



Department of Defense **INSTRUCTION**

NUMBER 5240.04

February 2, 2009

USD(I)

SUBJECT: Counterintelligence (CI) Investigations

References: See Enclosure 1

1. **PURPOSE.** This Instruction reissues DoD Instruction (DoDI) 5240.4 (Reference (a)), implements the policy in DoD Directive (DoDD) O-5240.02 (Reference (b)), and assigns responsibilities and establishes procedures for conducting CI investigations within the Department of Defense in accordance with the authority in DoDD 5143.01 (Reference (c)).

2. **APPLICABILITY.** This Instruction:

a. Applies to OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as the "DoD Components").

b. Addresses CI investigations under the purview of the Under Secretary of Defense for Intelligence (USD(I)), but not criminal investigations of a non-CI nature.

c. Does not pertain to CI inquiries.

3. **DEFINITIONS.** Unless otherwise noted, these terms and their definitions are for the purpose of this Instruction.

a. **anomalies.** Defined in Reference (b).

b. **CI investigations.** Formal investigative activities undertaken to determine whether a particular person is acting for or on behalf of, or an event is related to, a foreign power engaged in spying or committing espionage, sabotage, treason, sedition, subversion, assassinations, or international terrorist activities, and to determine actions required to neutralize such acts.

c. DoD unknown subject. The subject of a DoD CI investigation whose identity has not been determined.

4. POLICY. It is DoD policy that CI investigations shall be conducted in accordance with Reference (b) and shall only be conducted by the Military Department CI organizations identified in the “Memorandum of Agreement Between the Attorney General and the Secretary of Defense” (Reference (d)) and the “Memorandum of Understanding Between the FBI and the Department of Defense” (Reference (e)).

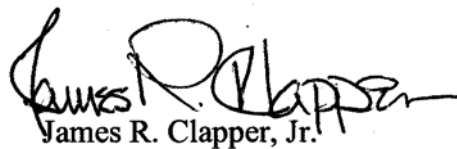
5. RESPONSIBILITIES. See Enclosure 2.

6. PROCEDURES. Enclosure 3 provides procedures for conducting CI investigations.

7. INFORMATION REQUIREMENTS. The information requirement in this Instruction is exempt from licensing in accordance with paragraphs C4.4.1., C4.4.7., and C4.4.8. of DoD 8910.1-M (Reference (f)).

8. RELEASABILITY. UNLIMITED. This Instruction is approved for public release and is available on the Internet from the DoD Directives Program Web Site at <http://www.dtic.mil/whs/directives>.

9. EFFECTIVE DATE. This Instruction is effective immediately.



James R. Clapper, Jr.
Under Secretary of Defense for Intelligence

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ENCLOSURE 1

REFERENCES

- (a) DoD Instruction 5240.4, "Reporting of Counterintelligence and Criminal Violations," September 22, 1992 (hereby canceled)
- (b) DoD Directive O-5240.02, "Counterintelligence," December 20, 2007
- (c) DoD Directive 5143.01, "Under Secretary of Defense for Intelligence (USD(I)),", November 23, 2005
- (d) Memorandum of Agreement Between the Attorney General and the Secretary of Defense, "Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the Federal Bureau of Investigation," April 5, 1979¹
- (e) Memorandum of Understanding Between the Federal Bureau of Investigation and the Department of Defense, "Coordination of Counterintelligence Matters Between FBI and DoD," June 20, 1996¹
- (f) DoD 8910.1-M, "Department of Defense Procedures for Management of Information Requirements," June 30, 1998
- (g) Deputy Secretary of Defense Directive-Type Memorandum 08-032, "Establishment of the Defense Counterintelligence and Human Intelligence Center (DCHC)," July 22, 2008
- (h) Assistant to the President for National Security Affairs Memorandum, "Early Detection of Espionage and Other Intelligence Activities Through Identification and Referral of Anomalies," August 23, 1996¹
- (i) DoD Instruction 5400.15, "Guidance on Obtaining Information from Financial Institutions," December 2, 2004
- (j) DoD Instruction 5240.6, "Counterintelligence (CI) Awareness, Briefing, and Reporting Programs," August 7, 2004
- (k) Memorandum of Understanding Between the Attorney General and the Secretary of Defense, "Reporting of Information Concerning Federal Crimes," August 1995¹
- (l) Chapter 47 of title 10, United States Code
- (m) Sections 402a(e) and 436 of title 50, United States Code
- (n) Section 533 of title 28, United States Code
- (o) DoD Instruction 5240.10, "Counterintelligence Support to the Combatant Commands and the Defense Agencies," May 14, 2004
- (p) Section 3414 of title 12, United States Code
- (q) Section 1681u of title 15, United States Code
- (r) DoD Regulation 5240.1-R, "Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons," December 1, 1982

¹ Copies may be requested from the USD(I) at USDI.Pubs@OSD.mil.

