REDACTIONS MADE BY DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL PURSUANT TO THE PRIVACY ACT

OFFICE OF INSPECTOR GENERAL

Management Alert - Coast Guard Investigative Service Search and Seizure of DHS OIG and Congressional Communications

REDACTIONS MADE BY DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL PURSUANT TO THE PRIVACY ACT

Homeland Security

October 29, 2018

OIG-19-03

REDACTIONS MADE BY DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL PURSUANT TO THE PRIVACY ACT

OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

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

October 29, 2018

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

The Honorable Admiral Karl L. Schultz
Commandant
United States Coast Guard

The Honorable John M. Mitnick
General Counsel
Department of Homeland Security

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

SUBJECT: Management Alert - *Coast Guard Investigative Service Search and Seizure of DHS OIG and Congressional Communications*

I write to notify you of my profound concerns regarding a search warrant recently executed by the Coast Guard Investigative Service (CGIS) against a DHS whistleblower.

The Office of Inspector General (OIG) is conducting an investigation into allegations that the whistleblower was retaliated against for, among other things, communicating with Members of Congress regarding discrimination and retaliation against the whistleblower. The whistleblower alleged being subjected to retaliatory investigations by CGIS in violation of the Military Whistleblower Protection Act (MWPA).

We recently learned that CGIS executed a search warrant against the whistleblower several months after the whistleblower retired from the Coast

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Guard, but soon after CGIS became aware of the OIG's whistleblower retaliation investigation. Our information indicates that a CGIS agent obtained the search warrant in connection with a CGIS-directed investigation. This same CGIS agent oversaw execution of the warrant, which specifically sought "communications with DHS OIG and congressional aid[e]s" regarding the whistleblower's claims of discrimination:

ATTACHMENT B

Description of Items to be Seized

A. Any and all records including but not limited to receipts from [redacted]

[redacted]

Equal Opportunity documents relating to discrimination based on [redacted] disability, communications with DHS OIG and Congressional aids pertaining to [redacted] discrimination, [redacted]

Excerpt from search warrant.

The MWPA prohibits restricting a member of the armed forces from communicating with a Member of Congress or an Inspector General. The Act also prohibits conducting an investigation "requested, directed, initiated, or conducted for the primary purpose of punishing, harassing, or ostracizing a member of the armed forces for making a protected communication."

Based on the information before me, I am deeply concerned that CGIS may be conducting a retaliatory investigation against the whistleblower. Moreover, CGIS' involvement in the extraordinary efforts to seize a DHS employee's communications with DHS OIG and Congress, even if non-retaliatory, are likely to have a significant chilling effect on whistleblowers' willingness to

provide information to, and cooperate with, DHS OIG and Congress. These efforts also raise First Amendment concerns.

Whistleblowers are an invaluable tool for rooting out waste, fraud, and abuse. I am confident that you and Secretary Nielsen are committed to creating an environment in which whistleblowers do not fear reprisal for reporting misconduct. CGIS' actions in this case are inconsistent with that commitment.

Recommendations

Recommendation 1: Take immediate action to resolve this situation.

Recommendation 2: Ensure that all DHS components with investigative authority exercise that authority with due respect for the rights of whistleblowers.

Management Comments and OIG Analysis

The Department concurred with our recommendations. We have included a copy of DHS' Management Response in its entirety in Appendix A.

Response to Recommendation 1: DHS concurred with the recommendation. DHS reviewed details of the investigation provided by USCG and concluded that no reprisal took place in this matter. DHS deemed the timing of the OIG whistleblower retaliation investigation and the execution of the search warrant by CGIS coincidental. DHS noted that neither the CGIS agent nor the Assistant U.S. Attorney involved with the investigation was aware of the existence of the OIG whistleblower retaliation investigation at the time they obtained and executed the search warrant.

OIG Analysis: While we appreciate DHS leadership's inquiries into the matter, we do not consider the actions taken sufficient to resolve our concerns. Moreover, some of the characterizations made in DHS's response are inconsistent with our understanding of the situation. Until the Department takes full accountability for its actions in this matter, this recommendation will remain open and unresolved.

