

# **Law Violations and Cover-up by FBI Management**

**Response to FBI “Investigation”**

**dated**

**by Scott A. MacDonald, CPA**

**March 25, 2013**

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# Introduction

In January 1997, Frederic Whitehurst was suspended from the FBI as a whistleblower. Mr. Whitehurst uncovered the improper handling of evidence at the FBI lab. On February 27, 1998 he was vindicated and awarded a substantial monetary amount in his whistleblower suit against the FBI.

I believe my situation is very similar. While working at the FBI, I discovered the mishandling of Electronic Surveillance evidence, and the FBI had potentially provided false testimony to Federal judges when applying for a Title III wiretap order, and had mishandled investigative records at the FBI. As a result of my findings, I believe there is likelihood criminal cases may be appealed and lawsuits initiated against the FBI for failure to properly respond to discovery and FOIA requests.

In May of 2001, the execution of the Oklahoma City Bomber, Timothy McVeigh was delayed because the FBI failed to provide McVeigh's trial defense with more than 3,100 pages of documents from its investigation. We see, through my disclosure to the Office of Special Counsel, that the records management of the FBI is still in disarray, almost 12 years after. Additionally, ELSUR evidence has been lost and millions of pieces of ELSUR evidence have not been inventoried, EVER.

I was an employee of the FBI from March 2010 to March 2011 as a Supervisor Management & Program Analyst in Winchester, VA. I supervised a team assigned to perform "compliance audits" also known as "Quality Assurance Reviews (QARs) for two FBI responsibilities; Electronic Surveillance (ELSUR) and Records Management.

My FBI employment was terminated two business days prior to the end of my probationary period even though I had received an overall "excellent" rating on my PAR just a few short months before. Also, during my time at the FBI I was also recommended for a performance award. Additionally, both my team and I were recognized by the AD of the Inspection Division (Amy Lyons) for our outstanding redesign of the compliance processes.

I truly believe my removal was the result of issues identified while performing these redesigned compliance audits and my desire to address these deficiencies. During discovery in my separate EEOC action, I discovered my immediate supervisor, Glenn Murphy, believed I was a whistleblower. (See attached excerpt from the FBI discovery documents see Exhibit G). I find it interesting to note that the FBI refers to me in their response as a "whistleblower" (Section III B). I believe this statement alone justifies my suspicion that my dismissal from the FBI based on of the deficiencies I discovered and which were subsequently disclosed to the Office of Special Counsel.

This case is also about the violation of law for which I filed a Form 12 with your office, and upon you review of my disclosure, your office recommended it be forwarded to the Department of Justice. The FBI violated laws, wasted resources and disregarded their oath to uphold the US Constitution.

# Investigative Failures

Let me be clear, the FBI violated civil rights of suspects and failed to safeguard Electronic Surveillance (ELSUR) evidence and other records of the FBI. Before I deconstruct their attempt at an investigation, I first want to point out certain significant weaknesses in their investigation.

1. The DOJ did not do an investigation as directed by the OSC. Instead they turned the investigation over to those who violated the law, namely management within the FBI. I believe, this is a clear violation of "independent review" and provides a clear example of a **conflict of interest**.

2. The FBI investigation was conducted by two inspectors in the FBI Inspection Division. It has been reported in the media that a Special Agent with the same name as one of the inspectors was previously dismissed from the FBI for "lack of candor". He was subsequently reinstated but did admit that he used government property for personal use. This is information I had previously researched before my interview and made me uncomfortable during my interview.

3. As a test of the thoroughness of the investigation, I did not mention to the Inspectors the fact that I identified lost ELSUR evidence when I performed an inventory of the HQ ELSUR evidence room. During my inventory of the HQ ELSUR evidence room, there were two pieces of evidence that were missing. They had been signed out to a Special Agent (SA) in the Washington Field Office. The SA had since retired and the evidence could not be located and returned to storage. This is documented in as EC to the FBI administrative files. The investigative report doesn't mention this memo or the lost evidence. Either the memo was destroyed or the Inspectors saw it and elected to not report the malfeasance of one of their Special Agents. Failure to mention this significant failure and loss of ELSUR evidence casts significant doubt on the completeness of the whole report. In other words, the FBI has cherry-picked items to disclose to protect their reputation.

4. It is my perception, and that of many others, the Inspection Division is a highly political division within the FBI. Special Agents and Supervisory Special Agents are selected for or volunteer for these positions to advance their careers and they must prove themselves as team players. It is difficult for me to envision an investigation of my concerns performed by these Inspectors would be free of bias.

5. It was clear from my interaction with the Inspectors performing this "investigation" they were not open to any information outside of their preconceived notions. They refused to allow me to read to them my prepared statement (See Exhibit I) during my interview. In fact they threatened to leave the interview and not return. Additionally, when interviewing Kenneth W. Candell, they displayed the same attitude. (See Exhibit D) Mr. Candell is retired from the FBI with 40 years of experience and has detailed knowledge of the problems disclosed in my Form 12 (See Exhibit K). The FBI has been provided his sworn statements and has interviewed him. As such, the FBI did have eyewitness accounts of all the issues raised but only mentioned Mr. Candell in one of the areas under investigation.

6. The FBI attempts to blunt my allegations by indicating in their report that I did not have firsthand knowledge. Using this same logic, an FBI Special Agent would not be able to testify on his/her investigation of a bank robbery. As a Certified Public Accountant, my work has the same status as a law enforcement investigator and would be admissible in court. I was specifically hired by the FBI because Law Violations by FBI Management – Response to FBI Investigation by Scott A. MacDonald, CPA March 25, 2013

of my audit experience and knowledge of Government Auditing Standards (the Yellow Book.) To now say I was not involved in auditing the FBI is a gross misstatement of fact.

7. I have provided a list of 14 witnesses to support my concerns to the FBI. The FBI indicates they interviewed 10 of these witnesses. I am left to wonder why they didn't talk to the remaining two witnesses. For one of those witnesses they did interview, they only spoke to him after the OSC made a call to Inspector Fikes instructing her to interview Mr. Kenneth W. Candell a retired 40 veteran of the FBI who I believe can completely substantiated my allegations. Inspectors SA Fikes and SA Ludlum refused to ask Mr. Candell any questions while he was on a conference call during my interview. It was clear to me the FBI did not want to interview Mr. Candell until the OSC intervened.

8. Not mentioned in the FBI's report, system-wide, the FBI Resource Planning Office estimates there are 2 to 3 million piece of ELSUR evidence that have not been inventoried. Some of this evidence is 20 to 30 years old. Because it has not been inventoried, it is doubtful any of this evidence would turn up in a FOIA or discovery request, because locating it would be almost impossible. The New York Field Office alone has 90,000 pieces of un-inventoried evidence. This important fact was not mentioned in the FBI's "investigation".

# Executive Summary of Law Violations

Item	Law Violations	FBI Conclusion	Actual Conclusion
1	False information provided to Federal Judges by FBI. Violation of Title III wiretap laws.	<i>"The former ELSUR database did have technological limitations. However, this was recognized by EOU and manual procedures were implemented to ensure deficiencies within ERS did not impact the ability to meet the statutory requirements. The new EDA system eliminated these deficiencies."</i>	FBI admits the ERS system had design flaws which are an admission of guilt. They further admit that the EOU knew but took no action for a problem that was present for at least 10 to 15 years. "Manual procedures" apparently did not work. FBI fails to sight the following case as an example of a defendant who found them giving false testimony due to "false negative" reporting. (Nadia Winstead vs United States of America DC No. CR-05-90293-MISC-SI Northern District of California, San Francisco) See Exhibit E). According to Ms. Winstead's attorney, Mark Goldrosen, Ms. Winstead won her appeal. FBI was given a copy of this appeal after my interview with them. <b>Final conclusion, FBI fully substantiates my claim.</b>
2	Hidden/restricted ELSUR wiretap records would not allow proper discovery and FOIA and would have provided false testimony to Federal Judges on wiretap requests.	<i>"Evidence of incomplete Title III searches resulting from restricted files was not identified. The majority of restricted files identified during the investigation contained Consensual Monitoring and FISA applications which were not applicable to required Title III "prior application" searches. Only three Title IIIs were restricted within the ERS. Due to the procedures established for Title III application review, these restricted files would most likely have been identified during subsequent searches."</i>	The FBI investigative report does not rule out the possibility of false testimony was given to Federal Judges. The just say they didn't identify any incomplete searches over thousands of records. Their limited investigation would not have had time to look at every case. The conclusion is wishful thinking. They admit in the analysis paragraphs they don't really know the extent of the problem. Their "most likely" comment is meant to hedge their conclusion. Their conclusion completely ignores the fact that discovery and FOIA requests would not have been properly fulfilled which is a violation of law.
3	Annual Wiretap Report to Congress was incomplete and inaccurate.	<i>"Evidence of Annual Wiretap Reports (AWRs) and other ELSUR Inquires Containing Inaccurate Information Was Not Identified."</i>	Again, the fact that they didn't identify any problems in their short investigation is wishful thinking. They did not have time to review all data and compare to

			<p>all AWRs. I met numerous times with the Program Manager and discussed the problems with the AWRs. The fact that they don't reconcile the AWR to the ELSUR database is also very troubling. If they don't reconcile the two, then the reports are of questionable quality. The AWR also contains time estimates for each wiretap. The time spent on each wiretap is a guess at best. The more time spent on a wiretap the more resources get assigned to a Field Office. With no checks and balances on time spent, the statistics cannot be accurate.</p>
6	US unreliable data in ERS contaminating the New EDA System.	<i>"Evidence of Unreliable Data from ERS Contaminating the New EDA System Was Not Identified."</i>	<p>Again, the use of the term "not identified" simply means they did not look far enough. There have to be data problems with a database of this size. The only question is "how big is the problem"? Given the history of the ELSUR program, it is doubtful the data contained in the old system were properly loaded. Additionally, there were prior data loads into the old ERS system that had significant data integrity issues. This was outlined in documentation the inspectors found, but did not include in their report.</p>
7	Records are not stored according to records laws contained in CFR 36 1236 thru 1238	<i>"Evidence the FBI Did Not Store Records or Certify Record Systems Properly Was Identified, but Mitigated." See below for detailed problems with the sighted 36 CFR sections.</i>	<p>How are improper storage facilities mitigated? Answer, they aren't. This conclusion is wishful thinking again. The FBI record contains numerous demands by NARA for the FBI to bring their facilities into compliance. ALL FBI facilities are out of compliance. Their systems are also out of compliance with NARA standards. I gave the inspectors an example of the use of Sharepoint that is not DoD compliant being used in the FBI. FBI is out of compliance for ALL facilities, including Field Offices and LEGATs. This is a violation of Federal law.</p>
8	Violation of CFR 36 1236	Says they are in compliance for email but doesn't say how.	<p>Section 1236.22 gives specific guidelines for managing electronic mail records. Under Federal law, EVERY email is a</p>

			<p>record. The FBI has no system to catalog and control emails. Their "system" relies on manual sorting of emails by the recipient. If an email is embarrassing it won't get indexed or saved. When an employee leaves the FBI they are expected to review all of their emails and make sure all "important" emails have been printed and indexed into the files. This is not happening. The standard for records management systems is Department of Defense Directive #5015.2. The FBI systems do not comply and they are breaking the law. Millions of emails are going un-filed and un-indexed. Not to mention text messages and other social media. The FBI doesn't have a clue as to how to control this. Yet they say they are somehow in compliance. Again, wishful thinking.</p>
9	Violation of 36 CFR 1237	Says they are in compliance for audiovisual, cartographic and related records but gives no specifics.	This section requires specific storage and inventory requirements for these records. The FBI has already admitted their facilities do not meet requirements. Additionally, this CFR requires annual inventory of these items. The FBI does not perform annual inventories on these items.
10	Violation of 36 CFR 1238	Says they are in compliance for storage of microform documents but gives no specifics.	This CFR section covers storage and inventory requirements for microform documents. The FBI has already admitted their facilities do not meet requirements. Additionally, I personally witnessed microfilm being stored in the open, exposed to sunlight and with no environmental humidity controls. Finally, the FBI does not perform annual inventories of these items.
	Violation of 36 CFR Section XII Subpart B	Another oversight in the FBI report.	36 CFR Section XII Subpart B requires that the FBI follow ANSI and ISO standards in its records management process. The FBI doesn't know what these standards are much less have policies and procedures to conform to these standards.

11	Improperly filed Sept 11, 2001 ELSUR evidence	<i>"No instances of Improperly Filed September 11, 2001 Terrorist Attack Evidence Were Identified".</i>	After I performed the inventory of the HQ ELSUR evidence room, I wrote and filed a memo documenting the process and the fact that data was bulk filed. Why wasn't this memo made available to the Inspectors? The memo was reviewed by Unit and Section management. The ELSUR Evidence Room at HQ was specifically established for 9/11 evidence. The bulk filing of evidence of any type is prohibited by FBI policy. A memo was written to the files documenting the bulk filed storage. Evidence has apparently been destroyed on the inventory I conducted.
12	Lost ELSUR evidence	Not addressed by report.	As a test of the thoroughness of the investigation, I did not mention to the Inspectors the fact that I identified lost ELSUR evidence when I performed an inventory of the HQ ELSUR evidence room. During my inventory of the HQ ELSUR evidence room, there were two pieces of evidence that were missing. They had been signed out to a Special Agent in the Washington Field Office. The SA had since retired and the evidence could not be located and returned to storage. This is documented in a EC to the file. The investigative report doesn't mention this. Either the memo was destroyed or the Inspectors saw it and elected to not report the malfeasance of one of their Special Agents. Additionally, if this evidence was Title III evidence, the FBI should have notified the Courts. Failure to mention this significant failure of the FBI cast doubt on the completeness of the whole report.
13	Audit Scope Limited	<i>"No Evidence Mr. MacDonald's Audit Scope Was Improperly Limited Was Identified.</i>	The Inspectors were provided 2 sworn statements by two former FBI employees supporting the allegations that the embarrassing questions were resisted by FBI management. Additionally, the investigation by the FBI admits

			the embarrassing questions were removed. The interrogatories included in the audit for RMD addressed requirements of the FBI Federal Records Officer, who was the AD of the RMD. Since the questions to be asked would have found a dereliction of duty by the Federal Records Officer, the questions were eliminated.
14	Historical ERS files in danger of destruction	<i>"Evidence of Historical ERS Files At Risk of Destruction Was Not Identified."</i>	Destruction is only part of the worry here. The FBI admits these are important documents, but they have not been indexed into the main indexing system (ACS) which is a violation of FBI policy. Additionally, since they are not indexed into the ACS system, they would not be found during FOIA or discovery requests. The FBI is attempting to hide these files from public view as they are embarrassing to the FBI and its management. These files are long past due for submission the NARA.
15	ELSUR evidence is not being inventoried as required by law and FBI policy.	<i>Not addressed by FBI "investigation".</i>	The FBI has millions of pieces of ELSUR evidence that have not been inventoried. For several years, the FBI has been using a "bar coded" method of controlling ELSUR evidence. Unfortunately, the ELSUR evidence placed into the ELSUR evidence rooms before the use of bar codes has not been inventoried. In my personal discussion with the EOT at the New York Field office, she estimated they had 90,000 pieces of evidence. System wide the FBI Resource Planning Office estimates 2 to 3 million pieces of evidence are not cataloged or inventoried. I personally reviewed a report prepared by the RPO on this subject. As I identified lost ELSUR evidence in the inventory performed on the HQ ELSUR evidence room, the probability that other ELSUR evidence has been lost is high. But because the FBI does not perform an annual inventory of 2 to 3 million pieces of ELSUR

		evidence, it will probably never be known how inept the FBI is at maintaining ELSUR evidence.
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## Conclusion:

The FBI's investigative report found all of my allegations and concerns as stated were true but their report is an attempt to obfuscate my allegations and concerns. It uses language to obscure their findings of FBI not providing known ELSUR information to law enforcement officers that are swearing to facts contained in their Title III applications made before a Federal judge. It also does not adequately address the concern of improper responses to FOIA and discovery requests and outright flaunting of records management laws. The FBI specifically states in their findings that they don't really know the extent of the problems. There is ample evidence to conclude that Federal judges have been misled by the FBI and FOIA and discovery requests were not answered properly. Additionally, the FBI readily admits its records storage facilities are out of compliance and they don't maintain existing records are required by 36 CFS 1236 thru 1238. They are thus in direct violation of Federal Law.

And finally, they readily admit the ELSUR ERS program had "technical" problems, which means the ERS system provided false information that was then relayed to Federal Judges on Title III wiretap requests. They were even provided with case law to prove this.

There is only one conclusion: civil rights have been violated, Federal laws on records retentions and records storage have been violated, which has the result of Freedom of Information Act requests responses and discovery requests being incomplete. If FOIA and discovery requests have been incomplete, **every** case that the FBI has been involved with has been tainted. I believe the findings contained in the FBI investigative report have identified mismanagement of by FBI managers. The only logical action to be taken by the FBI is to relieve the managers of RMD of their duties and find qualified individuals who will not willfully violate Federal laws.

