



REDACTED REPORT



U.S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

January 29, 2013

The Honorable Carolyn N. Lerner
Special Counsel
Office of the Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

Re: OSC File No. DI-12-1761

Dear Ms. Lerner:

This letter and its enclosures further respond to your July 20, 2012 correspondence to the Attorney General to which I responded on behalf of the Department of Justice on November 26, 2012. In your correspondence to the Attorney General you reported your conclusion that there was a substantial likelihood that information provided to your office by former FBI employee Scott A. MacDonald disclosed a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, and an abuse of authority. With my November 26 letter, I enclosed a report and attachments as a summary of our investigation and findings with respect to this matter as required under 5 U.S.C. § 1213. The Attorney General delegated to me authority to review and sign the report in accordance with section 1213(d).

With this correspondence, I am submitting to you a revised report and a revised redacted report to reflect changes necessary to ensure compliance with our statutory obligation in an appropriate format that also permits publication of the redacted report by your office and disclosure of the report to Mr. MacDonald. The redactions are intended to protect law enforcement sensitive information, privacy protected information, and other confidentiality interests.

If you have any questions, please feel free to contact me at your convenience at 202-305-7848.

Sincerely,

Scott N. Schools
Associate Deputy Attorney General

Enclosures

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U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
INSPECTION DIVISION
OFFICE OF INSPECTIONS



INSPECTOR'S REPORT

A REVIEW OF FBI ELECTRONIC SURVEILLANCE AND RECORDS
MANAGEMENT PROGRAMS IN RESPONSE TO A REFERRAL BY THE U.S.
OFFICE OF SPECIAL COUNSEL

For Submission to the U.S. Office of Special Counsel
Pursuant to 5 U.S.C. § 1213

Robert S. Mueller, III
Director
Federal Bureau of Investigation

By:

Keith L. Bennett Date: 01/25/2013
Keith L. Bennett
Assistant Director
Inspection Division

&

Approved and Submitted on Behalf
of the Attorney General By:

Robert H. [Signature] Date: 1/26/13

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I. EXECUTIVE SUMMARY:

(U) On behalf of Director Robert S. Mueller, III, the Inspection Division (INSD) of the Federal Bureau of Investigation (FBI) investigated allegations made by Scott A. MacDonald, a former Supervisory Management and Program Analyst (SMAPA) with the FBI's Records Management Division (RMD). On February 18, 2012, Mr. MacDonald advised the U.S. Office of Special Counsel (OSC) of perceived violations of law, rule, regulation, gross mismanagement, gross waste of funds, and abuse of authority within the RMD. In accordance with Section 1213(c) of Title 5, United States Code, the appropriate agency head is required to conduct an investigation and prepare a report for submission to OSC. The Attorney General delegated the authority to investigate and compile a report to the FBI. Inspector Deirdre L. Fike directed the investigation for INSD.

(U) Mr. MacDonald alleged FBI management officials were deficient in three areas. First, Mr. MacDonald alleged FBI management officials did not properly manage and maintain official records, including databases used for seeking Title III wiretap warrants, because FBI employees knowingly relied on an antiquated electronic surveillance (ELSUR) database to tabulate prior wiretap records and to prepare Annual Wiretap Reports (AWRs). He alleged false information was provided to federal courts, the Drug Enforcement Administration, Congress, and the White House. Mr. MacDonald alleged erroneous data was retrieved from this database because of its poorly designed software, which only produced wiretap information from "exact match" searches. He further alleged this limitation precluded discovery of prior instances in which a wiretap was granted for the same person, or falsely indicated a person was previously monitored by a wiretap.

(U) Second, Mr. MacDonald alleged FBI management officials did not comply with National Archives and Records Administration (NARA) and FBI certification procedures for records and records storage systems by not having a system for capturing E-mails which, along with audiovisual, microfilm, and cartographic material, were not stored or maintained properly as official records.

(U) Third, Mr. MacDonald alleged FBI management officials did not allow him to audit records properly. He alleged RMD management limited the questions he could ask employees during audits about management of records systems. In his advisory role at RMD, Mr. MacDonald was responsible for streamlining the self-assessment process and ensuring self-assessment tools were user-friendly and supported by policy. During the development of a new Records Management (RM) questionnaire by his team, several topics Mr. MacDonald suggested for the questionnaire were edited as they underwent review by RMD Executive Management, leading him to believe his audit scope was limited.

(U) During the investigation, INSD examined ELSUR and RM policy, and interviewed 12 on-board and former employees from the ELSUR and RM Programs, several of them more than once.

