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Office of Special Investigations

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September 6, 1996

The Honorable Charles E. Grassley
Chairman, Subcommittee on Administrative
Oversight and the Courts
Committee on the Judiciary
United States Senate

Dear Mr. Chairman:

On July 31, 1995, you expressed concern about a complaint raised by an individual, formerly with the Child Exploitation and Obscenity Section (CEOS), Criminal Division, Department of Justice, and now an Assistant U.S. Attorney in Washington, D.C. The complaint raised serious allegations about the unauthorized disclosure of the existence of a confidential informant for the Federal Bureau of Investigation (FBI) and a pattern of retaliation against the complainant for reporting the disclosure to the appropriate Justice officials. You asked us to (1) determine if credible evidence existed that anyone employed at CEOS had disclosed the existence and/or identity of a confidential informant without authorization or approval in the criminal investigation code-named Blue Darcy, (2) determine if retaliatory acts were taken against the complainant, as alleged, (3) determine whether a then Associate Attorney General or any other current or former Justice official had attempted to intervene improperly in the matter involving the complainant, and (4) identify previous Justice investigations of either the alleged leak or the alleged retaliation.

In summary, the evidence we found supported previous federal agency conclusions: We could not substantiate that any current or former Justice employee had disclosed the informant's existence or identity in the Blue Darcy investigation, and we found no evidence to support the complainant's claim of retaliation. Further, we found no evidence that the then Associate Attorney General or other Justice officials had acted improperly during the course of investigations involving the alleged leak and alleged retaliation. Those investigations were conducted by the Office of Special Counsel and by Justice's Office of Professional Responsibility (OPR) and Office of Inspector General (OIG).

BACKGROUND

In December 1991, at a Christmas party for individuals in the pornography business and their attorneys, one defense attorney was asked to address the attendees about developments in certain pornography cases, including United States v. Mary Jane Jenkins, et al. (C.A. No. H-91-50 (1992)). In his remarks, the defense attorney allegedly discussed the existence of a confidential informant in the Jenkins case and said he had gotten the information from someone in Justice's "porn unit." He also allegedly used the term "Blue Darcy," which was the FBI file name for the case. Reportedly, the informant overheard the defense attorney's statements at the party and subsequently reported them during a February 1992 debriefing attended by two FBI Special Agents and the lead Assistant U.S. Attorney prosecuting the Jenkins case.

After the debriefing, the lead Assistant U.S. Attorney relayed the information to the complainant, a line attorney assisting on Jenkins. Through the process of elimination, the two attorneys concluded that the most likely source of the defense attorney's information was an individual who was the then Deputy Director of CEOS and the complainant's supervisor. The Assistant U.S. Attorney reported their suspicions to the Deputy Assistant Attorney General, Criminal Division, who was in charge of the section in which the Deputy Director, CEOS; the complainant; and the Assistant U.S. Attorney were employed.

In July 1992, the Deputy Director, CEOS, completed a performance appraisal of the complainant that the complainant believed contained many derogatory comments about his professional performance and interpersonal behavior even though his overall rating was "excellent." The complainant subsequently met with the CEOS Director about the appraisal and was told that the Deputy Director felt it was fair and was unwilling to change it. When the complainant said he intended to grieve the matter, the Director, CEOS, agreed to review the appraisal because he was the official who would initially act on such a grievance. During the discussion, the Director questioned the complainant about why the Deputy Director might have made the derogatory comments. The complainant told the Director about the possible disclosure of the confidential informant's existence, the suspicions he and the lead Assistant U.S. Attorney had about the Deputy Director as the source of information, and his belief that those suspicions had been passed on to the Deputy.

ALLEGED DISCLOSURE OF THE EXISTENCE OF THE CONFIDENTIAL INFORMANT

The belief that someone at CEOS had disclosed the existence of a confidential informant without approval came from remarks made by a defense attorney for the pornography business at a 1991 Christmas party. When questioned, the defense attorney recalled commenting about a confidential informant in the Jenkins case. However, he denied saying he had gotten his information about the informant from someone in either the pornography unit or Justice. Although he acknowledged that he had talked with the Deputy Director of CEOS by telephone and in person about cases being handled by CEOS, he denied having received information from the Deputy Director about the confidential informant. According to the defense attorney, the defense had already concluded that there was an informant after examining documents provided by the government in accordance with the discovery process. From our discussion with the defense attorneys and review of documents provided to them, such as copies of redacted search warrants, we believe the defense attorneys could have made such a conclusion.

When we interviewed the CEOS Deputy Director, he also recalled visits in the office by the defense attorney in question and telephone conversations with him. Although the Deputy Director did not specifically recall such a conversation, he said he might have talked with the defense attorney in December 1991, depending on which matters were active in CEOS during that period. However, he denied disclosing the informant's existence to the defense attorney.