Since at least December 2017, CGIS has been aware of the whistleblower's protected communications with DHS OIG and Congress. Specifically, in a CGIS document dated December 4, 2017, CGIS noted that the whistleblower "has a history of filing Congressional, OIG, [and] workplace complaints throughout [the member's] CG career." Moreover, on August 29, 2018, the OIG notified USCG that it had opened a whistleblower retaliation investigation involving this whistleblower. Within approximately one month of this notice, CGIS had obtained and executed a search warrant specifically targeting the whistleblower's communications with the OIG and Congress.

Whether the CGIS agent executing the warrant was personally aware of the existence of the OIG's retaliation investigation is immaterial — USCG was on notice and is therefore responsible for the actions taken by its personnel against the whistleblower. Although the Department has asserted that the timing of USCG's knowledge of OIG's investigation and execution of the warrant was "purely coincidental," the timing is sufficient to establish under the MWPA that the whistleblower's protected communications with DHS OIG were a contributing factor in USCG's decision to take action against the whistleblower.

Even assuming USCG acted without retaliatory intent, CGIS failed to exercise its investigative authority in a manner affording due respect to the rights of whistleblowers. First, the Department has not presented a compelling explanation as to why CGIS targeted the whistleblower's communications with the OIG or Congress. The response indicates that CGIS already had access to other information, including the whistleblower's medical and police records, that provided support for CGIS's theory that the whistleblower was involved in a scheme to fraudulently obtain health care and disability benefits. How the whistleblower's communications with the OIG and Congress are relevant to such a benefits scheme remains unclear.

In any event, the marginal relevance of such communications to CGIS's investigation must be weighed against the likely chilling effect resulting from USCG's deliberate effort to target a whistleblower's OIG and congressional communications. The Department's response fails even to acknowledge this chilling effect. Unless whistleblowers have confidence that their communications will be safeguarded, their "right to freely make protected communications to OIG and Congress" is impermissibly undermined.

Response to Recommendation 2: DHS concurred with the recommendation, noting its compliance with various legal requirements meant to protect whistleblowers. In addition, CGIS will require its agents to coordinate with DHS OIG concerning any investigation in which DHS OIG communications will be sought.

OIG Analysis: We appreciate the Department's efforts to notify and train DHS employees, contractors, and other staff about whistleblower rights, and we fully support the requirement that CGIS coordinate with DHS OIG prior to seeking DHS OIG communications. However, the Department's response does not adequately address this recommendation. Specifically, the recommendation is directed at all DHS components with investigative authority, not just CGIS. This recommendation will remain open and unresolved until the Department requires all DHS components, operational units, and/or personnel with investigative authority to coordinate with DHS OIG prior to seeking to view, collect, or otherwise access communications between DHS OIG and DHS employees or contractors.

Appendix A
DHS' Management Comments to the Draft Report

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

October 17, 2018

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

FROM: Jim H. Crumpacker, CIA, CFE
Director
Departmental GAO-OIG Liaison Office

SUBJECT: Management's Response to OIG Draft Report: "Management Alert – Coast Guard Investigative Service Search and Seizure of DHS OIG and Congressional Communications" (OIG-19-XXX, dated October 5, 2018)

Thank you for the opportunity to review and provide a response to this draft report. The U.S. Department of Homeland Security (DHS) appreciates the important responsibilities of the Office of Inspector General (OIG) relating to the Military Whistleblower Protection Act.

Similar to the OIG, the Coast Guard Investigative Service (CGIS) fills a crucial role within the Coast Guard by carrying out internal and external criminal investigations within the component's purview. The OIG's draft report accurately states that CGIS executed a search warrant of the home of a retired Coast Guard member (an alleged whistleblower). Additional context, however, will allow OIG to understand the conduct of the CGIS agent involved. Specifically, the agent prepared the affidavit and supporting application for the search warrant in close coordination with and under the supervision of an Assistant United States Attorney (AUSA) for the Western District of Michigan. After receiving details of this investigation from the Coast Guard, discussed below, DHS management does not believe that reprisal against the alleged whistleblower took place.

The impetus for the warrant was a criminal investigation that CGIS initiated in late 2017 into alleged health care and benefits fraud by the service member who was then on active duty. This investigation continues under the supervision of the AUSA, and beginning in April 2018 became a joint investigation with the Social Security Administration (SSA) OIG. A Senior Agent from the SSA OIG Cooperative Investigations Disability Unit has been actively working alongside the AUSA and CGIS agents, was present at the member's residence, and helped execute the search warrant.

