

DEC 12 2018



U.S. Customs and
Border Protection

Deputy Commissioner

The Honorable Henry Kerner
Special Counsel
Office of Special Counsel
1730 M Street, Suite 300
Washington, D.C. 20036

Re: OSC File Nos. DI-18-3920, DI-18-3924, DI-18-3931

Dear Mr. Kerner:

The enclosed report is in response to your referral of allegations that the Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), is not collecting deoxyribonucleic acid (DNA) samples of detainees and arrestees, which may constitute a violation of law, rule, or regulation, and a substantial and specific danger to public safety. I am the designated official responsible for providing your office with the enclosed DHS report of investigation pursuant to 5 U.S.C. § 1213. As discussed in more detail below, the investigative report shows that there has been no violation of law, rule, or regulation, and no substantial and specific danger to public safety. Therefore, I have concluded that no corrective action is required in this case.

The Office of Special Counsel (OSC) received the allegations from [REDACTED]

[REDACTED] The employees alleged that: (1) since 2008 CBP has not collected DNA samples from individuals it detained; (2) A 2010 DHS exception request did not contemplate the permanent waiver of DNA collection; and (3) CBP is not collecting DNA from individuals detained for violations of Title 8 United States Code (U.S.C.) §1325, despite current Department of Justice policy requiring the criminal prosecution of such persons.

On July 23, 2018, OSC referred the above allegations and a request for an investigation to DHS Secretary Kirstjen Nielsen. CBP's Office of Professional Responsibility conducted an investigation, which revealed the following:

On March 22, 2010, DHS Secretary Janet Napolitano consulted with U.S. Attorney General (AG) Eric Holder regarding her decision to exempt DHS from collecting DNA samples for: (1) non-U.S. persons detained for processing under administrative proceedings (not facing criminal charges), including juveniles under the age of 18; and (2) non-U.S. persons pending administrative removal proceedings. Secretary Napolitano

also requested that AG Holder exercise his authority to provide DHS with an additional exemption from collecting DNA samples for all persons, alien or otherwise, detained or arrested by DHS in the event of emergency or unforeseen circumstances or conditions, including mass migrations, natural or man-made disasters, medical emergencies, and other operational emergencies outlined DHS's proposed exemptions to DNA collection.

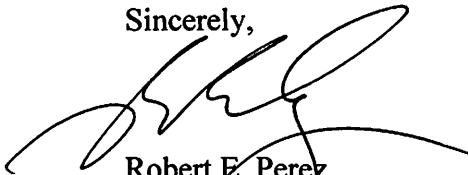
On July 22, 2010, in response to Secretary Napolitano's exemption decisions, AG Holder approved the two exemptions by stating: "It is within your authority as Secretary to make such a judgment under 28 CFR 28.12(b)(4), and the consultation with the Attorney General that the rule requires in such decisions has been effected by our present communications." With regard to the request for the third exemption, AG Holder reserved the Department of Justice's authority to allow exceptions to the DNA collection requirement for criminal arrestees. However, he noted that if DHS cannot collect DNA samples from criminal arrestees as part of the normal booking process, then arrangements should be made to take the DNA samples at a later point by DHS or another agency.

CBP policy requires that detainees be promptly processed and turned over to appropriate law enforcement agencies such as Immigration and Customs Enforcement (ICE) and U.S. Marshals Service (USMS). Both ICE and USMS have policies requiring DNA collection of detainees and arrestees.

CBP has determined that the above-referenced exemptions, which were approved by the AG in 2010, are still in effect. In addition, individuals who are detained or arrested by CBP and will be subject to criminal prosecution are transferred to other agencies that collect DNA samples. Therefore, I have concluded that no corrective action is required in this case because there has been no violation of law, rule, or regulation, and no substantial and specific danger to public safety.

The investigative findings are included in the enclosed report. If you require further information regarding this matter, please contact [REDACTED] in the Office of Chief Counsel at [REDACTED].

Sincerely,



Robert E. Perez
Deputy Commissioner
U.S. Customs and Border Protection

Enclosures

cc: Secretary, Department of Homeland Security
General Counsel, Department of Homeland Security

1. SUMMARY OF THE INFORMATION WHICH FORMED THE BASIS FOR THE INVESTIGATION

Whistleblowers alleged to the Office of Special Counsel (OSC) that employees at the Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), Washington D.C., engaged in conduct that may constitute a violation of law, rule, or regulation, and a substantial and specific danger to public safety. The whistleblowers, [REDACTED]

On July 23, 2018, the OSC referred these allegations and a request for investigation to DHS Secretary Kirstjen Nielsen. On August 16, 2018, the matter was assigned to CBP, Office of Professional Responsibility (OPR) for investigation. On September 28, 2018, Mr. Wynn was interviewed. On October 2, 2018, Mr. Jones and Mr. Taylor were interviewed. Field investigative work began on October 10, 2018, at the CBP OPR Special Agent in Charge (SAC) Washington.

