



U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

September 15, 2020

Austin R. Evers
Executive Director
American Oversight
foia@americanoversight.org

**Re: FOIA Tracking No. FY19-211;
American Oversight v. Dep't of Justice, D.D.C. No. 19-cv-3540**

Dear Mr. Evers:

This letter responds to your September 4, 2019 Freedom of Information Act ("FOIA") request to the Office of Legal Counsel ("OLC") and others seeking "email communications . . . sent by the [listed] officials . . . containing any of the [listed] key terms." As you know, the request was assigned the tracking number FY19-211, is also the subject of the above-captioned litigation, and has been narrowed in certain ways by negotiation through counsel.

OLC has completed a search of its records and OLC has completed processing the remaining responsive records. Since the last letter in this matter, OLC has processed 18 records totaling 37 pages.

We have enclosed all 18 records with some material redacted pursuant to FOIA Exemptions Three, Five, and/or Six, 5 U.S.C. § 552(b)(3), (5), (6). The material subject to Exemption Three is specifically exempted from disclosure by 50 U.S.C. § 3024(m)(1), which protects, among other things, the names and identifying information of personnel of the Office of the Director of National Intelligence. Exemption Five exempts material protected by the attorney-client, deliberative process, and presidential communications privileges, as well as the attorney work product doctrine and other privileges. Exemption Six exempts material the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. We have determined that none of the withheld material is appropriate for discretionary release.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

Your counsel may contact Andrew Freidah of the Civil Division, Federal Programs Branch, at 202-305-0879 or at andrew.f.freidah@usdoj.gov, to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services

("OGIS") at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Although your request is the subject of ongoing litigation, and administrative appeals are not ordinarily acted upon in such situations, I am required by statute and regulation to inform you of your right to file an administrative appeal. You may administratively appeal by writing to the Director, Office of Information Policy ("OIP"), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIA STAR portal by creating an account following the instructions on OIP's website: <https://www.justice.gov/oip/submit-and-track-request-or-appeal>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,


for Paul P. Colborn
Special Counsel

Enclosures

cc: Andrew Freidah, Trial Attorney
Civil Division, Federal Programs Branch

Daniel McGrath, Counsel
American Oversight

Engel, Steven A. (OLC)

From: Engel, Steven A. (OLC)
Sent: Thursday, September 26, 2019 10:11 AM
To: Eisenberg, John A. EOP/WHO
Subject: FW: OLC Opinion
Attachments: Urgent Concern Op (Sept 3 declassified).pdf

From: Gannon, Curtis E. (OLC) <(b) (6)>
Sent: Thursday, September 26, 2019 9:26 AM
To: Engel, Steven A. (OLC) <(b) (6)> Whitaker, Henry C. (OLC) <(b) (6)>
Subject: RE: OLC Opinion

Here's a scan of what Brad sent. Nothing remains classified. On JWICS, Steve has asked ODNI to send us the Word version, with classification markings removed, on the low side.

From: Engel, Steven A. (OLC) <(b) (6)>
Sent: Thursday, September 26, 2019 8:37 AM
To: Gannon, Curtis E. (OLC) <(b) (6)> Whitaker, Henry C. (OLC) <(b) (6)>
Subject: RE: OLC Opinion

Right.

From: Gannon, Curtis E. (OLC) <(b) (6)>
Sent: Thursday, September 26, 2019 8:35 AM
To: Whitaker, Henry C. (OLC) <(b) (6)>; Engel, Steven A. (OLC) <(b) (6)>
Subject: RE: OLC Opinion

But only if it's completely declassified. Brad's email doesn't quite say that, though it may well be what they sent.

From: Whitaker, Henry C. (OLC) <(b) (6)>
Sent: Thursday, September 26, 2019 7:43 AM
To: Engel, Steven A. (OLC) <(b) (6)>
Cc: Gannon, Curtis E. (OLC) <(b) (6)>
Subject: Re: OLC Opinion

I know that NSC can send the electrons to the low side, even if our people somehow cannot.

On Sep 26, 2019, at 7:32 AM, Engel, Steven A. (OLC) <(b) (6)> wrote:

Sent from my iPhone

Begin forwarded message:

Begin forwarded message:

From: Bradley A Brooker <(b) (3), (b) (6)>
Date: September 26, 2019 at 6:41:33 AM EDT
To: "'Engel, Steven A. (OLC)'" <(b) (6)>, (b) (3), (b) (6) - Jason Klitenic
Subject: RE: OLC Opinion

Steve –

Good morning. Our classification experts re-reviewed the original OLC opinion in light of the public releases. I sent a properly classified version to you on the other system for any action you want to take as discussed below.

Thanks,
Brad

From: Engel, Steven A. (OLC) <(b) (6)>
Sent: Wednesday, September 25, 2019 1:31 PM
To: (b) (3), (b) (6) - Jason Klitenic
Cc: Bradley A Brooker <(b) (3), (b) (6)>
Subject: RE: OLC Opinion

Thanks. Will go review shortly.

Once we have the opinion declassified, we can certainly post it. There will be certain logistical issues, since the electrons for the classified version exist on the high side. But I assume that we can get over those.

From: (b) (3), (b) (6) - Jason Klitenic
Sent: Wednesday, September 25, 2019 1:26 PM
To: Engel, Steven A. (OLC) <(b) (6)>
Cc: Bradley A Brooker <(b) (3), (b) (6)>
Subject: OLC Opinion

Steve, I just sent you the Q&A via the other system. Also, although we are still confirming, it looks like the original OLC opinion will not have any classified information in it – given the information is derived from the soon-to-be declassified complaint and ICIG transmittal letter. We assume OLC will post/publish this original soon-to-be declassified version of the opinion but please let us know if we are off base.