Finally, the FBI report is incomplete and fails to disclose other law violations (i.e. lost ELSUR evidence). It has been prepared by individuals who are not independent of the FBI and who have a vested interest in providing a less than complete report.

# Exhibit A

## Biography of Scott A. MacDonald, CPA

Scott A. MacDonald, CPA has more than 32 years of accounting and auditing experience. His background includes eight years with two of the largest accounting and auditing firms in the world. Three of these eight years was with Price Waterhouse (now PwC) in Washington, DC. While at PwC, he gained expertise in the use of the use of Generally Accepted Government Auditing Standards (the Yellow Book). It was his vast auditing experience and his thorough knowledge of the Yellow Book that caused the FBI to hire Mr. MacDonald.

Mr. MacDonald also has extensive experience in the design and staffing of audit and compliance engagements as well as the use of statistical audit techniques. He quickly found that the compliance programs at the FBI failed even the rudimentary requirements of the Yellow Book and did not use statistical sampling; both a significant deficiency that rendered any compliance work as near useless.

## **Exhibit B**

### **Paragraph by Paragraph Response** (See Exhibit C for report with paragraph numbers)

Paragraph	Response
2	This paragraph attempts to gloss over the biggest issue raised in my whistleblower disclosure, that of "false negatives". But it is clear from their analysis that ERS was a flawed system and false testimony was given to Federal judges.
25	The statement that I was unaware of ELSUR indices search variations is untrue. I conducted numerous discussions with the Team Lead of the Analysis Team about search criteria and we reviewed several examples. Additionally, an FBI Memorandum is not official FBI policy as it has not gone through the normal policy review and publication procedures. As such, it is simply the opinion of the person writing the memo. Additionally, since 2003, there have been numerous changes in indexing policy not documented in a memo.
27	There was no formalized tracking of errors.
29	I read the Red Team report. It did not specifically address any of the disclosures made by me. It was however a stinging indictment management of the Records Management Division, especially UC O'Clair, that they had failed in the proper administration of the ELSUR program.
29	Note that the FBI fully admits that the ELSUR Program Guide has not been completed. But in paragraph 26 attempts to rely on a memo written in 2003. A 10 year old memo is grossly inadequate for the administration of a program such as ELSUR. This in itself demonstrates the gross mismanagement of the program by management of the FBI.
30	<p>The information contained in the old ELSUR system had significant integrity issues. Loading that information into the new system would not fix the indexing issues of the past. Simply put - garbage in garbage out. In any event, the new system would not absolve the civil rights violations of the past. Additionally, the last sentence attempts to gloss over the issue of "false hits" by stating there were manual procedures that prevented this. These manual procedures did not stop "false hits". See Exhibit E for a case involving false negatives. 1.</p> <p>The report glosses over the issue of "false negatives" in Title III searches to determine if the potential target of a wiretap had been previously wiretapped. Paragraph 30 says something about manual comparisons being done, which would negate the use of an automated system. The Inspectors were given a copy of a case (Nadia Winstead vs United States of America DC No. CR-05-90293-MISC-SI Northern District of California, San Francisco – See attached Exhibit E), where Ms. Winstead filed an Appeal for contempt of court and sighted "false negative" wiretap searches as a basis for her Appeal, which according to her attorney Mark Goldrosen, she won. This case (on pages 15 and 16) clearly indicates some of the issues surrounding false negatives. In my disclosure I disclosed that false negatives were also returned as a program fault and were sometimes solved by re-booting the desktop computer. But following Federal law should not be dependent on re-booting a computer. Additionally, EOT personnel did not re-boot on every negative search performed, only those for obvious names that would have been expected to return a match.</p>
31	The FBI admits in this paragraph that the old system was inadequate. This is admission of guilt. FBI management allowed this to go on for over 15 years. Further, there were no "manual" procedures that would catch every "false negative". The wording of this paragraph is an attempt to hide the most serious civil rights issue. By first stating that the system "did have technological limitations", is then followed by the word "however". This is a device used to distract the reader.
32	In the middle of this paragraph, the FBI again admits guilt. "...it is possible the records of wiretap subjects in restricted ERS files were not identified...". And further admittance of

	guilt "... Affiants were not able to fully and completely state to the courts in which there were wiretap applications whether there were prior Title II wiretap applications for their subjects". Yet in the conclusion the Inspectors attempt to ignore this possibility. Additionally, in this paragraph the FBI states there were 15 to 20 restricted files, yet in paragraph 36 they indicate there were 47 restricted files.
33	"Access to certain ERS files was restricted..." The FBI admits guilt. If there were hidden files, searches were incomplete by definition. Additionally, FOIA requests would not have been answered properly.
34	It doesn't matter that they were reviewed periodically, searches are conducted daily. This paragraph confirms my disclosure. The FBI is guilty. Secondly, ELSUR RM Alexandria MacPherson initially was not aware of the restricted files until several months into her tenure. And even then she was not given access to the restricted files for several months afterward.
36	The distinction of consensual files is of little importance when answering FOIA and discovery requests. So by the FBI's own admission, they have 47 cases where discovery and FOIA response might have been inadequate.
37	The FBI admitted records were restricted. To say that they did not identify problems with search results has no bearing. The FBI is guilty of improper searches and maintaining hidden files.
41	I had several conversations with ELSUR PM Alexandria MacPherson on the problems with the Annual Wiretap Report. The fact that it was being prepared on a spreadsheet indicates the non-technical nature of the collection methodology. Ms. MacPherson readily admitted that the AWR was not accurate. She specifically had issues with the AWR in reporting how much time was spent on each wiretap. This information was sometimes obtained from the field offices, but was only an estimate, as the FBI has no time keeping system that would give them this information. As such, this information is not correct and it is not disclosed to Congress how the information is obtained and the limits of its accuracy.
43	The Inspectors were given the specific recordkeeping laws that were violated, as I gave them my detail Form 12 disclosure. To say "unspecified federal record keeping standards" is a gross misstatement of fact.
47	Mr. Candell informed the Inspectors of ERS known data load issues from prior data loads processed into the system. This issue was not addressed in this "investigation".
51	UC O'Clair admits to improper filing of data. Yet later in the document it is stated they were not. The new TRIM system does not fix prior FOIA and discovery issues. The FBI has broken the law.
52	There are no ELSUR records there, but the Alexandria Records Center contains millions of other FBI records that are rotting away because of improper storage.
54	Admission of guilt. ALL records storage facilities are not in compliance with NARA standards. Not just the ARC.
55	Doesn't matter if the FBI was fully engaged. They have broken the law.
59	During the inventory, I identified several pieces of ELSUR evidence that had been lost. They had been checked out to a Special Agent who had subsequently retired and had not returned the evidence to the ELSUR evidence room. This lost evidence was documented in an EC I wrote to document the inventory process. It is apparent the Inspectors did not do a complete review of the record or chose to not mention this fact in their report.
58	It is incorrect that I stated I didn't see anything else on the boxes.
60	In paragraph 51, UC O'Clair admits evidence was bulk filed. Paragraph 57 admits the ELSUR evidence room at HQ was opened for September 11, 2001 evidence. So what other evidence could it be in the HQ ELSUR room? This Conclusion is an outright misstatement of fact.

66	First I was hired because of my "yellow book" audit experience, then this conclusion says I had no audit responsibilities. The items in questions were not removed until I left the FBI. The FBI has shown no evidence of redundancy in their findings.
70	The files have not been indexed into ACS as required by FBI policy. Any FOIA or Discovery requests would have excluded this information.
75	I read the Red Team reports. They did not address any of the issues raised in my disclosure. The use of this "excuse" by the FBI is fraudulent.
76	It is good the ELSUR program was moved. It confirms that RMD did not have sufficient management expertise. However, the movement of the program does not mitigate the violations of law by the FBI in prior years.
78	States they were removed because of redundancy, but still does not state with what policy.
79	Bulk filing of evidence is against FBI policy. Additionally, all FOIA and Discovery requests would have been incomplete.

## **Exhibit C**

**– FBI Response to OSC with Numbered Paragraphs (Cross reference for Exhibit B)**

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U.S. DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
INSPECTION DIVISION  
OFFICE OF INSPECTIONS



INSPECTOR'S REPORT

A REVIEW OF FBI ELECTRONIC SURVEILLANCE AND RECORDS  
MANAGEMENT PROGRAMS IN RESPONSE TO A REFERRAL BY THE U.S.  
OFFICE OF SPECIAL COUNSEL

For Submission to the U.S. Office of Special Counsel  
Pursuant to 5 U.S.C. § 1213

Robert S. Mueller, III  
Director  
Federal Bureau of Investigation

By:

*Keith L. Bennett* Date: 01/22/2013  
Keith L. Bennett  
Assistant Director  
Inspection Division

&

Approved and Submitted on Behalf  
of the Attorney General By:

*W. H. [Signature]* Date: 1/22/13

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## I. EXECUTIVE SUMMARY:

1 (1) On behalf of Director Robert S. Mueller, III, the Inspector Division (INSD) of the Federal Bureau of Investigation (FBI) investigated allegations made by Scott A. MacDonald, a former Supervisory Management and Program Analyst (SMAPA) with the FBI's Records Management Division (RMD). On February 18, 2012, Mr. MacDonald advised the U.S. Office of Special Counsel (OSC) of perceived violations of law, rule, regulation, gross mismanagement, gross waste of funds, and abuse of authority within the RMD. In accordance with Section 1213(e) of Title 5, United States Code, the appropriate agency head is required to conduct an investigation and prepare a report for submission to OSC. The Attorney General delegated the authority to investigate and compile a report to the FBI. Inspector Debra L. Fike directed the investigation for INSD.

2 (2) Mr. MacDonald alleged FBI management officials were deficient in three areas. First, Mr. MacDonald alleged FBI management officials did not properly manage and maintain official records, including databases used for seeking Title III wiretap warrants, because FBI employees knowingly relied on an antiquated electronic surveillance (E.SUR) database to retrieve prior wiretap records and to prepare Annual Wiretap Reports (AWRs). He alleged false information was provided to federal courts, the Drug Enforcement Administration, Congress, and the White House. Mr. MacDonald alleged erroneous data was retrieved from this database because of its poorly designed software, which only produced wiretap information from "exact match" searches. He further alleged this limitation precluded discovery of prior instances in which a wiretap was granted for the same person, or falsely indicated a person was previously monitored by a wiretap.

3 (3) Second, Mr. MacDonald alleged FBI management officials did not comply with National Archives and Records Administration (NARA) and FBI certification procedures for records and records storage systems by not having a system for capturing E-mails which, along with audiovisual, microfilm, and cartographic material, were not stored or maintained properly as official records.

4 (4) Third, Mr. MacDonald alleged FBI management officials did not allow him to audit records properly. He alleged RMD management limited the questions he could ask employees during audits about management of records systems. In his advisory role at RMD, Mr. MacDonald was responsible for streamlining the self-assessment process and ensuring self-assessment tools were user-friendly and supported by policy. During the development of a new Records Management (RM) questionnaire by his team, several topics Mr. MacDonald suggested for the questionnaire were edited as they underwent review by RMD Executive Management, leading him to believe his audit scope was limited.

5 (5) During the investigation, INSD examined ELSUR and RM policy, and interviewed 12 on-board and former employees from the ELSUR and RM Programs, several of them more than once.

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(U) INSD review revealed the following:

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- (U) Mr. MacDonald lacked firsthand knowledge of his allegations, with the exception of scope limitation. Mr. MacDonald based his allegations regarding ELSUR deficiencies on informal conversations with other employees;
- (U) Mr. MacDonald was not in a position to know of ongoing FBI efforts to improve and modernize ELSUR records systems and records storage facilities;
- (U) Procedures and policies were in place to ensure accurate information was entered into and retrieved from new and old ELSUR databases;
- (U) The FBI conducted comprehensive, formal studies of ELSUR procedures, policies, and systems in 2001 and 2009. These studies led to the relocation of the ELSUR Program to Operational Technology Division (OTD) in 2011, and replacement of the database Mr. MacDonald alleged produced erroneous information. No evidence the FBI provided false or erroneous Title III print application search results to courts or other entities was identified;
- (U) Mr. MacDonald did not prepare or review AWRs and was not familiar with the databases used to collect and present the data used in the reports. No evidence the FBI provided erroneous AWR information was identified;
- (U) Policies and procedures were in place to ensure retention of E-mail and other media as official records;
- (U) The FBI encountered prohibitive budgetary constraints in its attempt to construct a centralized records storage facility, and it was similarly situated with other federal agencies whose records storage facilities were not in compliance with NARA regulations, including NARA's own facilities;
- (O) Records Mr. MacDonald alleged were lost, unaccounted for, or in danger of destruction, including records of the September 11, 2001 terrorist attacks, were accounted for and safeguarded;
- (U) The action Mr. MacDonald alleged limited his audit scope occurred during the initial development stage of a proposed voluntary self-assessment tool, and did not occur during an audit.

II. METHODOLOGY

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(U) The investigation addressed each of Mr. MacDonald's allegations of records mismanagement, false reporting, and audit scope limitation as documented in the OSC referral letter, the OSC Form 12, and other information furnished directly by Mr. MacDonald or his witnesses.

(U) INSD examined the FBI's ELSUR and RM procedures, policies, and systems used to collect, analyze and maintain ELSUR and other FBI records. The 2001 ELSUR indexing study and 2009 Office of Integrity and Compliance (OIC) Red Team analyses of ELSUR and Title III regulatory compliance risks served as reference materials.

(U) The review included 19 interviews of 12 on-board and former ELSUR operations technicians, programmers, and managers from RMD and OTD. Ten of the 19 interviews conducted were of witnesses recommended by Mr. MacDonald.

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(U) Forty-seven restricted ELSUR Records System (ERS) files were reviewed to determine whether they contained inaccessible Title III material.

III THE INVESTIGATION

A. Background

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(U) EMD formed the Policy, Analysis and Compliance Unit (PACU) in July 2009, and created a GS-14 SMAPA position for the Compliance Team Lead. The position's duties were listed as: "suggesting, supervisory, and liaison responsibilities; serve as an expert advisor and consultant providing oversight and advice to managers and operational personnel; and planning, research, and analysis. On March 14, 2010, Mr. MacDonald was hired directly as the Compliance Team Lead, and reported to Unit Chief (UC) [REDACTED] PACU. UC [REDACTED] reported to Section Chief (SC) Debra O'Clain, Records, Policy and Analysis Section. Mr. MacDonald's first assignment was to review recommendations from the previous year's inspections and finalize a field office compliance report. After the final report was distributed, Mr. MacDonald oversaw his team's development of the electronic version of the Quality Assurance Review (QAR). The Compliance Team's focus was to revise and streamline the assessment process, and to verify whether each QAR question was policy driven. When the new QAR process was implemented, Mr. MacDonald worked with INSD to pilot the QAR project and examine the usability of the new assessment tools. Mr. MacDonald was also responsible for coordinating his team's evaluations of 26 field office ELSUR Programs with INSD.

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(U) Mr. MacDonald was employed with the FBI from March 14, 2010 to March 9, 2011. On February 15, 2012, Mr. MacDonald filed whistleblower disclosures with the OSC. OSC referred Mr. MacDonald's whistleblower disclosures to the U.S. Attorney General on July 24, 2012.

21

(U) INSD reviewed the OSC referral letter and the OSC Form 12 provided by Mr. MacDonald to address each allegation he disclosed in his whistleblower action. The following sections address each allegation identified and the results of the INSD review.

B. The Whistleblower's Specific Allegations

a. Evidence of False Information Provided to Courts and DEA in Wiretap Applications Was Not Identified

22

(U) Allegation: Mr. MacDonald stated FBI employees provided false information to federal courts and DEA because they knowingly relied on an antiquated database used to translate

(U) The ELSUR Records System (ERS) was an alphanumeric and numeric index maintained in FBIHQ and each FBI field office containing the true name or true known name of all persons, facilities, or places, for which a court ordered ELSUR had been sought, conducted, or administratively reviewed by the FBI. It also identified those persons and facilities who have been a party to a communication monitored or intercepted during the course of an FBI administrative ELSUR, and those who own, lease, license, constructively use, or otherwise hold a possessory interest in property subjected to an ELSUR search, conducted or administratively reviewed by the FBI.

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prior wiretap records. He believed the discovery of these violations was serious enough to make evidence from all wiretaps in recent years inadmissible in court.

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(U) Analysis: Section 2518(1)(c) of Title 18, United States Code, required all applications for the interception of wire, oral, or electronic communications ("Title III applications") to contain:

*a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, aside to any judge for the authorization to intercept, or for the approval of interceptions of wire, oral or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application.*

(U) Chapter III, Section 2.c. of the DOJ Office of Enforcement Operations (OEO) Electronic Surveillance Manual stated a "full and complete statement" must include:

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*the date, jurisdiction, and disposition of previous applications, as well as the relevance, if any, to the instant investigation. In addition to any known prior applications, the agency conducting the investigation should run an ELSUR check of its own electronic surveillance indices, the indices of any other participating agency, and the indices of any agency which would likely have investigated the subjects in the past.*

25

(U) Mr. MacDonald stated he was not aware of the parameters of ELSUR indices search variations followed by ELSUR Operations Technicians (EOTs). Mr. MacDonald advised he did not know whether there was a statutory minimum for how many variations in name spellings should be made in the course of an ELSUR name search, nor did he recall discussions among ELSUR personnel about this. Mr. MacDonald advised he knew only of the overall technological problems with the entry of information into ERS, and how search results varied with the experience and motivation of EOTs conducting the searches.

