

A Review of the Federal Bureau of Investigation's Initial Response to Representative Mark Foley's E-mails to a Former Page



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I. Introduction

This report describes the Office of the Inspector General's (OIG) review of the Federal Bureau of Investigation's (FBI) response when it received e-mails sent by Representative Mark Foley to a former page with the United States House of Representatives. The e-mails contained comments from Foley to the former page, and comments from the page to a House employee to whom the page had forwarded Foley's e-mails.

Melanie Sloan, the Executive Director of a group called Citizens for Responsibility and Ethics in Washington (CREW), believed that the e-mails warranted investigation and in July 2006 forwarded the e-mails to the FBI's Washington Field Office (WFO), Northern Virginia Resident Agency (NVRA). An FBI agent in that office who reviewed the e-mails decided that the e-mails did not warrant any investigative action. The FBI did not inform CREW of its decision or take any additional action with respect to the e-mails.

In September 2006, these e-mails and other instant messages from Foley to other former congressional pages became public. Foley resigned from Congress on September 29.

On October 1, the FBI announced that it was opening a "preliminary investigation" into Foley's e-mails with House pages.¹ The following day, Melanie Sloan from CREW informed the OIG of her submission of several of Foley's e-mails to the FBI in July, and she questioned why the FBI had not investigated them at the time.

Sloan subsequently sent a letter to the OIG complaining about the FBI's public statements in response to public reports about the e-mails she had provided to the FBI. Several media reports reported that the FBI and the Department of Justice (Department) had said the e-mail messages CREW provided were "heavily redacted" and that CREW had refused to provide more information when asked by the FBI, factors that the news stories suggested contributed to the FBI's decision not to investigate the e-mails in July.

II. OIG Review

The OIG conducted this review to examine the FBI's actions when it received the Foley e-mails from CREW in July 2006. As part of this review, we interviewed Sloan, the Executive Director of CREW; the FBI

¹ See, e.g., Charles Babington and Jonathan Weisman, *FBI to Examine Foley's E-mails*, The Washington Post, Oct. 2, 2006; John Heilprin, *FBI Examining Foley's E-mails to Teens*, Associated Press, Oct. 2, 2006.

Special Agent and the Supervisory Special Agents at the NVRA who reviewed the e-mails in July 2006 and made the decision not to investigate them; a WFO Assistant Special Agent in Charge who reviewed the e-mails in October 2006; a supervising Assistant United States Attorney from the United States Attorney's Office for the District of Columbia who reviewed the e-mails in October 2006; and three FBI media officials.

We also reviewed various documents, including the e-mails that CREW provided to the FBI in July 2006, a draft chronology created by the FBI's WFO in October 2006 describing its response to the e-mails it received from CREW, e-mails between FBI employees regarding Foley's resignation and inquiries from the media, newspaper articles concerning the information that CREW provided to the FBI, and documents regarding the Department and the FBI's initiatives against the online sexual exploitation of children.

Our review focused on two issues. First, we examined what the FBI did in response to the information it received from CREW in July 2006. Second, we reviewed the accuracy of the Department and the FBI's statements to the media in October 2006 regarding these e-mails.² This report describes the results of our review.

III. Factual Chronology

A. The E-mails from CREW

Melanie Sloan, the Executive Director of CREW, told the OIG that on July 19, 2006, a CREW staff member received a set of e-mails that allegedly were sent by Foley to a former House page and then forwarded by the former page to an employee of the House of Representatives. Sloan said she did not know the age of the former page but understood that all pages were minors.

Sloan said that a third person affiliated with an interest group other than CREW had received the e-mails from a congressional staffer and had provided the e-mails to CREW. Sloan stated that at the time she received the e-mails she did not know the identity of the congressional staffer who provided the e-mails to the interest group.

The material that CREW received consisted of five e-mails from Foley to the former page and three e-mails between the page and an employee with the House of Representatives. The first of the five e-mails sent by

² Our review does not examine the FBI's current investigation into the Foley e-mails, which the FBI began on October 1, 2006.

Foley indicates in the address header that it was sent on July 29, 2005, at 11:00 a.m. The remaining four e-mails from Foley do not indicate when they were sent. The body of these e-mails from Foley to the former page read, in full, as follows:

1) do I have the right email
Mark Foley

2) glad your home safe and sound...we dont go back into session until Sept 5,,,si its a nice long break....I am back in Florida now...its nice here..been raining today..it sounds like you will have some fun over the next few weeks...how old are you now?...

3) I am in North Carolina..and it was 100 in New Orleans...wow that's really hot...well do you miss DC...Its raining here but 68 degrees so who can argue..did you have fun at your conference...what do you want for your birthday coming up...what stuff do you like to do

4) I just emailed [name of page]...hes such a nice guy....acts much older than his age...and hes in really great shape....i am just finished riding my bike on a 25 mile journey now heading to the gym...whats school like for you this year?

5) how are you weathering the hurricane..are you safe..send me an email pic of you as well

On the face of the documents that were provided to CREW and subsequently forwarded to the FBI, it appears that the five e-mails from Foley to the former page were forwarded to another person, other than the House employee mentioned above, whose name is redacted. The former page's full name is included in all five e-mails.³

A second set of three e-mails provided to CREW and subsequently forwarded to the FBI are the e-mails between the former page and the House employee who had an e-mail address indicating she worked for the House of Representatives.

³ These e-mails, with names and e-mail addresses of the page and the House employee, and other information that is irrelevant, redacted by the OIG, are attached to this report.

The first e-mail in this set is dated August 30, 2005, and is from the former page to the House employee. The e-mail starts as follows:

Yeah. I have his personal e-mail.