In brief, [REDACTED] alleged the following:

- Since 2008 CBP has not collected deoxyribonucleic acid (DNA) samples from individuals it detained.
- A 2010 DHS exception request did not contemplate the permanent waiver of DNA collection
- CBP is not collecting DNA from individuals detained for violations of Title 8 United States Code (U.S.C.) §1325, despite current Department of Justice (DOJ) policy requiring the criminal prosecution of such persons.

2. DESCRIPTION OF THE INVESTIGATION

CBP OPR Senior Special Agents (SSA) and Special Agents (SA) from SAC Washington, conducted investigative interviews of the whistleblowers and the following employees:

- Executive Director Policy Directorate, Immediate Office of the Commissioner, CBP
- Associate Chief Patrol Agent, Policy, United States Border Patrol
- Assistant Director Border Security, Border Security Division, Baltimore Field Operations
- Supervisory CBP Officer, Border Security Division, Baltimore Field Operations

The interviews were conducted between September 27, 2018, and October 29, 2018.

In addition, the following references were consulted for guidance:

- March 22, 2010, Letter from DHS Secretary Napolitano to DOJ Attorney General (AG) Holder
- July 22, 2010, Letter from DOJ AG Holder to DHS Secretary Napolitano
- November 18, 2010, “DNA Sample Collection from Federal Arrestees and Defendants” Memorandum from DOJ AG Holder
- Title 34 U.S.C. § 40702
- Title 28 Code of Federal Regulations (C.F.R.) § 28.12
- Federal Register (F.R.) Volume 73, Page 74932
- Title 8 U.S.C. §1325
- April 6, 2018, “Zero-Tolerance” Memorandum from AG Jeff Sessions
- CBP Office of the Chief Counsel (OCC), Opinion on DNA Collection into CODIS
- CBP Implementation of DNA Sample Collection Requirements Memorandum
- CBP Directive No. 3340-030B, Secure Detention, Transport and Escort Procedures
- United States Marshals Service (USMS) Prisoner Operations Directive
- Immigration and Customs Enforcement (ICE) DNA Sample Standard Operating Procedures

3. SUMMARY OF EVIDENCE OBTAINED FROM THE INVESTIGATION

Since 2008, CBP has not collected DNA samples from individuals it detained.

Investigative Finding: DNA collection requirements went into effect January 9, 2009, and in 2010, the DHS Secretary requested exemptions to certain DNA collection requirements. The exemptions were approved by the DOJ AG. After consultation with CBP Office of Chief Counsel (OCC), CBP management determined that currently, DHS’s requirement to collect DNA under 34 U.S.C. § 40702(a)(1)(A) is still exempted by the AG.

- A 2010 DHS exception request did not contemplate the permanent waiver of DNA collection

Investigative Finding: After consultation with OCC, CBP management determined that CBP is currently exempt from DNA collection requirements.

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

Investigative Finding: CBP policy directives ensure individuals detained and arrested by CBP who will be presented to the U.S. Attorney's Office for criminal prosecution are transferred to agencies that collect DNA such as ICE, Office of Enforcement and Removal Operations (ERO); USMS; and the Bureau of Prisons. Those agencies collect and submit DNA samples to the Federal Bureau of Investigation (FBI) for entry into the Combined DNA Index System (CODIS), according to federal law.

4. INVESTIGATIVE FINDINGS

A. Background

Since 2004, Federal law has required the collection of DNA from most persons convicted of federal crimes, and the DNA Finger Print Act, enacted in 2006, further expanded collection requirements. Title 34 U.S.C. § 40702(a)(1)(A) authorizes the AG to collect DNA in certain circumstances and authorizes the AG to direct other agencies to collect DNA as well. The AG exercised collection authority pursuant to Title 28 C.F.R. § 28.12 and F.R. Volume 73, Page 74932, which authorizes the Secretary of DHS to make judgments on exemptions to DNA collection requirements.

On January 9, 2009, DNA collection requirements went into effect for agencies that arrest or detain individuals under the authority of the United States.