26

(U) [REDACTED] was assigned as the ELSUR Operation Unit (EOU)/Analysis Team Lead at PACU from 2008 through 2010. She described the procedure field EOTs and RMD MAPAs followed to conduct ELSUR searches. ELSUR searches were conducted in accordance with FBI's Pre-Title III ELSUR Search Policy, documented in FBI Memorandum 1-2003, dated March 5, 2003. [REDACTED]

[REDACTED]

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Although ELSUR searches conducted in ERS were time consuming, the system in place was functional.

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(U) EOU performed ELSUR searches on behalf of outside agencies and, under special circumstances, for FBI cases. EOU conducted the majority of FBI ELSUR searches within the field office where the witness application was made. EOU MAPAs also oversaw all field EOT searches conducted within their geographic areas of responsibility. EOU MAPAs ensured accuracy and compliance through daily reviews of all Title III applications. For every Title III application prepared within the FBI, EOU MAPAs were furnished with copies of all application documentation. EOU MAPAs checked the accuracy of EOU's indexing against supporting documentation in the Title III application. If indexing errors or incomplete search results were discovered, EOU memorialized them on a standardized form and routed it back to the field. Field personnel were then directed to complete the indexing or search, and to furnish the additional results to AUSA's and courts. This standardized form was also used by EOU to track trends in errors, and provide training to specifically address developing trends.

28

(U) The ERS limitations were among several ELSUR Program risk areas identified by INSD, RMD, and OTD managers during reviews conducted in 2001 and 2009. Both reviews acknowledged ELSUR and ERS deficiencies, and both concluded ELSUR management needed improvement. Neither review identified instances in which ELSUR searches produced erroneous results.

29

(U) During the 2009 review, the FBI's OIG conducted a seven month compliance risk analysis (Red Team review) to assess the FBI's systems and procedures used to collect, analyze, and maintain court-authorized Title III<sup>2</sup> and Foreign Intelligence Surveillance Act (FISA)<sup>3</sup> ELSUR data. The Red Team categorized ELSUR compliance risks into six areas identified as:

As a result, the Red Team formulated a Mitigation Plan which recommended overall consolidation of program management, policy, training, and audit compliance. The foremost Red Team recommendation was to move the ELSUR Program from EMD to OTD. OIG conducted quarterly reviews of the plan's progress with OTD and stakeholders from other divisions. Pursuant to the Red Team recommendations, the ELSUR program was relocated to OTD in October 2011, and ERS was replaced with the ELSUR Data Application (EDA). On

<sup>2</sup> (U) Title III of the Omnibus Crime Control and Safe Streets Act of 1968 governs the court-authorized non-consensual electronic interception of information (usually communications) in crime-related investigations under circumstances in which the parties have a reasonable expectation of privacy.

<sup>3</sup> (U) The Foreign Intelligence Surveillance Act of 1978 (FISA) is an act of Congress that provides the guidelines and procedures governing physical and electronic surveillance for the purpose of intelligence collection against foreign powers and their agents.

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September 4, 2012, OIG stated all tasks in the Mitigation Plan were completed with the exception of finalization of the ELSUR Program Guide (PG). OTD provided INSD with a draft ELSUR PG which, when approved, will bring OTD into full compliance with the Mitigation Plan.

30 (U) In OTD, the EOU was renamed the ELSUR Program Office (EPO), and assigned to ELSUR Program Manager (PM) [REDACTED]. In January 2012, the EDA system went online and replaced ERS. ELSUR searches conducted in RDA eliminated the need for EOTs to perform "hand searches" of wiretap applications and other resources to supplement ERS searches. The EDA system used new software integration which allowed for "round-the-clock" searches. This feature automatically searched all known name combinations and spelling variations. The EDA system also featured software that streamlined the process used to eliminate false search hits. This software automatically applied biographical data, such as dates of birth, to name search hits, and eliminated those names not matching dates of birth. EOTs and case agents had to manually compare each hit to known biographical data to eliminate false hits with the older ERS system.

31 (U) Conclusion: The former ELSUR database did have technological limitations. However, this was recognized by EOU and manual procedures were implemented to ensure deficiencies within ERS did not impact the ability to meet the statutory requirements. The new EDA system eliminated these deficiencies.

*h. No Evidence Title III Information in Restricted ERS Files Withheld from "Prior Application" Searches Was Identified*

32 (U) Allegation: Mr. MacDonald advised [REDACTED] told him about the ERS deficiencies he disclosed to the OSC, and that he did not have firsthand knowledge of such deficiencies. [REDACTED] was a MASA with EOU and later with the ELSUR Operations/Analysis Unit from 2007 to 2009. [REDACTED] retired from the FBI in 2010. According to [REDACTED], Title III wiretap "prior application" searches conducted in ERS did not return complete information as there were 15 to 20 ERS files restricted for viewing only by those EOTs who requested the restrictions. As a result, it was possible the records of wiretap subjects in restricted ERS files were not identified when other EOTs subsequently conducted prior application searches for those subjects. [REDACTED] therefore advised affiants were not able to fully and completely state to the courts in which there were wiretap applications whether there were prior Title III wiretap applications for their subjects.

33 (U) Analysis: According to [REDACTED], access to certain ERS files was restricted to specific users. Only these users could determine the existence of those files, and some had been restricted and inaccessible since 1996. [REDACTED] stated the only way EOTs conducting prior application searches could gain access to information in restricted ERS files was to ask the EOTs who had restricted the files whether the information sought was in one of the restricted files. Otherwise, no information from a restricted ERS file would be identified during a search. [REDACTED] stated by following ELSUR searches were incomplete because most field LOIs were unaware of the practice of restricting ERS files, and would not have known to ask for access to these files.

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34 (A) On-board BLSUR PM [REDACTED] and former BLSUR PM [REDACTED] were not aware of any "prior application" searches conducted of subjects whose files were restricted. [REDACTED] and [REDACTED] advised there were measures to mitigate such occurrences. According to [REDACTED], restricted ERS files were regularly reviewed and unrestricted as soon as the underlying need for the restriction ended. At least one FOI from field offices where files were restricted was granted access to them in the event of a subsequent subject search from one of those files. Finally, because DOJ processed all requests to restrict ERS files and reviewed all Title III wiretap authorization documentation to include BLSUR searches, it would have identified wiretap authorizations based on search results that did not include information from restricted files.

35 (U) Information Technology Specialist (ITS) [REDACTED] possessed the codes necessary to restrict ERS files, and was tasked with entering the restrictions into ERS. At the time of this review, ITS [REDACTED] was assigned to the Intelligence Applications Support Unit, Information Technology Services Division, and was the FBI's subject matter expert regarding ERS. Along with a software engineer contractor, ITS [REDACTED] performed all programming and updates for ERS, to include limiting access to certain ERS files. According to ITS [REDACTED], many files were restricted over the years, but it was not his job to know why. ITS [REDACTED] stated he only made the modifications necessary to restrict files upon request, and was never given any justification or predication for restricting records, and had very little interaction with field personnel. He did not know if hard copies of requests to restrict cases were kept. He was not aware of any problems caused by searches having been conducted which did not include information from the restricted files.

36 (U) ITS [REDACTED] provided INSD with a spreadsheet identifying 47 restricted ERS files involving 36 cases which had been intermittently restricted during the period of March 27, 1997 to March 30, 2010. A review of these files determined 43 (91%) of 47 remained restricted. Consensual Monitoring or FISA information, and were not relevant to Title III prior application searches. One (25%) of the four remaining restricted files contained Title III information which was still pending and searchable in the new BDA system. INSD identified subjects in the three remaining files and duration of each restriction. The first was restricted from May 27, 1999 to March 17, 2004, the second from July 13, 2000 to March 11, 2001, and the third from July 1, 2003 to December 30, 2003. Although ERS is deactivated, INSD is researching whether there could be an electronic database re-created to conduct a "prior application" search on these three cases.

37 (U) Conclusion: Evidence of incomplete Title III searches resulting from restricted files was not identified. The majority of restricted files identified during the investigation contained Consensual Monitoring and FISA applications which were not applicable to required Title III "prior application" searches. Only three Title IIIs were restricted within ERS. Due to the procedures established for Title III application review, these restricted files would most likely have been identified during subsequent searches.

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c. *Evidence of AWRs and Other ELSUR Inquiries Constituting Inaccurate Information Was Not Identified*

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(U) Allegations: Mr. MacDonald stated employees provided inaccurate information in AWRs and in response to inquiries from Congress, the White House, and other Executive Branch agencies because ERS was obsolete and outdated.

39

(U) Analysis: The Omnibus Crime Control and Safe Streets Act of 1968 required the Administrative Office of the United States Courts (AOUSC) to report to Congress the number and nature of federal and state applications for orders authorizing the interception of wire, oral, or electronic communications. The act required AOUSC to collect information on the offenses under investigation, locations of intercepts, surveillance costs, and numbers of arrests, trials, and convictions resulting from the surveillance. Section 2519(2), Title 18, United States Code required DOJ to report wiretap information to AOUSC in January of each year.

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(U) Information from all closed Title III wiretaps was used to provide data for the AWR. While the ELSUR Program was at RMD, PACU was responsible for collecting and reporting wiretap data to OML. Upon the ELSUR Program's relocation to OTD, the Data Acquisition/Intercept Section was responsible for preparing the AWR. ELSUR Program Managers at both RMD and OTD advised data from ERS was not used to prepare AWRs.

[REDACTED]

41

(U) Mr. MacDonald advised he had no role in preparing the AWR because it was the responsibility of the ELSUR Analysis Team. According to Mr. MacDonald, the data in the report not only included whether a wiretap was conducted, but also how much time was spent on it. Mr. MacDonald stated ELSUR PM [REDACTED] had difficulty measuring how many hours were spent on wiretaps, and asked Mr. MacDonald to help her analyze the data. Mr. MacDonald stated he remembered seeing a spreadsheet where the information was compiled, and concluded the absence of automation amounted to clericalism of duty. Mr. MacDonald stated he had no direct involvement with the production or review of the report. Mr. MacDonald did not cite any instances of erroneous or inaccurate information reported in AWRs. He also stated he never read an AWR. None of the present or former ELSUR personnel interviewed, to include ELSUR PMs [REDACTED] and [REDACTED], cited instances of erroneous or inaccurate information reported in the AWRs.

42

(U) Conclusion: Due to Mr. MacDonald's limited exposure to AWRs, he did not possess knowledge of the reports' contents or the process by which they were produced.

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Through interviews and review of policy and procedure, JNSO determined the databases used in tabulating AWRs were unrelated to those used for ERS Title III "prior application" searches. Evidence of incomplete or inaccurate AWRs was not identified.

*d. Evidence of Unreliable Data from ERS Communicating the New EDA System Was Not Identified*

43 (U) Allegation: Mr. MacDonald stated ELSUR and the Records Management Programs were in violation of unspecified federal record keeping standards due to lack of funding and competent management. Mr. MacDonald explained although ERS was replaced with EDA in January 2012, the unreliable information contained in ERS was used to populate the EDA system. As a result, the new database was also unreliable. Mr. MacDonald stated he was neither involved with, nor aware of, the efforts made or entities involved in correcting ELSUR deficiencies.

44 (U) Analysis: ██████████, Assistant Section Chief (ASC) of OTD's Data Acquisition/Integrity Section, explained the ERS replacement process. Prior to the Red Team review of ELSUR evidence issues, there was an initiative to create a replacement for ERS. Former ELSUR PM ██████████ was aware of SCU's reliance on "hand searches" of paper and scanned winitap application documents as part of the ELSUR search process. In December 2009, she consulted with ██████████, OTD's Technical Operations Control Unit (UC) about bringing the Technical Management Database (TMD) project on line. The TMD project was an OTD cost saving initiative designed to stream together multiple sources of electronic data, to include telephonic, microphonic, and data intercepts. In an effort to streamline the ELSUR process, UC ██████████ sought RMD's interest to include ELSUR records in the TMD. ASC ██████████ stated this was the first major attempt to move the ELSUR program to OTD. Staffing concerns led RMD to table the idea at that time.

45 (U) The project to move ELSUR to OTD was re-initiated in October 2010 when the Red Team completed its review and began to implement the Mitigation Plan. RMD did not have the resources necessary to fulfill the Mitigation Plan's ELSUR action items, and requested the ELSUR Program be moved from RMD to another division. RMD, OTD, OIC, OGC, and RPO prepared position papers identifying the best division to relocate ELSUR. In December 2010, former Assistant Deputy Director (ADD) T.F. Harrington determined OTD was best suited to manage the ELSUR Program. In June 2011, ADD Harrington approved OTD's ELSUR Transition Plan, and in October 2011 the ELSUR Program Office began operations at OTD. OTD's Data Interest Technology Unit added ERS functions to an existing database and in January 2012 the EDA became operational.

46 (U) According to ASC ██████████, the ERS data entered into EDA was reliable and accurate. Two data validation contractors were hired and tasked with examining ERS data and entering it into EDA. This project consisted of two phases of activity. Contractors were tasked in phase one with familiarization with ERS, familiarization with the ERS replacement system (EDA), and familiarization with scanned and hard copies of historical winitap application documents. The contractors' phase two tasks included comparison of existing ERS records to scanned and hard copies of documents, data entry of additional historical data not captured in ERS, data entry of

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historical data into EDA, and spot checking existing records for completeness and accuracy. In April 2011, OTD budgeted funds sufficient for the two contractors to conduct those data verification activities full-time for two years. In September 2011, the contractors commenced data familiarization and review of Title III application information as it was entered in MMS. From January 2012 forward, the contractors reviewed information as it was entered in EDA. The contractors began with current and most recent Title III applications, and worked back to "legacy," or historical applications.

47 (U) Conclusion: INSD determined the transfer of data from ERS to EDA was thorough, accurate, and inclusive of all available Title III application data. Mr. MacDonald had no involvement with the data transfer process between the systems and his allegation of erroneous data transfer was contradicted by employees engaged in the data transfer process.

c. *Evidence the FBI Did Not Store Records or Certify Record Systems Properly Was Identified, But Mitigated*

48 (U) Allegation: Mr. MacDonald stated the FBI failed to comply with the certification of records and storage systems, as required by unspecified NARA and FBI policy. Mr. MacDonald disclosed E-mail, audiovisual, microfilm, and cartographic materials were not maintained or stored as official records. Mr. MacDonald further stated there was no system or procedure in place to capture E-mails as official records, and they were not maintained or available for discovery, retention, or historical purpose. Mr. MacDonald also disclosed the FBI had "bulk filed" CDs in boxes of 100 or more, in violation of unspecified provisions of Sections 1236 -1238, Title 36, Code of Federal Regulations.

49 (U) Analysis: CPD 0877D, dated March 24, 2011, required E-mail be classified as record or non-record, and required record E-mails be managed in accordance with the FBI's RM Manual. Section 4.2.2.8.2 of the RM Manual required incorporation of record E-mails into FBI files. RMD provided further E-mail record management guidance in an EC dated March 16, 2012. In this EC, RMD categorized E-mail as non-record, transitory record, and non-transitory record. RMD policy required non-transitory record E-mails be uploaded in the FBI's Central Records System. When interviewed, Mr. MacDonald stated he was not aware of this policy until after it was furnished to him during discovery after his whistleblower action was filed.

50 (U) NARA regulations governed the physical and environmental standards for facilities in which federal records were stored. NARA also regulated the scheduling of records for destruction, or transfer from the originating agency to NARA for permanent retention. NARA did not have oversight over the custody practices of individual electronic records, such as CDs or other removable storage media, unless scheduled for destruction or transfer. Because of the volume and complexity of FBI records, NARA had more contact with the FBI than other federal agencies. NARA representatives had weekly, and at times, daily contact with RMD managers over retention scheduling. At the FBI's request, NARA reviewed Automated Case Support (ACS)<sup>4</sup> electronic records in 2005 and made recommendations for improvement. In 2009, RMD

<sup>4</sup> (U) ACS is the umbrella name for three primary subsystems: Investigative Case Management (ICM), Electronic Case File (ECF), and Universal Name Index (UNI). It is a suite of internet applications that provide immediate, real-time access to FBI investigative information to authorized users from any FBI location.

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and NARA began a firm course training initiative to have all RMD employees certified in RM. In instances where NARA received deteriorated records from the FBI, NARA assisted the FBI in developing remedies to prevent future occurrences.

51 (U) SC O'Clair stated she was aware of the bulk filing of CDs. While SC O'Clair acknowledged these media were not always readily retrievable, she stated they were filed and indexed in 1A envelopes,<sup>5</sup> in accordance with acceptable internal business processing methods. To make electronic media such as CDs more readily retrievable, RMD was conducting a fieldwide inventory of FBI files utilizing an application known as Total Record Information Management (TRIM)<sup>6</sup>. TRIM captured records only at the file level, not at the individual media level. However, "Facilitate Media Conversion" was added as a Priority Initiative to RMD's 2013 Strategy Management System. The goal of this initiative was to enable access to electronic media directly from Sentinel<sup>7</sup> case files.

