits available to the spouses of heterosexual Federal employees would be extended to the same-sex domestic partners of Federal employees. The memorandum directed the heads of all Federal agencies to conduct a review of other benefits they offered to determine what authority existed to extend them as well.[120]

In addition, the President stated, many "top employers in the private sector already offer benefits to the same-sex partners of their employees; those companies recognize that offering partner benefits helps them compete for and retain the brightest and most talented employees. The Federal Government is at a disadvantage on that score right now, and change is long overdue."[121]

Changes to Federal Employee Benefits.

Changes to Federal benefits that occurred in response to the June 2009 memorandum or in response to a second Presidential memorandum the following year[122] include:

- Extending the coverage of child-care subsidies to the children of same-sex domestic partners of lower-income Federal employees.[123]

[118] Statement on Signing a Memorandum on Federal Benefits and Non-Discrimination and Support of Domestic Partners Benefits and Obligations Legislation, Daily Comp. Pres. Docs., 2009 DCPD No. 00476, p. 1 (June 17, 2009). The ambassador was Michael Guest.

[119] Id.

[120] Memorandum of June 17, 2009, Federal Benefits and Non-Discrimination, 74 Fed. Reg. 29,393 (June 22, 2009).

[121] Statement on Signing a Memorandum on Federal Benefits and Non-Discrimination and Support of Domestic Partners Benefits and Obligations Legislation, op. cit., p. 2.

[122] Memorandum of June 2, 2010, Extension of Benefits to Same-Sex Domestic Partners of Federal Employees, 75 Fed. Reg. 32,247 (June 8, 2010).

[123] Agency Use of Appropriated Funds for Child Care Costs for Lower Income Employees (Final rule), 77 Fed. Reg. 42,905 (July 20, 2012).

- Clarifying that a Federal employee's domestic partner and children qualify as family members for access to agency alcohol and drug abuse counseling programs.[124]
- Establishing that an employee's same-sex domestic partner qualifies as a family member for purposes of eligibility for noncompetitive appointment based on overseas employment.[125]
- Amending regulations to add same-sex domestic partners to the class of people for which an insurable interest is presumed to exist.[126]
- Revising regulations to ensure that the same-sex domestic partners of Federal employees and their children have access to evacuation pay and to the separate maintenance allowance for duty at Johnston Island.[127]
- Amending guidance that grants 24 hours of unpaid leave to Federal employees to cover educational activities, routine medical needs, and elderly relatives' health or care needs to include an employee's same-sex domestic partner or the partner's children.[128]
- Modifying the definitions of family member and immediate relative for purposes of the use of sick leave, funeral leave, voluntary leave transfer, voluntary leave bank, and emergency leave transfer.[129]
- Amending the Federal Travel Regulations so that employees and their domestic partners and children can obtain the available benefits including certain travel, relocation, and subsistence payments.[130]
- Expanding the eligibility to apply for long-term care insurance to the same-sex domestic partners of Federal employees and annuitants.[131]

[124] Id.

[125] Noncompetitive Appointment of Certain Former Overseas Employees (Final rule), 77 Fed. Reg. 42,902 (July 20, 2012).

[126] Presumption of Insurable Interest for Same-Sex Domestic Partners (Final rule), 77 Fed. Reg. 42,909 (July 20, 2012).

[127] Change in Definitions; Evacuation Pay and the Separate Maintenance Allowance at Johnston Island (Final rule), 77 Fed. Reg. 42,903 (July 20, 2012).

[128] John Berry Memorandum for Chief Human Capital Officers, "Extension of 24-Hour LWOP Family Support Policy to Same-Sex Domestic Partners of Federal Employees," September 10, 2010. Accessed at www.chcoc.gov/transmittals.

[129] Absence and Leave; Definitions of Family Member, Immediate Relative, and Related Terms (Final rule), 75 Fed. Reg. 33,491 (June 14, 2010).

[130] Federal Travel Regulation (FTR); Terms and Definitions for "Dependent", "Domestic Partner", "Domestic Partnership", and "Immediate Family" (Final rule), 76 Fed. Reg. 59,914 (September 28, 2011).

[131] Federal Long Term Care Insurance Program: Eligibility Changes (Final rule), 75 Fed. Reg. 30,267 (June 1, 2010).

This list is included not only to enumerate the changes that have recently taken place concerning Federal employee benefits but also to give the reader some insight into the daily job-related obstacles that LGBT Federal employees and their partners faced prior to these changes.[132]

In June 2013, two days after the U.S. Supreme Court ruled Section 3 of the Defense of Marriage Act[133] unconstitutional,[134] OPM announced that it would extend certain benefits to Federal employees and annuitants legally married to a spouse of the same sex. Among these benefits were health insurance, life insurance, and retirement benefits. This meant that, for example, the legally married same-sex spouses of Federal employees for the first time were eligible for coverage under the Federal Employees Health Benefits Program, as were the children of same-sex marriages.[135]

In addition to changes in employment policies and the extension of employee benefits, OPM has incorporated sexual orientation in its guidance regarding agency diversity programs. For example, in its November 2011 guidance for the development of agency diversity and inclusion strategic plans, OPM noted that the Federal Government should strive to be the "Nation's model employer by leveraging diversity and fostering inclusion to deliver the best public service."[136] The guidance defined diversity, including sexual orientation, "as a collection of individual attributes that together help agencies pursue organizational objectives efficiently and effectively."[137] Such inclusive policies also can be found in some private sector organizations, as discussed below.

Private Sector Inclusion Policies.

A majority of Fortune 500 companies include sexual orientation (88 percent) and gender identity (57 percent) in their non-discrimination policies. In addition, the majority of these companies (62 percent) offer equivalent medical benefits to spouses and partners.[138] Private

[132] For further information on the extension of benefits, see John Berry Report for the President, "Extending Federal Employment Benefits to Same-Sex Domestic Partners of Federal Employees," April 1, 2011.

[133] Pub. L. No. 104-199, 110 Stat. 2419 and 2420.

[134] *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

[135] Elaine Kaplan Memorandum for Heads of Executive Departments and Agencies, "Guidance on the Extension of Benefits to Married Gay and Lesbian Federal Employees, Annuitants, and Their Families," June 28, 2013. Accessed at www.chcoc.gov/transmittals. See also, Federal Employees Health Benefits Program and Federal Employees Dental and Vision Insurance Program: Expanding Coverage of Children; Federal Flexible Benefits Plan: Pre-Tax Payment of Health Benefits Premiums: Conforming Amendments (Final rule), 78 Fed. Reg. 64,873 (October 30, 2013). For an example of litigation involving these benefits changes, see, *Hara v. Office of Personnel Management*, No. 2009-3141 (Fed. Cir. Sep. 16, 2013) vacating MSPB's decision that the Defense of Marriage Act barred grant of a survivor annuity and remanding the case to MSPB for proceedings consistent with *Windsor*.

[136] U.S. Office of Personnel Management, *Guidance for Agency-Specific Diversity and Inclusion Strategic Plans*, November 2011, p. 4.

[137] Id., p. 3.

[138] Human Rights Campaign Foundation, *Corporate Equality Index 2013*, Washington, D.C., 2012, p. 8.

sector policies that are inclusive of LGBT individuals are indeed important as only 21 States and the District of Columbia have State laws that provide protection from sexual orientation discrimination in employment.[139]

Such policies are responsive to the concerns of many LGBT individuals, who increasingly view equal employment rights as an important priority, as well as to the attitudes of a majority of the general public. According to a 2013 report from the Pew Research Center, when asked to rate the importance of different LGBT-related policy priorities, 57 percent of LGBT survey respondents said equal employment rights should be a top priority. Results of this survey showed that LGBT individuals considered equal employment rights more important than legally-sanctioned same-sex marriage, prevention and treatment of HIV/AIDS, and adoption rights for same-sex couples.[140] According to the Gallup organization, by 2008, support for the principle of equal employment rights of LGBT individuals among the general adult population had held steady at 89 percent for several years.[141]

Besides issues of equality and fairness, there are other reasons that companies provide protections and offer comparable benefits to their LGBT employees. Many top companies believe that embracing diversity in the workplace makes them better employers and better providers of services to their customers.[142]

Inclusive policies may assist in attracting top LGBT talent, but businesses are also concluding that younger employees and applicants who are not members of such groups may care about a business culture that supports women, minorities, and LGBT employees.[143] Not only are some companies trying to appeal to LGBT customers by touting their inclusive policies, they are also cognizant that many heterosexual customers favor strong diversity practices as well.[144] Some companies champion widely diverse work groups because they create more innovative products and bring more ideas and different approaches to the table. Others implement such policies because organizations that include many different perspectives are better able to find more efficient ways to operate and different ways to grow.[145]

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[139] U.S. Government Accountability Office, *Sexual Orientation and Gender Identity Employment Discrimination: Overview of State Statutes and Complaint Data*, GAO-10-135R, October 1, 2009.

[140] Pew Research Center, op. cit., p. 108. Based on a nationally representative 2013 online research panel of 398 gay men, 277 lesbians, 479 bisexuals, and 43 transgender individuals.

[141] Lydia Saad, "Americans Evenly Divided on Morality of Homosexuality," Gallup, Inc., June 2008. Accessed at www.gallup.com/poll/108115/Americans-Evenly-Divided-Morality-Homosexuality.aspx. Based on telephone interviews with 1,017 adults across the country in 2008.

[142] Brief of 278 businesses; law and professional firms; trade and civic organizations; and cities, counties and the United States Conference of Mayors as *amici curiae* for respondent in *Windsor* at 35.

[143] Diane Cadrain, "Sexual Equity in the Workplace," *HR Magazine*, September 2008, pp. 44-50.

[144] Ronald J. Alsop, "Pride vs. Prejudice," *Workforce Management*, March 2011, p. 42.

[145] Cadrain, op. cit. Although many studies support the link between LGBT-supportive policies and workforce outcomes, none provide direct quantitative estimates of that link to the bottom line (M.V. Lee Badgett, Laura E. Durso, Angeliki Kastanis, and Christy Mallory, "The Business Impact of LGBT-Supportive Workplace Policies," The Williams Institute, UCLA School of Law, May 2013).

The Tenth Prohibited Personnel Practice: Employee Perceptions

Through its Merit Principles Survey (MPS), MSPB has collected data on Federal employee perceptions of discrimination on a variety of bases, including off-duty conduct and sexual orientation.[146] In 2010 the MPS also asked how well Federal employees believe their organizations communicate the prohibition on sexual orientation discrimination in the Federal workplace. This chapter summarizes the results of these surveys and explores how Federal employee perceptions of the occurrence of discrimination may be related to how engaged they are in their work. The following chapter presents a discussion of LGBT Federal employee attitudes about the workplace.

Discrimination Based on Off-Duty Conduct

In 2010 only two percent of Federal employee respondents to the MPS said that they had been personally affected by discrimination based on off-duty conduct that was entirely unrelated to the job (see **Table 1**).[147] This was a similar percentage to those respondents who perceived that they had been personally affected by other PPPs such as discrimination based on national origin or marital status, being influenced to withdraw from competition for a position, or an agency official practicing nepotism. In addition, six percent of MPS 2010 respondents said that discrimination based on off-duty conduct had occurred in their work unit but that they were not personally affected by it.[148]

[146] Survey data regarding employee perceptions of discrimination cannot be equated with actual incidents of discrimination. Survey responses reflect the respondent's interpretation of events. Respondents may have differing ideas about what constitutes discrimination that not only differ from each other but also differ from any legal definition of discrimination. Nevertheless, the survey data presented in this chapter represent Federal employee perceptions and attitudes that may affect virtually every aspect of an employee's daily work life from effectively accomplishing tasks to contributing to a positive work environment.

[147] The MPS 2010 was distributed to 71,970 full-time, permanent Federal employees in 24 agencies. We received valid responses from 42,020 individuals, for a response rate of 58 percent. For more information about this survey, see: U.S. Merit Systems Protection Board, *Federal Employee Engagement: The Motivating Potential of Job Characteristics and Rewards*, December 2012.

[148] U.S. Merit Systems Protection Board, *Prohibited Personnel Practices: Employee Perceptions*, Washington, D.C., August 2011, pp. 35-36.

Table 1. Percent agreement with the MPS 2010 item: In the past two years, an agency official (e.g. supervisor, manager, senior leader, etc.) in my work unit has discriminated against someone in a personnel action on the basis of off-duty conduct which was entirely unrelated to the job.[149]

	Agreement
I was personally affected by this	2%
This has occurred in my work unit, but I was not personally affected by this	6%

Discrimination Based on Sexual Orientation

In response to the MPS in 2005, 2007, and 2010,[150] only about one percent of respondents reported being personally denied a job or job benefit (or otherwise being discriminated against) due to their sexual orientation.[151] About three percent of MPS 2010 respondents perceived that sexual orientation discrimination had occurred in their work unit but such discrimination did not personally affect them. This is a similar percentage of employees who perceived other PPP's had occurred, including discrimination based on national origin and marital status or violations of veteran's preference laws.[152] Given the history of sexual orientation discrimination in Federal employment described earlier in this report, such low reported perceptions of continuing discrimination are indeed welcome.

This low rate of perceived sexual orientation discrimination is consistent with the results of OPM's 2012 FEVS. Although the FEVS did not ask directly about respondent experiences with discrimination, it asked whether respondents agreed that PPPs are not tolerated. A similar percentage of heterosexual employees and LGBT employees agreed with this statement (see **Table 2**). Leaving aside a discussion of the broader implications of only about two-thirds of Federal employees agreeing with this statement, it would appear that the experiences of heterosexual and LGBT employees concerning PPPs are similar. (More results from the 2012 FEVS are presented in the next chapter.)

[149] Id., p. 36.

[150] The MPS 2005 was distributed to about 74,000 full-time, permanent Federal employees in 24 agencies. We received valid responses from 36,926 individuals for a response rate of approximately 50 percent. For more information about the MPS 2005, see: U.S. Merit Systems Protection Board, *Accomplishing Our Mission: Results of the Merit Principles Survey 2005*, February 2007. The MPS 2007 was distributed to 68,789 full-time, permanent, Federal employees in 30 agencies. We received valid responses from 41,577 individuals, for a response rate of 60 percent. For more information about the MPS 2007, see: U.S. Merit Systems Protection Board, *Managing for Engagement – Communication, Connection, and Courage*, July 2009. See note 147 for information about the MPS 2010.

[151] The wording of these survey questions has changed over the years: The MPS 2005 asked: "In the past 2 years, do you feel you have been denied a job, promotion, pay or other job benefit because of unlawful discrimination based upon sexual orientation?" The MPS 2007 asked: "In the past 2 years, have you been denied a job, promotion, pay increase, or other job benefit because of unlawful discrimination based on sexual orientation?" The MPS 2010 asked: "In the past two years, an agency official (e.g. supervisor, manager, senior leader, etc.) in my work unit has discriminated in favor or against someone in a personnel action based upon sexual orientation." The one percent figure refers to affirmative responses to these questions. See, for example, U.S. Merit Systems Protection Board, *Prohibited Personnel Practices: Employee Perceptions*, Washington, D.C., August 2011, p. 34.

[152] U.S. Merit Systems Protection Board, *Prohibited Personnel Practices: Employee Perceptions*, Washington, D.C., August 2011, pp. 35-36.

Table 2. Percent agreement with the FEVS 2012 item: Prohibited Personnel Practices (for example, illegally discriminating for or against any employee/applicant, obstructing a person's right to compete for employment, knowingly violating veterans' preference requirements) are not tolerated.[153]

	Agreement
Heterosexual employees	67%
LGBT employees	64%

Data regarding the incidence of perceived sexual orientation discrimination among Federal employees are not easily comparable to data in other employment sectors. This is because the data discussed in this section either refer to perceptions of all Federal employees regarding sexual orientation discrimination, or the data refer to LGBT Federal employee perceptions regarding the occurrence of the broader PPPs. We have no data on the specific question of whether LGBT Federal employees believe they have been the victims of sexual orientation discrimination.

Other surveys based in other employment sectors have asked lesbian, gay, and bisexual (LGB) individuals about their experience with job discrimination. For example, one 2009 study based on a national probability sample found 10 percent of LGB individuals reported being discriminated against due to their perceived sexual orientation.[154] In addition, a 2013 national survey found that 26 percent of gay men, 23 percent of lesbians, and 15 percent of bisexuals believed they had been treated unfairly by an employer because they were or were perceived to be lesbian, gay, or bisexual.[155]

Relationship to Employee Engagement

Previous MSPB research found a relationship between the engagement level of Federal employees and certain desirable agency outcomes. That research defined employee engagement as a heightened connection between employees and their work, their organization, or the people they work for or with. We found that in Federal agencies where more employees were engaged, better program results were produced, employees used less sick leave, fewer employees filed EEO complaints, and there were lower rates of work-related injury or illness.[156]

[153] FEVS question 38, *2012 Federal Employee Viewpoint Survey Results—Report by Demographics*, U.S. Office of Personnel Management, p. 112.

[154] Gregory M. Herek, "Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States: Prevalence Estimates from a National Probability Sample," *Journal of Interpersonal Violence*, January 2009, pp. 54-74. Based on a 2005 survey of 662 lesbian, gay, and bisexual individuals.

[155] Pew Research Center, op. cit., p. 42.

[156] U.S. Merit Systems Protection Board, *The Power of Federal Employee Engagement*, Washington, D.C., September 2008.

There are many factors from one's intrinsic motivation to the culture of one's organization that may affect the engagement level of an employee. We expected employees who perceived that they have been the victims of outright discrimination or any other PPP to be less engaged in their work than those who did not harbor those perceptions. Further MSPB examination of the MPS 2010 results confirmed this expectation and showed that the effects were not limited to employees who perceived that they had been the specific targets of such practices. Employees who believed these practices were occurring in the work unit but who were not directly affected were also typically less engaged than other employees.[157]

As with PPPs in general, survey respondents who believed they were personally affected by sexual orientation discrimination were far less engaged than respondents who did not believe sexual orientation discrimination had occurred in their work unit (see **Table 3**). Survey respondents who were not personally affected by sexual orientation discrimination but believed it had happened in their work unit were also less engaged.

Table 3. Level of employee engagement based on responses to the MPS 2010 item: In the past two years, an agency official (e.g. supervisor, manager, senior leader, etc.) in my work unit has discriminated in favor or against someone in a personnel action based upon sexual orientation.

	Engaged	***Not engaged***
I was personally affected by this	12%	64%
This has occurred in my work unit but I was not personally affected by this	13%	46%
This has not occurred in my work unit	53%	9%

Remaining respondents fell into the "somewhat engaged" category

PPPs should be avoided because to commit one is to violate the law, and the offender may be subject to adverse action, up to and including removal from the Federal service.[158] In noting that employees who do not perceive PPPs are occurring are far more engaged, however, we present a solid business case for avoiding PPPs. As with the perception of any PPP, the negative effects of sexual orientation discrimination spread wider than the individual directly affected—other employees in the work unit see what is happening and their level of engagement may decrease. When levels of employee engagement drop, organizational results and other positive outcomes are likely to suffer.

[157] U.S. Merit Systems Protection Board, *Prohibited Personnel Practices: Employee Perceptions*, Washington, D.C., August 2011, pp. 37-38.

[158] 5 U.S.C. § 1215(a)(3)(A).

Communicating the Policy of Non-Discrimination

The Notification and Federal Employee Antidiscrimination and Retaliation Act.

In 2002 Congress enacted the Notification and Federal Employee Antidiscrimination and Retaliation Act,[159] which requires agencies to provide notification to Federal employees of their rights and protections regarding discrimination and retaliation.[160] OPM's regulations that implemented this act provided sample language for agencies to use for this notification, including:

> A Federal agency cannot discriminate against an employee or applicant with respect to the terms, conditions or privileges of employment on the basis of race, color, religion, sex, national origin, age, disability, marital status or political affiliation…If you believe that you have been the victim of unlawful discrimination on the basis of race, color, religion, sex, national origin or disability, you must contact an…EEO counselor within 45 calendar days[.][161]

When the OPM regulations were proposed, several commenters suggested that the regulations be expanded to cover the tenth PPP and Executive Order 13087, which would include sexual orientation discrimination as a form of prohibited discrimination. OPM concluded, however:

> [T]he No FEAR Act does not directly refer to 5 U.S.C. 2302(b)(10) as a law covered by the Act or refer to Executive Order 13087 (or 11478) as being covered by the Act. The regulations address those matters directly identified in the No FEAR Act. Therefore, the suggestion is not adopted.[162]

Congressional action to specifically prohibit sexual orientation discrimination in Federal employment would undoubtedly provide greater visibility to this issue. Absent this visibility, Federal agencies may have to play a greater role in communicating the requirements of Executive Order 13087 than they may have to play regarding other types of discrimination that are specifically prohibited by legislation. The notification that Federal agencies are required to provide to their employees by the No FEAR Act could have been a method to provide such guidance regarding sexual orientation discrimination.

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[159] Pub. L. No. 107-174. Also known as the "No FEAR Act."

[160] For further information, see U.S. Equal Employment Opportunity Commission, *Questions and Answers: No FEAR Act*, accessed at www.eeoc.gov/eeoc/statistics/nofear/qanda.cfm.

[161] Implementation of Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002—Notification and Training (Final rule), 71 Fed. Reg. 41,098 (Jul. 20, 2006). See regulations at 5 C.F.R. § 724.202.

