



**U.S. Department of Justice
Office of the Inspector General
Evaluation and Inspections Division**

**Review of Termination and Appeals
Notice to Witness Security
Inmate Participants**

August 2014

I-2014-005

EXECUTIVE SUMMARY

The federal Witness Security (WitSec) Program includes prison inmates who have provided assistance to the government. Title 18 U.S.C. § 3521, Witness Relocation and Protection, is the statutory provision authorizing the WitSec Program and governing its administration. When a decision is made by the Office of Enforcement Operations (OEO) to terminate a participant from WitSec, the statute requires that the participant must be notified about the reasons for the proposed termination so that the participant can challenge the decision through established procedures.

On April 10, 2013, in a concurring opinion related to a claim by a former inmate participant challenging his termination from the WitSec Program, two Judges on the U.S. Court of Appeals for the Second Circuit expressed concern that OEO had failed to comply with procedural guarantees contained in 18 U.S.C. § 3521(d)(1) and (f) and asked that the opinion be forwarded to the Office of the Inspector General (OIG). Following our review of the concurring opinion, we undertook this review to determine whether OEO was complying with the statutory requirements of 18 U.S.C. § 3521(d)(1) and (f).

In sum, we found that up until August 2013, the standard memorandum of understanding (MOU) that OEO required WitSec Program inmate participants to sign did not explain, as required by 18 U.S.C. § 3521(d)(1), the procedures to be followed if a participant breaches the terms of an MOU. On August 20, 2013, OEO modified its standard MOU so that it complied with the statutory requirements regarding notice of the procedures for filing and resolving grievances.

We also found that OEO did not comply with the requirements of 18 U.S.C. § 3521(f) when it terminated the WitSec Program participant because it failed to provide him with information of sufficient specificity to enable him to challenge the proposed termination. OEO advised the OIG that in August 2013, after we initiated this review, it began providing specific information to WitSec inmate participants when they are notified of their proposed removal from the WitSec Program. OEO also provided the OIG with copies of recent notification letters, which we found contained specific reasons for the proposed removal.

We recommend that OEO ensure that all inmate participants sign the new MOU, or an addendum to their previously executed MOU, so

that they are informed of the procedural guarantees contained in 18 U.S.C. § 3521(d)(1) and (f).

TABLE OF CONTENTS

INTRODUCTION..... 1

RESULTS OF THE REVIEW..... 4

 Factual Chronology..... 4

 Analysis..... 6

 Compliance with 18 U.S.C. § 3521(d)(1) 6

 Compliance with 18 U.S.C. § 3521(f) 7

CONCLUSION AND RECOMMENDATION 9

APPENDIX I: EXAMPLE OF OLD OEO AGREEMENT 10

APPENDIX II: EXAMPLE OF CURRENT OEO AGREEMENT
(EFFECTIVE AUGUST 20, 2013) 12

APPENDIX III: THE CRIMINAL DIVISION’S RESPONSE TO THE
DRAFT REPORT..... 15

APPENDIX IV: OIG ANALYSIS OF THE CRIMINAL DIVISION’S
RESPONSE 19

INTRODUCTION

On April 10, 2013, the U.S. Court of Appeals for the Second Circuit unanimously upheld the dismissal of a claim by a former inmate participant in the Department of Justice's Witness Security (WitSec) Program challenging his termination from the Program. In so ruling, the Court concluded that the decision whether to terminate a WitSec Program participant is within the Attorney General's unreviewable discretion in accordance with 18 U.S.C. § 3521(f).¹ Nevertheless, in a concurring opinion, Judge Peter Hall, joined by Judge Barrington Parker, expressed concern that the Department's Office of Enforcement Operations (OEO), which manages the WitSec Program, had failed to comply with the procedural guarantees contained in 18 U.S.C. § 3521(d)(1) and (f).

Those provisions require that the memorandum of understanding (MOU) the Department and the WitSec Program participant enter into must describe the procedures to be followed if a participant breaches the MOU, and that prior to terminating his participation, the Department must inform the participant of the reasons for the proposed termination so that he can challenge the decision through the established procedures.² In light of concerns that the Department was not meeting the statutory requirements, the concurring opinion concluded with a request that the Clerk of the Court forward the Court's opinion and concurrence to the Office of the Inspector General (OIG) for review.