ENCLOSURE 2

RESPONSIBILITIES

1. USD(I). The USD(I), in accordance with Reference (c), shall develop, coordinate, and oversee the implementation of DoD CI investigative policy.

2. DEPUTY UNDER SECRETARY OF DEFENSE FOR HUMINT, COUNTERINTELLIGENCE, AND SECURITY (DUSD(HCI&S)). The DUSD(HCI&S), under the authority, direction, and control of the USD(I), shall:

- a. Oversee the DoD CI investigative program.
- b. Develop and recommend CI investigations policy.
- c. Participate in DoD and national-level CI investigations forums.
- d. Serve as the OSD staff point of contact for CI investigations-related issues.

e. When circumstances surrounding a CI investigation warrant, form and chair a subject matter experts board, composed of U.S. Government personnel, to review all information, make a risk versus gain determination, and provide recommendations to the USD(I) on whether to continue or terminate the investigation.

3. DIRECTOR, DEFENSE COUNTERINTELLIGENCE AND HUMAN INTELLIGENCE CENTER (DCHC). The Director, DCHC, under the authority, direction, and control of the Director, Defense Intelligence Agency (DIA), and in accordance with Deputy Secretary of Defense Directive-Type Memorandum 08-032 (Reference (g)) shall:

a. Oversee DoD-wide CI investigations and coordinate between Military Department CI organizations on those CI investigations that overlap Service boundaries to ensure all DoD equities are considered.

b. Advise the DUSD(HCI&S) and the USD(I) on all significant CI investigations.

c. Identify, monitor, evaluate, and recommend investigative actions to be taken concerning anomalies according to Assistant to the President for National Security Affairs Memorandum (Reference (h)).

d. Serve as the focal point and central repository for DoD unknown subject CI leads, reports, and information.

e. When an unknown subject lead is not DoD Component-specific:

(1) Conduct further non-investigative inquiries to determine DoD Component affiliation and then refer the investigation to the appropriate Military Department CI organization or the Federal Bureau of Investigation (FBI).

(2) Provide all original documentation, results of all inquiries, relevant files, leads, and all other relevant information to the appropriate Military Department CI organization or the FBI, as appropriate.

f. Analyze information gleaned from DoD CI investigations and report trends, anomalies, and other matters of CI interest to the DUSD(HCI&S).

g. Coordinate Defense Agency requests for review of CI referrals when the Military Department CI organization or the FBI declines to investigate.

h. Provide timely advice and recommendations to the USD(I) and other affected senior DoD officials concerning potential damage to DoD or national security that could result from the compromise of classified, sensitive, and proprietary information identified during a CI investigation.

i. Develop, provide, and validate advanced and other specialized CI investigations training, to include procedures for requesting customer and/or institution financial transaction information.

j. In accordance with DoDI 5400.15 (Reference (i)), maintain an annual tabulation of the total times access procedures for financial records are used by Military Department CI organizations using the format in the table in Enclosure 3.

k. Participate in DoD and national-level CI investigative forums.

4. HEADS OF THE DoD COMPONENTS. The Heads of the DoD Components shall:

a. Refer matters specified in Reference (b) and in DoDI 5240.6 (Reference (j)) to the organic CI organization or lead Military Department CI organization.

b. Request a USD(I) review when a Military Department CI organization or the FBI chooses not to investigate a referred CI matter and the DoD Component disagrees with that decision. Such requests shall be submitted in writing through the Director, DCHC, and the DUSD(HCI&S). CI matters the FBI chooses not to investigate may be referred to a Military Department CI organization for investigation. Every attempt shall be made to resolve these disputes at the lowest possible level.

5. SECRETARIES OF THE MILITARY DEPARTMENTS. The Secretaries of the Military Departments shall:

a. Provide for the conduct, management, coordination, and control of CI investigations within their Departments according to Reference (b), to include investigations of active and reserve military personnel, DoD civilians, and other DoD-affiliated personnel as provided for in Reference (d), Reference (e), the “Memorandum of Understanding between the Attorney General and the Secretary of Defense” (Reference (k)), and chapter 47 of title 10, United States Code (U.S.C.) (Reference (l)).

b. Designate organizations within their Departments that are authorized to conduct CI investigations.

c. Manage and oversee the use of CI resources funded for CI investigations.

d. Require the Heads of the Military Department CI organizations to:

(1) Report to the FBI those incidents meeting the criteria of section 402a(e) of title 50, U.S.C. (Reference (m)) and refer CI investigative matters to the FBI according to Reference (d), Reference (e), and section 533 of title 28, U.S.C. (Reference (n)).