Jason Klitenic
General Counsel
Office of the Director of National Intelligence

(b) (3), (b) (6)
(b) (3), (b) (6)

Engel, Steven A. (OLC)

From: Engel, Steven A. (OLC)
Sent: Friday, September 27, 2019 11:10 AM
To: Bradley A Brooker; Whitaker, Henry C. (OLC); Gannon, Curtis E. (OLC)
Cc: (b) (3), (b) (6) - Jason Klitenic
Subject: RE: Declassified Opinion

Thanks.

From: Bradley A Brooker <(b) (3), (b) (6)>
Sent: Friday, September 27, 2019 11:08 AM
To: Engel, Steven A. (OLC) <(b) (6)>; Whitaker, Henry C. (OLC) <(b) (6)>; Gannon, Curtis E. (OLC) <(b) (6)>
Cc: (b) (3), (b) (6) - Jason Klitenic
Subject: RE: Declassified Opinion

Agreed on all counts. Our classification folks are producing a properly marked version of the letter, but that will not be ready until mid-afternoon. To avoid any classification concerns while that happens, and to allow you to work this on the low side, I would suggest that (at least for your draft response) you simply drop a footnote citing to the unclassified version of the complaint and transmittal letter for any statement you want to make about the allegations.

From: Engel, Steven A. (OLC) <(b) (6)>
Sent: Friday, September 27, 2019 11:03 AM
To: Bradley A Brooker <(b) (3), (b) (6)>; Whitaker, Henry C. (OLC) <(b) (6)>; Gannon, Curtis E. (OLC) <(b) (6)>
Cc: (b) (3), (b) (6) - Jason Klitenic
Subject: RE: Declassified Opinion

Correction: footnote 12 is also marked classified. But the subject of that footnote has also been publicly released.

From: Engel, Steven A. (OLC)
Sent: Friday, September 27, 2019 10:51 AM
To: Bradley A Brooker <(b) (3), (b) (6)>; Whitaker, Henry C. (OLC) <(b) (6)>; Gannon, Curtis E. (OLC) <(b) (6)>
Cc: (b) (3), (b) (6) - Jason Klitenic
Subject: RE: Declassified Opinion

The ICIG marked only two paragraphs as classified, and both paragraphs simply concerned the allegations related to the contents of the President's call with President Zelenskyy. Please review and confirm the same. thanks!

From: Bradley A Brooker <(b) (3), (b) (6)>
Sent: Friday, September 27, 2019 9:48 AM
To: Whitaker, Henry C. (OLC) <(b) (6)>; Engel, Steven A. (OLC) <(b) (6)>; Gannon, Curtis E. (OLC) <(b) (6)>
Cc: (b) (3), (b) (6) - Jason Klitenic

Cc: (b) (3), (b) (6) - Jason Klitenic
Subject: RE: Declassified Opinion

I am not aware of the ICIG requesting a review of that document. Will ask.

From: Whitaker, Henry C. (OLC) <(b) (6)>
Sent: Friday, September 27, 2019 9:46 AM
To: Engel, Steven A. (OLC) <(b) (6)> Bradley A Brooker <(b) (3), (b) (6)>
Gannon, Curtis E. (OLC) <(b) (6)>
Cc: (b) (3), (b) (6) - Jason Klitenic
Subject: RE: Declassified Opinion

Is the IC IG's letter to OLC declassified as well? It would be good to have that on the low side too, if we can.

Henry

From: Engel, Steven A. (OLC) <(b) (6)>
Sent: Friday, September 27, 2019 9:44 AM
To: Bradley A Brooker <(b) (3), (b) (6)> Gannon, Curtis E. (OLC) <(b) (6)>
Whitaker, Henry C. (OLC) <(b) (6)>
Cc: (b) (3), (b) (6) - Jason Klitenic
Subject: RE: Declassified Opinion

Thanks!

From: Bradley A Brooker <(b) (3), (b) (6)>
Sent: Friday, September 27, 2019 9:40 AM
To: Engel, Steven A. (OLC) <(b) (6)> Gannon, Curtis E. (OLC) <(b) (6)>
Whitaker, Henry C. (OLC) <(b) (6)>
Cc: (b) (3), (b) (6) - Jason Klitenic
Subject: Declassified Opinion

Please see attached. Thanks, Brad

Engel, Steven A. (OLC)

From: Engel, Steven A. (OLC)
Sent: Friday, September 27, 2019 12:37 PM
To: Whitaker, Henry C. (OLC); Gannon, Curtis E. (OLC); Colborn, Paul P (OLC);
(b) (6) (OLC)
Subject: RE: Draft letter
Attachments: Letter Response to Bakaj 9 27 19 + olc.doc

Here are my edits. henry, let me know if you want to fold some on mine (although they may moot yours). Likewise, Curtis.

From: Whitaker, Henry C. (OLC) <(b) (6)>
Sent: Friday, September 27, 2019 12:23 PM
To: Engel, Steven A. (OLC) <(b) (6)> Gannon, Curtis E. (OLC) <(b) (6)>
Colborn, Paul P (OLC) <(b) (6)> (b) (6) (OLC) <(b) (6)>
Subject: RE: Draft letter

OLC only.

Here are my suggestions.

From: (b) (3), (b) (6) - Jason Klitenic
Sent: Friday, September 27, 2019 12:02 PM
To: Engel, Steven A. (OLC) <(b) (6)> Whitaker, Henry C. (OLC)
<(b) (6)>; Gannon, Curtis E. (OLC) <(b) (6)>
Cc: Bradley A Brooker <(b) (3), (b) (6)>
Subject: Draft letter

Welcome and would greatly appreciate your input on (b) (5) – or anything else.

