



# Department of Justice

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**STATEMENT OF**

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**BEFORE THE**

**COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE**

**AT A HEARING ENTITLED**

**“WHISTLEBLOWER RETALIATION AT THE FBI:  
IMPROVING PROTECTIONS AND OVERSIGHT”**

**PRESENTED  
MARCH 4, 2015**

**Statement of  
Kevin L. Perkins  
Associate Deputy Director  
Federal Bureau of Investigation  
Before the Committee on the Judiciary  
United States Senate  
Entitled "Whistleblower Retaliation at the FBI:  
Improving Protections and Oversight"  
March 4, 2015**

Good morning Chairman Grassley, Ranking Member Leahy and Members of the committee. Thank you for the opportunity to appear before you today to discuss the issue of whistleblower retaliation within the FBI.

The FBI recognizes the important role played by whistleblowers in our law enforcement efforts. We take very seriously our responsibilities with regard to FBI employees who may protect disclosures under the regulations, and we appreciate this Committee's longstanding interest in these important matters. As Director Comey has told this Committee, "[W]histleblowers are ... a critical element of a functioning democracy." Employees "have to feel free to raise their concerns and if they are not addressed up their chain of command to take them to an appropriate place."

The FBI has taken considerable steps to assure that employees are aware of whistleblower protections and of the whistleblower process. The FBI along with the Department of Justice (DOJ) has worked and continues to work to improve the process and employee's education about the process.

### **The Process for Making a Claim**

All FBI whistleblowers are protected by federal law from retribution. Title 5, U.S.C. Section 2303 provides that:

Any employee of the Federal Bureau of Investigation who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to any employee of the Bureau as a reprisal for disclosure of information by the employee...which the employee or applicant reasonably believes evidences:

- (1) a violation of any law, rule or regulation, or
- (2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

The process for making a protected disclosure under the law specifies the set of persons to whom a disclosure of wrongdoing must be made in order to qualify as a protected disclosure. A disclosure may qualify as protected if it is made to the DOJ

Office of Professional Responsibility (OPR), the DOJ Office of Inspector General (OIG), the FBI Office of Professional Responsibility (FBI OPR), the FBI Inspection Division (FBI-INSID) Internal Investigations Section (collectively, Receiving Offices), the Attorney General, the Deputy Attorney General, the Director of the FBI, the Deputy Director of the FBI, or to the highest ranking official in any FBI field office.

Any FBI employee who believes he or she has suffered a reprisal for making a protected disclosure may report the reprisal in writing to DOJ OPR or OIG. Some are also referred by the FBI Inspection Division to the OIG. OPR and OIG will then confer to determine which office will conduct an investigation into the alleged reprisal. The office that eventually conducts the investigation is known as the “Conducting Office.” The Conducting Office investigates the allegation “to the extent necessary to determine whether there are reasonable grounds to believe that a reprisal has been or will be taken” for a protected disclosure.

As part of its investigation, the Conducting Office obtains relevant documents from the FBI and from any other relevant source, including the complainant. These documents may include, for example, e-mails and personnel files. The Conducting Office interviews witnesses with relevant knowledge, typically including the complainant, the person(s) who allegedly retaliated against the complainant, and others in a position to have knowledge of the relevant facts and circumstances.

If the Conducting Office finds that there is no reasonable basis to believe that a reprisal occurred, it provides a draft report to the complainant with factual findings and conclusions justifying termination of the investigation, and allows the complainant to submit a written response. Upon termination, the Office must so inform the complainant in writing, and must provide the reasons for termination, a summary of relevant facts ascertained by the Office, and a response to any written response submitted by the complainant.

If the Conducting Office determines that there are reasonable grounds to believe that there has been or will be a reprisal for a protected disclosure, it reports its conclusion, along with any findings and recommendations for corrective action, to the DOJ Office of Attorney Recruitment and Management (OARM).

### **Oversight and Review by Office of Attorney Recruitment and Management**

In addition, any complainant may file a request for corrective action with OARM within 60 days of receipt of notification of termination of an investigation by the Conducting Office, or at any time beyond 120 days after filing a complaint with the Conducting Office if that Office has not notified the complainant that it will seek corrective action.

OARM’s first step is to make a jurisdictional determination. To establish jurisdiction, a complainant must demonstrate exhaustion of Conducting Office remedies and allege in a non-frivolous manner that the complainant made a protected disclosure

that was a contributing factor in the FBI's decision to take or not take (or threaten to take or not take) a personnel action against the complainant.