On November 2, 2009, CBP Executive Director, Admissibility and Passenger Programs, issued a DNA collection requirements memorandum to the Directors of Field Operations. This memorandum provided notice that DHS was consulting with DOJ regarding exemptions to DNA collection, and as a result CBP officers are not required to collect DNA.

A March 22, 2010 letter from DHS Secretary Napolitano to AG Holder outlined DHS's proposed exemptions to DNA collection. The letter identified necessary exemptions to DNA collection requirements due to significant organizational and financial challenges imposed on DHS due to Title 28 C.F.R. § 28.12.

A July 22, 2010 letter from AG Holder to DHS Secretary Napolitano granted DHS exemptions to DNA collection in certain circumstances and recognized the authority of the DHS Secretary to make judgements under Title 28 C.F.R. § 28.12.

In October, 2017, CBP employees assigned to the Office of Intelligence (OI), WMDD, started working on a DNA Collection Pilot Program designed to take DNA samples from certain aliens in CBP custody and provide the DNA to the FBI CODIS) During the development of this DNA Collection Pilot Program, WMDD collaborated with the several departments within CBP, including OCC.

After consultation with OCC in January 2018, CBP management understood that in July 2010, AG Holder approved the DNA collection exceptions requested by DHS, noting that the exceptions were within the DHS Secretary's authority under 28 C.F.R. § 28.12(b)(4). AG Holder further noted that the consultation required by the rule was effected by the communications between Secretary Napolitano and AG Holder. In addition, after consultation with OCC, CBP management determined that the DHS exceptions remained in place and a revised DNA collection waiver coordinated between DHS and DOJ was necessary before CBP engaged in any DNA collection for inclusion in CODIS.

B. Relevant Regulations

Title 34 U.S.C. § 40702(a)(1)(A) - The Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested, facing charges, or convicted or from non-United States persons who are detained under the authority of the United States. The Attorney General may delegate this function within the Department of Justice as provided in section 510 of title 28 and may also authorize and direct any other agency of the United States that arrests or detains individuals or supervises individuals facing charges to carry out any function and exercise any power of the Attorney General under this section.

Title 28 CFR § 28.12(b)(1)-(b)(4) - Any agency of the United States that arrests or detains individuals or supervises individuals facing charges shall collect DNA samples from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States. For purposes of this paragraph, “non-United States persons” means persons who are not United States citizens and who are not lawfully admitted for permanent residence as defined in 8 CFR 1.1(p). Unless otherwise directed by the Attorney General, the collection of DNA samples under this paragraph may be limited to individuals from whom the agency collects fingerprints and may be subject to other limitations or exceptions approved by the Attorney General. The DNA-sample collection requirements for the Department of Homeland Security in relation to non-arrestees do not include, except to the extent provided by the Secretary of Homeland Security, collecting DNA samples from: (1) Aliens lawfully in, or being processed for lawful admission to, the United States; (2) Aliens held at a port of entry during consideration of admissibility and not subject to further detention or proceedings; (3) Aliens held in connection with maritime interdiction; or (4) Other aliens with respect to whom the Secretary of Homeland Security, in consultation with the Attorney General, determines that the collection of DNA samples is not feasible because of operational exigencies or resource limitations.

73 F.R. 74932, 74934 - Accordingly, the Attorney General is directing all agencies of the United States that arrest or detain individuals or supervise individuals facing charges to collect DNA samples from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States, pursuant to 42 U.S.C. 14135a (a)(1)(A), if the agencies take fingerprints from such individuals.

The Department recognizes, however, that there may be some circumstances in which agencies collect fingerprints but in which the collection of DNA samples would not be warranted or feasible. For example, in relation to non-arrestees, DHS will not be required to collect DNA samples from aliens who are fingerprinted in processing for lawful admission to the United States, or from aliens from whom DNA-sample collection is otherwise not feasible because of operational exigencies or resource limitations. If any agency believes that such circumstances exist within its sphere of operations, the agency should bring these circumstances to the attention of the Department, and exceptions to the DNA sample collection requirement may be allowed with the approval of the Attorney General.

Title 8 U.S.C. §1325(a) - Improper time or place; avoidance of examination or inspection; misrepresentation and concealment of facts - Any alien who (1) enters or attempts to enter the

United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.