Jason Klitenic
General Counsel
Office of the Director of National Intelligence

(b) (3), (b) (6)
(b) (3), (b) (6)

From: Engel, Steven A. (OLC) <(b) (6)>
Sent: Friday, September 27, 2019 11:10 AM

duplicate

duplicate

(b) (6)

duplicate

(b) (6)

(b) (6)

(b) (6)

Engel, Steven A. (OLC)

From: Engel, Steven A. (OLC)
Sent: Friday, September 27, 2019 7:33 PM
To: (b) (3), (b) (6) - Jason Klitenic; Gannon, Curtis E. (OLC)
Cc: Bradley A Brooker; Whitaker, Henry C. (OLC)
Subject: RE: Draft letter

Makes sense. Have a good weekend. Steve

From: (b) (3), (b) (6) - Jason Klitenic
Sent: Friday, September 27, 2019 7:25 PM
To: Gannon, Curtis E. (OLC) <(b) (6)>
Cc: Bradley A Brooker <(b) (3), (b) (6)>; Engel, Steven A. (OLC) <(b) (6)>
Whitaker, Henry C. (OLC) <(b) (6)>
Subject: Re: Draft letter

Thank you again for help. Also just clarified for whistleblower's counsel that because we are authorizing whistleblower to speak to Congress the protections apply to those communications as well - so long as disclosure to Congress is consistent with described scope (complaint allegations) and security procedures (cleared individuals/secure facility).

From: "Gannon, Curtis E. (OLC)" <(b) (6)>
Date: Friday, September 27, 2019 at 1:26:22 PM
To: (b) (3), (b) (6) - Jason Klitenic
Cc: "Bradley A Brooker" <(b) (3), (b) (6)>, "Engel, Steven A. (OLC)" <(b) (6)>, "Whitaker, Henry C. (OLC)" <(b) (6)>
Subject: RE: Draft letter

Thanks, Jason. Here are some suggestions from OLC.

Curtis

From: (b) (3), (b) (6) - Jason Klitenic
Sent: Friday, September 27, 2019 12:02 PM

duplicate

duplicate

duplicate

(b) (6)

(b) (6)

(b) (6)

(b) (6)

Engel, Steven A. (OLC)

From: Engel, Steven A. (OLC)
Sent: Thursday, October 24, 2019 8:09 PM
To: Jason Klitenic (b) (3), (b) (6); Bradley A Brooker
Cc: Whitaker, Henry C. (OLC); Gannon, Curtis E. (OLC) (b) (6)
Subject: OLC response to IGs
Attachments: Draft Response to ICIG and CIGIE 10-24-19.docx; IC IG Letter to OLC.pdf; OLC Whistleblower Opinion_October 22 2019 FINAL v4_PDF.PDF

Attached is our draft response to the ICIG and to CIGIE. I'm also attaching the ICIG and CIGIE letters.

Please let us know if you have comments. (b) (5)

[REDACTED]

Steve

Steven A. Engel
Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Office: (b) (6)
(b) (6)



Council of the
INSPECTORS GENERAL
on INTEGRITY and EFFICIENCY

October 22, 2019

Honorable Steven A. Engel
Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Dear Assistant Attorney General Engel:

Thank you for your interest in the views of the Inspector General community on the concerns raised by the Inspector General of the Intelligence Community (ICIG) in response to the Office of Legal Counsel's (OLC) September 3, 2019 Memorandum for the Office of the Director of National Intelligence (ODNI). That memorandum effectively overruled the determination by the ICIG regarding an "urgent concern" complaint under the Intelligence Community Whistleblower Protection Act (ICWPA) that the ICIG concluded appeared credible and therefore needed to be transmitted to Congress. This letter from the Council of the Inspectors General on Integrity and Efficiency, on behalf of the undersigned federal Inspectors General (IG), expresses our support for the position advanced by the ICIG and our concern that the OLC opinion, if not withdrawn or modified, could seriously undermine the critical role whistleblowers play in coming forward to report waste, fraud, abuse, and misconduct across the federal government. Further, as addressed in detail below, OLC's interpretation regarding the ICWPA procedure in question, which mirrors the procedure that Congress included in Section 5(d) of the Inspector General Act of 1978 (IG Act), has the potential to undermine IG independence across the federal government.

As an initial matter, we find the arguments and concerns raised by the ICIG in his September 17, 2019 response to the OLC memorandum compelling. OLC concluded that the foreign election interference alleged by the whistleblower was not an "urgent concern" within the meaning of the ICWPA because it did not concern "the funding, administration, or operation of an intelligence activity" under the authority of the DNI. In his response, by describing and citing to the DNI's relevant legal authorities, the ICIG showed that the DNI has a broad legal mandate to address intelligence matters related to national security, as well as the specific responsibility to assess instances of possible foreign interference in United States elections and identify, to the maximum extent possible, the methods used and persons and foreign governments involved in the interference. These responsibilities support the ICIG's conclusion that the protection of federal elections from foreign interference is squarely within the DNI's "operations". The legal authorities cited in his letter also support the ICIG's determination that the whistleblower raised a claim of a serious or flagrant problem that relates to an intelligence activity within the DNI's jurisdiction. It surely cannot be the case that the DNI has responsibilities related to

foreign election interference but is prohibited from reviewing the cause of any such alleged interference.¹

We further note that the DNI has jurisdiction over the handling of classified and other sensitive information. As a result, the whistleblower's allegation that certain officials may have misused an intelligence system also raises an additional claim of a serious or flagrant problem that relates to the operations of the DNI and therefore may properly be considered an urgent concern under the statute.²

The OLC memorandum also confuses whether the ICIG has jurisdiction to investigate alleged foreign interference with U.S. elections with the question of whether the DNI has the responsibility to address that issue. The ICIG determined that the whistleblower complaint relates to intelligence activities subject to the DNI's responsibility and authority, and the ICIG is responsible, under the ICWPA, for making an independent judgment as to what disclosures represent an "urgent concern" related to DNI's jurisdiction. The two cases cited in the OLC opinion, which narrowly question an IG's authority to conduct specific regulatory compliance investigations on behalf of its establishment agency, are distinguishable from the ICIG's ability to accept, review, and transmit whistleblower allegations related to DNI responsibilities.³ They do not undermine the responsibility, under the ICWPA, for the DNI to transmit to Congress what the ICIG determined to be an urgent concern related to the DNI's jurisdiction.

