



DEPARTMENT OF JUSTICE | OFFICE OF THE INSPECTOR GENERAL

MANAGEMENT ADVISORY MEMORANDUM

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FEBRUARY 2022

Notification of Concerns Regarding Potential Conflicts of Interest and Appearance Issues When the Federal Bureau of Investigation Assigns or Delegates Internal Affairs Investigations to FBI Employees Who Have Professional Relationships or Friendships with the Subject or Witnesses of the Investigation

INVESTIGATIONS DIVISION



February 28, 2022

Management Advisory Memorandum

To: Christopher Wray
Director
Federal Bureau of Investigation

A handwritten signature in blue ink that reads "Michael E. Horowitz".

From: Michael E. Horowitz
Inspector General

Subject: Notification of Concerns Regarding Potential Conflicts of Interest and Appearance Issues When the Federal Bureau of Investigation Assigns or Delegates Internal Affairs Investigations to FBI Employees Who Have Professional Relationships or Friendships with the Subject or Witnesses of the Investigation

The purpose of this memorandum is to advise you of concerns the Department of Justice Office of the Inspector General (OIG) has identified in connection with potential conflicts of interest and related appearance issues when the Federal Bureau of Investigation (FBI) delegates the responsibility for Internal Affairs Investigations (IAI) of FBI personnel to FBI employees who have professional relationships or friendships with the subject or witnesses of the IAI.¹ The OIG identified these concerns in connection with an OIG investigation and notified the FBI's Inspection Division (INSD) of them. The FBI informed the OIG that it shares the concerns identified by the OIG and already provided the OIG a Standard Operating Procedure to address them. In this memorandum, the OIG makes one recommendation to address these concerns.

Relevant Authorities

The Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), located at 5 C.F.R. Part 2635, contain a section addressing impartiality and related appearance issues—5 C.F.R. § 2635.502 (Section 502). Section 502 states that an employee should not participate in a particular matter involving specific parties without authorization where the employee knows that the matter is “likely to have a direct and predictable effect on the financial interest of a member of his household or knows that a person with whom [the employee] has a covered relationship” (such as a relative or a person with whom the employee is seeking a business, contractual, or other financial relationship) is or represents a party to such matter and “where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality.” 5 C.F.R. § 2635.502(a). In addition, “[a]n employee who is concerned that circumstances other than those specifically described in [Section 502]

¹ IAIs are internal investigations of alleged FBI employee misconduct that do not meet the OIG's intake criteria and which therefore the OIG has referred to the FBI for handling.

would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter.” 5 C.F.R. § 2635.502(b)(1)(i).

The process described in Section 502 involves the employee first informing a designated agency ethics official of the impartiality question. 5 C.F.R. § 2635.502(b)(1)(i). If the designated agency ethics official determines that the employee’s impartiality is not likely to be questioned, he may advise the employee that the employee’s participation in the matter would be proper. 5 C.F.R. § 2635.502(b)(1)(i). If the designated agency ethics official makes a determination that the employee’s impartiality is likely to be questioned, the agency ethics official must determine whether to nonetheless authorize the employee to participate in the matter. 5 C.F.R. § 2635.502(b)(1)(i). The designated agency ethics official “may authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee’s participation outweighs the concern that a reasonable person may question the integrity of the agency’s programs and operations” and the employee’s participation does not create a criminal conflict of interest. 5 C.F.R. § 2635.502(d).

According to FBI policy, FBI Supervisory Special Agents (SSA) are required to participate in certain mandatory and elective “Development Experiences” (DE) before they may be promoted to Assistant Special Agent in Charge. One of the mandatory DEs for SSAs to be eligible for such a promotion is to conduct an IAI. The FBI informed the OIG that due to this mandatory DE, the lack of a sufficient number of FBI SSAs within INSD Internal Affairs Section to conduct all IAIs, and the efficiencies associated with conducting IAIs where witnesses and physical evidence are located, the FBI frequently delegates the responsibility for conducting IAIs to SSAs within the FBI Headquarters division or field office in which the subject of the IAI is employed. An SSA within the INSD continues to monitor the case and on occasion participates in the interviews.

Another DE that SSAs are required to complete before being promoted is to conduct Full Field Office Inspections (FOI). The FBI told the OIG that it has historically recognized that potential conflicts could exist when SSAs conduct FOIs. Accordingly, the FBI has followed ongoing practices of (1) not assigning SSAs to FOIs of the field offices or divisions in which they are currently employed; and (2) requiring SSAs to attest that they have not been employed in the division or field office that is the subject of the FOI during the three years before being assigned to the FOI. However, the FBI does not observe similar practices for delegated IAIs.

Further, the FBI informed us that INSD employees routinely seek recusal from IAIs upon learning that they previously worked with or have professional relationships or friendships with the subject or witnesses of the IAI. However, the FBI informed us that there is no written policy requiring recusal under such circumstances.

