

EMPOWER OVERSIGHT

Whistleblowers & Research



January 16, 2024

Via Electronic Transmission

Inspector General Michael Horowitz
U.S. Department of Justice
Office of the Inspector General
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

Counsel Jeffrey Ragsdale
U.S. Department of Justice
Office of Professional Responsibility
950 Pennsylvania Avenue NW, Suite 3266
Washington, DC 20530-0001

RE: Complaint of Reprisal Against Federal Bureau of Investigation Employee for Making a Protected Disclosure

Dear Inspector General Horowitz and Counsel Ragsdale:

INTRODUCTION

Empower Oversight Whistleblowers & Research (“Empower Oversight”) is a nonpartisan, nonprofit educational organization dedicated to enhancing independent oversight of government and corporate wrongdoing. We work to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, and seek to hold those authorities accountable to act on such reports by, among other means, publishing information concerning the same.

REPRISAL COMPLAINT

Empower Oversight represents Monica Shillingburg, who is employed by the Federal Bureau of Investigation (“FBI”) at its Criminal Justice Information Services Branch (“CJIS”) in Clarksburg, West Virginia. Prior to reprisal taken against her, she served as a program manager/unit chief in the FBI National Instant Criminal Background Check System (“NICS”). Pursuant to 28 C.F.R. § 27.3(a), through undersigned counsel, Mrs. Shillingburg makes a complaint against various CJIS officials for taking personnel actions with respect to her as reprisal for her protected disclosures, in violation of 5 U.S.C. § 2303(a) and 28 C.F.R. § 27.2.

A. Protected Disclosures

The NICS section is responsible for conducting criminal background checks of individuals who seek to purchase firearms. The section performed the initial checks, as well as appeals of checks that were delayed or where there was a denial.

Mrs. Shillingburg had served in that section since 1997 and was an original member of the NICS development team when the section was formed. Because of her vast experience, she became a program manager/unit chief in the NICS section. She has been a unit chief or the lead manager in every single unit of NICS during her career, making her one of the most knowledgeable managers of NICS in the FBI. Mrs. Shillingburg was nominated by the FBI and was the recipient of a national award from the Women in Federal Law Enforcement Foundation in 2016.

1. Protected Disclosures

During the spring of 2018, Mrs. Shillingburg was informed by a deputy assistant director that the background check appeals were being moved to CJIS's Biometric Services Section ("BSS") on October 1, 2018. Prior to the October 1, 2018 move, Mrs. Shillingburg disclosed that moving NICS appeals to BSS was improper for three general reasons.

First, she reasonably believed the move would violate the Brady Handgun Violence Protection Act of 1993 ("the Brady Act"), Public Law No. 103-159 and 28 C.F.R. Part 25, which mandate that background check procedures, including appeals, must be performed by the NICS section. Only the attorney general may delegate NICS functions to another entity, and the attorney general did not make any such delegation when the FBI moved the background check appeals to BSS. Mrs. Shillingburg based her opinion, in part, on an FBI attorney's legal opinion on the matter when the issue previously arose in 2013.

Mrs. Shillingburg was particularly concerned about the legality of the move because NICS and BSS use different funding streams. BSS is funded by user fees, while NICS is funded by congressional appropriation. Thus, it appeared that mixing the two sections' functions would be a misuse of funds. In fact, after the move, BSS personnel began using the NICS cost code, which further complicated the matter. BSS employees were using NICS funding while supervised by BSS management.

Mrs. Shillingburg's concern over the legality of the move was heightened when CJIS employees were instructed in an email to avoid saying the appeals had been "moved" to BSS and, instead, to say the work was "surged" or "merged" with BSS. She believed this instruction was an effort by CJIS management to obfuscate the legal and regulatory impropriety of the move.

Second, in addition to the legal and regulatory violations, Mrs. Shillingburg disclosed that moving the appeals to BSS was gross mismanagement and a gross waste of funds. The NICS system had suffered from a backlog of checks for a substantial period of time, and the NICS section repeatedly asked for additional personnel to address the backlog. When insufficient resources were provided, the NICS section used substantial resources to automate some of the appeals work, which allowed it to address the backlog. Moving the appeals to BSS would waste all of the NICS section's previous work, as BSS would have to develop a new system, and it would cause the backlog to increase. Furthermore, BSS employees received substantially less training in the appeals work, so the quality of work suffered when it was moved to BSS. Some NICS employees had to be transferred to BSS to assist with the appeals work.

Finally, Mrs. Shillingburg disclosed a substantial and specific danger to public safety because the BSS personnel's lack of experience and training increased the likelihood of an improper gun sale.

2. Recipients of Protected Disclosures

Mrs. Shillingburg and other employees, particularly NICS section attorney Julie Baumgardner, disclosed the above improprieties regarding the move to BSS to her chain of command. In response, Deputy Assistant Director (“DAD”) Kim DelGreco communicated down through the Section Chief and Assistant Section Chief Lisa Vincent that Mrs. Shillingburg and Ms. Baumgardner needed to get on board with the decision to move the unit or the FBI would take action against the employees. DAD DelGreco even stated that she would decide to whom early retirement from the FBI would be offered, in what appeared to be a threat to those raising concerns.

After the NICS appeals were moved, Mrs. Shillingburg saw that various problems arose. After seeing that and doing some research on making a whistleblower disclosure, Mrs. Shillingburg made a formal protected disclosure about these improprieties to her Section Chief Robin Stark-Nutter and Assistant Section Chief Vincent on May 29, 2019. Under 5 U.S.C. § 2303(a)(1)(A), a supervisor in an employee’s chain of command is a designated recipient for protected disclosures from FBI personnel.¹

Mrs. Shillingburg believes her supervisors were required to forward her disclosure to the FBI’s Inspection Division (“INSD”). Under 5 U.S.C. § 2303(a)(1)(E) and 28 C.F.R. § 27.1(a), the FBI Inspection Division is a designated recipient for protected disclosures from FBI personnel.

When the FBI INSD failed to take action, Mrs. Shillingburg disclosed the impropriety to the U.S. Department of Justice (“DOJ”) Office of the Inspector General (“OIG”), receiving an acknowledgment from the OIG dated July 30, 2019. Under 5 U.S.C. § 2303(a)(1)(B) and 28 C.F.R. § 27.1(a), the OIG is a designated recipient for protected disclosures from FBI personnel.

On September 1, 2019, after hearing nothing from INSD and only receiving an acknowledgment from the OIG, Mrs. Shillingburg disclosed the mishandling of the NICS system to the Office of Special Counsel (“OSC”). *See* Exhibit A. Specifically, she reported that:

- a. The FBI had failed to provide adequate staffing to NICS, resulting in the failure to complete required background checks prior to the sale of firearms; and
- b. CJIS management improperly transferred the NICS appeal process to the BSS, in violation of the Brady Act and 28 C.F.R. Part 25.

The Office of Special Counsel is a designated recipient for protected disclosures from FBI employees under 5 U.S.C. § 2303(a)(1)(G).²

At OSC’s request, Mrs. Shillingburg signed a consent form dated October 3, 2019, for the OSC to disclose her name as a whistleblower to the FBI and DOJ.

¹ Currently, DOJ’s regulations regarding FBI whistleblower protections are inconsistent with statutory requirements under 5 U.S.C. § 2303, specifically relevant here, excluding disclosures to a supervisor in an employee’s chain of command. However, DOJ has proposed updating those regulations to conform to statutory requirements. *See* Whistleblower Protection for Federal Bureau of Investigation Employees (Docket No. JM 154; AG Order No. 5618-2023) 88 Fed. Reg. 18487.

² As discussed in n.2 above, DOJ’s regulations regarding FBI whistleblower protections are currently inconsistent with statutory requirements under 5 U.S.C. § 2303. Specifically relevant here, regulations currently exclude protections for disclosures to the OSC. However, DOJ has proposed updating those regulations to conform to statutory requirements. *See* Whistleblower Protection for Federal Bureau of Investigation Employees (Docket No. JM 154; AG Order No. 5618-2023) 88 Fed. Reg. 18487.

On October 22, 2019, OSC referred Mrs. Shillingburg's disclosure to DOJ, which asked the FBI to investigate the matter. In an April 14, 2020 report, FBI INSD found that there had been no improprieties by CJIS, and DOJ concurred with the INSD's findings. DOJ transmitted INSD's report to OSC on April 22, 2020. *See* Exhibit B.

On June 29, 2020, Mrs. Shillingburg responded to the INSD report by disclosing to OSC several errors. *See* Exhibit C. For example, INSD claimed that the move of appeals to BSS resulted in improvements to the appeals process, particularly with automation, but the NICS section had already been making those improvements and the move to BSS actually delayed their implementation. In fact, before the move to BSS, the NICS section was completing appeals in 17 days. After the move, BSS completed appeals in 45-48 days.

Also, BSS decided not to process an entire set of appeals that are not required by law to be addressed, when a response by NICS is delayed. Before the move to BSS, the NICS section processed appeals of delayed responses. After the move to BSS, the prospective gun buyers' only option to address the delayed response, which could result in a de facto denial of their ability to buy a gun, was to file a different form of appeal called a voluntary appeal file. Voluntary appeal file submissions were still being processed by the NICS section. Essentially, part of BSS's claimed success was the result of pushing its work back onto the NICS section. The backlog for voluntary appeal file submissions grew to over 3,000. Furthermore, INSD failed to account for the reduction in the quality of appeals processing. BSS personnel did not require appellants to confirm that the fingerprints submitted were actually theirs, which increased the likelihood of purchasers being allowed to buy a gun by using someone else's fingerprints.

OSC closed its disclosure file and sent it to the President and Congress on January 27, 2022.³ *See* Exhibit D. Mrs. Shillingburg authorized the inclusion of her written comments on the INSD report in OSC's public release.

3. Reasonableness of Disclosures

Mrs. Shillingburg had a reasonable belief that her disclosures evidenced the wrongdoing described in 5 U.S.C. § 2303(a)(2). The reasonableness of her disclosures is further confirmed by recipients of her disclosures.

In its referral of Mrs. Shillingburg's disclosures to DOJ, Exhibit A, OSC advised DOJ that it "concluded that there is a substantial likelihood that the information provided to OSC discloses a violation of law, rule, or regulation, gross mismanagement, and a substantial and specific danger to public safety."

Additionally, on October 1, 2023, the FBI moved NICS appeals back to the NICS section from BSS. The FBI's justification to its employees for moving the appeals back to the NICS section mirrors several of the disclosures Mrs. Shillingburg made against the transfer five years earlier. This further validates the reasonableness of Mrs. Shillingburg's disclosures.

Thus, Mrs. Shillingburg's disclosures to her chain of command, FBI Inspection Division, the OIG, and OSC meet all the requirements of a protected disclosure under 5 U.S.C. § 2303(a) and 28 C.F.R. § 27.1(a).

B. Reprisal

Michael Christman served as one of the three DADs at CJIS from 2018 to 2020. This included the period when Mrs. Shillingburg made her protected disclosures and DAD

³ https://osc.gov/Documents/Public%20Files/FY22/DI-19-5076/DI-19-5076%20Letter%20to%20President_Redacted.pdf.

Christman's colleague, DAD DelGreco, told her the FBI would take action against Mrs. Shillingburg if she continued to object to the improper transfer of NICS appeals to BSS. In May 2020—seven months after OSC referred to DOJ Mrs. Shillingburg's disclosures, along with her identity as the source—Christman was appointed as the Special Agent in Charge of the FBI's Pittsburgh Field Office. Christman returned to CJIS as Assistant Director ("AD") in March 2021.⁴

Mrs. Shillingburg and other NICS employees had been working remotely during the COVID-19 pandemic, including when OSC closed its report in early 2020 on her disclosure. After returning to the office, Mrs. Shillingburg had a meeting with AD Christman and other NICS unit chiefs in August 2021. Thereafter, Section Chief Trudy Ford and Assistant Section Chief Joey Hixenbaugh told Mrs. Shillingburg in September or October 2021 that Mrs. Shillingburg had "left a bad taste" in the mouth of AD Christman during the August 2021 meeting because of her "body language." Ford and Hixenbaugh also told Mrs. Shillingburg that she needed to work to get on AD Christman's "good side."