We also share the ICIG's concern that the OLC opinion could seriously impair whistleblowing and deter individuals in the intelligence community and throughout the government from reporting government waste, fraud, abuse, and misconduct. Whistleblowers play an essential public service in coming forward with such information, and they should never suffer reprisal or

¹ The fact that other parts of the government, such as the Federal Bureau of Investigation and the Department of Justice, also have responsibilities in this area does not divest the DNI of such duties as a matter of law or practice. The ICWPA does not require that the activity that is the subject of an urgent concern be exclusively within the purview of the DNI, but only that it is "relating" to such operations,

² The suggestion in the OLC memorandum that the jurisdiction of the DNI, or any federal agency head, is limited to the conduct of their own employees is not correct as a matter of law or practice. In this example, the misuse of federal intelligence systems within the oversight of the DNI, by whomever it may allegedly have been done, would relate to the administration or operation of an intelligence operation or activity within the responsibility of the DNI and, therefore, properly be the subject of an urgent concern.

³ Courts have routinely denied challenges raised by regulated entities to OIG jurisdiction, including challenges relying on the notion that OIGs cannot be involved in a "routine agency investigation". *See, e.g. Univ. of Med. & Dentistry of New Jersey v. Corrigan*, 347 F.3d 57, 66 (3d Cir. 2003) ("[W]e see no basis for concluding that the inspector general's authority cannot overlap with that of the department. As the Court of Appeals for the Fifth Circuit stated, 'Section 9(a)(2) prohibits the transfer of 'program operating responsibilities,' and not the duplication of functions or the copying of techniques.'" (internal citation omitted)); *Adair v. Rose Law Firm*, 867 F. Supp. 111, 1117 (D.D.C. 1994) ("*Burlington Northern* imposed limits on the authority of Inspectors General that do not appear on the face of the statute or in its legislative history."). The OLC opinion suggests a clear delineation, when none exists, between what an OIG may not investigate (a "routine agency investigation") and what it may ("an investigation relating to abuse and mismanagement in the administration" of the programs and operations of the agencies subject to OIG oversight).

even the threat of reprisal for doing so. For over 40 years, since enactment of the Inspector General Act in 1978, the IG community has relied on whistleblowers, and the information they provide, to conduct non-partisan, independent oversight of the federal government. Because the effectiveness of our oversight work depends on the willingness of government employees, contractors, and grantees to come forward to us with their concerns about waste, fraud, abuse, and misconduct within government, those individuals must be protected from reprisal. Indeed, just three months ago, in July 2019, the Council of the Inspectors General on Integrity and Efficiency released a [report](#) that highlights the many contributions whistleblowers have made to uncovering waste and abuse in federal agencies. We agree with Senator Charles Grassley, Chairman and co-founder of the U.S. Senate’s Whistleblower Caucus, who noted recently regarding this matter, that whistleblowers “ought to be heard out and protected” and “we should always work to respect whistleblowers’ requests for confidentiality.” Similarly, Senator Mark Warner, Vice Chairman of the Senate Select Committee on Intelligence, noted that intelligence community leaders have a responsibility to protect any “individual within the intelligence community who steps forward to lawfully report illegal or unethical behavior within the federal government.”

Given the nature of the information handled within the intelligence community, Congress passed the ICWPA to ensure that employees and contractors in that community have a safe, lawful channel to disclose classified information to Congress that evidences alleged wrongdoing without fear of reprisal. As Congress has done in every other whistleblower law passed since 1978, it entrusted IGs to play a central role in the evaluation of the information provided. Specifically, the ICWPA requires an IG to make within 14 days a factual determination as to whether an alleged urgent concern provided to the IG “appears credible.” If the IG determines that the allegation appears credible, which necessarily includes a determination by the IG that it involves an “urgent concern,” the IG is required to forward the allegation to the head of the agency and the agency head “shall” forward it to Congress within 7 days “with any comments.” The ICWPA’s use of the word “shall” makes it clear that the statute does not authorize the agency head, or any other party for that matter, to review or second-guess an IG’s good faith determination that a complaint meets the ICWPA’s statutory language. Indeed, an earlier Senate version of the ICWPA would have authorized Intelligence Community employees to report urgent concerns directly to Congressional committees of jurisdiction. However, in response to Executive Branch constitutional concerns, Congress ultimately created the current procedure by which IGs would be entrusted with the assessment of the urgent concern and would trigger production to Congress if the IG determined that the allegation “appears credible.”⁴

This ICWPA procedure, which Congress created in 1998, mirrors the procedure that Congress included in Section 5(d) of the IG Act. Under that provision, when an IG identifies “particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs

⁴ The additional Executive Branch role under the ICWPA was added to protect potentially highly classified information. For example, for highly classified intelligence information or activities, notification could be restricted to the chair and ranking members of the appropriate committees and chambers of Congress.

and operations” of the agency, the IG must notify the agency head in writing of such matters. Section 5(d) requires that the agency head, within 7 days of receipt of the letter, “shall” transmit the IG’s written concerns to Congress along with “any comments [the agency head] deems appropriate.” It would be wholly inconsistent with the IG Act, and undermine IG independence, if the agency head – instead of forwarding the IG’s concerns to Congress as the law requires – sought OLC’s advice so that OLC could consider, and then potentially second-guess, the IG’s determination (a) that the problem, abuse, or deficiency was a “serious” or “flagrant” one, or (b) that it related to the administration of agency programs and operations.

In this matter, OLC did not find that production to Congress was limited due to a valid constitutional concern. Rather, OLC substituted its judgment and reversed a determination the statute specifically entrusted to the ICIG because of its independence, objectivity, and expertise to credibly assess the information. In our view, the OLC’s opinion undermines the independence of the ICIG and wrongly interprets the respective roles and responsibilities of IGs and agency heads under the ICWPA. Further, the opinion potentially creates space for agency heads across government to make their own determinations related to IG jurisdiction or reporting. Such a result would be contrary to IG independence and congressional intent in requiring IGs to maintain independent legal counsel and may impede the ability of Congress and taxpayers to obtain the objective and independent oversight they rely on from IGs.