The Issue

During the course of an OIG investigation, the OIG learned that an SSA within an FBI Headquarters division (Investigating SSA) led the IAI of another SSA who was employed within the same FBI Headquarters division (Subject SSA). According to the FBI, this IAI was at all times overseen by an SSA from INSD.

In connection with this IAI, the Investigating SSA separately interviewed the Subject SSA and a senior FBI official who also was employed within the same Headquarters division as the Investigating SSA and the Subject SSA. Moreover, the senior FBI official was involved in a romantic relationship with the Subject SSA and was involved in the incident that led to the IAI. While the senior FBI official was not in the Investigating SSA’s chain of command at the time of the IAI, the senior FBI official had a higher-level position within the Headquarters division than the Investigating SSA and had previously been in the Investigating SSA’s chain of command. Further, the Investigating SSA told the OIG that prior to conducting the IAI of the Subject SSA, a

colleague of similar seniority, the Investigating SSA considered the senior FBI official to be a mentor and friend with whom the Investigating SSA maintained regular communication.

The OIG determined that the Investigating SSA's position as a colleague in the same FBI division and at the same level as the Subject SSA created the risk of a conflict of interest. Specifically, the OIG found that it would be very difficult for any FBI employee to impartially investigate a colleague of a similar or higher level of seniority within the same division or field office. In addition, as part of any IAI, an investigating employee is likely to learn sensitive, potentially private information about the subject of the IAI. This situation could lead to awkwardness and difficulties for both the investigating and subject FBI employees as they would continue working with one another in the same division or field office. Moreover, we found that the senior FBI official's involvement in a romantic relationship with the Subject SSA and in the incident that led to the IAI may have caused the senior FBI official to have an interest in the outcome of the IAI, or at least created the appearance of such an interest. As a result, we found that the Investigating SSA's friendship with the senior FBI official and the fact that the Investigating SSA considered the senior FBI official to be a mentor created the risk of a conflict of interest.

The OIG believes that the likelihood of conflicts of interest or appearances of conflicts of interest is enhanced when an IAI is conducted by an FBI employee who currently has or previously had a professional relationship or friendship with the subject or witnesses of the IAI. Accordingly, the likelihood of conflicts of interest or appearances of conflicts of interest is greater when IAIs are delegated to an FBI employee who works in the same division or field office as the subject of the IAI. In addition, we found that these potential conflicts of interest and appearance issues could place FBI employees at risk of being found to have exercised poor judgment by failing to consult with a designated agency ethics official, consistent with the process set forth in Section 502 of the Standards of Conduct, before exercising responsibility over IAIs involving colleagues with whom they have professional relationships or friendships.

As noted above, the FBI has observed practices to prevent conflicts of interest in connection with FOIs but has not observed similar practices in connection with IAIs. In addition, the FBI informed us that INSD employees routinely seek recusal from IAIs upon learning that they previously worked with or have professional relationships or friendships with the subject or witness of the IAI. However, they also informed us that there is no written policy requiring recusal under such circumstances. When the OIG raised the concerns identified in this memorandum with the FBI, the FBI said it was considering requiring FBI employees, before they are delegated IAIs, to certify that they have never worked with the subject of the IAI.

Conclusion

The OIG determined that delegated IAIs present potential conflicts of interest and appearance issues when they are conducted by FBI employees within the same division or field office in which the subject of the IAI is employed. The OIG determined that potential conflicts of interest and appearance issues are similarly presented when an IAI is conducted by an FBI employee who currently has or previously had a professional relationship or friendship with the subject of the IAI or witnesses who may be interviewed in connection with the IAI.

Recommendations

To address the concerns identified above, the OIG recommends the following:

1. The FBI should take steps to prevent conflicts of interest and appearances of conflicts of interest in Internal Affairs Investigations (IAI). To accomplish this, the FBI should consider:

- a. Adopting a policy or practice of not assigning FBI employees to conduct IAIs of subjects within field offices or divisions in which they are currently employed, or, if the relevant field office or division has multiple squads or sections, not assigning FBI employees to conduct IAIs of subjects within the same squad of the field office or section of the division in which they are currently employed;
- b. Adopting a policy or practice of not assigning FBI employees to conduct IAIs of supervisors within their chain of command;
- c. Ensuring INSD employees are trained on the types of conflicts of interests that require recusal from conducting IAIs, such as current or prior professional relationships or friendships with the subject of the IAI or potential witnesses who may be interviewed in connection with the IAI;
- d. Requiring non-INSD FBI employees, before being delegated an IAI, to sign an attestation regarding potential conflicts of interest, including whether the FBI employee currently has or previously had a professional relationship or friendship with the subject of the IAI or potential known witnesses who may be interviewed in connection with the IAI;
- e. Requiring FBI employees to whom IAIs are being assigned or delegated to notify the INSD if they become aware before or during the course of the investigation of a subject or witness with whom they have a professional relationship or friendship, or become aware of other circumstances that might raise a question regarding their impartiality;
- f. Notifying FBI employees to whom IAIs are being assigned or delegated of the types of circumstances that would require them to consult with a designated agency ethics official pursuant to 5 C.F.R. § 2635.502.