[162] Id., p. 41,095.

Agency Communication.

Although some agencies may include sexual orientation as part of the required No FEAR Act training, we wanted to know how effective agencies have been in communicating to employees the policy of non-discrimination based on sexual orientation in the Federal workplace. To this end, the MPS 2010 asked Federal employees whether their organization has made it clear that it prohibits sexual orientation discrimination. Among nonsupervisory employees, 68 percent agreed that their organizations had made this policy clear, while 81 percent of supervisors agreed. Among all employees, agreement with this statement varied across agencies from 58 percent to 82 percent (see **Table 4**).

Table 4. Percent agreement with the MPS 2010 item: My organization has made it clear that it prohibits discrimination based on a person's sexual orientation.

	Agreement
Supervisors	81%
Non-supervisors	68%
Agency with most agreement	82%
Agency with least agreement	58%

Typically, 81 percent of supervisors agreeing with a positive statement would seem like a good result for most types of survey questions. In this case, however, it means that nearly one in every five supervisors—who make important decisions regarding their employees every day—did not report that their organizations have made it clear that supervisors are prohibited from engaging in sexual orientation discrimination.

Unfortunately, because we have no data on the extent to which survey respondents have been notified of the prohibition on other forms of discrimination, we cannot place these survey results into a proper context.[163] If, however, survey results showed that about one-fifth of Federal supervisors (and over one-third of some agency workforces) did not agree that their organizations have made it clear that they prohibit discrimination on any other another basis (sex, religion, or disability, for example), it would rightly raise concern.

[163] The MPS 2010 asked respondents whether their agency had educated them about what their rights would be if they disclosed wrongdoing—another activity required by the No FEAR Act. Only 55 percent of respondents agreed they had received such education, see U.S. Merit Systems Protection Board, *Blowing the Whistle: Barriers to Federal Employees Making Disclosures,* Washington, D.C., November, 2011, p. 14.

LGBT Employee 2012 FEVS Results

This chapter presents results from OPM's 2012 FEVS. The FEVS is a tool used by OPM and Federal agencies to provide annual snapshots of employees' perceptions of whether characteristics of successful organizations are present in their organizations. After a pilot study in 2011, the full 2012 FEVS asked respondents for the first time to self-identify as heterosexual or straight, as lesbian or gay, as bisexual, as transgender, or to indicate that they preferred not to self-identify their sexual orientation.[164]

Over 687,000 Federal employees from 82 agencies responded to the 2012 FEVS, for a response rate of 46 percent.[165] For the current study, OPM made data from the 40 largest agencies available for review. To ensure the confidentiality of respondents from smaller agencies, OPM consolidated respondent data from the remaining 42 agencies into a single small agency category.[166] Unless otherwise indicated, the data presented in this chapter represent MSPB analysis of weighted results of the 2012 FEVS.[167]

Results of the 2012 FEVS form the first large-scale data set that exists regarding the LGBT Federal workforce. Therefore, we present the demographic data made available for review below to give an initial picture of some of the characteristics of the LGBT portion of the Federal workforce.[168] After this demographic data is presented, we discuss LGBT Federal employee perceptions of the workplace.

[164] Data received from OPM for analysis were collapsed into the following three categories: heterosexual or straight, LGBT, I prefer not to say. Although issues related to gender identity fall outside the scope of this report, 2012 FEVS data made available by OPM for review included perceptions of transgender employees.

[165] U.S. Office of Personnel Management, *2012 Federal Employee Viewpoint Survey Results—Governmentwide Management Report,* p. 2. For more information about the FEVS, including obtaining survey data, see www.fedview.opm.gov.

[166] Employees of the very smallest agencies were not asked demographic questions including their sexual orientation to protect their privacy (U.S. Office of Personnel Management, *2012 Federal Employee Viewpoint Survey Results—Technical Report*, p. 40; and 2012 FEVS Small Agency Management Reports noting that agencies that had 50 or more survey-eligible employees had the option to include the demographic section on the 2012 FEVS).

[167] For an explanation of OPM's 2012 FEVS weighting strategy, see *2012 Federal Employee Viewpoint Survey Results—Technical Report*, op. cit., pp. 24-25.

[168] OPM adheres to a strict practice of not releasing data that would compromise the privacy of any survey respondent group so the number of demographic variables made available for analysis was limited.

LGBT Employee Demographics

As shown in **Table 5**, about two percent of the respondents to the 2012 FEVS self-identified as LGBT. This means the 2012 FEVS measured the attitudes of over 13,500 Federal employees who self-identified as LGBT.[169] By comparison, other studies have estimated the percentage of adults in the United States who identify as LGBT at between three and four percent of the adult population.[170]

Table 5. FEVS LGBT respondent proportion of various demographic categories.[171]

Respondents	Heterosexual or straight	LGBT	I prefer not to say
All*	87.0%	2.2%	10.8%
By gender:			
Male	88.2%	2.3%	9.5%
Female	85.7%	2.2%	12.1%
By supervisory status:			
Supervisory**	87.1%	2.4%	10.5%
Non-supervisory***	87.0%	2.2%	10.8%
By age group:			
39 and younger	88.5%	2.9%	8.6%
40-49	87.4%	2.5%	10.0%
50 and older	86.5%	1.7%	11.7%

* *2012 Federal Employee Viewpoint Survey Results—Governmentwide Management Report*, op. cit., p. 28.
** Includes supervisors, managers, and executives.
*** Includes non-supervisors and team leaders.

169 *2012 Federal Employee Viewpoint Survey Results—Governmentwide Management Report*, op. cit., p. 28.

170 Gary J. Gates, "How many people are lesbian, gay, bisexual, and transgender?," The Williams Institute, UCLA School of Law, April 2011, estimating 3.5 percent of adults identify as lesbian, gay, or bisexual, and 0.3 percent identify as transgender. See also, Gary J. Gates and Frank Newport, "LGBT Percentage Highest in D.C., Lowest in North Dakota," Gallup.com, February 15, 2013, estimating the nationwide average of adults who identify as LGBT at 3.5 percent.

171 Unweighted 2012 FEVS results.

About 11 percent of 2012 FEVS respondents declined to identify their sexual orientation. Among agency workforces, the percentage that declined to identify their sexual orientation ranged from 8 percent to 18 percent.[172] Employees may have a number of reasons for not sharing this information, ranging from belief that it is no one's business to fear that the information will not be kept confidential. Employees who believe their workplace is less than safe or supportive may be unwilling to share this information. Our analysis of the 2012 FEVS results showed that the greatest determinant in whether respondents disclosed their sexual orientation was related to their global satisfaction. Respondents were more receptive to disclosing their sexual orientation if they were highly satisfied with their work, their workplace, and their organizational leadership.

One previous nationally representative survey of the workplace attitudes of LGBT employees found that 72 percent of those employees would self-disclose their sexual orientation or gender identity along with other demographic information in an anonymous human resources survey. Unfortunately, we do not know what percentage of LGBT Federal employees declined to self-identify their sexual orientation on the 2012 FEVS. According to the same national survey, two-thirds of LGBT employees said one reason they are not open about their sexual orientation to everyone at work is because they believe "it's nobody's business." That survey also found that this belief was closely tied to a negative workplace climate—employees who believed their sexual orientation was nobody's business were most likely to feel unaccepted by coworkers.[173]

Although the differences in percentages were small, it appears that younger employees were more willing to disclose their sexual orientation on the 2012 FEVS than were older employees. As can be seen in **Table 5,** about 9 percent of respondents age 39 and younger, as opposed to about 12 percent of respondents age 50 and older, declined to identify their sexual orientation.

The two percent figure who self-identified as LGBT was fairly stable across the other 2012 FEVS demographic items that OPM provided for review. For example, (as shown in **Table 5**) two to three percent of both genders, both supervisory statuses, and all age groups self-identified as LGBT. We noted in the previous chapter that similar percentages of 2012 FEVS heterosexual respondents and LGBT respondents agreed that PPPs are not tolerated. That LGBT employees appear to be represented in the supervisory, managerial, and executive ranks in the same proportion as they are in the overall workforce may be another indication that discrimination against LGBT individuals in Federal employment is being remedied.

[172] U.S. Office of Personnel Management, *2012 Federal Employee Viewpoint Survey Results—Report on Demographic Questions by Agency*, pp. 16-20.

[173] Human Rights Campaign Foundation, *Degrees of Equality—A National Study Examining Workplace Climate for LGBT Employees*, Washington, D.C., 2009, pp. 15, 33. Based on a 2008 survey of 761 LGBT individuals.

LGBT Employee Perceptions of the Federal Workplace

OPM has previously published data on LGBT Federal employee perceptions of the workplace through a number of indices OPM tracks as a part of the FEVS process. These findings are summarized below as are the findings from our agency-based analysis of the 2012 FEVS results.

2012 FEVS Indices.

The 2012 FEVS included six indices that provide a consistent method for Federal agencies to assess different facets of their workforces. Four of these indices provide metrics for assessing agency management of human capital as provided for by the Human Capital Assessment and Accountability Framework (HCAAF).[174] These four indices are: Leadership and Knowledge Management, Results-Oriented Performance Culture, Talent Management, and Job Satisfaction. The remaining two FEVS indices are Global Satisfaction (a combination of employees' satisfaction with their job, their pay, and their organization, and their willingness to recommend their organization as a good place to work) and Employee Engagement (which consists of three additional indices: Leaders Lead, Supervisors, and Intrinsic Work Experiences).[175] This measure of employee engagement was developed by OPM through the FEVS process and is different than MSPB's measure of employee engagement discussed earlier in this report.

The scores for each of these indices for LGBT and non-LGBT employees are listed in **Table 6**. OPM calculated these scores by averaging the percent positive responses on the survey items within each index.[176] As reported by OPM, employees who self-identified as LGBT responded less positively than non-LGBT employees across all indices.

[174] For more information on HCAAF, see www.opm.gov/policy-data-oversight/human-capital-management/.

[175] *2012 Federal Employee Viewpoint Survey Results—Governmentwide Management Report*, op. cit., pp. 5-13.

[176] Id., p. 34.

Table 6. 2012 FEVS indices scores for self-identified LGBT and non-LGBT respondents.[177]

Index	***Average of percent positive responses*** LGBT	Not LGBT
Human Capital Assessment and Accountability Framework		
Leadership and Knowledge Management	56	62
Results-Oriented Performance Culture	50	54
Talent Management	55	60
Job Satisfaction	62	67
Employee Engagement	62	67
Leaders Lead	50	56
Supervisors	68	72
Intrinsic Work Experiences	67	72
Global Satisfaction	59	65

The differences between the FEVS index scores for LGBT and non-LGBT respondents only range between four and six percentage points. Although these differences are small, those small differences become more important because there is a pattern of less positive LGBT responses across all of the indices. The indices listed in **Table 6** include 47 separate questions from the 2012 FEVS. The pattern of less positive LGBT responses across the indices also holds for those underlying questions—LGBT respondents had less positive attitudes on each of those 47 questions. The difference in LGBT and non-LGBT positive responses to those questions ranged from one to eight percentage points.[178]

[177] Id., p. 22.

[178] For lists of questions comprising each index, see *2012 Federal Employee Viewpoint Survey Results—Governmentwide Management Report,* op. cit., pp. 41-57. For LGBT and non-LGBT responses to those questions, see *2012 Federal Employee Viewpoint Survey Results—Report by Demographics*, op. cit., pp. 1-211.

Agency Differences.

We examined the generally less positive perceptions of the LGBT Federal workforce described in the previous section to see if they varied depending on the employing agency. Our examination of the 2012 FEVS results revealed that, in some agencies, there was a small but statistically significant relationship between survey responses on the LGBT item and how strongly respondents endorsed other items on the survey. For the questions for which this relationship existed, LGBT employee attitudes were less positive than heterosexual employee attitudes. In other agencies, status on the LGBT item had no effect on how strongly (or weakly) LGBT employees endorsed other survey items.

Our analysis focused on 3 clusters of questions from the 2012 FEVS (16 questions in all) that we grouped into the following categories: Leadership, Work Environment, and Training.[179] The results of our analysis are discussed in the remainder of this section and show that, in some agencies for these survey items, LGBT perceptions are generally less positive than their heterosexual colleagues while in other agencies LGBT employee perceptions of these three workplace components are very similar to the perceptions of heterosexual employees.[180]

Leadership. **Table 7** lists the questions included in the Leadership Cluster. The Leadership questions involve how employees view the effectiveness of the management above the level of their immediate supervisor. Effective leaders set a vision for the organization, empower employees to make the vision a reality, respond to employee concerns, and ultimately play a large role in how satisfied employees are with the organization.

Table 7. 2012 FEVS Leadership Cluster questions.

30.	Employees have a feeling of personal empowerment with respect to work processes.
41.	I believe the results of this survey will be used to make my agency a better place to work.
57.	Managers review and evaluate the organization's progress toward meeting its goals and objectives.
58.	Managers promote communication among different work units (for example, about projects, goals, needed resources).
59.	Managers support collaboration across work units to accomplish work objectives.
60.	Overall, how good a job do you feel is being done by the manager directly above your immediate supervisor/team leader?
61.	I have a high level of respect for my organization's senior leaders.
62.	Senior leaders demonstrate support for Work/Life programs.
71.	Considering everything, how satisfied are you with your organization?

[179] These three groupings and their component 2012 FEVS questions merely illustrate that differences exist in the attitudes of LGBT employees across different agencies—differences may exist in other areas as well.

[180] See the Appendix for further information about how we determined the effect of the 2012 FEVS LGBT item on other survey items, why we selected these 16 questions to discuss, and why we placed questions in selected groups.

As can be seen in **Figure 2**, there were differences in perception between LGBT and heterosexual employees regarding leadership within some agencies. There were other agencies, however, where LGBT employee and heterosexual employee attitudes about leadership were very similar. For example, **Figure 3** shows that the attitudes among LGBT and heterosexual employees in the National Aeronautics and Space Administration (NASA), concerning the questions within the Leadership Cluster, were almost identical.

Figure 2. Percent positive responses to Leadership Cluster questions among heterosexual and LGBT respondents within selected agencies with a significant LGBT effect for each question.[181]

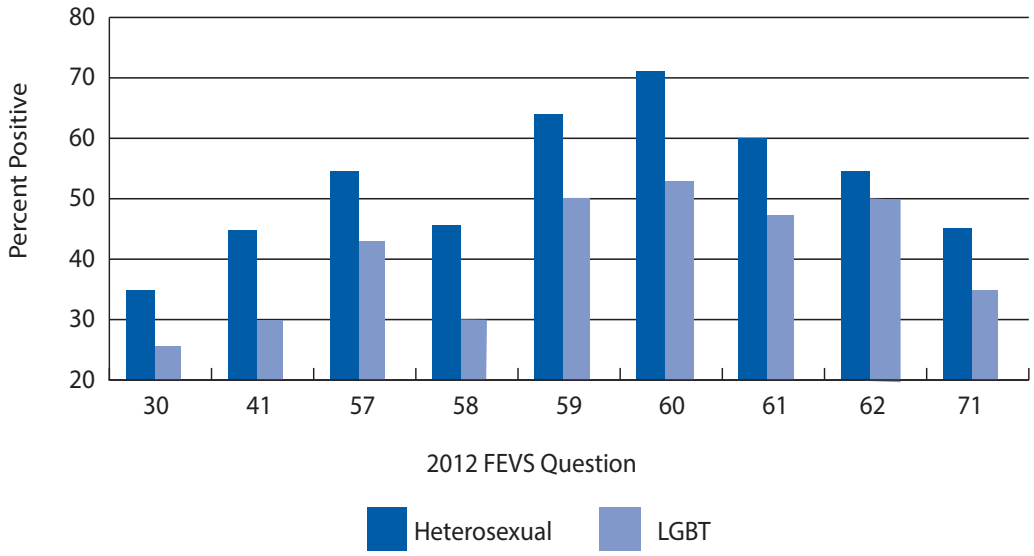
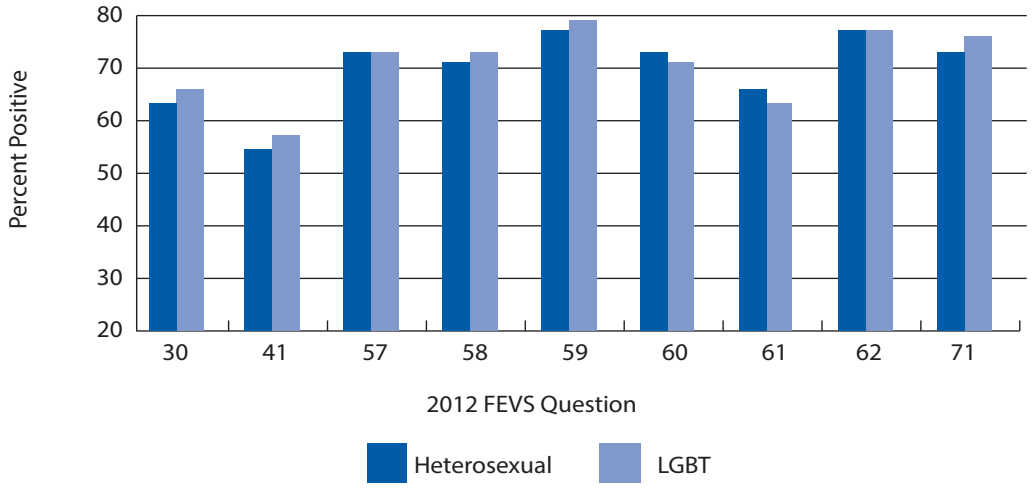


Figure 3. Percent positive responses to Leadership Cluster questions among heterosexual and LGBT respondents in NASA.



[181] Data represent four agencies with at least 100 FEVS respondents who self-identified as LGBT.

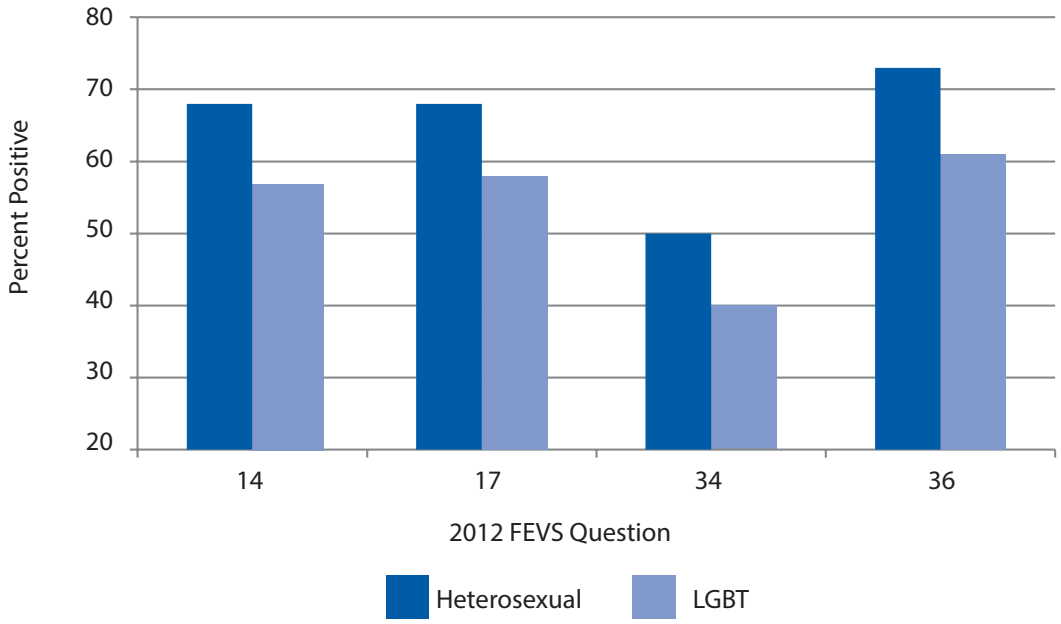
Work Environment. **Table 8** lists the questions included in the Work Environment Cluster. The Work Environment Cluster questions involve how employees perceive the physical conditions in which they work, whether they are prepared for security threats, and whether the work environment promotes diversity and values reports of wrongdoing.

Table 8. 2012 FEVS Work Environment Cluster questions.

14. Physical conditions (for example, noise level, temperature, lighting, cleanliness in the workplace) allow employees to perform their jobs well.
17. I can disclose a suspected violation of any law, rule or regulation without fear of reprisal.
34. Policies and programs promote diversity in the workplace (for example, recruiting minorities and women, training in awareness of diversity issues, mentoring).
36. My organization has prepared employees for potential security threats.