Perhaps most concerning to the IG community, we believe that the OLC opinion creates uncertainty for federal employees and contractors across government about the scope of whistleblower protections, thereby chilling whistleblower disclosures. As the ICIG noted in his letter to OLC, “because OLC’s opinion determined that the DNI is not required to transmit the complaint to the intelligence committees, a question has arisen about whether the Complainant has the statutory protections against a reprisal, or threat of reprisal, for submitting the disclosure pursuant to the ‘urgent concern’ process.” Given their importance to accountability in government, it is critical that the protection of whistleblowers from retaliation not be diminished by OLC’s narrow interpretation of the ICPWA.

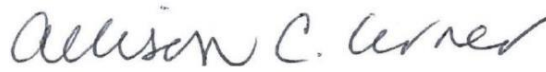
If intelligence community employees and contractors believe that independent IG determinations may be second guessed, effectively blocking the transmission of their concerns to Congress and raising questions about the protections afforded to them, they will lose confidence in this important reporting channel and their willingness to come forward with information will be chilled. More generally, this concern is not limited to the intelligence community but will have a chilling effect that extends to employees, contractors, and grantees in other parts of the government, who might not consider it worth the effort and potential impact on themselves to report suspected wrongdoing if they think that their efforts to disclose information will be for naught or, worse, that they risk adverse consequences for coming forward when they see something they think is wrong. That would be a grave loss for IG oversight and, as a result, for the American taxpayer.

For these reasons, we agree with the ICIG that the OLC opinion creates a chilling effect on effective oversight and is wrong as a matter of law and policy. We urge you to reconsider the conclusions of the OLC opinion and withdraw or modify it.

Sincerely,



Michael E. Horowitz
Chairperson
IG, U.S. Department of Justice



Allison C. Lerner
Vice Chairperson
IG, National Science Foundation

Additional Signatories:

The Honorable Ann Calvaresi-Barr, Inspector General, Agency for International Development

The Honorable Phyllis Fong, Inspector General, Department of Agriculture

Kevin Winters, Inspector General, Amtrak

Hubert Sparks, Inspector General, Appalachian Regional Commission

Christopher Failla, Inspector General, Architect of the Capitol

Michael A. Bolton, Inspector General, U.S. Capitol Police

Christine Ruppert, Acting Inspector General, Central Intelligence Agency

The Honorable Peggy Gustafson, Inspector General, Department of Commerce

Thomas Lehrich, Inspector General, Committee for Purchase from People who are Blind or Severely Disabled (Ability One)

A. Roy Lavik, Inspector General, Commodity Futures Trading Commission

Christopher W. Dentel, Inspector General, Consumer Product Safety Commission

Kimberly A. Howell, Inspector General, Corporation for Public Broadcasting

The Honorable Deborah Jeffrey, Inspector General, Corporation for National and Community Service

Glenn Fine, Principal Deputy Inspector General Performing the Duties of the Inspector General, Department of Defense

Kristi M. Waschull, Inspector General, Defense Intelligence Agency

Sandra D. Bruce, Deputy Inspector General Delegated the Duties of the Inspector General, Department of Education

Patricia Layfield, Inspector General, U.S. Election Assistance Commission

The Honorable Teri Donaldson, Inspector General, Department of Energy

Milton Mayo, Inspector General, Equal Employment Opportunity Commission

Jennifer Fain, Acting Inspector General, Export-Import Bank of the United States

Wendy Laguarda, Inspector General, Farm Credit Administration

The Honorable Jay Lerner, Inspector General, Federal Deposit Insurance Corporation

Christopher Skinner, Inspector General, Federal Election Commission

The Honorable Laura S. Wertheimer, Inspector General, Federal Housing Finance Agency

Dana Rooney, Inspector General, Federal Labor Relations Authority

Jon Hatfield, Inspector General, Federal Maritime Commission

Mark Bialek, Inspector General,
Board of Governors of the Federal
Reserve System/Consumer Financial
Protection Bureau

Andrew Katsaros, Inspector General,
Federal Trade Commission

The Honorable Carol F. Ochoa, Inspector
General, General Services Administration

Adam Trzeciak, Inspector General, Government
Accountability Office

Michael P. Leary, Inspector General,
Government Publishing Office

Joanne Chiedi, Acting Inspector General,
Department of Health and Human Services

The Honorable Joseph V. Cuffari, Inspector
General, Department of Homeland
Security

The Honorable Rae Oliver Davis,
Inspector General, Department of Housing
and Urban Development

The Honorable Mark L. Greenblatt, Inspector
General, Department of Interior

Philip M. Heneghan, Inspector General,
U.S. International Trade Commission

The Honorable Scott Dahl, Inspector
General, Department of Labor

Kurt W. Hyde, Inspector General,
Library of Congress

The Honorable Paul K. Martin, Inspector
General, National Aeronautics and Space
Administration

James Springs, Inspector General,
National Archives and Records
Administration

James Hagen, Inspector General,
National Credit Union Administration

Ron Stith, Inspector General,
National Endowment for the Arts

Laura Davis, Inspector General,
National Endowment for the Humanities

Cardell Richardson, Inspector General,
National Geospatial-Intelligence Agency

David Berry, Inspector General,
National Labor Relations Board

The Honorable Susan S. Gibson, Inspector
General, National Reconnaissance Office

The Honorable Robert P. Storch, Inspector
General, National Security Agency

David C. Lee, Deputy Inspector General
Delegated the Duties of the Inspector General,
Nuclear Regulatory Commission

