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The Special Counsel

August 21, 2019

The President
The White House
Washington, D.C. 20500

Re: OSC File Nos. DI-18-3920, DI-18-3924, and DI-18-3931

Dear Mr. President:

I am forwarding reports from the Department of Homeland Security (DHS), Customs and Border Protection (CBP), Washington, D.C. I take serious issue with CBP's conduct in this matter, and I have determined that its findings appear unreasonable. The whistleblowers, Mark J. Jones, Chief, Operations Manager, CBP's Weapons of Mass Destruction Division (WWMD), Fred A. Wynn, Operations Manager, WWMD, and Michael J. Taylor, Chief Operations Officer, WWMD (the whistleblowers), who consented to the release of their names, alleged that CBP has failed to meet DNA collection requirements imposed by the DNA Fingerprint Act of 2005 and subsequent Department of Justice regulations.[1]

The agency's noncompliance with the law has allowed subjects subsequently accused of violent crimes, including homicide and sexual assault, to elude detection even when detained multiple times by CBP or Immigration and Customs Enforcement (ICE). This is an unacceptable dereliction of the agency's law enforcement mandate.

I. The Allegations

Under the DNA Fingerprint Act of 2005, federal law enforcement agencies are required to collect DNA samples from arrested or detained individuals.[2] However, the law authorizes the Attorney General to grant exceptions in certain circumstances. In March 2010, citing a lack of agency resources, then Secretary of Homeland Security Janet Napolitano requested a DNA collection exception for certain classes of individuals, including those detained for processing under administrative proceedings, not facing criminal charges. With respect to criminal arrestees, Secretary Napolitano noted: "We intend to phase-in implementation [of DNA collection] over the next year, with certain DHS Components to begin the process more quickly than others." When he responded in July 2010, then Attorney General Holder stressed the importance of expeditious compliance with criminal DNA collection requirements, and noted exceptions were granted **"at the present time"** because of "operational exigencies and resource limitations (emphasis added)."

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[1]The whistleblowers' allegations were referred to then Secretary of Homeland Security Kirstjen Nielsen for investigation pursuant to 5 U.S.C. §1213(c) and (d). CBP's Office of Professional Responsibility (OPR) investigated the matter. CBP Deputy Commissioner Robert Perez was delegated the authority to review and sign the report. The whistleblowers provided comments to the report.

[2]*See* 34 U.S.C. § 40702(a)(1)(A), 28 C.F.R. § 28.12(b), 73 F.R. 74932, 74934.

The whistleblowers asserted that pursuant to this correspondence and based on the language of Secretary Napolitano's request and Attorney General Holder's approval, DHS operated with the assumption that they had one year to initiate the collection of DNA from criminal subjects. The whistleblowers alleged that after the one-year exemption period lapsed, CBP did not start collecting DNA samples from individuals detained by the agency. The whistleblowers noted that in the intervening decade since the exemption period lapsed, despite efforts to come into compliance, DNA collection from criminal subjects has yet to occur.

The whistleblowers further alleged that the failure to collect DNA samples has demonstrably allowed individuals with serious criminal offenses to avoid prosecution. They noted that since the 2010 DNA collection exemptions went into effect, CBP has detained over 5 million individuals. They alleged that data collected in a Bureau of Prisons (BOP) DNA analysis project suggests that CBP's population of detained subjects could contain a similar percentage of DNA matches to crimes in the Federal Bureau of Investigation's (FBI) Combined DNA Information System. Based on percentages found during BOP's efforts, the whistleblowers asserted the number of matches could total approximately 950,000 persons.[3]

II. The Agency Report

The report did not substantiate these allegations, asserting that after consulting with CBP's Office of Chief Counsel (OCC), CBP management determined that the 2010 DNA collection exception still stands. The report did not articulate a legal basis for this determination beyond the assertion that OCC was consulted, nor did it indicate that OCC had provided a formal written legal opinion or official guidance regarding these matters.