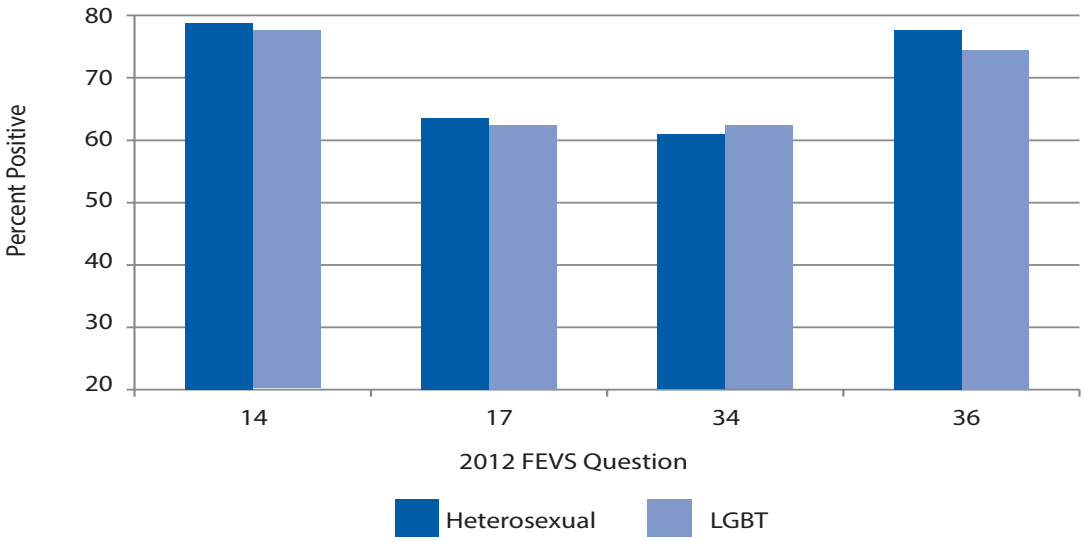
As can be seen in **Figure 4**, there were differences in perception between LGBT and heterosexual employees regarding the work environment within some agencies. There were other agencies, however, where LGBT employee and heterosexual employee attitudes about the work environment were very similar. For example, **Figure 5** shows that the attitudes among LGBT and heterosexual employees in the General Services Administration (GSA), concerning the questions within the Work Environment Cluster, were almost identical.

Figure 4. Percent positive responses to Work Environment Cluster questions among heterosexual and LGBT respondents within selected agencies with a significant LGBT effect for each question.[182]



[182] Data represent three agencies with at least 100 FEVS respondents who self-identified as LGBT.

Figure 5. Percent positive responses to Work Environment Cluster questions among heterosexual and LGBT respondents in GSA.



Training. **Table 9** lists the questions included in the Training Cluster. Beyond satisfaction with training and whether employees' training needs are assessed, the Training Cluster includes whether employees believe they have enough information to do their job well.

Table 9. 2012 FEVS Training Cluster questions.

2. I have enough information to do my job well.
18. My training needs are assessed.
68. How satisfied are you with the training you receive for your present job?

As with our previous two clusters, there were differences in perception between LGBT and heterosexual employees regarding training within some agencies (see **Figure 6**). Again, we observe that there were some agencies where LGBT employee and heterosexual employee attitudes about training were very similar. For example, **Figure 7** shows the percentage of positive attitudes of LGBT and heterosexual employees in the Department of Health and Human Services (HHS) for the questions in the Training Cluster. Regarding these questions, attitudes among these two groups of employees within HHS were almost identical.

Figure 6. Percent positive responses to Training Cluster questions among heterosexual and LGBT respondents within selected agencies with a significant LGBT effect for each question.[183]

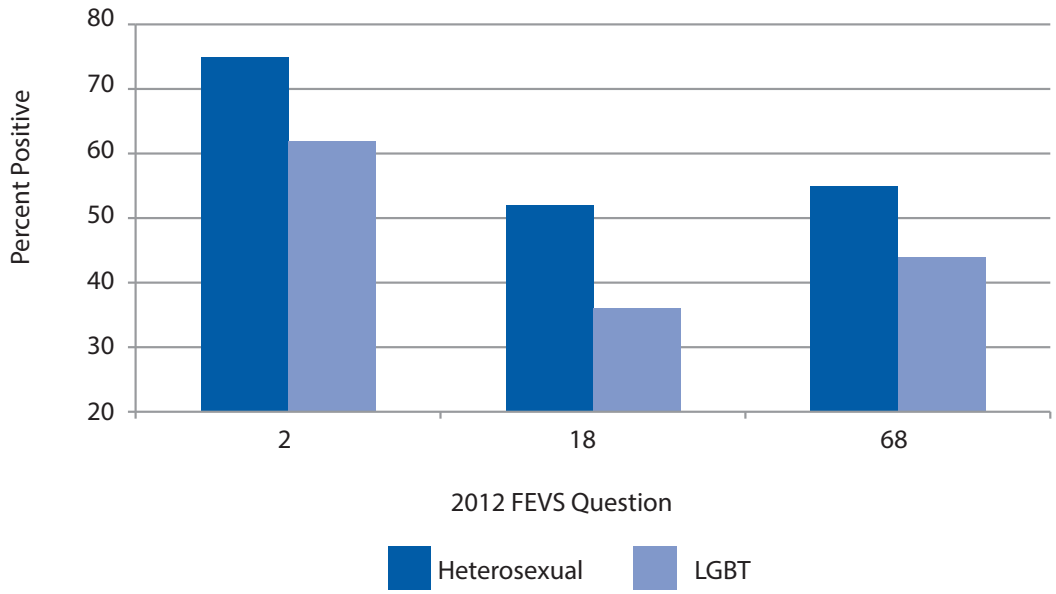
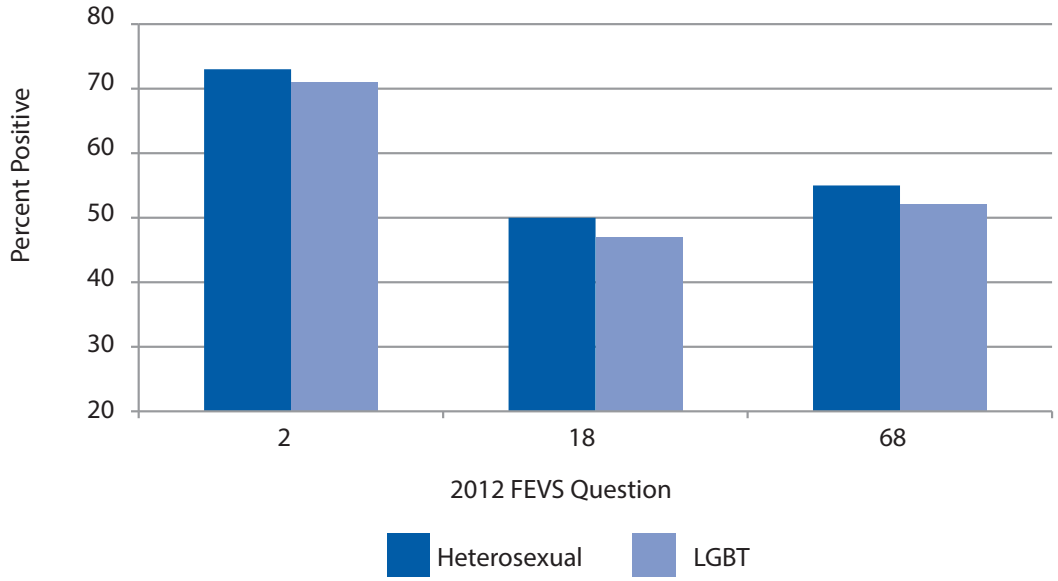


Figure 7. Percent positive responses to Training Cluster questions among heterosexual and LGBT respondents in HHS.



[183] Data represent one agency with at least 100 FEVS respondents who self-identified as LGBT.

Research has identified some factors that could cause LGBT employees to view their workplace less positively than other individuals. Although neither previous MSPB surveys nor the FEVS have asked if LGBT respondents have self-disclosed their sexual orientation at work, one nationally representative survey found that 51 percent of LGBT workers hide their LGBT identity from most people at work.[184] The consequences of hiding one's LGBT identity may include having to lie daily about one's personal life and being unable to participate honestly in everyday conversations at work which may hinder trust and cohesion with one's coworkers and superiors.[185] Whether due to the workplace climate or other reasons, the belief that one must conceal such an integral part of oneself in the workplace may reduce employees' ability to perform their best, as well as their attitudes about the workplace (as measured by instruments such as the FEVS).[186]

A number of other factors could contribute to these less positive attitudes as well. In addition to perceiving outright discrimination, if LGBT employees perceive non-inclusiveness either in the policies of their managers or the attitudes of their coworkers, we would expect them to harbor less positive attitudes about the workplace. It is also understandable for Federal employees to have less positive attitudes if they perceive employment protections as confusing or inadequate, or they believe employee benefits are administered inequitably.

Future researchers or agencies themselves may undertake studies to determine why differences exist in some agencies for some FEVS questions. This level of detailed inquiry was beyond the scope of the current study. We note, however, that individual characteristics of agencies such as organizational culture and management practices can contribute to any employee's positive or negative perceptions about the workplace. It is safe to say that these same characteristics play a part in LGBT employee perceptions of the workplace as well.

[184] Human Rights Campaign Foundation, 2009, op. cit., p. 11.

[185] Id., p. 5.

[186] U.S. Merit Systems Protection Board, "Religion in the Workplace: Moving Beyond Nondiscrimination and Accommodation," *Issues of Merit*, July 2011, p. 5.

The Current State of Protection from Sexual Orientation Discrimination

In completing this study we encountered a number of peculiarities in how Federal employment policy regarding sexual orientation discrimination evolved. In 2005 legislation was introduced in the House of Representatives to dispel any confusion that may have existed regarding the protections from sexual orientation discrimination in the Federal workplace—so we are not alone in noting the ambiguity that surrounds this topic.[187] We briefly summarize below the current state of protection from sexual orientation discrimination in the Federal workplace.

Federal Government Policy.

It is the policy of the Federal Government that sexual orientation discrimination is prohibited in Federal employment. As significant a step as the signing of Executive Order 13087 was in stating the policy of non-discrimination based on sexual orientation, however, it was just that—a policy statement. It provided for no enforceable rights for employees who believe they are victims of sexual orientation discrimination. Employees have no individual right of action to independently seek review from the EEOC for claims of sexual orientation discrimination.[188]

Prohibited Personnel Practices.

The tenth PPP prohibits discriminating based on conduct that does not adversely affect an employee's performance. Since 1980 OPM has interpreted this prohibition to include sexual orientation discrimination. Therefore, Federal employees are free to petition OSC if they believe they have been discriminated against on this basis. If OSC finds enough evidence of wrongdoing it may petition the agency in question for corrective action.

Federal employees may raise the tenth PPP as an affirmative defense in an otherwise appealable action before MSPB. It is important to remember, however, that although OSC will accept a complaint alleging discrimination based on sexual orientation under the tenth PPP, neither MSPB nor the courts have resolved whether sexual orientation alone is enough to prevail under 5 U.S.C. § 2302(b)(10).[189]

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[187] H.R. 3128, 109th Cong. (2005). This legislation was not passed by either house of Congress.

[188] EEOC has jurisdiction over employment discrimination codified in a number of laws prohibiting discrimination based on race, color, sex, religion, national origin, age, disability, and genetic information. See 29 C.F.R. § 1614.101 (a) and (b).

[189] *Mahaffey v. Department of Agriculture*, 105 M.S.P.R. 347, ¶ 24 (2007) and Matthew S. Bajko, "Federal Agency Quietly Reasserts Pro-Gay Policy," *The Bay Area Reporter*, September 24, 2009.

Differing Interpretations.

In 2004 the Special Counsel determined that the protections found at 5 U.S.C. § 2302(b)(10) did *not* extend to sexual orientation discrimination. At that time, OSC was accepting claims based on sexual orientation discrimination but was evaluating them to see if some other standard applied.[190] The White House subsequently issued a statement affirming that President Bush believed "that no Federal employee should be subject to unlawful discrimination, and Federal agencies will fully enforce the law against discrimination, including discrimination based on sexual orientation."[191] It was the confusion raised by these events that the bill introduced in the House of Representatives in 2005 (discussed in the introduction to this chapter) was meant to dispel.[192]

Senator Daniel K. Akaka observed during a Senate committee hearing in 2009 that OSC had recently updated its website to once again explain that sexual orientation discrimination *was* actually a PPP subject to investigation by OSC. According to Senator Akaka, Federal employees had been provided inaccurate and inconsistent guidance on this issue.[193]

Agency Policies.

Some agencies have developed procedures that parallel agency EEO complaint processes to hear employee complaints of sexual orientation discrimination.[194] These procedures undoubtedly provide a valuable avenue for the airing and resolution of such complaints. The existence of these parallel procedures, however, may lead to confusion. For example, employees may assume that the basis for their sexual orientation discrimination complaint is rooted in statute similar to other matters brought into the agency EEO process. Employees may also assume that the avenues of redress available for allegations of sexual orientation discrimination outside of agency processes are similar to those available to employees alleging discrimination on other bases. Both of these assumptions are false.

No FEAR Act.

In 2002 Congress enacted the No FEAR Act, which requires agencies to notify Federal employees of their rights and protections regarding discrimination and retaliation. The No FEAR Act did not, however, require for employees to be notified of the protections that exist from sexual orientation discrimination, and consequently neither did OPM's implementing regulations.

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[190] Christopher Lee, "Official Says Law Doesn't Cover Gays," *The Washington Post,* May 25, 2005, p. A25; and Stephen Barr, "Bills Would Affirm Anti-Bias Laws Cover Sexual Orientation," *The Washington Post*, May 15, 2007, p. D4.

[191] Wayne Washington, "White House, Counsel Split on Gay Rights—Official Had Questioned Antidiscrimination Law," *Boston Globe*, April 1, 2004. p. A4.

[192] H.R. Rep. No. 109-313 (2005).

[193] "Domestic Partner Benefits: Fair Policy and Good Business for the Federal Government," Hearing before the Committee on Homeland Security and Governmental Affairs United States Senate, S. Hrg. 111-758, October 15, 2009, p. 29.

[194] Some employees may have other protections or avenues of redress within their agencies by virtue of negotiated collective bargaining agreements.

Court and EEOC Decisions.

The Supreme Court has held that whether a victim of discrimination is gay or bisexual does not preclude a claim under Title VII of the Civil Rights Act of 1964. In two separate cases, the court ruled that Title VII claims can proceed if lesbian, gay, or bisexual individuals can demonstrate that they were the victims of unlawful sex discrimination in the form of sexual harassment or gender stereotyping. Therefore, these individuals may be protected under Title VII if they are discriminated against based on sex, but they are not protected under current law if they claim discrimination based on sexual orientation.[195]

EEOC has also ruled that lesbian, gay, and bisexual individuals may also experience sex discrimination.[196] For example, it has ruled that an ongoing pattern of referring to an individual as "gay" can be pervasive enough to rise to the level of sexual harassment[197] and that sex discrimination may include adverse actions taken because of an individual's failure to conform to sex-stereotypes.[198]

[195] Congressional Research Service, *Sexual Orientation and Gender Identity Discrimination in Employment: A Legal Analysis of the Employment Non-Discrimination Act (ENDA)*, July 15, 2013, p. 4. See *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998) and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

[196] U.S. Equal Employment Opportunity Commission, *Processing Complaints of Discrimination by Lesbian, Gay, Bisexual, and Transgender (LGBT) Federal Employees*. Accessed at www.eeoc.gov//federal/directives/lgbt_complaint_processing.cfm.

[197] See, e.g., *Brooker v. U.S. Postal Service*, EEOC Appeal No. 0120112085 (2013).

[198] See, e.g., *Veretto v. U.S. Postal Service*, EEOC Appeal No. 0120110873 (2011).

Recommendations

Given the history of sexual orientation discrimination in Federal employment, it is encouraging that so few Federal employees perceive that such discrimination occurs today. More research will be needed to determine the more relevant point—how many LGB employees believe such discrimination occurs (as well as how many transgender Federal employees believe gender identity discrimination occurs). It is also encouraging that LGBT Federal employees appear to be represented among the supervisory and managerial cadre at a rate comparable to their representation in non-supervisory positions. We note, however, that there are issues inherent in the existing protections from sexual orientation discrimination as well as in the communication of those protections.

The recent nominees to lead the agencies that deal with Federal employment policy and the prosecution of allegations of PPPs—OPM and OSC—have typically been asked as part of the Senatorial confirmation process whether they agree with the interpretation that the tenth PPP bars sexual orientation discrimination.[199] This practice illustrates the fundamental limitation of current policy—the existence and enforcement of protections against sexual orientation discrimination in Federal employment depend on interpretation. Any ambiguity in the longstanding policy prohibiting sexual orientation discrimination would be resolved by legislation making that prohibition explicit. Such legislation could grant Federal employees who allege they are victims of sexual orientation discrimination access to the same remedies as those who allege discrimination on other bases.

MSPB recommends the following actions be taken to further the inclusion of LGBT employees in the Federal workplace:

Federal Agencies Should:

- As required by OPM's *Guidance for Agency-Specific Diversity and Inclusion Strategic Plans*, review their management programs, policies, and procedures to

[199] See, for example, (a) "Nominations of Othoniel Armendariz to be a Member of the Federal Labor Relations Authority and Kay Coles James to be Director of the Office of Personnel Management," Hearing before the Committee on Governmental Affairs United States Senate, S. Hrg. 107-128, June 21, 2001, p. 89. (b) "Nominations of Hon. Linda M. Springer, to be Director, U.S. Office of Personnel Management; Hon. Laura A. Cordero, to be Associate Judge, Superior Court of the District of Columbia; and Hon. Noel Anketell Kramer, to be Associate Judge, District of Columbia Court of Appeals," Hearing before the Committee on Homeland Security and Governmental Affairs United States Senate, S. Hrg. 109-156, June 15, 2005, p. 61. (c) "Nomination of Carolyn N. Lerner to be Special Counsel, Office of Special Counsel," Hearing before the Committee on Homeland Security and Governmental Affairs United States Senate, S. Hrg. 112-218, March 10, 2011, p. 37.

ensure they are inclusive, transparent, and fair to all employees—and that they are perceived as such by employees. OPM's guidance provides specific steps that agencies may take to complete this analysis.[200]

- Support employee affinity groups focused on LGBT issues. In addition to signaling to all employees that the workplace is open and inclusive, agency sponsored LGBT affinity groups may be consulted when management policies are developed or changed. Such groups can also assist with recruitment efforts, mentoring, and other retention-focused activities.[201]
- Remain vigilant against PPPs and other activities including instances of sexual orientation discrimination that may undermine the actual or perceived integrity of agency human resources programs. Although the percentage of employees reporting violations of the MSPs or instances of PPPs are low, Federal agencies should seek to further reduce the incidence of illegal behaviors through education, appropriate redress mechanisms, and accountability for employees who abuse personnel authorities, commit PPPs, or tolerate such actions.[202]
- Provide training for (and on-going communication to) all employees regarding the prohibition on discriminating based on an employee's or an applicant's sexual orientation. Such training could be part of agency general diversity and inclusion instruction. The procedures for filing a complaint if employees believe they have been discriminated against on this basis should be included in agency training and communication efforts. In addition, these topics should be addressed as part of the training provided to new supervisors.
- Monitor the attitudes and perceptions of LGBT employees through FEVS data, other survey instruments, or employee focus groups to ascertain whether agency diversity and inclusion efforts are successful.

The Office of Personnel Management Should:

- Continue to include an item regarding sexual orientation and gender identity in future Federal Employee Viewpoint Surveys. Such data can assist agencies in crafting more inclusive management policies and can be used to benchmark employee attitudes across agencies.

- Consider adding an item to the FEVS regarding employee perceptions of whether they have been discriminated against and, if so, on what basis they believe that discrimination occurred. The results of this survey item will fill an important gap in our understanding of LGBT issues across the civilian service.

[200] U.S. Office of Personnel Management, *Guidance for Agency-Specific Diversity and Inclusion Strategic Plans*, November 2011, p. 16.

[201] Human Rights Campaign Foundation, 2012, op. cit., p. 33.

[202] U.S. Merit Systems Protection Board, *The Federal Government: A Model Employer or a Work in Progress? Perspectives from 25 Years of the Merit Principles Survey*, September 2008, p. 55.

Managers and Supervisors Should:

- Foster an inclusive work environment that is open to and accepting of all employees by managing in accordance with the MSPs while avoiding PPPs. The extent to which managers and supervisors discharge their authority in accordance with these ideals can influence the extent to which LGBT employees believe they are accepted in the workplace.[203]

Federal Employees Should:

- Make the effort to understand individual differences and work effectively with colleagues regardless of those differences. In most organizations, an employee who is merely tolerated, or left to his or her own, is unlikely to remain, much less thrive. The benefits of diversity—bringing a range of perspectives to bear on agency problems, courses of action, and how those actions may be perceived—can only be realized when employees work proactively to attain those benefits.[204]

  It can be challenging to work with individuals whose interests, values, or beliefs differ from our own. We acknowledge these challenges can be uncomfortable for employees. It is imperative, however, that personal discomfort—with the differences themselves, or with the effort needed to bridge them—not be allowed to interfere with the sharing of work-related information and the accomplishment of work unit and agency goals.[205]

Future Researchers Should:

- Review the protections afforded transgender Federal employees, their attitudes toward those protections, and their perceptions of the work environment. These steps will help determine what additional actions, if any, should be taken to make the Federal workplace more inclusive of these individuals.

These recommendations are intended to promote the management of civilian Federal employees in accordance with the MSPs while being free from PPPs. The MSPs state that all employees and applicants for Federal employment should receive fair and equitable treatment with proper regard for their privacy and constitutional rights, and should be protected against arbitrary action and personal favoritism.[206] They also require that the Federal Government's recruitment policies strive for a workforce that is representative of all segments of society.[207] A commitment to equal opportunity, diversity, and inclusion is critical to achieving this goal.

[203] Human Rights Campaign Foundation, 2009, op. cit., p. 37.

[204] U.S. Merit Systems Protection Board, *Women in the Federal Government: Ambitions and Achievements*, Washington, D.C., May 2011, p. 60.

