



U.S. OFFICE OF SPECIAL COUNSEL
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The Special Counsel

July 23, 2018

The Honorable Kirstjen Nielsen
Secretary
U.S. Department of Homeland Security
245 Murray Lane, S.W., Building 410
Washington, D.C. 20528

Re: OSC File Nos. DI-18-3920, DI-18-3931, and DI-18-3924
Referral for Investigation 5 U.S.C. §1213 (c)

Dear Secretary Nielsen:

Pursuant to 5 U.S.C. § 1213, I am referring to you for investigation a whistleblower disclosure that employees at the Department of Homeland Security (DHS), Customs and Border Protection (CBP), Washington, D.C., engaged in conduct that may constitute a violation of law, rule, or regulation, and a substantial and specific danger to public safety. A report of your investigation in response to the allegations and any related matters is due to the Office of Special Counsel (OSC) on September 21, 2018.

[REDACTED]
[REDACTED]
[REDACTED] (the whistleblowers), who consented to the release of their names, alleged that CBP has failed to meet DNA collection requirements imposed by the DNA Fingerprint Act of 2005 and subsequent Department of Justice regulations.¹ The allegations to be investigated include:

- CBP has not collected DNA samples from individuals detained since 2008;
- A 2010 exception request did not contemplate the permanent waiver of DNA collection; and

¹ See 73 Fed. Reg. 74932 and 28 CFR §28.12. Under current law, "[a]ny agency of the United States that arrests or detains individuals or supervises individuals facing charges shall collect DNA samples from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States." See 28 C.F.R. § 28.12(b). Notably, the rule affords the Secretary of Homeland Security discretion regarding the collection of DNA samples from aliens in certain categories other than arrestees, contingent upon the approval of the Attorney General.

The Honorable Kirstjen Nielsen
July 23, 2018
Page 2 of 3

- CBP is not collecting DNA from individuals detained for violations of 8 U.S.C. §1325, despite current DOJ policy requiring the criminal prosecution of such persons.

In March 2010, citing a lack of agency resources, then-Secretary of Homeland Security Janet Napolitano requested a DNA collection exemption from then-Attorney General Eric Holder, with the intent to phase in implementation over the next year. Attorney General Holder granted a collection exemption for (1) Non-U.S. persons detained [by DHS] for processing under administrative proceedings, and (2) Non-U.S. persons currently within DHS custody, pending administrative removal proceedings. *See* Enclosure A.

The whistleblowers asserted that pursuant to these memoranda, DHS operated under the assumption that the exemption lasted for a period of one year. The whistleblowers explained that after the one-year period lapsed, CBP did not start collecting DNA samples from individuals detained by the agency. The whistleblowers noted that in the intervening decade, despite efforts to come into compliance, DNA collection has not occurred. According to the whistleblowers, Attorney General Jeff Sessions' April 6, 2018 memorandum calling for zero-tolerance of offenses associated with 8 U.S.C. §1325, requires DNA collection from all individuals detained by CBP in immigration enforcement actions, regardless of the prior exemption. However, DNA collection is currently not being conducted.

The whistleblowers also alleged the failure to collect DNA samples allowed individuals with serious criminal offenses to avoid prosecution. A 2016 DNA collection project with the Federal Bureau of Prisons (BOP), found 19 percent of the approximately 2,500 inmates sampled returned as matches in FBI's Combined DNA Information System (CODIS). Of those positive matches, 49 percent were matches to sexual assaults, and 40 percent matched to other violent crimes. Since the 2010 exemption, CBP has detained over 5 million individuals, which the whistleblowers allege may contain a similar percentage of CODIS matches to persons who have avoided prosecution due to CBP's failure to collect DNA samples.

Pursuant to my authority under 5 U.S.C. § 1213(c), I have concluded that there is a substantial likelihood that the information provided to OSC discloses violations of law, rule or regulation; and a substantial and specific danger to public safety. Please note that specific allegations and references to specific violations of law, rule or regulation are not intended to be exclusive. If, in the course of your investigation, you discover additional violations, please include your findings on these additional matters in the report to OSC. As previously noted, your agency must conduct an investigation of these matters and produce a report, which must be reviewed and signed by you. Per statutory requirements, I will review the report for sufficiency and reasonableness before sending copies of the agency report along with the whistleblowers' comments and any comments or

The Special Counsel

The Honorable Kirstjen Nielsen
July 23, 2018
Page 3 of 3

recommendations I may have, to the President and congressional oversight committees and making these documents publicly available.

Additional important requirements and guidance on the agency report are included in the attached Appendix, which can also be accessed at <https://osc.gov/Pages/DOW.aspx>. If your investigators have questions regarding the statutory process or the report required under section 1213, please contact Catherine A. McMullen, Chief, Disclosure Unit, at (202) 804-7088 for assistance. I am also available for any questions you may have.

Sincerely,



Henry J. Kerner
Special Counsel

Enclosures

cc: John Kelly, Acting Inspector General

APPENDIX

AGENCY REPORTS UNDER 5 U.S.C. § 1213

GUIDANCE ON 1213 REPORT

- OSC requires that your investigators interview the whistleblower at the beginning of the agency investigation when the whistleblower consents to the disclosure of his or her name.
- Should the agency head delegate the authority to review and sign the report, the delegation must be specifically stated and include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5).
- OSC will consider extension requests in 60-day increments when an agency evidences that it is conducting a good faith investigation that will require more time to complete.
- Identify agency employees by position title in the report and attach a key identifying the employees by both name and position. The key identifying employees will be used by OSC in its review and evaluation of the report. OSC will place the report without the employee identification key in its public file.
- Do not include in the report personally identifiable information, such as social security numbers, home addresses and telephone numbers, personal e-mails, dates and places of birth, and personal financial information.
- Include information about actual or projected financial savings as a result of the investigation as well as any policy changes related to the financial savings.
- Reports previously provided to OSC may be reviewed through OSC's public file, which is available here <https://osc.gov/Pages/Resources-PublicFiles.aspx>. Please refer to our file number in any correspondence on this matter.

RETALIATION AGAINST WHISTLEBLOWERS

In some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their allegations. The Special Counsel strongly recommends the agency take all appropriate measures to protect individuals from retaliation and other prohibited personnel practices.

EXCEPTIONS TO PUBLIC FILE REQUIREMENT

OSC will place a copy of the agency report in its public file unless it is classified or prohibited from release by law or by Executive Order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs. 5 U.S.C. § 1219(a).

EVIDENCE OF CRIMINAL CONDUCT

If the agency discovers evidence of a criminal violation during the course of its investigation and refers the evidence to the Attorney General, the agency must notify the Office of Personnel Management and the Office of Management and Budget. 5 U.S.C. § 1213(f). In such cases, the agency must still submit its report to OSC, but OSC must not share the report with the whistleblower or make it publicly available. See 5 U.S.C. §§ 1213(f), 1219(a)(1).