52 (U) SC O'Clair stated the Alexandria Records Center facility did not meet NARA guidelines for physical requirements such as lighting and air conditioning. There were no ELSUR records kept there. According to SC O'Clair, there was no penalty for non-compliance with NARA guidelines, and many of NARA's own facilities were not in compliance.

53 (U) NARA dictated the regulations for storage facilities in which the records were kept, and the FBI was responsive to NARA's facility certification process. In 2008, NARA started a federal government-wide initiative to have agencies comply with NARA's facilities certification process. NARA imposed a deadline of October 1, 2009 for compliance, but had to modify the deadline because many agencies could not meet it. NARA further accommodated agencies by allowing them to provide alternative written plans in response to non-compliance. As an alternative to bringing existing facilities into NARA compliance, the FBI provided a plan to build a Central Records Complex (CRC). This plan was initially accepted by NARA, and NARA was aware the building of this facility was slowed by funding issues. Correspondence provided by NARA addressed the unresolved funding issues, but in a February 17, 2011 memo from NARA to DOJ's OIG, NARA identified the FBI as in non-compliance with NARA records storage facility requirements.

54 (U) RMD Assistant Director (AD) Michaela Juptina acknowledged FBI records storage facilities were not in compliance with NARA standards, and stated construction of the CRC was RMD's top priority for FYs 2012 and 2013. Prior to FY 2012, RMD had a budget of \$200 million to fund construction of the CRC to include \$97 million in congressional funding. In FY 2012, the congressional funding was removed and a new plan was developed to reduce the scope of the CRC. Due to the loss of congressional funding, the budget for the CRC was reduced to \$110 million of the FBI's "prior funds." The FBI is continuing discussions with Congress to

<sup>5</sup> (U) A 1A envelope (FD-340) is a standardized envelope containing a document or item of property that is pertinent to an investigation.

<sup>6</sup> (U) TRIM is a records management application designed to track and manage transfer of closed files from field offices to RMD facilities and to the National Personnel Records Center in St. Louis, MO. It provided the capability to support the capture and protection of the data associated with the transfer of records from all field offices in custody of HQ Records Center, a NARA Federal Records Center, or other disposition.

<sup>7</sup> (U) Sentinel is the FBI's electronic case management system which replaced ACS and integrated data migration of numerous legacy systems, repositories and workflows.

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authorize the expenditure for the CRC. In a letter dated November 29, 2012, the FBI notified NARA there continues to be ongoing efforts to centralize records into NARA compliant space, noting the CRC remains the FBI's highest priority facility project.

55 (U) Conclusion: The FBI was fully engaged with NARA concerning guidelines for record retention. The FBI used its current policies and procedures to manage E-mail records over which NARA did not have direct oversight. Mr. MacDonald was not in a position to assess NARA compliance of existing RMD facilities or the current budget and funding matters in support of the CRC's construction. He had no involvement with ongoing efforts to develop the CRC.

f. *No Instances of Improperly Filed September 11, 2001 Terrorist Attack Evidence Were Identified*

56 (U) Allegation: Mr. MacDonald stated he discovered evidence in the FBIHQ ELSUR Evidence Room, including evidence from the investigation of the September 11, 2001 terrorist attacks, which had not been filed or indexed properly.

57 (U) Analysis: FBIHQ was designated as the office of origin, rather than the historical practice of designating a field office, for certain counterterrorism investigative matters after the terrorist attacks of September 11, 2001. This led to the opening of an ELSUR evidence room on the seventh floor at FBIHQ under the supervision of former BOU UC [REDACTED]. The ELSUR room was managed by BOU EOT [REDACTED], and all evidence in this room was filed, highly organized, and closely monitored. When EOT [REDACTED] retired in 2012, the 1100 to 1200 items of evidence were transferred to the Washington Field Office because the underlying investigation had been transferred.

58 (U) Mr. MacDonald described how he learned of the September 11, 2001 evidence. Mr. MacDonald assisted with an evidence inventory when RMD moved evidence from a basement room to the seventh floor special file room. FBI policy required the evidence be inventoried prior to and immediately after being moved. Mr. MacDonald stated he and ELSUR PM [REDACTED] conducted both inventories with an EOT and a supervisor. The inventory involved scanning barcodes on the boxes, and also served as the official annual inventory. During this inventory, Mr. MacDonald scanned a box and noticed it was heavier than the others. The EOT told him it contained CDs or DVDs. Mr. MacDonald advised there could have been three or four boxes like this. The EOT also told Mr. MacDonald the room contained September 11, 2001 related FBIHQ evidence. Mr. MacDonald stated the EOT may not have said at that time the CDs or DVDs were related to the September 11, 2001 investigation, however, he made the assumption. Mr. MacDonald stated the CDs or DVDs could have been related to the September 11, 2001 investigation, but whatever the case, they were not discoverable because they were in boxes. Mr. MacDonald stated he did not notice whether the boxes had any other labels or documentation on them as he was only looking for barcodes. Mr. MacDonald stated he did not look to see if there were any other documents in the boxes, such as 1A or 1C envelopes.<sup>6</sup> Mr. MacDonald further stated his conclusion the evidence was related to the September 11, 2001

<sup>6</sup> (U) A 1C envelope (FD-192a) is a standardized form used to identify large (bulk) non-identifying property seized, subpoenaed, or contributed pursuant to investigative activity.

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investigation was based on inference, as he was not looking at what cases the evidence belonged to.

(U) When interviewed, ██████████ stated she participated in the inventory, and recalled all contents of the room being scanned and accounted for. ██████████ stated she was not aware of any boxes of unindexed CDs.

(U) **Conclusion:** Mr. MacDonald made an unfounded assumption the boxes he scanned during an inventory contained evidence of the September 11, 2001 terrorist attacks. His allegation of improper evidence filing was disproved through interviews with ELSUR PM ██████████ and Mr. MacDonald.

*g. No Evidence Mr. MacDonald's Audit Scope Was Improperly Limited Was Identified*

(U) **Allegation:** MacDonald stated he experienced scope limitation regarding his audit of records management. This occurred when management curtailed his audit in order to avoid embarrassing RMD senior managers for their ongoing failures to properly maintain and store records and make records accessible during litigation and discovery.

(U) **Analysis:** Prior to PACU's inception in 2009, there was no compliance unit within RMD addressing the ELSUR or RM Programs. PACU's Compliance Team was formed to develop self-audit programs for ELSUR and RM Programs. Mr. MacDonald was hired in March 2010 as the Team Lead for PACU's newly established Compliance Team because, according to UC ██████████, he possessed GAO "Yellow Book" experience and had a work history with government audits. The GAO Government Auditing Standards guide was commonly referred to as the "Yellow Book" and set forth the generally accepted government auditing standards. UC ██████████ stated these qualifications were a good fit for the Compliance Team Lead position. During Mr. MacDonald's tenure, the Compliance Team had a staff of approximately 15 people tasked with preparing questionnaires for RM and ELSUR Program self-audits required by INSD. RMD management also wanted to implement a HQ-level voluntary self-audit review process because INSD did not require this process of HQ divisions. RMD took the lead on self-inspection before subjecting other HQ divisions. PACU developed a proposal for the RM Program self-audit with 25 to 30 procedural topics.

(U) PACU's Compliance Team, under Mr. MacDonald's supervision, developed these topics with input from PACU's Policy Team. The RM self-audit proposal was not policy, and was purely voluntary and proactive. Some topics were procedures recommended by NARA, while others were compiled from a patchwork of pre-existing FBI policies. RMD management reviewed the proposal and directed the removal of no more than five of the recommended topics. Various reasons were given for the removal of these topics, two of them were the RMD AD's authority as the FBI Records Officer, and the storage and security of personnel records in unit leaders' offices. RMD management removed the topic addressing one of the RMD AD's roles as FBI Records Officer because it was not a NARA requirement. The personnel records storage topic was removed because it was covered by existing HRD policy. RMD management's

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response to the proposal was initiated to ELSUR record maintenance, however it was the sole basis for Mr. MacDonald's allegation of audit scope limitation.

64 (U) Mr. MacDonald advised he was otherwise not limited in other aspects of the development of the ELSUR Program self-audit review, nor was his team limited in its routine audits and oversight of field ELSUR compliance. Mr. MacDonald's direct audit experience, while with the FBI, was limited to two instances in which he traveled to the field during audits. In both instances, Mr. MacDonald accompanied more experienced ELSUR staff members to observe the pilot of the new self-audit process.

65 (U) Mr. MacDonald's primary duty was to oversee the conversion of the QAR self-assessment from a paper spreadsheet to an electronic form. Mr. MacDonald stated his understanding of his job was to ensure the compliance process had a formal structure and basis in the Yellow Book, and to ensure the process was effective. The focus of his unit was to manage and repair the next two year cycle for upcoming QARs. The QAR had been in use prior to Mr. MacDonald's tenure at the FBI, and he only assisted in developing additional questions for the electronic version.

66 (U) Conclusion: Mr. MacDonald had no direct audit responsibilities during his employment with the FBI. The matter he identified as scope limitation was the creation of a draft proposed questionnaire submitted through his chain of command for review. Topics were removed from the draft during the review process as they were found to be redundant with existing policy.

*k. Evidence of Historical ERS Files At Risk of Destruction Was Not Identified*

67 (U) Allegation: Mr. MacDonald advised five to seven boxes in the custody of ELSUR PM [REDACTED] contained documents which described the failures of ERS. Mr. MacDonald stated these documents had not been reviewed or catalogued, and feared they would be destroyed to cover up the failure of ERS to return accurate information.

68 (U) Analysis: Mr. MacDonald stated there were five to seven boxes of documents which had been stored under a desk in the RMD Winchester facility. Mr. MacDonald further stated he never reviewed the materials in these boxes, but believed one of them contained a "white paper" addressing ERS failures written by [REDACTED]. Mr. MacDonald stated PM [REDACTED] would know the location of these boxes.

69 (U) According to PM [REDACTED], there were seven boxes which contained historical ELSUR documents, referred to as the "[REDACTED] file," which had been reviewed, cataloged in due order, and safeguarded in OTD file cabinets. These documents consisted of notes, journals, and working copies of documents prepared and maintained by retired ELSUR PM [REDACTED]. They were not considered part of the ELSUR case file, and although preserved, had not been scanned. Some documents in the "[REDACTED] file" described efforts to better manage the ELSUR program dating back to the 1980s. These proposals were never acted upon because the ELSUR program encompassed many technical and legal issues beyond the scope of records management.

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During her interview with INSD, PM [redacted] made the contents of these seven boxes available for review.

70

(U) Conclusion: ELSUR PM [redacted] fully refuted this allegation as the files identified by Mr. MacDonald were reviewed, catalogued, and maintained by OTD. The files were made available to INSD for review.

IV. OBSERVATION & RECOMMENDATION

71

(U) INSD Observation: The FBI did not comply with NARA records storage facility certification requirements.

72

(U) Analysis: NARA regulations codified in 36 C.F.R. Part 1228, subpart K specified the facility standards and approval standards applicable to all federal records storage facilities. Although NARA imposed a 10/01/2009 deadline for compliance with this statute, NARA allowed agencies to provide alternative written plans in response to non-compliance. The FBI opted for this alternative and provided a plan to build the CRC.

73

(U) INSD interview of NARA Appraisal Archivist [redacted], and review of documents [redacted] provided, indicated the FBI was aware it did not comply with statutory storage facility standards. NARA advised in a February 17, 2011 letter to DOJ's OIG the five FBI records storage facilities did not meet NARA standards and establishment of the CRC remained unfunded and unscheduled.

74

(U) Recommendation: AD, RMD should further collaborate with NARA to develop and document plans for a new CRC or develop and document plans to upgrade existing records storage facilities which meet NARA certification standards.

V. CONCLUSION

75

(U) Mr. MacDonald raised valid points concerning perceived deficiencies in the ELSUR Program, however, his position and limited tenure did not allow him to know the extent of ongoing corrective actions being taken by the FBI. Prior to Mr. MacDonald's allegations, the FBI recognized deficiencies in the ELSUR Program, specifically ERS, and took corrective actions with ELSUR reindexing and data retrieval functions. With OIG's oversight and coordination, a thorough review of the ELSUR Program was conducted by a Red Team. The Red Team identified risks created by the existence of several ELSUR and Title III compliance policies, as well as fragmented training, monitoring and auditing. The Red Team assigned the consolidation of policy as a top priority in the Mitigation Plan. This effort also facilitated the relocation of the ELSUR Program to OTD, and the replacement of ERS with the FDA system. FDA's enhanced record input and retrieval features. Although ERS was functional and reliable, FDA's automated search capabilities eliminated reliance on "hand searches," streamlined indexing, and accelerated search turnaround time.

76

(U) The relocation of the ELSUR Program from RMD to OTD and the establishment of the DPO corrected the issues of fragmented ELSUR management, procedures, and training. A

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comprehensive ELSUR Program Office Policy Guide was drafted and submitted to the FBI's Corporate Policy Office for approval.

77 (U) The FBI also recognized deficiencies in compliance with NARA records storage facility certification guidelines. Mitigation efforts have been slowed, but once budgetary constraints and GSA regulatory requirements are addressed, the construction of the CRC would bring the FBI into compliance.

78 (U) Mr. MacDonald's official job description, as well as his account of his job responsibilities, was to manage the newly formed Compliance Team within the PACA. While the Compliance Team's mission was to prepare and oversee QARs, the instance in which alleged scope limitation occurred was not an audit. The removal of questions from the proposed Records Management self-audit questionnaire occurred during an early planning phase. Further, these questions were removed to avoid redundancy with existing policy. No limitations on Mr. MacDonald's role and responsibilities were identified as stated in his job description and by his chain of command. His allegation of audit scope limitation as stated in the OSC referral letter was not substantiated.

79 (U) Finally, no evidence of mismanagement of historical ELSUR documents or records of the September 11, 2001 terrorist attack investigation was identified. The seven boxes of ELSUR documents were accounted for and were safeguarded. The bulk storage of CDs in boxes and of other electronic media did not violate FBI or NARA policy.

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## **Exhibit D**

**– Sworn Statement by FBI Expert on  
“investigation” performed by FBI**

Notes on my FBI interview concerning RMD records management and ELSUR

Interviewed by: SA Dierdre Fike and SA Andrew Ludlum

I was escorted to an office in the JCH building where the interview was to take place and introduced to SA Dierdre Fike. SA Ludlum informed me this interview was occurring based on information provided by Scott MacDonald and information he knew I was privy too as a witness via telephone to Mr. MacDonald statement.

I asked if this interview was being recorded. SA Ludlum said no. I then asked if they have read my file. SA Ludlum said "what file". I responded "my personnel file". SA Ludlum said no and that they had a protocol to follow for this interview.

SA Ludlum presented a 2-page document undated to me for review and asked if I wrote it. I reviewed it and responded, yes. He then asked is this the "white paper" to which Mr. MacDonald referred. I said it is the second one, because it had 2-pages, and the first "white paper" I wrote was only page one of this document. I explained, I added the additional second page was added at the request of SA White to support his efforts to try and obtain money captured from drug investigations. SA Ludlum set the document aside with a comment to the effect that he saw nothing wrong with the information stated in the document.

About this time, SA Ludlum said he understood that I was a detail person, but if I could limit my responses to the questions asked since they had a short time frame to prepare their response to DOJ. I opined that I would attempt to do so, but I would frame my responses within the context of the information I had to share to assist them in understanding my answer. He reiterated they had a protocol to follow and had only planned an hour for my interview.

He asked how long I worked in ELSUR. I responded I transferred from the CJIS N-Dex program as a MAPA to the RMD ELSUR position in January, 2007.

I offered information about my arrival in the ELSUR Unit concerning the lack of the following documents: ELSUR Policy, ERS Program Guide, ERS User Guide, ERS error code definitions and rectifications. Additionally, SA White and MAPA Gayle Jones informed me these were being developed.

SA Ludlum again complained to me about how he did not need details and that they had a protocol to follow.

SA Ludlum asked me what I knew about ERS. I said, I learned the system by communicating with the IT person, M.L. Woodall who was responsible for the ERS computer programs. I obtained from M. L. Woodall the ERS program code with SA White's permission so I could review the ADABAS programs in preparation for developing a replacement ELSUR system. SA Ludlum asked if I was a programmer. I stated I was not. SA Ludlum then asked what skills or training I had to perform this review. I informed him that throughout my career I had many intelligent mentors willing to share and educate me, received training at DODCI, Bureau of the Census 1980 electronic files, FBI UCR Program, the electronic storage for the Law Enforcement Officers Killed Program collection documents, established the electronic capture of the interview protocol, and the NBRS and N-DEX FBI programs. Again, SA Ludlum showed his displeasure with the depth of my response and reiterated his admonishment.