[205] Id.

[206] 5 U.S.C. § 2301(b)(2) and (8).

[207] 5 U.S.C. § 2301(b)(1).

Not only is attaining a diverse, qualified workforce one of the cornerstones of the merit-based civil service, as "the nation's largest employer, the Federal Government has a special obligation to lead by example."[208]

[208] Executive Order 13583, *Establishing a Coordinated Government-Wide Initiative to Promote Diversity and Inclusion in the Federal Workforce*, August 18, 2011.

Appendix: Methods

We used a number of processes to determine if the way people responded to the 2012 FEVS LGBT item affected the way they responded to other FEVS questions, and whether differences between LGBT and non-LGBT respondents were statistically significant within and between agencies. If being LGBT made no significant difference to a question's positivity or negativity, we concluded that the question did not vary by sexual orientation. If, however, a question's answer depended on whether one was LGBT, heterosexual, or declined to self-identify, then we concluded that sentiments expressed on this question varied significantly based on one's sexual orientation. In this way, we measured the effect of being LGBT on responses to questions and clusters of questions and could compare these effects across agencies.

We compiled a list of FEVS questions where the LGBT effect was statistically significant for any agency. We found 22 FEVS questions that showed a small but statistically significant LGBT effect for at least 16 different agencies. In our estimation, if an FEVS question showed a statistically significant LGBT effect in more than 15 agencies, the effect had occurred in enough agencies to warrant discussion in the report—some of these items were statistically significant in as many as 23 agencies. For ease of discussion, we classified these 22 questions into various groups that we had earlier identified through a factor analysis, also based on the FEVS LGBT question.

Factor analysis is commonly used to determine how many latent variables underlie a set of questions such as the responses to the 2012 FEVS. It is also used to explain the variation among many original variables (all of the items in the 2012 FEVS, for example) using fewer newly created variables (the factors). In this way, the factor analysis process condenses large numbers of questions into a smaller, more manageable set of factors. Factor analysis is also used to define the substantive content or meaning of each of the factors or latent variables.[209]

We determined that, if 3 or more of these 22 questions fell into a single factor, the factor would be further analyzed and discussed in the report. Of these 22 questions, 16 fell into 3 of our factors—Leadership (9 questions), Work Environment (4 questions), and Training (3 questions). These three factors are discussed in the text of the report. The remaining six FEVS questions were spread across five other factors, meaning each of those factors had less than our three-question threshold for being further analyzed or discussed in the report.

[209] Robert F. DeVellis, *Scale Development Theory and Applications* (2nd ed.), Sage Publications, Thousand Oaks, CA, 2003, pp. 103-104.

Analyses of survey results that are presented in this report exclude "don't know/not applicable" responses to focus on those who reported an opinion in response to a survey question.

All data that are presented in this report have been rounded either to the nearest percentage or to the nearest tenth of a percentage. This may cause some within-item data to appear not to total 100 percent.

In addition to the sources cited in the text of the report, our study was informed by OPM responses to a MSPB questionnaire regarding the current status and possible future of employment protections based on sexual orientation in the Federal workplace. We also sought input from knowledgeable individuals within the Federal EEO community and academia.

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Sexual Orientation

and the

Federal Workplace

Policy and Perception

Exhibit 4

12 FR 1935, Exec. Order No. 9835, 1947 WL 30991(Pres.)

EXECUTIVE ORDER 9835

PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT

March 21, 1947

WHEREAS each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

WHEREAS it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

WHEREAS, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

WHEREAS maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

PART I—INVESTIGATION OF APPLICANTS

1. There shall be a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government.

a. Investigations of persons entering the competitive service shall be conducted by the Civil Service Commission, except in such cases as are covered by a special agreement between the Commission and any given department or agency.

b. Investigations of persons other than those entering the competitive service shall be conducted by the employing department or agency. Departments and agencies without investigative organizations shall utilize the investigative facilities of the Civil Service Commission.

2. The investigations of persons entering the employ of the executive branch may be conducted after any such person enters upon actual employment therein, but in any such case the appointment of such person shall be conditioned upon a favorable determination with respect to his loyalty.

a. Investigations of persons entering the competitive service shall be conducted as expeditiously as possible; provided, however, that if any such investigation is not completed within 18 months from the date on which a person enters actual employment, the condition that his employment is subject to investigation shall expire, except in a case in which the Civil Service Commission has made an initial adjudication of disloyalty and the case continues to be active by reason of an appeal, and it shall then be the responsibility of the employing department or agency to conclude such investigation and make a final determination concerning the loyalty of such person.

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3. An investigation shall be made of all applicants at all available pertinent sources of information and shall include reference to:
a. Federal Bureau of Investigation files.

b. Civil Service Commission files.

c. Military and naval intelligence files.

d. The files of any other appropriate government investigative or intelligence agency.

e. House Committee on un-American Activities files.

f. Local law-enforcement files at the place of residence and employment of the applicant, including municipal, county, and State law-enforcement files.

g. Schools and colleges attended by applicant.

h. Former employers of applicant.

i. References given by applicant.

j. Any other appropriate source.

4. Whenever derogatory information with respect to loyalty of an applicant is revealed a full filed investigation shall be conducted. A full field investigation shall also be conducted of those applicants, or of applicants for particular positions, as may be designated by the head of the employing department or agency, such designations to be based on the determination by any such head of the best interests of national security.

PART II—INVESTIGATION OF EMPLOYEES

1. The head of each department and agency in the executive branch of the Government shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency.
a. He shall be responsible for prescribing and supervising the loyalty determination procedures of his department or agency, in accordance with the provisions of this order, which shall be considered as providing minimum requirements.

b. The head of a department or agency which does not have an investigative organization shall utilize the investigative facilities of the Civil Service Commission.

2. The head of each department and agency shall appoint one or more loyalty boards, each composed of not less than three representatives of the department or agency concerned, for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee of such department or agency on grounds relating to loyalty, and he shall prescribe regulations for the conduct of the proceedings before such boards.
a. An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affdavit.

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b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail, so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit, and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time, (2) of his right to an administrative hearing on such charges before a loyalty board, and (3) of his right to appear before such board personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal, to the head of the employing department or agency or to such person or persons as may be designated by such head, under such regulations as may be prescribed by him, and the decision of the department or agency concerned shall be subject to appeal to the Civil Service Commission's Loyalty Review Board, hereinafter provided for, for an advisory recommendation.

4. The rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment, but the head of the employing department or agency may suspend any officer or employee at any time pending a determination with respect to loyalty.

5. The loyalty boards of the various departments and agencies shall furnish to the Loyalty Review Board, hereinafter provided for, such reports as may be requested concerning the operation of the loyalty program in any such department or agency.

PART III—RESPONSIBILITIES OF CIVIL SERVICE COMMISSION

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three impartial persons, the members of which shall be officers or employees of the Commission.
a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:
(1) Advise all departments and agencies on all problems relating to employee loyalty.

(2) Disseminate information pertinent to employee loyalty programs.

(3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.

(4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

2. There shall also be established and maintained in the Civil Service Commission a central master index covering all persons on whom loyalty investigations have been made by any department or agency since September 1, 1939. Such master index shall

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contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted a loyalty investigation concerning the person involved.
a. All executive departments and agencies are directed to furnish to the Civil Service Commission all information appropriate for the establishment and maintenance of the central master index.

b. The reports and other investigative material and information developed by the investigating department or agency shall be retained by such department or agency in each case.

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate, investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.
a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

PART IV—SECURITY MEASURES IN INVESTIGATIONS

1. At the request of the head of any department or agency of the executive branch an investigative agency shall make available to such head, personally, all investigative material and information collected by the investigative agency concerning any employee or prospective employee of the requesting department or agency, or shall make such material and information available to any officer or officers designated by such head and approved by the investigative agency.

2. Notwithstanding the foregoing requirement, however, the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed. Investigative agencies shall not use this discretion to decline to reveal sources of information where such action is not essential.

3. Each department and agency of the executive branch should develop and maintain, for the collection and analysis of information relating to the loyalty of its employees and prospective employees, a staff specially trained in security techniques, and an effective security control system for protecting such information generally and for protecting confidential sources of such information particularly.

PART V—STANDARDS

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:
a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

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c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination or persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

PART VI—MISCELLANEOUS

1. Each department and agency of the executive branch, to the extent that it has not already done so, shall submit, to the Federal Bureau of Investigation of the Department of Justice, either directly or through Civil Service Commission, the names (and such other necessary identifying material as the Federal Bureau of Investigation may require) of all of its incumbent employees.

a. The Federal Bureau of Investigation shall check such names against its records of persons concerning whom there is substantial evidence of being within the purview of paragraph 2 of Part V hereof, and shall notify each department and agency of such information.

b. Upon receipt of the above-mentioned information from the Federal Bureau of Investigation, each department and agency shall make, or cause to be made by the Civil Service Commission, such investigation of those employees as the head of the department or agency shall deem advisable.

2. The Security Advisory Board of the State-War-Navy Coordinating Committee shall draft rules applicable to the handling and transmission of confidential documents and other documents and information which should not be publicly disclosed, and upon approval by the President such rules shall constitute the minimum standards for the handling and transmission of such documents and information, and shall be applicable to all departments and agencies of the executive branch.

3. The provisions of this order shall not be applicable to persons summarily removed under the provisions of section 3 of the act of December 17, 1942, 56 Stat. 1053, of the act of July 5, 1946, 60 Stat. 453, or of any other statute conferring the power of summary removal.

4. The Secretary of War and the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, are hereby directed to continue to enforce and maintain the highest standards of loyalty within the armed services, pursuant to the applicable statutes, the Articles of War, and the Articles for the Government of the Navy.

5. This order shall be effective immediately, but compliance with such of its provisions as require the expenditure of funds shall be deferred pending the appropriation of such funds.

6. Executive Order No. 9300 of February 5, 1943,[FN1] is hereby revoked.

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HARRY S. TRUMAN

THE WHITE HOUSE,*March 21, 1947*.

Footnotes

1 3 CFR Cum. Supp.

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Exhibit 5

(Typed September 7, 1951)

STRICTLY CONFIDENTIAL
BUREAU BULLETIN NO.____
SERIES 1951

TO ALL INVESTIGATIVE EMPLOYEES:

RE: SEX DEVIATES IN UNITED STATES GOVERNMENT SERVICE

The Seat of Government has been receiving an increasing number of reports, arrest records, and allegations concerning present and past employees of the United States Government, who assertedly are sex deviates. The Bureau has no investigative jurisdiction over sex deviates, but when an allegation is received that a present or former civilian employee of any branch of the United States Government is a sex deviate, such information is furnished to the United States Civil Service Commission. If the person is presently employed by the United States Government, the employing agency is likewise furnished a summary of the information. Information concerning members of the National Military Establishment is furnished to the Intelligence Unit of that particular agency.

All of the police departments throughout the country were notified in the May, 1950, issue of the FBI Law Enforcement Bulletin and again by letter dated July 26, 1950, to place a notation on the arrest fingerprint card that the subject was an employee of the Federal Government. They were also requested to set forth the name of the Department or Agency and the position occupied. Hence, it will be unnecessary to solicit this information from the police departments. Normally, a fingerprint card with the above-described data on it will suffice if the fingerprint card has been furnished to the Bureau's Identification Division.

Whenever information is received in the field, either from the police, a complainant, or through any other sources of information, it will be necessary to consolidate the information and transmit it to the Bureau by letter captioned as above. This letter should include (1) the name of the alleged sex deviate as well as the name of any other alleged deviates with whom he associated, (2) the date and place that the alleged act of sexual perversion occurred, (3) the identity of the individual's United States Government employment, (4) any other pertinent facts, including the disposition, where the person is arrested.

Your letter should specifically point out the source of

(The Executive Conference on 8-28-51 consisting of Messrs. Ladd, Glavin, Rosen, Mohr, Belmont, Parsons for Harbo, G.C. Gearty and Laughlin recommended approval of the above Bulletin with the exception of the last paragraph. The last paragraph is based on Exec.Conf. memo of 8-27-51. If you concur, this will be sent to the Field.LLL:mer)

(ABF:mhm)
LLL:mer

Tolson
Ladd
Clegg
Glavin
Nichols
Rosen
Tracy
Harbo
Belmont
Mohr
Tele. Room
Nease
Candy

RECEIVED READING ROOM
FBI

DECLASSIFIED BY SP-8BTJ/MC
ON 3/18/83

ENCLOSURE 66-03-1143

the information, whether or not that information should be treated as confidential, or whether the name of the source may be used by the Bureau in disseminating the information to the United States Civil Service Commission and the employing agency.

Whenever information of this nature is received during the course of a regular Bureau investigation, such should, of course, be incorporated in the regular investigative report and it will be unnecessary to furnish the information to the Bureau by supplemental cover letter.

With specific reference to Loyalty of Government Employees cases, it has been the Bureau policy to accept information of a derogatory nature relating to the character and personal habits of an employee if volunteered. Such information has been reflected in an investigative report as information volunteered and no attempt has been made to develop this data by supplemental inquiry. This policy is now changed to the following extent; when information is received during the course of a full field loyalty investigation or a preliminary inquiry indicating the person under investigation is a sex deviate, this allegation should be completely and fully developed and the facts reported. This procedure must be placed in effect immediately and followed closely.

Run and sent to all Bureau Offices Very truly yours,
and SAC's 9-13-51 GLH

John Edgar Hoover
Director

Exhibit 6

HEADS PERSONAL STAFF

Vandenberg Key Aide of Ike at Convention

BY JAMES M. HASWELL
Of Our Washington Bureau

CHICAGO—Gen. Dwight D. Eisenhower's right-hand man in Chicago is Arthur H. Vandenberg, Jr., son of the former statesman and senator from Michigan.

Ike calls Vandenberg his "chief of staff."

"I'm hardly that," says "Young Arthur" Vandenberg, modestly.

"I head up the personal staff Gen. Eisenhower assembled for this campaign to win the Republican nomination."

* * *

THIS IS NOT a new job for Vandenberg. He served many years as secretary to his father, and headed Senator Vandenberg's "personal staff" at the Republican National Conventions of 1936, 1940 and 1948.

In each of those conventions Senator Vandenberg was a presidential possibility, and the Vandenberg suite a major political headquarters.

This time the show is bigger. Eisenhower is installed on the fifth floor of the Blackstone Hotel, where Vandenberg presides over the staff and over workrooms which take most of the rest of the floor.

Oddly, "Young Arthur" who "knows everybody" in Washington, says he only met Eisenhower once before enlisting in the Eisenhower campaign.

* * *

"IT WAS a social occasion in 1947 or 1948," Vandenberg recalls.

"Gen. Eisenhower came over to me and said he was a Vandenberg man, that he hoped my father would win the Republican nomination for President."

"And why are you now supporting Eisenhower for President?" Vandenberg was asked.

"I think Gen. Eisenhower's basic principles are almost identical with those of my father," he said.

"I think the peace and security of the United States are at stake in this election. And I think Gen. Eisenhower can preserve the peace and security of the United States better than any man in either party today."

* * *

VANDENBERG SAID he wrote Gen. Eisenhower last October offering his services. In January he took a leave of absence from the International Basic Economy Corp. of New York and became operating head of the "Citizens for Eisenhower" movement.

"This was formed to channel and direct the grass-roots Eisenhower sentiment of the country into effective action, and to combat the strong political sentiment for Taft," he said.

In the 4½ months he headed the movement, Vandenberg says he created an organization with active branches in every state, and some 1,500 Eisenhower clubs in all.

There are more now, but this was the score when Vandenberg left to meet Ike in Paris and take over the General's personal campaign.

* * *

THERE IS NO question the "Citizen for Eisenhower" movement stirred the grass-roots of America. The story of this National Convention is a story of political delegates who find the folks back home demanding they nominate Eisenhower.

A lot of the grumbling you hear from Chicago is the grumbling of politicians being forced to obey the wishes of the voters.

Ike's personal convention staff numbers two-score people. The list includes Miss Geraldine Creaghan, of Grand Rapids, who served as secretary to the Vandenbergs, father and son, in Washington.

It Was Vandenberg Day

By ESTHER TUFTY
The Herald Washington Bureau

WASHINGTON—It was Vandenberg Day at the Pentagon Thursday. In the No. 1 spotlight was the youngest of the Vandenberg men, Arthur Jr., to receive the highest non-combative award, the Legion of Merit, from Gen. Carl Spaatz, commanding general of the Army Air Forces.

✦ ✦ ✦

CAST AS merely onlookers were Arthur Jr.'s famous father, Sen. Arthur H. Vandenberg, and his equally famous cousin, Lt. Gen. Hoyt Vandenberg, Central Intelligence. With Mrs. Vandenberg, they heard the following citation read:

"Major Arthur H. Vandenberg, Jr., Air Corps, as assistant A2 and chief, Public Relations Division, Headquarters, third Air Force, from Oct. 1944 to January 1946, Maj. Vandenberg demonstrated outstanding professional ability in carefully solving the complex problems of public relations with the utmost dexterity and delicacy. Maj. Vandenberg's outstanding services reflect great credit upon himself and the Army Air Forces."

✦ ✦ ✦

THE ONLY son of the Senator served as an enlisted man six months before attending quartermaster officer candidate school at Camp Lee, Virginia. He was commissioned Aug. 14, 1942 and served as an instructor at Camp Lee until his transfer to the Third Air Force in 1943.

He became assistant intelligence officer and chief of the Public Relations Division at headquarters of the Third Air Force in Tampa, Fla. He was disscharged from the service on March 15, 1946.

✦ ✦ ✦

THE SENATOR looked on at the ceremony with pride. Determined to keep it "Arthur's Day" he refused even to pose for pictures with the General pinning on the award.

In congratulating his son, the Senator voiced his envy and then turning to Gen. Spaatz, laughlingly added, "a poor Senator, unlike a General, doesn't get a medal or a flag to fly on his car."

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Exhibit 7

OFFICE OF DWIGHT D. EISENHOWER

DENVER COLORADO
October 11, 1952

Dear Arthur:

A press release which I authorized in New York City on September 29th was taken by some to constitute an implied promise to publish a statement as to personal income for the last ten years.

I have had, of course, no responsibility for political funds nor have I ever held political office. Moreover, I am not conscious of any public interest in my personal finances. But, because of the interpretation of my intent, you are authorized to make available for inspection by accredited representatives of the press, the following information.

Before leaving New York City on this current trip, I arranged for an appropriate compilation of pertinent data from my Federal income tax returns. From this compilation, please show for the ten-year period, ending December 31, 1951, the total of my taxable income from salary, the total income from investments, the income taxes paid and the amounts left after taxes and authorized deductions.

Because of some curiosity about the publication of my book "Crusade in Europe," please also give out separately complete information on that transaction, including total amount received, taxes paid, and copies of all correspondence between me and the United States Treasury.

To complete the record, I request that you also make clear:

(a) Upon going to Europe in early 1951, I took leave, without salary, from Columbia University when the Trustees declined to consider my offer to resign.

(b) Upon returning from Europe to participate in pre-convention Republican activities, I retired from the Army, stipulating that such retirement would be without pay. When nominated, I resigned my commission, thereby severing all connection with the Army.

I am now, in every sense of the word, a private citizen, and without income except from investments.

Sincerely,

Dwight D. Eisenhower

Mr. Arthur H. Vandenberg
Commodore Hotel
New York, N. Y.

KATZ
JJO

Eisenhower for President

STATE FINANCE COMMITTEE

CHAIRMAN
FRANK O. H. WILLIAMS

27 LEWIS STREET
HARTFORD, CONN.

April 8, 1952

Mr. Nelson A. Rockefeller
Room 5600
30 Rockefeller Plaza
New York 20, New York

Dear Mr. Rockefeller:

Arthur Vandenberg has turned over to me your note of March 10 together with the check of Mrs. Nelson A. Rockefeller for $3,000 drawn to the order of the Connecticut Eisenhower for President Committee.

Will you please express my sincere thanks to Mrs. Rockefeller inasmuch as this substantial support comes at a most opportune time. You will find an official receipt enclosed.

With best regards and repeated thanks, I am

Cordially yours,

Frank Williams

Chairman

FOHW:ebc
enc.

Exhibit 8

Vandenberg Jr. Is Selected As Eisenhower's Secretary

W. P. Rogers, Former Aide to Dewey, Named Deputy Attorney General

By RUSSELL PORTER

Gen. Dwight D. Eisenhower, President-elect, yesterday named Arthur H. Vandenberg Jr., 45 years old, of Grand Rapids, Mich., to be Secretary to the President, and William P. Rogers, 39, a war veteran of Bethesda, Md., to be Deputy Attorney General.

Mr. Vandenberg, who aided his father, the late Senator Vandenberg, in the development of bipartisan foreign policy, will have as one of his duties the supervision of the new President's engagements. He has been closely associated with General Eisenhower for some time.

Mr. Rogers has been chief counsel for Senate investigating committees which, according to a statement from Eisenhower headquarters, brought forth evidence of "influence peddling, corruption and disloyalty in the Federal Government." When Governor Dewey was District Attorney of New York County, Mr. Rogers was one of his aides. He also served under District Attorney Frank S. Hogan.

In an interview, Mr. Rogers, who is a New York and Washington lawyer, promised to sever all his private legal connections to help General Eisenhower and Herbert Brownell Jr., who will be Attorney General, to clean up the government and restore "the prestige of

The New York Times
Arthur H. Vandenberg Jr.