What happened was I gave certain people Thank-you cards, you know? I gave Foley one because he was a really nice guy to me and all. Then, he asked me to write my e-mail on the back of his. So I was like, "sure!" because of course I had no suspicions.

In the same e-mail, the former page gives the full name of the person that Foley describes in his e-mail as acting "much older than his age" and being "in really great shape." The former page describes this person as "just another page he [Foley] liked." The former page goes on to describe some of the e-mails from Foley and his reaction, including the following:

And this is the one about send him a pic:

"how are you weathering the hurricane...are you safe....send me an email pic of you as well..."

Sick sick. .

The former page also mentions that another former House page, who he identifies by her first name, had previously told him "that there was a congressman that did hit on pages. She didn't know his name. . ."

In this e-mail, the former page also requests that the House employee "mention this to Rodney [Representative Rodney Alexander] so he is aware. I wonder what he would do about it. And if he wants to e-mail me or call me, you can give him my info if he doesn't already have it."

The former page next comments in the e-mail that it is late and "I have freaked out enough tonight, lol." The former page adds, "I still haven't emailed him back, and I don't think I will for a while, if ever. What do you think about it all?"

In the second e-mail, dated August 31, 2005, the House employee sent the following one-sentence reply to the former page: "If you can, forward me the emails."

In the third e-mail, also dated August 31, 2005, the former page replies to the House employee:

Ok. I am forwarding them now.

Maybe it is just me being paranoid, but seriously. This freaked me out.

But do tell me what you think about it all. I have one friend thinking I am being paranoid and the other saying that she thinks it is weird that he even asked for my e-mail, much more what he said.

B. CREW Provides the E-mails to the FBI

Sloan told the OIG that based on her prior experience as an Assistant United States Attorney in the District of Columbia who had prosecuted some sex crimes, she concluded that the e-mails contained information that warranted investigation by the FBI. Sloan noted to the OIG that the former page who received Foley's e-mails was clearly upset and distressed about the messages.

On July 21, 2006, the same day that Sloan received the e-mails from a member of her staff, and two days after Sloan said her staff member first received the e-mails, Sloan contacted an FBI special agent assigned to the Public Corruption Squad at the FBI's Washington Field Office (WFO), who was stationed in WFO's Northern Virginia Resident Agency (NVRA). Part of the Special Agent's responsibilities was to serve as a liaison with federal watchdog groups and to encourage these groups to report to the FBI any information about potential criminal activity that they received. In 2003 or 2004, the Special Agent had called Sloan and encouraged her to report to the Special Agent any suspicious activity that CREW might learn about. The Special Agent and Sloan had not spoken again until the call from Sloan in July 2006 to pass along the Foley e-mails.

According to the Special Agent, when Sloan called she said she had "disturbing e-mails concerning a Congressman soliciting pages." Sloan told the Special Agent that she thought the e-mails might involve criminal activity because all pages are minors, and Sloan wanted to "get the e-mails to law enforcement." The Special Agent said she requested that Sloan send her the e-mails.

Sloan sent the e-mails to the Special Agent, first by facsimile and then in a PDF document sent to the Special Agent's e-mail account. After receiving the e-mails, the Special Agent said she called Sloan back to

confirm that the e-mails were from Congressman Foley. The Special Agent told the OIG that she questioned Sloan regarding the portions of the e-mails that had been redacted or underlined, and Sloan told her that the redactions and underlines were present when Sloan had received the e-mails, and that the FBI was receiving the e-mails in the same condition that CREW received them.⁴

The Special Agent told the OIG that she believes, but is not certain, that she also asked Sloan to reveal who had forwarded the e-mails to CREW, and that Sloan declined to do so. However, the Special Agent said that she cannot be certain that her recollection was accurate regarding this point, because she may be confusing her recollection with an unrelated case.⁵

The Special Agent said she also asked Sloan for information about the House employee whose name was on the documents because the former page had forwarded the Foley e-mails to that employee. The Special Agent said that Sloan explained that the House employee was another page who was a friend of the former page who received the Foley e-mails.

In contrast, Sloan told the OIG that she recalled that the Special Agent called her after receiving the e-mails and the only question that the Special Agent asked was whether the e-mails were between Congressman Foley and a page. Sloan said the Special Agent did not ask her to reveal who had provided the e-mails to CREW, did not ask any follow-up questions about the House employee whose name was in the e-mails, and did not ask any questions about the redactions. Sloan said that she did not decline to answer any questions that the Special Agent asked her.

Both the Special Agent and Sloan said that this conversation was their last communication with each other about the e-mails. Sloan said she did not speak with anyone else at the FBI regarding the e-mails and Congressman Foley.

⁴ The e-mails appeared to have been forwarded to another person or persons in addition to the House employee. While the full name of the House employee was in the e-mails, the name and e-mail address of the additional persons to whom the e-mails had been forwarded were redacted. The e-mails also contained some handwritten underlines and brackets.

⁵ In a written draft chronology of events prepared in October 2006 by another FBI employee but which the Special Agent reviewed and approved, the Special Agent's recollection is described as follows: "[The Special Agent] has a vague recollection of asking Ms. Sloan who she got the emails from and Ms. Sloan did not want to reveal her source."

Sloan said that she reported the e-mails to the FBI because she wanted to “get the e-mails to law enforcement” and she believed that the FBI was best situated to investigate the matter. Sloan told the OIG that she thought the FBI would interview the former page to determine if any follow-up was needed. She said she did not believe it was appropriate for her to follow up on the matter by trying to talk to the former page herself.