SA Ludlum then asked if I knew of anything else about ELSUR that I was not asked. I responded that I do and stated that there is an undocumented process to "hide" ELSUR data when a data search is performed by an EOT of ELSUR Unit MAPA. He inquired as to what I meant. I explained that subject information would

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## **Exhibit E**

**Nadia Winstead v USA – Illegal wiretaps caused by problems with FBI searches of records (See pages 14 thru 16 for discussion of evidence problem with ELSUR records issues including “false negatives”).**

[http://grandjuryresistance.org/files/Winstead\\_Appeal\\_Reply.pdf](http://grandjuryresistance.org/files/Winstead_Appeal_Reply.pdf)

**Note, the contempt charge was ultimately dropped against Ms. Winstead, due in part to the errors of the FBI.**

**See this link for dismissal:**

<http://www.indybay.org/newsitems/2006/12/24/18340237.php>

NO. 06-17218

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

IN RE GRANT JURY INVESTIGATION

DC No. CR-05-90293-MISC-  
SI  
Northern District of California,  
San Francisco

\_\_\_\_\_  
NADIA WINSTEAD,

Witness-Appellant

UNDER SEAL

v.

UNITED STATES OF AMERICA,

Appellee,  
\_\_\_\_\_

Appeal from the United States District Court  
for the Northern District of California  
The Honorable Susan Wilson, District Judge, Presiding

**WITNESS-APPELLANT'S REPLY BRIEF  
[RECALCITRANT WITNESS APPEAL]**

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NADIA WINSTEAD

NO. 06-17218  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

IN RE GRAND JURY INVESTIGATION

DC No. CR-05-00293-MISC-  
SI  
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v.

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\_\_\_\_\_ /

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The Honorable Susan Illston, District Judge, Presiding

**WITNESS-APPELLANT'S REPLY BRIEF  
[RECALCITRANT WITNESS APPEAL]**

**ARGUMENT**

- I. Winstead's Preliminary Showing That She Was the Victim of Illegal Electronic Surveillance Was Strong, Requiring the Government to Make an Unequivocal Response**

The government's argument that Winstead's claim of illegal electronic

surveillance was weak ignores Ninth Circuit precedent that a witness need only make a "mere assertion" of unlawful surveillance in order to trigger the government's obligation to provide an unequivocal response. *United States v. Velguth*, 502 F.2d 1257, 1258 (9<sup>th</sup> Cir. 1974). See also *In re Evans*, 452 F.2d 1239, 1247-50 (D.C. Cir. 1971) ("[i]f we were to hold that a witness could make a 'claim' only when he has found an electronic bug in his home, heard mysterious beeps in his telephone, or rifled the files of the Justice Department, we would merely succeed in encouraging the government to improve its security as well as its technology"); *In re Grand Jury Proceedings (Hermann)*, 664 F.2d 423, 428-29 (5<sup>th</sup> Cir. 1981); *United States v. Nabors*, 707 F.2d 1294, 1301-02 (11<sup>th</sup> Cir. 1983).

In addition, the court in *Evans*, which involved surveillance of political activists like this case, recognized that the government's history of monitoring First Amendment-related activities can itself comprise part of the factual allegation that surveillance occurred:

To be sure, appellants have merely asserted that wiretapping has been used against them. But this is not a case where a reasonable man would be startled to learn that electronic eavesdropping had, in fact, been used. On the contrary, in view of the government's well publicized anxiety about the anti-war activities planned for May, 1971, it would almost be more surprising if some telephones had not been tapped. We do not mean to suggest that a witness can invoke the procedures of § 3504(a) (1) only when an allegation of wiretapping seems plausible on its face. But it is important to avoid

misconceptions about the nature of appellants' claim. Their allegations surely cannot be dismissed as patently frivolous; nor could we safely assert that they have been made in bad faith in order to obstruct the grand jury. The government, not appellants, has the information which can substantiate or dissolve their contentions, and for that reason Congress expected that the burden of going forward would shift to the government.

*Id.* at 1249-50. *Evans's* reasoning applies with at least equal force in *Winstead's* case, wherein the government has been engaged in a multi-state, multi-year investigation of the animal rights movement involving wiretapping and all manner of other electronic and non-electronic surveillance of political activists. See EOR 8-12 (Declaration of Attorney Christine Garcia).

The government's reliance on *In re Grand Jury Proceedings (Garrett)*, 773 F.2d 1071 (9<sup>th</sup> Cir. 1985) (per curiam) is misplaced. See Government's Brief ("Gov. Br.") at 13. As the district court stated in its order here (EOR 60), *Garrett* does not stand for the proposition that allegations of unusual noises heard on telephones are insufficient to support a witness's claim of illegal electronic surveillance. *Garrett's* preliminary showing of illegal electronic surveillance, which was based on alleged problems with his telephones, was not found to be inadequate to trigger a government response. Rather, the court in *Garrett* affirmed the contempt order because the government unequivocally denied the use of electronic surveillance: the government's response included four affidavits from

case agents who affirmatively stated “that electronic surveillance has not been used in the investigation to gather evidence for use against any of the suspected coconspirators.” *Id.* at 1073. *Garrett* thus supports Winstead’s claim in this case that the government is obligated to make an unequivocal response and that the declarations it submitted do not meet that standard.

Significantly, the government’s claim that Winstead’s showing of illegal electronic surveillance is weak includes no mention of this Court’s recent opinion in *In re Grand Jury Investigation, 2003R01576, John Doe v. United States*, 437 F.3d 855 (9<sup>th</sup> Cir. 2006) (per curiam) (hereinafter “*Doe*”). In *Doe*, this Court upheld the sufficiency of the witness’s showing which was based primarily on his having heard “clicks” during telephone conversations. *Id.* at 857.<sup>2</sup> As stated in the opening brief, Winstead’s showing of illegal electronic surveillance was considerably stronger than that in *Doe*. AOB at 17. The government does not dispute this argument and makes no attempt to distinguish *Doe*, in which the witness’s declarations were not found to be weak or speculative; rather, even on the showing in *Doe*, this Court “ha[d] serious doubts regarding the adequacy of the FBI agent declaration in rebutting *Doe*’s claims.” *Doe*, 437 F.3d at 857.

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<sup>2</sup>*Doe* also stated that legal mail he exchanged with an attorney had been intercepted twice. *Doe*, 437 F.3d at 857.

The government also is incorrect that law enforcement use of other investigation methods, such as non-electronic surveillance and search warrants, suggests that no electronic surveillance was used in the investigation. Gov. Br. at 13-14. Electronic surveillance often is used in conjunction with other techniques when the government is investigating criminal conduct. Indeed, in *Doe*, it was alleged that government agents also monitored the witness's mail and interviewed him about the subject of the investigation. The use of these investigation techniques did not deter this Court from finding an adequate preliminary showing of unlawful electronic surveillance, and a questionable government response. *Doe*, 437 F.3d at 857-58. Moreover, it is additionally critical that in this case it was not until a short time after Winstead had problems with her telephone that the government's visual surveillance began. This timing further suggests that law enforcement first became interested in Winstead from tapping her telephone line, and then expanded its investigation to include other techniques.

The government's attack on the sufficiency of attorney Christine Garcia's declaration is equally unavailing. See Gov. Br. at 14-15. Contrary to the government's argument, Garcia's declaration did not establish that only "one animal-rights activist" was wiretapped. She wrote that there were other "targets" of the wiretap in both New Jersey and Minnesota, which is consistent with a

common practice to use electronic surveillance in investigating animal rights activists. ROR 9, 11. Additionally, once the government overheard Garcia on the wiretap, they affirmatively named her as a target on a subsequent authorization regarding further wiretapping. ROR 9-20. Moreover, Garcia's declaration established that the electronic surveillance had continued through the time of her representation of Winstead. She continued to hear noises and clicks that interfered with her telephone reception as late as August 10, 2005, which was nine days before she filed her declaration (LR 11) and more than one month after she became Winstead's attorney (ER 74, 77).

The government cites *United States v. See*, 505 F.2d 845, 856 (9<sup>th</sup> Cir. 1974), claiming that the Court in *See* "rejected as 'vague to the point of being a fishing expedition' claims of electronic surveillance, based on an affidavit by *See*'s attorney, which stated that the attorney's 'telephones had been tapped during the previous five years,'" and for the proposition that "Garcia's declaration is plainly insufficient to support Winstead's speculations about electronic surveillance here." Gov. Br. at 15, n.4. The government misreads and misapplies *See*. The government's cursory summary of the case fails to recognize that there were two claims of electronic surveillance made by the appellants: that unlawful electronic surveillance had been conducted of the appellants themselves; and of *See*'s

attorney. *See*, 505 F.2d at 856.

With respect to the claim involving the appellants, the Ninth Circuit stated that the showing "was vague to the point of being a fishing expedition," but did not specify the precise nature of the record made by the appellants. *Id.* at 856. With respect to the claim involving See's attorney, the Ninth Circuit held that the attorney's declaration did not allege that any electronic surveillance of counsel's telephone had been conducted in connection with the attorney's representation of See, and therefore did not meet the standard set forth in *United States v. Alton*, 482 F.2d 1016 (9<sup>th</sup> Cir. 1973), which requires a different and more extensive showing before the government is required to respond to a claim that an attorney's telephone was monitored. *See Fitzginn*, 502 F.2d at 1260. Thus, contrary to the government's assertion here, the affidavit submitted by See's attorney was not the basis of this Court's finding that the witnesses' claim that their own conversations had been electronically monitored was too vague. *See* is distinguishable because here Winstead is asking only that the government respond to the claim that her conversations were monitored, and her showing in support of that claim, which includes attorney Garcia's declaration, is not vague.

Additionally, the fact that Winstead declined to answer questions asked by a grand juror and did not differentiate among the questions asked by the government

is of no relevance with respect to whether she has made an adequate preliminary showing of electronic surveillance. The claims made by Winstead in her declaration include that unlawful electronic surveillance resulted in the government's very decision to subpoena her before the grand jury. BR 4. If that is true, any answers given by Winstead before the grand jury would be derived from the government's illegal conduct. Moreover, the government cites no authority (and there appears to be none) to support its far-fetched argument that Winstead must answer some of the questions asked before the grand jury in order to require an unequivocal response from the government concerning the use of electronic surveillance.

**II. The Government's Response Is Inadequate Because it Does Not Unequivocally Deny the Use of Electronic Surveillance**

The government asserts that it is required only to make a general response because Winstead's showing of electronic surveillance is "weak and speculative." Gov. Br. at 16. The government's analysis is flawed because again, *inter alia*, it ignores any discussion of the most recent and relevant Ninth Circuit precedent, *Doe*, 437 F.3d 855. *Doe*'s declarations, which were not even equal to the showing made by Winstead, were found sufficient to require an unequivocal government response affirming or denying electronic surveillance. *Id.* at 857. Moreover, as

noted by the district court below, at least one of the shortcomings in the government's response in *Doe* is present in the instant case. In *Doe*, the government's "declaration address[ed] the possibility that . . . other agencies may have been surveilling Doe only with the statement that the FBI agent is 'unaware of any electronic surveillance involving Mr. Doe conducted by any other law enforcement agency.' This falls short of an unequivocal denial." *Id.* at 858. Here, the government relies on the very same response, found equivocal in *Doe*, in its attempt to address the possibility that non-FBI law enforcement agencies surveilled Winstead.

Rather than acknowledge *Doe's* application to the instant case, the government attempts to find support in an earlier Ninth Circuit decision and two decisions from other circuits. Gov. Br. at 20-22 (citing and discussing *United States v. Wylie*, 625 F.2d 1371 (9th Cir. 1980), *DeMonte v. United States*, 661 F.2d 590 (7th Cir. 1981) and *In re Grand Jury Matter (Bochie)*, 906 F.2d 78 (3<sup>rd</sup> Cir. 1990)). These cases provide no such support, and the government's arguments regarding these cases distort and misrepresent their bases and holdings.

In discussing *Wylie*, the government distorts the case's facts and holdings. The government posits that *Wylie* "held [that] the attorney who filed [the] affidavit [had] 'unequivocally denied any electronic surveillance'" based on the attorney's

affidavit stating "that he was unaware of any electronic surveillance" (other than a body recorder worn by undercover agents that had already been disclosed). *Gov. Br.* at 20. However, the prosecutor's affidavit in *Wylie*, said much more: the prosecutor "[i]ncorporated into the affidavit [] the summary of the Justice Department's search of the surveillance records from the [nine] different government agencies." *Wylie*, 625 F.2d at 1376. These agencies included the FBI, ATF, United States Customs Service, DEA, United States Postal Service, United States Secret Service, IRS, CIA and National Security Agency. *Id.* at 1376, n. 6. The search "disclosed no evidence" that the defendant or his attorney were subjected to electronic surveillance on the date that the electronic monitoring was claimed to have occurred. Furthermore, the government in *Wylie* also submitted a declaration from the agent in charge of the investigation, in which "[t]he agent stated unequivocally that at no time was any type of wiretap or area bug ever used during the investigation of the case." *Id.* at 1376.

Here, the government's response falls short of that proffered in *Wylie* in two ways. First, no search was conducted of records maintained by any agency other than the FBI, despite clear evidence that other agencies were involved in this

investigation.<sup>2</sup> In addition, unlike in *Wylie*, none of the government's declarations in this case directly denied the existence of electronic surveillance, and instead, all of them simply disclaimed awareness or knowledge of its existence.

The government also distorts and misrepresents *DeMonte*, which is readily distinguishable from the instant case. In *DeMonte*, the Seventh Circuit found that the government's affidavit, which was submitted "as a response to the appellant's initial general allegation of illegal electronic surveillance," was adequate only because of the minimal showing made by the appellant. *DeMonte*, 667 F.2d at 595. The Court found that DeMonte's claim "fail[ed] to make a 'concrete and specific showing' of probable electronic surveillance outside of the scope of that admitted by the government." *Id.* When before the grand jury, DeMonte merely objected to the questions on the ground that they were the product of unlawful electronic surveillance and then repeated that claim at the immunity hearing. Unlike the instant case, DeMonte did not submit an affidavit that detailed the factual basis for his claim of unlawful electronic surveillance. *Id.* Later, when on the stand at the contempt hearing, DeMonte sought to bolster his claim by stating

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<sup>2</sup>The involvement of other agencies is demonstrated by the case agent's admission in this case and in the related case, *Doe*, and by the searches conducted at Winstead's residence just shortly before the subpoena was served on her. See AOB at 6 (noting the involvement of the FBI, Joint Terrorism Task Force, Coast Guard, ATF, and local police).

that he had received notices from the telephone company, and that he heard clicks on his line. *Id.* at 595, n.11. By then, however, the district court had "the benefit of both the government's affidavit and the supporting materials" explaining the scope of the electronic surveillance. *Id.* DeMonte's additional testimony was found not to necessitate a further government response. *Id.* at 595. Thus, only because of the lack of specificity of DeMonte's claim was the government's response adequate, and only because of this was it unnecessary for the government to conduct a general search of all investigative agencies. *Id.* at 595 ("Although, in other contexts, these concerns might dictate the need for a more extensive government response, on the facts of this case, we find that the affidavit was a sufficient denial under section 3504(a)(3).")

The government's discussion of *Buckiel* likewise is off-base. The government claims that the declarations in the present case are "indistinguishable" from the government declarations in *Buckiel*. Gov. Br. at 21, 22. The government is wrong for several reasons. First, in *Buckiel*, the government declarations were found to be adequate only because the witness's "allegations fail[ed] to raise even a suspicion of illegal electronic surveillance in connection with [her] appearance before the grand jury." *Buckiel*, 906 F.2d at 93 (noting that "[w]here the allegations of surveillance are specific enough to raise a legitimate inference that

the proceedings at issue have been tainted or where the nature of the case is such that the likelihood of illegal surveillance is strong, a more detailed and more specific section 3504 denial will be required"). This is in marked contrast to the declarations submitted by Winstead in the instant case. Second, the government's declaration in *Backiel*<sup>1</sup> stated expressly that "[t]his investigation is being conducted solely by the Federal Bureau of Investigation." *Id.* at 89; *see also id.* at 92 ("[N]either motion for disclosure sets forth any allegation indicating that any agency other than the FBI had any reason or occasion to place [the witness] under surveillance."). This contrasts sharply with the multiple-agency investigation at issue in the present case. Additionally, the court in *Backiel* made clear that case-by-case analysis is necessary to proper consideration of this issue. *Id.* at 92 ("We believe that, *in the context of this case*, the government's section 3504 denial was adequate.") (emphasis added), 93 ("We conclude that at this proceeding ...") (emphasis added; quotation marks and citation omitted). *Backiel*, like *Wylie* and *DeMonte*, does not provide the government the support it seeks here.<sup>1</sup>

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<sup>1</sup>At another point in its brief, *see* Gov. Br. at 13-14, the government overstates another point made in *Backiel*. The government posits that *Backiel* stands for proposition that the "fact that [a] witness was served with [a] subpoena in home *does not constitute evidence* that she was subject to electronic surveillance." (Emphasis added). The actual statement in *Backiel* on this point addressed Backiel's contention that service of the subpoena at her residence "is proof of the fact of surveillance," which the court found meritless. *Backiel*, 906

Much of the government's defense of its response rests on Analyst Ferrari's declaration describing her ELSUR search. Gov. Br. at 25-26. The government states that "this database plainly was the correct database for the FBI to search," and cites the Federal Register which describes the purpose of ELSUR as allowing the government to respond to judicial inquiries concerning electronic surveillance, and to certify whether or not such surveillance has occurred. Gov. Br. at 25-26 (citing 70 Fed. Reg. 7513, 7515).