Following receipt and review of the Court's opinion and concurrence, the OIG undertook this review to determine whether OEO was complying with the statutory requirements of 18 U.S.C. § 3521(d)(1) and (f).

¹ *J.S. v. T'Kach*, 714 F.3d 99, 103 (2d Cir. 2013). The Court reversed the dismissal of the plaintiff's additional claim regarding the conditions of his confinement in administrative segregation following his termination from the WitSec Program and remanded the case to the U.S. District Court for consideration of this specific claim. However, that claim is not relevant to our review.

² The MOU is a legally binding document between OEO and the WitSec Program participant that outlines the rules governing the individual's participation in the WitSec Program.

Relevant Statutory Provisions

Title 18 U.S.C. § 3521, Witness Relocation and Protection, is the statutory provision authorizing the WitSec Program and governing its administration. Our review focused primarily on the requirements in 18 U.S.C. § 3521(d)(1) and (f). Pursuant to § 3521(d)(1), the Department must enter into an MOU with the WitSec Program participant that sets forth the participant’s responsibilities as well as the procedures to be followed in case of a breach of the agreement. The statute requires the MOU to include a description of the process for “filing and resolution of grievances”:

Each such memorandum of understanding shall also set forth . . . the procedures to be followed in the case of a breach of the memorandum of understanding, as such procedures are established by the Attorney General. Such procedures shall include a procedure for filing and resolution of grievances of persons provided protection under this chapter regarding the administration of this program. This procedure shall include the opportunity for resolution of a grievance by a person who was not involved in the case.³

Title 18 U.S.C. § 3521(f) provides that the Attorney General may terminate the protection provided to

any person who substantially breaches the memorandum of understanding Before terminating such protection, the Attorney General shall send notice to the person involved of the termination of the protection provided under this chapter and the reasons for termination.

That subsection also states that “[t]he decision of the Attorney General to terminate such protection shall not be subject to judicial review.”

Purpose, Scope, and Methodology of the OIG Review

We did not undertake a formal evaluation of the WitSec Program in connection with this review. Instead, we focused on the Department’s

³ Section 3521(d)(3) authorizes the Attorney General to delegate the requirements in the statute to the Assistant Attorney General for the Criminal Division, which the Attorney General has done. OEO is within the Criminal Division, and it handles the administration of the WitSec Program.

compliance with two particular statutory provisions, 18 U.S.C. § 3521(d)(1) and (f). We obtained and reviewed information from OEO about the specific case that was the subject of the Second Circuit’s decision, as well as the standard MOUs that OEO used during the relevant time period. We also reviewed the procedures OEO followed when seeking to terminate a participant from the Program. We interviewed OEO personnel, and we reviewed letters between the terminated WitSec Program participant and OEO, the MOU between OEO and the participant, correspondence related to the participant’s appeal process, the Federal Bureau of Prisons’ (BOP) correspondence logbook, and the documents in the official court records.⁴

⁴ When a WitSec Program participant is incarcerated, the BOP requires the participant to enter into a separate written agreement with the BOP that outlines specific rules governing the inmate’s participation the Witness Security Program while in BOP custody.

RESULTS OF THE REVIEW

Factual Chronology

In 2007, the Attorney General authorized the admission into the WitSec Program of an inmate in the Federal Prison System identified in the Second Circuit's opinion as "J.S." J.S. was formally admitted into the Program later that year after reading, acknowledging, and signing the MOU, which is formally titled the OEO Witness Security Program Prisoner-Witness Agreement (see Appendix I).⁵

In general, the MOU with OEO outlines what is expected, including what is authorized and prohibited, of all inmate WitSec Program participants. Among other things, the MOU specifically prohibits inmates from disclosing their involvement in the WitSec Program with uncleared individuals and from having contact with other WitSec Program participants unless specifically given pre-authorization by OEO. The MOU further states that contacting or attempting to contact unauthorized individuals constitutes a breach of the agreement. The MOU that J.S. signed in 2007 also states that "failure to adhere to this Agreement could result in termination of Program services *without notice*" (emphasis in original).

In late 2007, J.S. also completed a BOP Witness Commitment Interview and signed a separate MOU with the BOP acknowledging the conditions governing his participation in the WitSec Program while in BOP custody. In addition to background information regarding what WitSec Program participants can expect from the BOP while in custody, the MOU with the BOP dictates the rules that prisoner-witnesses are expected to follow while in the WitSec Program during their incarceration.