Norbert Vint, Acting Inspector General, Office of
Personnel Management

Kathy A. Buller, Inspector General, Peace Corps

Robert Westbrook, Inspector General, Pension
Benefit Guaranty Corporation

Jack Callender, Inspector General,
Postal Regulatory Commission

Tammy Whitcomb, Inspector General,
U.S. Postal Service

The Honorable Martin J. Dickman,
Inspector General, Railroad Retirement
Board

Carl Hoecker, Inspector General, Securities and
Exchange Commission

The Honorable Hannibal “Mike” Ware, Inspector
General, Small Business Administration

Cathy Helm, Inspector General,
Smithsonian Institution

The Honorable Gail S. Ennis, Inspector General,
Social Security Administration

John F. Sopko, Special Inspector General,
Special Inspector General for Afghanistan
Reconstruction

The Honorable Christy Romero, Special
Inspector General, Special Inspector
General for the Troubled Asset Relief
Program

The Honorable Steve A. Linick, Inspector
General, Department of State

Jill Matthews, Deputy Inspector General
Performing the Duties of the Inspector
General, Tennessee Valley Authority

The Honorable Calvin L. Scovel, III, Inspector
General, Department of Transportation

Richard K. Delmar, Acting Inspector General,
Department of Treasury

The Honorable Michael J. Missal, Inspector
General, Department of Veterans Affairs

From: Engel, Steven A </o=doj/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn= (b) (6) 22b8-engel, steven a>
To: Jason Klitenic-DNI- <(b) (3), (b) (6) (b) (3) DNI- <(b) (3), (b) (6) Michael K. Atkinson-DNI- <(b) (3), (b) (6)>
Cc: Bradley A. Brooker-DNI- <(b) (3), (b) (6) Whitaker, Henry C. </o=doj/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=whitaker, henry c.dfb>
Bcc:
Subject: (TS) Draft OLC opinion --- ~~TOP SECRET~~
Date: Mon Sep 02 2019 13:43:30 EDT
Attachments: Draft ODNI Urgent Concern Opinion 9-2-19 1330.docx

Classification: ~~TOP SECRET~~

Classified By: Steven A. Engel, Assistant Attorney General, Office of Legal Counsel
Derived From: Multiple Sources
Declassify On: 20441231
=====

Happy holiday to all. Attached is the draft OLC opinion addressing the urgent-concern question. After you have reviewed the draft, let us know if you have any comments or if you would like to discuss. I will be away from the office this afternoon, but reachable on a non-secure line. We also could do a secure call tomorrow morning, if you would like to discuss next steps. Per our earlier conversation, the draft opinion reflects a deliberative, attorney-client communication, subject to privilege, and so we would appreciate your treating it closely.

Best, Steve

From: Jason Klitenic-DNI- <(b) (3), (b) (6)>
Sent: Friday, August 30, 2019 4:04 PM
To: Engel, Steven A <(b) (6)>; (b) (3) DNI- <(b) (3), (b) (6)>
Michael K. Atkinson-DNI- <(b) (3), (b) (6)>
Cc: Bradley A. Brooker-DNI- <(b) (3), (b) (6)>
Subject: Contact Info

Classification: UNCLASSIFIED//FOUO
=====

Thank you again for taking time with us this afternoon.

Jason Klitenic

General Counsel

Office of the Director of National Intelligence

(b) (3), (b) (6)

=====
Classification: UNCLASSIFIED//FOUO

=====
Classification: ~~TOP SECRET~~

From: Engel, Steven A </o=doj/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn= (b) (6) 22b8-engel, steven a>
To: Demers John C NSD USA GOV </o=doj/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn= (b) (6) 5af6-demers john c nsd us>; kevin.driscoll (b) (6) <(b) (6)>; brian.benczkowski (b) (6) <(b) (6)>
Cc: Whitaker, Henry C. </o=doj/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=whitaker, henry c.dfb>
Bcc:
Subject: (TS) Draft OLC opinion --- ~~TOP SECRET~~
Date: Mon Sep 02 2019 13:46:54 EDT
Attachments: Draft ODNI Urgent Concern Opinion 9-2-19 1330.docx

Classification: ~~TOP SECRET~~

Classified By: Steven A. Engel, Assistant Attorney General, Office of Legal Counsel
Derived From: Multiple Sources
Declassify On: 20441231
=====

Attached is the draft OLC opinion on the urgent concern matter. Best, Steve

=====
Classification: ~~TOP SECRET~~

From: Engel, Steven A </o=doj/ou=exchange
administrative group
(fydibohf23spdlt)/cn=recipients/cn=[REDACTED] (b) (6)
22b8-engel, steven a>
To: Whitaker, Henry C. </o=doj/ou=exchange
administrative group
(fydibohf23spdlt)/cn=recipients/cn=whitaker, henry c.dfb>;
[REDACTED] (b) (6) </o=doj/ou=exchange administrative group
(fydibohf23spdlt)/cn=recipients/cn=[REDACTED] (b) (6)
9441-[REDACTED] (b) (6) >; paul.colborn [REDACTED] (b) (6)
<[REDACTED] (b) (6)>
Cc:
Bcc:
Subject: (TS) Draft opinion --- ~~TOP SECRET~~
Date: Mon Sep 02 2019 13:48:41 EDT
Attachments: Draft ODNI Urgent Concern Opinion 9-2-19 1330.docx

Classification: ~~TOP SECRET~~

Classified By: Steven A. Engel, Assistant Attorney General, Office of Legal Counsel
Derived From: Multiple Sources
Declassify On: 20441231
=====

Attached is the current draft of the opinion.