As OSC closed its file in January 2022, CJIS management began taking the following personnel actions against Mrs. Shillingburg as reprisal for her protected disclosures: 1) she was transferred from her unit chief position in the NICS section to a non-unit chief position in another section; 2) she has been denied the opportunity to work remotely; and 3) CJIS management has communicated to her that it is considering a reduction in her pay.

1. Transfer/Reassignment

On January 3, 2022, CJIS management informed Mrs. Shillingburg she would be transferred from her unit chief position in the NICS section to the Crime and Law Enforcement Statistics Unit ("CLESU"). This move was made without any negative written or verbal personnel action (i.e., reprimand, "write-up," performance review, etc.), and she was given no choice in the move. When she was moved, she was told that she would be working on a special project for the AD, but she was not actually given that assignment.

Although the transfer has not resulted in a reduction in pay yet, Mrs. Shillingburg lost her position as a unit chief in the transfer. Oddly, even though there was an open unit chief position in CLESU, Mrs. Shillingburg was not moved into that position. Later, a unit chief was selected who had no previous experience at that supervisory level. Also, CJIS management told Mrs. Shillingburg that she was to perform the duties of acting unit chief when the permanent unit chief was out of the office. Mrs. Shillingburg had been a unit chief for eighteen years—from 2004 to 2022. The transfer forced her to work for a far less experienced unit chief and act in his stead. Also, while she previously supervised about 160 employees when she was a unit chief in the NICS section, she only supervised three employees at CLESU when she was initially moved. She currently only supervises ten people: eight employees and two contractors. Finally, as a result of the transfer, Mrs. Shillingburg was moved from a private office to a small cubicle. Amongst employees at CJIS, the loss of a private office is a significant public rebuke of an employee. In fact, after the move, many employees asked her what she had done wrong, which was a humiliating experience for her.

Mrs. Shillingburg's transfer, causing her to lose her unit chief position, work for a far less experienced manager, supervise far fewer employees, and lose her private office, had the dual effect of demoralizing her and sending a message to other CJIS employees about what management would do to them if they made protected disclosures.

⁴ FBI, Press Release, Michael A. Christman Named Assistant Director of the Criminal Justice Information Services Division (Mar. 12, 2021) available at <https://www.fbi.gov/news/press-releases/michael-a-christman-named-assistant-director-of-the-criminal-justice-information-services-division> (last visited Oct. 27, 2023).

2. Significant Change in Working Conditions – Denial of Previously Approved Remote Work and Arbitrary Restrictions on Remote Work and Leave⁵

After her transfer to CLESU, in July 2022, Mrs. Shillingburg received permission to work remotely for three weeks at a recently completed home in North Carolina. Shortly after arriving in North Carolina, Mrs. Shillingburg's unit chief notified her that the remote work policy had changed. She was not allowed to work remotely for more than one week at a time, even though she had previously received permission to work remotely for longer periods. Mrs. Shillingburg asked her unit chief for a written copy of the policy change, but she was not given one until June 2023, almost a year after her approved remote work was cancelled. Meanwhile, during the fall of 2022, Mrs. Shillingburg was notified that she could no longer work remotely at all from her home in North Carolina because it was considered routine telework. Mrs. Shillingburg has learned that other CJIS employees have been allowed to telework nearly full-time the past two and a half years, including an employee in her same section who has been allowed to telework from a home out of state.

Mrs. Shillingburg learned that AD Christman was taking a personal interest in whether she was working remotely. In April 2023, her unit chief told her that AD Christman had printed out a copy of a Facebook post she posted while she was on leave in North Carolina. The AD reportedly questioned why she was out of state. Upon returning to CJIS, Mrs. Shillingburg met with DAD Brian Griffith, who confirmed that AD Christman had printed out the Facebook post and had given it to him and others in Mrs. Shillingburg's chain of command. DAD Griffith indicated that he believed this was a "bad move" by the AD and that he would talk to him about it. Mrs. Shillingburg also learned that AD Christman had reportedly searched her work record to determine when she would be retiring. DAD Griffith told Mrs. Shillingburg that AD Christman had a bad impression of her.

In June 2023 Mrs. Shillingburg was questioned by her chain of command about how many times she had worked remotely since October 2022. She had worked one day remotely, and she only worked remotely that day because it was CJIS Family Day, when her section chief encouraged employees to work remotely to make sure there was enough parking for visitors.

In addition, in July 2023, Mrs. Shillingburg has been told by her unit chief that CJIS management decided that she cannot take more than two weeks of consecutive leave at any one time. Before that, she had been able to take more than two weeks of consecutive leave. Also, another employee in the section was allowed to take three consecutive weeks of leave. To Mrs. Shillingburg's knowledge, she was the only employee whose leave was restricted, and this was not a written policy.

3. Threat to Reduce Pay

In June 2023, while she was being questioned about her remote work, Mrs. Shillingburg's unit chief notified her that AD Christman did not feel she was earning her pay, because she is not a unit chief and does not always act for the current unit chief when he is out of the office.

⁵ A significant change in working conditions is a "personnel action" under 5 U.S.C. § 2302(a)(2)(A)(xii), but, under 5 U.S.C. § 2303(a) the definition of a personnel action involving an FBI employee only includes the personnel actions listed in clauses (i) through (x) of § 2302(a)(2)(A). However, this discrepancy is a result of Congress including additional personnel actions to § 2302(a)(2)(A) without amending § 2303(a). When § 2303 was originally passed, a significant change in working conditions was clause (x) of § 2302(a)(2)(A), and, thus, a personnel action for FBI employees. DOJ has acknowledged this in its proposed changes to FBI whistleblower regulations and has proposed changing regulations to correct this discrepancy. See Whistleblower Protection for Federal Bureau of Investigation Employees (Docket No. JM 154; AG Order No. 5618-2023) 88 Fed. Reg. 18491.

During September 2023, Mrs. Shillingburg was told that she must act as unit chief for CLESU for a month while the permanent unit chief was on temporary assignment.

CONCLUSION

Mrs. Shillingburg disclosed to her chain of command, FBI INSD, DOJ OIG, and OSC information that she reasonably believed evidenced violations of law, rule, or regulation, gross mismanagement, gross waste of funds, and a substantial and specific danger to public safety. OSC's referral validates the reasonableness of her belief. The FBI's own actions confirm her beliefs were reasonable, since it has since reversed the actions that she originally reported and told employees that the decision was based on many of the same reasons Mrs. Shillingburg had cited in her whistleblower complaint. Yet CJIS management, particularly AD Christman, has retaliated against Mrs. Shillingburg for her protected disclosures. We respectfully request that the OIG or DOJ OPR investigate this reprisal and take corrective action.

Cordially,

[/Tristan Leavitt/](#)
Tristan Leavitt
President



U.S. OFFICE OF SPECIAL COUNSEL

1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

October 22, 2019

The Honorable William Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: OSC File No. DI-19-005076
Request for Investigation—5 U.S.C. § 1213(c)

Dear Attorney General Barr:

I am referring to you for investigation a whistleblower disclosure concerning employees of the Department of Justice, Federal Bureau of Investigations (FBI), Criminal Justice Information Systems Branch (CJIS), Clarksburg, West Virginia. The whistleblower alleged that employees have engaged in conduct that may constitute a violation of law, rule, or regulation, gross mismanagement, and a substantial and specific danger to public safety. A report of your investigation on these allegations and any related matters is due to the Office of Special Counsel on December 20, 2019.

████████████████████ a Program Manager in the FBI National Instant Criminal Background Check System (NICS) who consented to the release of her name, disclosed that officials have engaged in conduct that violates DOJ regulations and puts the public at risk. The allegations to be investigated include:

- The FBI has failed to provide adequate staffing to NICS, allegedly resulting in the failure to complete required background checks prior to the sale of firearms; and
- CJIS management has improperly transferred the NICS appeal process to the Biometric Services Section, in violation of the Brady Handgun Violence Protection Act of 1993 (the Brady Act), Public Law 103-159 and 28 C.F.R. Part 25.

Prior to completing a sale of a firearm, a commercial seller, known as a Federal Firearms Licensee (FFL), must contact NICS to perform a background check to verify that the buyer is not prohibited from purchasing and owning a firearm. Upon review, an NICS examiner advises the FFL to proceed with the firearm transaction if the background check results in no matching records, or to deny the firearm transaction if the purchaser has a record that includes prohibitive criteria. If a purchaser's record contains potentially prohibitive criteria and more information is required to make a determination, the NICS examiner advises the FFL to delay the firearm transfer. In the case of delay, if the NICS

Exhibit A

The Honorable William Barr

October 22, 2019

Page 2 of 3

examiner is unable to provide a determination to the FFL within three business days, under the Brady Act the FFL may proceed with the firearm transfer.

██████████ alleged that NICS does not have adequate staff to make determinations on all inquiries within three business days. As a result of NICS's inability to meet the three business day determination period, firearms transactions that should have been denied have been completed, requiring subsequent recovery efforts by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). In 2018, for example, NICS completed a background check and found prohibitive criteria in 4,240 firearm transactions after the three-day window, referring those transactions to ATF for firearm retrieval from individuals prohibited from purchasing and owning a firearm. Moreover, ██████████ reported that if NICS does not make a final determination on a background check that contains potentially prohibitive criteria within 90 days of receipt, the record of the transaction is purged from the system. In 2018, NICS purged 201,323 background checks at 90 days with no final determination ever being made on those firearm transactions. In purged cases, NICS does not know whether the FFL transferred a firearm to the buyer.

██████████ alleged that NICS management has requested additional staff annually to address its increasing caseload but has been denied the requested staffing increases. NICS requested 368 additional employees in 2017, and received 75; 321 employees in 2018, and received 38; and 409 employees in 2019, and received none. ██████████ alleged that NICS is unable to perform all background checks in the required timeframe based on this staffing shortage.

██████████ also alleged that CJIS management has improperly transferred the NICS appeal process to the Biometric Services Section (BSS). The appeal procedures have been specifically delegated to the NICS section under §103 of the Brady Act and the implementing policies and procedures laid out in 28 C.F.R. Ch. 25. According to ██████████ the appeal process was assigned outside of the NICS section to BSS in October 2018, without the required delegation from the Attorney General.

Pursuant to my authority under 5 U.S.C. § 1213(c), I have concluded that there is a substantial likelihood that the information provided to OSC discloses a violation of law, rule, or regulation, gross mismanagement, and a substantial and specific danger to public safety. Please note that specific allegations and references to specific violations of law, rule, or regulation are not intended to be exclusive. If, in the course of your investigation, you discover additional violations, please include your findings on these additional matters in the report to OSC. As previously noted, your agency must conduct an investigation of these matters and produce a report, which must be reviewed and signed by you. Per statutory requirements, I will review the report for sufficiency and reasonableness before sending copies of the agency report, along with the whistleblower's comments and any comments or recommendations I may have, to the

The Special Counsel

The Honorable William Barr
October 22, 2019
Page 3 of 3

President and congressional oversight committees and making these documents publicly available.

Additional important requirements and guidance on the agency report are included in the attached Appendix, which can also be accessed at <https://osc.gov/Services/Pages/DU-Resources.aspx>. If your investigators have questions regarding the statutory process or the report required under section 1213, please contact Catherine A. McMullen, Chief, Disclosure Unit, at (202) 804-7088 or cmcmullen@osc.gov for assistance. I am also available for any questions you may have.