With respect to criminal arrestees, notwithstanding Attorney General Holder's approval of a one-year implementation period, the report noted that "CBP policy directives ensure that individuals detained by CBP, who will be presented to the U.S Attorney's Office for criminal prosecution, are transferred to agencies that collect DNA such as ICE, Office of Enforcement and Removal Operations (ERO); [United States Marshals Service]; and [BOP]." CBP also took the position that in order to initiate the collection of DNA, a revised collection waiver coordinated between DHS and the Department of Justice was necessary.

Due to the conclusory and unsupported nature of these assertions, in addition to the serious issues raised by the whistleblowers discussed below, OSC requested a supplemental report on February 19, 2019, in which OSC asked that CBP "provide the legal justification and basis of authority that led OCC to conclude CBP is still exempt from these

[3]BOP's 2016 DNA collection project sampled approximately 2,500 individuals in custody for immigration-related offenses. Nineteen percent returned as matches in FBI's Combined DNA Information System. Of the roughly 500 positives, 49 percent were matches to sexual assaults and 40 percent matched to other violent crimes.

requirements." On March 15, 2019, OSC was informed, yet again, that the exclusive authority for the exemption was the 2010 correspondence between then-Secretary Napolitano and then-Attorney General Holder. Even so, CBP requested additional time to complete its supplemental report "due to competing priorities and limited resources." In response to the revised deadline in May 2019, CBP asserted it "needed to expand its investigation and coordinate with other components of DHS."

Given CBP's repeated failure to respond to OSC's supplemental request for an explanation of its continued non-compliance with the statutory DNA collection requirements, CBP's recurring requests for extra time to complete its supplemental report appeared to be nothing more than an effort to delay and obfuscate. On June 18, 2019, four months after OSC's initial request for a supplemental report, and with no official response, I took the unusual step of meeting with then CBP Commissioner John Sanders and Deputy Commissioner Perez to express my frustrations with the agency's conduct and continued failure to collect DNA from criminal subjects. At this meeting, I was informed that additional review of these matters would occur and that the original agency report would be revised accordingly. CBP requested an additional four to eight weeks to provide this information to OSC, which OSC granted.

On August 13, 2019, CBP provided its supplemental report. Again, the agency took the position that the 2010 exception remained in place and that CBP's responsibilities extended only to the collection of DNA from criminal subjects. However, it does not appear that CBP actually collects DNA from criminal subjects as the agency further maintained that other law enforcement agencies, such as ICE and USMS collected DNA from criminal subjects, apparently obviating CBP's need to do so. This assertion is also refuted by DHS DNA collection data discussed at length below.

III. The Whistleblowers' Comments

The whistleblowers refuted the agency's findings. They noted that, in asserting the exception still stands, CBP ignores clear representations in Secretary Napolitano's correspondence with Attorney General Holder:

> We intend to phase-in implementation over the next year, with certain DHS Components to begin the process more quickly than others. DHS wishes to pursue further discussions with DOJ regarding training options for DHS law enforcement officers and agents, as training is needed in the initial stage of the broader DHS implementation of this process. In addition to the training requirement, for example, both ICE and **CBP** must negotiate with their unions to bargain on impact and implementation due to this proposed change in working conditions (emphasis added).

The whistleblowers asserted that this language demonstrates CBP's original intent to implement the collection of DNA from criminal arrestees after a period of coordination and preparation. They further noted that the original conditions and concerns that precipitated the

exception request no longer exist. The whistleblowers commented that DHS estimated in 2010 that approximately one million individuals would be subject to DNA collection, creating an "unfunded, unmanageable burden." However, since 2010, there has been a significant drop in Southwest Border apprehensions, while Border Patrol Agent staffing levels have increased by over 80 percent.

Furthermore, the whistleblowers found the agency's assertion that the obligation to collect DNA is met by other agencies disingenuous. Specifically, they noted that in Fiscal Year 2017, ICE took DNA samples from approximately 3 percent of apprehended individuals, while CBP took DNA samples from fewer than 100 out of the approximately 330,000 individuals they arrested or apprehended. Therefore, it appears that the DNA of the vast majority of individuals in CBP custody was not collected.