If OARM's jurisdiction is established, the parties then engage in discovery. OARM typically affords the parties 75 days to complete discovery, but extensions are often granted upon the parties' joint request. After discovery and any hearing, OARM sets a schedule for briefing on the merits, which typically takes two to four months to complete. OARM can grant corrective relief unless the FBI proves by clear and convincing evidence that it would have taken the same personnel action against the complainant even if he or she had not made the protected disclosure. After any merits hearing and filing of the parties' respective merits (or post-hearing) briefs, OARM renders a final determination on the merits.

Within 30 days of a final determination or corrective action order by OARM, either party may request review by the Deputy Attorney General (DAG) which typically involves another round of briefing. The DAG may set aside or modify OARM's actions, findings, or conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence. The DAG has full discretion to review and modify corrective action ordered by OARM. However, if the DAG upholds a finding that there has been a reprisal, then the DAG must order appropriate corrective action.

### **Presidential Review and Improvements to the Process**

In response to Presidential Policy Directive (PPD) 19, DOJ undertook a review of the disposition of FBI whistleblower reprisal cases filed with OIG, OPR, OARM, and the DAG from the beginning of 2005 through March 15, 2014.

This review was conducted by a working group that included the Office of the DAG, the FBI, OARM, OIG, OPR, and the Justice Management Division. In addition, the Department consulted with the Office of Special Counsel and FBI employees, as required by PPD-19, as well as with representatives of non-governmental organizations that support whistleblowers' rights and with private counsel for whistleblowers. The co-chairs of advisory committee representing all FBI employees conveyed two main points, based upon their own prior consultation with various constituents. First, they stated that OARM takes too long to process cases. Second, the co-chairs stated that a better job could be done of making FBI employees conscious of the whistleblower process and its parameters.

Based on this review, DOJ proposed a number of legal, policy and regulatory steps that the Department believes may be warranted. DOJ and the FBI have started implementing many recommendations. Other recommendations require further development, including, where applicable, public notice and comment procedures involved in the rulemaking process. Recommendations that are currently being implemented include:

- **Providing access to alternative dispute resolution.** DOJ created a voluntary mediation program for FBI whistleblower cases. The program utilizes the DOJ Mediator Corps Program, which was created in 2009 to expedite and make more efficient the resolution of workplace disputes. Mediation is now available at all stages in the process at the request of the complainant.
- **Expanding resources for OARM.** Many have expressed concerns about the length of time it takes to adjudicate FBI whistleblower cases. With a consistent average of approximately ten new cases a year, the number of active FBI whistleblower cases on OARM's docket at any one time is relatively small. However, the pendency of several large, complex cases among the more routine cases, along with associated administrative responsibilities, significantly slows overall case processing times. Large, complex cases can slow the adjudicative process due to the multitude of procedural questions that may arise, requests to extend discovery, and extensive factual records that must be reviewed and analyzed after discovery has closed. A number of cases have taken several years to resolve; the longest case took ten years from the filing of the complaint with OIG to the final decision by the DAG. To address this issue, DOJ determined that OARM's resources should be expanded. In November 2013, OARM hired a part-time attorney to supplement the work of its full-time staff attorney. Since then, OARM has improved its case processing time.
- **Awarding compensatory damage.** In light of PPD-19, DOJ will amend its regulations to provide that OARM may award compensatory damages, in addition to other available relief.
- **Expanding the list of persons to whom a protected disclosure can be made.** DOJ recommends a limited expansion of the set of persons to whom a "protected disclosure" may be made. DOJ recommends expanding the persons to whom protected disclosures may be made to include—in addition to the highest-ranking FBI field office official—the second-highest ranking tier of field office officials. This expansion would enhance the ability of employees to make protected disclosures within their own office. Such a change would mean that, in 53 field offices, a disclosure to the Special Agent in Charge (the highest-ranking official) or to any Assistant Special Agent in Charge (the second-highest ranking tier of officials, typically 2-3 per office) would be protected, assuming the disclosure's content qualified for protection. In the remaining and largest three field offices – Los Angeles, New York City, and Washington, D.C. – a disclosure to the Assistant Director in Charge (the highest-ranking official) or to any Special Agent in Charge (the second-highest ranking tier of officials, typically 5-6 in these three offices) would be protected. DOJ will amend the regulations accordingly.
- **Improving training for FBI employees.** DOJ believes that it is essential that all FBI employees, as well as non-FBI employees involved in the DOJ's FBI whistleblower program, receive proper training on DOJ's regulations and the rights and responsibilities of all parties. The OIG Whistleblower Ombudsman, in

connection with the FBI and other affected offices, is currently reviewing DOJ's training efforts regarding whistleblowing activities. As a result of this process, DOJ will implement a reinforced training program to ensure that (1) relevant employees receive appropriate training on a regular basis, and (2) that all employees are fully apprised of their rights and responsibilities.