Continued on Page 42, Column 3

The New York Times
Published: November 27, 1952
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EISENHOWER NAMES 2 MORE TOP AIDES

Continued From Page 1

public service, integrity and public morality," and to cooperate fully with Congress and Congressional committees.

Mr. Brownell received a visit at Eisenhower headquarters from Senator Alexander Wiley of Wisconsin, member of the United States delegation to the United Nations General Assembly and ranking Republican member of the Senate Judiciary Committee; Robert Morris, chief counsel of the Senate Internal Security subcommittee, and Roy M. Cohn, special Assistant Attorney General in charge of anti-subversive activities.

According to Senator Wiley, they discussed subversive problems, particularly in the United Nations. Mr. Morris and Mr. Cohn have recently been investigating charges of subversion against United Nations employes. Mr. Morris said his committee, of which Senator Pat McCarran, Nevada Democrat, is chairman, would resume hearings Monday.

General Eisenhower spent a crowded day seeing visitors at his Commodore Hotel headquarters but will take today off for Thanksgiving dinner at his home, 60 Morningside Drive.

Two Cabinet Posts Still Open

Eisenhower headquarters will remain open today, and two more appointments of high officials in the new administration are expected to be announced this afternoon. James C. Hagerty, the President-elect's press secretary, said there would be a heavy schedule of work at headquarters tomorrow, Saturday and Sunday, with more job appointments to be announced. Two Cabinet posts remain to be filled, those of Secretary of Commerce and Secretary of Labor.

Mr. Hagerty announced expanded plans for news coverage of General Eisenhower's coming trip to Korea. These call for the President-elect to be accompanied by three reporters, representing The Associated Press, The United Press and The International News Service; two "pool" photographers and one "pool" radio representative. It had previously been planned to take only one reporter, one still photographer and one newsreel photographer.

News and pictures will not be released until after General Eisenhower has left Korea.

The press representatives will be Don Whitehead of The Associated Press, Merriman Smith of The United Press and Bob Considine of The International News Service. Frank Jurkoski of International News Photos will represent the photo services and Life magazine pool. Dave Oliver of Pathe News will represent the pooled newsreel and television coverage, and Everett Holles of the Mutual Broadcasting System will represent the combined radio networks.

Mr. Hagerty said the television networks had arranged for a special pool operation once General Eisenhower reached Korea. He said that in Korea any pool operations involving television would be covered by Julius Zenier of the National Broadcasting Company, who has been designated as the TV pool cameraman in Korea.

Announcing yesterday's appointments, Mr. Hagerty said the President-elect, after his inauguration on Jan. 20, would send Mr. Rogers' nomination as Deputy Attorney General to the Senate for confirmation. The nomination will be acted on by the Senate Judiciary Committee. Mr. Rogers said:

"Over the week-end Mr. Brownell and I had a chance to talk about his new job. He told me that he will have two major aims. First, he plans to recruit the most able and conscientious group of public servants available who will dedicate themselves to the cause of integrity in government. He expects and will demand that those who serve their Government set a good example. This is of the first importance because the public cannot be expected to take the laws very seriously if those who are in a position to enforce them are not honest and above reproach. Second, Mr. Brownell intends that his department will enforce the laws of this nation with real vigor and devotion so that the trend of the last several years toward a breakdown in public morality will be reversed.

"The President-elect believes that the public is sick and tired of corruption. The new Attorney General, and the whole Department of Justice which he heads, will conduct a vigorous campaign of law enforcement."

Rogers New to Politics

In reply to questions, Mr. Rogers said he was a Republican but had never taken any part in party politics until he helped Mr. Brownell prepare the fight over contested Southern delegates to the Republican National Convention in Chicago last July. He said he served in the District Attorney's office here as an independent.

The Vandenberg announcement was made by Mr. Hagerty in the name of Gov. Sherman Adams of New Hampshire, who has been designated by General Eisenhower as Assistant to the President, and who will serve as the President-elect's right-hand man at the White House. The appointment will be made after the inauguration.

Referring to his twenty-one years in Washington with his father, Mr. Vandenberg said: "Congress and the Washington scene will not be new to me."

Among General Eisenhower's visitors yesterday was Mrs. Anna Rosenberg, Assistant Secretary of Defense in charge of manpower, who returned Sunday from a trip to Korea. Asked whether she was going to remain in the Government after the change in administration, Mrs. Rosenberg replied:

"I went to the Defense Department for eight months at the request of Gen. [George C.] Marshall. I have been there two years and three months, and I think that's long enough for anybody."

But, she added, if there were anything she could do for General Eisenhower, she would be glad to do it.

Gov. Theodore R. McKeldin of Maryland, who placed General Eisenhower in nomination at Chicago, called on the President-elect and discussed plans for developing continued Republican strength in the South. The Governor said the Eisenhower Administration would crack down on corruption, "some of which has not even been suspected."

He also predicted that the Korean war would "no longer be secondary to the defense plans for Europe," but would become "the nation's most important problem."

Merlyn S. Pitzele, chairman of the New York State Mediation Board and labor editor of Business Week, a magazine, visited the President-elect, but refused to comment when asked whether he was slated for an administration post, or whether he knew who would be named Secretary of Labor. He said he and General Eisenhower had discussed "some of the obvious problems which have to be dealt with in the field of labor and race relations."

Mr. Pitzele paid a second visit to General Eisenhower in company with James Mitchell, vice president of Bloomingdale's store, who served as director of industrial manpower in the War Department in World War II. After seeing the President-elect, both men declined comment.

John Foster Dulles, designated by the President-elect to be Secretary of State, visited Eisenhower headquarters and conferred with Karl Gruber, Austrian Foreign Minister, on the Austrian peace treaty and other problems.

Other visitors to Eisenhower headquarters included Sinclair Weeks, chairman of the Republican Finance Committee; Laurence F. Lee, president of the United States Chamber of Commerce; Brig. Gen. Cornelius Wickersham, retired, a New York attorney who served on General Eisenhower's wartime staff, and George Mantzavinos, governor of the Bank of Greece.

The New York Times
Published: November 27, 1952
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Exhibit 9

Reproduced at the National Archives

Eisenhower

December 9, 1952

Mr. Tolson:

RE: GEORGE CLAYTON IRWIN or IRVIN

Milt Hill called and stated that he had just had a call from Ed Green, the personal assistant to General Eisenhower, who informed him that he had information to the effect that Irwin or Irvin had been arrested in Lafayette Park on a morals charge and has been bounced out of the Navy. Green asked if Hill could contact me and see if we had any information on Irwin. Green wants it purely on a personal and confidential basis, with nothing in writing. He does not want to request through channels that Irwin or Irvin be investigated; that Irwin or Irvin has been advanced for some kind of a job and that he is being sponsored by Arthur Vandenberg, Jr.

I told Milt that I didn't know whether we had anything or could furnish anything, but I would check.

You will recall that this is the same individual that Hill previously mentioned to me as having been introduced to the Republican National Committee and furnished the Chrysler air-conditioners for use at the convention, and was sponsored by Arthur Vandenberg, Jr.

We are presently checking on Irwin in connection with the Vandenberg inquiry and it is suggested that we await the outcome of this before deciding how to answer this query.

Hill told me that Green in turn told him that Arthur Vandenberg, Jr., was the chap who originally advanced Bernard Gladieux, known by Arthur Fleming, and Gladieux was, accordingly, accepted to serve on the Nelson Rockefeller Commission.

Respectfully,

L. B. Nichols

LBN:arm

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 3/10/82 BY Sp-8 BTJ/dcg

Exhibit 10

eproduced at the National Archives

United States Department of Justice
Federal Bureau of Investigation
Washington 25, D. C.

E REFER TO
FILE

January 5, 1953

MEMORANDUM FOR MR. TOLSON
MR. NICHOLS
MR. LADD

On December 30, 1952, at the request of General Eisenhower, I called at his headquarters at 9:30 a. m.

The General stated that he was desirous of talking with me about the contents of some of the reports upon the investigations which we had made of persons who were being appointed to important positions in his administration. He referred particularly to the report upon Mrs. Oveta Culp Hobby, who has been named to head the Federal Security Agency. He stated he noted that in the FBI report there was reference to the fact that there had been a rumor at one time that she had been a "kept" mistress but that the investigation had failed to substantiate any such allegation. The General stated that he would like to have me give consideration to the possibility of setting up two files upon cases, one to contain the factual material and the other to contain the rumors which we have not been able to substantiate. He stated that he made this suggestion because he felt, first, that it was probably unfair to disseminate rumors about an individual, even though such rumors are dispelled through investigation; and secondly, he stated that he anticipated that there would be brought to bear upon him considerable pressure after he became President to make available certain Government files. He stated he had, while in the Armed Services, declined to make available files to Congress but that there might be pressure of sufficient volume exerted that would make it necessary for him to re-evaluate this procedure and if there were two sets of files on an individual or a situation, one containing facts established and the other the rumors, that he might be inclined to make available in some situations the actual files. He stated he certainly would be opposed to making available to Congress or anyone else the so-called "raw" files that contained largely rumors.

I informed the General that it had been the practice of the Bureau not to disseminate to other Government agencies uncorroborated information but that we had included complete information in the reports being made to his office upon applicants in view of the importance of the positions to which such persons were being appointed. I also informed the General that I would have an immediate study made to put into force and effect the suggestions that he had made of having two separate files, one containing facts and the other rumors. (Upon my return to my hotel, I contacted Mr. Ladd by long distance and instructed him to see that this study was made and that steps were taken to put the practice into force and effect. I also instructed Mr. Ladd to see

DATE 3/10/82 BY Sp-8 BFDdcg

Produced at the National Archives

that all future reports to General Eisenhower's headquarters be carefully screened to eliminate any uncorroborated rumors or gossip.)

The General discussed at some length with me some of the over-all problems dealing with investigations and with intelligence. He stated that it was his desire to have the FBI handle the domestic phase of such matters and CIA the foreign. He stated he felt that both agencies might be able to work cordially together and effect results for the best interests of the country. He commented that General Smith was a very good man, although inclined at times to "pop off." He commented favorably upon Mr. Allen Dulles and inquired of me as to what my opinion was concerning him. I told General Eisenhower I felt that Allen Dulles was a brilliant man with a very excellent mind but that he sometimes was not as practical as he might be in regard to operational intelligence. I also indicated to General Eisenhower that I felt that General Smith was a very sincere and earnest man but, unfortunately, he had inherited from OSS some elements that were not conducive to the best operations of such an agency as CIA.

During the course of my discussion with General Eisenhower I mentioned the case of Mr. Arthur Vandenberg and outlined briefly to the General some of the angles of the case which we are now investigating. I told the General that Vandenberg had asked that we not interview the young man at present living with Vandenberg until he, Vandenberg, came out of the hospital, to which he had gone for a physical check over the last week end. The General inquired about some other phases of this matter about which I informed him. The General told me that should Mr. Vandenberg decide that he did not desire to continue in the position to which he had been appointed as Secretary to the President, that I could inform Vandenberg that no report would be submitted as it would then be a moot question. (I transmitted this information to Mr. Nichols but subsequent developments have indicated that Mr. Vandenberg desires that the investigation be concluded and that a report be submitted to General Eisenhower. This, of course, should be expedited.)

Very truly yours,

J. Edgar Hoover

John Edgar Hoover
Director

JEH:mpd

Exhibit 11

Reproduced at the Dwight D. Eisenhower Presidential Library

EISENHOWER HEADQUARTERS
COMMODORE HOTEL
January 13, 1953

FOR IMMEDIATE RELEASE

President-elect Dwight D. Eisenhower today made public the following letter from Arthur H. Vandenberg, his Secretary-designate.

January 13, 1953
1088 Park Avenue
New York, N. Y.

General Dwight D. Eisenhower
Commodore Hotel
New York, N. Y.

Dear General Eisenhower:

In my eagerness to fill the post which you offered me, I have made every effort to overcome an adverse condition of health. But I cannot longer delay in yielding to the fact that I will not be able to assume the duties of Secretary to the President on January 20th. Therefore I have no alternative except to request that you grant me an extended leave of absence from your staff.

I am deeply indebted to you for the privilege of serving with you in the past and I earnestly hope that it will be possible to resume the work within the next few months.

With sentiments of deep respect and with all good wishes,

Sincerely yours,

(Signed) Arthur

Arthur H. Vandenberg Jr.

* * * * * * * * * * * * *

On receipt of this letter President-elect Eisenhower issued the following statement:

I am distressed to learn of Arthur Vandenberg's illness. I sincerely hope he will have an early return to robust health. In this office he will be greatly missed.

#

Exhibit 12

DDE

January 17, 1953.

Dear Arthur:

When Mamie and I go off to Washington this weekend, one of our great regrets will be that you are unable to be with us. I am very distressed about your health, and from the superior vantage point of my great age, I want to tell you that you must take care of yourself. That is the one and the important thing.

I realize that you have been in this thing from the very beginning and that you have given tremendously of your energies during that period. On that account I feel in some respects guilty. All of us are looking forward to your early return to vitality and health.

Meanwhile, as I know you understand, we have to go ahead with our setup. We are keeping some vacancies in the organization -- and when you are feeling fit again, I want you to get in touch with Sherman Adams and me.

Please let Mrs. Whitman know your address, and drop me a note from time to time. And let me repeat -- do be careful and do follow the doctor's orders.

Mamie joins me in warm regard,

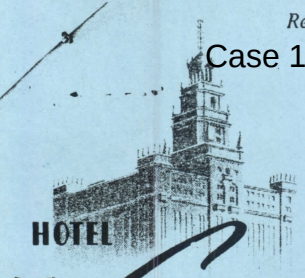
Very sincerely,

Dwight D. Eisenhower

Mr. Arthur H. Vandenberg,
1088 Park Avenue,
New York, New York.

Exhibit 13

Reproduced at the Dwight D. Eisenhower Presidential Library



HOTEL Everglades

ON BISCAYNE BAY

MIAMI, FLORIDA

JAMES W. TINLEY
MANAGER

February 6, 1953.

President Dwight D. Eisenhower
The White House
WASHINGTON, D. C.

Dear Mr. President:-

Pursuant to your kind suggestion that occasionally I advise you of my progress and plans, I am writing to report that I am ready and anxious to go to work. The timing of my return north will depend upon a decision as to what I am to do. Whenever there are any opportunities for discussion on the subject, I will be available as quickly as transportation permits. If nothing develops in the meantime, I will return to New York on March 1st.

May I report also that your decisive action on a broad front has had an extremely heartening effect upon the rank and file of the people in this area.

With all good wishes.

Sincerely yours,

Arthur

AHV:mw

Arthur H. Vandenberg, Jr.

Exhibit 14

Vandenberg Forgoes U. S. Post

MIAMI BEACH, Fla., April 13 (AP)—Arthur H. Vandenberg Jr. said today he had asked President Eisenhower to withdraw his appointment to the White House staff as appointment secretary. Mr. Vandenberg, son of the late Michigan Senator and one of President Eisenhower's campaign aides, said he made the request because he had been suffering from stomach ulcers and did not know how long the ailment would continue.

The New York Times
Published: April 14, 1953
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Exhibit 15

New U.S. Jobs Went to Half Of State Department 'Risks'

Special to THE NEW YORK TIMES.

WASHINGTON, Feb. 23—The State Department's list of employes separated from its service as security risks in 1953 was disclosed today. The list involved 590 persons, of whom eleven had been held disloyal.

Action against seven of the eleven was originated during the Truman Administration.

Ten others were accused of fraud or dishonesty in making up their personnel records.

On the other hand, 291 of the 590, almost half of the total, had been transferred to other government jobs, apparently with records clear enough to keep them employed in Federal establishments.

The State Department report, submitted after Representative John J. Rooney, Democrat of Brooklyn, had threatened to withhold appropriations unless a breakdown was given, also showed that among the 590:

¶Resignations, for reasons not given, had numbered 188.

¶Fifty employes had been separated through economy reductions in force.

¶The temporary employment of thirty-six had expired.

¶Four had retired.

¶Ninety-nine involved "homosexual deviations" as the principal factor, and 278 similar cases were under investigation with no determinations yet made.

The State Department report indicated that in seven Government departments and agencies employing more than 760,000 workers, separations under the security risk Executive Order of President Eisenhower that became effective last July numbered at least 1,057. Loyalty, it appeared, was involved in forty of the cases.

New Breakdown Promised

In the background was a phase of the President's Message on the State of the Union last month in which he indicated that 2,200 persons had been separated from Government service as security risks under that Executive Order.

Some Republican spokesmen interpreted this to mean that most if not all of those separated were subversives. Democrats demanded a breakdown, and one, breaking causes for separation into four general categories, was promised.

Today the Senate Post Office and Civil Service Committee voted to conduct an investigation into the "security risk" separations. Special attention, it was indicated, would be given those who had moved into other Government positions. Hearings were scheduled to start next Tuesday.

Before this investigative move, Democrats of Appropriations subcommittees of the House of Representatives had voted to get their own breakdowns of reasons for separations. As spokesmen from departments and agencies appeared to request funds for the fiscal year to start July 1, they have peppered them with demands for specific information on "security risk" separations from jobs.

In the transcript made public today the principal witness in this field was Scott McLeod, administrator of the Bureau of Security and Consular Affairs. He

Continued on Page 12, Column 5

The New York Times
Published: February 24, 1954
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291 OF 590 'RISKS' GOT NEW U. S. JOBS

Continued From Page 1

contended that the purpose and operations of the State Department's security risk program had been misinterpreted. He explained:

"Under the [Eisenhower] Executive Order, when a person's case was evaluated under the old Truman loyalty-security order [of 1947]; it must be re-evaluated under 10450 [President Eisenhower's Executive Order]. So to set up the machinery on this phase, we took those cases which had previously been through the old process and scheduled them for readjudication under this new order.

"When any person left the department, for whatever reason, who was on that list, we notified the Civil Service Commission that this unresolved security-integrity question existed in order that any other Federal agency which might employ that person would be aware of this situation and would inquire into it with respect to the sensitivity of the job he was to be assigned to.

"This is meant to be, and in my judgment is, justification of the fact that the department in reporting these figures to the Civil Service Commission, reported people who left the service by whatever means, which included transfers.

"That has been subjected to attack as a dishonest reporting device. I do not defend it. I can only explain it."

In stating the Eisenhower Executive Order contained "more stringent" standards "than ever experienced before," Mr. McLeod contended that its purpose also had been a mere security risk order: it was a "security and integrity" order, he said.

"The investigation attempts to look into a man's background up to the day when you evaluate his security potential * * * On the basis of the information you have * * * you attempt to project into the future a judgment as to whether or not he is potentially a security hazard," he declared.

"I make this point because you cannot prove how this fellow is going to act in the future. This is a human judgment. It is not susceptible to proof, because it involves future acts.

"I think frequently the public gets the impression that the security program is designed to somehow punish a man for what he has done in the past. This is not the purpose of this program. It is an attempt to project into the future what the pattern of behavior and conduct of this individual will be, from what he has exhibited in the past, and whether or not that is likely to be a danger to the Government."

Mr. McLeod tesified that after consulting a dictionary he had found the best definition of "security" to be "freedom from exposure to danger."

The New York Times
Published: February 24, 1954
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Exhibit 16

Reproduced from the Unclassified/Declassified Holdings of the National Archives

SPECIAL

Memo from Mr. Steele to Mr. Stahl brought about by Mr. Stahl's request for comments on a Washington Post editorial that will be discussed at a future Commission meeting. (Editorial dated 10-10-64).

GPO 16—10149-1

Reproduced from the Unclassified/Declassified Holdings of the National Archives

Homosexuality and Government employment
(Chairman Macy's memorandum of October 14, 1964)

NOV 17 1964

PIP:JLN:dmb

John W. Steele /s/ JWS

O. Glenn Stahl

In considering this subject, I believe it is necessary to distinguish at the outset between homosexuality as a security factor and homosexuality at a suitability factor.

The security requirements for Government employment are set forth in Executive Order 10450. The Order provides that the occupant of a sensitive position must have a full field investigation designed to develop information as to whether the employment of that individual is clearly consistent with the interests of national security. Among the kinds of information identified by the Order as pertinent in this regard are the following:

> Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.
>
> Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

Although there are some dissenting voices, our society generally regards homosexuality as a form of immoral conduct. Also, our social attitudes being what they are, a homosexual is extremely vulnerable to blackmail: exposure means public opprobrium and, in the case of a Government employee, the loss of his job. Thus, under the terms of the Order, evidence of past or present homosexuality renders the individual unacceptable for a sensitive position. Action in these cases, therefore, is determined not so much by policy as by the intent of the Order.

On the suitability side, the essential instructions, standards, and guides required for the rating of suitability cases within the Commission's jurisdiction are contained in FPM Supplement (Internal) 731-71, "Suitability Rating --- Instructions to Suitability Examiners." One of the basic disqualifications listed in this supplement is "Criminal, infamous, dishonest,

John W. Steele
Chief, Program Systems
And Instructions Division
Civil Service Commission, 1964

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immoral, or notoriously disgraceful conduct." The following is excerpted from the discussion of immoral conduct:

> "Homosexuality and sexual perversion. -- Persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts with them, without evidence of rehabilitation, are not suitable for Federal employment ... Evidence showing that a person has homosexual tendencies, standing alone, is insufficient to support a rating of unsuitability on the ground of immoral conduct.
>
> "Other immoral conduct. -- These cases raise special problems because the morals of an individual are generally considered to be his own private affair. Also, there is a wide variation in views, both between individuals and social groups or classes, as to what constitutes immoral conduct. Further, public opinion relating to moral standards shifts from time to time over the years ... Our main concern in these cases is to determine whether or not the immoral behavior is such as to render the applicant, in the minds of responsible people, unfit for Federal employment. It should be clear in reaching an adverse decision in these cases that the Federal service would suffer by permitting the employment of the person."

