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Analysis of Disclosures, Agency Investigation and Report, and Whistleblower Comments

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Summary

Scott Flood, former Commander of the Special Operations Group (SOG), U.S. Marshals Service (USMS), disclosed to the Office of Special Counsel (OSC) allegations of a violation of law and a substantial and specific danger to public safety arising out of actions by officials at the U.S. Department of Justice (DOJ), USMS. Specifically, he alleged that, in Fiscal Years (FYs) 2004, 2005, and 2006, the USMS withheld funds from SOG's budget that Congress specifically appropriated for SOG. Mr. Flood asserted that, in doing so, the USMS violated the Purpose Statute and disregarded Congressional intent. Mr. Flood alleged that, because SOG did not receive its full appropriation, SOG did not have sufficient operating funds to provide necessary training to Deputy Marshals, it was unable to provide Deputy Marshals with crucial protective gear and weapons, and it was unable to adequately maintain the SOG Tactical Center. As SOG performs an important strategic function in protecting the public, he alleged that SOG's budgetary shortfall posed a substantial and specific danger to public safety.

The DOJ, Office of the Inspector General (OIG) investigated Mr. Flood's allegations. The investigation substantiated Mr. Flood's allegations in part. The OIG concluded that USMS did not violate the Purpose Statute or misallocate funds; however, the investigators did discover that SOG lacked adequate operating funds and other critical resources. Among other findings, the OIG found that SOG was unable to conduct regular sustainment training, could not fully staff teams deployed to cover high-profile trials, and was unable to replace heavy-duty vests that had expired. Although the OIG did not find a violation of law or a substantial and specific danger to public safety, it does appear that the shortage of resources hindered SOG's ability to carry out its mission. The agency report states that USMS has since remedied the deficiencies uncovered by the investigation.

The Whistleblower's Disclosures

Mr. Flood, who has consented to the release of his name, began working for the USMS in October 1988 as a Deputy Marshal. In October 1999, he was promoted to Commander of SOG. Mr. Flood is currently on a temporary duty assignment to the USMS Justice Prison and Alien Transportation System.

Mr. Flood advised that SOG is a unit within USMS that executes high-risk tactical missions. These missions include controlling crowds at protests and riots, such as those directed against the World Bank and International Monetary Fund; conducting high-risk fugitive

extraditions; and providing security at high-profile criminal trials. SOG personnel consists of approximately 11 full-time employees stationed at the SOG Tactical Center at Camp Beauregard in Alexandria, Louisiana, and approximately 100 Deputy Marshals scattered throughout the 94 USMS judicial districts, who work for SOG on a collateral-duty basis. In order to become a collateral member of SOG, a Deputy Marshal must first complete a rigorous training program at the SOG Tactical Center. The collateral employees spend the majority of their time working for their local districts, but are periodically assigned to work for SOG on special missions.

Mr. Flood alleged that the USMS misdirected funds Congress specifically earmarked for SOG, in violation of the Purpose Statute and in disregard of Congressional intent. He stated that, in FYs 2004, 2005, and 2006 Congress appropriated \$2.8 million for SOG to expend on training, equipment and salary upgrades. However, according to Mr. Flood, USMS only placed \$1.4 million in SOG's budget. He asserted that the remainder of the funds were allocated to other USMS components. The Purpose Statute provides that agencies may expend funds only for the purpose for which they were appropriated. See 31 U.S.C. 1301.

Mr. Flood further alleged that, because SOG did not receive its full appropriation, it has not been able to fulfill its mission. He explained that USMS policy requires SOG employees to receive training on a quarterly basis, yet, over the past three years, SOG has lacked the funds to conduct quarterly training. In addition, Mr. Flood reported that SOG's body armor has expired and its weapon systems are outdated. He also stated that, because SOG lacks adequate resources, he has been unable to fully staff some high-profile trials. For example, he stated that, for the criminal trial of Zacarias Moussaoui in Alexandria, Virginia, he was only able to send five SOG Deputy Marshals, rather than the usual eight.

