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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

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July 27, 2012

The Honorable Carolyn Lerner
Special Counsel
U.S. Office of Special Counsel
1730 M Street, NW, Suite 300
Washington, DC 20036-4505

Dear Ms. Lerner:

I am writing to request that you begin an investigation into the Food and Drug Administration (FDA) and its retaliatory spying on whistleblowers.

Whistleblowers first raised concerns about improper conduct at the FDA, including using improper techniques to evaluate medical devices, in 2009. The FDA responded that the whistleblowers may have committed a crime by revealing sensitive information. Both the Department of Health and Human Services (HHS) Office of the Inspector General (OIG) and the Office of Special Counsel investigated the matter, and found that the whistleblowers had not violated the law. In spite of these findings, the FDA continued to retaliate against the whistleblowers through criticisms on evaluations, personal character attacks, and attempts to terminate the whistleblowers' employment.

Allegations arose in January of this year that the FDA was spying on the whistleblowers' personal email accounts. Recently, documents were discovered on a public internet site that clearly shows that the FDA was spying on its employees, specifically targeting their communications with Congress, including my office. I have attached these documents to this letter. As you are aware, it is illegal to interfere with an employee's communications with Congress or take an adverse personnel action against someone because of such communications. Moreover, it is illegal to release Privacy Act protected information to the public. The documents I am providing you, including confidential communications between the whistleblowers and their attorneys, were found on a publicly accessible internet site run by an FDA contractor acting under instructions from the FDA.

The software used by FDA to collect this information collected all keystrokes on the targeted computer, thus capturing even the personal email passwords of the targeted employees who accessed those accounts consistent with FDA policy allowing them to do so. While such monitoring of activity on a government computer may be appropriate, the Stored Communications Act makes it a crime to use such passwords to login to the employees personal

email accounts without legal process and go fishing for emails that were not sent or received from a government computer. While the FDA denied in a letter to me on July 13, 2012, that the passwords were used, it cited only one unnamed engineer in support of its claim.

According to the counsel for the whistleblowers, they do not recall ever accessing some of the documents the FDA collected from a work computer. Therefore, there appears to be a need for a more thorough investigation to determine whether there may have been a violation of the Stored Communications Act to gather emails from purely personal email accounts using the captured passwords to access them. Such an investigation should include, at a minimum, interviewing each employee who had access to the captured personal passwords of the whistleblower employees.

I have tried to get information from the FDA regarding these matters, including submitting interview and document request, but have been met with stonewalling and incomplete answers. However, I was able to obtain all 80,000 documents which were made public on the Internet regarding the FDA's monitoring of these employees. They are enclosed to assist in your investigation.

Thank you for your help in this matter. Please keep Erika Smith of my Committee staff, available at (202) 224-5225, informed of your progress in this investigation.

Sincerely,



Charles E. Grassley
Ranking Member

Cc: Department of Justice

Enclosure