ELSUR is not a single database, as the Government suggests, but a wide set of databases, maintained in both electronic and paper form, at numerous FBI facilities, including its headquarters, academy, laboratory, technology centers, and satellite field offices. 70 Fed. Reg. 7515, 7516. The Federal Register discusses ELSUR as a set of "indices," plural, and it specifies that separate requests for ELSUR information must be made separately to each of these facilities. *Id.* at 7516. While most records are maintained electronically, "[s]ome records are maintained in hard-copy (paper) format or other form." 70 Fed. Reg. 7514

In the present case, the Government has not stated which ELSUR databases it searched. And it has not stated whether it looked for non-electronically stored records. The affidavit by Rose Ferrari states that she works for the Operations

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*id.* at 92

Unit of the FBI's Records Management Division. She states: "I conducted a field-wide search of the ERS for all records of the name Nadia Verna Winstead. My search of the ERS disclosed no records for Nadia Verna Winstead." EOR at 53. Ferrari does not state where the Records Management Division is located, or whether the FBI has more than one such Division. She does not state whether a "field-wide" search includes a search of all field offices, and whether or not it also includes a search of the FBI's national headquarters or technology centers.

In describing the procedures for requesting ELSUR searches, the Federal Register explains that requests for information "maintained at FBI Headquarters must be directed to the Record/Information Dissemination Section," and "[r]equests for information maintained at FBI field offices, information technology centers, or other locations *must be made separately* and addressed to the specific field office, information technology center, or other location..." 70 Fed. Reg. 7516 (emphasis added). No procedure is delineated for making a so-called full-field search request to a Records Management Division, as Ferrari purports to have done. Finally, the Government has not stated whether it looked for non-electronically stored records at any location.

In addition, Ferrari states that she searched "for all records of the name Nadia Verna Winstead," before stating that her search disclosed no records. EOR

at 53. In so stating, her declaration begs the question whether she constructed the search in an overly restrictive way. For example, if one were to search Westlaw for "Nadia Verna Winstead" in quotes, but her name only appeared in cases as "Nadia Winstead" or "Nadia V. Winstead," Westlaw would return zero results. Ferrari thus has not even made it unequivocally clear whether the ELSUR search she did perform, such as it was, was in fact negative.

**III. At this Stage of the Proceedings, the Government May Not Avoid its Obligation to Properly Deny or Disclose Any Electronic Monitoring by Claiming That the Relevant Test Is Whether the Questions Asked Were the Product of Unlawful Electronic Surveillance**

The shortcomings of the government's response, in this case, read in conjunction with the showing made via Winstead's declarations, are spelled out in Winstead's opening brief (*see* AOB at 19-230) as well as *supra* at 8-13. The government attempts to deflect attention from its inadequate response by repeatedly proposing that "the relevant test" is whether the questions asked of Winstead were derived from illegal electronic surveillance. Gov. Br. at 19, 20, 23. The government's argument, however, puts the cart before the horse and attempts to derogate and short-circuit the process established by years of precedent. At this stage of the proceedings, Winstead is not required to prove that the questions asked were the product of unlawful electronic surveillance. *See*, 437 F.3d at 858.

That ultimate issue is not to be addressed until the government has properly disclosed any electronic monitoring that was utilized in its investigation. The parties could then litigate the legality of the wiretapping. If the surveillance is found to be illegal, the information obtained from the electronic monitoring could be compared to the questions asked before the grand jury to determine if there is a causal connection.

When a grand jury witness makes a claim under § 3504, only a slight showing of a causal connection is required. As stated by this Court, all that is required is "*some arguable causal connection, apparent on the face of the witness's allegation, between the questions being posed to the grand jury witness and the alleged unlawful surveillance.*" *Doe*, 437 F.3d at 838 (emphasis added). If the questions asked "*suggest any reliance on surveillance of any sort,*" the government must make a response that complies with 18 U.S.C. § 3504(a)(1). *Id.* (emphasis added). That section requires the government to "*affirm or deny the occurrence of the alleged unlawful fact.*" (Emphasis added.) To accept the argument made here by the government would effectively nullify this obligation placed on the government by § 3504(a)(1).

In the AOH, Winstead discussed the well-reasoned decision of the Fourth Circuit in *United States v. Apple*, 915 F.2d 899, 911 (4<sup>th</sup> Cir. 1990), which

disapproved the district court's ruling on the causal connection issue before the government had adequately denied the occurrence of the alleged illegal surveillance. *See* AOB at 29. The government's brief fails to even mention *Apple* or rebut its reasoning.

Here, Winstead has made a strong preliminary showing of unlawful electronic surveillance. The government, however, has not made an unequivocal denial of the alleged unlawful activity in conformity with the case law. For that reason, the district court abused its discretion in finding Winstead in civil contempt.

**IV. The Declaration Submitted as Exhibit B to Appellee's Opposition to the Motion for Bail Pending Appeal Should Not Be Considered Because it Was Not Part of the Record Before the District Court at the Time Winstead's Renewed Motion for Disclosure of Electronic Surveillance Was Denied**

The government's argument that this Court should consider the Exhibit B declaration flies in the face of the relevant legal principle set forth in *United States v. Walker*, 601 F.2d 1051, 1055 (9<sup>th</sup> Cir. 1979) and the other cases discussed in the AOB at 36. In addition, when reviewing a district court's decision for an abuse of discretion this Court looks for "plain error, discretion exercised to an end not justified by *the evidence*, a judgment that is clearly against the logic and effect of *the facts as are found*." *Int'l Jensen, Inc. v. Aetrasound U.S.A., Inc.*, 4 F.3d 819,

822 (9th Cir.1993) (citation omitted) (emphasis added). It necessarily follows that appellate review of a district court's exercise of discretion is thus limited to the record before the district court at the time the decision was made. Here, the record before the district court when it denied Winstead's motion for renewed electronic surveillance did not include the Exhibit B declaration.

The fact that the declaration is part of the appellate record because it was filed after the denial of Winstead's motion, but before the contempt finding, is of no significance. The district court's contempt order was based on its finding that there was no just cause for Winstead to not answer questions before the grand jury, which in turn was predicated on the district court's prior denial of Winstead's renewed motion for disclosure of electronic surveillance. Winstead had not moved for reconsideration of that decision, and the litigation with respect to that issue was already completed. The Exhibit B declaration was a nullity; because the denial of Winstead's motion had already been issued, the district court had no need to consider the declaration and Winstead had no incentive to confront it.

The government's additional argument that Winstead had yet another opportunity to rebut the declaration in her opening brief is vexatious and without authority. See Gov. Br. at 32. Clearly, the opening brief does not provide an opportunity to cross-examine and confront declarants or to test the facts of the

record in any way.

Additionally, the government's contention that Winstead's intent is to delay the proceedings is completely salacious and unwarranted. For this proposition the government cites *Backiel*, 906 F.2d 78, but unlike *Backiel*, Winstead's case raises a substantial claim of unlawful illegal surveillance. See *supra* at 12-13.

Moreover, while noting the potential for a witness to misuse a § 3504 motion to cause delay, *Backiel* "recognize[d] the importance of the mechanism provided in [that] section." *Id.* at 91.

In enacting the wiretap legislation embodied in 18 U.S.C. §§ 2515 and 3504, Congress intended to provide safeguards against invasion of the privacy interest secured by the fourth amendment. Section 3504 was drafted to provide procedures by which a witness may attempt to demonstrate that the questions posed to him fail to comply with the mandate of section 2515 which proscribes the use in any official proceeding of evidence tainted by illegal surveillance.

*Backiel*, 906 F.2d at 91 (citations omitted).

By filing her motion and through this appeal, Winstead seeks only to be free from illegal surveillance and to exercise her right not to answer questions based on such surveillance. *Garrett*, 773 F.2d at 1072 (citing 18 U.S.C. § 3504 and *Geibhard v. United States*, 408 U.S. 41, 52 (1972)). She seeks a fair opportunity to litigate that issue before being incarcerated on the basis of questions with more than an arguable connection to surveillance.

Moreover, if the government is truly concerned about delay, it could easily expedite the case by providing an unequivocal response to Winstead's claim of electronic surveillance, thereby allowing the court to determine if the questions asked of Winstead were based on unlawful acts. Clearly, the government does not want to disclose this information, and as argued in the AOB at 19-23, has gone through pains to avoid directly responding to Winstead's claim. Winstead is therefore put in the position of having to vigorously litigate the issue.

The Government is also wrong that, if considered by this Court, the Exhibit B declaration will eliminate the sole ground asserted by Winstead for distinguishing her case from *Doe*. Gov. Br. at 29. The declaration merely alleges an explanation for how Winstead became a person of interest for the government. In *Doe*, the government not only had a prior reason for wanting to question the witness before the grand jury, but in fact had already interviewed him. Thus, the witness had "cooperated with the FBI . . . and provided them with substantially all of the information the government sought to elicit from him under oath before the grand jury." *Id.* at 858. This critical difference between *Doe* and Winstead's case would remain even if the Exhibit B declaration is considered by this Court. Moreover, as noted in the AOB at 36, the declaration actually supports the inference that illegal electronic surveillance occurred in this case. If the Court is

to consider the declaration, it provides additional weight to Winstead's claim and calls even more for a remand to the district court so that that court may consider the declaration's impact in the first instance.<sup>4</sup>

### CONCLUSION

For all of the forgoing reasons as well as the reasons stated in Winstead's opening brief, the district court's order holding Winstead in civil contempt should be reversed, and the government should be precluded from compelling her testimony before the grand jury.

DATED: December 18, 2006

Respectfully submitted,

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MARK GOLDROSEN  
Attorney for Witness-Appellant  
NADIA WINSTEAD

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<sup>4</sup>Furthermore, the candid admission in the declaration that Winstead is of interest because of her presence at public protests, raises a host of First Amendment infirmities which Winstead should be permitted to address after a remand to the district court. The First Amendment may be invoked against the infringement of protected freedoms by law or lawmaking, including government investigations. *Watkins v. United States*, 354 U.S. 178, 197 (1957) (reversing a conviction contempt of Congress before the House Un-American Activities Committee). The Supreme Court has recognized limits on investigative and contempt powers where the government interest was too remote and conjectural to warrant intrusion into the political and associational privacy protected by the First Amendment. *De Gregory v. Attorney Gen. Of New Hampshire*, 383 U.S. 825 (1963) (reversing a state court finding of contempt on First Amendment grounds).

## **Exhibit F**

**Witness list with 14 names provided to FBI  
of which they reportedly only talked to 10.**

# Witness List

Glenn Murphy – My Unit Chief who knew of all issues disclosed in Form 12 to OSC.

Debra O'Clair – My Section Chief who knew of all issues disclosed in Form 12 to OSC.

Alexandria MacPherson – Knows about all the problems with ELSUR and some with RM issues.

Gayle Jones – Ran the ELSUR program at one time. Currently works in the Director's Office.

SA Robert White – Ran the ELSUR at one time. Knows about all the problems even the hidden file issue, where files are hidden and not available for search, disclosure to Congress or Discovery.

Kara Nelson – Attorney in OGS at FBI that knows about problems with bad search results in ELSUR computer system.

Jan Poff – EOT ion Portland FO. Knows about hidden files that do not turn up as part of search. Search is restricted within the program itself. To get to them, a person has to have access to the code or have the programmer give them access.

ML Woodall – FBI employee who managed the contractors who worked on ERS. He knows all of the problems with the program.

Ken Candell – Retired from the FBI with 40 years. Knows the ELSUR program inside and out. Wrote a white paper on all the problems with the ELSUR program. Was told by Debra O'Clair to bury it. The whitepaper is in the custody of Alex MacPherson in Quantico – Science and Technology Branch. Also see sworn statement.

Karen Jewell – Knows about the issues with Records Management. Retired with 39 years of records management experience. Married to a retired SA.

Kiya Tabb – See Sworn statement. Knows about the limitation of scope issues on the RMD audit.

Monica Grein – Still working in Winchester. Was on the ELSUR compliance team, now on the RM compliance team. Knows about the limitation of scope issues.

AD (retired) Amy Lyons – Knows of the scope limitation issue plus management problems in RMD.

Louie Krause – FBI Resource Planning Office – Abuse of power by Debra O'Clair on transfer of ELSUR program from RMD to Science & Technology Branch.

## **Exhibit G**

# **Whistleblower admission by Unit Chief Glenn Murphy**

**Excerpt from FBI discovery documents in  
EEOC case.**

UNCLASSIFIED  
NON-RECORD

[REDACTED]

[REDACTED]

[REDACTED]

UNCLASSIFIED

11/19 I briefed Scott, John, and Alex, on some information I learned while at an OIC conference on 11/18. When the meeting began, I spoke to Alex about the ELSUR memo that she and Debbie revised and asked her about the recommendations. Alex said all she did was recommend that placement of bullets in the memo. As the meeting continued, I showed them a quick reference guide that was distributed to all attendees. Scott immediately took the book and said he wanted to see what it said about whistle-blower protection and possible retaliation. He thumbed through the book and was commenting he could not find what he was looking for. I said if he had any concerns he wanted to bring up, he should consider writing an email or contacting the appropriate party to address the issue. He said he was afraid that anything he reported on could be traced back to him. Alex pointed out that emails and phone calls can be traced. He continued to discuss it and finally I responded to him and said that we need to continue our meeting and if he had any questions about anonymously reporting a concern he should contact the Ombudsman's office. I am unaware of what concern he has that might rise to the level of needing "whistleblower" protection.

X

[REDACTED]

FBI000533

## **Exhibit H**

**Notes of Mr. MacDonald after FBI  
interview sent to OSC.**

**From:** scott macdonald  
**Sent:** Tuesday, September 25, 2012 8:52 PM  
**To:** 'Flood, Edward'  
**Subject:** Reflections

Ed,

Got your voice mail. Thanks for talking with them about interviewing Ken.

Here are my general observations about the experience with the FBI Inspectors.

1. They were not objective, they had very specific narratives they were asking the questions around. They were not searching for the truth they only wanted to hear the answers to their questions that met their narrative. Several questions I told them that Ken Candell could answer the questions better than I. As soon as I said that, they would move on to the next question. The purposely did not want to hear specific examples from Ken because his answers would not meet their narrative.
2. Two main narratives: 1) they will claim I did not have "first hand" knowledge of certain issues. Of course I have witnesses that do, but they had no intention of interviewing any of my witness. I also interviewed individuals as a compliance auditor which is acceptable procedure for an auditor and for an auditor to make a finding. 2) the FBI did the best they could with the resources they had. Can't blame them that they didn't have the resources, therefore they are innocent of willfully violating the law.
3. This experience points out the necessity of having someone from the OSC present at these interviews. It was apparent to me and to Ken that they were not objective or interested in finding the truth. The OSC has to find a way to get involved like it does on the whistleblower side.
4. They played the "good cop/bad cop" routine a couple times. Started parsing words in the Form 12 disclosure that I had written and started becoming accusatory. I reminded them that it was the FBI that broke the law and not me and that I would not accept them trying to parse words. Also told them that they needed to ask questions about the major points of the complaint not whether I had used the "perfect" word to describe the law violations.
5. If they don't ask the questions, they won't have to report uncomfortable answers. They are managing their final report by not asking all the questions. I tried to refocus them at the end of the interview, but they cut me off and started looking at their watches. They were VERY uncomfortable with me talking without them asking questions. Again, they didn't want me to say anything that they didn't control. That is why they didn't want me to read my written statement.
6. When I asked them if they were going to interview any of my witnesses, Deirdre said "we have a very specific process we go through, you will get a copy of our report and will be able to see who we interviewed". I told her that didn't answer my question, and I asked her specifically whether they were going to talk to Ken Candell. She repeated the same non-answer as before. I then said I didn't see how they could do a complete and competent investigation without talking to Ken. They didn't answer. This was a clear indication how they were going to manage the information they received by saying interviewing my witnesses was not necessary.
7. They will no doubt try and do the same thing with Ken, meaning they will only ask the questions that meet their narrative and pose the question in such a way as to illicit the answer they want.
8. On several occasions they asked me questions that had I said "yes" to would have been a clear violation of law, such as opening the seals on ELSUR evidence in the ELSUR evidence room. This was completely uncalled for. If I had said yes, they would have written in their report that I had

violated the law as well. They also wanted to know if I knew of specific cases where the law was violated. In my opinion they were trying to see if there was a case they could claim some security limits on and shut down the investigation on national security grounds.

All in all, my fears of the FBI investigating themselves were completely confirmed. They are not independent and it is obvious they have been instructed as to how the report is to be written. They just have to force all the interviews and evidence into the pre-conceived response.

Somehow, the OSC has to find a way to make sure this type of whitewash doesn't happen again. The DOJ had no business pushing the investigation down to the FBI. It just doesn't work.

