



Office of the Inspector General
United States Department of Justice

Statement of Michael E. Horowitz
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before the

U.S. Senate Committee on the Judiciary

concerning

"Whistleblower Retaliation at the FBI: Improving Protections and Oversight"

March 4, 2015

Mr. Chairman, Senator Leahy, and Members of the Committee:

Thank you for inviting me to testify today about how to improve protections for FBI whistleblowers and oversight of whistleblower retaliation matters. Whistleblowers perform an important service to their agency and the public when they come forward with information about potential wrongdoing, and they must never be subject to reprisal for doing so. We need to do all we can to foster and support a culture where Department employees are encouraged to report information they have about waste, fraud, abuse, and misconduct. In my tenure as Inspector General, I have seen first-hand how important whistleblower information is to our work. For these reasons, whistleblower rights and protections have been one of my highest priorities since becoming Inspector General in 2012.

To advance this work, we established a Whistleblower Ombudsperson Program, created at my direction shortly after my arrival as Inspector General – before such positions were required by the Whistleblower Protection Enhancement Act and going well beyond the requirements of that statute. To lead this program, I assigned a senior attorney from my Front Office staff, with whom I consult regularly regarding whistleblower issues. Our Whistleblower Ombudsperson created, with the help of Special Agent John Dodson, a video entitled “Reporting Wrongdoing: Whistleblowers and their Rights,” which discusses whistleblower rights and protections applicable to all DOJ employees, and specifically points out where the rules for FBI employees differ from those applicable to others. The OIG is working with the FBI to create a specialized training program that highlights the specific requirements and procedures for FBI whistleblowers, and we also are providing training to employees of other Department components on these issues. The OIG also has a dedicated “Whistleblower Protection” page on its website, available to FBI employees and others at <http://www.justice.gov/oig/hotline/whistleblower-protection.htm>, with a section on FBI Whistleblowers that we have enhanced to include additional links to the applicable regulation and other information specific to FBI employees. We have reached out to the whistleblower community, so that we can hear from them first-hand about issues and challenges that concern them, and to ensure that they can provide us with constructive feedback on our work. And as a result of our internal training and education efforts, in the fall of 2013, the OIG was certified by the Office of Special Counsel pursuant to Title 5, United States Code, Section 2302(c).

In addition, we helped to create and we continue to chair the government-wide working group of federal whistleblower ombudspersons established through the Council of the Inspectors General on Integrity and Efficiency. In my capacity as Chairperson of the Council of IGs, I look forward to working with my fellow Inspectors General to enhance the prominence of whistleblower protection programs across the IG community.

I am proud of these efforts, and of the tremendous dedication of the OIG staff that handles these matters and cares so deeply about them. Nevertheless, like any organization, in order to continue to improve, we need to critically assess our efforts, and improve them as necessary. The OIG has implemented several reforms recently in order to improve the effectiveness and timeliness of our handling of our responsibilities under the FBI Whistleblower Regulations. And we very much appreciate the report of the Government Accountability Office (GAO). As an independent oversight entity, the OIG fully appreciates the difficulty of the GAO's work and value of its conclusions. We have and will continue to implement reforms, in our ongoing effort to improve our work in this important area.

Overview of the FBI Whistleblower Retaliation Regulations

The protection of civilian federal whistleblowers from reprisal began with the enactment of the Civil Service Reform Act of 1978 (CSRA), and was expanded by the Whistleblower Protection Act of 1989 (WPA) and the Whistleblower Protection Enhancement Act of 2012 (WPEA). These statutes generally make it illegal for federal agency supervisors to engage in an adverse personnel action against an employee in reprisal for revealing agency misconduct. While most federal employees can challenge alleged reprisals via the Office of Special Counsel and the Merit Systems Protection Board, Congress established separate procedures for FBI employees by providing for an administrative remedy within the Department of Justice. These procedures are contained in 28 CFR Part 27, known generally as the "FBI Whistleblower Regulations."