C. Review by the FBI’s Public Corruption Squad

The FBI Special Agent who received the e-mails from Sloan said that she read the e-mails and concluded that the former page appeared “to be wierded out by it.” That same day, the Special Agent showed the e-mails to her supervisor, the supervisory special agent (SSA) in charge of the Public Corruption Squad at the NVRA. The Public Corruption SSA told the OIG he read the e-mails and thought “What a freak” about the Congressman. However, he concluded they did not fall within the jurisdiction of the Public Corruption Squad because they did not involve any allegations of public corruption, such as bribery or gratuities.

The Public Corruption SSA directed the Special Agent to give the e-mails to the supervisor of the NVRA Crimes Against Children and Adult Obscenity Squad (Crimes Against Children Squad). The Special Agent said that because it was already around 6 p.m. on a Friday, she waited until the following Monday, July 24, 2006, to leave a voicemail for the SSA of the Crimes Against Children Squad.

D. Review by the Crimes Against Children and Adult Obscenity Squad

The NVRA Crimes Against Children Squad investigates adult obscenity crimes and non-Internet crimes against children, including child prostitution, child pornography, child sexual exploitation cases that are not Internet based, and international parental kidnappings. The Crimes Against Children Squad SSA has been the supervisor of this squad since September 18, 2005. She said that prior to this assignment, she had no previous assignments that related to sex crimes, other than her work as a police officer before joining the FBI.

The Crimes Against Children Squad SSA was on annual leave on Monday, July 24, 2006. She received a copy of the Foley e-mails from the Special Agent when she returned to the office the next day. The SSA said she understood from her communications with the Special Agent that this matter involved a House page receiving e-mail messages from a Congressman and that the page was probably a juvenile. The SSA told the OIG that after reading the e-mail messages, it “was clear to me that there was no criminal violation” on the face of the e-mails. She acknowledged

that the e-mails were “inappropriate” if they were sent from an adult to a child.

The Crimes Against Children Squad SSA concluded that, because the e-mail messages were sent via computer, the appropriate squad to review the messages was the Cyber Crimes Squad in NVRA.

E. Review by the Cyber Crimes Squad

1. Background of Cyber Crimes Squad

The Cyber Crimes Squad investigates Internet fraud, theft of intellectual property, and online sexual exploitation of children.

The Cyber Crimes Squad is supervised by an SSA. That SSA said that, generally, the online sexual exploitation of children matters her squad investigates are cases involving the distribution, production and receipt of online child pornography or “traveler cases” in which suspects entice children through the Internet to cross state lines to engage in sexual activity. The Cyber Crimes Squad SSA said that her squad’s cases generally do not come from referrals, either from the public or from public interest groups. The cases generally are referred by local law enforcement agencies or are generated by FBI agents working undercover in an online capacity. She said that the squad’s traveler cases are almost exclusively self-initiated by agents posing as children on the Internet.

The Cyber Crimes Squad SSA said that she has ten agents assigned to her squad, but only two agents work full time and one agent works part time on investigations involving the online sexual exploitation of children. The remaining agents work on Internet fraud and theft of intellectual property cases.

When the Cyber Crimes Squad SSA first joined the squad, the squad’s highest priority was intellectual property rights. She said that after the announcement of the Project Safe Childhood Initiative in March or April of 2006, sexual exploitation of children over the Internet became her squad’s number one priority. However, because of the emotionally difficult nature of sexual exploitation cases, agents on the Cyber Crimes Squad must volunteer to work on these types of cases and can only be assigned the cases after undergoing psychological testing. Thus, the Cyber Crimes Squad SSA said she does not have any other agents available to work on these cases. However, as explained in the following section, the amount of available resources did not influence the Cyber Crimes SSA’s decision on whether or not to conduct additional follow-up on the e-mails that the FBI received from CREW.

The Cyber Crimes Squad SSA said that her squad has an approximate backlog of 30 unaddressed sexual exploitation complaints, which may or may not merit investigation but are not yet being pursued because she does not have the resources to address them. According to the Cyber Crimes Squad SSA, the majority of the unaddressed complaints involve allegations of possession of child pornography.

2. Review of the E-mails by the Cyber Crimes Squad Supervisor

On July 25, 2006, the Crimes Against Children Squad SSA hand-delivered the e-mails to the Cyber Crimes Squad SSA and told the Cyber Crimes Squad SSA that it was her understanding that the e-mail messages were between a Congressman and a juvenile. After reviewing the e-mails, they briefly discussed their belief that there was no criminal activity in the e-mails. They said they also discussed the possibility of assuming the former page's identity on the computer and engaging the Congressman in a conversation. However, they both concluded that pursuing an assumed identity investigation was not viable because the e-mails had been written in 2005.

The Cyber Crimes Squad SSA told the OIG that while she found the messages "odd," she did not see any evidence of criminal wrongdoing. She said that she concluded, after reading the e-mails, that no further investigation was warranted. She said that in determining that no investigation was warranted, she relied in part on the fact that the age of consent in the District of Columbia is 16. She said that she was uncertain how old the former page was, but said she had a recollection that the Crimes Against Children Squad SSA had stated that the former page was 16 or 17 years old.⁶ The Cyber Crimes Squad SSA stated that although the former page appeared to be bothered by the e-mails, as evidenced by his repeated use of the word "sick," she believed that fact did not provide a basis for any further investigation.

The Cyber Crimes Squad SSA also told the OIG that, "We only open a case if there is a reasonable indication that criminal activity has occurred or will occur." She said that "There was nothing in this [e-mails] that warranted taking any action."