Ed, thanks for listening to me and again I appreciate you calling and making sure they will be talking to Ken. I strongly believe they had no intention of talk with him. I don't think they would have let him be my witness if they had any intention of interviewing him.

Take care and I will keep you informed if anything else happens.

Scott

## **Exhibit I**

# **Statement FBI refused to let me read at interview on Sept 25, 2012**

Sept 25, 2012

Statement to FBI Agents on Form 12 Disclosure

Speaking to Inspector Deirdre Fike and Assistant Inspector Andrew Ludlum

Ken Candell on the phone as witness for Scott MacDonald

Everyone in this room, and on the phone, has taken the following oath:

I will support and defend the Constitution of the United States against all enemies, foreign and

domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

We also are working for or have been employed at the FBI which we are taught stands for Fidelity, Bravery and Integrity.

Unfortunately, my experience at the FBI has proven to me that most of the people I met, outside of a handful, are working at the FBI for selfish reasons, and not for their country, and seem to forget their oaths on a daily basis. Their first instinct is to protect themselves, their position or their kingdoms they have built, rather than tell the truth. There is a "don't rock the boat" mentality that is pervasive at the FBI. It appears to me the FBI doesn't learn by its mistakes when one considers such scandals as what occurred in the FBI Lab a number of years ago or the failure of the discovery process in the OKC bombing case.

I have witnessed obfuscation, half-truths, and outright lies from FBI management to fellow FBI employees, outside people and organizations. I have witnessed the rawest of personal greed at the detriment of staff, the FBI and the USA. I have been a victim of destroyed evidence and failure to provide discovery documents, simply because the FBI and its employees believe they are immune from following the law. They know that NOTHING can reach them personally as they hide behind the facade of the FBI and the politicians who don't want a scandal. I even spoke with the Assistant Director of the FBI's Inspection Division, Amy Lyons, about some of the issues to be discussed here and asked for her protection from any whistleblower reprisal resulting from reporting my findings. My presence here today demonstrates my faith in her integrity was not well founded. After I left the FBI, I even notified the Department of Justice Inspector General and the FBI Ombudsman's Office about the issues in my Form 12 but they refused to seriously consider my claims.

As a result of the past behavior by AD Lyons, the DOJ IG and the FBI Ombudsman's Office, I am extremely skeptical as to the potential outcome of this investigation. I hope you two will surprise me. But sadly my hopes are not well founded based on my recent FBI experience. I don't believe the FBI can investigate itself, it is a conflict of interest, and you lack the most basic element of all, independence.

The fact that it has taken me over 2 years to get these issues into the open is testament to the power of the bureaucracy to stifle the reporting of law violation. Without the help of other whistleblowers and conscientious people in the Office of Special Counsel, these law violations would not have come to light.

My background includes over 32 years of diverse senior and executive financial and operational management experience. I am a CPA and have worked for 2 of the largest accounting firms in the world. This included 3 years as an audit manager with Price Waterhouse in the Washington, DC office, where I specializing in financial

institutions, non-profits and governmental auditing using the Government Auditing Standards Guide otherwise known as the "Yellow Book".

On the phone is Kenneth W. Candell. Ken retired at the end of 2010 after 40 years of good and faithful service to his country and the FBI. Ken has intimate knowledge of the laws that were violated, especially in the ELSUR program, as Ken worked in that Program. Ken's honesty and candor cannot be questioned. He also has one of the best memories of anyone I know. I would like to again thank Ken for his 40 years of service to the FBI and the USA and for his ongoing and significant support in my efforts to bring these law violations to light. Ken is also a leading authority on J. Edgar Hoover.

So let's talk a bit about the main issues of the OSC referral letter and Form 12. While the OSC letter is a good condensed view of the issues, it is a committee written document and is missing some details and misses some nuances. I have provided you with a copy of the original Form 12, submitted by me, to fill in additional details. My remaining prepared comments will address the main points of the laws violated by the FBI.

And let me be clear, the FBI willfully violated Federal laws; there is no other conclusion that can be drawn. The only question at this point is will you be able to see past your years of indoctrination that the FBI can do no wrong.

#### Records Management

The FBI Assistant Director of the Records Management Division, William L. Hooton, stated "We need to figure out how to manage our case files effectively. Understand, we have no real, in my opinion, records management system at the bureau." This statement was published in the Government Computer News on February 4, 2003. And there has been nothing done since then to make this statement incorrect.

While Records Management may seem mundane and unimportant, it is the basis for everything the FBI does. Without proper records management, investigators can't do their job, proper discovery can't be made (Timothy McVeigh's case for example), and records archive laws cannot be followed. Additionally, DoD 5015.2 standards for records management systems are not under consideration at the FBI.

As Special Agents you should be outraged by what I have brought to light, not only in Records Management but in the Electronic Surveillance (ELSUR) program. Your very careers could be jeopardized by poor records management. Yet, RM seems to be an afterthought for the FBI.

So here are the specific laws that have been violated in the area of records management, which also includes ELSUR as a general matter.

36 CFR Chapter XII Subpart B Section 1236, requires that emails be maintained as any other record. The current FBI email system is outdated and antiquated and does not meet the requirements of National Archives and Records Administration (NARA). FBI emails are not maintained, controlled or marked for scheduled destruction. The current email system is not "discoverable" for legal purposes and would therefore not meet the legal requirements of a subpoena. The email system does not meet minimal industry standards (DoD 5015.2 for example). I find it not surprising, that in March of this year FBI Records Management Division (RMD) wrote an Electronic Communication (EC) on email policies. It is probably not a coincidence this EC was released shortly after my claims would have been made available to the FBI through my EEOC claims. But a close reading of the EC shows nothing new and fails, again, to address the issue of retention at the source. Additionally, the FBI RMD has an antiquated view as to what constitutes a "record". To them, a record is only produced when it is printed on a piece of paper. This is not what the law says.

36 CFR Chapter XII Subpart B Section 1234 requires all records be stored in proper storage facilities including field offices and LEGATs. The OSC referral letter talks about the Alexandria Records Center (ARC), but this applies to any FBI facility that holds records, not just the ARC. All storage facilities must also be certified, in writing, by the Federal Records Officer at the FBI. This has never been done for all locations. And the ARC fails almost all requirements. The Federal Records Officer is required by law to inspect ALL facilities that store records, not just the ARC. Records have been lost at the ARC due to flooding. Additionally, the facility workers are in danger due to mold caused by improper storage and maintenance of the records. In the past, the FBI has also attempted to deflect criticism by pointing to the RMD facility that was to be built in Winchester, VA. However, this facility is no longer an option and is not an excuse any longer for failing to abide by this law.

36 CFR Chapter XII Subpart B Section 1237 requires that Audiovisual and Cartographic material be handled in very specific ways. The FBI does not have policies or procedures in place to meet any of these legal requirements. This extends to any electronic evidence that would be considered audiovisual as well.

36 CFR Chapter XII Subpart B Section 1238 requires specific handling and procedures for Microform material, such as annual inventories. Additionally, microform material should be stored out of sunlight and under environmental controls. The FBI is not in compliance.

36 CFR Section XII Subpart B requires that the FBI follow ANSI and ISO standards in its records management process. The FBI doesn't know what these standards are nor have policies and procedures to conform to these standards.

FBI policy requires that all systems within the FBI be "certified" for records management. However, multiple systems inside the FBI have not been "certified" and none, to my knowledge, meet DoD 5015.2 standards, which is the government standard for records management. I attempted several times with my Unit Chief and Section Chief to stress this point, but they showed no interest.

So you might ask who cares about these issues. Are they really a big deal? They are a "big deal" if you believe evidence should be maintained, easily found, available for lawful discovery, and sent to NARA as prescribed by law.

The failure to follow these records management laws is willful and will be discussed in the following section.

#### Limitation of Scope and Lack of Independence

Limitation of scope is an audit term and is a serious issue. The general term means limiting the work done in an audit because 1) the target of the audit refuses to allow access to evidence or tells the auditor they can't perform parts of their work or 2) the auditor limits the scope of the audit because they are afraid of the target or don't want to "make the target mad or upset". Any audit with scope limitations makes the results of the audit unusable and calls into question the independence of the audit team.

In late 2010 I was asked to draft a Quality Assurance Review (QAR) to review the Records Management Division. The NARA Federal Records Officer is the AD of the RMD, so it was logical for me to include the above referenced requirements in the QAR. The QAR was presented to my Unit Chief who signed off on the questions. However, Law Violations by FBI Management – Response to FBI Investigation by Scott A. MacDonald, CPA March 25, 2013

a few days later, my Unit Chief requested me to provide a copy of the QAR to the RMD front office managers. I explained to the Unit Chief the hazards of providing the audit questions to the target of the audit and explained to him the issue of scope limitation.

I specifically told him that I would provide the QAR to the front office, but that we would not be able to eliminate questions which the front office personnel found "uncomfortable".

After the front office reviewed the QAR, they attempted through my Unit Chief to have the embarrassing questions removed. I again explained to the Unit Chief the issues of scope limitation and how this affected the compliance team's independence.

Initially the Section Chief had wanted to complete the QAR of the RMD quickly, but once she and the front office saw the questions, the QAR was delayed. Ultimately, the QAR was not done until after I was dismissed and all of the embarrassing questions on the 36 CFR laws were removed.

An additional problem with the Inspection process was having the compliance team report through the current chain of command to the program manager. This provides a significant conflict of interest and destroys the independence of the compliance team.

#### Electronic Surveillance (ELSUR) Program

Plain and simple, the FBI has been providing inaccurate information to Federal Judges for years.

As you are or should be aware, there are 2 main facts an agent must swear to for a wiretap to be authorized; 1) that the evidence can't be obtained any other way and 2) whether or not the target of the wiretap has ever been the subject of a previous wiretap.

Unfortunately, the Electronic Record System or ELSUR (ERS) computer system was not designed OR maintained to insure information needed for item #2 has been answered correctly. And the tragedy is this has been known for years, but no one has spent the time and resources necessary to make sure the constitutional rights of Americans have been protected. There is a reason a Federal Judge has to issue an order, and the FBI has been knowingly providing false testimony to obtain wiretaps.

The ERS system is a rudimentary indexing tool. It routinely returned false negatives and false positives, to the point of being unreliable. The underlying data has been indexed in multiple ways with little or no descriptions of the field codes used. As a result of these inconsistent indexing processes, the data is unreliable. And further, any case which has obtained a conviction using wiretap evidence can now be appealed. This is very similar to the problems the Lab had several years ago when it was found that evidence had been handled improperly and hundreds of cases were appealed, dismissed or convictions overturned.

Additionally, ERS uses an "exact match" search criteria and is therefore unreliable for complex names. (i.e. foreign, hyphenated, complex structure, etc.)

It is my understanding from discovery materials provided me from my EEOC complaint that the ERS system was replaced in January of 2012, but the data that would have been back loaded into the new system is unreliable as was documented in a white paper written by Ken Candell. And the new system does not mitigate the years of inaccurate testimony presented before Federal Judges. As a side note, the white paper prepared by Ken was presented to Section Management and they told him to "lose it". Fortunately for all concerned, the white paper was not destroyed and is with the program team in Quantico, unless it has been destroyed since March of this year.

Finally, ELSUR evidence is not properly stored. During my employment at the FBI, the Headquarters ELSUR evidence room was relocated. This evidence room is under the management of RMD. While performing the inventories necessary to relocate the evidence room, I personally found that CD/DVDs were bulk filed; meaning hundreds of CD/DVDs were placed in one box and entered as one piece of evidence in the inventory system. This is a clear violation of evidence procedures and would prohibit those individual pieces of evidence from being found during discovery. The majority of this evidence pertained to the 9-11-2001 incidents occurring in New York City, the Pentagon, and the field in Pennsylvania and as a result any discovery motion or FOIA requests received since then have not been properly or lawfully fulfilled.

**Conclusion:**

So where does all this leave us. I actually feel sorry for you two. You are in the Inspection Division because you want to advance in the FBI. But producing a report critical to the FBI is not in your best interest for advancement. My claims are undeniable and you will have to make a decision as to how to write your report. I believe that if you write your report confirming my claims, your management will request you to edit your report just as my FBI management did to downplay the issues I found.

At that point you will have a legal and moral decision to make. Stick to the truth or go along with half-truths or cover-up. I do not envy your position.

## **Exhibit J**

# **Statement of Kiya Tabb in support of Mr. MacDonald**

Signed Sworn Statement

I, Kyla Elizabeth Tabb, a former FBI employee, do hereby swear to the following statement:

**Background**

I began employment with the FBI as a GS-7 Legal Administrative Specialist in the Records Management Division in September, 2008 in the Record/Information Dissemination Section, under the supervision of Ms. Peggy Jackson (now retired Unit Chief), and Mr. David Haroy (Section Chief). I was selected for GS-9 training ahead of my scheduled promotion to GS-9. At a GS-9, I worked in the Freedom of Information/Privacy Acts Unit. I was in this position for three months and then applied for a GS-11 Management and Program Analyst (MAPA) position in the Policy, Analysis, and Compliance Unit in the Records Policy and Administration Section. I qualified for this position based on my experience in previous professional careers and the fact that I held a Master's Degree. I was selected for the MAPA position in the Policy, Analysis, and Compliance Unit (PACU) and worked on the Compliance Team for approximately one year. During this time, I also completed a three-month temporary assignment in the Business Standards Assurance Group working on internal audits. I was then promoted to GS-12 and asked to be moved to the Training Unit within the Records Policy and Administration Section. My request was granted and I served on this unit until September, 2012. I then left FBI service for another professional career.

**Statement**

I was hired to PACU in late November of 2009. A few months after hire, I began to see an unpleasant side of Mr. Murphy. Around the Christmas holiday, our unit was down to only a few people due to employees taking vacation time or "use or lose" leave. Mr. Murphy was rarely there as well. At this point, nobody had clearly explained the duties I was to perform, even though I had asked several times. I had completed several tasks that I perceived needed to be done (though I had not been directed to do anything at this point), but because I didn't know what I was to be doing, and there was nobody to ask, I decided to take classes in Virtual Academy (the FBI's continuing education system) that I felt were relevant to my new position. In January, when Mr. Murphy was back in the office regularly, he called me into his office and chastised me for "taking too many Virtual Academy classes."

During the months of January - March, 2010, I observed several of my female coworkers crying when exiting closed door meetings in Mr. Murphy's office. He was routinely rude, sarcastic, and patronizing. For example, Mr. Murphy once interrupted a meeting with one team to speak with an employee regarding a non-emergency matter. When one of the female employees asked if the conversation was able to wait until after the team meeting was complete, Mr. Murphy sarcastically said "So you're saying you can't be flexible, then?" Mr. Murphy had also told other female employees that he thought they were being "ugly" to him, or that they wore too much makeup. He routinely ignored employees he was meeting with to play with his BlackBerry.

I first met Mr. Scott MacDonald in mid-March of 2010. He had just been hired as my immediate supervisor on the Policy, Analysis, and Compliance Unit's Compliance Team. Before Mr. MacDonald's

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arrival, my Unit Chief, Mr. Glenn Murphy, spoke to all Compliance Team members and conveyed his excitement about hiring Mr. MacDonald due to Mr. MacDonald's experience in accounting, supervision, and knowledge of the GAO Yellow Book Auditing Standards. Mr. Murphy introduced Mr. MacDonald to me and informed me that Mr. MacDonald would be responsible for overseeing all activities of the Compliance Team, to include compliance reviews for the Records Management and Electronic Surveillance (ELSUR) programs. I specifically worked on the Records Management compliance reviews, among other duties within PACU.

Mr. MacDonald turned out to be a fantastic superior. While he allowed for some creativity in performing duties, he was also always available to answer questions, help formulate solutions, and serve as a respectful intermediary between his employees and both unit and section management. Mr. MacDonald spoke with each employee when he arrived in the morning and appropriately monitored work progress and set reasonable deadlines for stages of project completion.