5. DESCRIPTION OF ACTION TAKEN OR PLANNED

A. Action Taken by CBP since 2008 to address DNA collection from individuals.

DNA collection requirements went into effect January 9, 2009, and in 2010, the DHS Secretary requested exemptions to certain DNA collection requirements. The exemptions were approved by the DOJ AG. As noted above, the CBP Implementation of DNA Sample Collection Requirements (IDSCR) memorandum dated November 2, 2009, outlines CBP policy relating to 28 C.F.R. 28.12 and F.R. Volume 73, Page 74932. This memorandum states, "CBP submitted an implementation plan to DHS earlier this year, including additional exemptions based on interpretation of the language contained in the final rule as well as resource limitations and operational exigencies." The memorandum continues to state, "CBP Officers are not required to collect DNA samples at this time. Additional information and policy guidance will be distributed when CBP is prepared to implement the final rule."

After the 2009 CBP IDSCR memorandum went into effect, DOJ and DHS exchanged communications in 2010 addressing exemptions to the DNA collection requirements. The 2010 letters in conjunction with 28 C.F.R. 28.12 and FR Volume 73 Page 74932, established the following:

DNA-sample collection requirements for the Department of Homeland Security in relation to non-arrestees (i.e., those not arrested on criminal charges) do not include, except to the extent provided by the Secretary of Homeland Security, collecting DNA samples from:

- (1) Aliens lawfully in, or being processed for lawful admission to, the United States;
- (2) Aliens held at a port of entry during consideration of admissibility and not subject to further detention or proceedings;
- (3) Aliens held in connection with maritime interdiction; or
- (4) Other aliens with respect to whom the Secretary of Homeland Security, in consultation with the Attorney General, determines that the collection of DNA samples is not feasible because of operational exigencies or resource limitations.

- i. Non-U.S. persons detained for processing under administrative proceedings (not facing criminal charges), including juveniles under the age of 18.
- ii. Non-U.S. persons currently within DHS custody, pending administrative removal proceedings.

B. Action Taken by CBP to address the 2010 DHS waiver excepting DNA collection:

After consultation with OCC in January 2018, CBP management understood that in July 2010, AG Holder approved the DNA collection exceptions requested by DHS, noting that the exceptions were within the DHS Secretary's authority under 28 C.F.R. § 28.12(b)(4). AG Holder further noted that the consultation required by the rule was effected by the communications between Secretary Napolitano and AG Holder. In addition, after consultation with OCC, CBP management determined that the DHS exceptions remain in place and a revised DNA collection waiver coordinated between DHS and DOJ was necessary before CBP engaged in any DNA collection for inclusion in CODIS.

C. Action Taken by CBP to address the collection of DNA from individuals detained for violations of Title 8 U.S.C. §1325:

CBP policy directives ensure individuals detained and arrested by CBP are transferred to agencies that collect DNA according to federal law. CBP Directive Number 3340-030B, "establishes national policy for the temporary detention, transport, and escort of persons by CBP," and pertains to "all persons who are undergoing CBP processing," to include those "suspected of terrorist activity, are under arrest, are awaiting confirmation on National Crime Information Center (NCIC) warrants, are suspected as internal contraband carriers, or are aliens awaiting removal." This directive states "Detainees will be promptly processed and when necessary turned over to Immigration and Customs Enforcement (ICE), Detention and Removal Operations (DRO), the Office of Refugee Resettlement (ORR); the U.S. Marshals Service (USMS), or any other appropriate Law Enforcement Agency (LEA)." Furthermore, the Directors of Field Operations (DFO) "shall develop local procedures in writing for authorization and arrangement for detention and transfer procedures." Lastly, "Once a detainee has been transferred to the custody of another agency, including ICE/DRO," "responsibility for the individual is transferred to that entity."

After CBP transfers a detainee to another agency, for example to ICE, ERO, it is the responsibility of that agency to adhere to the DNA collection requirements set forth in 28 C.F.R. § 28.12. According to ERO 11152.2, ICE has a Standard Operating Procedure that "implements the collection of DNA samples from aliens who will be presented to the U.S. Attorney's Office for criminal prosecution." This ICE ERO policy directs officers within ERO to "collect and submit DNA samples to the FBI for entry into [CODIS]." Therefore, when CBP transfers a detainee to ICE ERO for criminal prosecution, that detainee does have DNA collected and submitted to the FBI for CODIS, as required by federal law.

Similarly, USMS has agency policy requiring DNA collection. The Prisoner Operations Directive states “USMS will collect and submit DNA samples from any prisoner that is summonsed by a United States District Court for the purpose of facing federal charges regardless of which federal law enforcement agency is the investigative agency.” Thus, USMS policy ensures DNA collection is completed despite the prisoners originating agency.