The OIG provided a draft of this memorandum to the FBI, and the FBI's response is incorporated as Appendix 1. The FBI indicated in its response that it agreed with the OIG's recommendation and created a Standard Operating Procedure to address it. Appendix 2 provides the OIG's analysis of the FBI's response and a summary of the action necessary to close the recommendation in this memorandum. The OIG requests that the FBI provide an update on the status of its response to the recommendation within 90 days of the issuance of this memorandum. If you have any questions or would like to discuss the information in this memorandum, please contact Sarah E. Lake, Assistant Inspector General for Investigations, at (202) 616-4730.

cc: Bradley Weinsheimer
Associate Deputy Attorney General
Department of Justice

Appendix 1: The FBI's Response



U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No.

935 Pennsylvania Ave., Room 3092A
Washington, DC 20535
202-324-5545
February 17, 2022

The Honorable Michael E. Horowitz
Inspector General
Office of the Inspector General
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530

Dear Mr. Horowitz:

The Federal Bureau of Investigation appreciates the opportunity to review and respond to your Office's Management Advisory Memorandum, *Notification of Concerns Regarding Potential Conflicts of Interest and Appearance Issues when the Federal Bureau of Investigation Assigns or Delegates Internal Affairs Investigations to FBI Employees Who Have Personal Relationships or Friendships with the Subject or Witnesses of the Investigation*.

We agree that an official protocol would ensure that our delegated investigations would remain free from any actual or potential conflict of interest, or any appearance thereof. Accordingly, we promulgated a Standard Operating Procedure ("SOP"), which will ultimately become part of our official Internal Affairs Policy Guide.

This new SOP includes the requirement that investigators, who are delegated investigations, must sign a declaration to attest that there are no actual or potential conflicts of interest in their delegated investigations, and prevents the assignment of investigators who have served in the chain of command of a subject of the investigation or who have any personal or professional relationship with a subject of the investigation. Moreover, the personnel assigned to our Internal Affairs Section receive training on the grounds for, requirements of, and continuing obligation to recuse.

We appreciate your concern and the courtesy provided to the FBI.

Sincerely,

A handwritten signature in black ink, appearing to read "Douglas A. Leff".

Douglas A. Leff
Assistant Director
Inspection Division

Appendix 2: Office of Inspector General Analysis of the FBI's Response

The OIG provided a draft of this memorandum to the FBI, and the FBI's response is incorporated in Appendix 1. The FBI indicated in its response that it agreed with the OIG's recommendation and created a Standard Operating Procedure (SOP) to address it.

The following provides the OIG's analysis of the FBI's response and a summary of the action necessary to close the recommendation. The OIG requests that the FBI provide an update on the status of its response to the recommendation within 90 days of the issuance of this memorandum.

Recommendation 1: The FBI should take steps to prevent conflicts of interest and appearances of conflicts of interest in Internal Affairs Investigations (IAI). To accomplish this, the FBI should consider:

- a. Adopting a policy or practice of not assigning FBI employees to conduct IAIs of subjects within field offices or divisions in which they are currently employed, or, if the relevant field office or division has multiple squads or sections, not assigning FBI employees to conduct IAIs of subjects within the same squad of the field office or section of the division in which they are currently employed;
- b. Adopting a policy or practice of not assigning FBI employees to conduct IAIs of supervisors within their chain of command;
- c. Ensuring INSD employees are trained on the types of conflicts of interests that require recusal from conducting IAIs, such as current or prior professional relationships or friendships with the subject of the IAI or potential witnesses who may be interviewed in connection with the IAI;
- d. Requiring non-INSD FBI employees, before being delegated an IAI, to sign an attestation regarding potential conflicts of interest, including whether the FBI employee currently has or previously had a professional relationship or friendship with the subject of the IAI or potential known witnesses who may be interviewed in connection with the IAI;
- e. Requiring FBI employees to whom IAIs are being assigned or delegated to notify the INSD if they become aware before or during the course of the investigation of a subject or witness with whom they have a professional relationship or friendship, or become aware of other circumstances that might raise a question regarding their impartiality;
- f. Notifying FBI employees to whom IAIs are being assigned or delegated of the types of circumstances that would require them to consult with a designated agency ethics official pursuant to 5 C.F.R. § 2635.502.

Status: Resolved.