Mr. Flood also alleged that the Tactical Center, which is responsible for training SOG employees and for coordinating SOG missions, lacks the resources to function properly. He maintained that, for over one year, the Tactical Center had three vacant administrative positions, which USMS management would not allow him to fill. As a result, at the time of his disclosure, no one at the Tactical Center possessed financial or purchase authority, and Mr. Flood asserted that he struggled to maintain the facility and obtain necessary supplies to stay in operation. For example, he stated that SOG fell behind in paying many of the Tactical Center's routine bills, including its rent, its electric bill, and its telephone bill. He also advised that the electricity to the Tactical Center was cut off on several occasions.

According to Mr. Flood, SOG's financial woes are compounded by the fact that the USMS refuses to reimburse funds to SOG that SOG expended in training employees of other DOJ agencies. Mr. Flood reported that, pursuant to reimbursement agreements between SOG and other agencies, SOG is entitled to be reimbursed for these training expenditures. However, USMS management usually opts to retain the reimbursement funds for other purposes, further depleting SOG's meager budget.

Lastly, Mr. Flood advised that, in the Conference Report accompanying the FY '05 Consolidated Appropriations Act, Congress directed the USMS to close down its Hazardous Response Unit (HRU), located at USMS headquarters in Washington, D.C. Congress further

directed USMS to reassign HRU funding, duties, personnel and resources to SOG and relocate them to the SOG Tactical Center in Alexandria, Louisiana. Mr. Flood alleged that, at the time of his disclosure, USMS had failed to comply. He reported that USMS transferred HRU resources to SOG in name only. Mr. Flood contended that USMS management did not place the HRU staff under his authority as SOG Commander, nor did management relocate them to Alexandria, Louisiana. He also maintained that USMS management failed to transfer the HRU budget to SOG, in disregard of Congressional mandate.

Department of Justice Investigation and Reports

The DOJ OIG investigated Mr. Flood's allegations. The agency report states that the investigators interviewed Mr. Flood; Lloyd Allgaier, Supervisory Deputy Marshal; Maureen Pan, USMS Chief of Budget Formulation; John May, USMS Chief of Budget Execution; and Anthony Corbitt, USMS Assistant Chief of Budget Execution. They also reviewed numerous documents provided by USMS and by Mr. Flood.

According to the agency report, the OIG concluded that the manner in which USMS allocated funds in FYs 2004, 2005, and 2006 did not violate the Purpose Statute or any other law. The investigators found that the FY 2004, 2005, and 2006 appropriations statutes for USMS did not specifically earmark funds for SOG. Instead, the language Mr. Flood referenced is actually contained in the Conference Committee Reports, and, therefore, it is not legally binding on USMS.¹ The report continues that, even though the language may not be legally binding, agencies generally do follow guidance contained in conference committee reports. The agency report examines the manner in which USMS allocated funds in each of the fiscal years in question, and it concludes that USMS did not deviate significantly from the guidance set forth in the legislative history.

The agency report next addresses Mr. Flood's allegation that USMS failed to transfer the HRU to SOG, as directed by Congress. The OIG found that USMS never relocated HRU personnel and equipment to the SOG Tactical Center in Alexandria, Louisiana. The report states that, instead, USMS decided to create a new SOG unit in the Washington, D.C. area, comprised of former HRU personnel. The OIG determined that this decision was consistent with Congressional intent, as the Conference Committee Report permitted USMS to determine the proper location for HRU personnel transferred to SOG.

The OIG confirmed Mr. Flood's allegation that the SOG personnel in Washington, D.C., who were previously assigned to HRU, never reported to him when he served as SOG Commander. Instead, the employees continued to report to Arthur Roderick, Assistant Director

¹ In support, the agency cites the Government Accountability Office's Principles of Federal Appropriations Law, which provides that, "[r]estrictions on a lump sum appropriation contained . . . in legislative history are not legally binding on the department or agency unless they are carried into (specified in) the appropriations act itself, or unless some other statute restricts the agency's spending flexibility." Principles of Federal Appropriations Law, Vol II at 6-6 (3d ed.).

of USMS Operations Support Division, and Bill Snelson, Chief Inspector. In addition, the OIG found that USMS never transferred \$200,000 to SOG for "equipment, travel, and training," as it had proposed doing in its April 2005 Report to the Appropriations Committees. The OIG determined that, even though USMS should have corrected the inaccurate information it provided in its April 2005 report, the agency did not intend to mislead Congress. The report explains that the HRU was in considerable disarray at the time it was transferred to SOG, and the unit was disbanded shortly thereafter.