The OIG asked her whether the language in the e-mails could have been interpreted as "grooming" behavior that is employed by sexual predators. Typically, in this scenario, predatory behavior begins with the

⁶ The Crimes Against Children SSA told the OIG that she did not know how old the former page was, although it was her understanding at the time that the former page was a juvenile.

suspect using inappropriate language and then later builds up to inappropriate sexual communications and conduct. The Cyber Crimes Squad SSA responded that she did not view the content of the e-mails alone as constituting grooming behavior. She also told the OIG that she could not go forward with an investigation unless the e-mails contained explicitly sexual language. When asked to give an example of the type of language that would be sufficient to justify opening an investigation, she suggested language such as, "How big is your penis?" The SSA also said an enticement case had to be at a "substantial stage" before prosecutors would take the case for prosecution, such as evidence that plane or bus tickets had been purchased to enable the child to travel.

The OIG asked the SSA if she would have viewed the matter any differently if the e-mail exchange had been between another authority figure and a juvenile, such as between a coach and a student. The SSA said no.

When asked if there was anything in the e-mails that warranted notifying anyone outside the FBI of the e-mails, including anyone in a position of authority over the page program, the SSA also replied, "No." She said she did not consider referring the e-mails to the local police because the local police are overburdened and there is only one person in the District of Columbia who handles these types of cases.

The SSA also stated that these e-mails were "not the job of the FBI. This is a parental job." The SSA stated that the FBI does not have the authority to investigate absent an indication that a crime has or may be occurring. The SSA said that for this reason, the FBI engages in outreach to raise parental awareness. She said that the FBI has to have a reasonable basis to believe a crime has been committed or will be committed before investigating because "we're the big bad government." The SSA stated that to do otherwise would be a misuse of FBI authority. She said, "In hindsight, I wouldn't have changed my decision." She added, "We are not the ethics police."

The OIG asked the SSA if her decision to not open the investigation was influenced in any way by the fact that the suspect was a Congressman. She replied, "No." She also said that her decision was not influenced by the lack of any information about the former page's identity. She said that she believed that the FBI had enough information from the e-mails provided by CREW to find the former page if the FBI had wanted to locate him.

The SSA said that other than a brief discussion with the Crimes Against Children Squad SSA, she did not discuss her decision to decline to open an investigation with anyone else at the FBI at the time.

After deciding no further investigation was warranted, the Cyber Crimes Squad SSA placed the e-mail messages in her in-box around July 25, 2006. She said it was her intention to place the e-mails in a "zero" file, which is the name of an FBI file that is created to store information received by the FBI that it believes does not warrant further action. However, the e-mail messages remained in the SSA's in-box and no further action was taken until she was contacted by her supervisor, a WFO Assistant Special Agent in Charge (the ASAC), on September 29, 2006, after Foley announced his resignation.

F. Review of the Cyber Crimes Squad SSA's Decision

1. SAC Review

The first information the ASAC received concerning any allegations of inappropriate communications between Congressman Foley and House pages was on Friday, September 29, 2006, the day Foley resigned. The ASAC received a telephone call that day from the FBI WFO media representative asking the ASAC if he knew anything about an FBI investigation of Congressman Foley. The ASAC called the Crimes Against Children Squad SSA to find out if the FBI had received anything regarding Foley, and that SSA directed the ASAC to the Cyber Crimes Squad SSA. The ASAC spoke to the Cyber Crimes Squad SSA, who told him that in July 2006 the FBI had received e-mails sent by Foley to a former page. She reported to the ASAC that she had determined that there was nothing sexually explicit in the e-mails and that the matter did not warrant a criminal investigation. She also told the ASAC that she had put the e-mails in her in-box with the intention to place them in a zero file, but that the e-mails were still in her in-box.

The ASAC also asked the Cyber Crimes Squad SSA to create a chronology of events outlining what information the FBI received from CREW and what the FBI did with this information. The SSA prepared a draft chronology and incorporated the comments of the Special Agent who had received the e-mails from CREW, the Public Corruption Squad SSA, and the Crimes Against Children SSA. In this draft chronology, the Cyber Crimes Squad SSA provided the following rationale for declining to open an investigation:

[The Cyber Crimes SSA] reviewed the emails and discussed the content with [the Crimes Against Children SSA]. Based on the emails, [the Cyber Crimes SSA] and [the Crimes Against Children SSA] agreed there was no evidence of criminal wrongdoing. [The Cyber Crimes SSA] made this determination based on the content of the emails, her experience in IINI

[Innocent Images National Initiative] matters, and her legal background.⁷ Specifically, for the following reasons:

1. The emails were not sexually explicit.
2. The emails did not discuss illegal or legal sexual activity.
3. The emails did not contain language inducing or enticing an individual, regardless of age, to engage in sexual activity. In fact, the emails contained no language of persuasion or enticement to engage in **any** type of activity, criminal or otherwise.
4. The emails contained no discussion of any past crime or potential future crime. No criminal acts were discussed.
5. Emailing a minor is not a crime.
6. Based on the facts provided, there was no reasonable suspicion any criminal activity had taken place. Thus, the FBI was not warranted in conducting further investigation and there was no basis to conduct an investigation, especially in light of the fact Ms. Sloan, CREW, refused to provide the identity of her source.
7. The age of consent in the District of Columbia is 16.

[Emphasis in original].

The ASAC told the OIG that upon his review of the e-mails and this draft chronology, he agreed with the Cyber Crimes Squad SSA's decision to not open a criminal investigation. However, he said that, in accordance with FBI policy, the SSA should have promptly indexed the relevant information from the e-mails into the FBI's Automated Case Support (ACS) computer data system when the e-mails were received in July.

The ASAC said he told the Cyber Crimes Squad SSA that even though she had declined to open an investigation when she received the e-mails in July, she should have promptly had the relevant information from the e-mails indexed so that it would be entered into ACS.