Our review of J.S.'s file showed that, contrary to the statutory requirements, the MOU with OEO did not explain the procedures to be followed if the participant breached the agreement, nor did the MOU detail the mechanism for appeal. In addition, the BOP MOU did not explain how the participant could challenge a decision that he violated its terms.

⁵ OEO has a separate MOU for witness participants that are not incarcerated. With regard to the two issues we discuss in this report, the MOU for non-incarcerated Program participants was identical in all material respects to the MOU for prisoner-witnesses.

OEO documents we reviewed indicated that between 2008 and early 2010, J.S. took actions that OEO considered to be violations of the MOU. On March 9, 2010, OEO sent J.S. a letter notifying him that “[c]redible information has come to our attention that you have violated Program rules, specifically paragraph 2(b) of the [OEO MOU], . . . by continuing to establish contact or to attempt to establish contact with uncleared individuals or entities.”⁶ The letter did not contain any substantive information regarding the alleged violations of Program rules. In the letter, OEO informed J.S.:

. . . you will be removed from the Program within 15 calendar days after your receipt of this letter unless, during that time, you appeal this decision by writing to the Office of Enforcement Operations at the above address, providing any information in support of your appeal of this decision. Any appeal will be resolved by a person not previously involved in this case. You will remain highlighted as a Program participant during this appeal process, and must adhere to Program rules during this time. If no appeal is received from you within this time frame, you will be de-highlighted and recommended for Central Inmate Monitoring classification.

In response to the March 9 OEO notification letter, J.S. submitted a two-page “Notice of Appeal,” signed and dated March 21, 2010, requesting details as to how he had violated the agreement and asserting that since no one would tell him who he was alleged to have contacted or tried to contact, he was unable to provide an adequate response.⁷ He also alleged that BOP staff had approved every telephone call he had made and every letter he had sent.

⁶ Paragraph 2(b) of the OEO MOU states, “You are not to take any action (in person, electronically, by mail, by telephone, or otherwise) to establish contact or to attempt to establish contact with uncleared individuals or entities. Such actions, which could breach, or otherwise affect, your security, or breach the security of another protected witness, will be considered a serious violation of this Agreement, even if a security breach does not actually occur. You should direct to appropriate staff at your institution any questions you have about when you need clearance to contact a particular individual or entity. Media contact/interviews are not permitted for Program participants.”

⁷ Although the date next to the signature line of the “Notice of Appeal” is March 21, 2010, the first paragraph of the document states that it was signed on March 11, 2010.

Our review of J.S.'s file shows that in an undated letter to OEO, which was stamped as received by OEO on April 3, 2010, J.S. referenced his appeal, which he noted he mailed on March 22 and stated "you should have it by the 24th or 25th of March."⁸ In this undated letter, J.S. complained about OEO "trying to kick me out of the program You leave me no choice but to contest this issue. I would appreciate it very much if you would talk to me about this matter, I'm sure we can resolve this matter [sic] that will be beneficial to us both. Looking forward to a reply."

According to OEO, it never received the "Notice of Appeal" letter from J.S. dated March 21, and we found no response by OEO to that letter in the files. OEO did, however, consider the undated letter by J.S. that OEO received on April 3 as a timely appeal by J.S. On April 15, 2010, OEO sent J.S. a letter denying his appeal on the ground that his April 3 letter "offer[ed] no viable defense" for violating the terms of the MOU. The April 15 letter further noted that "in your [April 3] letter you do not address the allegations at all" and "[a]s such, it is difficult, if not impossible, for me to determine the basis for your appeal." The April 15 letter also provided substantive details regarding the violations that OEO found J.S. had committed while in the WitSec Program and concluded by informing J.S. that he had been removed from the WitSec Program.

Analysis

Compliance with 18 U.S.C. § 3521(d)(1)

By its terms, 18 U.S.C. § 3521(d)(1) requires the MOU between OEO and the WitSec Program participant to explain the procedures for a participant to appeal a finding that the participant breached the terms of the MOU. We found that at the time J.S. entered the WitSec Program in late 2007, the standard MOU OEO used did not contain the information the statute required. Although OEO did eventually describe the appeal procedures to J.S. in its proposed termination letter to him dated March 9, 2010, OEO clearly failed to comply with the statutory requirement because this information should have been part of the original MOU that J.S. signed in 2007.