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(U) INSD review revealed the following:

- (U) Mr. MacDonald lacked firsthand knowledge of his allegations, with the exception of scope limitation. Mr. MacDonald based his allegations regarding ELSUR deficiencies on informal conversations with other employees;
- (U) Mr. MacDonald was not in a position to know of ongoing FBI efforts to improve and modernize ELSUR records systems and records storage facilities;
- (U) Procedures and policies were in place to ensure accurate information was entered into and retrieved from new and old ELSUR databases;
- (U) The FBI conducted comprehensive, formal studies of ELSUR procedures, policies, and systems in 2001 and 2009. These studies led to the relocation of the ELSUR Program to Operational Technology Division (OTD) in 2011, and replacement of the database Mr. MacDonald alleged produced erroneous information. No evidence the FBI provided false or erroneous Title III prior application search results to courts or other entities was identified;
- (U) Mr. MacDonald did not prepare or review AWRs and was not familiar with the databases used to collect and present the data used in the reports. No evidence the FBI provided erroneous AWR information was identified;
- (U) Policies and procedures were in place to ensure retention of E-mail and other media as official records;
- (U) The FBI encountered prohibitive budgetary constraints in its attempt to construct a centralized records storage facility, and it was similarly situated with other federal agencies whose records storage facilities were not in compliance with NARA regulations, including NARA's own facilities;
- (U) Records Mr. MacDonald alleged were lost, unaccounted for, or in danger of destruction, including records of the September 11, 2001 terrorist attacks, were accounted for and safeguarded;
- (U) The action Mr. MacDonald alleged limited his audit scope occurred during the initial development stage of a proposed voluntary self-assessment form, and did not occur during an audit.

II. METHODOLOGY

(U) The investigation addressed each of Mr. MacDonald's allegations of records mismanagement, false reporting, and audit scope limitation as documented in the OSC referral letter, the OSC Form 12, and other information furnished directly by Mr. MacDonald or his witnesses.

(U) INSD examined the FBI's ELSUR and RM procedures, policies, and systems used to collect, analyze and maintain ELSUR and other FBI records. The 2001 ELSUR Indexing study and 2009 Office of Integrity and Compliance (OIC) Red Team analyses of ELSUR and Title III regulatory compliance risks served as reference materials.

(U) The review included 19 interviews of 12 on-board and former ELSUR operations technicians, programmers, and managers from RMD and OTD. Ten of the 19 interviews conducted were of witnesses recommended by Mr. MacDonald.

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(U) Forty-seven restricted ELSUR Records System (ERS)¹ files were reviewed to determine whether they contained inaccessible Title III material.

III. THE INVESTIGATION

A. Background

(U) RMD formed the Policy, Analysis and Compliance Unit (PACU) in July 2009, and created a GS-14 SMAPA position for the Compliance Team Lead. The position's duties were listed as: managerial, supervisory, and liaison responsibilities; service as an expert advisor and consultant providing oversight and advice to managers and operational personnel; and planning, research and analysis. On March 14, 2010, Mr. MacDonald was hired directly as the Compliance Team Lead, and reported to Unit Chief (UC) [REDACTED] PACU. UC [REDACTED] reported to Section Chief (SC) Debra O'Clair, Records, Policy and Analysis Section. Mr. MacDonald's first assignment was to review recommendations from the previous year's inspections and finalize a field office compliance report. After the final report was distributed, Mr. MacDonald oversaw his team's development of the electronic version of the Quality Assurance Review (QAR). The Compliance Team's focus was to revise and streamline the assessment process, and to verify whether each QAR question was policy driven. When the new QAR process was implemented, Mr. MacDonald worked with INSD to pilot the QAR project and examine the usability of the new assessment tools. Mr. MacDonald was also responsible for coordinating his team's evaluations of 26 field office ELSUR Programs with INSD.

(U) Mr. MacDonald was employed with the FBI from March 14, 2010 to March 9, 2011. On February 18, 2012, Mr. MacDonald filed whistleblower disclosures with the OSC. OSC referred Mr. MacDonald's whistleblower disclosures to the U.S. Attorney General on July 24, 2012.

(U) INSD reviewed the OSC referral letter and the OSC Form 12 provided by Mr. MacDonald to address each allegation he disclosed in his whistleblower action. The following sections address each allegation identified and the results of the INSD review.

B. The Whistleblower's Specific Allegations

a. Evidence of False Information Provided to Courts and DEA in Wiretap Applications Was Not Identified

(U) **Allegation:** Mr. MacDonald stated FBI employees provided false information to federal courts and DEA because they knowingly relied on an antiquated database used to tabulate

¹ (U) The ELSUR Records System (ERS) was an alphanumeric and numeric index maintained at FBIHQ and each FBI field office containing the true name or best known name of all persons, facilities, or places, for which a court ordered ELSUR had been sought, conducted or administered by the FBI. It also identified those persons and facilities who have been a party to a communication monitored or intercepted during the course of an FBI administered ELSUR; and those who own, lease, license, commonly use, or otherwise hold a possessory interest in property subjected to an ELSUR sought, conducted or administered by the FBI.

