




OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

November 15, 2018

MEMORANDUM FOR: The Honorable Claire M. Grady
Acting Deputy Secretary
Department of Homeland Security

FROM: John V. Kelly 
Senior Official Performing the Duties of the
Inspector General

SUBJECT: Additional Questions Regarding Investigation of
Allegations Related to Temporary Holding
Facilities and Non-Intrusive Inspection
Equipment at U.S. Customs and Border
Protection (OSC File No. DI-17-0368)

On October 10, 2017, we issued a report (the Report)¹ addressing allegations that a whistleblower sent to the U.S. Office of Special Counsel (OSC) regarding Kevin McAleenan, then-Acting Commissioner, U.S. Customs and Border Protection (CBP).² Pursuant to 5 U.S.C. § 1213, DHS transmitted the Report to OSC on October 23, 2017. On October 19, 2018, OSC requested additional information in the form of eight questions. This memorandum addresses those eight questions.

Summary of Original Report

The whistleblower alleged that Mr. McAleenan committed an abuse of authority and a gross waste of funds, because against the advice of senior CBP executives:

¹ Memorandum from John Roth, DHS Inspector General to the Honorable Claire M. Grady, DHS Under Secretary for Management re: Investigation of Allegations Related to Temporary Holding Facilities and Non-Intrusive Inspection Equipment at U.S. Customs and Border Protection (Oct. 10, 2017), <https://www.oig.dhs.gov/sites/default/files/assets/FOIA/Investigation%20of%20Allegations%20Related%20to%20Temporary%20Holding%20Facilities%20and%20Non-Intrusive%20Inspection%20Equipment%20at%20U.S.%20Customs%20and%20Border%20Protection.PDF>.

² When we issued the Report, Mr. McAleenan was the Acting Commissioner of CBP. He is now CBP's Senate-confirmed Commissioner.



OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

- Mr. McAleenan improperly allocated \$32,200,000 of CBP's Operations and Maintenance funds to construct and operate temporary holding facilities in Tornillo, Texas and Donna, Texas from November 2016 to March 2017; and
- Mr. McAleenan halted Border Patrol agents' use of Non-Intrusive Inspection (NII) equipment from June 9, 2017 to June 19, 2017 in order to avoid scrutiny from the National Border Patrol Council prior to his confirmation hearing.

After a thorough investigation, we did not substantiate these allegations and found no violations of law, rule, or regulation, or any gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. As explained in the Report:

- Then-CBP Commissioner Gil Kerlikowske made the ultimate decision to establish and operate the Tornillo and Donna facilities in order to address a documented surge of migrants arriving on the Southwest border.³ The decision was based on sound evidence, after significant research, with the consensus of CBP senior officials, and in consultation with DHS, Congress, and the White House.
- Mr. McAleenan, who was then CBP's Acting Commissioner, unilaterally decided to temporarily suspend the use of NII equipment by Border Patrol agents in the El Paso, Texas Sector for 10 days in June 2017. Mr. McAleenan did not receive objections from any senior officials, and we identified no evidence that his decision was based on anything other than a concern for the safety of CBP employees and their potential lack of confidence in the safety of the NII equipment.

OSC Question #1: The rationale for CBP to fund the Donna and Tornillo detention facilities rather than ICE or HHS

As noted on page 9 of the Report, CBP funded the Donna and Tornillo facilities because then-DHS Secretary Jeh C. Johnson decided that CBP would do so. Although CBP argued that the overcrowding in its facilities

³ Mr. McAleenan was CBP's Deputy Commissioner when CBP established the facilities in 2016.



OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

was caused by U.S. Immigration and Customs Enforcement (ICE) not being able to process and transport aliens from CBP custody fast enough, then-Secretary Johnson directed CBP to devise solutions to the problem.

We did not develop evidence related to then-Secretary Johnson's reasoning because it was not relevant to determining whether Mr. McAleenan acted improperly or unilaterally.⁴ Nor was there any suggestion, from either the whistleblower or any witness, that former Secretary Johnson acted inappropriately. To the contrary, all of the evidence indicates that the decision to build the temporary facilities was calculated and involved people at various levels of CBP and DHS, as well as coordination and communication with the White House and Congress. Indeed, as page 7 of the Report details, every CBP senior official we interviewed (which includes every person who the whistleblower said objected to the facilities) told us that they agreed with the decision to establish the temporary facilities.