During our review, the OEO Deputy Director told us that OEO was taking steps to address the issue. The Deputy Director told the OIG that

⁸ A review of the BOP correspondence logbook showed that J.S. sent mail to the OEO Director on March 22, 2010, and again on March 23, 2010.

in June 2010, OEO staff began reviewing and modifying Program-related documents for both prisoner-witnesses and relocated witnesses, who are administered by the U.S. Marshals Service (USMS). As part of this review process, in August 2013, OEO finalized modifications to its MOU for prisoner-witnesses to more specifically address the statutory requirements in 18 U.S.C. § 3521(d)(1). We have reviewed the newly implemented MOU's section on Termination or Removal, and it now contains language intended to fulfill the statutory requirements outlined in 18 U.S.C. § 3521(d)(1). (See Appendices I and II for examples of the old and new MOUs, respectively.) We also reviewed the MOU the OEO revised for the relocated witnesses that it administers in the Program and found the revised version meets the requirements in 18 U.S.C. § 3521(d)(1).

Compliance with 18 U.S.C. § 3521(f)

We also considered whether the inmate was provided proper notice of removal and the reasons for dismissal from the Program, as 18 U.S.C. § 3521(f) requires. We concluded that, although OEO did provide the inmate notice of the general basis for its decision to recommend termination from the WitSec Program in its March 9 letter, it did not provide J.S. with information that was sufficiently specific to enable him to meaningfully challenge his termination. Neither OEO nor the BOP informed J.S. of the specific details regarding whom he was alleged to have contacted so that he could provide an explanation in accordance with the grievance resolution process prescribed in 18 U.S.C. § 3521(d)(1).

Ironically, even though OEO had failed to provide J.S. with details of the alleged violations in its March 9 letter or at any time prior to its April 15 termination decision, OEO criticized J.S. in its termination letter for failing to substantively respond to the allegations made against him. Moreover, in the termination letter, OEO provided significant detail regarding the alleged violations committed by J.S. In light of these facts, we concluded that OEO did not comply with the requirement in 18 U.S.C. §3521(f) that an inmate must be afforded the reasons for termination *prior* to the final decision to remove him from the WitSec Program.

During the course of our review, we learned that OEO was in the process of modifying its MOU for prisoner-witnesses. The OEO Deputy Director provided the OIG with examples of recent notification letters to inmate WitSec participants. The letters we reviewed provided specific reasons for the participants' proposed removal from the Program. We

also reviewed the MOU the OEO revised for the relocated witnesses that it administers in the Program and found the revised version meets the requirements in 18 U.S.C. § 3521(f).

CONCLUSION AND RECOMMENDATION

Pursuant to 18 U.S.C. § 3521(d)(1), OEO's MOU with WitSec Program participants is required to detail the procedures for a participant to appeal a finding that the participant breached the agreement. We found that prior to August 2013, OEO's standard agreement with inmate participants did not comply with this statutory provision. OEO has since finalized and implemented a re-drafted MOU that contains language describing the appeals process, as the statute requires. Specifically, the MOU states that "if it is determined that you have breached any provision of this Memorandum of Understanding (including failing to follow all rules and regulations of the BOP and USMS, which are themselves conditions of this agreement), you will be notified that your termination/removal from further Program services is being proposed and reasons for the termination" (see paragraph 5b of the MOU in Appendix II). In addition, the MOU now contains discussion about the participant's opportunity to appeal the removal decision.

We further concluded that OEO's notice to J.S. regarding its decision to recommend his termination from the WitSec Program did not contain sufficiently specific information to enable him to meaningfully challenge his proposed termination, as required by 18 § U.S.C. 3521(f). However, the Deputy Director for the Federal Witness Security Program told us that new protocols require that OEO list the specific reasons for termination in its initial notice to the inmate proposing removal from the WitSec Program. Our review of copies of post-August 2013 notifications of proposed termination for other WitSec inmate participants showed that OEO now provides to the inmate participant specific information regarding the reason for removal.