Sincerely,



Henry J. Kerner
Special Counsel

Enclosure

cc: The Honorable Michael E. Horowitz, Inspector General

APPENDIX
AGENCY REPORTS UNDER 5 U.S.C. § 1213

GUIDANCE ON 1213 REPORT

- OSC requires that your investigators interview the whistleblower at the beginning of the agency investigation when the whistleblower consents to the disclosure of his or her name.
- Should the agency head delegate the authority to review and sign the report, the delegation must be specifically stated and include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5).
- OSC will consider extension requests in 60-day increments when an agency evidences that it is conducting a good faith investigation that will require more time to complete.
- Identify agency employees by position title in the report and attach a key identifying the employees by both name and position. The key identifying employees will be used by OSC in its review and evaluation of the report. OSC will place the report without the employee identification key in its public file.
- Do not include in the report personally identifiable information, such as social security numbers, home addresses and telephone numbers, personal e-mails, dates and places of birth, and personal financial information.
- Include information about actual or projected financial savings as a result of the investigation as well as any policy changes related to the financial savings.
- Reports previously provided to OSC may be reviewed through OSC's public file, which is available here: <https://osc.gov/PublicFiles>. Please refer to our file number in any correspondence on this matter.

RETALIATION AGAINST WHISTLEBLOWERS

In some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their allegations. The Special Counsel strongly recommends the agency take all appropriate measures to protect individuals from retaliation and other prohibited personnel practices.

EXCEPTIONS TO PUBLIC FILE REQUIREMENT

OSC will place a copy of the agency report in its public file unless it is classified or prohibited from release by law or by Executive Order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs. 5 U.S.C. § 1219(a).

EVIDENCE OF CRIMINAL CONDUCT

If the agency discovers evidence of a criminal violation during the course of its investigation and refers the evidence to the Attorney General, the agency must notify the Office of Personnel Management and the Office of Management and Budget. 5 U.S.C. § 1213(f). In such cases, the agency must still submit its report to OSC, but OSC must not share the report with the whistleblower or make it publicly available. See 5 U.S.C. §§ 1213(f), 1219(a)(1).



U.S. Department of Justice

Office of the Deputy Attorney General

Bradley Weinsheimer
Associate Deputy Attorney General

Washington, D.C. 20530

April 22, 2020

The Honorable Henry J. Kerner
Special Counsel
Office of the Special Counsel
1730 M. Street, N.W., Suite 300
Washington, D.C. 20036-4505

Re: OSC File No. DI-19-005076; Investigation Regarding Whistleblower Disclosures
Relating To the FBI Criminal Justice Information Service

Dear Mr. Kerner:

I am responding to your October 22, 2019 letter to the Attorney General in which you referred for investigation allegations by a whistleblower that you believe constituted a substantial likelihood that a violation of law, rule, or regulation has occurred. Specifically, a federal employee of the Federal Bureau of Investigation (FBI) alleged that: (1) the FBI Criminal Justice Information Services (CJIS) Division failed to provide adequate staffing to the National Instant Background Check System (NICS), resulting in the failure to complete required background checks prior to the sale of firearms; and 2) CJIS management improperly transferred the NICS appeal process to the Biometric Services Section (BSS), in violation of the Brady Handgun Violence Protection Act of 1993 (Brady Act). While response to these types of whistleblower allegations are delegated to me by the Attorney General, in this matter, the FBI through the Inspection Division was charged with investigating this matter and provided its report directly to you.

As reflected in the report, the FBI's Inspection Division received your letter and undertook an investigation. That investigation did not substantiate that there exists a substantial likelihood that a violation of law, rule, or regulation had occurred as alleged by the whistleblower. In particular, the investigation concluded that CJIS executive management took appropriate and proactive steps to address staffing needs and that required background checks were completed as appropriate. The Inspection Division further concluded that the transfer of the NICS Appeal process to the BSS capitalized on automation, improved efficiency, and was completed in accordance with the Brady Act. I have thoroughly reviewed the FBI's report and concur with its conclusions.

Exhibit B

I trust that the investigation conducted by the FBI's Inspection Division resolves the concerns outlined in your letter, and that you will close your file on this matter. Please do not hesitate to contact me if I can provide further assistance.

Sincerely,

G. Bradley Weinsheimer

Bradley Weinsheimer
Associate Deputy Attorney General

**INSPECTION DIVISION
OFFICE OF INSPECTIONS**



INSPECTON REPORT

**REVIEW OF CJIS DIVISION'S NATIONAL INSTANT CRIMINAL
BACKGROUND CHECK SYSTEM (NICS)**

April 14, 2020



A handwritten signature in blue ink, appearing to read "SBC", is written over a horizontal line.

**Scott B. Cheney
Deputy Assistant Director
Inspection Division**



**CJIS DIVISION
NATIONAL INSTANT CRIMINAL
BACKGROUND CHECK SYSTEM
04/15/2020**



EXECUTIVE SUMMARY

(U//FOUO) On 10/22/2019, the U.S. Office of Special Counsel (OSC) referred a request for investigation to Attorney General (AG) William Barr. The request was delegated to the FBI, Inspection Division (INSD) and involved two allegations made by a whistleblower that:

1) the FBI Criminal Justice Information Services (CJIS) Division failed to provide adequate staffing to the National Instant Background Check System (NICS), resulting in the failure to complete required background checks prior to the sale of firearms; and 2) CJIS management improperly transferred the NICS appeal process to the Biometric Services Section (BSS), in violation of the Brady Handgun Violence Protection Act of 1993 (Brady Act).

(U//FOUO) On 01/23/2020, an INSD team deployed to CJIS to conduct a review. The team conducted nine interviews with CJIS personnel; reviewed documentation; compiled statistics; and obtained pertinent data. INSD reviewed CJIS and NICS Section communications consisting of reports, emails, and internal documents. For the purposes of this review, INSD evaluated relevant information from 2016 to 2019 to evaluate the two allegations.

(U//FOUO) INSD assessed between 1999 and 2019, NICS had a three-fold increase in background checks. Since its inception in 1993, NICS staffing has been a focus of CJIS executive management (EM) and the staffing challenges have been addressed through budget and FSL enhancement, increased automation, contract employee utilization, employee overtime, and employee cross training. INSD further assessed that despite increased workload and staffing challenges, the NICS Section took appropriate steps to complete required background checks prior to the transfer of firearms. In 2019, of the 28,369,750 background checks submitted to NICS, 28,108,438 (99.1%) were resolved within three business days; 28,162,329 (99.3%) were resolved within the 90 day Brady Act required timeframe; and 2,989 (<1%) were referred to the ATF for retrieval.

(U//FOUO) The authority for processing transactions, providing five-day response letters, and conducting NICS appeals was statutorily vested with the AG pursuant to the Brady Act. The AG delegated the authority to process appeals to NICS. In 2018, CJIS EM partially automated the firearms appeals process by transferring the NICS appeals function to the BSS, after consulting with the FBI Office of General Counsel (OGC), who had no legal objection.

(U//FOUO) INSD assessed CJIS EM took appropriate and proactive steps to address staffing needs during the review period and the transfer of the NICS Appeal process to the BSS capitalized on automation, improved efficiency, and was completed in accordance with the Brady Act.

SCOPE AND METHODOLOGY

(U//FOUO) On 01/23/2020, Inspector In-Charge Thomas F. Relford and Assistant Inspector Scott A. James deployed to FBI CJIS in Clarksburg, West Virginia, to conduct this review. The team conducted interviews with the Complainant and CJIS personnel, reviewed documentation, compiled statistics, and obtained pertinent data to assess the whistleblower complaint.

(U//FOUO) Additionally, CJIS responded to a Request for Information from INSD which addressed Recommendations made in the 2015 INSD Report, "*A Review of the CJIS Division's National Instant Criminal Background Check System (NICS) in Clarksburg, West Virginia,*" conducted following the Dylann Roof shooting, which occurred on 06/17/2015 in Charleston, South Carolina.

(U//FOUO) The review focused on the two areas outlined in the whistleblower complaint: (1) the adequacy of NICS staffing levels related to the processing and appeals of background checks, and (2) the transfer of the NICS Appeals function from the NICS Section to the BSS.

(U//FOUO) INSD conducted nine interviews, consisting of the Complainant, CJIS personnel, and an attorney from the OGC.

(U//FOUO) INSD reviewed CJIS and NICS Section communications consisting of reports, e-mails, and internal documents. For the purposes of this review, INSD evaluated relevant information from 2016 to 2019.

BACKGROUND

(U//FOUO) On 10/22/2019, the U.S. OSC referred a request (*OSC File No. DI-19-005076*) for investigation of a whistleblower complaint to AG Barr. (*Appendix B*) The request was in turn delegated to the INSD for review. As detailed in the complaint, the Complainant, [REDACTED], alleged the following:

- *The FBI failed to provide adequate staffing to NICS, allegedly resulting in the failure to complete required background checks prior to the sale of firearms*
- *CJIS management improperly transferred the NICS appeal process to the Biometric Services Section, in violation of the Brady Handgun Violence Protection Act of 1993, Public Law 103-159 and 28 C.F.R. Part 25.*

(U//FOUO) For background, NICS is a DOJ program established pursuant to the Brady Act designed to prevent the transfer of firearms to criminals, the mentally ill, illegal aliens, and people who have renounced their U.S. Citizenship or violated a number of State specific prohibitions. NICS is a name check system utilized to determine qualification for receiving or possessing firearms according to federal guidelines. The NICS process includes searching, at a minimum, three federally maintained databases: the National Crime Information Center, the Interstate Identification Index, and the NICS Index. If applicant identifiers match any entries in the federally maintained databases, the external manual and automated databases are cross-referenced for resolution. These databases include the ATF Relief from Disabilities Database, NICS Voluntary Appeal File, Disposition and Document File, and Westlaw.

(U//FOUO) Legal Instrument Examiners (LIEs), who range in grade from GS-7 to GS-9, assigned to the NICS Section, within CJIS are divided into various NICS program roles, to include: Research and Analysis; Appeals Services and Explosives; Command Center; Regional Coordinators; and NICS Index Team. Additionally, the NICS Section manages three regional contract call centers in Dallas/Fort Worth, Texas; Wheeling, West Virginia; and Barbourville, Kentucky. These call centers employed approximately 240 Customer Service Representatives, who triage initial telephone NICS inquires. (*An organizational chart is contained in the Appendix E.*)

(U//FOUO) The NICS process follows several paths from inquiry to resolution. To initiate a firearms background check, an applicant must show a Federal Firearms Licensee (FFL) an approved form of photo identification and provide the following required information via ATF Form 4473. A NICS Transaction Number is provided to the FFL and recorded on the ATF Form 4473. In some situations, NICS may request that applicants submit additional descriptors and unique identifiers to assist in discerning between similar records. The response from NICS to an inquiry consists of a notice to the FFL, which states that the transfer of the firearm may Proceed, the transfer should be denied, or the transfer is Delayed pending further review. The criterion for Denying a transfer is based on 10 federal prohibitions, as well as additional State specific prohibitions. *The list of the ten prohibitions is contained in Appendix C.*

UNCLASSIFIED//FOR OFFICAL USE ONLY

(U//FOUO) If requested information is not obtained from state and local authorities within three business days, also referred to the “Brady period”, and NICS is unable to provide either a Proceed or Deny response, the FFL has the option to legally transfer the firearm. The date on which the transfer may legally occur is called the “Brady Transaction Date.” If a LIE subsequently receives information that a firearm transaction should have been denied at the Brady Transaction Date, the LIE is required to verify if the firearm has been transferred by the FFL, and if so, required to refer the matter to the ATF for retrieval. INSD assessed since 2016, NICS has referred an average of 4,197 firearm retrievals per year to the ATF, including 2,989 in 2019.