The FBI Whistleblower Regulations prohibit Department employees from taking or failing to take, or threatening to take or fail to take any personnel action against any FBI employee as a reprisal for making a protected disclosure. The regulations define a "protected disclosure" as information that the employee reasonably believes evidences (1) a violation of law, rule, or regulation; or (2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. To be protected from being a source for reprisal under the regulations, the disclosure must be made to one or more of nine enumerated individuals or entities: the Attorney General, the Deputy Attorney General, the Director of the FBI, the Deputy Director of the FBI, the highest ranking official in any FBI field office, the OIG, the Department of Justice Office of Professional Responsibility (OPR), the FBI OPR, or the Internal Investigations Section of the FBI Inspection Division. A "personnel action" includes a decision about hiring, termination, promotion, transfer, pay or benefits, or any significant change in duties, responsibilities, or working conditions. If the complainant shows by a preponderance of the evidence that the protected disclosure was a contributing factor in the personnel action taken against him, the burden shifts to

the agency to show by clear and convincing evidence that it would have taken the personnel action in the absence of the protected disclosure.

Role of the OIG as “Conducting Office”

The FBI Whistleblower Regulations establish a two-phase procedure for addressing allegations of illegal retaliation against FBI employees: an investigation phase and an adjudication phase. Either the OIG or the Department’s OPR investigates, and the Department’s Office of Attorney Recruitment and Management (OARM) adjudicates.

The process begins when an FBI employee or applicant who believes he or she has suffered an illegal reprisal submits a complaint, which the regulation indicates should be in writing, to either the OIG or OPR. The OIG and OPR consult to determine which of them will serve as the “Conducting Office” for the investigation phase. The Conducting Office begins by analyzing the complaint to determine whether it satisfies threshold regulatory requirements, including whether the facts alleged in the complaint, if accepted as true, would meet the requirements for establishing a prohibited reprisal for making a protected disclosure. If the complaint satisfies these threshold requirements, the Conducting Office commences an investigation to determine whether there are “reasonable grounds” to determine that a reprisal has been or will be taken for a protected disclosure. The regulations allow 240 days for the completion of this investigation, which may be extended with the agreement of the complainant. The investigation typically involves collecting and analyzing relevant documents, including e-mails, and interviewing the complainant and other witnesses with knowledge of relevant facts.

At the conclusion of the investigation, the Conducting Office prepares a draft report, which is provided to the complainant for comment. If the Conducting Office finds a reasonable basis to conclude that there has been or will be a prohibited reprisal, it reports that to OARM, which is responsible for adjudicating. If the Conducting Office does not find a reasonable basis to conclude that a reprisal has occurred, the complainant may nonetheless file a request for corrective action with OARM. (Alternatively, a complainant may file a complaint with OARM at any time 120 days after the complaint was filed with the OIG or OPR, even if the Conducting Office has not yet completed its investigation. In practice, however, complainants have rarely bypassed the investigation phase in this manner.)

The adjudication phase is a more formal, adversarial process to which both the complainant and the FBI are parties, the latter represented by the FBI’s Office of General Counsel. The OIG, however, has no role in the adjudication phase or in any appeal of an OARM determination.

Data regarding FBI whistleblower retaliation cases processed by the OIG

In its capacity as the Conducting Office, the OIG has processed a total of 73 FBI whistleblower retaliation complaints that were received in the six years since January 1, 2009. Of these, the OIG closed 52 of the 73 complaints without conducting an investigation, usually because a complaint failed on its face to state a claim – which means that the facts alleged in the complaint, even if accepted as true, did not meet the regulatory requirements for establishing a prohibited reprisal. The OIG has completed investigations of 10 of the 73 complaints. With regard to 2 of the 73 complaints, the complainant withdrew the complaint before the OIG completed its investigation. And as to the remaining 9 complaints, the OIG's investigation was still underway as of December 31, 2014.

Our review of available data relating specifically to the OIG's performance of its discrete role in addressing FBI whistleblower retaliation complaints confirms that the OIG has a record of timely completion of its responsibilities. Since January 1, 2009, the median time it took for the OIG to determine that a complaint should be closed without an investigation was 23 days. The longest was 142 days. The median time for the OIG to complete an investigation (including writing a report of investigation or final termination report) was 363 days. The longest was 478 days. We are committed to continued improvement, but these numbers reflect the strong commitment of the OIG to complete its role as Conducting Office efficiently and expeditiously.

OIG efforts to improve the FBI whistleblower retaliation process

The OIG is fully committed to furthering the rights and protections of whistleblowers throughout the Department of Justice. While we have always pursued FBI whistleblower matters with the utmost dedication and commitment, we have been making important improvements to our process for handling such matters, and we will continue to make every effort to improve our processes. These improvements have grown out of our own continual self-examination of our processes and recommendations from external sources such as the GAO's recent review of the Department's handling of FBI whistleblower retaliation complaints, as well as the independent outreach we have done with leading whistleblower organizations.