To ensure that inmate participants are informed of the procedural guarantees contained in 18 U.S.C. § 3521(d)(1) and (f), we recommend that the Office of Enforcement Operations require all current inmate participants in the Witness Security Program sign the new memorandum of understanding or an addendum to their previously executed memorandum of understanding. The addendum should include language such as that contained in the August 20, 2013, memorandum of understanding used for newly authorized inmate participants.

APPENDIX I: EXAMPLE OF OLD OEO AGREEMENT



U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

OEO Witness Security Program Prisoner-Witness Agreement

You have been authorized into the Federal Witness Security Program (Program) by the United States Department of Justice, Office of Enforcement Operations (OEO), to receive Program services ONLY while you are incarcerated, subject to your understanding of, and agreement to, the following terms and conditions, and all other Program requirements, including all rules and regulations of the Federal Bureau of Prisons (BOP) and/or the United States Marshals Service (USMS), as they relate to you as a prisoner-witness. This authorization is for the "Prisoner Witness" portion of the Program ONLY, and is applicable at all times while you are in the Program, regardless of where you are housed. The *OEO Witness Security Program Prisoner-Witness Agreement* (Agreement) has no affect on your cooperation or plea agreement, nor does it have a bearing on the security BOP would ordinarily provide you. This Agreement relates only to matters involving Program security and services.

1. **Effect of Prison Disciplinary Violations** - Stringent adherence to all Program rules is imperative in order to maintain your safety and anonymity, and in order to minimize the notoriety of your cooperation and thus reduce the threat to you. Any disciplinary violations/infractions you commit while incarcerated will be considered as a factor when deciding whether to revoke your current "prisoner witness" status in the Program or to authorize post-release Program services. Prisoner-witnesses are expected to cooperate in Program-related matters and investigations with the BOP, USMS, United States Attorney's Offices (USAO), and any other law enforcement agency's (LEA) staff.
2. **Prohibition on Disclosure of Program Participation and Contact With Other Protected Witnesses** - Since public attention on Program participants and the Program's methods and procedures is not compatible with the Program's best efforts to maintain the security and anonymity of witnesses participating in the Program:
 - a. You are not to discuss, or in any other way reveal or divulge, details about your conviction, your admission to, or status--current or former--in, the Program, your true identity, your location while in the Program, or any other information concerning you or your family members or other protected witnesses or their family members or visitors, to any individual or entity (including, but not limited to, other prisoners, your relatives, government officials, and representatives of the media) unless specifically pre-authorized by OEO Program Officials in Washington, D.C. It is understood that the government officials who sponsored your participation in the Program will know certain details about you or your family members from their prior relationship with you. When housed with other prisoners, you should identify yourself only by the means provided by BOP; you should not discuss your case with any other prisoner unless specifically authorized.
 - b. You are not to take any action (in person, electronically, by mail, by telephone, or otherwise) to establish contact or to attempt to establish contact with uncleared individuals or entities. Such action, which could breach, or otherwise affect, your security, or breach the security of another protected witness, will be considered a serious violation of this Agreement, even if a security breach does not actually occur. You should direct to appropriate staff at your institution any questions you have about whether you need clearance to contact a particular individual or entity. Media contact/interviews are not permitted for Program participants.
 - c. Any action in which you participate through any means or medium that would in any way or to any degree focus public attention on you, your case, or the Program's methods and procedures will be construed by OEO as an intentional abandonment of your desire for anonymity and for the Program's services, and you will be subject to immediate removal from the Program and cancellation of all Program services. This does not include normal trial testimony.