(U//FOUO) Any buyer who believes a NICS denial is erroneous may appeal the decision by either challenging the accuracy of the record used in the evaluation of the denial or claim the record used as basis for the denial was invalid or did not pertain to the buyer. An appeal is defined as “a formal procedure to challenge the denial of a firearm transfer.” Pursuant to Code of Federal Regulations Title 28, sub section 25.2, “an individual may request the reason for the denial from the agency whom conducted the check of the NICS (either the FBI or the state/local law enforcement agency serving as POC).” In the alternative, a buyer denied by a POC State may elect to submit an appeal to the NICS Section.

(U//FOUO) An appellant may submit documentation to determine if he or she is eligible to possess or receive a firearm since some records are not complete or up-to-date. As a result, eligible firearm transferees may be subject to lengthy delays, or receive erroneous denials even after the completion of a successful appeal.

(U//FOUO) NICS encourages appellants submit a set of fingerprints with an appeal as proof of identity. In cases where the potential matches were refuted by fingerprints, the Deny decision could be overturned and the transaction allowed to Proceed. However, since NICS is required to purge all identifying information regarding Proceed transactions within 24 hours of notification to the FFL, pursuant to the Brady Act, in many instances, the process must be repeated when the same transferee attempts a subsequent purchase. NICS also includes a Voluntary Appeal File (VAF) procedure, by which a buyer may request the NICS Section retain their identifying information, rather than purging it, to prevent future erroneous denials or delays. VAF applications are processed by the NICS Section in the order they were received. INSD assessed that in October 2018 there were approximately 13,000 outstanding appeals. As of April 2020, there were approximately 6,900 pending appeals, which represents a 46% reduction.

(U//FOUO) In 2017, Congress passed the Fix NICS Act, which requires the FBI to take no longer than 60 days to complete the firearm appeal process. To provide a secure and efficient means to process appeals requests for, and challenges to, criminal history records, CJIS developed the electronic Departmental Order (eDO), (*see appendix D*), which maintains criminal history records and associated fingerprints. The eDO application/database maintains and manages criminal history record requests and challenges. The eDO website permits the public to submit requests and challenges and receive responses electronically. CJIS EM identified the existing eDO process as a means for also completing firearms appeals in a timely manner.

UNCLASSIFIED//FOR OFFICAL USE ONLY

NICS STAFFING

(U//FOUO) **Allegation:** *The FBI failed to provide adequate staffing to NICS, allegedly resulting in the failure to complete required background checks prior to the sale of firearms.*

(U//FOUO) For reference, in 1999, NICS conducted 9,128,123 background checks. In 2019, NICS conducted 28,369,750 background checks, an increase of approximately 322%. Since its inception in 1993, NICS staffing has been a focus of CJIS EM due to the increasing volume and attrition of the workforce. INSD assessed between 2016 and 2019, background checks increased three percent while NICS staffing increased by five percent, from 607 to 639.

A. Budget and FSL Enhancement

(U//FOUO) CJIS EM utilized FSL enhancements and re-allocated personnel to address staffing challenges. Since 2016, LIE FSL has increased from 465 to 531 (12%).

Date	Enhancement/Realignment	LIE FSL
01/15/2016	+75	465
07/05/2017	+49	528
04/26/2018	+2	530
06/26/2018	+32	562
10/03/2018	-25	537
05/24/2019	+1	538
10/16/2019	-1	537
11/06/2019	-5	532
11/22/2019	-1	531

(According to CJIS Division Crosswalk for Professional Staff provided by RPO)

(U//FOUO) NICS Section funding is Directly Appropriated by Congress. To request an FSL or budget enhancement, the NICS submits requests through the Office of Management and Budget (OMB) to Congress. In the aftermath of the 2015 Dylann Roof shooting, NICS requested and received \$6.6 million in funding for 75 full time employees and 33 contractors. For FY 2017, NICS requested \$31.8 million for 368 permanent positions and \$26 million for 160 contractors. In response, OMB provided \$15 million for permanent staff (75 positions surged from FY 2016) and \$20 million for contractor support. For FY 2018, NICS requested \$8.9 million for 85 permanent positions and received funding from OMB for 38 positions. NICS requested 100 FSL for FY 2020, OMB approved 40.

(U//FOUO) As a result of the Fix NICS Act of 2017, the NICS Section identified an additional FSL need of 60 employees to meet new mandates. The steady pace of incoming firearms transactions, the two plus year backlog of appeals, revealed the need for over 200 additional NICS Section LIEs. CJIS EM directed the NICS and BSS to merge the appeal work with the existing criminal history record challenges completed within the BSS. At the time, there were approximately 75 employees assigned to perform appeal work. With the merge of NICS Section appeal work and BSS challenge requests, BSS was augmented with 27 additional personnel, 25 of which were realigned from NICS. The personnel remaining (approximately 50) who

UNCLASSIFIED//FOR OFFICAL USE ONLY

performed NICS Section appeal work were utilized to perform more critical, time sensitive work within the NICS Section, such as incoming firearm transactions and other backlogs.

(U//FOUO) NICS Section total resource utilization fill rate was 97% for FY 2019, which represented a five percent increase from the average of the previous three fiscal years. Specifically in FYs 2016, 2017, and 2018, the resource utilization fill rate was 93%, 92%, and 92%, respectively.

B. Increased Process Automation

(U//FOUO) INSD assessed NICS has increased the efficiency of background check system through the E-Check system and the appeals process through the use of the eDO. Since 2002, the NICS E-Check system has provided the capability to conduct background checks electronically through a secure Internet connection. Upon receipt of a NICS E-Check request, the NICS Section processes the NICS E-Check by performing a review in an attempt to complete the transaction. In 2018, there were 6,814,676 NICS E-Check transactions processed. Of the 2018 NICS E-Check transactions, 6,674,847 were inquiries for firearms; the remainder were explosives.

(U//FOUO) To increase the usage of the NICS E-Check, the NICS Section routinely advances initiatives to promotion of the NICS E-Check process.

(U//FOUO) INSD assessed as a result of these initiatives, NICS E-Check usage steadily increased. By the end of 2019, the percentage of transactions initiated via the NICS E-Check was 81.96 percent, as follows:

Fiscal Year	Percentage of Checks Processed via E-Check:
2016	76.21%
2017	79.95%
2018	81.05%
2019	81.96%

(U//FOUO) In April of 2018, CJIS EM directed the NICS Functional Support Unit (FSU) to restructure the NICS appeals process. The intent was to adopt the eDO system to partially automate the process. Once CJIS EM merged the processing of appeal challenges by integrating NICS personnel into the BSS. When applications are denied, applicants are provided with the option to submit fingerprint cards, which allows the eDO to automatically process challenges. The turnaround time for such requests may be as little as two minutes for electronic submissions and 24 hours for fingerprints received by mail. If the submitted fingerprints does not match a prohibited person, the system automatically generates an email to the appellant and processes the challenge. As a result, efficiency of denial challenge processing improved; the appeals challenge function is now accomplished by 25 FSL as opposed to the 75 FSL previously required. The use of the eDO process has reduced the processing times on certain queries from 16 weeks to less

than one hour. Despite significantly fewer personnel, processing times have reduced and the majority of appeals are completed through automation.

C. Contract Employee Utilization

(U//FOUO) Since 2016, the NICS Section has utilized contract personnel to supplement government staff to sustain the mission of NICS. Contractors perform all NICS tasks with the exception of name check final determinations. Hiring contractors using non-personnel funding was a means to address staffing shortages over the years. Contract support grew from 122 contractors in 2017 to 199 in 2020. Although contractors do not determine final status, they provide assistance by conducting research and supporting the background check process. For FY 2017, CJIS EM requested fewer contractors due to the 75 FSL increase in full time LIEs. The following chart details the number of contract LIEs and corresponding budgets from 2016 to 2019:

Fiscal Year	Number of Contractors	Total Budget
2016	163	\$10,977,194
2017	122	\$11,244,717
2018	136	\$18,769,402
2019	211	\$15,961,542

D. Funding for Employee Overtime

(U//FOUO) At the beginning of each FY, the Resource Planning Office (RPO) provided Overtime (OT) to all divisions within the FBI. CJIS OT was requested by each section through the CJIS Division Application for Resource process. Based on interviews with CJIS personnel, unlimited OT was available to NICS employees within certain limits. Furthermore, during times of peak volumes, NICS employees were required to work OT due to mission critical needs.

(U//FOUO) The following chart represents NICS OT requests and usage from 2016 to 2019:

Fiscal Year	NICS Requested OT Hours	OT Hour Usage	Over/Under OT Hours Requested
2016	16,990	76,136	50,444
2017	41,030	75,499	34,419
2018	70,000	79,687	9,687
2019	79,000	73,371	-5,629

E. Employee Cross Training/Surge Capacity

(U//FOUO) INSD assessed CJIS EM took appropriate and proactive steps to address staffing needs during the review period. The steady growth in the volume of firearm purchases, as well as specific times of year with noted increases in sales, often strain NICS personnel resources. To comply with the deadlines mandated by the Brady Act, CJIS EM diverts personnel assigned to

UNCLASSIFIED//FOR OFFICAL USE ONLY

other NICS functions to assist with the processing of background checks. This practice was termed “escalation” amongst CJIS personnel. For example, approximately 79 BSS personnel were trained to assist NICS during times of peak volume. It was common practice to surge CJIS employees to NICS and other CJIS Sections if warranted. NICS also relied on former NICS employees within CJIS to address staffing shortages. During times of high volume, it was common to recall former NICS employees working in other units to address the increased workload.

(U//FOUO) The following tables represent the number escalation days relative to background checks by quarter:

Background Checks					Days of Escalation			
	2016	2017	2018	2019	2016	2017	2018	2019
1st	7,682,141	6,711,093	7,131,422	6,863,831	64	29	31	26
2nd	6,147,350	5,890,009	6,161,896	6,995,867	26	8	24	2
3rd	6,043,203	5,634,796	5,865,295	6,604,797	49	16	25	0
4th	7,665,979	6,999,317	7,023,323	7,905,255	63	50	35	20
Total	27,538,673	25,235,215	23,181,936	28,369,750	202	103	115	48

(U//FOUO) Since 2016, CJIS EM has made significant efforts to address the increased volume of NICS background checks. From FY 2016 to FY 2019, background checks have risen three percent from 27,538,673 to 28,369,750. During the same time period, NICS increased its FSL by 5% and contractor utilization by 29%. However, the increase in FSL did not represent the number of positions requested by NICS through the OMB Budget Enhancement Process. Starting in 2016 NICS requested position and budget enhancements to address the growing volume of NICS Background checks. For FY 2018, FY 2019, and FY 2020, NICS requested 491, 409, and 382 positions, respectively. Forty additional positions have been approved for FY2020. In addition, since FY19, HRD has approved over-hire authority for NICS to maintain an experienced workforce when attrition occurs. NICS maintains this this pool of qualified candidates due to a recurring quarterly job posting for the NICS LIE position.

(U//FOUO) INSD assessed the use of contract employees to be an effective means to augment NICS. Although not allowed to make “final determination”, contract employees provided valuable support to the NICS Background check process. Since 2016 to date, NICS has employed on average 166 contract employees. Additionally, contract employees could be hired and trained relatively quicker than FBI LIEs.

(U//FOUO) Beginning in 2002, the NICS E-Check system has provided FFLs the capability to conduct background checks electronically through a secure Internet connection. Use of this technology has steadily increased; as an example, 81.96% of NICS background checks in FY19 were done via the E-Check system.

UNCLASSIFIED//FOR OFFICAL USE ONLY

(U//FOUO) In 2016, NICS developed the Automation of the NICS plan to generate rule-based, automated decision making within NICS software. Subject matter experts (SME) derived conclusions for large amounts of precise data points to determine if the transfer of a firearm would be Definitely Prohibited, Never Prohibitive, or Possible Prohibitive based upon the specific set of data points. The approved rules, based upon the SME recommendations, were ingested into the NICS. The system in turn applied the status accordingly on comparable future background checks and automatically routed the transactions to the appropriate workbasket, i.e., Delay Queue, if needed. This automation reduced the number of transactions which required human interaction.