The ASAC said that he does not have any personal experience in investigating cases involving sexual exploitation of children, other than what he has learned by supervising the squad that conducts these cases. He said that he relies on the Cyber Crimes Squad SSA's expertise in these matters.

The ASAC told the OIG that he believed the FBI would have a moral obligation to notify someone if that person was at risk of being a victim,

⁷ Before joining the FBI, the Cyber Crimes Squad SSA was a lawyer in private practice, primarily handling civil litigation.

even if the FBI was not going to conduct an investigation. However, he said that it is not the FBI's policy to make such a notification without proof. He said that the FBI did not have anything in the e-mails it received from CREW that provided adequate grounds to provide notification to anyone involved with the page program.

The ASAC said that several officials from the FBI, the District of Columbia United States Attorney's Office (D.C. USAO), and the Criminal Division of the Department of Justice met during the week following Foley's resignation and decided to open an investigation into Foley's conduct in light of the sexually explicit instant messages that had been revealed by ABC News in September 2006. The ASAC noted that no one at that meeting expressed any disagreement with the Cyber Crimes Squad SSA's previous decision not to open a criminal investigation based on the e-mails received from CREW, but he added this meeting was focused on the instant messages and not on the e-mails.

2. Assessment of Decision by Assistant United States Attorney

Patricia Stewart is the Deputy Chief of the Major Crimes Section of the Criminal Division of the D.C. USAO, the section that investigates and prosecutes federal crimes involving the online sexual exploitation of children. Stewart did not formally review or supervise the FBI's decision on whether to pursue an investigation into the e-mails provided by CREW. However, D.C. USAO can be called upon to provide advice to the WFO Cyber Crimes Squad about whether an investigative lead is worth pursuing. The Cyber Crimes Squad SSA stated that if she had had "an ounce of question" in July 2006 about her decision to place the e-mails in a zero file without any further follow-up, she would have run her decision through the D.C. USAO for guidance. The SSA also said that after Foley resigned, she discussed the e-mails with Stewart, who endorsed the SSA's July 2006 decision that no further follow-up by the FBI was necessary at that time.

Stewart said that the majority of the federal Internet exploitation cases handled by the D.C. USAO Major Crimes Section are brought to her office by the Washington, D.C., Metropolitan Police Department Youth Division. She said that most of the online child sexual exploitation cases her office prosecutes are initiated by undercover police officers posing as children in Internet communications.

Stewart said that prior to the resignation of Congressman Foley, she did not have any knowledge of the e-mails between Foley and the former page that the FBI had received in July 2006. Stewart said that had the FBI brought the e-mails to her in July 2006, she would have reviewed the

e-mails in light of 18 U.S.C. § 2422(b), which makes it a crime to entice or attempt to entice a minor to engage in illicit sexual conduct. She noted that illicit sexual conduct is defined by state law, and that if someone was trying to entice anyone age 16 or older in the District of Columbia, it would not be illegal. Stewart said she could not speak to the laws in other states where some of the e-mails may have been sent or received.

Stewart said that the e-mails sent to the FBI by CREW indicated that someone was being made uncomfortable but, in her opinion, the Cyber Crimes Squad SSA appropriately decided that a follow-up call to the former page was not warranted. However, Stewart noted that the FBI could have conducted an investigation without the D.C. USAO's involvement, although her office would not have assisted at that point without more evidence. Stewart also said that in her opinion the e-mails the FBI received in July did not rise to a level where notification to some other authority would be warranted. Stewart said that the instant messages revealed by ABC in September 2006 were sexually explicit communications and provided enough justification for both the FBI and the D.C. USAO to open an investigation, which they have since done.

IV. OIG Assessment of the FBI's Actions

In this section, we examine the FBI's decision not to conduct any follow-up regarding the e-mails it received from CREW in July 2006. Because this decision must be viewed in the framework of the law that criminalizes sexual solicitations of minors via the Internet, we first provide an overview of the relevant provision of the federal criminal code governing that conduct.

A. Overview of Relevant Provision of the Federal Criminal Code

Federal law governing the sexual solicitation of a minor via the Internet provides:

Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with

a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than ten years or for life.

See 18 U.S.C. § 2422(b).⁸

The criminal code in the state or states where the conduct occurred would determine whether the sexual activity is one for which a subject could be charged with a criminal offense. Many states set the age at which a minor can consent to engage in sexual activity with an adult at less than 18 years old. Thus, it would not be illegal to solicit a person under 18 to engage in consensual sexual activity if that person were above the age of consent in the state where the conduct was occurring.

From the information on the face of the e-mails provided to the FBI by CREW, it appears that they may have been sent either to or from Florida, North Carolina, Washington, D.C., Maryland, Virginia, Louisiana, Mississippi, or Alabama. First, Foley mentions in one e-mail that he is “back in Florida now” and in another e-mail that “I am in North Carolina.” Second, it is possible that Foley may have sent some of the e-mails either from Washington, D.C., where he had an office, or from his residence in the Washington, D.C., metropolitan area, which includes the states of Maryland and Virginia. Third, Foley tells the former page in one e-mail that he is “glad your home safe and sound” and in a later e-mail asks “how are you weathering the hurricane.” The first e-mail Foley sent was dated July 29, 2005, and the former page forwarded the e-mails to the House employee on August 31, 2005. Because Hurricane Katrina occurred during that time period, it appears possible that the former page resided in Louisiana, Mississippi, or Alabama, the states most affected by Hurricane Katrina. The age of consent in those states ranges from 16 to 18 years old.⁹

⁸ On July 27, 2006, the penalties were increased from “not less than 5 years and not more than 30 years” to “not less than 10 years or for life”. See The Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 (2006).