(2) Provide training to personnel assigned CI investigative duties.

(3) Coordinate CI investigations overseas according to Intelligence Community Directives.

(4) Brief appropriate command officials on CI investigations that require determinations on continuing access to classified information and other personnel security actions.

(5) Within 14 days after receiving an investigative referral from a Defense Agency, respond to the referring Defense Agency with a determination to either assume or decline the investigation.

(6) Keep the Commanders of the Combatant Commands and the Directors of the Defense Agencies informed of CI investigations taking place within their respective areas of responsibility or affecting their interests and assist in periodic command briefings concerning these investigations according to DoDI 5240.10 (Reference (o)).

(7) Submit requests for financial information to support a Military Department CI investigation in accordance with the applicable provisions of Reference (i); section 3414 of title 12, U.S.C. (Reference (p)); section 1681u of title 15, U.S.C. (Reference (q)); and section 436 of Reference (m).

(8) Obtain legal reviews of requests for financial information before submission to financial institutions and obtain a legal review of financial institution responses to ensure they are within the scope of the request.

(9) Maintain an annual tabulation of the occasions in which access procedures for financial records were used and report this information to the Director, DCHC, by February 15 of each year, using the format in the table in Enclosure 3.

(10) Provide the Director, DCHC:

(a) All investigative data required to carry out his or her responsibilities as provided for in this Instruction.

(b) Copies of all unknown subject leads received from non-DoD agencies.

(c) Significant CI reporting in accordance with the requirements in Reference (b).

ENCLOSURE 3

PROCEDURES

1. CI INVESTIGATIONS

a. Investigative information pertaining to U.S. persons shall be collected, retained, and disseminated in accordance with DoD Regulation 5240.1-R (Reference (r)).

b. CI investigations shall be documented in the Portico electronic archiving system.

c. When a commander or director not assigned to a Military Department CI organization objects to the initiation of a CI investigation for operational or other reasons, efforts to resolve the basis for the objection shall be initiated at the intermediate commander or the Military Department CI supervisor level. If an objection cannot be resolved at a lower level, the basis for the objection shall immediately be reported through appropriate channels to the Secretary of the Military Department concerned.

d. Only the Secretary of a Military Department may direct a Military Department CI organization to suspend or terminate a CI investigation initiated by the CI organization. Only the USD(I) may direct a CI organization to suspend or terminate an investigation being conducted at USD(I) direction.

(1) CI Investigations Initiated by a Military Department CI Organization. When the CI organization receives a request to suspend or terminate an investigation, the Secretary of the Military Department concerned shall decide promptly whether the investigation should be discontinued. No investigation shall be suspended while this process is ongoing except by decision of the Secretary of the Military Department concerned. The Secretaries of the Military Departments shall promptly notify the USD(I) of the facts in all cases brought to them for resolution and their decision in each instance.

(2) CI Investigations Initiated by or at the Direction of the USD(I). When a CI investigation has been directed by the USD(I), the Secretary of the Military Department concerned shall promptly refer to the USD(I) any request to suspend or discontinue the investigation. The USD(I) shall make a prompt decision and inform the Secretary of the Military Department concerned.

2. INVESTIGATIVE REQUESTS FOR FINANCIAL INFORMATION ANNUAL REPORT.

By February 15 of each year, the Secretaries of the Military Departments shall report to the Director, DCHC, the total requests for financial information made in conjunction with a Military Department CI or terrorism-related investigation during the previous calendar year. They shall use the report format in the table.

Table. Annual Report Format

| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
|---|-----------------------------------|---------------------------------|-------------|----------------------------|--|---|---|
| Section 3414 of title 12, U.S.C. | Section 1681u of title 15, U.S.C. | Section 436 of title 50, U.S.C. | CI requests | Terrorism related requests | Number of investigations in which requests were issued | Number of people on whom requests were issued | Number of people on whom requests were issued who were not DoD-affiliated |
| <p>Explanation:</p> <p>Column 1: Total number of requests issued pursuant to Reference (p)</p> <p>Column 2: Total number of requests issued pursuant to Reference (q)</p> <p>Column 3: Total number of requests issued pursuant to section 436 of Reference (m)</p> <p>Column 4: Total number of CI requests from columns 1-3</p> <p>Column 5: Total number of terrorism requests from columns 1-3</p> <p>Column 6: Self-explanatory</p> <p>Column 7: Self-explanatory</p> <p>Column 8: Explain in footnotes as necessary</p> | | | | | | | |