(U//FOUO) INSD assessed the use of eDO to address NICS appeals increased productivity. In 2018, the NICS appeals function was transitioned to BSS to capitalize on the efficiency and technology inherent in the eDO to process NCIC challenges. (*Appendix D*)

(U//FOUO) Starting in 2019, NICS Section management and analysts began actively reviewing schedules in an effort to develop recommended changes to maximize scheduling efficiencies. To assist in this effort to develop, streamline, and maintain an adaptive schedule to manage daily volume, NICS acquired Calabria Scheduling software. Based on input from this scheduling team, NICS instituted 24 work schedules to coordinate 17-hour coverage, seven days a week. These schedules, in contrasts to previous work schedules, provided no overlap between the day and night shift workplace, resulting in increased efficiency and reduced stress. The increased number of work schedules incentivized NICS LIEs, helped counter attrition, and provided a better work life balance for employees. As new employees are brought on board, shifts are evaluated to ensure they meet targeted service requirements while providing flexibility to LIEs for schedule preference and tenure.

(U//FOUO) Despite increased workload and staffing shortages, the NICS Section accomplished their mission to complete required background checks prior to the sale of firearms.

(U//FOUO) The priority of the NICS Section is to complete all NICS Background checks within three business days of the initial request. Without a final determination within three business days, the FFL is authorized to legally transfer the firearm. The Immediate Determination Rate (IDR) is comprised of the number of calls immediately proceeded at the NCCC, the rate of transaction determinations provided by the NICS Section while the FFL was still on the telephone, and the data from NICS E-Check. The AG requires NICS maintain a 90% or better IDR. INSD assessed since 2016, NICS achieved a rate of 89.09% (2016), 89.26% (2017) and 89.68% (2018). In FY 2019, 90.08% of background checks were resolved immediately upon initiation. This represented an increase on average of .07% from the previous three FYs. Of the 28,369,750 background checks conducted by NICS in 2019, 0.0092% were unresolved within three business days and 0.0073% were unresolved and purged after 88 days.

(U//FOUO) Background checks not immediately addressed are often delayed due to the absence of complete records or unavailable clarifying information. Delayed transactions are placed in the Delayed Queue. In such cases, the Brady Act allowed the LIEs up to three business days to

UNCLASSIFIED//FOR OFFICAL USE ONLY

UNCLASSIFIED//FOR OFFICAL USE ONLY

obtain the missing/clarifying information by contacting local, state, and federal law enforcement agencies.

(U//FOUO) If the search for all relevant documentation continued beyond the three business days to provide a final determination. In some instances, the information was subsequently obtained and a final status determined. If the final determination resulted in a Deny decision after the lapse of the three business days and the NICS Section is advised by the FFL that the firearm was transferred, the ATF is notified that a prohibited person is in possession of a firearm. These instances are referred to as Firearm Retrieval Referrals. Since 2016, NICS has referred an average of 4,197 firearm retrievals per year to the ATF, with 2,989 in 2019.

Year	Federal Denials	ATF Referrals
2016	120,497	4,170
2017	103,985	6,004
2018	99,252	4,240
2019	101,669	2,989
AVERAGE	106,350	4,197

(U//FOUO) INSD assessed as a result of the increase in FSL, contracting, OT utilization, and automated efficiency, NICS ATF referrals have decreased by 28% and NICS days of escalation have decreased by 24% during the review period.

UNCLASSIFIED//FOR OFFICAL USE ONLY

NICS APPEALS TRANSFER

(U//FOUO) **Allegation:** *CJIS management improperly transferred the NICS appeal process to the Biometric Services Section, in violation of the Brady Handgun Violence Protection Act of 1993 (the Brady Act). Public Law 103-159 and 28 C.F.R. Part 25.*

(U//FOUO) The authority for processing transactions, providing five-day response letters, and conducting NICS appeals was statutorily vested with the AG pursuant to the Brady Act. This authority was delegated by the AG to NICS as the “denying agency” responsible for determining whether information in NICS holdings indicate the transfer of a firearm violates federal or state law. NICS as the denying agency was delegated the authority to receive and respond to the five-day reason for denial requests, and processing appeals. Therefore, in order to transfer the processing of the reason denied requests and appeals to another section within the FBI would need AG delegated authority.

(U//FOUO) INSD assessed the transfer of the NICS appeal process to the BSS capitalized on automation, improved efficiency, and was done in accordance with the Brady Act. In 2018, CJIS EM began utilizing the eDO process as a means for completing firearms appeals in a timely manner. The eDO system provides a secure and efficient means to process appeals requests for, and challenges to, criminal history records based on fingerprint submissions. By capitalizing on the eDO system, which maintained criminal history records and associated fingerprints, an appellant may submit their request and receive responses electronically. The eDO electronically matched the appellant’s fingerprint, which supported or denied the appeal. The eDO system allows for background check data to be purged in accordance with Brady Act requirements.

(U//FOUO) Upon transfer of the appeals process in October 2018, there were approximately 13,000 outstanding appeals; requests by appellants challenging the denial of their attempted firearm purchase. INSD assessed that as of April 2020, there were approximately 6,900 pending appeals, a 46% reduction. The current goal of CJIS EM is to complete the backlog by the end of the FY 20. Prior to the transfer to BSS, 75 employees were dedicated to NICS appeals processing. Due to the eDO and the ability to adjudicate an appeal through automation, 25 employees now complete the process. This enabled the NICS Section to reallocate resources. With the continual increase in workload over the past decade without an equivalent increase in staffing, the results of this time study were critical to ensuring full use of the NICS Section's staff, therefore eliminating waste and maximizing the volume of work completed including legacy appeals backlogs.

(U//FOUO) Per the Brady Act, NICS employees are funded through Direct Appropriated funding from Congress. This is not the case with all CJIS functions, to include the BSS. BSS employees are funded through fees charged to the user/applicants. Upon the transfer of the NICS appeals function to BSS, CJIS consulted with the Finance and Facilities Division, Human Resource Division, and the Resource Planning Office, to create a sub-program within HR Source, which allowed for the work of NICS personnel to be tracked and funded through Direct Appropriated funding, not fee-based. The creation of the sub-program provided an

UNCLASSIFIED//FOR OFFICAL USE ONLY

organizational and administrative connection to the employees working NICS Appeals and the NICS Section.

(U//FOUO) Prior to the transfer of the NICS appeals function to BSS, CJIS EM consulted the FBI OGC due to the stipulation in the Brady Act that the NICS function was specifically delegated to NICS from the AG. OGC opined that no further delegation was required since the change represented a “merging” of NICS and BSS personnel to address a particular NICS function. Accordingly, under such a “merger,” the authority delegated to NICS personnel is retained in their updated capacity and no further delegation would be required.

UNCLASSIFIED//FOR OFFICAL USE ONLY

Introduction

Early in my 25-year career with the FBI, I was told by my first managers that the “I” in FBI stood for integrity and that if I were asked a question by an agent or by one of my superiors that I should always answer with “complete candor” – not just the utmost in honesty and integrity, but with *complete* candor.

That’s why I filed my report as a protected whistleblower – because I saw that a decision at the Criminal Justice Information Services (CJIS) Division in Clarksburg was not made with complete candor. In addition, I saw first-hand that decisions were being made that potentially deteriorated public safety and could result in a dangerous person purchasing a firearm. Prior to filing my report, I and numerous other long-time employees in the National Instant Criminal Background Check System (NICS) Section raised these concerns with CJIS Management, but were told that if we continued to voice our concerns we would be viewed as being “insubordinate.” I felt that I had no other recourse than to file as a whistleblower so that I could be protected for raising my concerns and so that a costly and even potentially dangerous decision would not be hidden from those who oversee the FBI as well as from the general public.

The response by the FBI’s Inspection Division (INSD) contains information that is inaccurate and misleading. It also cites data that is selective in order to paint a picture that isn’t entirely accurate or completely transparent. When CJIS was being investigated and audited last year, employees were directed to be less than candid with those doing the investigation. The example provided was that if asked if we had a pencil, we were to say “yes,” but to not offer them a pencil as they didn’t ask for a pencil. In other words, we were told not to provide any additional information beyond that which was *specifically* asked.

The Issue

The issue at hand involved the transfer of firearm background check appeals work from under the direction of the NICS Section to the Biometric Services Section (BSS) in October 2018. Despite a very clear and resolute written legal opinion from the FBI’s own Office of General Counsel on April 19, 2013 (Attachment A) that *any* movement of this work was prohibited by Department of Justice (DOJ) regulations without first going through the process of changing those regulations, CJIS Management made the decision in April 2018 to transfer this work. This new legal opinion was discussed in an email from CJIS Management dated July 26, 2018, (Attachment B). The email discussed how FBI employees were directed to use certain words such as “merging” and “surging” instead of “moving” to describe the transfer of work, since this major change could raise red flags with the General Accounting Office (GAO).

In a meeting when it was announced that the BSS would be “assisting” with the appeals function (NICS Management was completely blindsided by this decision), the NICS Section was given direction to draft a plan for what work the NICS Section would retain and what work the BSS could provide assistance. However, after drafting the plan and forwarding it to CJIS management, the email from CJIS Management made it clear that the entire appeals function (with the exception of the Voluntary Appeal File (VAF)) would be moved to the BSS. As noted in the comments section of the attached document dated June 4, 2018 (Attachment C), the intent was very clear from CJIS management. This work was not being “merged” or “surged.” This work was being moved.

An organization that is operating with the utmost in integrity does not need to parse words to try to rationalize or justify a major decision affecting public safety and customer service so that it *might* possibly fit within existing laws and regulations. An organization that follows existing laws and regulations does not make a decision then try to find an attorney to provide an opinion that can somehow justify that decision, especially when a previous written opinion strongly opposed and actually prevented the movement of this same work.

The INSD report admits that although the appeals work is being performed in the BSS, CJIS Management developed a sub program (budget code) under the NICS Section to fund this work in the BSS. These budgeting acrobatics make it *appear* that the work is still being done in the NICS Section and the 25 employees (plus two supervisors) physically moved to the BSS and now under BSS management control are still NICS employees. This is not operating with complete candor to the GAO or to Congress.

The INSD report also does not adequately address the fact that management funded by user fees (BSS management) is currently overseeing appeals work – and that firearm background check and appeals work are prohibited by Congress to be funded by user fees – even partially. The NICS, which does not charge user fees, does not manage or oversee the processing of appeals in the BSS – even indirectly. Again, this is not operating with complete candor to the GAO or to Congress. Clearly, it was not the intent of Congress to mix fee-based work with functions that are prohibited by law to be supported by user fees. I am positive that it was also not the intent of Congress, which appropriates these dollars, to have NICS-related work performed outside of the NICS, if for no other reason than to have the firearm background check and appeals systems “firewalled” from other law enforcement areas of the FBI to protect the confidentiality of firearm purchasers. Clearly, when Congress passed the Fix NICS Act, it did not intend for the FBI to move this vital work *outside* of NICS.

A Waste of Taxpayer Dollars

The NICS Section had already begun the process of automating some of the appeals work (some functions such as five-day response letters are easily automated, but most of the day-to-day processing of appeals requires intensive legal work by highly-trained Examiners). When the decision was made in April 2018 to move the work by October 1, 2018, the NICS Section had planned a summer 2018 rollout of a new system to process the work that could be automated. CJIS Management never even asked about the status of this automation project before making the decision to move appeals work to the BSS. Thousands of staff hours and likely millions of dollars in staff salaries and wages had already been invested on this NICS automation process over the previous few months, all for naught. These resources were wasted, as a modified system had to be developed for the BSS, duplicating existing efforts and requiring significant, additional resources.