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prior wiretap records. He believed the discovery of these violations was serious enough to make evidence from all wiretaps in recent years inadmissible in court.

(U) **Analysis:** Section 2518(1)(e) of Title 18, United States Code, required all applications for the interception of wire, oral, or electronic communications (“Title III applications”) to contain:

a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for the authorization to intercept, or for the approval of interceptions of wire, oral or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application.

(U) Chapter III, Section 2.e. of the DOJ Office of Enforcement Operations (OEO) Electronic Surveillance Manual stated a “full and complete statement” must include:

the date, jurisdiction, and disposition of previous applications, as well as the relevance, if any, to the instant investigation. In addition to any known prior applications, the agency conducting the investigation should run an ‘ELSUR’ check of its own electronic surveillance indices, the indices of any other participating agency, and the indices of any agency which would likely have investigated the subjects in the past.

(U) Mr. MacDonald stated he was not aware of the parameters of ELSUR indices search variations followed by ELSUR Operations Technicians (EOTs). Mr. MacDonald advised he did not know whether there was a statutory minimum for how many variations in name spellings should be made in the course of an ELSUR name search, nor did he recall discussions among ELSUR personnel about this. Mr. MacDonald advised he knew only of the overall technological problems with the entry of information into ERS, and how search results varied with the experience and motivation of EOTs conducting the searches.

(U) [REDACTED] was assigned as the ELSUR Operation Unit (EOU)/Analysis Team Lead at PACU from 2008 through 2010. She described the procedure field EOTs and RMD MAPAs followed to conduct ELSUR searches. ELSUR searches were conducted in accordance with FBI’s Pre-Title III ELSUR Search Policy, documented in FBI Memorandum 1-2003, dated March 5, 2003. [REDACTED]

[REDACTED]

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September 4, 2012, OIC stated all tasks in the Mitigation Plan were completed with the exception of finalization of the ELSUR Program Guide (PG). OTD provided INSD with a draft ELSUR PG which, when approved, will bring OTD into full compliance with the Mitigation Plan.

(U) In OTD, the EOU was renamed the ELSUR Program Office (EPO), and assigned to ELSUR Program Manager (PM) [REDACTED]. In January 2012, the EDA system went online and replaced ERS. ELSUR searches conducted in EDA eliminated the need for EOTs to perform "hand searches" of wiretap applications and other resources to supplement ERS searches. The EDA system used new software integration which allowed for "round-the-clock" searches. This feature automatically searched all known name combinations and spelling variations. The EDA system also featured software that streamlined the process used to eliminate false search hits. This software automatically applied biographical data, such as dates of birth, to name search hits, and eliminated those names not matching dates of birth. EOTs and case agents had to manually compare each hit to known biographical data to eliminate false hits with the older ERS system.

(U) **Conclusion:** The former ELSUR database did have technological limitations. However, this was recognized by EOU and manual procedures were implemented to ensure deficiencies within ERS did not impact the ability to meet the statutory requirements. The new EDA system eliminated these deficiencies.

b. No Evidence Title III Information in Restricted ERS Files Withheld from "Prior Application" Searches Was Identified

(U) **Allegation:** Mr. MacDonald advised [REDACTED] told him about the ERS deficiencies he disclosed to the OSC, and that he did not have first-hand knowledge of such deficiencies. [REDACTED] was a MAPA with EOU and later with the ELSUR Operations/Analysis Unit from 2007 to 2009. [REDACTED] retired from the FBI in 2010. According to [REDACTED], Title III wiretap "prior application" searches conducted in ERS did not return complete information as there were 15 to 20 ERS files restricted for viewing only by those EOTs who requested the restrictions. As a result, it was possible the records of wiretap subjects in restricted ERS files were not identified when other EOTs subsequently conducted prior application searches for those subjects. [REDACTED] therefore advised affiants were not able to fully and completely state to the courts in which there were wiretap applications whether there were prior Title III wiretap applications for their subjects.

(U) **Analysis:** According to [REDACTED], access to certain ERS files was restricted to specific users. Only these users could determine the existence of these files, and some had been restricted and inaccessible since 1996. [REDACTED] stated the only way EOTs conducting prior application searches could gain access to information in restricted ERS files was to ask the EOTs who had restricted the files whether the information sought was in one of the restricted files. Otherwise, no information from a restricted ERS file would be identified during a search. [REDACTED] stated he believed ELSUR searches were incomplete because most field EOTs were unaware of the practice of restricting ERS files, and would not have known to ask for access to these files.