OSC Question #2: An explanation for ICE not using a detention facility in the midst of overcrowding in CBP, ICE, and HHS facilities

As mentioned in the report, one of the approaches that DHS and CBP explored for dealing with the overcrowding in CBP facilities was to convert a building that ICE was no longer using into a holding facility. However, this building was located in Southern California and the biggest need for additional holding space was in Texas. Moreover, CBP did not want to assume permanent control of this mothballed building from ICE. Finally, as discussed on page 4 of the Report, temporary facilities offered several advantages over permanent facilities, such as cost, scalability, and staffing.

OSC Question #3: A review of all CBP unfunded requirements during Fiscal Years 2016, 2017, and 2018

During our investigation, we reviewed CBP's Fiscal Year 2017 unfunded requirements because the whistleblower suggested that document would show equipment and other needs that CBP could not purchase as a result of funding the Tornillo and Donna facilities. While that document lists many items that CBP was unable to purchase, it generally does not provide reasons for those funding shortfalls. For example, the document

⁴ The U.S. Department of Health and Human Services' (HHS) efforts to address the migration surge were similarly irrelevant to the allegations.



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

does not attribute any funding shortfalls to the Tornillo and Donna facilities. More fundamentally, none of the 2016-2018 unfunded requirements would likely show shortfalls related to the temporary facilities because as noted on page 11 of the Report, the Fiscal Year 2017 omnibus appropriation covered the full amount that CBP had previously spent on the temporary facilities. In other words, within months of CBP funding the facilities, Congress made CBP whole for all of the associated costs.

OSC Question #4: An accounting of all expenses related to the construction, maintenance, and closing of the Donna and Tornillo facilities

The whistleblower did not claim there were any specific abnormalities or improprieties in how CBP funded the construction, maintenance, or closing of the two facilities. Rather, the whistleblower asserted that the entire procurement itself was improper because CBP may not lawfully spend appropriated funds on detention facilities. As discussed in the Report, the Tornillo and Donna facilities merely expanded CBP's capacity to do what it had already been doing and continues to do – hold aliens in short-term detention pending their processing and transfer to ICE and HHS. A detailed accounting of all of the Tornillo and Donna expenses would not change that conclusion.

Furthermore, during our investigation, we saw no suggestion of anything untoward in how the facilities were procured or funded. Witnesses said CBP's procurement staff mainly handled the procurement process and did not identify any outside influence or interference with that process. CBP also regularly communicated with Congress and OMB about its surge-related expenses, including the Tornillo and Donna facilities. Congress later validated that CBP used the correct source of funds for the facilities when it twice used the same funding category for CBP's surge expenses. Because we have no indication of any spending issues related to the facilities, we choose not to commit the significant resources that would be necessary for this type of review.

OSC Questions #5-6: The total number of detainees in the Donna/Tornillo facilities (do not recount detainees who remained in the facilities for multiple days)

As noted on page 6 of the Report, the Tornillo facility held a total of 5,721 aliens and the Donna facility held a total of 2,172 aliens. CBP provided



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

these figures to OIG and represented that they reflect unique individuals and do not recount people who remained in the facilities on multiple days.

OSC Question #7: An explanation for Mr. McAleenan not ending the NII equipment ban immediately after learning about the previous NII equipment safety review

According to Mr. McAleenan, learning about the earlier safety review did not change his decision to shut down the equipment because he believed the number and specificity of the cancer diagnoses in the union complaint gave it credibility and warranted verification. Mr. McAleenan was notified by email about the prior safety review while he was attending meetings all day in Mexico City. The email that discussed that safety review did not address the cancer diagnoses in the union complaint and therefore did not assuage his concerns. Consistent with this explanation, Mr. McAleenan told us that one of the reasons he ultimately ended the shutdown was that CBP had only been able to corroborate one or two cancer cases. We found McAleenan credible and we developed no evidence that contradicts his explanation. Witnesses told us they believed Mr. McAleenan was solely concerned about the safety of CBP employees and not one witness thought Mr. McAleenan's confirmation process or his relationship with the union factored into his decision in any way.

OSC Question #8: An explanation for Mr. McAleenan's allowance of NII equipment to be used nationally when he was allegedly concerned about its safety

Mr. McAleenan told us what troubled him most about the union complaint was that it said eight Border Patrol Agents within El Paso all were diagnosed with specific and similar cancers. He believed that eight diagnoses could not be a coincidence and therefore there might be something wrong with a particular Border Patrol machine in El Paso. The complaint did not allege any cancers in other geographic areas or among Office of Field Operations employees, so he had no reason to believe that there might be problems with other machines.