A Decline in Efficiency and Customer Service

Prior to the work being moved to the BSS and after the passage of the Fix NICS Act, NICS staff members were completing appeals that needed further research in an average of 17 days – well within the 60-day mandate by Congress and without the planned automation. While watching an FBI executive testify before Congress in Spring 2019, I heard her report under oath that appeals were being processed in an average of 45-48 days. This was six months after the move of appeals work to the BSS. I have heard this same statistic on multiple occasions – that 45 to 48 days were required in the BSS on average to process appeals that needed research. In the INSD report, it is stated that it takes the BSS as little as two minutes to 24 hours to process appeal requests. That figure is for the automated five-day response, not appeals that require research. The report also states that it was taking the NICS Section 16 weeks compared to an hour currently. The NICS Section was taking an extended amount of time on appeals prior to the Fix NICS Act because there was a three-year backlog of Appeals requests due to insufficient staffing in the NICS Section. The appeals were being processed – “first in, first out.” This was to provide the best customer service to the appellants that had been waiting the longest. Once the Fix NICS Act was passed by Congress, the NICS Section had to re-configure the system and staff to prioritize appeal work in order to meet the new 60-day mandate. In short, it now requires the BSS more than twice the time (45-48 days) to complete the same appeals work that NICS staff were completing (17 days) *without* any of the planned automation in place. That is not increased efficiency.

Since the work was transferred to the BSS, there have been improvements to the overall appeals process, making it easier for applicants, including a website that allows for online applications. But what the INSD response didn't mention is that these same improvements would have been in place months earlier if the NICS Section had been allowed to continue the automation work that was more than halfway towards completion. The automation being

planned by the NICS Section was being directed by highly-trained NICS staff, who had performed appeals work since its inception and understood all of the processes required to perform this work with great quality and with an emphasis on improved customer service. Conversely, the BSS staff were trying to learn in just a couple of months very difficult and complex work that was completely new to BSS employees and management.

Shifting/Wasting Resources

When the appeals work was shifted to the BSS, 25 NICS Section staff (plus two supervisors) were permanently moved to the BSS, although they are still being paid under a NICS sub program. They are not managed by the NICS Section in any way.

The INSD report notes that the backlog of appeals in October 2018 was approximately 13,000 and now it has been reduced to 6,900, a 46% reduction. During 2019 and 2020, nearly two dozen additional staff were temporarily shifted from the NICS Section to the BSS for months at a time on at least three occasions to help the BSS deplete the backlog of NICS appeal requests -- and likely to make it appear the transfer of work was a prudent decision. While these employees were moved and working the appeal backlog, the VAF backlog in the NICS Section grew to over 3,000.

In addition, the INSD report states that prior to the transfer to the BSS, 75 employees in the NICS Section were dedicated to processing appeals; however, only 25 are now needed to process the work in the BSS. This is yet another “apples to oranges” comparison and very misleading. There are four distinct parts to appeals: five-day response, appeals of delays, appeals needing research (60-day mandate) and the appeals backlog.

The five-day response is now automated, requiring no staff on the BSS’ part. The NICS Section was in the process of automating this five-day response when the decision was made to move the appeals work. Since this process was not automated in 2018, NICS employees were required to manually process this work (a portion of those 75 employees).

The BSS decided not to process appeals of delays as the legal requirement only stated appeals of denials must be processed. In some cases, gun dealers will not transfer a firearm if they receive a delay response from the NICS, so it is as if the purchaser did receive a denial. Because the BSS made the decision not to process that work, the only recourse for a delayed purchaser is to apply to the VAF. So in effect, the BSS did not take on this work when taking the appeal process. This VAF work remained with the NICS Section staff and currently there are approximately 15 NICS staff working VAF cases. As stated previously, approximately 20 NICS Section staff on at least three separate occasions were temporarily moved to the BSS to work on the backlog of appeals, freeing the 25 BSS staff to solely focus on the appeals requiring research in order to process within the 60-day mandate required by the Fix NICS Act.

The BSS requested staffing again this summer from the NICS Section to process the backlog of appeals. The NICS Section Management decided that the entire backlog of appeals would be returned to the NICS Section since NICS Section employees were performing this work anyway in temporary assignments to the BSS.

I can state with 100% certainty that if the NICS Section had been allowed to automate the system as it had planned, had been given a fraction of the additional resources that the BSS has been given over the past year and a half, the appeals work would now be able to be performed in the NICS Section in 15-17 days and the entire backlog of appeals would have been depleted.

Management Decisions

The decision to move appeals work to the BSS was made in a vacuum by upper CJIS Management, without even consulting with NICS Management to fully understand the scope or difficulty of this very complex work. The BSS Management had little knowledge about the level of complexity required to perform this very intensive legal work before the functions were transitioned. One of many examples the complexity of the work was an automated letter sent by the BSS to appeals applicants that asked them to take additional steps in order to have their denial researched. But when applicants performed these steps and returned information to the BSS as requested, they received another automated letter from the BSS that informed applicants that the FBI did not process these cases. Previously, the NICS Section staff responded in the first response to the applicant that the NICS Section did not process those types of appeals. Those were related to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) work. For some applicants, the new appeals process appeared to be more like a maze – one that they could never exit. That is not improved customer service.

Yet another example of poor decision-making is a decision by the BSS to not verify that fingerprints submitted by applicants are actually their fingerprints. When the NICS Section processed appeals and now processes VAF, it requires information verifying that the fingerprint was processed by a law enforcement agency to ensure fingerprint integrity in a case where fingerprints do not match to a criminal history record. This ensures that someone does not submit a fingerprint card with their descriptive data but with someone else's fingerprints. The BSS no longer requires or even checks for this verification because only about 30% of non-matches were missing this vital information. To those of us in the NICS Section, 30% of records missing this vital information is a huge red flag. The BSS will now overturn these denials and appellants will be allowed to purchase their firearm.

Insufficient Resources in NICS

A lack of staffing continues to be a problem in the NICS Section. In fact, volume became so exorbitantly high in the spring of 2020 that the NICS Section had to make a number of major

changes (shortcuts) in processes to be able to process incoming firearm background check requests. In addition to these steps, employees from other NICS Units have been escalated for months at a time to perform incoming firearm background checks, which has meant other, vital NICS-related work has not been performed. This spring, hundreds of firearm transactions have rolled to the “fourth day” on a number of occasions, which means that firearms were able to be transferred by gun dealers before NICS Examiners were able to even begin working the transaction. On top of all these challenges, audits of transactions (performed to ensure quality) were severely limited because employees who perform these audits are being escalated to perform incoming firearm background checks. In short, the NICS is failing and putting public safety at risk because of high volume and inadequate staffing.

While the FBI may argue that this spring’s pandemic was unforeseen, as was the resulting spike in the volume of firearm sales, these dramatic increases are experienced by the NICS Section every couple of years, based on my extensive experience. The NICS Section experienced dramatic increases in volume in 2016 in the months prior to the Presidential election and following the Pulse Nightclub shooting. The NICS also experiences similar dramatic spikes in firearm sales volumes in the weeks following events such as school shootings. In fact, Attachment A in the INSD’s response illustrates this very well. As an example, the staffing increases in 2017 were *after* the dramatic spikes in volume in 2016, which means that the NICS Section was grossly understaffed in 2016. The INSD’s Attachment A shows requests for hundreds of additional NICS staff in 2018, 2019 and 2020, which were largely ignored.

Keep in mind that even when additional staff positions are approved, it typically requires up to two years (application process, screening resumes, interviewing employees, conducting background checks and then hiring and training) before a new staff member is working firearm background check transactions and is proficient at performing this work. Clearly, the FBI needs to do a better job of staffing the NICS Section *ahead of the curve*, instead of waiting until the system and its employees are completely inundated.

While in the past two years staffing had seemingly improved in the NICS Section, largely because of a more stable workload (until this spring), serious challenges remain. The permanent transfer of 25 employees from the NICS Section to the BSS only exacerbated the problem, especially when additional NICS employees have been shifted so many times to temporarily perform appeals work to assist the BSS for months at a time.

The reason the appeals backlogs grew dramatically in 2016-17 is because staff performing firearm background check appeals were routinely “escalated” because of inadequate staffing in the NICS Operations Unit (NOU), which processes these incoming firearm background checks. This routine escalation resulted in the appeals backlog growing over a period of a couple years.

If staffing had been adequate in the NICS Section in 2016-17, this appeal backlog would have never grown to over 13,000.

The selective data cited in the INSD response shows that between 2016 and 2019 NICS staffing increased by 5% while gun background checks increased by only 3%. The first year in this time period (2016) was one of the FBI's highest years ever for firearm background checks, while the next three years (2017-2019) remained relatively stable in terms of volume. As a result, the 2016-19 data seemingly shows that the FBI has adequately addressed NICS staffing. The reality is that the number of firearm background checks increased by 19% from 2015 to 2016 alone. At the staffing levels in 2015-16, our employees were able to process 2,000 to 2,500 transactions per day but our employees are now forced to process double, triple and even quadruple that amount-- and to work mandatory overtime for weeks on end because of the dramatic increases in volume.

"Adequate staffing" for the NICS Section would mean:

- All gun background check transactions are able to be "worked" by NICS Examiners on the day they are received so that additional information needed from courts and law enforcement agencies can be received back before the end of the third day so that a firearm cannot transfer to someone who should not be able to legally purchase one.
- All "Information Received" back from courts and law enforcement agencies is processed and a determination is made by an Examiner before the end of the third business day.
- NICS Examiners receive regular training and professional development to ensure they are performing this work with quality.
- Staff from other units within the NICS Section are not "escalated" more than 5-10 days per year so that they can perform other NICS vital work.

None of this is happening and hasn't happened for years in the NICS Section. As one can easily see, the NICS Section *has not* been adequately staffed.

Conclusion

Vital and much-needed coordination/efficiency is impossible with two different sections and two different management structures overseeing this work.

As I wrote this response, I thought about a few questions:

- 1) If the transfer of work from the NICS Section to the BSS were legal and ethical, why did the FBI parse words and direct employees to use euphemisms to describe this transition?

- 2) If the transfer of work were a prudent decision, why has most of the appeals work, with the exception of the appeals requiring research, either been retained by the NICS Section or being planned to move back to the NICS Section?
- 3) If the transfer of work were a prudent decision, why were NICS staff moved temporarily to the BSS to reduce the appeals backlogs on at least three different occasions (for months on end), at a time when the NICS Section was understaffed?
- 4) How is it more efficient for two different Sections to be performing firearm background checks and appeals, which are similar work requiring analogous training, auditing and applying the same laws and regulations to firearm purchases and appeals?

As the daughter of an Air Force retiree, I was raised to never question my superiors, so filing as a protected whistleblower was one of the most difficult things I have ever done. But I also realize that if honest, dedicated people don't tell the truth, the President, our Attorney General, members of Congress and even the general public will never know what is really occurring in agencies within our government. In this case, I and many others within the FBI know with certainty that an ill-informed decision was made, significant financial resources were wasted and the safety of the general public was placed in jeopardy.

After all of this work to transition appeals work, most of the appeals work has been retained or had been planned to be returned to the NICS Section, which clearly affirms the concerns that I and many others had about the complexity of this work and the ability of the BSS staff to perform it quickly, efficiently and accurately.

I am not a disgruntled employee or a low-performing employee. In fact, my most recent performance review was at the highest rating possible in the FBI. Over the years, I have received a number of awards from the FBI and other agencies, including the Women in Federal Law Enforcement (WIFLE) Foundation award for my hard work and dedication to the job. This month, I received another award from the FBI for my outstanding work during the pandemic. Clearly, I know my job and I know the work in the NICS Section. I care deeply about the FBI and the vital work we perform to protect public safety.