_____ initials of prisoner-witness

10E03858E.AGR 04/07/00

Page 1 of 2

- d. During and after your period of incarceration, you must not attempt to establish any contact with, or request others to establish contact with, other—current or former—Program witnesses (including their family members, visitors, and acquaintances), whether they are incarcerated or not. Current or former Program witnesses, including all former Protective Custody Unit inmates, are considered uncleared individuals. This ban on contact is necessary in order to avoid compromising your or their protected status or anonymity. Such contact will likely result in your removal from the Program. If you are incarcerated with Program witnesses, it is understood that you will have contact with them while you are in the same Protective Custody Unit, as long as you abide by section 2.a. of the Agreement.
 - e. Any of the above actions which come to our attention could jeopardize your continued participation in the Program and will be considered as a factor in any decision to provide you with Program services in the future.
3. **Program Relocation Services After Release from Custody** - Placement in the Program as a prisoner-witness does not include any assurance that you will be authorized to receive any further Program services upon your release from custody.
- a. While you may request the full post-release services of the Program, which generally include relocation assistance by the USMS upon release, you must also develop alternate release plans in the event post-release services of the Program are denied. You should begin developing your own alternate release plans, with the assistance of BOP, at least eleven to thirteen months prior to your anticipated release from custody.
 - b. The fact that you may already have relocated family members currently in the Program is no guarantee that you will be authorized into the Program to join them. Having family in the Program is just one thing considered by OFO, which could be outweighed by other considerations in determining whether Program placement for full Program services is appropriate upon your release.
4. **Relocation Decision-Making Authority** - The final decision as to whether you will be authorized to receive further Program services after your release from incarceration is made solely by OEO, not by BOP, the USMS, your sponsoring USAO, or any LEA. While OEO invites recommendations concerning post-release services, OEO is not bound by any promises or offers (or plea agreements) made to you by anyone in regard to post-release Program services.

Failure to adhere to this Agreement could result in termination of Program services without notice. Your signature below, and initials on page one, indicate that you have read both pages of this Agreement, or had them read to you, that you have had the opportunity to ask questions and all questions asked have been answered to your satisfaction, and that you understand the limitations set forth herein and agree accordingly. You may consult with your sponsoring USAO and/or your private attorney about this Agreement, provided that you do so within ten (10) business days of reviewing this document.

[Where necessary, a true and accurate translation of this notice has been provided to the prisoner. Any such translator should sign here _____.]

Prisoner's full name (printed)

Prisoner's signature and date

BOP staff witness's name (printed) and title

BOP staff witness's signature and date

[BOP PLEASE FORWARD THIS ORIGINAL DOCUMENT TO OEO IMMEDIATELY]

**APPENDIX II: EXAMPLE OF CURRENT OEO AGREEMENT
(EFFECTIVE AUGUST 20, 2013)**

“OEO Witness Security Program Prisoner-Witness Agreement”

Memorandum of Understanding Between Prisoner-Witness and Attorney General

Through the Office of Enforcement Operations (OEO), you have been authorized into the Federal Witness Security Program (Program) to receive Program services ONLY while you are incarcerated. Your authorization is contingent on your agreement to follow all of the terms and conditions contained in this Memorandum of Understanding (MOU). This authorization is for the "Prisoner-Witness" portion of the Program ONLY. There is a separate application process for out-of-custody Program services and your Assistant United States Attorney (AUSA) must apply to OEO for you to be considered for further services of the Program upon your release.

1. **Compliance with Rules/Regulations**

You are required to follow all Program requirements, including all rules and regulations of the Federal Bureau of Prisons (BOP) and the United States Marshals Service (USMS) when in their respective custody. Any violation could result in your removal from the Program and termination of protective services of the Program without advance notice. Further, your continued cooperation with the Government is a condition of this agreement. Any refusal to cooperate with prosecutors, any breach of a plea agreement, or the taking of any action that impairs a prosecution is a violation of this agreement and could lead to immediate termination of Program services.

2. **Prison Disciplinary Violations**

Stringent adherence to all Program rules is imperative in order to maintain your safety and anonymity, and in order to minimize the notoriety of your cooperation and thus reduce the threat to you. Any disciplinary violations/infractions you commit while incarcerated will be considered as a factor in any decision to revoke your current "prisoner-witness" status in the Program and to terminate you from Program services. Disciplinary violations/infractions may also negatively impact any consideration for post release Program services. Prisoner-witnesses must cooperate with all OEO, BOP, USMS, and investigative agency staff in Program-related matters and investigations.

3. **Disclosure of Program Participation/Contact with Other Protected Witnesses**

Public attention on Program participants and the Program's protective methods and procedures is not compatible with the Program's best efforts to maintain the security and anonymity of witnesses participating in the Program. As such:

a. You are not to discuss, or in any other way reveal or divulge, details about your conviction, your admission to or status in the Program (current, former, or pending), your true identity, your location while in the Program, or any other information concerning you or your family members or other protected witnesses or their family members or visitors, to any individual or entity (including, but not limited to, other prisoners, your relatives, government officials, and/or representatives of the media) unless specifically pre-authorized by OEO.