In April, 2010, Mr. MacDonald had been my supervisor for about a month. There was a clear direction on my team, clear deadlines were set for projects, and progress was being appropriately monitored. We were getting things done. On April 26, 2010, our Section Chief at the time, Marilyn Moore (who was relatively absent as far as lower-level supervision, but seemed like a kind, genuine Section Chief), called a meeting to inform PACU that she was leaving her position for a GS-15 position in DC. Several employees were absent at the beginning of the meeting, and I had noticed that Mr. Murphy left them off of the e-mail list when scheduling the meeting. I happened to be sitting next to Ms. Moore, and she asked me if "everyone was here". I stated that no, there were still some employees at their desks, because I didn't believe they were aware of the meeting. Someone went to get the other employees, and the meeting was held. After the meeting, I was called into Mr. Murphy's office, along with Mr. MacDonald. Mr. Murphy asked me why I "went over his head" and told Ms. Moore that he had not notified employees of the meeting. I attempted to explain the circumstances surrounding exactly what I had said to Ms. Moore, as it was in no way attempting to seek Mr. Murphy to his superior. He did not listen at all. Mr. Murphy then said "Did you go to Scott first?" I replied that no, there wasn't really an opening for that to happen. Mr. Murphy then angrily raised his voice and said, "DID YOU GO TO SCOTT?" At this point, I decided that anything I said would be unsatisfactory, so I simply said "No." Mr. Murphy then said, "Did you come to me first?" I replied, "No, I did not." Mr. Murphy told me that he was "very annoyed" with me, and that I was not to go to Section management for anything without going through Mr. MacDonald and himself first. Mr. Murphy then told me that there were issues regarding conduct, work deadlines, and work products that he attributed to me, but that we would need to talk about it another time because he was "too annoyed" to speak about it. He stated that I was the holdup in one of our main projects (which was blatantly untrue). I asked him to please explain that to me. The only holdup in any of our projects at that time was Mr. Murphy allowing our work products to sit on his desk for weeks at a time. Mr. Murphy could not give me any examples of how his accusations were relevant. Mr. Murphy then told me that lately I had been "distant" and "unfriendly", and that I didn't "chat" with him in the mornings. Because I had been witnessing his hostility to other employees, as well as myself, I admit this is true. While I was always professional and respectful to Mr. Murphy, I did not carry on long conversations with him. Mr. Murphy then addressed my comments (made in a meeting setting) about a

recent Climate Survey that had been taken in the unit. During this climate survey, employees were asked to give candid feedback about what they felt could be improved upon in the unit. I had stated that more communication and transparency between two differing teams in the unit would help to improve workflow. Mr. Murphy told me that he was disappointed in my comments and then loudly and angrily asked, "WHO IS NOT BEING TRANSPARENT WITH YOU?" Once again, I realized that respectful conversation between employee and supervisor was not going to happen, and when I tried to explain that my comments regarding the Climate Survey were truly innocent, he once again yelled, "WHO IS NOT BEING TRANSPARENT WITH YOU?" I shut down at this point, and before leaving his office, he implied that he planned to use on my mid-year review and blame work failings of his own on me.

Mr. MacDonald was present for the above episode, and frankly, I believe he was too shocked to address what was happening. After I left Mr. Murphy's office, Mr. MacDonald apologized to me for Mr. Murphy's behavior and stated that it was "completely uncalled for." A few days after the incident, I filed a hostile work environment claim with EEOC, the Inspection Division, and section management against Mr. Murphy. I must stress that I had never before had an issue with any supervisor, and I had never before filed such a claim. I have always gotten along very well with my superiors, and in fact, I still keep in contact with the other superiors I had in the FBI.

My relationship with Mr. Murphy, although remaining professional and respectful, was broken at that point. I relied on Mr. MacDonald to be a buffer between myself and Mr. Murphy. In fact, all of Mr. MacDonald's employees at the time had had some sort of similar episode with Mr. Murphy, and we all looked to him to be a buffer. I believe Mr. Murphy realized that all of his employees avoided direct contact with him, as he had insulted and belittled each of us at some point, and he began to take his frustration out on Mr. MacDonald. Mr. Murphy was nothing but a placeholder, as far as a superior went. He was never involved in any projects, he never promoted cohesion in the unit, and routinely told employees that even though he knew accolades were in order, he was "too busy" or "didn't have time" to write them up for awards.

In the time I worked for PACU, Ms. Debbie O'Clair was promoted to Section Chief in my section. Where Ms. Moore was absent but friendly, Ms. O'Clair was exactly the opposite – an absolute micromanager and very hostile. Ms. O'Clair became involved in the lowest level projects on each team, and in each unit. Essentially, work came to a standstill. Employees were constantly waiting for approval on one assignment, or Debbie's corrections on another, and work simply kept going "up and down the chain" with no progress. It was very frustration for everyone in the Records Policy and Administration Section. Ms. O'Clair, like Mr. Murphy, was very quick to criticize employees, and frequently took sole credit for the work products that her employees did manage to complete. To put it mildly, it was the most miserable working environment I had ever encountered.

By applying for and receiving a temporary duty assignment to the Business Standards Assurance Group, I was able to "escape" from both the Unit and the Section for a while. When my TDY was complete, I begged upper management to allow me to stay on for another tour. While they agreed, Ms. O'Clair denied my request, and I was forced to return to PACU. It was not even two weeks before I could no longer handle being in the unit. I went to Ms. O'Clair and basically informed her that I was quitting it!

could not be moved. I was then moved to the Twinning Tourn, under leadership of Ms. Nina Frederick. While Ms. Frederick was a wonderful supervisor, Ms. O'Clair was still involved in my day to day work activities, just as she was involved in the daily activities of everyone in her section. However, at least I was away from Mr. Murphy. Mr. MacDonald was unfortunately still working under Mr. Murphy. I kept in touch with him after switching positions and while he was always very diplomatic when I asked how things were going, I could tell that he was being abused by Mr. Murphy and Ms. O'Clair.

Mr. MacDonald always followed policy and procedure, was always professional in communication between employees and upper management, and was quick to give credit to his employees for work well done. If an employee was being unfairly treated (which happened frequently in PACU), Mr. MacDonald tried very hard to serve as a respectful intermediary between the employee and upper management. Mr. MacDonald was one of the best supervisors I have ever had. When I found out that Mr. MacDonald was being terminated, I knew it was because he had the guts to stand up for his employees. His termination was obviously vindictive, as he had no prior warning, and was walked out one week before his probationary period was to have ended.

Mr. Murphy and Ms. O'Clair conspired to terminate Mr. MacDonald on a host of accusations that were flat out FALSE. I had the opportunity to read the EC written by Mr. Murphy supporting Mr. MacDonald's termination, and everything listed as a reason for termination was an outright lie. Mr. Murphy accused Mr. MacDonald of poor conduct in a meeting when I looked through my calendar (because I certainly could not remember a meeting in which Mr. MacDonald conducted himself poorly), I realized that the meeting Mr. Murphy cited was cancelled. It never took place. I never witnessed Mr. MacDonald interacting inappropriately with any employees, with Mr. Murphy, or with Ms. O'Clair. In fact, when Mr. MacDonald's employees expressed frustration with Mr. Murphy and Ms. O'Clair, Mr. MacDonald did his best to attempt to explain the reasons behind their decisions and behavior. The only people in the entire section who had an axe to grind with Mr. MacDonald were Mr. Murphy, and Ms. O'Clair – simply because Mr. MacDonald refused to railroad his employees. The rest of us adored Mr. MacDonald, and countless employees cried the day he was walked out of RMD. The accusation listed in the EC requesting Mr. MacDonald's termination described everything Mr. Murphy had done, and nothing that Mr. MacDonald had done.

I have also had the opportunity to read the Form 12 that Mr. MacDonald filed with the US Office of Special Counsel. Mr. MacDonald had identified programmatic problems with the Records Management and LLSUR programs that he was blatantly told to ignore. I know this because I worked on those projects. We would discuss our findings with him, ask him what he wanted us to do (because we knew that management would not like them), and were later told by upper management to not include them in our reports. In my opinion, these decisions were based on the fact that bonuses would not be received if program deficiencies were to be properly reported.

I am no longer employed with the FBI. I have been happily employed in local government for eight months now. The abuse I suffered at the FBI, and the abuse Mr. MacDonald suffered at the FBI should never be tolerated. I used to cry on my way into work. I experienced the loss of a pregnancy that attribute to the stress I endured on a daily basis under the leadership of Mr. Murphy and Ms. O'Clair.

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Mr. MacDonald was simply a casualty in the game of reaping bonuses, covering up failures, and promoting self-interest at RMD. Before leaving, I met with the new Assistant Director, Ms. Jupina, to inform her of the injustice that happened to Mr. MacDonald. I also told her about the position abuse and performance failings of Mr. Murphy and Ms. O'Clair. I warned her that if something was not done, there would be none of the current section employees left. I was right; several have already left. Mr. Murphy and Ms. O'Clair have caused irreparable damage to RMD, and while Mr. Murphy has now left, Ms. O'Clair will continue to damage RMD. Skilled, educated, hard-working employees are fleeing from the building, and taking enormous pay cuts to get into another agency or into the private sector.

While my complaints to EEOC and the Inspection Division were dismissed for lack of evidence to conduct an inquiry, I sincerely hope that Mr. MacDonald's account of what happened at RMD is taken seriously. The FBI certainly lost a good employee when they allowed Mr. Murphy and Ms. O'Clair to trample Mr. MacDonald. The FBI lost a good employee when they pushed me to my breaking point as well.

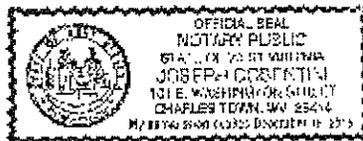
I declare under penalty of perjury that the foregoing is true and correct.

Executed April 13, 2012 by

Scott A. MacDonald ... .. April 13, 2012  
Klye E. Tebb Date

On this 15 day of April, 2012, Scott A. MacDonald, did appear before me, a Notary Public in and for the State of West Virginia, Jefferson County and acknowledged to me to be the person whose name is signed to this document.

My Commission Expires: December 15, 2015



[Signature]  
(Notary Public)

## **Exhibit K**

# **Sworn statement of Ken Candell in support of Form 12 disclosures**

### Signed Sworn Statement

I, Kenneth W. Candell, a retired FBI employee, do hereby solemnly swear to the following:

I am preparing this statement at the request of and in support of the statements made by Scott A. MacDonald in reference to his removal from his FBI employment and in support of his statements made in the Form 12, case number DH121781, recently filed with the US Office of Special Counsel.

#### My background

I am a retired FBI Management and Program Analyst with over 40 years experience in FBI programs and systems. I entered on duty as a Statistical Assistant into the Records Management Division, Statistical Unit located in Washington, DC on September 8, 1970 and retired on December 3, 2010 from the Records Management Division in Winchester, Virginia assigned to the Policy Team of the Policy, Analysis, and Compliance Unit. My FBI career provided me with opportunities to develop my research and analytical skills in support of the FBI requirements to enhance and expand the technical support for these programs: Uniform Crime Reports (UCR), Law Enforcement Officers Killed and Assaulted Program (LEOKA), National Incident-Based Reporting System (NIBRS), National Crime Information Center (NCIC 2000), Hate Crime Reporting Program, UCR Automation Project, National Data Exchange (N-DEx) and Electronic Surveillance (ELSUR).

#### Statement

I was introduced to Mr. MacDonald by my Unit Chief Glenn Murphy at a Unit Meeting held during the week of March 14-18, 2010. Mr. Murphy advised the unit members that Mr. MacDonald's responsibilities as the team leader for the newly formed Compliance Team included the development of Quality Assurance Reviews (QARs) for the Management of FBI Records, and the ELSUR records. These reviews would encompass both the paper and electronic versions. Mr. Murphy opted on his experience in performing QARs in the FBI, Criminal Justice Information Services (CJIS) Division of the NCIC and UCR where problems were identified and corrective recommendations provided. Mr. Murphy explained to us that Mr. MacDonald was an experienced Certified Public Accountant familiar with the Federal guidelines for governmental audits (Yellow Book); has valuable personnel management experience in training and team development.

I need to opine here on my relationship with Mr. Murphy. Mr. Murphy and I both worked at CJIS before coming to the RMD. While working at CJIS, Mr. Murphy was assigned by his Unit Chief of the Audit Unit, CJIS, to provide information to the Uniform Crime Reporting Automation Project where I was the Project Manager. Mr. Murphy refused to provide this information to the Project Team even when it was explained to him that it would provide a valuable product to the user community. Upon his refusal to two requests for this information, I recommended to the Project Coordinator, Dr. Yoshio Akiyama that Mr. Murphy be removed from the project team. Dr. Akiyama concurred and advised Mr. Murphy's Unit Chief that his services were no longer

required. This episode occurred in 1988.

In July 2009 shortly after his arrival in Winchester, Va., Mr. Murphy invited to have lunch with him. He initiated a discussion during lunch by requesting my support in the performance of his Unit Chief position. I responded by saying as long as you don't lie to me, request me to lie or bend the truth, to compromise my oath or ethics, I would execute my responsibilities effectively and efficiently in support of the FBI mission. Unit Chief Murphy did reassign me to the Policy Team when he found out that the ELSUR Team Lead lied by omission about me.

This Policy Team reassignment placed me in direct contact with Mr. MacDonald, his workspace was next to mine. Mr. MacDonald addressed his tasks of developing the QARs for the management of FBI records and ELSURs. He met with each of his assigned team members to ascertain the extent of their knowledge of FBI records, ELSUR experience, and additional tools they could bring to the team. Mr. MacDonald attempted to locate the Record Management Division (RMD) record requirements and quickly learned that few of the current record processes were documented. He shared this observation with me. I responded by saying welcome to RMD. I also stated, you think that is bad wait to you try to understand ELSUR. I provided him an example of the electronic 'help' response to a user inquiry. The response directed the user to learn the difference between the codes to be entered in the field.

I also provided Mr. MacDonald with copies of a White Paper I wrote on how the current ELSUR Electronic Record System (ERS) did not meet the operational or research requirements necessary to provide support to FBI agents in their pursuit of obtaining a Title III wiretap authorization. Mr. MacDonald asked me about the results or actions taken by RMD management to rectify the shortcomings I identified. I explained to him that SA Robert White presented the paper at a RMD management meeting, where he was directed by Debra O'Clair and Glen Scott not to have myself or anyone else look at the process and only accept the information as presented. I explained to Mr. MacDonald that shortly after SA White provided their response to me, I expressed my concerns to SA White and he said he could do nothing.

Mr. MacDonald thanked me for my input and said his team would incorporate the ELSUR white paper information in the ELSUR record management findings. Mr. MacDonald related to me that he was instructed by Mr. Murphy to remove any negativity from the ELSUR findings that indicated poor RMD record management practices. At this point I express my concerns to Mr. MacDonald that his employment might be in jeopardy since he objected to the removal of findings indicating that RMD is remiss in providing directions, instructions, and training in the proper recordation and maintenance of ELSUR records. I explained to Mr. MacDonald that the RMD usurps the standard FBI inspection process by performing self-inspections and providing those results to the Inspection Division in lieu of the Inspection Division doing employee interviews and job functions reviews. Mr. MacDonald expressed amazement that an agency like the FBI would allow the removal of an employee because they did the job they were hired to perform. I recommended to Mr. MacDonald to protect himself by getting a bureau "rabbi", someone who could act on his behalf. I suggested to Mr. MacDonald that RMD management will set him up to fail and then suggest his termination will be based on this failure, along with a

statement to the effect that he did meet the requirement to be a member of the FBI family.

It is my opinion Mr. MacDonald's termination was because he would not compromise his integrity at the direction of RMD management. He did his job, supported his team members, and interceded with Glenn Murphy, Debra O'Clair, and Andrew Scott when a team member (Kia Tabb) was singled out for following FBI employee leave policy and not following the undocumented RMD leave policy. Kia Tabb is the same individual who had been verbally assaulted by Mr. Murphy in April 2010 which resulted in an EEOC action being filed against Mr. Murphy for multiple EEOC violations. The FBI RMD management retaliated against Mr. MacDonald because he did the job he was hired to do.

I have also read the EO written by Mr. Murphy requesting Mr. MacDonald's removal from the FBI. As stated earlier, I sat next to Mr. MacDonald for several months and never witnessed any of the behavior listed. Our cubicles were separate by a low wall and we could see and hear each other and the conversations we had on the phone and with other staff members on a daily basis. I never witnessed any of the personality or behavior issues Mr. Murphy wrote in the dismissal memo. I also never heard from anyone within the unit or section any negative remarks about Mr. MacDonald's professionalism or working knowledge of audit and compliance. If anything the negative behaviors listed in the dismissal EO described Mr. Murphy, not Mr. MacDonald.

I have read the Form 12 that Mr. MacDonald filed with the US Office of Special Counsel and concur with his findings and the weaknesses he found in the ELSUR and Records Management programs. I am willing to testify to this. The deficiencies identified by Mr. MacDonald are serious and have damaged the effectiveness of the FBI investigative process to say nothing of jeopardizing any past investigations where convictions were obtained by the use of wire tap evidence or for any discovery processes. In my view, RMD management acted out of self interest and did not make decisions in the best interest of the ELSUR and RMD programs, but to protect themselves and their paychecks and bonuses, and they didn't care who they had to damage to do it. They allowed and continue to allow the FBI break the law as documented in the Form 12. In my view, they feared for their future bonuses and promotions would be limited if these very serious deficiencies were communicated to senior management and therefore they eliminated Mr. MacDonald as a potential threat.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 2, 2012 by

Name: Scott A. MacDonald  
 CITIZENSHIP: USA (City, State, Zip) \_\_\_\_\_  
 I, Scott A. MacDonald, a Notary Public, do hereby certify that \_\_\_\_\_  
 is the true and correct copy of the original document.  
 My commission expires on 5/1/13.  
 My office is located at 14530...  
 My office phone is ...  
 My office fax is ...  
 My office e-mail is ...  
 My office website is ...  
 My office address is ...  
 My office phone is ...  
 My office fax is ...  
 My office e-mail is ...  
 My office website is ...

Signature: Scott A. MacDonald Date: 4/2/12  
 Kenneth W. Candell

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