=====
Classification: ~~TOP SECRET~~

From: Engel, Steven A </o=doj/ou=exchange
administrative group
(fydibohf23spdlt)/cn=recipients/cn=[REDACTED] (b) (6)
22b8-engel, steven a>
To: Whitaker, Henry C. </o=doj/ou=exchange
administrative group
(fydibohf23spdlt)/cn=recipients/cn=whitaker, henry c.dfb>
Cc:
Bcc:
Subject: (TS) Latest draft of the opinion --- ~~TOP SECRET~~
Date: Tue Sep 03 2019 12:58:40 EDT
Attachments: Draft ODNI Urgent Concern Opinion 9-3-19 1200.docx

Classification: ~~TOP SECRET~~

Classified By: Steven A. Engel, Assistant Attorney General, Office of Legal Counsel
Derived From: Multiple Sources
Declassify On: 20441231
=====

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Classification: ~~TOP SECRET~~

From: Engel, Steven A. </o=doj/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=[REDACTED] (b) (6) 22b8-engel, steven a>
To: Whitaker, Henry C. </o=doj/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=whitaker, henry c.dfb>; [REDACTED] (b) (6) </o=doj/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=[REDACTED] (b) (6) 9441-[REDACTED] (b) (6)>
Cc:
Bcc:
Subject: (TS) Draft ODNI Urgent Concern Opinion 9-3-19 1500 --- TOP SECRET
Date: Tue Sep 03 2019 15:31:14 EDT
Attachments: Draft ODNI Urgent Concern Opinion 9-3-19 1500.docx

Classification: TOP SECRET

Classified By: Steven A. Engel, Assistant Attorney General, Office of Legal Counsel
Derived From: Multiple Sources
Declassify On: 20441231
=====

=====
Classification: TOP SECRET

From: Engel, Steven A </o=doj/ou=exchange
administrative group
(fydibohf23spdlt)/cn=recipients/cn=[REDACTED] (b) (6)
22b8-engel, steven a>
To: Whitaker, Henry C. </o=doj/ou=exchange
administrative group
(fydibohf23spdlt)/cn=recipients/cn=whitaker, henry c.dfb>;
[REDACTED] (b) (6) </o=doj/ou=exchange administrative group
(fydibohf23spdlt)/cn=recipients/cn=[REDACTED] (b) (6)
9441-[REDACTED] (b) (6) >
Cc:
Bcc:
Subject: (TS) Draft ODNI Urgent Concern Opinion 9-3-19 1545 --- ~~TOP SECRET~~
Date: Tue Sep 03 2019 15:46:27 EDT
Attachments: Draft ODNI Urgent Concern Opinion 9-3-19 1545.docx

Classification: ~~TOP SECRET~~

Classified By: Steven A. Engel, Assistant Attorney General, Office of Legal Counsel
Derived From: Multiple Sources
Declassify On: 20441231
=====

=====
Classification: ~~TOP SECRET~~

From: Engel, Steven A </o=doj/ou=exchange
administrative group
(fydibohf23spdlt)/cn=recipients/cn=[REDACTED] (b) (6)
22b8-engel, steven a>
To: Eisenberg John EOP USA GOV
<[REDACTED] (b) (6)>; Ellis, Michael J.
<[REDACTED] (b) (6)>
Cc:
Bcc:
Subject: (U) (b) (5) --- UNCLASSIFIED
Date: Wed Sep 11 2019 18:51:54 EDT
Attachments: [REDACTED] (b) (5).docx

Classification: UNCLASSIFIED
=====

Attached is OLC's [REDACTED] (b) (5). Let us know if you have comments. Best, Steve

=====
Classification: UNCLASSIFIED

From: Engel, Steven A </o=doj/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=f (b) (6) 22b8-engel, steven a>
To: Gannon, Curtis E </o=doj/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=f (b) (6) 3e6f-gannon, curtis e>; Whitaker, Henry C. </o=doj/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=whitaker, henry c.dfb>; Colborn, Paul P. </o=doj/ou=first administrative group/cn=recipients/cn=pcolborn>; Eisenberg John EOP USA GOV < (b) (6) >; Ellis, Michael J. < (b) (6) >
Cc:
Bcc:
Subject: FW: (TS) Draft OLC opinion --- ~~TOP SECRET//ORCON/NOFORN~~
Date: Tue Sep 17 2019 16:35:42 EDT
Attachments: image002.png
Letter to OLC re Alleged Urgent Concern Determination.pdf

Classification: ~~TOP SECRET//ORCON/NOFORN~~

Classified By: Steven A. Engel, Assistant Attorney General, Office of Legal Counsel

Derived From: Multiple Sources

Declassify On: 20441231

=====

From: Michael K. Atkinson-DNI- (b) (3), (b) (6) >
Sent: Tuesday, September 17, 2019 3:02 PM
To: Engel, Steven A < (b) (6) >; Jason Klitenic-DNI- < (b) (3), (b) (6) (b) (3) >
< (b) (3), (b) (6) >
Cc: Bradley A. Brooker-DNI- < (b) (3), (b) (6) > Whitaker, Henry C. < (b) (6) >
Subject: RE: (TS) Draft OLC opinion

Classification: ~~TOP SECRET//ORCON/NOFORN~~

Classified By: 2501897

Derived From: Multiple Sources

Declassify On: 20441231

=====

Mr. Engel: Attached please find a letter from the Office of the Inspector General of the Intelligence Community in response to the Memorandum for Jason Klitenic, General Counsel, Office of the Director of National Intelligence, dated September 3, 2019, from the Department of Justice's Office of Legal Counsel. Please feel free to contact me if you have any questions or need additional information. Thank you.

=====
Classification: ~~TOP SECRET//ORCON/NOFORN~~

=====
Classification: ~~TOP SECRET//ORCON/NOFORN~~

image002.png for Printed Item: 15 (Attachment 1 of 2)



Michael K. Atkinson

Inspector General of the Intelligence Community

(b) (3), (b) (6)

ICIG Hotlines: 855.731.3260 (Open); 933.2800 (Secure)

From: Engel, Steven A </o=doj/ou=exchange
administrative group
(fydibohf23spdlt)/cn=recipients/cn= (b) (6)
22b8-engel, steven a>
To: Jason Klitenic-DNI-
< (b) (3), (b) (6) >
Cc:
Bcc:
Subject: (U) RE: Document --- UNCLASSIFIED
Date: Wed Sep 25 2019 14:18:23 EDT
Attachments: 092619 (b) (5) v7 VM + OLC.docx

Classification: UNCLASSIFIED
=====

Looks good. A few suggested edits or comments.