TRAVEL AUDIT AND ALLEGED RETALIATION AGAINST THE COMPLAINANT

Although the timing of a November 1992 audit of the complainant's travel vouchers, according to the complainant, suggests possible retaliation against him for reporting his suspicions about the CEOS Deputy Director to agency officials, the audit began because of questions about a duplicate travel reimbursement of approximately $2,300 to the complainant. We found no evidence of retaliation by the CEOS Deputy Director or the CEOS Director against the complainant.

Travel Voucher Audit

On August 28, 1992, about 1 month after the CEOS Deputy Director's appraisal of the complainant, the complainant's secretary faxed a memorandum from the

complainant to Justice's Accounting Operations asking that office to reissue a travel reimbursement check for $2,275 that the complainant believed he had not received. The CEOS Director had initialed the memorandum. A second check was subsequently issued to the complainant in September 1992.

Justice's Accounting Operations notified the CEOS Deputy Director[1] in October 1992 that the complainant had received and cashed two checks for the same travel reimbursement. The Deputy Director said that he told the complainant that the duplicate payment would have to be repaid. The complainant agreed and repaid it.

When the CEOS Director learned from his Deputy that the complainant had received and cashed the first reimbursement, he questioned how the complainant could not recall receiving it, given its size. The Director then asked his Deputy to review several of the complainant's travel vouchers that were awaiting approval. Because he became concerned about some items in the vouchers, the CEOS Director referred the matter to the Executive Officer, Criminal Division, in mid-November 1992.

Approximately 2 weeks later, the Executive Officer, Criminal Division, sent the complainant a letter telling him that his travel vouchers for August 2 through October 16, 1992, would be reviewed concerning several discrepancies. He asked the complainant for complete explanations of the discrepancies by December 4. The complainant's attorney subsequently contacted the Executive Officer with concerns about possible criminal liability on the part of his client and told the Executive Officer that he had advised his client not to respond until the concerns were addressed. The Executive Officer advised the attorney that the audit was strictly an administrative inquiry but that the complainant could have approximately 3 additional weeks to respond.

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[1]Finance personnel said they would have faxed the information about the duplicate payment to the complainant's secretary (since she had sent the information originally) and attempted to contact the complainant. However, the complainant was in Houston, Texas. Under such circumstances, according to the finance personnel, they probably would have attempted to contact the CEOS Director, who had initialed the memorandum. Because of the length of time that has elapsed, the finance clerk could not recall the sequence of events that led her to talk with the CEOS Deputy Director rather than the Director; but this would not have been unusual if the Director was absent or was otherwise unavailable.

On December 3, 1992, the Security Programs Manager, Office of Administration, Criminal Division, contacted the complainant concerning a delinquent student loan from Morris Brown College in Atlanta, Georgia, that had appeared on the complainant's credit report. The complainant told the manager that he had never attended that college; and a week later, the college confirmed that the report's information was in error. The credit check that revealed the erroneous delinquent loan had been obtained in mid-November by the Justice Management Division, at the request of the Deputy Executive Officer, Office of Administration, Criminal Division. According to the Deputy, the report was obtained to determine if financial need had driven the problems discovered in the travel audit.

Allegations of Reprisal Actions

On December 16, 1992, the complainant's attorney contacted Justice's OPR, alleging reprisal actions against the complainant, including the detailed audit of the complainant's travel vouchers. About 1 week later, the attorney again sought assurances from the Executive Officer, Criminal Division, that the complainant would not be criminally prosecuted. Later in December, the Executive Officer sent the Criminal Division's concerns to OPR; and the complainant's attorney sent reprisal allegations to the Office of Special Counsel and the same information to OPR.

On March 22, 1993, the Acting Assistant Attorney General, Criminal Division, sent a letter to the complainant, proposing to remove him from federal service based on the results of the travel audit. The apparent violations included misuse of a government telephone card, falsification of a travel voucher, leave abuse, unauthorized use of a government credit card, and misuse of a rental car. The following month, the complainant's attorney filed a second reprisal complaint with the Office of Special Counsel. His attorney also responded to the proposed removal by letter to the Director of Justice's Office of Attorney Personnel Management (OAPM). That letter included an explanation for many claimed expenditures. According to a Justice official, this was the first time the complainant had provided any such explanation.

The Acting Assistant Attorney General, Criminal Division, changed his proposal from removing the complainant to a 30-day suspension, which was upheld by OAPM. OAPM based its decision on what it found to be the complainant's "disturbing pattern of negligence and carelessness in handling [his] administrative responsibilities." However, Justice agreed to stay the proposed suspension, pending the conclusion of an investigation by the Office of Special Counsel. On September 10, 1993, the complainant entered into an agreement

with the Department of Justice by which he was detailed to the Office of the U.S. Attorney, Washington, D.C.