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(U) On-board ELSUR PM [REDACTED] and former ELSUR PM [REDACTED] were not aware of any "prior application" searches conducted of subjects whose files were restricted. [REDACTED] and [REDACTED] advised there were measures to mitigate such occurrences. According to [REDACTED], restricted ERS files were regularly reviewed and unrestricted as soon as the underlying need for the restriction ended. At least one EOT from field offices where files were restricted was granted access to them in the event of a subsequent subject search from one of those files. Finally, because EOU processed all requests to restrict ERS files and reviewed all Title III wiretap authorization documentation, to include ELSUR searches, it would have identified wiretap authorizations based on search results that did not include information from restricted files.

(U) Information Technology Specialist (ITS) [REDACTED] possessed the codes necessary to restrict ERS files, and was tasked with entering the restrictions into ERS. At the time of this review, ITS [REDACTED] was assigned to the Intelligence Applications Support Unit, Information Technology Services Division, and was the FBI's subject matter expert regarding ERS. Along with a software engineer contractor, ITS [REDACTED] performed all programming and updates for ERS, to include limiting access to certain ERS files. According to ITS [REDACTED], many files were restricted over the years, but it was not his job to know why. ITS [REDACTED] stated he only made the modifications necessary to restrict files upon request, and was never given any justification or predication for restricting records, and had very little interaction with field personnel. He did not know if hard copies of requests to restrict cases were kept. He was not aware of any problems caused by searches having been conducted which did not include information from the restricted files.

(U) ITS [REDACTED] provided INSD with a spreadsheet identifying 47 restricted ERS files involving 36 cases which had been intermittently restricted during the period of March 27, 1997 to March 30, 2010. A review of these files determined 43 (91%) of 47 contained restricted Consensual Monitoring or FISA information, and were not relevant to Title III prior application searches. One (25%) of the four remaining restricted files contained Title III information which was still pending and searchable in the new EDA system. INSD identified subjects in the three remaining files and duration of each restriction. The first was restricted from May 27, 1999 to March 17, 2004, the second from July 13, 2000 to March 13, 2001, and the third from July 1, 2003 to December 30, 2003. Although ERS is deactivated, INSD is researching whether there could be an electronic database re-created to conduct a "prior application" search on these three cases.

(U) **Conclusion:** Evidence of incomplete Title III searches resulting from restricted files was not identified. The majority of restricted files identified during the investigation contained Consensual Monitoring and FISA applications which were not applicable to required Title III "prior application" searches. Only three Title IIIs were restricted within ERS. Due to the procedures established for Title III application review, these restricted files would most likely have been identified during subsequent searches.

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Through interviews and review of policy and procedure, INSD determined the databases used in tabulating AWRs were unrelated to those used for ERS Title III "prior application" searches. Evidence of incomplete or inaccurate AWRs was not identified.

d. Evidence of Unreliable Data from ERS Contaminating the New EDA System Was Not Identified

(U) **Allegation:** Mr. MacDonald stated ELSUR and the Records Management Programs were in violation of unspecified federal record keeping standards due to lack of funding and competent management. Mr. MacDonald explained although ERS was replaced with EDA in January 2012, the unreliable information contained in ERS was used to populate the EDA system. As a result, the new database was also unreliable. Mr. MacDonald stated he was neither involved with, nor aware of, the efforts made or entities involved in correcting ELSUR deficiencies.

(U) **Analysis:** ██████████, Assistant Section Chief (ASC) of OTD's Data Acquisition/Intercept Section, explained the ERS replacement process. Prior to the Red Team review of ELSUR evidence issues, there was an initiative to create a replacement for ERS. Former ELSUR PM ██████████ was aware of EOU's reliance on "hand searches" of paper and scanned wiretap application documents as part of the ELSUR search process. In December 2009, she consulted with ██████████, OTD's Technical Operations Control Unit UC, about bringing the Technical Management Database (TMD) project on line. The TMD project was an OTD cost saving initiative designed to stream together multiple sources of electronic data, to include telephonic, microphone, and data intercepts. In an effort to streamline the ELSUR process, UC ██████ sought RMD's interest to include ELSUR records in the TMD. ASC ██████ stated this was the first major attempt to move the ELSUR program to OTD. Staffing concerns led RMD to table the idea at that time.

(U) The project to move ELSUR to OTD was re-initiated in October 2010 when the Red Team completed its review and began to implement the Mitigation Plan. RMD did not have the resources necessary to fulfill the Mitigation Plan's ELSUR action items, and requested the ELSUR Program be moved from RMD to another division. RMD, OTD, OIC, OGC, and RPO prepared position papers identifying the best division to relocate ELSUR. In December 2010, former Assistant Deputy Director (ADD) T.J. Harrington determined OTD was best suited to manage the ELSUR Program. In June 2011, ADD Harrington approved OTD's ELSUR Transition Plan, and in October 2011 the ELSUR Program Office began operations at OTD. OTD's Data Intercept Technology Unit added ERS functions to an existing database and in January 2012 the EDA became operational.