It is important to note that the full warrant provided as an attachment to your draft report was placed under seal by the United States District Court for the Western District of Michigan on application from the United States Attorney's Office (USAO). While the AUSA stands ready to assist DHS OIG in obtaining access to the information under seal, DHS's ability to discuss in this memorandum the specifics of the matters contained in that sealed document is limited. Upon receiving your draft report, however, DHS leadership inquired into the circumstances that gave rise to the issuance and execution of the search warrant in question. The general theory of criminal liability is that the alleged whistleblower made false statements and attempted to fraudulently seek federal benefits based on numerous false claims regarding the basis for the member's [redacted], both while in the Coast Guard and after retirement.

The alleged whistleblower first became the subject of CGIS interest on August 2, 2017, when CGIS initiated an investigation of the member for elder fraud after being approached by a local civilian complainant.[1] That case remains active. CGIS opened a second investigation—the one in which the search warrant in question was executed—on December 4, 2017. CGIS opened this investigation to address questions raised by the member's command regarding a claim by the member that the elder fraud investigation and command action regarding the failure to qualify to perform assigned duties exacerbated the [redacted].[2] More specifically, given that the member was recently found fit for full duty, the concern was that the member might be fraudulently claiming [redacted] to escape work obligations in violation of the Uniform Code of Military Justice. The CGIS agent's review of the member's medical records and police records in connection with those claims identified suspect information concerning the accuracy of the member's claims about the underlying events.

The AUSA overseeing the investigation and the lead CGIS agent have reported that the results of their investigation thus far have established probable cause to believe that the alleged whistleblower made criminally false statements and committed fraud against the United States government.[3] Both the AUSA and CGIS agent involved have assured the Coast Guard that they were unaware of the existence of a pending investigation by the OIG

[1] More specifically, CGIS investigated the alleged whistleblower's participation in a fraudulent land transfer involving an elder. CGIS referred its initial investigation to the [redacted] Prosecutor's Office, leading to the arrest of the alleged whistleblower and the member's spouse in February 2018. A Michigan district court dismissed the case, but the prosecutor's office has appealed the ruling to the next higher court. The state criminal case and investigation are still ongoing.

[2] Based on the member's failure to qualify to perform assigned duties beginning in 2015, the command convened an administrative investigation that began in October 2017 and ended on November 28, 2017. As a result, the member's Commander took the member to "mast" (i.e., administered non-judicial punishment in accordance with Article 15, Uniform Code of Military Justice, 10 U.S.C. § 815). The member accepted non-judicial punishment, foregoing the right to request court-martial, and on January 31, 2018, the member admitted to, and was found to have committed the charges of failure to obey a lawful order and unauthorized absence. Prior to going to mast, the member submitted a request to retire.

[3] *See* 18 U.S.C. §1001 (criminalizes materially false statements in any matter within the jurisdiction of the executive, legislative, or judicial branch). When the investigation began, CGIS was looking into the member's receipt of private medical care reimbursed by the government under the TRICARE program, and related benefits. After retirement, the member filed for SSA and Veterans Affairs benefits that are the current subject of the investigation.

Whistleblower Protection Unit at the time of opening the investigation or presenting the search warrant application to the U.S. District Court for the Western District of Michigan. The timing of the OIG Whistleblower Protection Unit retaliation investigation and the execution of the warrant appears to be purely coincidental. The AUSA and CGIS agent also have assured the Coast Guard that neither the criminal investigation nor the application for the search warrant was intended in any way as retaliation for any communication the alleged whistleblower may have initiated with OIG or Congress.

After opening the investigation, the CGIS agent conducted a routine forensic examination of the alleged whistleblower's Coast Guard computer account. That examination incidentally uncovered emails between the member and congressional staff members from June to October 2017 in which the member discussed his medical condition and referred to a complaint to the DHS OIG.[4] Those emails referred to previous claims that the member made as part of a 2016 equal opportunity complaint alleging discrimination, harassment, and reprisal, due at least in part to alleged [redacted] and included statements which the agent believed detailed how the member [redacted] As a result, the CGIS agent and AUSA concluded that those communications were relevant and material to the ongoing criminal investigation. The AUSA overseeing the investigation also has assured the Coast Guard that the communications with congressional staff and DHS OIG are being sought only because they are believed to contain evidence of an overall scheme to defraud the government, and that they are a minor part of the overall information sought.

