



U.S. OFFICE OF SPECIAL COUNSEL

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Washington, D.C. 20036-4505

The Special Counsel

June 20, 2013

The President  
The White House  
Washington, D.C. 20500

Re: OSC File No. DI-12-1761

Dear Mr. President:

Pursuant to 5 U.S.C. § 1213(e)(3), enclosed please find an agency report based on disclosures made by a former employee at the Department of Justice, Federal Bureau of Investigation (FBI), Records Management Division (RMD). The whistleblower, Scott A. MacDonald, former FBI Supervisory Management and Program Analyst, consented to the release of his name. He alleged that FBI employees in Washington, D.C., Quantico, Virginia, and Winchester, Virginia, were responsible for a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, and an abuse of authority. Specifically, Mr. MacDonald alleged that employees failed to: manage and maintain official records properly, including databases used for seeking wiretap warrants; comply with certification procedures for records and storage systems as required by the National Archives and Records Administration (NARA) and FBI policy; and allow Mr. MacDonald to audit records properly by limiting his audit scope of authority.

**The agency report did not substantiate Mr. MacDonald's allegations. There was no evidence that the FBI provided false information to federal courts or other entities regarding the management and maintenance of official records, including wiretaps. The investigation further did not find that records related to September 11, 2001 were lost or that the agency had improperly limited Mr. MacDonald's scope of authority during an audit. Additionally, the report stated that, although the agency's centralized storage facility is not in compliance with NARA regulations, the FBI is similarly situated with other federal agencies due to budget constraints, including NARA's own facilities, and that the agency is engaged in an ongoing effort to address the matter. Based upon my review of the original disclosure, the agency report and Mr. MacDonald's comments, I have determined that the report contains all of the information required by statute and that the findings appear to be reasonable.**

Mr. MacDonald's allegations were referred on July 20, 2012, to the Honorable Eric H. Holder, Jr., Attorney General, to conduct an investigation.<sup>1</sup> On December 14, 2012, then-Associate Deputy Attorney General Scott N. Schools submitted the agency's report to this office based on a FBI investigation. On March 25, 2013, pursuant to 5 U.S.C. § 1213(e)(1),

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<sup>1</sup> The Office of Special Counsel (OSC) is authorized by law to receive disclosures of information from federal employees alleging violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a

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Mr. MacDonald submitted comments on the agency's findings. As required by 5 U.S.C. § 1213(e)(3), I am now transmitting the agency report and Mr. MacDonald's comments to you.

The agency report concluded that Mr. MacDonald's allegations of records mismanagement, false reporting, and audit scope limitation were not substantiated. The agency conducted an examination of the Electronic Surveillance (ELSUR) Program, evaluated the agency's records management, reviewed central storage management and requirements, and interviewed nineteen current and former employees, including ten witnesses recommended by Mr. MacDonald. The FBI acknowledged that the ELSUR database had technological limitations, which the FBI had been systematically addressing prior to Mr. MacDonald's allegations. In 2001 and 2009, the FBI conducted formal comprehensive studies regarding the ELSUR Program's procedures, policies, and systems. Any deficiencies in ELSUR, however, did not impact the agency's ability to meet its statutory requirements. Further, the new ELSUR database system in 2011 eliminated these deficiencies. Therefore, the FBI had been implementing ongoing efforts to modernize and improve the ELSUR records systems to ensure that accurate information was entered and retrieved from both the new and old ELSUR database systems. The agency report further found no evidence that the FBI had provided erroneous information in its Annual Wiretap Reports (AWRs). The agency report stated that Mr. MacDonald did not prepare or review AWRs and, thus, he was not familiar with the databases used to collect and present wiretap information used in AWRs.

The agency report also established that policies and procedures were in place to ensure the retention of official records, including information related to the terrorist attack on September 11, 2001. In addition, any limitations that Mr. MacDonald believed affected the scope of an audit occurred during a voluntary self-assessment in the initial development stage.

Further, the investigation revealed that the FBI was fully engaged with NARA concerning guidelines for records retention and used current policies and procedures to manage agency records. The agency has continued ongoing efforts to meet NARA compliance requirements, including analyzing current budget and funding matters in support of constructing a centralized storage facility.

Mr. MacDonald had an opportunity to comment on the agency report. He emphasized his professional experience as an auditor and Certified Public Accountant. He was disappointed with the agency's conclusions and restated his initial disclosures that he believed that the FBI failed to

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substantial and specific danger to public health and safety. 5 U.S.C. § 1213(a) and (b). OSC does not have the authority to investigate a whistleblower's disclosure; rather, if the Special Counsel determines that there is a substantial likelihood that one of the aforementioned conditions exists, she is required to advise the appropriate agency head of her determination, and the agency head is required to conduct an investigation of the allegations and submit a written report. 5 U.S.C. § 1213(c).

Upon receipt, the Special Counsel reviews the agency's report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(e)(2). The Special Counsel will determine that the agency's investigative findings and conclusions appear reasonable if they are credible, consistent, and complete based upon the facts in the disclosure, the agency's report, and the comments offered by the whistleblower under 5 U.S.C. § 1213(e)(1).

The Special Counsel

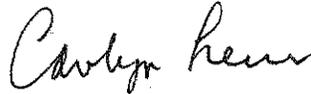
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protect and store sensitive information properly, noting some examples found in the public domain, and reasserted that the agency potentially provided false information to federal judges while seeking authorizations for wiretaps. I have enclosed a copy of Mr. MacDonald's comments for your review.

I have reviewed the original disclosure, the agency's report, and Mr. MacDonald's comments. Based on that review, I have determined that the agency's report contains all of the information required by statute, and the findings appear to be reasonable.

As required by 5 U.S.C. § 1213(e)(3), I have sent copies of the agency's unredacted report and Mr. MacDonald's comments to the Chairs and Ranking Members of the Senate and House Committees on the Judiciary. I have also filed copies of the agency's redacted report and Mr. MacDonald's comments in our public file, which is now available online at [www.osc.gov](http://www.osc.gov). This matter is now closed.

Respectfully,



Carolyn N. Lerner

Enclosures