(U) According to ASC ██████, the ERS data entered into EDA was reliable and accurate. Two data validation contractors were hired and tasked with examining ERS data and entering it into EDA. This project consisted of two phases of activity. Contractors were tasked in phase one with familiarization with ERS, familiarization with the ERS replacement system (EDA), and familiarization with scanned and hard copies of historical wiretap application documents. The contractors' phase two tasks included comparison of existing ERS records to scanned and hard copies of documents, data entry of additional historical data not captured in ERS, data entry of

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historical data into EDA, and spot checking existing records for completeness and accuracy. In April 2011, OTD budgeted funds sufficient for the two contractors to conduct these data verification activities full-time for two years. In September 2011, the contractors commenced data familiarization and review of Title III application information as it was entered in ERS. From January 2012 forward, the contractors reviewed information as it was entered in EDA. The contractors began with current and most recent Title III applications, and worked back to "legacy," or historical applications.

(U) **Conclusion:** INSD determined the transfer of data from ERS to EDA was thorough, accurate, and inclusive of all available Title III application data. Mr. MacDonald had no involvement with the data transfer process between the systems and his allegation of erroneous data transfer was contradicted by employees engaged in the data transfer process.

e. Evidence the FBI Did Not Store Records or Certify Record Systems Properly Was Identified, But Mitigated

(U) **Allegation:** Mr. MacDonald stated the FBI failed to comply with the certification of records and storage systems, as required by unspecified NARA and FBI policy. Mr. MacDonald disclosed E-mail, audiovisual, microfilm, and cartographic materials were not maintained or stored as official records. Mr. MacDonald further stated there was no system or procedure in place to capture E-mails as official records, and they were not maintained or available for discovery, retention, or historical purpose. Mr. MacDonald also disclosed the FBI had "bulk filed" CDs in boxes of 100 or more, in violation of unspecified provisions of Sections 1236 -1238, Title 36, Code of Federal Regulations.

(U) **Analysis:** CPD 0372D, dated March 24, 2011, required E-mail be classified as record or non-record, and required record E-mails be managed in accordance with the FBI's RM Manual. Section 4.2.2.8.2 of the RM Manual required incorporation of record E-mails into FBI files. RMD provided further E-mail record management guidance in an EC dated March 16, 2012. In this EC, RMD categorized E-mail as non-record, transitory record, and non-transitory record. RMD policy required non-transitory record E-mails be uploaded in the FBI's Central Records System. When interviewed, Mr. MacDonald stated he was not aware of this policy until after it was furnished to him during discovery after his whistleblower action was filed.

(U) NARA regulations governed the physical and environmental standards for facilities in which federal records were stored. NARA also regulated the scheduling of records for destruction, or transfer from the originating agency to NARA for permanent retention. NARA did not have oversight over the custody practices of individual electronic records, such as CDs or other removable storage media, unless scheduled for destruction or transfer. Because of the volume and complexity of FBI records, NARA had more contact with the FBI than other federal agencies. NARA representatives had weekly, and at times, daily contact with RMD managers over retention scheduling. At the FBI's request, NARA reviewed Automated Case Support (ACS)⁴ electronic records in 2005 and made recommendations for improvement. In 2009, RMD

⁴ (U) ACS is the umbrella name for three primary subsystems, Investigative Case Management (ICM), Electronic Case File (ECF), and Universal Name Index (UNI). It is a suite of integrated applications that provide immediate, real time access to FBI investigative information to authorized users from any FBI location.

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and NARA began a five course training initiative to have all RMD employees certified in RM. In instances where NARA received deteriorated records from the FBI, NARA assisted the FBI in developing remedies to prevent future occurrences.

(U) SC O'Clair stated she was aware of the bulk filing of CDs. While SC O'Clair acknowledged these media were not always readily retrievable, she stated they were filed and indexed in 1A envelopes,⁵ in accordance with acceptable internal business processing methods. To make electronic media such as CDs more readily retrievable, RMD was conducting a fieldwide inventory of FBI files utilizing an application known as Total Record Information Management (TRIM)⁶. TRIM captured records only at the file level, not at the individual media level. However, "Facilitate Media Conversion" was added as a Priority Initiative to RMD's 2013 Strategy Management System. The goal of this initiative was to enable access to electronic media directly from Sentinel⁷ case files.