I am willing to further discuss with complete candor and honesty about the decisions that were made and the need for additional NICS staffing. I have nothing to hide and nothing to gain by telling the truth, except to see the FBI operate at the same level of integrity and professionalism I admired when I first joined this great organization. Thank you for providing me with the opportunity to respond.

Monica Shillingburg

From: [REDACTED]
 Sent: Friday, April 19, 2013 2:28 PM
 To: [REDACTED]
 Cc: [REDACTED]
 Subject: RE: BSS Project Storm

[REDACTED] – after my precipitous response to your email yesterday (attached), I reviewed more closely your questions and the stated factual predicate for them. I originally thought that we would need OGC expertise regarding authorized staffing levels and potential appropriation augmentation issues. After the closer review, I do not think that we get to those issues because the proposed pilot is not permissible either temporarily or permanently under law or regulation.

Your email identified the following as the chief characteristics of Project Storm:

1. (BSS) Will not perform any work in relation to the five business day mandate
2. Appeals with Fingerprint Cards will be forwarded to CJIS Fairmont—Case will be pulled from the Appeal Management Database (AMD)
3. BSS will research and analyze all prohibitors and potential prohibitors
4. Update all records
5. Enter comments into the NICS and AMD
6. Make final decision on appeal—applying federal and state prohibitors and terminology
7. Draft and Mail Letter to the appellant
8. Apply final status to case in AMD and NICS (Per BSS this is being questioned due to the User Fee)

You asked whether

1. Based on the definition of "Denying Agency" can the BSS perform the appeal process outlined above and are we meeting the NICS Regulation? Does it make a difference if they are temporarily assisting or if this becomes a permanent project?
2. You wanted to me to remind you to look at appropriated staff versus user fee staff and the use of certain FSL to perform appeal functions. Please let me know if there is a difference between temporary assistance vs. a permanent project.

Based on the information provided, the new description differs markedly and significantly from the characteristics of the project originally described to Drew and me. It is much more expansive and appears to propose a transfer of the entire NICS appeal function to the BSS, except for the initial 5 business day response that is required by statute. I still have no official pilot concept description in writing; so, my conclusion may change depending on what is ultimately proposed. I understand that you are also waiting for a more detailed description of the project in the form of a function map.

The appeal functions of the Brady Act are assigned statutorily to "the system" and the Attorney General. Pub. L. 103-159, § 103 (f) and (g) (18 U.S.C. § 922 note). The Attorney General's responsibilities under the Brady Act have been delegated to the NICS Section pursuant to §

103(h). The Attorney General delegated those functions in 28 C.F.R. Part 25. Section 25.1, specifically includes "appeals procedures for persons who have been denied the right to obtain a firearm as a result of a NICS background check." The Attorney General designated "NICS Operations Center" (now designated the NICS Section) as "the unit of the FBI that receives, telephone or electronic inquiries from FFLs to perform background checks, makes a determination based upon available information as to whether the receipt or transfer of a firearm would be in violation of Federal or state law, researches criminal history records, tracks and finalizes appeals, and conducts audits of system use." 28 C.F.R. § 25.2 Definitions. Further, the Brady Act also assigns to the Attorney General the duty to "correct all erroneous Federal records relating to the prospective transferee and give notice of the error to any Federal department or agency or any State that was the source of such erroneous records." That duty is described in 28 C.F.R. § 25.10 [Correction of erroneous system information] and delegated to the denying agency. Denying agency is either the NICS Operations Center (now NICS Section) or state POCs. 28 C.F.R. § 25.2.

The purpose of the tedious recitation of delegations above is to explain the fact that the Attorney General has delegated his responsibilities with regard to the Brady Act. Further, delegation, such as that described in your email, will have to be authorized by the Attorney General and cannot be so delegated without that permission. That does not mean that certain discrete tasks performed for the NICS cannot be assigned out of the Section. For example, during appeals research, appellant fingerprint cards are sent to BSS for it to verify the identity of the person on the record used to deny the firearm transaction. Fingerprint matching is a function normally performed by the BSS and not the NICS Section.

**Assistant General Counsel
Office of the General Counsel
Federal Bureau of Investigation
304-625-3510 phn
304-625-3944 fax**

Confidentiality Statement:
This message is transmitted to you by the Office of the General Counsel of the Federal Bureau of Investigation. The message, along with any attachments, may be confidential and legally privileged. If you are not the intended recipient of this message, please destroy it promptly without further retention or dissemination (unless otherwise required by law). Please notify the sender of the error by a separate e-mail or by calling (304) 625-5751.

From: [REDACTED]
Sent: Thursday, April 18, 2013 8:45 AM
To: [REDACTED]
Cc: [REDACTED]
Subject: BSS Project Storm

[REDACTED] Per your request about the BSS performing appeal work for record challenges. If possible I need a

pretty quick turn around on this as they want to implement by May 1st. This is an initiative at the request of Mr. [REDACTED] for the NICS and BSS to find ways they can assist in maintaining a reasonable processing time.

[REDACTED] discovered a definition in the NICS Reg that we felt should be looked at. I have attached the regulation and highlighted some areas of concern. We want to make sure we are meeting NICS Regulation before we get too far into this implementation.

Based on my conversation with BSS, they will perform the following steps. I'm currently waiting on the draft map that will provide more detail. I will also forward it when I receive it.

- Will not perform any work in relation to the five business day mandate
- Appeals with Fingerprint Cards will be forwarded to CJS Fairmont—Case will be pulled from the Appeal Management Database (AMD)
- BSS will research and analyze all prohibitors and potential prohibitors
- Update all records
- Enter comments into the NICS and AMD
- Make final decision on appeal—applying federal and state prohibitors and terminology
- Draft and Mail Letter to the appellant
- Apply final status to case in AMD and NICS (Per BSS this is being questioned due to the User Fee)

Also, the BSS is drafting letters to incorporate user fee and appeal language. I have notified them that you need to review these before we use them.

Please answer the following questions:

1. Based on the definition of "Denying Agency" can the BSS perform the appeal process outlined above and are we meeting the NICS Regulation? Does it make a difference if they are temporarily assisting or if this becomes a permanent project?
2. You wanted to me to remind you to look at appropriated staff versus user fee staff and the use of certain FSL to perform appeal functions. Please let me know if there is a difference between temporary assistance vs. a permanent project.

Thanks for all your help!
[REDACTED]

From: [REDACTED] (CJIS) (FBI)
Sent: Thursday, July 26, 2018 2:17 PM
To: [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>
Subject: NICS Appeals

All,

I just got off the phone with [REDACTED] regarding the NICS Appeals. She asked for a quick call with me today (Thanks [REDACTED] – your visit/email may have prompted [REDACTED] and [REDACTED] bringing up NICS Appeals with [REDACTED]). [REDACTED]'s interpretation the terminology being used if modified will solve all of the legal concerns with who is accessing the NICS data, and who is making final decisions. Keep in mind, I reminded [REDACTED] that every Section in CJIS has employees who assist NICS, have access to delayed transactions that may be a final proceed and are being trained to make final decisions. [REDACTED] asked that if we were to say instead of moving NICS Appeals to BSS rather we are "merging" NICS Appeals with BSS. She agrees that it is all under the same Branch within the same Division. She also said that by using the terminology of "Surging" to BSS makes anyone else outside of the FBI, such as GAO under an Audit, understand the access controls better. She brought up a couple of times how important semantics are and as an example used the Face GAO Audit and the Face hearing.

[REDACTED]'s recommendation is to use the terms:

Merging
Surging
Augmenting

I did tell [REDACTED] that using the language that NICS Appeals is moving to BSS was completely internal. Of course, we will notify the FFLs and appellants on a different way to process the appeal. However, no one outside will understand the Section differences all they know is the FBI is processing the appeal. We will ensure that we do not present this differently to the public or in papers. We do not need approval from anyone else nor do we need to confuse anyone else.

[REDACTED] said she discussed with [REDACTED] and [REDACTED] the DOJ comments. I read to [REDACTED] the two sentences from [REDACTED]'s email regarding needing DOJ approval. [REDACTED] said "OGC does not view it that way" [REDACTED] said they do not think this needs to go to DOJ. [REDACTED] did indicate that they will raise it with General Counsel (as it should have been through OGC chain of command) and if the General Counsel has a question then they will go to DOJ. However, [REDACTED] doesn't think this will be the case. She will keep me informed.

One Action Item: [REDACTED] would like to see a copy of the screen shot for the eAppeals on-line if you have it. She said if it says a NICS Appeal then we clearly are merging the work and can justify the NICS appeals are being processed. Please send me the screen shots.

BOTTOM LINE: [REDACTED] VERIFIED NO-LEGAL ISSUES WITH WHAT WE ARE DOING JUST SEMANTICS ON THE TERMINOLOGY!

Last item for NICS: [REDACTED] said she spoke with [REDACTED] on the Remote Work and are in discussions about our request.

Please let me know if you have any questions.

Thank you,
[REDACTED]

Shillingburg, Monica D. (CJIS) (FBI)

From: [REDACTED] (CJIS) (FBI)
Sent: Monday, June 4, 2018 4:00 PM
To: [REDACTED] (CJIS) (FBI); [REDACTED] (CJIS) (FBI)
Cc: [REDACTED] (CJIS) (FBI); [REDACTED] (CJIS) (FBI); [REDACTED] (CJIS) (FBI); [REDACTED] (CJIS) (FBI); [REDACTED] (CJIS) (FBI); [REDACTED] (CJIS) (FBI); [REDACTED] (CJIS) (FBI); [REDACTED] (CJIS) (FBI); [REDACTED] (CJIS) (FBI); [REDACTED] (CJIS) (FBI); [REDACTED] (CJIS) (FBI)
Subject: RE: Appeals Plan
Attachments: AST Pilot Plan(2).docx

Attached are my comments to the Appeals Plan – please make appropriate changes that reflect the effort moving forward as stated below.

From: [REDACTED] (CJIS) (FBI)
Sent: Monday, June 4, 2018 3:57 PM
To: [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>
Cc: [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>
Subject: RE: Appeals Plan
Importance: High

[REDACTED]

Thank you for proactively working out a plan. I would like the next version to be in coordination with the BSS and ITMS staff. This is a “WE-TEAM” project and we need to work TOGETHER to be successful! I get your comment below on my not micromanaging the project and transition. However, I projected multiple times to both Sections my EXPECTATIONS that the BSS Challenge team will take on the full appeal. [REDACTED], you agreed when you met with me that something has to be done! I will not micromanage “How” it happens such as the training plan, the volunteers to rotate, the technical, or the dates of transition. During our recent discussions, in no way was there an option for NICS to keep any of the functions for the appeal other than VAF.

I look forward to our next meeting scheduled on June 21st to hear the progress you all have made, we all know there is a lot riding on this effort – everyone is accountable!

Thank you,
[REDACTED]

From: [REDACTED] (CJIS) (FBI)
Sent: Monday, June 4, 2018 12:45 PM
To: [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>
Cc: [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>; [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>

[REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>

Subject: FW: Appeals Plan

[REDACTED]

I think I mentioned to you that I asked [REDACTED] to prepare an approach to move forward on the pilot to transition appeals/echallenge work to BSS. Attached is our phased approach without any specific timelines. We can add a timeline but I believe it's best to do so after [REDACTED] and [REDACTED] meet since both sides need to collaborate on any deadlines. [REDACTED] wanted to skip her daughter's doctor's appointment to come in and meet with [REDACTED] today. I believe [REDACTED] encouraged her to go to that appointment so they will meet next Tuesday, after [REDACTED] returns from the APB.

I believe that a phased approach is best to allow IT to get their part done, transition staff, train BSS staff, etc. I understand that the respective IT teams don't have a clear understanding of the end goal so I will ask [REDACTED] to meet with [REDACTED] and [REDACTED] so that he can help our IT folks understand and perhaps [REDACTED] can help her IT folks. I also believe a phased approach helps ease the transition and ensures that we can work through issues as they arise.