Moreover, the whistleblowers provided information demonstrating that CBP's failure to collect DNA from detainees has allowed individuals associated with violent crimes to elude detection, even when in the custody of ICE and CBP. This information came in the form of quarterly updates provided by the FBI's Federal DNA Database Unit. These updates frequently highlight cases where CBP and ICE repeatedly failed to collect DNA from subjects, allowing crimes to go unsolved for extended periods of time, in some instances even decades. The following are examples noted as particularly egregious by the whistleblowers:

- 1997 Sexual Assaults—In March 2019, DNA collected from a subject in federal prison for unlawful entry returned as a match for two 1997 sexual assaults described as particularly brutal by Arizona police. This individual had been in federal custody *nine times* previously with both CBP and ICE, without having his DNA collected.

- 2008 Dallas Homicide—In May 2016, DNA was collected from a subject imprisoned for illegal entry. A hit in the FBI DNA database matched to a DNA profile recovered from a glove left at the scene of a 2008 unsolved homicide in Dallas, Texas. In the eight years since the homicide, the subject had several interactions with law enforcement including a 2010 arrest by ICE as well as arrests in 2013 and 2016 by CBP, during which no DNA was collected.

- 2009 Denver Homicide—In February of 2017, the Federal Detention Center in Houston Texas, collected a DNA sample from a subject incarcerated for illegal entry. A match occurred in the database that linked the subject to a 2009 homicide in Denver, Colorado. The subject had several previous interactions with law enforcement including an arrest by ICE Denver in 2009 for reentry of removed aliens and an arrest in 2014 by CBP in Grand Forks for illegal entry. The FBI noted that had a DNA sample been collected during either of these interactions, this case would have likely been solved several years earlier.

There are additional examples beyond the three listed here, many with equally troubling circumstances. In supplemental comments addressing the agency's revised report,

the whistleblowers again disputed CBP's assertions, noting that the data does not support the contention that ICE obtains DNA from criminal subjects.

IV. The Special Counsel's Analysis and Findings

The Special Counsel's Analysis

Since 2010, CBP has not implemented DNA collection for criminal arrestees and is thus non-compliant with DOJ regulations. CBP did not successfully implement these processes within the one-year timeframe granted by Attorney General Holder, who noted in 2010 that: "The principal Department of Justice investigative agencies…are collecting DNA samples from their arrestees. All federal agencies that have not already done so, including DHS agencies, should complete their implementation of arrestee DNA sample collection as expeditiously as possible." In 2018, after 7 years of noncompliance, the whistleblowers were tasked with developing the capability to collect DNA from criminal arrestees as part of a CBP pilot program. Notably, the FBI's Federal DNA Database Unit issues quarterly updates concerning federal DNA collection efforts which demonstrate that DHS is non-compliant with these requirements.

CBP's reliance on the assertion that ICE collects DNA from CBP transfers and submits this information to the FBI is not supported by data published by the FBI and provided by the whistleblowers. Notably, in 2017, ICE reported 181,246 arrests. From this population ICE collected DNA from 4,977 individuals, or approximately 2.7 percent. The whistleblowers also provided information indicating that ICE is in the process of starting its own DNA collection pilot project, demonstrating that ICE has not taken fulsome measures to collect DNA from subjects in their custody up until now.

Beyond CBP's clear noncompliance with criminal DNA collection requirements, on April 4, 2018, then-Attorney General Jeff Sessions issued a memorandum requiring the criminal prosecution of all individuals arrested under 8 U.S.C. § 1325(a). This applies to individuals entering the United States without authorization, which represents the primary population of individuals CBP is tasked with arresting and detaining.

Attorney General Holder specifically noted in 2010 that when individuals are arrested on criminal charges, DNA samples must be collected. As immigration detainees are now criminally charged, they are presumptively criminal arrestees and do not fall within the 2010 exception. Accordingly, when DOJ modified its policy to prosecute immigration detainees arrested under 8 U.S.C. § 1325(a), DHS became responsible for DNA collection from all such individuals.