(U) SC O'Clair stated the Alexandria Records Center facility did not meet NARA guidelines for physical requirements such as lighting and air conditioning. There were no ELSUR records kept there. According to SC O'Clair, there was no penalty for non-compliance with NARA guidelines, and many of NARA's own facilities were not in compliance.

(U) NARA dictated the regulations for storage facilities in which the records were kept, and the FBI was responsive to NARA's facility certification process. In 2008, NARA started a federal government-wide initiative to have agencies comply with NARA's facilities certification process. NARA imposed a deadline of October 1, 2009 for compliance, but had to modify the deadline because many agencies could not meet it. NARA further accommodated agencies by allowing them to provide alternative written plans in response to non-compliance. As an alternative to bringing existing facilities into NARA compliance, the FBI provided a plan to build a Central Records Complex (CRC). This plan was initially accepted by NARA, and NARA was aware the building of this facility was slowed by funding issues. Correspondence provided by NARA addressed the unresolved funding issues, but in a February 17, 2011 memo from NARA to DOJ's OIG, NARA identified the FBI as in non-compliance with NARA records storage facility requirements.

(U) RMD Assistant Director (AD) Michelle Jupina acknowledged FBI records storage facilities were not in compliance with NARA standards, and stated construction of the CRC was RMD's top priority for FYs 2012 and 2013. Prior to FY 2012, RMD had a budget of \$200 million to fund construction of the CRC to include \$97 million in congressional funding. In FY 2012, the congressional funding was removed and a new plan was developed to reduce the scope of the CRC. Due to the loss of congressional funding, the budget for the CRC was reduced to \$110 million of the FBI's "prior funds." The FBI is continuing discussions with Congress to

⁵ (U) A 1A envelope (FD-340) is a standardized envelope containing a document or item of property that is pertinent to an investigation.

⁶ (U) TRIM is a records management application designed to track and manage transfers of closed files from field offices to RMD facilities and to the National Personnel Records Center in St. Louis, MO. It provided the capability to support the capture and protection of the data associated with the transfer of records from all field offices to custody of HQ Records Center, a NARA Federal Records Center, or other disposition.

⁷ (U) Sentinel is the FBI's electronic case management system which replaced ACS and integrated data migration of numerous legacy systems, repositories and workflows.

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authorize the expenditure for the CRC. In a letter dated November 20, 2012, the FBI notified NARA there continues to be ongoing efforts to centralize records into NARA compliant space, noting the CRC remains the FBI's highest priority facility project.

(U) **Conclusion:** The FBI was fully engaged with NARA concerning guidelines for record retention. The FBI used its current policies and procedures to manage E-mail records over which NARA did not have direct oversight. Mr. MacDonald was not in a position to assess NARA compliance of existing RMD facilities or the current budget and funding matters in support of the CRC's construction. He had no involvement with ongoing efforts to develop the CRC.

f. No Instances of Improperly Filed September 11, 2001 Terrorist Attack Evidence Were Identified

(U) **Allegation:** Mr. MacDonald stated he discovered evidence in the FBIHQ ELSUR Evidence Room, including evidence from the investigation of the September 11, 2001 terrorist attacks, which had not been filed or indexed properly.

(U) **Analysis:** FBIHQ was designated as the office of origin, rather than the historical practice of designating a field office, for certain counterterrorism investigative matters after the terrorist attacks of September 11, 2001. This led to the opening of an ELSUR evidence room on the seventh floor at FBIHQ under the supervision of former EOU UC [REDACTED]. The ELSUR room was managed by EOU EOT [REDACTED], and all evidence in this room was filed, highly organized, and closely monitored. When EOT [REDACTED] retired in 2012, the 1100 to 1200 items of evidence were transferred to the Washington Field Office because the underlying investigation had been transferred.

(U) Mr. MacDonald described how he learned of the September 11, 2001 evidence. Mr. MacDonald assisted with an evidence inventory when RMD moved evidence from a basement room to the seventh floor special file room. FBI policy required the evidence be inventoried prior to and immediately after being moved. Mr. MacDonald stated he and ELSUR PM [REDACTED] conducted both inventories with an EOT and a supervisor. The inventory involved scanning barcodes on the boxes, and also served as the official annual inventory. During this inventory, Mr. MacDonald scanned a box and noticed it was heavier than the others. The EOT told him it contained CDs or DVDs. Mr. MacDonald advised there could have been three or four boxes like this. The EOT also told Mr. MacDonald the room contained September 11, 2001-related FBIHQ evidence. Mr. MacDonald stated the EOT may not have said at that time the CDs or DVDs were related the September 11, 2001 investigation, however, he made the assumption. Mr. MacDonald stated the CDs or DVDs could have been related to the September 11, 2001 investigation, but whatever the case, they were not discoverable because they were in boxes. Mr. MacDonald stated he did not notice whether the boxes had any other labels or documentation on them as he was only looking for barcodes. Mr. MacDonald stated he did not look to see if there were any other documents on the boxes, such as 1A or 1C envelopes.⁸ Mr. MacDonald further stated his conclusion the evidence was related to the September 11, 2001

⁸ (U) A 1C envelope (FD-192a) is a standardized form used to maintain large (Bulky) non-evidentiary property seized, subpoenaed, or contributed pursuant to investigative activity.