From the foregoing, it is evident that we set homosexuality apart from other forms of immoral conduct and take a much more severe attitude toward it. In evaluating other morals cases we consider such factors as the seriousness of the act or acts, the age of the individual at the time the conduct occurred, the individual's general reputation, the recency of the conduct, and so on. In evaluating cases of homosexuality, we automatically find the individual not suitable for Federal employment unless there is evidence of rehabilitation. This is our stated policy. There is room for considerable variation in the application of this policy, however, because nothing whatever has been issued to indicate what the term "evidence of rehabilitation" contemplates.

The result is that our evaluations are quite subjective, depending on the strength of the reviewing official's personal aversion to homosexuality in general and his reaction to the circumstances of the particular case at hand. This was apparent from conversations with a number of officials who are or have been engaged in suitability rating or the appellate review of agency actions. For example, one expressed the view that he would regard as rehabilitated and suitable for Federal employment a man who had been the passive partner in a few homosexual acts in his youth but who had since married, had children, and for the past 4 or 5 years lived a seemingly normal life, without questionable associates or habits. He was then asked whether he would regard this same pattern as evidence of rehabilitation in a case when the homosexual conduct had consisted of molesting male children. To this he responded, with some heat, that he did not believe such an offender should ever be allowed in the Federal service.

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Some feel that "once a homo, always a homo" and tend to find against anyone who has ever engaged in such activity. This may have been at the root of our sustention of the FAA's action in the Dew case, although the rationale was something like this: homosexual conduct is evidence of some emotional imbalance and indicates instability or immaturity; the work of an airport control tower operator is pressure-filled, rigorous, and demands a high degree of steadiness; since there is reason to believe that Dew may have a basic emotional flaw which may some day give under pressure, he is less than a good risk in a job where the safety of human lives is at stake. The fact remains, however, that Dew's homosexual conduct occurred in his youth; that for many years thereafter he lived a normal life with no recurrence of or apparent interest in homosexual activity, that he had a good work record; and that, to all intents and purposes, he was "rehabilitated."

In summary, it seems clear that this is an area in which there is little objectivity. Although it is Commission policy to rule in favor of the individual if there is evidence of rehabilitation, in actual practice we rarely find evidence of rehabilitation. Really, we do not apply Commission policy at all; we apply our own individual emotional reactions and moral standards. Our tendency to "lean over backwards" to rule against a homosexual is simply a manifestation of the revulsion which homosexuality inspires in the normal person. What it boils down to is that most men look upon homosexuality as something uniquely nasty, not just as a form of immorality. It is problematical whether any study of the subject could result in overcoming an attitude this ingrained.

PIP:JLNammack:dwb t.d. 11-13-64
PIP:JLNammack:dwb rewritten 11-16-64

BLN for PM Sec 11/16/64

Exhibit 17

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UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

IN REPLY PLEASE RE

YOUR REFERENCE

February 25, 1966

The Mattachine Society
of Washington
P.O. Box 1032
Washington, D. C. 20013

Gentlemen:

Pursuant to your request of August 15, 1965, Commission representatives met with representatives of the Society on September 8, 1965, to enable the Society to present its views regarding the Government policy on the suitability for Federal employment, of persons who are shown to have engaged in homosexual acts.

The Society was extended 30 days to submit a written memorandum in support of the positions set forth at these discussions to ensure that full consideration could be given to its contentions and supporting data by the Commissioners. On December 13, 1965, the Society filed five documents,* which, along with the substance of the September discussions, have been considered by the Commissioners.

The core of the Society's position and its recommendations is that private, consensual, out-of-working hours homosexual conduct on the part of adults, cease to be a bar to Federal employment. In the alternative it is asked that the Commission activate continuing discussions with representatives of the Society to take a "progressive, idealistic, humane, forward-looking, courageous role" to elicit the holding of objective hearings leading to the adoption of the Society's recommendation.

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* "DISCRIMINATION AGAINST THE EMPLOYMENT OF HOMOSEXUALS", dated February 28, 1963, by the Society, "RESOLUTION OF NATIONAL CAPITOL AREA CIVIL LIBERTIES UNION ON FEDERAL EMPLOYMENT OF HOMOSEXUALS", dated August 7, 1964, "A BRIEF OF INJUSTICES" by the Council on Religion and the Homosexual, Inc., San Francisco, California, June 1965, "WHY ARE HOMOSEXUALS PICKETING THE U. S. CIVIL SERVICE COMMISSION", June 26, 1965, by the Society, and "FEDERAL EMPLOYMENT OF HOMOSEXUAL AMERICAN CITIZENS", November 15, 1965, by the Society.

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The Commission's policy for determining suitability is stated as follows:

> "Persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts with them, without evidence of rehabilitation, are not suitable for Federal employment. In acting on such cases the Commission will consider arrest records, court records, or records of conviction for some form of homosexual conduct or sexual perversion; or medical evidence, admissions, or other credible information that the individual has engaged in or solicited others to engage in such acts with him. Evidence showing that a person has homosexual tendencies, standing alone, is insufficient to support a rating of unsuitability on the ground of immoral conduct."

We have carefully weighed the contentions and recommendations of the Society, and perceive a fundamental misconception by the Society of our policy stemming from a basic cleavage in the perspective by which this subject is viewed. We do not subscribe to the view, which indeed is the rock upon which the Mattachine Society is founded, that "homosexual" is a proper metonym for an individual. Rather we consider the term "homosexual" to be properly used as an adjective to describe the nature of overt sexual relations or conduct. Consistent with this usage pertinent considerations encompass the types of deviate sexual behavior engaged in, whether isolated, intermittent, or continuing acts, the age of the particular participants, the extent of promiscuity, the aggressive or passive character of the individual's participation, the recency of the incidents, the presence of physical, mental, emotional, or nervous causes, the influence of drugs, alcohol or other contributing factors, the public or private character of the acts, the incidence of arrests, convictions, or of public offense, nuisance or breach of the peace related to the acts, the notoriety, if any, of the participants, the extent or effect of rehabilitative efforts, if any, and the admitted acceptance of, or preference for homosexual relations. Suitability determinations also comprehend the total impact of the applicant upon the job. Pertinent considerations here are the revulsion of other employees by homosexual conduct and the consequent disruption of service efficiency, the apprehension caused other employees of homosexual advances, solicitations or assaults, the unavoidable subjection of the sexual deviate to erotic stimulation through on-the-job use of common toilet, shower, and living facilities, the offense to members of the public who are required to deal with a known or admitted sexual deviate to transact Government business, the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, particularly among the youth, and the use of Government funds and authority in furtherance of conduct offensive both to the mores and the law of our society.

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In the light of these pervading requirements it is upon overt conduct that the Commission's policy operates, not upon spurious classification of individuals. The Society apparently represents an effort by certain individuals to classify themselves as "homosexuals" and thence on the basis of asserted discrimination to seek, with the help of others, either complete social acceptance of aberrant sexual conduct or advance absolvement of any consequences for homosexual acts which come to the attention of the public authority. Homosexual conduct, including that between consenting adults in private, is a crime in every jurisdiction, except under specified conditions, in Illinois. Such conduct is also considered immoral under the prevailing mores of our society.

We are not unaware of the numerous studies, reports and recommendations pertaining to the criminal aspects of aberrant sexual conduct and the unequal and anomalous impact of the criminal laws and their enforcement upon individuals, who for whatever cause, engage in homosexual conduct.* It is significant to note, however, that the renowned Wolfenden Report, which recommended that consensual homosexual conduct, in private between persons over 21 years of age, be excluded as an offense under the criminal law of England, nevertheless recognized that such conduct may be a valid ground for exclusion from certain forms of employment. id p. 22. Whether the criminal laws represent an appropriate societal response to such conduct is a matter properly addressed to the state legislatures and the Congress. It is beyond the province of this Commission.

We reject categorically the assertion that the Commission pries into the private sex life of those seeking Federal employment, or that it discriminates in ferreting out homosexual conduct. The standard against criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct is uniformly applied and suitability investigations underlying its observance are objectively pursued. We know of no means, consistent with American notions of privacy and fairness, and limitations on governmental authority, which could ascertain the nature of individual private sexual behavior between consenting adults. As long as it remains truly private, that is, it remains undisclosed to all but the participants, it is not the subject of an inquiry. Where, however, due to arrest records, or public disclosure or notoriety, an applicant's sexual behavior, be it heterosexual or homosexual, becomes a matter of public knowledge, an inquiry may be warranted. Criminal or licentious heterosexual conduct may equally be disqualifying, and like homosexual conduct, may become the subject of legitimate concern in a suitability investigation. In all instances the individual is apprised of the matter being investigated and afforded an opportunity to rebut, explain, supplement or verify the information.

---

*e.g. SEX OFFENDERS, Gebhard, Gagnon, Pomeroy, Institute of Sex Research (1965); SEXUAL BEHAVIOR AND THE LAW, Samuel G. Kling, Random House (1965); HOMOSEXUALITY AND CITIZENSHIP IN FLORIDA, Legislative Investigation Committee Report (1964); THE AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Proposed Official Draft (1962); PRIVATE CONSENSUAL HOMOSEXUAL BEHAVIOR: THE CRIME AND ITS ENFORCEMENT, Yale Law Journal, 623 (March 1961); REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT AND THE SECRETARY OF SCOTLAND (WOLFENDEN REPORT) (1957); A PSYCHIATRIC EVALUATION OF LAWS OF HOMOSEXUALITY, 29 Temple Law Quarterly, 273 (Spring 1956) and SEXUAL DEVIATION RESEARCH, Calif. Legislature, Judiciary Committee, Subcommittee on Sex Research (1952).

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To be sure if an individual applicant were to publicly proclaim that he engages in homosexual conduct, that he prefers such relationships, that he is not sick, or emotionally disturbed, and that he simply has different sexual preferences, as some members of the Mattachine Society openly avow, the Commission would be required to find such an individual unsuitable for Federal employment. The same would be true of an avowed adulterer, or one who engages in incest, illegal fornication, prostitution, or other sexual acts which are criminal and offensive to our mores and our general sense of propriety. The self-revelation by announcement of such private sexual behavior and preferences is itself public conduct which the Commission must consider in assaying an individual's suitability for Federal employment.

Hence it is apparent that the Commission's policy must be judged by its impact in the individual case in the light of all the circumstances, including the individual's overt conduct. Before any determination is reached the matter is carefully reviewed by a panel of three high level, mature, experienced employees, and all factors thoroughly considered. The fairness of this result, in the light of the investigative evidence including the applicant's statements, is subject to administrative review and may also be judicially reviewed. Hence there are safeguards against error and injustice.

We can neither, consistent with our obligations under the law, absolve individuals of the consequences of their conduct, nor do we propose by attribution of sexual preferences based on such conduct, to create an insidious classification of individuals. We see no third sex, no oppressed minority or secret society, but only individuals; and we judge their suitability for Federal employment in the light of their overt conduct. We must attribute to overt acts whether homosexual or heterosexual, the character ascribed by the laws and mores of our society. Our authority and our duty permit no other course.

By direction of the Commission:

Sincerely yours,

John W. Macy, Jr.

John W. Macy, Jr.
Chairman

Exhibit 18

McDermott
Will & Emery

Boston Brussels Chicago Düsseldorf Frankfurt Houston London Los Angeles Miami
Milan Munich New York Orange County Paris Rome Seoul Silicon Valley Washington, D.C.
Strategic alliance with MWE China Law Offices (Shanghai)

Lisa A. Linsky
Attorney at Law
llinsky@mwe.com
+1 212 547 5587

January 25, 2013

VIA FIRST CLASS MAIL

Federal Bureau of Investigation
Record/Information Dissemination Section
Attn: FOIPA Request
170 Marcel Drive
Winchester, VA 22602-4843

Dear FOIA Officer:

This is a new request pursuant to the Freedom of Information Act, 5 U.S.C. § 552.

In connection with this request, please provide copies of all communications, personnel or investigative files created in association with **Executive Order 10450**, which was signed by President Dwight Eisenhower in April 1953 and made effective on May 27, 1953. This request includes any and all internal FBI correspondence or communications regarding Executive Order 10450 and also specifically includes, but is not limited to, all files created by and communications to or from Warren E. Burger. The date range for this request is **1950-1990.**

To assist you in locating the documents and information related to this request, Executive Order 10450 authorized federal agencies, including the U.S. Civil Service Commission and the Federal Bureau of Investigation, to investigate current and potential federal employees for security risks. Notably, the order expanded criteria for determining a security risk to include "Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, sexual perversion." In this regard, Executive Order 10450 authorized the FBI to expand its "Sex Deviate program," which systematically collected information on suspected homosexuals employed in the federal government, law enforcement agencies, and institutions of higher learning. In addition, Warren E. Burger was in charge of enforcing Executive Order 10450 as an Assistant Attorney General in charge of the Civil Division at the Department of Justice, for the approximate period **1952-1957**. Information collected in the course of the program was forwarded to designated officials in the executive, legislative, and judicial branches of government.

Please advise if the administrative fees associated with this request will exceed $500.00.

The information sought pursuant to this request is not for commercial use but rather in connection with the work of the Mattachine Society, a non-profit education and research organization.

Please feel free to contact me or my colleague, Lisa Gerson, via phone or email with any questions. Our contact information is listed below.

Your prompt attention to this request is appreciated.

Sincerely,

Lisa A. Linsky
McDermott Will & Emery LLP
340 Madison Avenue
New York, New York 10172
llinsky@mwe.com
(212) 547-5587

Lisa Gerson
lgerson@mwe.com
(212) 547-5769

Jason Raymond
2122 P Street NW
Washington, D.C. 20037
248.767.4740
jasonmraymond@gmail.com

Exhibit 19

U.S. Department of Justice

Federal Bureau of Investigation
Washington, D.C. 20535

April 17, 2015

LISA A LINSKY
MCDERMOTT, WILL & EMERY LLP
340 MADISON AVENUE
NEW YORK, NY 10173

FOIPA Request No.: 1207786-000
Subject: EXECUTIVE ORDER 10450 (1950-1990)

Dear Lisa Linsky:

The enclosed documents were reviewed under the Freedom of Information/Privacy Acts (FOIPA), Title 5, United States Code, Section 552/552a. Deletions have been made to protect information which is exempt from disclosure, with the appropriate exemptions noted on the page next to the excision. In addition, a deleted page information sheet was inserted in the file to indicate where pages were withheld entirely. The exemptions used to withhold information are marked below and explained on the enclosed Explanation of Exemptions:

Section 552		Section 552a
☐ (b)(1)	☐ (b)(7)(A)	☐ (d)(5)
☐ (b)(2)	☐ (b)(7)(B)	☐ (j)(2)
☑ (b)(3)	☐ (b)(7)(C)	☐ (k)(1)
FRCP Rule 6(e)	☑ (b)(7)(D)	☐ (k)(2)
	☐ (b)(7)(E)	☐ (k)(3)
	☐ (b)(7)(F)	☐ (k)(4)
☐ (b)(4)	☐ (b)(8)	☐ (k)(5)
☐ (b)(5)	☐ (b)(9)	☐ (k)(6)
☐ (b)(6)		☐ (k)(7)

539 pages were reviewed and 253 pages are being released.

☑ Documents were located which originated with, or contained information concerning, other Government agencies) [OGA].

☑ This information has been referred to the OGA(s) for review and direct response to you.
☑ We are consulting with OGA(s). The FBI will correspond with you regarding this information when the consultation is finished.

☐ In accordance with standard FBI practice and pursuant to FOIA exemption (b)(7)(E) and Privacy Act exemption (j)(2) [5 U.S.C. § 552/552a (b)(7)(E)/(j)(2)], this response neither confirms nor denies the existence of your subject's name on any watch lists.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S. C. § 552(c) (2006 & Supp. IV (2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist. Enclosed for your information is a copy of the Explanation of Exemptions.

☑ You have the right to appeal any denials in this release. Appeals should be directed in writing to the Director, Office of Information Policy (OIP), U.S. Department of Justice,1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's eFOIA portal at http://www.justice.gov/oip/efoia-portal.html. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be easily identified.

☐ The enclosed material is from the main investigative file(s) in which the subject(s) of your request was the focus of the investigation. Our search located additional references, in files relating to other individuals, or matters, which may or may not be about your subject(s). Our experience has shown when ident, references usually contain information similar to the information processed in the main file(s). Because of our significant backlog, we have given priority to processing only the main investigative file(s). If you want the references, you must submit a separate request for them in writing, and they will be reviewed at a later date, as time and resources permit.

☑ See additional information which follows.

Sincerely,

David M. Hardy
Section Chief
Record/Information
Dissemination Section
Records Management Division

Enclosure(s)

In response to your Freedom of Information Act (FOIA) request submitted to the Records Management Division at Winchester, VA, enclosed is a processed copy of FBI Headquarters file 66-HQ-A19000, sections 1, 2, and 4. This release represents the first interim release of information responsive to your request.

Per your request the release has been placed on a CD-ROM.

No fee is being assessed at this time. When the second interim release is made in this case, you will be billed for the $5.00 fee associated with this first release as well as the $15.00 duplication fee for the second release for a total of $20.00. Each subsequent release will be made at a cost of $15.00.

EXPLANATION OF EXEMPTIONS

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552

(b)(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified to such Executive order;

(b)(2) related solely to the internal personnel rules and practices of an agency;

(b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(b)(9) geological and geophysical information and data, including maps, concerning wells.

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a

(d)(5) information compiled in reasonable anticipation of a civil action proceeding;

(j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;

(k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;

(k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;

(k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;

(k)(4) required by statute to be maintained and used solely as statistical records;

(k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;

(k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service he release of which would compromise the testing or examination process;

(k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.

Exhibit 20

U.S. Department of Justice

National Security Division

Washington, D.C. 20530

MAY 0 5 2015

Ms. Lisa Linsky
McDermott Will & Emery LLP
340 Madison Avenue
New York, NY 10172

NSD# 15-123

Dear Ms. Linsky:

While processing your January 25, 2013, Freedom of Information Act (FOIA) request, the Federal Bureau of Investigation (FBI) located records and referred them to the National Security Division (NSD). NSD received these records on April 27, 2015.

We have reviewed these records and are releasing them in part. We are withholding the portions of the record indicated pursuant to one or more of the following FOIA exemptions set forth in 5 U.S.C. 552(b):

(6) which permits with withholding of personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) which permits the withholding of records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information. . .

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Other records referred from the FBI originated with the Office of Legal Counsel (OLC). Pursuant to Department practice, we have referred those records to OLC for their review and direct response to you. OLC's contact information is attached.

If you are not satisfied with my response, you may administratively appeal by writing to the Director, Office of

Information Policy (OIP), United States Department of Justice, Suite 1100050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's portal at: http://www.justice.gov/oip/efoia-portal.html Your appeal must be postmarked or transmitted electronically within sixty days from the date of this letter. If you submit your appeal by mail, both the letter and the envelope should be clearly marked, "Freedom of Information Act Appeal."

Sincerely,

Kevin G. Tiernan, Chief
FOIA and Records Management

Exhibit 21

U.S. Department of Justice

Federal Bureau of Investigation
Washington, D.C. 20535

May 12, 2015

LISA A LINSKY
MCDERMOTT, WILL & EMERY LLP
340 MADISON AVENUE
NEW YORK, NY 10172

FOIPA Request No.: 1207786-000
Subject: EXECUTIVE ORDER 10450 (1950-1990)

Dear Lisa Linsky:

The enclosed documents were reviewed under the Freedom of Information/Privacy Acts (FOIPA), Title 5, United States Code, Section 552/552a. Deletions have been made to protect information which is exempt from disclosure, with the appropriate exemptions noted on the page next to the excision. In addition, a deleted page information sheet was inserted in the file to indicate where pages were withheld entirely. The exemptions used to withhold information are marked below and explained on the enclosed Explanation of Exemptions:

Section 552		Section 552a
☐ (b)(1)	☐ (b)(7)(A)	☑ (d)(5)
☐ (b)(2)	☐ (b)(7)(B)	☐ (j)(2)
☐ (b)(3)	☑ (b)(7)(C)	☐ (k)(1)
_____	☐ (b)(7)(D)	☐ (k)(2)
_____	☐ (b)(7)(E)	☐ (k)(3)
_____	☐ (b)(7)(F)	☐ (k)(4)
☐ (b)(4)	☐ (b)(8)	☐ (k)(5)
☐ (b)(5)	☐ (b)(9)	☐ (k)(6)
☑ (b)(6)		☐ (k)(7)

552 pages were reviewed and 169 pages are being released.

☑ Documents were located which originated with, or contained information concerning, other Government Agency (OGA).

☑ This information has been referred to the OGA for review and direct response to you.
☑ We are consulting with another agency. The FBI will correspond with you regarding this information when the consultation is completed.