In addition, the agency report states that the investigation did not substantiate Mr. Flood's allegation that USMS failed to reimburse funds to SOG that SOG expended in training employees of other DOJ agencies. The report explains that, before any training takes place, SOG and the guest agency are required to enter into a reimbursement agreement. The USMS Management and Budget Division subsequently reimburses SOG's internal account. After receiving the funding, SOG then provides training to the outside agency in accordance with the terms of the agreement. The investigators did not find any evidence that SOG expended funds "out of pocket" to train outside agencies.

The agency's initial report did not address Mr. Flood's allegations of a substantial and specific danger to public safety. Specifically, the report did not address his allegations that, due to inadequate funding (1) SOG has been unable to conduct quarterly training, (2) SOG's body armor has expired and its weapon systems are outdated, and (3) SOG is unable to adequately staff high-profile trials. Instead, the report merely stated that these allegations "derive from his allegations regarding misappropriation of funds." Consequently, in February 2007, OSC informed the OIG that, without additional information addressing these allegations, OSC would find the report to be deficient.

Supplemental Report

In response, the OIG investigated the remaining issues and submitted a supplemental report to OSC on July 20, 2007. According to the supplemental report, the OIG determined that USMS does not have a formal requirement dictating that SOG conduct sustainment training for its deputies on a quarterly basis. The OIG did find that there was a proposed USMS policy directive, dated June 6, 2003, which would have required SOG deputies to attend sustainment training and qualify with SOG-issued firearms on a quarterly basis. However, the report states that this proposed directive was never finalized.

Walter Sanborn, Deputy SOG Commander, reported that, according to his personal records, the last time SOG had held sustainment training prior to the agency investigation was in January 2003. Mr. Flood reported that SOG also conducted sustainment training in November 2004. Mr. Sanborn noted that, throughout the period in question, SOG members did receive general firearms training through their home districts and they also received SOG-specific training when they were deployed on a SOG mission. Nevertheless, in Mr. Sanborn's opinion, the absence of sustainment training for this length of time was less than ideal and it adversely affected teamwork within SOG. He attributed the gap in training to a scarcity of funds.

The supplemental report states that SOG has since increased the frequency of sustainment training. SOG last conducted sustainment training in May 2007, and it plans to hold training again in the fall of 2007.

Next, the OIG investigated Mr. Flood's allegations regarding expired body armor. According to the supplemental report, the SOG Tactical Center maintains 30 heavy-duty body armor vests for use during SOG-specific missions. Rodney Johnson, Supervisory Deputy U.S. Marshal, advised that these vests were acquired in 1999 and 2000, and have a lifespan of five years. Therefore, SOG's supply of heavy-duty vests expired in 2004 and 2005. Mr. Sanborn stated that he was not aware of any instance when a SOG member was sent on a mission with expired equipment. He acknowledged that this was true in part because some SOG members purchased their own heavy-duty vests and other members borrowed vests from coworkers.

The report further explains that each member of SOG possesses a standard-issue tactical body armor vest, issued by his or her home district. David Robertson, Acting SOG Commander, advised that, instead of replacing the heavy-duty armored vests that have expired, SOG plans to customize its members' standard-issue vests by adding protective plates and tailoring their shape. In his opinion, these customized vests should be adequate to protect SOG members, who may be exposed to heavier weaponry than other Deputy Marshals.