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investigation was based on inference, as he was not looking at what cases the evidence belonged to.

(U) When interviewed, ██████████ stated she participated in the inventory, and recalled all contents of the room being scanned and accounted for. ██████████ stated she was not aware of any boxes of unindexed CDs.

(U) **Conclusion:** Mr. MacDonald made an unfounded assumption the boxes he scanned during an inventory contained evidence of the September 11, 2001 terrorist attacks. His allegation of improper evidence filing was disproved through interviews with ELSUR PM ██████████ and Mr. MacDonald.

g. No Evidence Mr. MacDonald's Audit Scope Was Improperly Limited Was Identified

(U) **Allegation:** MacDonald stated he experienced scope limitation regarding his audit of records management. This occurred when management curtailed his audit in order to avoid embarrassing RMD senior managers for their ongoing failures to properly maintain and store records and make records accessible during litigation and discovery.

(U) **Analysis:** Prior to PACU's inception in 2009, there was no compliance unit within RMD addressing the ELSUR or RM Programs. PACU's Compliance Team was formed to develop self-audit programs for ELSUR and RM Programs. Mr. MacDonald was hired in March 2010 as the Team Lead for PACU's newly established Compliance Team because, according to UC ██████████, he possessed GAO "Yellow Book" experience and had a work history with government audits. The GAO Government Auditing Standards guide was commonly referred to as the "Yellow Book" and set forth the generally accepted government auditing standards. UC ██████████ stated these qualifications were a good fit for the Compliance Team Lead position. During Mr. MacDonald's tenure, the Compliance Team had a staff of approximately 15 people tasked with preparing questionnaires for RM and ELSUR Program self-audits required by INSD. RMD management also wanted to implement a HQ-level voluntary self-audit review process because INSD did not require this process of HQ divisions. RMD took the lead on self-inspection before subjecting other HQ divisions. PACU developed a proposal for the RM Program self-audit with 25 to 30 procedural topics.

(U) PACU's Compliance Team, under Mr. MacDonald's supervision, developed these topics with input from PACU's Policy Team. The RM self-audit proposal was not policy, and was purely voluntary and proactive. Some topics were procedures recommended by NARA, while others were compiled from a patchwork of pre-existing FBI policies. RMD management reviewed the proposal and directed the removal of no more than five of the recommended topics. Various reasons were given for the removal of these topics, two of them were the RMD AD's authority as the FBI Records Officer, and the storage and security of personnel records in unit leaders' offices. RMD management removed the topic addressing one of the RMD AD's roles as FBI Records Officer because it was not a NARA requirement. The personnel records storage topic was removed because it was covered by existing HRD policy. RMD management's

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response to the proposal was unrelated to ELSUR record maintenance, however it was the sole basis for Mr. MacDonald's allegation of audit scope limitation.

(U) Mr. MacDonald advised he was otherwise not limited in other aspects of the development of the ELSUR Program self-audit review, nor was his team limited in its routine audits and oversight of field ELSUR compliance. Mr. MacDonald's direct audit experience, while with the FBI, was limited to two instances in which he traveled to the field during audits. In both instances, Mr. MacDonald accompanied more experienced ELSUR staff members to observe the pilot of the new self-audit process.

(U) Mr. MacDonald's primary duty was to oversee the conversion of the QAR self-assessment from a paper spreadsheet to an electronic form. Mr. MacDonald stated his understanding of his job was to ensure the compliance process had a formal structure and basis in the Yellow Book, and to ensure the process was effective. The focus of his unit was to manage and repair the next two year cycle for upcoming QARs. The QAR had been in use prior to Mr. MacDonald's tenure at the FBI, and he only assisted in developing additional questions for the electronic version.

(U) **Conclusion:** Mr. MacDonald had no direct audit responsibilities during his employment with the FBI. The matter he identified as scope limitation was the creation of a draft proposed questionnaire submitted through his chain of command for review. Topics were removed from the draft during the review process as they were found to be redundant with existing policy.

h. Evidence of Historical ERS Files At Risk of Destruction Was Not Identified

(U) **Allegation:** Mr. MacDonald advised five to seven boxes in the custody of ELSUR PM [REDACTED] contained documents which described the failures of ERS. Mr. MacDonald stated these documents had not been reviewed or catalogued, and feared they would be destroyed to cover up the failure of ERS to return accurate information.