Since I became Inspector General in 2012, I have given high priority and personal attention to FBI whistleblower retaliation matters. My senior staff and I are regularly and directly involved in the discussion of these matters, and I personally review and approve every declination decision, termination report, and report to OARM. I firmly believe that any additional time required by such

involvement is well spent to ensure that these important matters receive the attention and priority that they deserve.

We have determined that there are areas for potential improvement in our processing of these complaints, and we have taken concrete steps to implement such improvements. For example, we recognized that we could process initial complaints faster, by ensuring that they are transmitted to our Oversight and Review Division, which handles these matters within the OIG, more quickly for initial review, and by conducting those initial reviews within 1 or 2 days of receipt when possible. We also recognize that we can improve our compliance with the regulatory requirement to provide a written notice to the complainant within 15 days of receiving the complaint indicating that the allegation has been received and identifying a point of contact. Similarly, while our investigators regularly and routinely have communicated with complainants about the status of our investigations, such communications have most often been through telephone contacts. Accordingly, we have found room for improvement in documenting the periodic status notifications that we provide to complainants, and in documenting the agreement of complainants to extend the time for making our "reasonable grounds" determinations should investigations continue beyond 240 days, as provided in the regulations. We have used technology to assist our efforts to improve the timeliness of investigations and reports by creating a specialized Access database and SharePoint site to facilitate case tracking, and by adopting model report language to make report writing more efficient.

In addition, the OIG was an active participant in the Department's workgroup convened pursuant to Presidential Policy Directive/PPD-19, "Protecting Whistleblowers with Access to Classified Information." Among other things, PPD-19 required the Department to assess the efficacy of the FBI Whistleblower Regulations and to propose revisions to the regulations to increase their effectiveness. The Department's report, which was issued in April 2014, recommended several changes to policies and procedures to enhance the protection of FBI whistleblowers from retaliation. Among these proposals was the creation of a voluntary mediation program for FBI whistleblower cases. We believe that Alternative Dispute Resolution can focus the parties' attention at early stages of the dispute, providing a shortcut to resolution as an alternative to the sometimes lengthy and inefficient multi-phase procedures described above.

Another important change recommended by the Department was expanding the definition of persons to whom a "protected disclosure" can be made. Currently, a disclosure is protected if its content qualifies for protection and if it is made to one of the nine offices and officials designated in the FBI Whistleblower Regulations.

The Department recommended expanding this list to include the second-highest ranking official in any FBI field office (which is typically any of 2-3 Assistant Special Agents in Charge in the field office). The OIG endorses broadening the scope of the individuals to whom a protected disclosure may be made, which will provide FBI employees with a level of protection closer to that granted to most other civilian employees. In this regard, we note that a separate FBI policy, known as Policy Directive 0727, prohibits FBI supervisors from retaliating against an employee for raising a "compliance concern" to any supervisor in the employee's chain of command. This policy may offer broader protection than the FBI Whistleblower Regulations, but it is not enforceable through the procedures provided under those Regulations.

Lastly, the OIG has modified its procedures with respect to decisions not to initiate an investigation. As noted above, many complaints submitted to the OIG do not require or call for the opening of an investigation because the facts alleged in the complaint, even if accepted as true, would not be sufficient to satisfy an essential element of a retaliation claim under the regulation. The OIG has closed such complaints by means of brief declination letters, not more detailed reports. Nevertheless, in the interest of enhancing the transparency of our review process and giving whistleblowers the fullest possible opportunity to provide additional information that may be relevant to our determinations, the OIG is now providing more detailed information in our declination letters identifying the deficiencies in complaints, including identifying the specific element or elements of a claim of reprisal under the regulations that are absent and informing the employee filing the complaint that we are providing them with an opportunity to submit any additional relevant information or comment on the OIG's initial determination prior to the OIG's declination of the complaint becoming final. These changes in practice go beyond the regulatory requirements, and will help the OIG ensure that all complainants have an opportunity to provide additional information or written comments before OIG closes their complaints consistent with our desire to provide the maximum possible support for whistleblowers from the FBI and throughout the DOJ.