Furthermore, Secretary Napolitano based her request for an exception to DNA collection requirements on potential "severe organizational, resource, and financial challenges for this Department." Attorney General Holder qualified his approval by stating that Secretary Napolitano's request reflects her judgment that the collection of DNA from "immigration detainees would not be feasible **at the present time"** because of "operational exigencies and resource limitations (emphasis added)." The whistleblowers explained that

since 2010, there has been a significant decrease in Southwest Border apprehensions, while Border Patrol Agent staffing levels have increased by over 80 percent. Additionally, the FBI developed a robust infrastructure for receiving and analyzing the DNA samples, with increased resources devoted in anticipation of the receipt of a large number of samples from CBP. Furthermore, advances in technology have streamlined and secured the collection process and chain of custody.

Based on the language of Attorney General Holder's letter, it appears that the 2010 exception was not intended to be permanent. As noted above, significant operational and resource improvements have occurred. Nevertheless, it does not appear that CBP has attempted to come into compliance or sought an additional exception.

The Special Counsel's Findings

CBP has failed to fulfill its responsibilities under the law and in so doing has compromised public safety. The failure to collect DNA clearly inhibits law enforcement's ability to solve cold cases and to bring violent criminals to justice. Furthermore, although CBP was granted a one-year exemption, as stated in the language of the exemption itself, CBP was supposed to use that period to begin complying with DNA collection. The passage of nearly a decade without compliance is unacceptable.

CBP's decision not to comply has had a negative effect on law enforcement's ability to solve crimes. This is evidenced by the FBI's regular and independent assessment of federal DNA collection efforts, which detail violent crimes likely committed by suspects who were repeatedly detained by CBP and ICE but released without detection. It is disturbing that this would occur even once, let alone routinely for approximately a decade. Many cold cases might have been solved – and victims of violent crimes granted closure - by now if CBP had complied with its obligations under the law.

Further, the assertion that ICE collects DNA from persons transferred to its custody thereby obviating CBP's obligation is refuted by data published by the FBI and provided by the whistleblowers. To justify this failure as the result of inadequate resources is also disingenuous. The FBI maintains a robust infrastructure for receiving and analyzing DNA samples, and advances in technology have simplified and protected the collection process and chain of custody. The whistleblowers accurately note that CBP staffing and budget levels have also increased significantly since the passage of the DNA Fingerprint Act.

I seriously question CBP's conduct in this matter, and I have determined that its findings appear unreasonable. Given the significant public safety and law enforcement implications at issue, I urge CBP to immediately initiate substantive efforts to begin DNA collection from detained criminal subjects. I also urge the Department of Justice to review the status and continued applicability of the 2010 correspondence that CBP uses as a basis for its inaction.

The finding of an agency report as unreasonable, and this letter detailing OSC's reasoning, is the strongest possible step OSC can take to rebuke the agency's failure to comply with the law. I write this letter to inform both the President and congressional oversight committees of this misconduct, and it is my hope that further action can be taken to bring CBP into compliance with the law. I strongly urge Congress to continue its robust oversight efforts in this area, with a particular focus on accountability for DHS and CBP officials who have known for years that this situation existed, but chose not to act. I note that a number of CBP officials central to agency inaction were identified by the whistleblowers but never interviewed in the investigation because CBP dismissed the extent of their involvement.

I strongly commend the whistleblowers for their public service and commitment to accountability. Their continued persistence is commendable, as is their concern for the dramatic law enforcement implications of this case.

As required by 5 U.S.C. §1213(e)(3), I have sent unredacted copies of this letter, the agency reports, and the whistleblower comments to the Senate Homeland Security and Governmental Affairs Committee and the House Committee on Homeland Security. I have also filed redacted versions of these documents and the redacted referral letter in OSC's public file which is available at www.osc.gov. This matter is now closed.

Respectfully,

Henry J. Kerner
Special Counsel

Enclosures