⁹ In fact, the former page was 16 years old at the time of the e-mail exchange with Foley. Three of the eight states from which the communications potentially were sent or received would have criminalized sexual contact between a 16 year old and Foley. See Fl. Stat. § 794.06 (providing that it is a second degree felony for a person 24 years of age or older to engage in sexual activity with a person 16 or 17 years of age); La. R.S. Ann. § 14.80 (felony carnal knowledge of a juvenile is committed when a person who is 19 years of age or older engages in consensual sex with a person older than 13 and younger than 17 when the victim is not the spouse of the offender); Va. Stat. § 18.2-371 (providing that it is a misdemeanor offense for an adult to engage in consensual sexual intercourse with a child aged 15 to 17 to whom the adult is not married). The remaining states established the age at which a person can legally consent to sexual activity with an adult at age 16 or lower. See Code of Ala. § 13A-6-70 (age of consent is 16 years old); 22 D.C. Code §§ 3008, 3009 (age of consent is 16 years old); Miss. Code Ann. § 97-3-65 (age of consent is 16 years old); N.C. Gen. Stat. § 14-27.7A (age of consent is 16 years old).

B. OIG Assessment of the FBI's Actions

Upon receipt of the e-mails, the FBI Special Agent and the Public Corruption SSA with whom she spoke acted quickly and appropriately in forwarding the information to the FBI's Crimes Against Children Squad. In turn, the SSA on that squad quickly forwarded the information to the Cyber Crimes Squad SSA, who she believed was the appropriate person to evaluate the information contained in the e-mails.

The Cyber Crimes Squad SSA made the decision not to open a criminal investigation. She said that she did not find anything in the e-mails that provided "a reasonable indication that criminal activity has occurred or will occur." The SSA also told the OIG she would not investigate any e-mail conversations between adults and minors unless the e-mails contained sexually explicit language.

While the SSA's squad has a large backlog of work, she said this did not influence her decision not to investigate the e-mails. Rather, she stated that she believed there was nothing criminal in the e-mails to investigate.

After Foley resigned and the issue of his behavior became public, the WFO ASAC who supervised the Cyber Crimes Squad told the OIG that he agreed with the SSA's decision not to investigate the e-mails or not to make any referral of the e-mails to the House authorities with responsibility for the page program. AUSA Stewart also agreed after the fact that no further investigation of the e-mails had been warranted.

It is important to note that we found no indication that the Cyber Crimes Squad SSA's decision to decline to investigate was influenced in any way by the fact that Foley was a member of Congress. Rather, the SSA said she relied on the fact that the e-mails lacked evidence of criminal activity.

Based on our review, we believe that the SSA's decision not to investigate the matter further did not constitute misconduct, and fell within the range of discretion that she was afforded in her position as an FBI supervisor.

However, notwithstanding the FBI supervisor and AUSA's opinions about actions they would have advised at the time, we believe that the e-mails provided enough troubling indications on their face, particularly given the position of trust and authority that Foley held with respect to House pages, that a better practice for the FBI would have been to take at least some follow-up steps with regard to the e-mails. Such action could have easily included a brief preliminary inquiry, with an interview of the

former page. Alternatively, if the FBI did not think that such an interview was warranted, the FBI should have considered notifying the House authorities in charge of the page program about the concerns expressed by the former page. At the least, we believe the FBI should have notified CREW, the complainant in this case, that the FBI had declined to open an investigation. At the time, CREW was relying on the FBI to pursue the matter and as a result had not notified anyone else about the e-mails.

We recognize that our assessment is made after-the-fact, when explicit instant messages and information about Foley's behavior have surfaced. However, given Foley's position of trust and authority in relation to the pages, the concern expressed by the page, and the troubling nature of the e-mails, we believe taking some action would have been the better course of action.

In making this assessment, we note that Foley's language in the e-mails fell within the type of behavior that the FBI warns against in its Parent's Guide to Internet Safety.¹⁰ Foley engaged in conversations that, at a minimum, could be described as unusual between an adult in a position of authority and a juvenile. The former page clearly was troubled by the e-mails, describing them as "sick," and stating that the e-mails "freaked him out." It also was apparent from the e-mails that Foley was engaging in a similar pattern of communication with another House page.

Had the FBI taken the initiative, it could have easily pursued some limited investigative steps. The e-mails contained the full name and e-mail addresses of the former page who received the e-mails and the House employee to whom he sent the e-mails. In addition, the FBI had the full name of another page that Foley said he was e-mailing and that Foley

¹⁰ As part of the FBI's Innocent Images National Initiative (IINI), which the FBI launched in 1995 to target child pornography and online child enticement, the FBI published *A Parent's Guide to Internet Safety* (Parent's Guide), which is available on the FBI's website. The Guide warns parents that while some offenders may use sexually explicit solicitations, other individuals who attempt to sexually exploit children through the use of the Internet begin by using more subtle tactics. As the Parent's Guide describes:

Some of these individuals gradually seduce their targets through the use of attention, affection, kindness, and even gifts. These individuals are often willing to devote considerable amounts of time, money, and energy in this process. They listen to and empathize with the problems of children. They will be aware of the latest music, hobbies, and interests of children. These individuals attempt to gradually lower children's inhibitions by slowly introducing sexual context and content into their conversations.

The Guide also warns that "[a]s part of the seduction process, it is common for offenders to send letters, photographs, and all manner of gifts to their potential victims."

allegedly “liked.” The Cyber Crimes Squad SSA acknowledged to the OIG that there was enough information in the original material she received to allow her to locate the former page who received the e-mails.