Initials _____

b. You are not to take any action (in person, electronically, by mail, by telephone, or otherwise) to establish contact, or to attempt to establish contact, with any unauthorized individuals or entities.¹ Such action(s), which could breach your security, or breach the security of another protected witness, will be considered a serious violation of this Agreement, even if a security breach does not actually occur.

c. Any action in which you participate through any means or medium that would in any way, or to any degree, focus attention on you, your case, or the Program's methods and procedures will be considered a breach of this agreement and could result in your termination from the Program. Such action will be construed by OEO as an intentional abandonment of your desire for anonymity and for the security of the Program, and you will be subject to immediate removal from the Program without advance notice.

d. During and after your period of incarceration, you must not attempt to establish any contact with other federally protected witnesses (including their family members, visitors, and acquaintances), whether they are incarcerated or relocated. This ban on contact is necessary in order to avoid compromising your, or their, protected status or anonymity. Such contact can result in your immediate removal from the Program.

e. Any of the above actions which come to our attention after your release from prison or after you leave the Program will be considered in any decision to provide you with any type of future Program services, even if the actions were taken after you left the Program.

4. **Program Services after Release from Custody**

Placement in the Program as a prisoner-witness does not include any assurance that you will be authorized to receive any further Program services upon your release from custody.

a. The final decision as to whether you will be authorized to receive further Program services after your release from incarceration is made solely by OEO. Your sponsoring United States Attorney's Office, the BOP, the USMS, or any law enforcement agency do not have the authority to authorize any services of the Program. OEO is not bound by any promises or offers made to you by anyone in regard to post-release Program services.

b. While you may request consideration for post-release services of the Program, you must also develop alternate release plans in the event that post-release services of the Program are not sought by your sponsoring officials, or, are ultimately denied. You should begin developing your own alternate release plans, with the assistance of BOP, at least nine to twelve months prior to your anticipated release from custody.

c. The fact that you may already have family members currently in the Program is no guarantee that you will be authorized into the Program to join them. Various factors are reviewed by OEO to determine whether Program placement for post-release Program services is appropriate upon your release.

¹ You should assume that the only individuals authorized to know about your Program status are the AUSA and case agent who sponsored your application for Program services, as well as OEO, BOP, and USMS personnel assigned to protect you. You must not take any action to communicate with any other person(s) or entities which could breach your security. This provision should be interpreted broadly. This means that you must not discuss any Program-related matter with anyone, including other law enforcement personnel or court officials. Important – contacts with representatives of the media are not permitted without specific written authorization of OEO.

Initials _____

5. **Termination or Removal**

a. You could be terminated from protective services of the Program and removed from the prisoner-witness portion of the Program if you breach any provision of this Memorandum of Understanding, or if you provide(d) any false information concerning the circumstances of your being authorized for Program services.

b. If it is determined that you have breached any provision of this Memorandum of Understanding (including failing to follow all rules and regulations of the BOP and USMS, which are themselves conditions of this agreement), you will be notified that your termination/removal from further Program services is being proposed and the reasons for the termination. The proposed termination will be forwarded to OEO for consideration. If a decision is rendered removing you from the Program and terminating Program services, you will be advised of your removal from the Program and you will be given an opportunity to appeal the removal decision. Any appeal must be filed within the prescribed time limits. Any appeal will be reviewed by an individual not involved in the initial removal decision. The protective services of the Program will not cease until such appeal has been finalized.

Your initials on each page and your signature below indicate that you have read each page of this Agreement, or had them read to you, that you have had the opportunity to ask questions and all questions asked have been answered to your satisfaction, and that you understand the limitations set forth herein and agree accordingly.

[Where necessary, a true and accurate translation of this notice has been provided to the prisoner. Any such translator should sign and date here: _____.]

Prisoner's full name (printed)

BOP witness' name and title (printed)

Prisoner's signature Date

BOP witness' signature Date

BOP - PLEASE FORWARD THIS ORIGINAL DOCUMENT TO OEO IMMEDIATELY

Initials _____

APPENDIX III: THE CRIMINAL DIVISION'S RESPONSE TO THE DRAFT REPORT



U.S. Department of Justice

Criminal Division

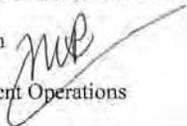
Office of Enforcement Operations

Washington, D.C. 20530

MEMORANDUM

To: Michael E. Horowitz
Inspector General
U.S. Department of Justice

Through: Nina Pelletier
Assistant Inspector General for Evaluation and Inspections