FBI Response: The FBI reported the following:

[W]e promulgated a Standard Operating Procedure ("SOP"), which will ultimately become part of our official Internal Affairs Policy Guide. . . . This new SOP includes the requirement that investigators, who are delegated investigations, must sign a declaration to attest that there are no actual or potential conflicts of interest in their delegated investigations, and prevents the assignment of investigators who have served in the chain of command of a subject of the investigation or who have any personal or professional relationship with a subject of the investigation. Moreover, the personnel assigned to our Internal Affairs receive training on the grounds for, requirements of, and continuing obligation to recuse.

The FBI also provided the OIG its new SOP and the "No Known Conflicts Declaration" (Declaration) that investigators who are delegated IAIs must sign. The SOP requires SSAs in nondelegated IAIs (INSD SSAs) to

immediately notify their Unit Chief and recuse themselves from participating in any IAI in which the INSD SSA suffers a bias. The SOP states that an INSD SSA is presumed to suffer from a bias in the circumstances outlined in the Declaration. The SOP further states that SSAs who are assigned a delegated IAI must sign the Declaration before conducting the delegated IAI.

OIG Analysis: The FBI's response is partially responsive to the recommendation.

- a. The FBI has adequately responded to Part a of Recommendation 1 because the SOP and Declaration require SSAs to whom IAIs are delegated to certify that they are not on the same squad or in the same unit as the subject of the IAI, and the SOP requires INSD employees to recuse under the same circumstances.
- b. The FBI has adequately responded to Part b of Recommendation 1 because the Declaration requires SSAs to whom IAIs are delegated to certify that they are not rated or reviewed by the subject of the IAI, and the SOP requires INSD employees to recuse under the same circumstances.
- c. The FBI has adequately responded to Part c of Recommendation 1 because the SOP states that INSD employees receive training on "the grounds for, requirements of, and continuing obligation to recuse."
- d. The FBI has adequately responded to Part d of Recommendation 1 because the SOP requires FBI employees to whom IAIs are delegated to sign the Declaration, which includes a statement that the FBI employee does not currently, nor has previously, had "a personal or professional relationship with any person substantially involved in the conduct that is the subject of this internal investigation..." The Declaration also requires FBI employees to whom IAIs are delegated to certify that they have never been "involved in a romantic or personal relationship with a subject or key witness" in the internal investigation. In addition, the SOP requires INSD employees to recuse under the same circumstances.
- e. The FBI has adequately responded to Part e of Recommendation 1 because the Declaration requires FBI employees to whom IAIs are delegated to acknowledge their "continuing obligation to identify and disclose" (emphasis in original) to their division head and the INSD any conflicts that arise during the internal investigation, and the SOP requires INSD employees to notify their Unit Chief and recuse under the same circumstances.
- f. The FBI has partially responded to Part f of Recommendation 1. Part f states that the FBI should consider notifying FBI employees to whom IAIs are being assigned or delegated of the types of circumstances that would require them to consult with a designated agency ethics official pursuant to 5 C.F.R. § 2635.502 (Section 502). The Declaration requires FBI employees to whom IAIs are delegated to certify that they are "not related by blood or marriage to a subject, key witness, or party in interest" and that they have never had a personal or professional relationship with any person who "has a specific and substantial interest that would be directly affected by the outcome" of the IAI. In addition, the Declaration requires FBI employees to certify that their participation in the IAI "would not present an actual or appearance of impartiality or conflict of interest" (emphasis in original). Further, the SOP requires INSD employees to notify their Unit Chief and recuse from any IAI in which they "suffer from or may suffer from a bias," and the SSA is presumed to suffer from a bias in the circumstances outlined in the Declaration.

While the FBI's response addresses some of circumstances described in Section 502, it does not specifically state that the FBI will notify FBI employees to whom IAIs are being assigned or delegated

of the types of circumstances that would require them to consult with a designated agency ethics official pursuant to Section 502. Moreover, Section 502 states that FBI employees should consult a designated agency ethics official in circumstances that are not described in the Declaration. For example, while Section 502 states that employees should not participate in a particular matter involving specific parties without authorization where the employee knows that the matter is “likely to have a direct and predictable effect on the financial interest of a member of his household,” 5 C.F.R. § 2635.502(a) (emphasis added), the FBI policy requires that FBI employees certify that they have never had “a personal or professional relationship with” any person who “has a specific and substantial interest that would be directly affected by the outcome,” (emphasis added). The OIG is concerned that FBI employees may rely on the language of the SOP and the Declaration in determining whether their involvement in an IAI creates a conflict of interest or the appearance of a conflict of interest, without considering other ethics laws or regulations, including Section 502.

Accordingly, this recommendation can be closed after the FBI considers whether to add to the SOP and/or the Declaration a caveat that FBI employees must still comply with all other ethics laws, regulations, and policies, including Section 502.