However, the Cyber Crimes Squad SSA stated in her draft chronology of events that her decision to decline to investigate was justified “especially in light of the fact the source of the e-mails was not identified.” Yet, Sloan told the OIG that she was never asked to identify the source who forwarded the e-mails to CREW. Moreover, that information was not critical, because the former page who originally received the e-mails was identified.

In addition, even if the FBI did not believe any interviews were warranted based upon the e-mails alone, we believe the FBI should have considered taking some steps to ensure that any minors in the Congressional page program were not at risk of predatory behavior by Foley. The FBI could have notified the House authorities who ran the page program about the e-mails as well as the FBI’s decision not to investigate the matter. At the least, it could have informed CREW that the FBI did not intend to investigate the matter, so that CREW could take whatever steps it deemed appropriate.¹¹

Finally, as the WFO ASAC noted, once the Cyber Crimes Squad SSA declined to investigate the e-mails, she should have entered the information into ACS. This type of data entry is particularly important regarding potential allegations of sexual activity with minors because patterns of inappropriate contact with minors may be indicative of illegal conduct.

In sum, we believe that the FBI’s decision to decline to investigate this matter was not misconduct. Yet, we believe that the e-mails should have raised enough concerns to warrant some action. At the least, the FBI should have ensured that supervisors of the House page program were aware of these e-mails, or informed the complainant that it was not going to investigate the e-mails and the complainant could therefore make such a notification. Finally, the FBI should have uploaded the information into its ACS computer system.

¹¹ We also note that, in May 2006, the Department initiated Project Safe Childhood, a program designed to protect children from sexual abuse and exploitation on the Internet. The project is led by the 94 United States Attorneys and includes the FBI. In addressing a Project Safe Childhood conference in December 2006, the Attorney General noted the critical role that citizens play in this initiative by notifying law enforcement of any suspicious behavior. He stated that “[w]e must therefore train ourselves so that no lead will ever cross the threshold of a U.S. Attorney’s Office, local police precinct or advocacy center without some kind of follow-up and action.”

V. Statements to the Media Regarding the Information CREW Provided to the FBI

In addition to reviewing the actions taken by the FBI in response to the e-mails it received from CREW in July, we reviewed the FBI's statements to the media regarding its interactions with CREW. Because of information that appeared in several media articles, CREW complained that the FBI or the Department provided the media with false information about CREW's referral of the Foley e-mails. According to some media reports, FBI or Department officials had stated to the media that CREW had provided the FBI with "heavily redacted" e-mails. According to those reports, the FBI asked CREW to go back to its source and ask for more information so it could follow up but CREW refused, which is why the FBI did nothing further at the time. Sloan alleged that these suggestions were false.

To examine this issue, we interviewed three public affairs specialists for the FBI who had spoken to the media regarding the Foley e-mails after they became public in September 2006. We also reviewed the media reports regarding this issue. For example, an October 4, 2006, article on the CBS News website stated:

The Justice Department told CBS News that in July, when Citizens for Responsibility and Ethics in Washington (CREW) provided the "innocuous" e-mails to the FBI, they were heavily redacted. . . The Justice Department also said the FBI asked CREW to go back to its source and ask for more information so it could follow up, but CREW refused. That's why the FBI, Justice said, did nothing further at the time.¹²

Other news organizations carried similar statements attributed to either Justice or FBI or law enforcement officials, such as an article in the Washington Post on October 6, which stated:

In subsequent days, unidentified Justice and FBI officials told reporters that the e-mails provided by CREW were heavily redacted and that the group refused to provide unedited versions to the FBI. One law enforcement official – speaking on the condition of anonymity to discuss an ongoing investigation – also told the Washington Post the FBI believed that CREW may have received the e-mails as early as April

¹² See Beverly Lumpkin, *Foley Probe Not a Jefferson Replay*, CBS News, Oct. 4, 2006.

and that the group refused to tell the FBI how they were obtained.¹³

We found that the statements attributed to the FBI and the Department about CREW and the Foley e-mails were not accurate. First, we found that the redactions in the e-mails, which the FBI learned soon after receiving the e-mails from CREW were in place when CREW had received copies of the e-mails, were not significant redactions. The only redactions on the e-mails appeared to be the name or e-mail address of the person or persons to whom someone had forwarded the e-mails. However, no language in the body of the e-mails was redacted. Significantly, the e-mails still contained the full names of the pages and the House employee to whom the e-mails were sent. Moreover, as we described above, the redactions in the e-mail did not factor into the FBI's decision to decline to investigate the matter.

Second, we found that the FBI did not seek any additional information from CREW, other than the one follow-up phone call the Public Corruption Squad Special Agent made to Sloan after initially receiving the e-mails. The Special Agent told the OIG that, although she is not sure, she may have asked Sloan during that call to reveal who provided the e-mails to Sloan and that Sloan declined. The Special Agent remembered that she asked Sloan other questions which Sloan answered, including whether the e-mails were from Foley, whether Sloan knew anything about the redactions, and whether Sloan knew anything about the House employee whose name was in the e-mails.

However, Sloan said the Special Agent never asked her at any time to reveal the source of the e-mails. Sloan told the OIG that the only question the Special Agent asked during this phone call was whether the e-mails were from Congressman Foley, to which Sloan said yes.

Third, the e-mails were provided to CREW in July 2006, not April, and CREW sent them to the FBI within days of receiving them.