- **Reporting findings of wrongdoing to the appropriate authority.** The whistleblower advocates recommended that any final decision that includes a finding of unlawful reprisal be forwarded to OIG, or other appropriate law enforcement authority, for consideration of whether disciplinary action is warranted against the officials responsible for the reprisal. OARM has recently implemented a policy of sending referrals to the FBI Office of Professional Responsibility, with a copy to the FBI Director. DOJ is amending its regulations to formalize this practice.
- **Providing authority to sanction violators.** DOJ supports revising its regulations to allow OARM to sanction litigants who violate protective orders. OARM would issue a protective order if necessary to protect from harassment a witness or other individual who testifies before it. Because OARM lacks sanction authority, there is currently no recourse available against a party who does not comply with a protective (or other) order, except for possible referral to a bar association. DOJ therefore will revise OARM's procedures or to propose revising its regulations, as appropriate, to include a provision providing sanction authority.
- **Expediting the OARM process through the use of acknowledgement and show cause orders.** At MSPB, within three business days of receipt of an appeal, an administrative judge issues an order which acknowledges receipt of the appeal, and informs the parties of the MSPB's case processing procedures (e.g., pertaining to designating a representative, discovery, filing pleadings, the agency's response, settlement, etc.). In cases where there is an initial question about the MSPB's jurisdiction, the MSPB issues, along with the acknowledgment order, an order directing that the appellant show cause as to why the appeal should not be dismissed for lack of jurisdiction. The show cause order puts the parties on notice of the jurisdictional requirements and their respective burdens of proof. Although MSPB procedures do not apply to FBI whistleblowers, issuing similar orders in FBI whistleblower cases could increase the efficiency of case adjudication at the jurisdictional phase. Through the public notice and comment process the Department will propose modifying its procedures to more closely mirror the MSPB process.
- **Equalizing access to witnesses.** The whistleblower advocates who met with DOJ raised concerns about access to FBI witnesses. They noted that, in some cases, the FBI has been able to call former FBI management officials or employees as witnesses against the complainant, either through affidavits or testimony at a hearing. However, the complainant has been unable to compel the deposition of those witnesses because OARM lacks authority to compel attendance at a hearing

of, or the production of documentary evidence from, persons not currently employed by DOJ. DOJ is considering whether to amend its regulations to prohibit a party from admitting affidavits into evidence from persons who are unavailable for cross-examination at a hearing or deposition, unless an access arrangement has otherwise been made.

- **Publishing decisions.** The whistleblower advocates recommended that decisions entered by OARM and the DAG be made available to the public, with appropriate redactions to protect the identities of employees and claimants. They suggested that publication of opinions would help potential whistleblowers provide information in a manner that would be protected and would assist them in litigating their cases should they suffer reprisal. Traditionally, these opinions have not been published due to the presence of law enforcement sensitive and Privacy Act-protected materials. DOJ is exploring whether it is possible to publish suitably redacted opinions in a manner that would provide useful information.
- **Publishing annual reports.** The whistleblower advocates recommended that DOJ publish the annual reports that the Attorney General submits to the President pursuant to a 1997 Presidential memorandum delegating to the Attorney General responsibilities concerning FBI employees under the Civil Service Reform Act of 1978, as amended by the Whistleblower Protection Act of 1989. The Department has previously disclosed the underlying data contained in the annual FBI whistleblower reports in response to congressional requests, and will publicly release this data annually in the future.

### **GAO Report on Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints**

We are also aware of the GAO's recent report on additional actions needed to improve DOJ's handling of FBI retaliation complaints. The FBI fully cooperated with the GAO's review and supports its recommendations, which were focused on DOJ's handling of claims of reprisal for making a protected disclosure. As noted above, DOJ has taken steps to improve their process for handling of retaliation claims.

Chairman Grassley, Ranking Member Leahy and Committee Members, I thank you for this opportunity to testify concerning whistleblower retaliation within the FBI. We take very seriously our responsibilities with regard to FBI employees who make protected disclosures under the regulations. Furthermore, we appreciate your interest in these matters. The FBI will not tolerate reprisals or intimidation by any FBI employee against those who make protected disclosures, nor tolerate attempts to prevent employees from making such disclosures. I am happy to answer any questions you might have.