☐ In accordance with standard FBI practice and pursuant to FOIA exemption (b)(7)(E) and Privacy Act exemption (j)(2) [5 U.S.C. § 552/552a (b)(7)(E)/(j)(2)], this response neither confirms nor denies the existence of your subject's name on any watch lists.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S. C. § 552(c) (2006 & Supp. IV (2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist. Enclosed for your information is a copy of the Explanation of Exemptions.

For questions regarding our determinations, visit the www.fbi.gov/foia website under "Contact Us." The FOIPA Request Number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

You have the right to appeal any denials in this release. Appeals should be directed in writing to the Director, Office Information Policy (OIP), U.S. Department of Justice,1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's eFOIA portal at http://www.justice.gov/oip/efoia-portal.html. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be easily identified.

☐ The enclosed material is from the main investigative file(s) in which the subject(s) of your request was the focus of the investigation. Our search located additional references, in files relating to other individuals, or matters, which may or may not be about your subject(s). Our experience has shown when ident, references usually contain information similar to the information processed in the main file(s). Because of our significant backlog, we have given priority to processing only the main investigative file(s). If you want the references, you must submit a separate request for them in writing, and they will be reviewed at a later date, as time and resources permit.

☑ See additional information which follows.

Sincerely,

David M. Hardy
Section Chief
Record/Information
Dissemination Section
Records Management Division

Enclosure(s)

In response to your Freedom of Information Act (FOIA) request submitted to the Records Management Division at Winchester, VA, enclosed is a processed copy of FBI Headquarters file 66-HQ-A19000, section 3, 66-HQ-A19000 EBF 50, section 1, and 66-HQ-A19000 EBF 89, section 1. This release represents the second interim release of information responsive to your request.

Per your request the release has been placed on a CD-ROM.

By letter dated April 17, 2015, we sent you a CD containing the first interim release for this case. At that time, we explained the $5.00 balance associated with that release would be billed with this release. Accordingly, upon receipt of the enclosed CD-ROM, please go to www.pay.gov to make an electronic payment* in the amount of $20.00, or make a check or money order payable to the Federal Bureau of Investigation and remit it to the Work Process Unit, Record Information/Dissemination Section, Records Management Division, Federal Bureau of Investigation, 170 Marcel Drive, Winchester, VA 22602. Please include the FOIPA Request Number with your payment. Failure to pay for this release within thirty (30) days from the date of this letter will close any pending FBI FOIPA requests from you. Nonpayment will also cause an automatic denial of any future FOIPA requests.

For questions regarding our determinations, visit the www.fbi.gov/foia website under "Contact Us."

The FOIPA Request Number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

*Pay.gov is a secure web-based application that accepts credit card and ACH payments online, and is hosted by the United States Department of Treasury, Financial Management Service. For frequent FOIPA requesters, it is recommended to create a Pay.gov account to retain an online history of payments made through Pay.gov and to retain specific information for future payments. To make an electronic payment, complete the FBI Freedom of Information Act and Privacy Act Form located on Pay.gov. Please note: if a refund is necessary, there is less processing time to refund a credit card payment than an ACH payment.

Inquiries regarding your OGA referrals designated within the release as "Referral/Direct" may be directed to the following agencies at:

Vanessa Brinkman
Department of Justice
Office of Information Policy (OIP)
1425 New York Ave, NW
Washington, DC 20530-0001

EXPLANATION OF EXEMPTIONS

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552

(b)(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified to such Executive order;

(b)(2) related solely to the internal personnel rules and practices of an agency;

(b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(b)(9) geological and geophysical information and data, including maps, concerning wells.

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a

(d)(5) information compiled in reasonable anticipation of a civil action proceeding;

(j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;

(k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy. for example, information involving intelligence sources or methods;

(k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;

(k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;

(k)(4) required by statute to be maintained and used solely as statistical records;

(k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;

(k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service he release of which would compromise the testing or examination process;

(k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.

FBI/DOJ

Exhibit 22

McDermott Will & Emery

Boston Brussels Chicago Dallas Düsseldorf Frankfurt Houston London Los Angeles Miami Milan Munich New York Orange County Paris Rome Seoul Silicon Valley Washington, D.C.

Strategic alliance with MWE China Law Offices (Shanghai)

Lisa A. Linsky
Attorney at Law
llinsky@mwe.com
+1 212 547 5587

June 12, 2015

VIA UNITED STATES MAIL

Director
Office of Information Policy
United States Department of Justice
1425 New York Ave., Suite 1050
Washington D.C. 2530-0001

Re: Appeal of Agency Determination of FOIA Request No. 1207786-000

Dear Director:

We represent the Mattachine Society of Washington D.C. ("MSDC") in the above referenced request for documents pursuant to the Freedom of Information Act ("FOIA"). The MSDC is a non-profit, non-partisan research and educational society that conducts original archival research at The National Archives, U.S. presidential libraries, the Library of Congress, the FOIA Library of the Federal Bureau of Investigation, the Stonewall National Museum and Archives, and other private and public repositories across the country. The mission of the MSDC is to uncover the often deleted political histories of lesbian, gay, bisexual and transgender ("LGBT") Americans who faced persecution and discrimination at the hands of federal and state governments for over sixty-five years. The MSDC is dedicated to achieving full civil equality for LGBT Americans.

We, on behalf of the MSDC, hereby appeal the determinations of the Federal Bureau of Investigation ("FBI") and Department of Justice ("DOJ") with respect to the above referenced matter for the reasons detailed herein.

Background

Under the pretext of protecting national security, President Dwight D. Eisenhower issued Executive Order 10450 ("EO 10450"), declaring that the federal government could deny a citizen employment in "each department or agency of the Government" solely because that person was homosexual. Exec. Order No. 10, 450 § 2, 18 Fed. Reg. 2,489 (Apr. 29, 1953). We understand that then Assistant Attorney General Warren E. Burger (and later Chief Justice of the Supreme Court) was tasked with the responsibility of defending any action under EO 10450.

On or about January 25, 2014, the MSDC submitted a FOIA request (the "Request") to the Federal Bureau of Investigation (the "FBI") seeking the production of documents concerning

EO 10450 dated from January 1, 1950 through December 31, 1990. The Request specifically sought all files in the FBI's possession created by and communications to or from Warren Burger concerning EO 10450.

More than two years later, on April 17, 2015, the FBI responded to the Request stating that "539 pages were reviewed and 253 pages are being released." (Ltr. from D. Hardy to L. Linsky, dated Apr. 17, 2015 (the "FBI Letter").) The FBI claims that the following exemptions, pursuant to 5 U.S.C. § 552, justified the withholding of documents responsive to the Request: 552(b)(3) (citing Federal Rule of Criminal Procedure 6(e)) and 552(b)(7)(D). Additional documents were sent to other Government agencies for review.

On May 5, 2015, we received a letter from the Department of Justice, National Security Division ("DOJ") which released an additional number of pages. However, the DOJ stated that it had "reviewed these records and are releasing them in part." (Ltr. from K. Tiernan to L. Linsky, dated May 5, 2015 (the "DOJ Letter").) The DOJ claims that the following exemptions, pursuant to 5 U.S.C. § 552, justified the withholding of documents responsive to the Request: 552(b)(6) and 552(b)(7)(C).

We hereby appeal the FBI's and the DOJ's determinations and respectfully request that the FBI (i) reconsider the scope of its search for documents and (ii) reconsider its application of the claimed exemptions.

Reasons for Appeal

"Congress enacted the FOIA in order to 'pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Morley v. C.I.A.*, 508 F.3d 1108, 114 (D.C. Cir. 2007) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976); *Rose v. Dep't of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)). FOIA "adopts as its most basic premise a policy strongly favoring public disclosure of information of federal agencies." *Halpern v. F.B.I.*, 181 F.3d 279, 286 (2d Cir. 1999).

Based upon the information we have received in response to the Request, we believe that the FBI and DOJ have not met these standards. More specifically, we assert that (i) the scope of the FBI's search for documents was inadequate and (ii) the FBI has failed to meet its burden to demonstrate that the claimed exemptions apply. For the reasons stated below, the FBI should reconsider its initial response, expand its search, and produce more documents pursuant to the Request.

The FBI's Search for Documents Was Inadequate

At the time the FBI received the Request, it had a responsibility "to do a reasonably thorough search of its records and to turn over all responsive materials except those for which it could prove an exemption from disclosure." *Church of Scientology Int'l v. DOJ*, 30 F.3d 224,

229-30 (1st Cir. 1994). In judging whether an agency has conducted an adequate search, "the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

Here, the FBI has not provided any basis upon which the adequacy of its search can be reasonably evaluated. It has not disclosed what method it used to search for records, where it searched for records or what other possible search parameters it used to locate potentially responsive documents. At a minimum, we request that the FBI disclose this basic information so that the adequacy of the FBI's search methodology can be scrutinized.

But, at a more fundamental level, it is apparent from the released documents themselves that the FBI's search was inadequate. As noted above, the time period for the request was from 1950 through 1990. The FBI released documents from the approximate period of 1956 through 1959. There is no indication whatsoever that the FBI searched for documents outside of this time period. This is especially troubling given that EO 10450 was issued in April of 1953 and the documents produced by the FBI predominantly concern the amendment of EO 10450 in light of the Supreme Court's decision in *Cole v. Young* which invalidated large portions of EO 10450.

Moreover, the FOIA request specifically requests all files in the FBI's possession created by and communications to or from Warren E. Burger concerning EO 10450. There is not one record that was produced by the FBI upon which Mr. Burger was copied or authored.

We believe that the FBI's search is patently inadequate and respectfully request that the FBI reevaluate whatever its search criteria is or may be and make an effort to locate additional responsive documents.

The FBI's and DOJ's Claimed Exemptions Are Inadequate

As the FBI and DOJ are undoubtedly aware, the court "'impose[s] a substantial burden on an agency seeking to avoid disclosure' through the FOIA exemptions." *Morley*, 508 F.3d at 1114-15 (quoting *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973)). "As such, exemptions from disclosure must be narrowly construed and 'conclusory and generalized allegations of exemptions' are unacceptable.'" *Id.* (quoting *Founding Church of Scientology of Wash., D.C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 830 (D.C. Cir. 1979)).

The FBI Letter and the DOJ Letter state that certain documents are being withheld pursuant to the following exemptions: (i) 5 U.S.C. § 552(b)(3) (citing Federal Rule of Criminal Procedure 6(e)); (ii) 5 U.S.C. § 552(b)(6); (iii) 5 U.S.C. § 552(b)(7)(C); and (iv) 5 U.S.C. § 552(b)(7)(D).

Other than identifying the claimed exemptions, neither the FBI Letter nor the DOJ Letter provide any further explanation or justification for withholding these documents. We respectfully request that the FBI and the DOJ provide an explanation for withholding these

documents other than with "conclusory and generalized allegations of exemptions." *Morley*, 508 F.3d at 1115.

Because the FBI and DOJ have failed to provide their reasons for the claimed exemptions, we reserve all rights to challenge the claimed exemptions on their merits when those reasons are provided.

Conclusion

We look forward to your response to this appeal and the production of further documents in response to the Request. Please advise if the further production of documents associated with the Request requires administrative fees that will exceed $500.00.

The information sought pursuant to this appeal and the Request is not for commercial use but rather in connection with the work of the Mattachine Society, a non-profit education and research organization.

Please feel free to contact me via phone or email with any questions.

Respectfully submitted,

Lisa Linsky /MRH

Lisa A. Linsky
on behalf of the Mattachine Society
of Washington D.C.

DM_US 61833143-1.099749.0589

Exhibit 23

U.S. Department of Justice

Federal Bureau of Investigation
Washington, D.C. 20535

June 22, 2015

LISA A LINSKY
MCDERMOTT, WILL & EMERY LLP
340 MADISON AVENUE
NEW YORK, NY 10172

FOIPA Request No.: 1207786-000
Subject: EXECUTIVE ORDER 10450 (1950-1990)

Dear Lisa Linsky:

The enclosed documents were reviewed under the Freedom of Information/Privacy Acts (FOIPA), Title 5, United States Code, Section 552/552a. Deletions have been made to protect information which is exempt from disclosure, with the appropriate exemptions noted on the page next to the excision. In addition, a deleted page information sheet was inserted in the file to indicate where pages were withheld entirely. The exemptions used to withhold information are marked below and explained on the enclosed Explanation of Exemptions:

Section 552		Section 552a
☑ (b)(1)	☐ (b)(7)(A)	☐ (d)(5)
☐ (b)(2)	☐ (b)(7)(B)	☐ (j)(2)
☑ (b)(3)	☑ (b)(7)(C)	☐ (k)(1)
50 U.S.C. § 403g	☑ (b)(7)(D)	☐ (k)(2)
	☐ (b)(7)(E)	☐ (k)(3)
	☐ (b)(7)(F)	☐ (k)(4)
☐ (b)(4)	☐ (b)(8)	☐ (k)(5)
☐ (b)(5)	☐ (b)(9)	☐ (k)(6)
☑ (b)(6)		☐ (k)(7)

476 pages were reviewed and 254 pages are being released.

☑ Documents were located which originated with, or contained information concerning, other Government Agencies [OGA].

☑ This information has been referred to the OGA(s) for review and direct response to you.
☑ We are consulting with another agency. The FBI will correspond with you regarding this information when the consultation is completed.

☐ In accordance with standard FBI practice and pursuant to FOIA exemption (b)(7)(E) and Privacy Act exemption (j)(2) [5 U.S.C. § 552/552a (b)(7)(E)/(j)(2)], this response neither confirms nor denies the existence of your subject's name on any watch lists.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S. C. § 552(c) (2006 & Supp. IV (2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist. Enclosed for your information is a copy of the Explanation of Exemptions.

For questions regarding our determinations, visit the www.fbi.gov/foia website under "Contact Us." The FOIPA Request Number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

You have the right to appeal any denials in this release. Appeals should be directed in writing to the Director, Office Information Policy (OIP), U.S. Department of Justice,1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's eFOIA portal at http://www.justice.gov/oip/efoia-portal.html. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be easily identified.

☐ The enclosed material is from the main investigative file(s) in which the subject(s) of your request was the focus of the investigation. Our search located additional references, in files relating to other individuals, or matters, which may or may not be about your subject(s). Our experience has shown when ident, references usually contain information similar to the information processed in the main file(s). Because of our significant backlog, we have given priority to processing only the main investigative file(s). If you want the references, you must submit a separate request for them in writing, and they will be reviewed at a later date, as time and resources permit.

☑ See additional information which follows.

Sincerely,

David M. Hardy
Section Chief
Record/Information
Dissemination Section
Records Management Division

Enclosure(s)

In response to your Freedom of Information Act (FOIA) request submitted to the Records Management Division at Winchester, VA, enclosed is a processed copy of FBI Headquarters file 66-HQ-A19000, sections 5, and 6. This release represents the third interim release of information responsive to your request.

Per your request the release has been placed on a CD-ROM.

Upon receipt of the enclosed CD, please go to www.pay.gov to make an electronic payment*, or make a check or money order payable to the Federal Bureau of Investigation in the amount of $15.00 and remit payment to the Work Process Unit, Record/Information Dissemination Section, Records Management Division, Federal Bureau of Investigation, 170 Marcel Drive, Winchester, VA 22602. Please include the FOIPA Request Number with your payment. Failure to pay for this release within thirty (30) days from the date of this letter will close any pending FBI FOIPA requests from you. Nonpayment will also cause an automatic denial of any future FOIPA requests.

For questions regarding our determinations, visit the www.fbi.gov/foia website under "Contact Us."

The FOIPA Request Number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

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As previously indicated, documents were located which originated with, or contained information concerning another agencies. We are consulting with the other agencies and are awaiting their response. Due to the fact that our office has processed all other information currently in our possession, your request is being administratively closed at this time, pending the completion of the outstanding consultation by our office. The FBI will correspond with you regarding those documents when the consultation is completed.

Inquiries regarding your OGA referrals designated within the release as "Referral/Direct" may be directed to the following agencies at:

Teresa Crosland
National Security Division
Department of Justice
Room 6150
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Vanessa Brinkman
Office of Information Policy (OIP)
1425 New York Avenue, NW
Washington, DC 20530

Attn: Arnetta James, FOIA Initiative Coordinator
Office of Intelligence Policy and Review
Department of Justice, National Security Division
950 Pennsylvania Avenue, NW Suite 6150
Washington, DC 20530

EXPLANATION OF EXEMPTIONS

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552

(b)(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified to such Executive order;

(b)(2) related solely to the internal personnel rules and practices of an agency;

(b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(b)(9) geological and geophysical information and data, including maps, concerning wells.

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a

(d)(5) information compiled in reasonable anticipation of a civil action proceeding;

(j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;

(k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;

(k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;

(k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;

(k)(4) required by statute to be maintained and used solely as statistical records;

(k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;

(k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service he release of which would compromise the testing or examination process;

(k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.

FBI/DOJ

Exhibit 24

McDermott
Will&Emery

Boston Brussels Chicago Dallas Düsseldorf Frankfurt Houston London Los Angeles Miami
Milan Munich New York Orange County Paris Rome Seoul Silicon Valley Washington, D.C.
Strategic alliance with MWE China Law Offices (Shanghai)

Lisa A. Linsky
Attorney at Law
llinsky@mwe.com
+1 212 547 5587

August 13, 2015

VIA UNITED STATES MAIL

Director
Office of Information Policy
United States Department of Justice
1425 New York Ave., Suite 1050
Washington D.C. 2530-0001

Re: Appeal of Agency Determination of FOIA Request No. 1207786-000
Appeal Number AP-2015-04578

Dear Director:

We represent the Mattachine Society of Washington D.C. ("MSDC") in the above referenced request for documents pursuant to the Freedom of Information Act ("FOIA") as well as the associated appeal.[1] We are in receipt of a letter dated June 22, 2015 from the Federal Bureau of Investigation ("FBI") providing an additional partial response to the above referenced request for documents.

After having reviewed the materials provided with the June 22 letter, on behalf of the MSDC, we hereby appeal the determinations of the FBI with respect to the above referenced matter. This appeal is related to the same appeal listed above as it all stems from the same FOIA request. As a result, we respectfully request that this appeal be consolidated with Appeal Number AP-2015-04578.

Background

Under the pretext of protecting national security, President Dwight D. Eisenhower issued Executive Order 10450 ("EO 10450"), declaring that the federal government could deny a citizen employment in "each department or agency of the Government" solely because that person was homosexual. Exec. Order No. 10, 450 § 2, 18 Fed. Reg. 2,489 (Apr. 29, 1953). We understand that then Assistant Attorney General Warren E. Burger (and later Chief Justice of the Supreme

[1] The MSDC is a non-profit, non-partisan research and educational society that conducts original archival research at The National Archives, U.S. presidential libraries, the Library of Congress, the FOIA Library of the Federal Bureau of Investigation, the Stonewall National Museum and Archives, and other private and public repositories across the country. The mission of the MSDC is to uncover the often deleted political histories of lesbian, gay, bisexual and transgender ("LGBT") Americans who faced persecution and discrimination at the hands of federal and state governments for over sixty-five years. The MSDC is dedicated to achieving full civil equality for LGBT Americans.

Court) was tasked with the responsibility of defending any action actions taken pursuant to the authority found in EO 10450.

On or about January 25, 2014, the MSDC submitted a FOIA request (the "Request") to the FBI seeking the production of documents concerning EO 10450 dated from January 1, 1950 through December 31, 1990. The Request specifically sought all files in the FBI's possession created by and communications to or from Warren Burger concerning EO 10450.

More than two years later, on April 17, 2015, the FBI responded to the Request stating that "539 pages were reviewed and 253 pages are being released." (Ltr. from D. Hardy, dated Apr. 17, 2015 (the "FBI Letter").) The FBI claimed that the following exemptions, pursuant to 5 U.S.C. § 552, justified the withholding of documents responsive to the Request: 552(b)(3) (citing Federal Rule of Criminal Procedure 6(e)) and 552(b)(7)(D). Additional documents were sent to other Government agencies for review.

On May 5, 2015, we received a letter from the Department of Justice, National Security Division ("DOJ") which released an additional number of pages. However, the DOJ stated that it had "reviewed these records and are releasing them in part." (Ltr. from K. Tiernan, dated May 5, 2015 (the "DOJ Letter").) The DOJ claimed that the following exemptions, pursuant to 5 U.S.C. § 552, justified the withholding of documents responsive to the Request: 552(b)(6) and 552(b)(7)(C).

On June 12, 2015, the MSDC appealed the determinations of the FBI and the DOJ and requested that additional information be released pursuant to the Request (the "Appeal").

On June 22, 2015, we received a letter from the FBI responding to the Request stating that "476 pages were reviewed and 254 pages are being released." (Ltr. from D. Hardy to L. Linsky, dated June 22, 2015 (the "Second FBI Letter"). The FBI claims that the following exemptions, pursuant to 5 U.S.C. § 552, justified the withholding of documents responsive to the Request: 552 (b)(1); 552(b)(3) (citing 50 U.S.C. § 403g); 552(b)(7)(C); and 552(b)(7)(D). The FBI indicated that additional documents were sent to other Government agencies for review. In addition, the FBI indicated that it is consulting with another agency concerning the Request.

On July 14, 2015, the Office of Information Policy for the DOJ sent a letter to undersigned counsel acknowledging receipt of the Appeal on June 23, 2015. The Appeal was assigned appeal number AP-2015-04578.