Given dual, open investigations—the OIG Whistleblower Reprisal Investigation and the USAO criminal investigation—DHS certainly understands OIG's concern about the potential appearance of inappropriate investigative activity, and the Coast Guard shares that concern. The Coast Guard continues to stand ready to respond to any OIG Whistleblower Protection Unit request for information and assist wherever the Service is able. After receiving details of this investigation from the Coast Guard, DHS does not believe that reprisal took place against the alleged whistleblower. If, however, your investigators uncover any evidence of reprisal for making a protected communication, we certainly would want such information provided to Coast Guard leadership as soon as possible. The Coast Guard invites OIG investigators to meet with CGIS and representatives from the USAO to provide any desired additional information to OIG, and coordinate these two important investigations as they move forward, to the extent appropriate, while preserving the integrity of the USAO's criminal investigation. Please let me know if OIG would like to have that meeting.

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[4] CGIS was aware the member made a complaint to DHS OIG because OIG referred the complaint to CGIS for investigation. CGIS opened an investigation but learned that the 9th Coast Guard District had already completed an administrative investigation into the same complaint, for which the final action was signed on August 11, 2017. As a result, CGIS performed a policy review of the issue in question and determined that the complaint to OIG was unsubstantiated and closed the case on September 8, 2017. The Coast Guard does not know whether the complaint referred by OIG to CGIS is the same complaint which the alleged whistleblower mentioned in his emails to Congress.
[5] That complaint of discrimination and others based on sex, race and disability were the subject of an independent investigation by the Coast Guard's Civil Rights Directorate. The Coast Guard entered a Final Agency Decision on May 22, 2017 finding all complaints unsubstantiated. The whistleblower did not appeal the Final Agency Decision to the DHS Office of Civil Rights and Civil Liberties.

The draft report contained two suggested actions, with which DHS concurs. Attached find our detailed response to each action.

Again, thank you for the opportunity to review and comment on the draft report. DHS and the Coast Guard are committed to avoiding any real or perceived appearance of an infringement on the rights of Coast Guardsmen under the Military Whistleblower Protection Act. Our service members are an invaluable resource if we hope to continue our past success in identifying and remediating instances of waste, fraud, and abuse within the Department and Coast Guard. DHS and the Coast Guard will continue to uphold service member rights, including the right to freely make protected communications to OIG and Congress. Please feel free to contact me if you have any questions.

Attachment

cc: DHS Office of the Deputy Secretary
DHS Office of General Counsel
Commandant, USCG

Attachment: Management Response to Recommended Actions Contained in OIG-19-XXX

The OIG asked that the DHS Acting Deputy Secretary, Commandant of the U.S. Coast Guard, and DHS General Counsel take the following actions:

Action 1: Resolve this particular situation.

Response: Concur. As discussed above, inquiries by staff working in the immediate Office of the Coast Guard Commandant and the DHS Office of the General Counsel have been made into the situation described in OIG's draft report. After receiving details of this investigation from the Coast Guard, DHS does not believe that reprisal took place against the alleged whistleblower. DHS requests that the OIG consider this action resolved and closed, as implemented.

Action 2: Ensure that all DHS components with investigative authority exercise that authority with due respect for the rights of whistleblowers.

Response: Concur. DHS leadership already requires that all of the Department's employees, contractors, and other staff (not just those with investigative authority) carry out their duties and responsibilities with due respect for the rights of whistleblowers. The Department has a current certification under 5 U.S.C. § 2302 from the Office of Special Counsel and has placed whistleblowing, whistleblowing retaliation, prohibited personnel practice, and Hatch Act posters prominently in all facilities and posted them on the DHS intranet. DHS provides information on prohibited personnel practices and whistleblower disclosures to new employees as part of the Department's Standardized New Employee Orientation program; provides current employees information on prohibited personnel practices and whistleblower disclosures, along with information on DHS's one-stop resource website, annually; and provides training on whistleblower disclosures and protections. In addition, CGIS will require that its agents coordinate with DHS OIG concerning any investigation in which communications with DHS OIG will be sought. Estimated Completion Date: January 31, 2019.

Appendix B
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