The investigation did not substantiate Mr. Flood's allegation that SOG's weapons systems are outdated and inadequate. Supervisory Deputy U.S. Marshal Drew Koschny reported that approximately 80 percent of SOG deputies carry a .45 caliber Springfield 1911 pistol, which was introduced approximately four years ago. The remaining SOG deputies carry a Glock 22 pistol. Mr. Koschny also related that SOG maintains Heckler & Koch MP5 submachine guns, which he described as being "the number one special operations tactical submachine gun in use throughout the world"; a small number of counter-sniper rifles; a few Heckler & Koch G3 .732 caliber fully-automatic rifles; 30 Remington 870 12-gauge pump shotguns; 26 Benelli M3 shotguns; 4 M60 machine guns; and 4 M249 machine guns. Mr. Koschny also advised that SOG is in the process of procuring 120 .223 caliber rifles, Colt M-16s or similar, and 4 M240 machine guns. The OIG consulted Randall Smith, Unit Chief, DEA Firearms Training, for an opinion regarding the adequacy of SOG's weaponry, and Mr. Smith responded that he has "no reservations about the currency, quality, or variety of SOG's arsenal."

Mr. Sanborn, who served as SOG's Tactical Operations Commander, provided information to the OIG regarding SOG's ability to staff high-profile trials. He stated that, under ideal circumstances, SOG security teams would always consist of 12 SOG members. However, SOG is frequently unable to assemble a 12-person team because SOG deputies frequently have difficulty getting released from their regular duties in their home districts and SOG does not have sufficient funds to train new SOG deputies. Mr. Sanborn related that there have been many occasions when SOG was only able to send between six and eight deputies to staff high-profile trials, including the trials of John Walker Lindh and Zacarias Moussaoui. Mr. Sanborn further explained that, whenever SOG is unable to assemble a 12-member team, the SOG team is supplemented by Deputy Marshals from the local district, as well as local law enforcement officers. In Mr. Sanborn's opinion, this practice does not pose a threat to public safety.

Lastly, the supplemental report addresses Mr. Flood's allegation that USMS management prevented him from filling administrative vacancies at the Tactical Center. Arthur Roderick, Assistant Director of the Investigative Services Division, confirmed that, for over one year, USMS did not allow Mr. Flood to fill three vacant administrative positions, and, as a result, SOG did not have any on-site support staff during that time period. Mr. Roderick explained that he did not allow Mr. Flood to fill these positions because members of the administrative staff had filed complaints against Mr. Flood, and an investigation was pending at the time. According to Mr. Roderick, in the interim, headquarters personnel adequately performed administrative functions for the Tactical Center. The report states that, after Mr. Flood was replaced by an Acting SOG Commander in June 2006, the agency filled two of the administrative positions.

The Whistleblower's Comments

Mr. Flood commented on the agency report. He noted that the report does not address whether the USMS actually obligated and expended funds in accordance with the plan it submitted to Congress. He advised that, in reality, USMS never implemented its proposed spending plan. Mr. Flood also expressed skepticism regarding the agency's explanation for its failure to transfer funds and equipment from HRU to SOG. He also complained that the agency non-competitively promoted several former HRU employees, who were given GS-13 positions within SOG.

Mr. Flood also commented on the agency's supplemental report. Mr. Flood asserted that, although there may not be a law or regulation mandating a particular frequency for SOG sustainment training, "the accepted SOG standard operating procedure was to conduct sustainment training at least two, but ideally four times a year." He further advised that, during policy discussions, USMS officials specifically instructed him to increase the frequency of SOG sustainment training from bi-annually to quarterly.

Mr. Flood contended that SOG's failure to fully staff teams deployed to high-profile trials did in fact jeopardize public safety. He maintained that USMS's decision to supplement the SOG teams with district personnel and local law enforcement officers was not an adequate solution. Mr. Flood explained that, "SOG is called out on a mission precisely because the unit is uniquely trained and prepared to handle high-profile, high-threat national situations. USMS district personnel and local law enforcement do not possess this same level of training and preparedness." Lastly, Mr. Flood expressed relief that USMS is finally making progress towards remedying many of the problems he raised to OSC in his whistleblower disclosure.

Conclusion

Based on the representations made in the agency report, the supplemental report and Mr. Flood's comments, I have determined that the agency reports contain all of the information required by statute and the findings of the agency head appear to be reasonable.