The OIG was unable to determine from the interviews it conducted who was responsible for making these inaccurate statements to the media. The three FBI media representatives we interviewed said they do not recall making any of these statements to any reporter. However, we determined that two of the three media representatives mistakenly believed, probably based on incorrect information from the Public Corruption Special Agent, that the FBI had sought additional information from CREW and that CREW refused to provide it. This mistaken belief also was likely passed to

¹³ See Dan Eggen, *Watchdog Group Disputes FBI's Claims on E-Mails*, The Washington Post, Oct. 6, 2006.

other FBI spokespersons and Department spokespersons who discussed the Foley e-mails with the media. Thus, we believe these misunderstandings may have contributed to inaccurate information being provided to the media.

In addition, it appears that a misreading of the draft chronology of events prepared by WFO contributed to the inaccurate perception that the FBI requested additional information from CREW and CREW refused to provide it. The draft chronology stated that the Special Agent who spoke with Sloan had a “vague recollection of asking Ms. Sloan who she got the emails from and Ms. Sloan did not want to reveal her source.” The draft chronology also stated that the Cyber Crimes Squad SSA decided the investigation was not warranted “especially in light of the fact Ms. Sloan, CREW, refused to provide the identity of her source.” Whether or not Sloan declined to reveal the source who gave her the e-mails, the e-mails CREW provided contained the identity both of the former page who received the e-mails and two other potential witnesses. Further, we determined that this issue was not a factor in the FBI’s decision to decline to investigate the matter, notwithstanding the suggestion in the draft chronology.

Finally, several news stories reported the inaccurate statement that CREW had the e-mails since April. We do not know who may have supplied the media with this inaccurate information.

In sum, the OIG concluded that the information provided by the FBI and the Department inaccurately portrayed the information that CREW provided to the FBI, and inaccurately suggested that CREW’s actions were the cause of the FBI’s decision not to investigate the e-mails. We believe that the inaccuracies were caused by a misinterpretation of the description of events that was disseminated within the FBI and the Department, both verbally and through the written draft chronology of events, regarding the FBI’s actions in response to the e-mails it received in July.

APPENDIX

Redaction in original

From: Redacted by OIG

Redaction in original

Subject: Fwd: (no subject)

----- Forwarded message -----

From: Maf54@aol.com <Maf54@aol.com>

Date: Jul 29, 2005 11:00 AM

Subject: (no subject)

To: Redacted by OIG

do I have the right email

Mark Foley

9/13/2005

Redaction in original

From: Redacted by OIG

Redaction in original

Subject: e-mail 2

glad your home safe and sound...we dont go back into session until Sept 5...si its a nice long break...I
am back in Florida now...its nice here ..been raining today...it sounds like you will have some fun over
the next few weeks...how old are you now?...

9/13/2005

Redaction in original

From: Redacted by OIG

Redaction in original

Subject: e-mail 3

I am in North Carolina..and it was 100 in New Orleans...wow that's really hot...well do you miss DC...Its raining here but 68 degrees so who can argue..did you have fun at your conference...what do you want for your birthday coming up...what stuff do you like to do

9/13/2005

Redaction in original

From: Redacted by OIG

Redaction in original

Subject: e-mail 4

Redacted by OIG

I just emailed [redacted] - hes such a nice guy....acts much older than his age...and hes in really great shape....i am just finished riding my bike on a 25 mile journey now heading to the gym....whats school like for you this year?

9/13/2005

Redaction in original

From: Redacted by OIG

Redaction in original

Subject: email 5

how are you weathering the hurricane...are you safe...send me an email pic of you as well.

9/13/2005

Redaction in original

From: [Redacted by OIG]
Sent: Wednesday, August 31, 2005 11:07 PM
To: [Redacted by OIG]
Subject: Re: [Redacted by OIG]

Ok. I am forwarding them now.

Maybe it is just me being paranoid, but seriously. This freaked me out.

But do tell me what you think about it all. I have one friend thinking I am being paranoid and the other saying that she thinks it is wierd that he even asked for my e-mail, much more what he said.

On 8/31/05, [Redacted by OIG] wrote:

If you can, forward me the emails.

From: [Redacted by OIG]
Sent: Tuesday, August 30, 2005 11:12 PM
To: [Redacted by OIG]
Subject: Re: [Redacted by OIG]

Yeah. I have his personal e-mail.

What happened was I gave certain people Thank-you cards, you know? I gave Foley one because he was a really nice guy to me and all. Then, he asked me to write my e-mail on the back of his. So I was like, "sure!" because of course I had no suspicions.

... yeah [Redacted by OIG] was just another page he liked [Redacted by OIG]
[Redacted by OIG]

But that's enough about [Redacted by OIG]

10/17/2005

I could just send you the e-mails if you want.

For some reason he likes to talk about riding his bike a lot. . . I don't want to try at find meaning in that. AHH!! lol

This was the one he sent about [Redacted by OIG]

[Redacted by OIG]

"I just emailed [Redacted], hes such a nice guy....acts much older than his age...and has in really great shape....i am just finished riding my bike on a 25 mile journey now heading to the gym....whats school like for you this year?"

And this is the one about send him a pic:

"how are you weathering the hurricane...are you safe....send me an email pic of you as well...."

Sick . . .

I talked to another page that was here during the school year and first part of summer. [Redacted by OIG] (her name) said that there was a congressman that did hit on pages. She didn't know his name. . .

Foley also asked me what I wanted for my birthday coming up. I told him it was in December before when he asked. I dunno, but I don't really think it is coming up any time soon. . . it's still August.

Anyway. If you can, mention this to Rodney so he is aware. I wonder what he would do about it. And if he wants to e-mail me or call me, you can give him my info if he doesn't already have it.

Well. It's late and I have freaked out enough tonight, lol. I still haven't e-mailed him back, and I don't think I will for a while, if ever. What do you think about it all??

[Redacted by OIG]

10/17/2005

Redacted by OIG

10/17/2005