On March 8, 1994, the then Associate Attorney General, who had been asked by the complainant's attorney to review the suspension, sent the complainant a letter saying he had decided not to impose the suspension and to terminate the proceedings, given the length of time the proceedings had taken and the circumstances of the matter. However, the letter stated that the complainant would be required to repay unauthorized expenses totaling $740.93. He repaid that amount.

PREVIOUS INVESTIGATIONS

Office of Special Counsel Investigations

The complainant's attorney sent an initial complaint to the Office of Special Counsel on December 16, 1992. The complaint contended that the complainant had experienced unlawful whistleblower reprisal after reporting what he reasonably believed to be the improper and unlawful actions of his supervisor. The complaint requested that the Office of Special Counsel investigate several issues, including the circumstances surrounding the complainant's July 1992 performance appraisal. The Office of Special Counsel considered the matter and found that the only personnel action at issue (the appraisal) had already been handled because changes had been made to the appraisal. Accordingly, there was insufficient evidence of any prohibited personnel practice or other violation to warrant the office's further action. The Office of Special Counsel closed its case on January 28, 1993.

On April 15, 1993, the complainant's attorney filed another complaint with the Office of Special Counsel. That complaint alleged that the initial proposal to remove the complainant from federal service and the second proposal to suspend him for 30 days were made because he alleged to agency officials that the CEOS Deputy Director had provided information about the informant to a defense attorney for the pornography industry. The office terminated its investigation of this issue in April 1994 because it had concluded that the complainant was not the victim of reprisal for protected whistleblowing.

OPR Investigation

On December 16, 1992, the complainant's attorney complained to OPR on behalf of the complainant, alleging reprisal against him, and later provided OPR the same information he had provided to the Office of Special Counsel. The

Executive Officer, Criminal Division, also submitted the Criminal Division's concerns--about discrepancies in the complainant's travel vouchers--to OPR for investigation.

OPR found that the complainant's allegations were unsubstantiated. It was unable to conclude either that the CEOS Deputy Director had made the alleged disclosure to the defense attorney in question or that the defense attorney had made the comment about having a departmental source. Similarly, OPR found no evidence of reprisal by the CEOS Director or Deputy Director and believed the performance evaluation matter had been handled as regularly as possible under the circumstances. OPR also believed that there was sufficient justification for the travel audit.

OIG Investigation

The complainant telephoned Justice's OIG Hotline on September 1, 1993, and asked it to investigate several issues, including the release of the identity of an FBI confidential informant to a defense counsel and a violation of the Fair Credit Reporting Act by the Executive Officer, Criminal Division. Because OPR was already investigating the complainant's allegations, with the exception of the possible credit reporting violation, it was decided that the OIG would address only that issue.

Allegedly, as part of whistleblower reprisal against the complainant, the Executive Officer, Criminal Division, had improperly obtained a copy of the complainant's credit report. The OIG investigation determined that obtaining the credit report was not improper. Further, the Acting Assistant Attorney General, Criminal Division, addressed the credit report issue in his letter amending his decision to remove the complainant from federal service. The Acting Assistant Attorney General stated that the Criminal Division maintains a continuing security oversight on its employees due to the extremely sensitive and classified information that it handles. According to the Acting Assistant Attorney General, whenever there is a suspicion of activity that might affect an individual's suitability to handle such information, the Criminal Division reserves the right to take appropriate measures, including obtaining a credit report.

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During the course of our investigation from mid-1995 to June 14, 1996, we interviewed 24 current and former Justice employees, including the Director, CEOS; the Deputy Director, CEOS; the complainant; and the lead Assistant U.S.

Attorney of the Jenkins case. We also interviewed the defense attorney in question and two other defense attorneys involved with the Jenkins case. In addition, we attempted to interview two FBI agents who had been assigned to the case, but the FBI refused to make them available to us. Because of this, we relied on affidavits that the agents had furnished to the FBI and other documents in the FBI file. Further, we reviewed pertinent files from the Department of Justice and the Office of Special Counsel as well as documents from the Subcommittee and from the complainant.

As arranged with your office, unless you announce its contents earlier, we plan no further distribution of this letter until 30 days after its date. At that time, we will send copies of the letter to interested congressional committees and will make copies available to others upon request. If you have any questions concerning this information, please contact me, or Assistant Director Barney Gomez of my staff, at (202) 512-6722.

Sincerely yours,

Donald J. Wheeler

Donald J. Wheeler
Acting Director

(600394)

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