In addition to the above referenced Appeal, we hereby appeal the FBI's determinations with respect to the Second FBI Letter and respectfully request that the FBI (i) reconsider the scope of its search for documents and (ii) reconsider its application of the claimed exemptions. Moreover, we respectfully request that this appeal be consolidated with the prior Appeal to streamline the administrative process.

Reasons for Appeal

"Congress enacted the FOIA in order to 'pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Morley v. C.I.A.*, 508 F.3d 1108, 114 (D.C. Cir. 2007) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976); *Rose v. Dep't of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)). FOIA "adopts as its most basic premise a policy strongly favoring public disclosure of information of federal agencies." *Halpern v. F.B.I.*, 181 F.3d 279, 286 (2d Cir. 1999).

Based upon the information we have received in response to the Request, we believe that the FBI has not met these standards. More specifically, we assert that (i) the scope of the FBI's search for documents was inadequate and (ii) the FBI has failed to meet its burden to demonstrate that the claimed exemptions apply. For the reasons stated below, the FBI should reconsider its initial response, expand its search, and produce more documents pursuant to the Request.

The FBI's Search for Documents Was Inadequate

At the time the FBI received the Request, it had a responsibility "to do a reasonably thorough search of its records and to turn over all responsive materials except those for which it could prove an exemption from disclosure." *Church of Scientology Int'l v. DOJ*, 30 F.3d 224, 229-30 (1st Cir. 1994). In judging whether an agency has conducted an adequate search, "the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

Here, the FBI has not provided any basis upon which the adequacy of its search can be reasonably evaluated. It has not disclosed what method it used to search for records, where it searched for records or what other possible search parameters it used to locate potentially responsive documents. At a minimum, we request that the FBI disclose this basic information so that the adequacy of the FBI's search methodology can be scrutinized.

But, at a more fundamental level, it is apparent from the released documents themselves that the FBI's search was inadequate. As noted above, the time period for the request was from 1950 through 1990. It appears, however, that the FBI only produced documents created after 1959. This is troubling because EO 10450 was issued in April of 1953 and the documents produced by the FBI predominantly concern the amendment of EO 10450 in light of the Supreme Court's decision in *Cole v. Young* in 1959 which invalidated large portions of EO 10450. The MSDC has a good faith basis to believe that there are responsive documents concerning actions and activities by government officials and agencies which occurred in the immediate aftermath of the issuance of EO 10450, and in the years prior to the *Cole v. Young* decision.

Moreover, the FOIA request specifically requests all files in the FBI's possession created by and communications to or from Warren E. Burger concerning EO 10450. There is not one record that was produced by the FBI upon which Mr. Burger was copied or authored.

We believe that the FBI's search is patently inadequate and respectfully request that the FBI reevaluate whatever its search criteria is or may be and make an effort to locate additional responsive documents.

The FBI's and DOJ's Claimed Exemptions Are Inadequate

As the FBI and DOJ are undoubtedly aware, the court "'impose[s] a substantial burden on an agency seeking to avoid disclosure' through the FOIA exemptions." *Morley*, 508 F.3d at 1114-15 (quoting *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973)). "As such, exemptions from disclosure must be narrowly construed and 'conclusory and generalized allegations of exemptions' are unacceptable.'" *Id.* (quoting *Founding Church of Scientology of Wash., D.C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 830 (D.C. Cir. 1979)).

The Second FBI Letter states that certain documents are being withheld pursuant to the following exemptions: (i) 5 U.S.C. § 552 (b)(1); (ii) 5 U.S.C. § 552(b)(3) (citing 50 U.S.C. § 403g); (iii) 5 U.S.C. § 552(b)(7)(C); and (iv) 5 U.S.C. § 552(b)(7)(D).

Other than identifying the claimed exemptions, the Second FBI Letter does not provide any further explanation or justification for withholding these documents. We respectfully request that the FBI provide an explanation for withholding these documents other than with "conclusory and generalized allegations of exemptions." *Morley*, 508 F.3d at 1115.

Because the FBI and DOJ have failed to provide their reasons for the claimed exemptions, we reserve all rights to challenge the claimed exemptions on their merits when those reasons are provided.

Conclusion

We look forward to your response to this appeal (which should be consolidated with the above referenced appeal) and the production of further documents in response to the Request. Please advise if the further production of documents associated with the Request requires administrative fees that will exceed $500.00.

The information sought pursuant to this appeal and the Request is not for commercial use but rather in connection with the work of the Mattachine Society, a non-profit education and research organization.

Please feel free to contact me via phone or email with any questions.

Respectfully submitted,

Lisa Linsky /MKH

Lisa A. Linsky
on behalf of the Mattachine Society
of Washington D.C.

DM_US 63156145-1.099749.0589

Exhibit 25

U.S. Department of Justice

Federal Bureau of Investigation
Washington, D.C. 20535

October 30, 2015

LISA A LINSKY
MCDERMOTT, WILL & EMERY LLP
340 MADISON AVENUE
NEW YORK, NY 10172

FOIPA Request No.: 1207786-001
Subject: EXECUTIVE ORDER 10450 (1950-1990)

Dear Lisa Linsky:

You were previously advised we were consulting with another agency concerning information located as a result of your Freedom of Information/Privacy Acts (FOIPA) request.

This consultation is complete and the enclosed material is being released to you with deletions made pursuant to Title 5, United States Code, Section(s) 552/552a as noted below. See the enclosed form for an explanation of these exemptions.

Section 552		Section 552a
☐ (b)(1)	☐ (b)(7)(A)	☐ (d)(5)
☐ (b)(2)	☐ (b)(7)(B)	☐ (j)(2)
☐ (b)(3)	☑ (b)(7)(C)	☐ (k)(1)
_____	☑ (b)(7)(D)	☐ (k)(2)
_____	☐ (b)(7)(E)	☐ (k)(3)
_____	☐ (b)(7)(F)	☐ (k)(4)
☐ (b)(4)	☐ (b)(8)	☐ (k)(5)
☐ (b)(5)	☐ (b)(9)	☐ (k)(6)
☑ (b)(6)		☐ (k)(7)

140 pages were reviewed and 140 pages are being released.

☐ Deletions were made by NAME OF AGENCY (USE ONLY FOR AGENCIES ALLOWING ATTRIBUTION). To appeal those denials, please write directly to that agency.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S. C. § 552(c) (2006 & Supp. IV (2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

For questions regarding our determinations, visit the www.fbi.gov/foia website under “Contact Us.” The FOIPA Request Number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

You may file an appeal by writing to the Director, Office of Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's eFOIA portal at http://www.justice.gov/oip/efoia-portal.html. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number in any correspondence to us for proper identification of your request.

☐ See additional information which follows.

Sincerely,

David M. Hardy
Section Chief,
Record/Information
Dissemination Section
Records Management Division

Enclosure(s)

EXPLANATION OF EXEMPTIONS

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552

(b)(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified to such Executive order;

(b)(2) related solely to the internal personnel rules and practices of an agency;

(b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(b)(9) geological and geophysical information and data, including maps, concerning wells.

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a

(d)(5) information compiled in reasonable anticipation of a civil action proceeding;

(j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;

(k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;

(k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;

(k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;

(k)(4) required by statute to be maintained and used solely as statistical records;

(k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;

(k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service he release of which would compromise the testing or examination process;

(k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.

FBI/DOJ

Exhibit 26

McDermott
Will&Emery

Boston Brussels Chicago Dallas Düsseldorf Frankfurt Houston London Los Angeles Miami
Milan Munich New York Orange County Paris Rome Seoul Silicon Valley Washington, D.C.
Strategic alliance with MWE China Law Offices (Shanghai)

Lisa A. Linsky
Attorney at Law
llinsky@mwe.com
+1 212 547 5587

December 10, 2015

VIA UNITED STATES MAIL

Director
Office of Information Policy
United States Department of Justice
1425 New York Ave., Suite 1050
Washington D.C. 20530-0001

Re: Appeal of Agency Determination of FOIA Request No. 1207786-0010
Appeal Number AP-2015-04578

Dear Director:

We represent the Mattachine Society of Washington D.C. ("MSDC") in the above referenced request for documents pursuant to the Freedom of Information Act ("FOIA") as well as the associated appeal.[1] We are in receipt of a letter dated October 30, 2015 (the "October 30 Letter") from your office providing additional partial responses to the above referenced request for documents. This letter is attached hereto as Exhibit A.

The October 30 Letter is the sixth response from the Office of Information Policy ("OIP"), Federal Bureau of Investigation ("FBI") and the Department of Justice ("DOJ") that we have received in partial response to MSDC's above referenced FOIA request. As further described below, each of these prior three responses are insufficient and have already been appealed. After having reviewed the October 30 Letter and its attached documents on behalf of the MSDC, we hereby appeal the determinations of the OIP with respect to the above referenced matter.

The below appeal of the October 30 Letter is related to the same appeal listed above as it all stems from the same FOIA request. So that the administrative burden of these piecemeal responses and piecemeal appeals we respectfully request that, upon receipt of this appeal, all of

[1] The MSDC is a non-profit, non-partisan research and educational society that conducts original archival research at The National Archives, U.S. presidential libraries, the Library of Congress, the FOIA Library of the Federal Bureau of Investigation, the Stonewall National Museum and Archives, and other private and public repositories across the country. The mission of the MSDC is to uncover the often deleted political histories of lesbian, gay, bisexual and transgender ("LGBT") Americans who faced persecution and discrimination at the hands of federal and state governments for over sixty-five years. The MSDC is dedicated to achieving full civil equality for LGBT Americans.

MSDC's appeals of the determinations of the FBI, DOJ and OIP with regard to FOIA Request number 1207786-001 into a single appeal under Appeal Number AP-2015-04578.

Moreover, we ask that we receive a substantive response to this appeal in no more than 20 business days from OIP's receipt of this letter as per 5 U.S.C. § 552(a)(6). If we do not receive a substantive response to this appeal and all other outstanding appeals within the proscribed statutory time period, we will pursue further remedies, including but not limited to, commencing an action in United States District Court to remedy these failures to comply with FOIA.

Background

Under the pretext of protecting national security, President Dwight D. Eisenhower issued Executive Order 10450 ("EO 10450"), declaring that the federal government could deny a citizen employment in "each department or agency of the Government" solely because that person was homosexual. Exec. Order No. 10, 450 § 2, 18 Fed. Reg. 2,489 (Apr. 29, 1953). We understand that then Assistant Attorney General Warren E. Burger (and later Chief Justice of the Supreme Court) was tasked with the responsibility of defending any action actions taken pursuant to the authority found in EO 10450.

On or about January 25, 2013, the MSDC submitted a FOIA request (the "Request", attached hereto as Exhibit B) to the FBI seeking the production of documents concerning EO 10450 dated from January 1, 1950 through December 31, 1990. The Request specifically sought all files in the FBI's possession created by and communications to or from Warren Burger concerning EO 10450.

More than two years later, on April 17, 2015, the FBI responded to the Request stating that "539 pages were reviewed and 253 pages are being released." (Ltr. from D. Hardy, dated Apr. 17, 2015 (the "FBI Letter"), attached hereto as Exhibit C.) The FBI claimed that the following exemptions, pursuant to 5 U.S.C. § 552, justified the withholding of documents responsive to the Request: 552(b)(3) (citing Federal Rule of Criminal Procedure 6(e)) and 552(b)(7)(D). Additional documents were sent to other Government agencies for review.

On May 5, 2015, we received a letter from the Department of Justice, National Security Division ("DOJ") which released an additional number of pages. However, the DOJ stated that it had "reviewed these records and are releasing them in part." (Ltr. from K. Tiernan, dated May 5, 2015 (the "DOJ Letter"), attached hereto as Exhibit D.) The DOJ claimed that the following exemptions, pursuant to 5 U.S.C. § 552, justified the withholding of documents responsive to the Request: 552(b)(6) and 552(b)(7)(C).

On June 12, 2015, the MSDC appealed the determinations of the FBI and the DOJ and requested that additional information be released pursuant to the Request (the "Appeal", attached hereto as Exhibit E).

On June 22, 2015, we received an additional letter from the FBI responding to the Request stating that "476 pages were reviewed and 254 pages are being released." (Ltr. from D. Hardy to L. Linsky, dated June 22, 2015 (the "Second FBI Letter"), attached hereto as Exhibit F). The FBI claims that the following exemptions, pursuant to 5 U.S.C. § 552, justified the withholding of documents responsive to the Request: 552 (b)(1); 552(b)(3) (citing 50 U.S.C. § 403g); 552(b)(7)(C); and 552(b)(7)(D). The FBI indicated that additional documents were sent to other Government agencies for review. In addition, the FBI indicated that it is consulting with another agency concerning the Request.

On August 13, 2015, the MSDC again appealed the determinations of the FBI and the DOJ arguing that the FBI's search was inadequate and that additional information be released pursuant to the Request (the "Second Appeal", attached hereto as Exhibit G).

On September 2, 2015, the OIP sent a letter to undersigned counsel stating that one document, totaling six pages had been referred to the OIP by the FBI for review as to whether it could be released (the "September 2 Letter", attached hereto as Exhibit H). This letter states that all six pages are being withheld under Exemption 5 of FOIA, 5 U.S.C. § 552(b)(5), the deliberative process privilege.

On September 28, 2015, the OIP sent another letter to undersigned counsel stating that seventy-five pages had been referred to the OIP by the FBI (the "September 28, 2015 Letter", attached hereto as Exhibit I). This letter states that eight documents, totaling thirty-two pages are being withheld under Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), the deliberative process privilege. The OIP further states that the remaining thirty-eight pages do not pertain to EO 10450 and, thus, are not being released.

On October 20, 2015, the MSDC again appealed the determinations of the OIP arguing that the FBI's search was inadequate and that additional information be released pursuant to the Request (the "Third Appeal", attached hereto as Exhibit J.)

On October 26, 2015, the MSDC received two letters acknowledging the Third Appeal and assigned the third appeal two appeal numbers, AP-2016-00335 and AP-2016-00336.[2] These letters are attached hereto as Exhibits K and L.

The MSDC sent the October 30 Letter to undersigned counsel stating that 140 pages were reviewed in response to MSDC's FOIA request and 140 pages are being released. However, at the same time, the letter states that certain deletions were made pursuant to 5 U.S.C. §§ 552(b)(6), 552(b)(7)(C), and 552(b)(7)(D). Making matters more confusing, the CD enclosed with the October 30 Letter only contains ***134*** pages of documents not, as the cover letter states, 140. After our review of the letter and the contents of the CD, we are at a loss as to what the

[2] We presume that these are in reference to the Third Appeal because neither response letter sent by the OIP makes reference to the date of the letter sent by the MSDC.

government is claiming was deleted and/or withheld or why we only received 134 pages instead of 140.

We hereby appeal the OIP's determination with respect to the documents referred to in October 30 Letter and respectfully request that the OIP reconsider its application of the claimed exemptions. Moreover, we respectfully request that this appeal be consolidated with the prior Appeals to streamline the administrative process. Our requests for consolidation have been seemingly ignored in the past and it would be helpful to understand from the OIP why it continues to assign new appeal numbers to a single FOIA request.

Reasons for Appeal

"Congress enacted the FOIA in order to 'pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'" *Morley v. C.I.A.*, 508 F.3d 1108, 114 (D.C. Cir. 2007) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976); *Rose v. Dep't of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)). FOIA "adopts as its most basic premise a policy strongly favoring public disclosure of information of federal agencies." *Halpern v. F.B.I.*, 181 F.3d 279, 286 (2d Cir. 1999).

Based upon the information we have received in response to the Request, we believe that the OIP has not met these standards. More specifically, we assert that the OIP has failed to meet its burden to demonstrate that the claimed exemption – the deliberative privilege exemption – applies. For the reasons stated below, the OIP should reconsider its initial response and produce the withheld documents. Furthermore, we request that OIP provide a more detailed explanation as to the thirty-two pages referred to in the September 28 Letter allegedly not related to EO 10450 and reconsider its decision not to product those documents. In addition, we request that OIP state why it believes the thirty-eight pages do not pertain to EO 10450. *Ray v. Fed. Bureau of Prisons,* 672 F.Supp.2d 75, 79–80 (D.D.C.2009) ("On this record, it is impossible to definitively conclude that the documents that the defendant determined to be non-responsive were, in fact, non-responsive.").

The OIP's Claimed Exemption Is Inadequate

As the OIP is undoubtedly aware, the court "'impose[s] a substantial burden on an agency seeking to avoid disclosure' through the FOIA exemptions." *Morley*, 508 F.3d at 1114-15 (quoting *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973)). "As such, exemptions from disclosure must be narrowly construed and 'conclusory and generalized allegations of exemptions' are unacceptable." *Id.* (quoting *Founding Church of Scientology of Wash., D.C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 830 (D.C. Cir. 1979)).

The October 30 Letter states that deletions are being made to documents pursuant to the exemptions contained in 5 U.S.C. §§ 552(b)(6), 552(b)(7)(C), and 552(b)(7)(D). Other than identifying the claimed exemptions, the October 30 Letter does not provide any further

explanation or justification. Indeed, we are not certain that the OIP intends to withhold any documents but, as noted above, the OIP stated that 140 pages would be released and we only received 134. We respectfully request that the OIP provide an explanation other than with "conclusory and generalized allegations of exemptions." *Morley*, 508 F.3d at 1115.

Because the OIP has failed to provide its reasons for the claimed exemption, we reserve all rights to challenge the claimed exemption on its merits when those reasons are provided.

The OIP Should Consolidate All Appeals and Responses

As described above, the OIP's piecemeal approach to responding to the MSDC's single FOIA request has unnecessarily complicated the appeal process both for MSDC and for OIP. We, again, respectfully request that all of MSDC's appeals be combined into one.

Conclusion

We look forward to your response to this appeal (which should be consolidated with the above referenced appeal) and the production of the documents in response to the Request. Please advise if the production of these documents requires administrative fees that will exceed $500.00.

As noted above, the OIP has 20 business days to respond substantively to this appeal. If we do not receive such a decision in a timely manner, we will bring an action in the United States District Court to enforce the rights of the Mattachine Society to obtain access to these documents under FOIA.

The information sought pursuant to this appeal and the Request is not for commercial use but rather in connection with the work of the Mattachine Society, a non-profit education and research organization.

Please feel free to contact me via phone or email with any questions.

Respectfully submitted,

/s/ Lisa Linsky /MRH

Lisa A. Linsky
on behalf of the Mattachine Society
of Washington D.C.

Exhibit 27

U.S. Department of Justice
Office of Information Policy
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

February 25, 2016

Lisa A. Linsky, Esq.
McDermott Will & Emery LLP
340 Madison Avenue
New York, NY 10173
llinsky@mwe.com

Re: Appeal Nos. AP-2016-00335 &
AP-2016-00336
Request Nos. AG/15-03099(F) &
AG/15-03541(F)
MWH:RNB

VIA: E-Mail

Dear Ms. Linsky:

You appealed on behalf of your client, the Mattachine Society of Washington, D.C., from the action of the Initial Request Staff (IR Staff) of the Office of Information Policy, acting on behalf of the Office of the Attorney General, on its Freedom of Information Act request for access to records concerning Executive Order 10450 for the period from 1950 to 1990.[1] I note your appeal concerns only the withholdings made by the IR Staff.

After carefully considering your appeal, I am affirming the IR Staff's action on your request. The FOIA provides for disclosure of many agency records. At the same time, Congress included in the FOIA nine exemptions from disclosure that provide protection for important interests such as personal privacy, privileged communications, and certain law enforcement activities. The IR Staff properly withheld 38 pages in full because they are protected from disclosure under the FOIA pursuant to 5 U.S.C. § 552(b)(5). This provision concerns certain inter- and intra-agency records protected by the deliberative process privilege and the attorney-client privilege.

Furthermore, I am denying your request that we itemize and justify each item of the information withheld. You are not entitled to such a listing at the administrative stage of processing FOIA requests and appeals. See Bangoura v. U.S. Dep't of the Army, 607 F. Supp. 2d 134, 143 n.8 (D.D.C. 2009).

I further note that the IR Staff properly determined that 38 additional pages are not responsive to your client's request. Those pages had nothing to do with Executive Order 10450.

[1] I note that your client's request was originally made to the Federal Bureau of Investigation, which referred two sets of documents to the IR Staff for processing. I am considering your appeal of both responses made by the IR staff in this response.

Please be advised that this Office's decision was made only after a full review of this matter. Your appeal was assigned to an attorney with this Office who thoroughly reviewed and analyzed your appeal and the action of the IR Staff on the records referred to it.

If your client dissatisfied with my action on your appeal, the FOIA permits your client to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

For your information, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your client's right to pursue litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,

2/24/2016

X

Sean R. O'Neill
Chief, Administrative Appeals Staff
Signed by: SEAN O'NEILL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mattachine Society of Washington, D.C. 527 16th St., N.W. Washington, D.C. 20036 Plaintiff, v. **United States Department of Justice** 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530 Defendant.	)	Case No. 1:16-cv-00773 (RCL)

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2016 I filed and served copies the foregoing on the parties of record via this court's CM/ECF filing system.

September 9, 2016

/s/ Paul M. Thompson
Paul M. Thompson
D.C. Bar No. 973977
McDermott Will & Emery LLP
The McDermott Building
500 North Capitol Street, N.W.
Washington, DC 20001
Telephone: +1 202 756 8032

Attorneys for Plaintiff
Mattachine Society of Washington, D.C.