

Congress of the United States
Washington, DC 20515

February 15, 2012

The Honorable Carolyn Lerner
Special Counsel
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505

Dear Ms. Lerner:

We are writing to request that the U.S. Office of Special Counsel (OSC) investigate whether the Food and Drug Administration (FDA) violated the Whistleblower Protection Act (WPA) or the Stored Communications Act (SCA) by covertly monitoring employees who communicated confidentially with Congress about a potential danger to public health. A lawsuit filed in U.S. District Court in Washington, D.C., alleges that the FDA relied on information it collected through secret surveillance to “fire, harass or pass over for promotion at least six doctors and scientists who communicated with Congress.”¹ The employees under surveillance were also communicating with OSC.

The WPA expressly provides that the statute is “not to be construed to authorize . . . the taking of any personnel action against an employee who discloses information to the Congress.”² Denying or interfering with employees’ rights to furnish information to Congress and the OSC is against the law and will not be tolerated at any federal agency.

The *Washington Post* reported that the FDA monitored the personal e-mail accounts of a group of nine agency scientists (“the FDA nine”) after learning they shared concerns about the medical device review process with Congress, and specifically, with our offices. Among the scientists whose e-mail was subject to monitoring was Paul Hardy. The FDA used information collected from Hardy’s personal e-mail account to build the case for firing him. In November 2011, OSC filed a request for a retroactive stay of Hardy’s marginal performance evaluation—which was used in part to justify his removal—because “it had reasonable grounds to believe that Hardy’s performance evaluation was based on reprisal for protected disclosures he had made.”³

In a May 5, 2011, memo entitled “Misconduct of LTJG Paul. T. Hardy,” sent from the FDA to Gregory Stevens, the Acting Director of the Office of Commissioned Corps Operations in the Office of the Surgeon General, the agency included several exhibits to “back-up”

¹ Ellen Nakashima and Lisa Rein, *FDA says it monitored workers’ e-mail to investigate potential leak*, WASH. POST, Feb. 9, 2012. [hereinafter Nakashima and Rein]

² Congressional Research Service Report RL33918.

³ U.S. Merit Systems Protection Board, Docket Nos. CB-1208-12-0002-U-2 and CB-1208-12-0002-U-3, Nov. 23, 2011.

assertions of the agency's "lack of trust" in Hardy, including a January 29, 2009, e-mail from Hardy to the House Committee on Energy and Commerce. In a February 9, 2012, *Washington Post* article, however, FDA spokesperson Erica Jefferson stated, "In fact, our **targeted monitoring** of e-mail content **of these individuals** was not initiated until April 2010, when it was brought to our attention by a company that confidential and proprietary information had been leaked to the public."⁴

The fact that the FDA is in possession of an e-mail from Hardy's personal account to Congress from January 2009—more than one year prior to the date on which FDA admits commencing surveillance—suggests that the FDA may have accessed Hardy's personal e-mail to retrieve prior communications that were not necessarily sent from a government computer. This could also be the case for the rest of the FDA nine, and it raises questions about the legality of the monitoring under the SCA. While monitoring activity on a government computer may be justified in certain circumstances, absent a subpoena it is difficult to imagine a justification for obtaining access to an employee's personal e-mail account for the purpose of mining for messages that were not transmitted through a government computer.

Perhaps more troubling, however, is that the surveillance was not limited to the FDA nine's communications with Congress. FDA's surveillance also intercepted protected communications with OSC. A February 1, 2012, story in the *Washington Post* states:

Documents show FDA officials thought the reviewers disclosed confidential information when they communicated concerns to congressional staffers, the White House, the Equal Employment Opportunity Commission **and the special counsel's office.**⁵

Because OSC is bound by law to maintain the confidentiality of information it receives, there could have been no legitimate reason for FDA to monitor or intercept communications with OSC.⁶ In fact, OSC is specifically authorized to receive both national security information and information that would otherwise be "specifically prohibited by law" from disclosure.⁷ Additionally, the WPA prohibits agencies from taking adverse personnel actions against individuals who make protected disclosures to OSC.⁸

In order to better understand the actions taken by the FDA with respect to the FDA nine, we respectfully request that OSC initiate an investigation into the facts and circumstances surrounding the e-mail monitoring. Specifically, we request that OSC examine (1) whether the monitoring occurred in retaliation for protected whistleblowing activities and thus may constitute a prohibited personnel practice, and (2) whether the monitoring may have violated any other law,

⁴ Nakashima and Rein, Feb. 9, 2012 (emphasis added).

⁵ Ellen Nakashima and Lisa Rein, *Grassley opens investigation into FDA surveillance*, WASH. POST, Feb. 1, 2012 (emphasis added).

⁶ See, e.g., 5 U.S.C. §§ 1212(g)(1), § 1213(h).

⁷ For example, even trade secret information may be legally disclosed to the OSC. U.S. Merit Systems Protection Board, Docket No. DC07529010241, Mar. 8, 1993.

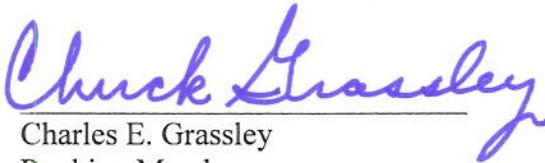
⁸ 5 U.S.C. § 2302(b)(8).

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including the Stored Communications Act (18 U.S.C. §§ 2701 - 2712) as an unauthorized access of stored electronic communications or as a failure to provide notice to the subscriber of court-approved access.

Thank you for your attention to this matter. Please contact Erika Smith of the Senate Committee on the Judiciary at (202) 224-5225 or Jonathan Skladany of the House Committee on Oversight and Government Reform at (202) 225-5074 with any questions about this request.

Sincerely,



Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate



Darrell Issa
Chairman
Committee on Oversight
and Government Reform
United States House of Representatives

cc: The Honorable Patrick Leahy, Chairman
Committee on the Judiciary
United States Senate

The Honorable Elijah E. Cummings, Ranking Member
Committee on Oversight and Government Reform
United States House of Representatives