The GAO Report

On February 23, 2015, the GAO released a report entitled "Whistleblower Protection – Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints." The OIG reviewed a draft of the report in early January and submitted detailed comments on the report, which are attached as an Appendix to the final GAO report. We appreciate the GAO review, and believe that it made a number of useful observations regarding the procedures for resolving FBI whistleblower complaints, and recommendations for improvements with which the OIG agrees. We also share the GAO's concern about the length of the adjudicative

process, including cases such as the one involving Jane Turner, which the report notes took over 10 years from investigation to final adjudication. As we noted previously, under the regulations, our role in the Department's process concludes once we finish our investigation, and we play no role in the adjudicative phase. Thus, in the Turner case for example, the OIG completed its draft report in a timely manner, within about 10 months from receiving the complaint, while the adjudicative phase (in which we had no role to play) lasted for 9 more years.

We fully support the goal of prompt resolution of whistleblower complaints, and look forward to continuing to improve our processes and to receive ideas and suggestions from all of the stakeholders in this critical area.

Document access issues in FBI whistleblower retaliation cases

I need to discuss another development that concerns me and that is hindering the OIG's ability to complete its FBI whistleblower retaliation investigations in a timely manner: the regular practice of the FBI of reviewing documents requested by the OIG in order to permit the FBI's Office of General Counsel (OGC) to determine whether they believe that the OIG is legally entitled to access them. In the context of FBI whistleblower retaliation cases, this raises two significant concerns.

First, having the FBI review documents that the OIG has requested in order to decide what records it should provide to the OIG regarding reprisal claims made against FBI supervisors creates, at a minimum, a significant appearance of a conflict of interest. This is particularly the case in light of the FBI OGC's direct involvement in the document review, given that in any subsequent adjudication of the whistleblower retaliation complaint before OARM, the very same FBI OGC will be responsible for defending the FBI and its managers against that claim of reprisal.

Second, these document reviews can seriously delay and impair our reviews. Most recently, this occurred in two FBI whistleblower retaliation investigations that are currently underway in the OIG. The document requests in issue were sent to the FBI on September 26, 2014, and October 29, 2014, respectively. After months of delays, the FBI finally produced most of the responsive e-mails to the OIG in February 2015. A major factor in the delays was the FBI's practice of reviewing e-mails requested by the OIG to determine whether they contain any information that the FBI maintains the OIG is not legally entitled to access, such as grand jury, Title III electronic surveillance, and Fair Credit Reporting Act information. The FBI has withheld materials from the OIG in these two whistleblowers cases following such a review, pending authorization from the Attorney General or Deputy Attorney General to produce the information to the OIG. However, Section 6(a) of the IG Act clearly provides that the OIG is authorized to have access to all records available to the agency relevant to the carrying out of our responsibilities, and it

does not contain an express limitation of the OIG's access to these categories of information. Moreover, even if the Department's leadership were to authorize the FBI to give us such records, which it has consistently indicated it would do, a process allowing the OIG access to records of the Department only when granted permission by the Department's leadership is inconsistent with the OIG's independence and results in serious delays for our work.

Further, Section 218 of the Appropriations Act for Fiscal Year 2015 does not permit the use of funds appropriated to the Department to deny the OIG access to records in the custody of the Department unless in accordance with an express limitation of Section 6(a) of the IG Act. Section 6(a) does not expressly or otherwise limit the OIG's access to the categories of information that the FBI maintains it must review before providing records to the OIG. For this reason, on February 3, 2015, we reported the status of document production in these two FBI whistleblower matters to the Appropriations Committees in conformity with Section 218.

The FBI OGC's practice of delaying document productions to complete these unauthorized pre-production reviews threatens to compromise the ability of the OIG to complete its investigations within a timely fashion consistent with the FBI Whistleblower Retaliation Regulations. Department leadership chose to refer the FBI's interpretation of its OIG disclosure obligations to the Office of Legal Counsel (OLC) in May 2014. Although we were told by the Department last year that this was a priority, we are still waiting for that decision so that this unnecessary and wasteful impediment to our work can be removed, whether by OLC or otherwise. Every day that goes by without a decision results in a waste of FBI and OIG resources, in delays in the OIG uncovering waste, fraud, abuse, and mismanagement in its reviews and audits, and in harm to FBI whistleblowers who rely on the OIG to fully and fairly review their retaliation allegations in a timely manner. It is long past time to issue the OLC opinion so this dispute can finally be resolved.

Conclusion

Thank you again for the Committee's continued support for our Office and for our efforts to vigorously pursue the protection of whistleblowers, who perform an essential service to the Department and the public when they come forward with information about potential wrongdoing. I look forward to continuing to work closely with the Committee to ensure the OIG can continue to lead the effort to protect FBI and all DOJ whistleblowers from illegal retaliation. I would be pleased to answer any questions you may have.