From: Jason Klitenic-DNI- < (b) (3), (b) (6) >
Sent: Wednesday, September 25, 2019 1:21 PM
To: Engel, Steven A < (b) (6) >
Subject: Document

Classification: UNCLASSIFIED
=====

Steve, per our conversation. Thanks again for your assistance.

Jason Klitenic

General Counsel

Office of the Director of National Intelligence

(b) (3), (b) (6)

=====
Classification: UNCLASSIFIED

=====
Classification: UNCLASSIFIED

From: Engel, Steven A </o=doj/ou=exchange
administrative group
(fydibohf23spdlt)/cn=recipients/cn=[REDACTED] (b) (6)
22b8-engel, steven a>
To: Eisenberg John EOP USA GOV
<[REDACTED] (b) (6)>
Cc:
Bcc:
Subject: (U) RE: Document --- UNCLASSIFIED
Date: Wed Sep 25 2019 14:21:28 EDT
Attachments: 092619 [REDACTED] (b) (5) v7 VM + OLC.docx

Classification: UNCLASSIFIED
=====

FYI. [REDACTED] (b) (5)

From: Engel, Steven A
Sent: Wednesday, September 25, 2019 2:18 PM
To: 'Jason Klitenic-DNI-' <[REDACTED] (b) (3), (b) (6)>

duplicate

duplicate

(b) (3), (b) (6)

From: Engel, Steven A </o=doj/ou=exchange
administrative group
(fydibohf23spdlt)/cn=recipients/cn=f (b) (6)
22b8-engel, steven a>
To: Bradley A. Brooker-DNI-
< (b) (3), (b) (6) Whitaker, Henry C. </o=doj/ou=exchange
administrative group
(fydibohf23spdlt)/cn=recipients/cn=whitaker, henry c.dfb>;
Jason Klitenic-DNI- < (b) (3), (b) (6) Gannon, Curtis E
</o=doj/ou=exchange administrative group
(fydibohf23spdlt)/cn=recipients/cn= (b) (6)
3e6f-gannon, curtis e>
Cc:
Bcc:
Subject: RE: (TS) Draft OLC opinion --- TOP SECRET
Date: Thu Sep 26 2019 08:58:36 EDT
Attachments: ODNI Urgent Concern FINAL Opinion (Declassified).docx

Classification: TOP SECRET

Classified By: Steven A. Engel, Assistant Attorney General, Office of Legal Counsel
Derived From: Multiple Sources
Declassify On: 20441231
=====

Thanks, Brad. If we are reading this correctly, the entire opinion has now been declassified. Is that correct? Typically, one sees an official marking that says "declassified" on the document, by someone with OCA. Is there a legal distinction of which we should be aware? I take it you believe that we could publicly release this document, with the portion markings removed?

Relatedly, I attach a Word version of the final opinion, with the classification banner, headers, and portion markings removed. If we agree that the opinion is now unclassified, could you send us the electrons for this Word version on the low side, so that we may begin the process of reformatting and posting it on the web? (We lack the capability over here to transfer a document from the high to the low side without retyping the whole thing.) Thanks!

From: Bradley A. Brooker-DNI- < (b) (3), (b) (6)
Sent: Wednesday, September 25, 2019 8:51 PM
To: Whitaker, Henry C. < (b) (6) >; Jason Klitenic-DNI- < (b) (3), (b) (6)
Cc: Engel, Steven A < (b) (6) >
Subject: RE: (TS) Draft OLC opinion

Classification: TOP SECRET

Classified By: 2381928
Derived From: Multiple Sources
Declassify On: 20441231
=====

Henry and Steve,

In light of the recent disclosures, our classification experts have reviewed the original OLC opinion and have determined that it no longer contains any classified information. Please see attached.

Thank you,

Brad

From: Whitaker, Henry C. <(b) (6)>
Sent: Tuesday, September 03, 2019 8:31 PM
To: Jason Klitenic-DNI- <(b) (3), (b) (6)> Bradley A. Brooker-DNI- <(b) (3), (b) (6)>
Cc: Engel, Steven A <(b) (6)>
Subject: RE: (TS) Draft OLC opinion --- TOP SECRET

Classification: TOP SECRET

Classified By: Henry Whitaker, Deputy Assistant Attorney General
Derived From: Multiple Sources
Declassify On: 20441231
=====

Jason, Brad:

Here's the opinion.

If you have any problems, don't hesitate to contact me on my cell tonight ((b) (6)).

It was great working with you all on this opinion,

Henry

From: Jason Klitenic-DNI- <(b) (3), (b) (6)>

Sent: Tuesday, September 3, 2019 2:34 PM

To: Engel, Steven A <(b) (6)>

Cc: Bradley A. Brooker-DNI- <(b) (3), (b) (6)> Whitaker, Henry C. <(b) (6)>

Subject: RE: (TS) Draft OLC opinion

Classification: ~~TOP SECRET~~

Classified By: 2506800

Derived From: Multiple Sources

Declassify On: 20441231

=====

Steve, once it ready, can you please send the final version of the opinion to Brad and me. I have to head downtown for a meeting and want to make sure Brad gets it in the event I'm late getting back to the office. Once we receive it, we'll then forward to Michael.

Thank you.

Jason Klitenic

General Counsel

Office of the Director of National Intelligence

(b) (3), (b) (6)

From: Engel, Steven A <(b) (6)>

Sent: Monday, September 2, 2019 1:44 PM

duplicate

duplicate

duplicate

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Classification: ~~TOP SECRET~~

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Classification: ~~TOP SECRET~~

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Classification: ~~TOP SECRET~~

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Classification: ~~TOP SECRET~~