I know you said you don't want to micromanage the details so I believe you! I'm sharing this with you as FYI and I know you'll let me know if you see any glaring problems. Otherwise, we will work to make this happen.

[REDACTED]

From: Vincent, Lisa A. (CJIS) (FBI)
Sent: Sunday, June 3, 2018 11:37 PM
To: [REDACTED] (CJIS) (FBI) <[REDACTED]@fbi.gov>
Subject: Fw: Plan

Attached is the recommendation from NSFU. [REDACTED], [REDACTED], [REDACTED], and [REDACTED] worked on it.

Thanks,

[REDACTED]

The Appeal Services Team's Pilot Plan

The NICS Functional Support Unit (NFSU) has been tasked to evaluate which Appeals Services Team (AST) functions will be transitioned to the Biometric Services Section's (BSS). The NICS Section's management, including members of the NFSU, held several meetings concerning the movement of the functions to the BSS. Meetings will be necessary as this transition is planned between the NICS Section, BSS and the applicable information technology staff working with both Sections. A pilot is being proposed between the AST and the BSS in order to ensure a successful partnership is established allowing for the success of the pilot while ensuring proper training and quality products are being delivered.

The NICS Section focuses on mandates of the Brady Handgun Violence Prevention Act of 1993 and continues to determine if prospective buyers are legally eligible to possess or receive firearms. The BSS has a slightly different focus, which may include firearm issues at random times during the course of their current functions. The BSS has decades of experience processing requests from a diverse group of individuals and agencies questioning criminal histories, etc. However, processing requests for firearms related background checks and appellants challenging firearm decisions, requires flexibility and knowledge of the multifaceted, in-depth process which entails ever-changing application of firearm laws. The firearm laws from state to state often differ. Even though the federal firearm laws are established, the underlying definitions of what is written may change with management changes and/or legal counsel.

Based on a collection of ideas related to the transition of functions between sections, the NICS Section proposes a collaboration of efforts to accomplish the transition. The NICS Section reviewed the Electronic Departmental Order (eDO) process and is confident the current AST function, Five Day Mandate, will most effectively match to the eDO to process. Similar to eDO submitted to the BSS, when an appeal is initiated with the NICS Section, several requirements must be met. After meeting the initial requirements to create an appeal within the NICS, several factors affect the furthering of the scenario of the appeal.

Initial submission of fingerprints will be submitted utilizing the eDO web page by the submitter selecting the eDO icon or the NICS Appeal icon. The fingerprints will be processed as they are currently with an eDO submission and the results returned to BSS and to NICS. The eDO process will automatically respond to the requestor with the reason for NICS denial/delay. If the appeal requires a record challenge to an Interstate Identification Index (III) hit and sufficient documentation is provided in the appeal, the BSS will attach the documentation to the NTN and will begin research on the III hit. The AST will temporarily assign 20 staff members to the BSS in order to initiate the pilot while also allowing proper firearm related training. The NICS Section is confident the BSS will enhance the NICS appeal process by updating of criminal histories using all NICS reference material, guidelines, standard operating procedures (SOPs), and their extensive III criminal history knowledge, skills, and previously established contacts along with NICS established contacts to assist. The NICS Section is confident the AST staff is sufficient to process any challenges made to the National Crime Information Center, the NICS Indices, and U.S. Immigration and Customs Enforcement.

Upon notification concerning the completion of the criminal history challenge processed by the BSS or no longer than 30 days have passed, the NICS Section will retrieve the data and

Comment [DKJ((1): This can be accomplished with an agreed upon training plan. There may be great items in the BSS Challenge process to adopt and great items from NICS to adopt.

Comment [DKJ((2): This doesn't make sense. The eAppeal will cover the requirements of an official appeal.

Comment [DKJ((3): As stated the BSS Challenge process will take on the appeal as an expanded challenge NICS will not be involved in a return response.

Comment [DKJ((4): All appeal related work will be handled by BSS, to include challenges to NICS, NICS Indices, and ICE records. All challenges other than III will be handled as an expanded challenge under BSS. It is anticipated that the 20 AST members will rotate within the BSS to ensure proper training is complete in addition to working alongside the BSS staff. At the conclusion of the pilot, it will be determined if 20 FSL is an adequate number to handle the work and at that point, the position will be posted.

The Appeal Services Team's Pilot Plan

resolve any hits to other records or databases. If the NICS could detect hits to other records besides III and automatically send those to the AST upon receipt that would allow the AST and the BSS to complete their research simultaneously. If not, the AST will compare the updated information to the appeal request and the firearm background check utilizing their NICS expert knowledge and experience to apply a final status based on all of the combined updated information. Allowing the AST to close-out the appeal will also allow for a quality assurance review. Once the BSS employees have established the NICS experience necessary, the quality reviews could be reduced as the AST currently does with newly-trained AST employees.

When a firearm background check is initiated in the NICS, an audit log is created for legal purposes and federal regulation mandates. Each time the firearm background check is modified or updated electronically/automatically or by an individual, a detailed comment or indication is imprinted on the transaction. Additionally, the comments section of a transaction is considered a living document, which details the actions taken. When the BSS messages the NICS, the BSS must include details concerning all actions taken regarding a transaction either manually or by an automated means. This is extremely important for sharing information with various levels of authority, the Bureau of Alcohol, Tobacco, Firearms and Explosives; any litigation; affidavits; or congressional inquiries. The AST will continue to process those tasks. In addition, the BSS will need to accommodate for the proper NICS purge requirements.

The AST has several underlying ideas that will not be detailed in this proposal as they will need to be discussed during this transition; however, it is important to mention that several units within the NICS Section assist with appeal functions. The AST is the "hub" of the appeal process; however, the AST coordinates efforts with a multiple of entities inside and outside of the FBI for ensuring firearms may or may not be legally transferred.

Examples of tasks the AST will retain are as follows:

- Supplying appeal statistics often requested with short deadlines
- Processing litigation, affidavits, and congressional inquiries
- Processing Voluntary Appeal File requests
- Researching legal questions (Legal Analysis Team)
- Researching region specific questions (Business Advocate Team)
- Performing quality control reviews (NICS Assessment Unit)
- Processing expedites upon receipt of information allowing a final decision on an appeal
- Notifying NICS State Point-of-Contact agencies regarding modifications of status
- Modifying information regarding firearm laws (federal and state) via subject matter experts in those areas
- Modifying appeal language in response letters
- Modifying the NICS AST SOPs
- Updating contact lists containing offices and/or agencies that house information necessary to complete research

Comment [DKJ((5)): As stated in my meetings with the NICS and BSS management, the BSS Challenge process will handle all close out appeals and notification to the FFL. The 20 NICS employees in BSS have the expert knowledge to make all completions. The BSS staff will be trained to handle the full challenge.

Comment [DKJ((6)): BSS will have full access to the NICS database as they do today. BSS will not need to message the NICS they will have full ownership to enter comments into the transaction.

Comment [DKJ((7)): AST will be turning over the "hub" function to BSS.

Comment [DKJ((8)): Please let me make myself clear – BSS will handle the 5-day, the NICS appeal (challenge) and the close-out. This was not up for discussion when I met with each of the Sections. The only two functions that will remain in the Unit are the VAF and RC functions. I expect NICS to support the challenge process and BSS will have full access to the teams such as LAT and BAT.

The Appeal Services Team's Pilot Plan

The NFSU recommends this effort begin as a pilot project and extend 6 months depending on the initiation date allowing for the 6 months to not end during the NICS Section's Busier Season. After the 6 months is completed, the NFSU will complete a project review with details on the pilot and recommendations for modifications if necessary.

Comment [DKJ((9): This will be determined.



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

January 27, 2022

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

Re: OSC File No. DI-19-5076

Dear Mr. President:

I am sending you a report transmitted to the Office of Special Counsel (OSC) by the U.S. Department of Justice in response to the Special Counsel's referral of a disclosure of wrongdoing at the Federal Bureau of Investigation (FBI), Criminal Justice Information Systems Branch (CJIS), Clarksburg, West Virginia. The whistleblower, [REDACTED], who consented to the release of her name, is a Program Manager for the FBI National Instant Criminal Background Check System (NICS). I have reviewed the agency report and whistleblower comments and, in accordance with 5 U.S.C. § 1213(e), provide the following summary and my findings.¹

The whistleblower disclosed that the FBI failed to provide adequate staffing to NICS to ensure that required background checks are completed prior to the sale of firearms. The whistleblower also alleged that CJIS management improperly transferred the NCIS appeal process to the Biometric Services Section (BSS), in violation of the Brady Handgun Violence Protection Act of 1993 (The Brady Act), Public Law 103-159 and 28 C.F.R. Part 25.

The agency did not substantiate the allegations. First, the agency found that CJIS executive management took appropriate and proactive steps to address NICS staffing requirements. CJIS executive management addressed staffing needs through budget enhancement requests to Congress through the Office of Management and Budget (OMB), increased automation, contract employee utilization, employee overtime, and employee cross-training to respond to increased workload and staffing challenges. The agency found that between 2016 and 2019, background checks increased by three percent while NICS staffing increased by five percent. As a result, of the over 28 million background checks conducted by NICS in 2019, 99.1% were resolved within three business days; 99.3% were

¹The whistleblower's allegations were referred to then Attorney General William Barr for investigation pursuant to 5 U.S.C. § 1213(c) and (d). The FBI Inspection Division conducted the investigation. Former Attorney General Barr delegated the authority to review and sign the agency report to Associate Deputy Attorney General G. Bradley Weinsheimer.

Exhibit D

The President
January 27, 2022
Page 2 of 2

resolved within Brady Act-required timeframe of 90 days; and less than 1% required referred to the Bureau of Alcohol, Tobacco, Firearms, and Explosives for retrieval.

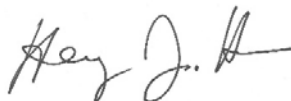
Next, the agency found that the transfer of the NICS appeal process to BSS employees capitalized on automation, improved efficiency, and maintained compliance with the Brady Act. Per the Brady Act, the Attorney General has the authority to process transactions, provide five-day response letters, and conduct NICS appeals. The Attorney General has delegated this authority to NICS. The agency found that in 2018, CJIS executive management sought to partially automate the NICS appeal process using the BSS electronic Departmental Order (eDO) system and database. To accomplish this goal, CJIS executive management realigned 25 NICS employees to BSS, but continued to track and fund all appeal activity through NICS's appropriated funding. The investigation revealed that the FBI Office of General Counsel advised CJIS executive management that merging NICS and BSS personnel in this manner complied with the parameters of the Brady Act and the Attorney General's delegation.

In her comments, the whistleblower remains concerned that CJIS's executive management's decisions regarding resource allocations contribute to declining and inefficient customer service. She also alleges that the investigative results on NICS sub-program merger with BSS contain information that is intentionally misleading and ignores key coordination and efficiency elements that were compromised by the transfer of the NICS appeal process.

I have reviewed the original disclosure, the agency report, and the whistleblower's comments. I thank [REDACTED] for bringing this to our attention. I am assured by the agency's continued pursuit to obtain an appropriately-sized and funded staffing level from Congress and to increase efficiency to meet its mission. Given the foregoing, I have determined the report contains the information required by statute and the findings appear reasonable.

As required by 5 U.S.C. § 1213(e)(3), I have sent a copy of this letter, the agency report, and whistleblower comments to the Chairs and Ranking Members of the Senate and House Judiciary Committees. I have also filed redacted copies of these documents and the redacted 1213(c) referral letter in our public file, which is available online at www.osc.gov. This matter is now closed.

Respectfully,



Henry J. Kerner
Special Counsel

Enclosures

Exhibit D