(U) **Analysis:** Mr. MacDonald stated there were five to seven boxes of documents which had been stored under a desk in the RMD Winchester facility. Mr. MacDonald further stated he never reviewed the materials in these boxes, but believed one of them contained a "white paper" addressing ERS failures written by [REDACTED]. Mr. MacDonald stated PM [REDACTED] would know the location of these boxes.

(U) According to PM [REDACTED], there were seven boxes which contained historical ELSUR documents, referred to as the "[REDACTED] file," which had been reviewed, cataloged in date order, and safeguarded in OTD file cabinets. These documents consisted of notes, journals, and working copies of documents prepared and maintained by retired ELSUR PM [REDACTED]. They were not considered part of the ELSUR case file, and although preserved, had not been scanned. Some documents in the "[REDACTED] file" described efforts to better manage the ELSUR program dating back to the 1980s. These proposals were never acted upon because the ELSUR program encompassed many technical and legal issues beyond the scope of records management.

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During her interview with INSD, PM ██████████ made the contents of these seven boxes available for review.

(U) **Conclusion:** ELSUR PM ██████████ fully refuted this allegation as the files identified by Mr. MacDonald were reviewed, catalogued, and maintained by OTD. The files were made available to INSD for review.

IV. OBSERVATION & RECOMMENDATION

(U) **INSD Observation:** The FBI did not comply with NARA records storage facility certification requirements.

(U) **Analysis:** NARA regulations codified in 36 C.F.R. Part 1228, subpart K specified the facility standards and approval standards applicable to all federal records storage facilities. Although NARA imposed a 10/01/2009 deadline for compliance with this statute, NARA allowed agencies to provide alternative written plans in response to non-compliance. The FBI opted for this alternative and provided a plan to build the CRC.

(U) INSD interview of NARA Appraisal Archivist ██████████, and review of documents ██████████ provided, indicated the FBI was aware it did not comply with statutory storage facility standards. NARA advised in a February 17, 2011 letter to DOJ's OIG the five FBI records storage facilities did not meet NARA standards and establishment of the CRC remained unfunded and unscheduled.

(U) **Recommendation:** AD, RMD should further collaborate with NARA to develop and document plans for a new CRC or develop and document plans to upgrade existing records storage facilities which meet NARA certification standards.

V. CONCLUSION

(U) Mr. MacDonald raised valid points concerning perceived deficiencies in the ELSUR Program, however, his position and limited tenure did not allow him to know the extent of ongoing corrective actions being taken by the FBI. Prior to Mr. MacDonald's allegations, the FBI recognized deficiencies in the ELSUR Program, specifically ERS, and took corrective actions with ELSUR recordkeeping and data retrieval functions. With OIC's oversight and coordination, a thorough review of the ELSUR Program was conducted by a Red Team. The Red Team identified risks created by the existence of several ELSUR and Title III compliance policies, as well as fragmented training, monitoring and auditing. The Red Team assigned the consolidation of policy as a top priority in the Mitigation Plan. This effort also facilitated the relocation of the ELSUR Program to OTD, and the replacement of ERS with the EDA system. EDA provided enhanced record input and retrieval features. Although ERS was functional and reliable, EDA's automated search capabilities eliminated reliance on "hand searches," streamlined indexing, and accelerated search turnaround time.

(U) The relocation of the ELSUR Program from RMD to OTD and the establishment of the EPO corrected the issues of fragmented ELSUR management, procedures, and training. A

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comprehensive ELSUR Program Office Policy Guide was drafted and submitted to the FBI's Corporate Policy Office for approval.

(U) The FBI also recognized deficiencies in compliance with NARA records storage facility certification guidelines. Mitigation efforts have been slowed, but once budgetary constraints and GSA regulatory requirements are addressed, the construction of the CRC would bring the FBI into compliance.

(U) Mr. MacDonald's official job description, as well as his account of his job responsibilities, was to manage the newly formed Compliance Team within the PACU. While the Compliance Team's mission was to prepare and oversee QARs, the instance in which alleged scope limitation occurred was not an audit. The removal of questions from the proposed Records Management self-audit questionnaire occurred during an early planning phase. Further, these questions were removed to avoid redundancy with existing policy. No limitations on Mr. MacDonald's role and responsibilities were identified as stated in his job description and by his chain of command. His allegation of audit scope limitation as stated in the OSC referral letter was not substantiated.

(U) Finally, no evidence of mismanagement of historical ELSUR documents or records of the September 11, 2001 terrorist attack investigation was identified. The seven boxes of ELSUR documents were accounted for and were safeguarded. The bulk storage of CDs in boxes and of other electronic media did not violate FBI or NARA policy.

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