From: Monique Perez Roth 
Director
Office of Enforcement Operations

Subject: Publicly Releasable Summary: Department of Justice's Response to the Office of the Inspector General's draft audit report entitled *Review of Termination and Appeals Notice to Witness Security Inmate Participants* (Assignment Number A-2014-002)

Thank you for the opportunity to respond to the Office of the Inspector General's July 8, 2014 draft audit report entitled *Review of Termination and Appeals Notice to Witness Security Inmate Participants* (OIG Audit Report). The Criminal Division appreciates the OIG's role in periodically auditing the federal Witness Security Program (WitSec Program or Program), and believes that, through our combined efforts, the Program has undergone significant improvements and will continue to do so.

For over 40 years, the WitSec Program has assisted prosecutors in bringing to justice the most violent and dangerous criminals by providing witnesses critical protection from retribution as a result of their cooperation with law enforcement. During the last four decades, the Program has proven to be an essential tool for prosecutors as they address domestic and international terrorism, narcotics trafficking, violent regional and national gangs, and traditional organized crime syndicates. The Program is administered by the Office of Enforcement Operations (OEO) of the Criminal Division.

As noted in the OIG Audit Report, the instant OIG review was undertaken in response to concerns expressed by two judges of the U.S. Court of Appeals for the Second Circuit that OEO may not have provided an inmate Program participant (referred to as J.S.) with certain procedural guarantees to which he was entitled. Upon review of the expressed concerns, OIG, through its report, concluded that:



U.S. Department of Justice

Criminal Division

Office of Enforcement Operations

Washington, D.C. 20530

1. The Program memorandum of understanding (MOU) between OEO and J.S. did not explain, "the procedures to be followed in the case of a breach of the memorandum of understanding," as required by 18 U.S.C. § 3521(d)(1); and
2. OEO did not comply with statutory requirements when it terminated J.S. because it failed to provide him "the reasons for termination," as directed in 18 U.S.C. § 3521(f).

The OIG Audit Report notes that OEO, in August 2013, amended the MOU to specifically alert Program participants to the appeals process available to them in the event of a termination. The Criminal Division agrees that this change brings the MOU into compliance with 18 U.S.C. § 3521(d)(1). However, it is important to note that even before this change to the MOU was made, Program participants who were terminated from Program services, including J.S., received a letter advising them of their removal from the Program (termination letter) and *specifying the available appellate procedures.*

The OIG Audit Report also notes that OEO has since amended its protocols to require that more specific reasons for termination be provided to the Program participant in its termination letter, and recognizes that, since August 2013, termination letters prepared by OEO have, in fact, provided sufficiently detailed information to the Program participant to enable him or her to meaningfully challenge termination.

Finally, the Criminal Division agrees with the OIG's recommendation that current inmate Program participants be presented with an addendum to their MOU that outlines termination procedures and the appeals process available to them. OEO has provided the Bureau of Prisons (BOP) with such an addendum to present to the inmate Program participants for signature.

Regarding the specific termination that prompted the instant OIG audit, the Criminal Division notes that J.S. had ample notice of the reasons for his termination, which was preceded by a number of specific verbal and written warnings about his conduct. Pursuant to statute, J.S. signed an MOU with OEO when he was authorized for protections of the Program in 2007. As noted in the OIG Audit Report,

...the MOU with OEO outlines what is expected, including what is authorized and prohibited, of all inmate WitSec Program participants. Among other things, the MOU specifically prohibits inmates from disclosing their involvement in the WitSec Program with uncleared individuals and from having contact with other WitSec Program participants unless specifically given pre-authorization by OEO. The MOU further states that contacting or attempting to contact unauthorized individuals constitutes a breach of the agreement. (Emphasis Added)

Between 2008 and 2010, J.S. took a series of actions which violated MOU provisions regarding contacts with unauthorized individuals. Both the BOP and OEO took specific actions



U.S. Department of Justice

Criminal Division

Office of Enforcement Operations

Washington, D.C. 20530

to advise J.S. that his conduct was prohibited, and put J.S. on notice that he risked termination from further protective services.

- In September 2008, in response to reports that J.S. was making contact with unauthorized individuals in direct violation of the MOU, at the direction of OEO, the BOP verbally warned J.S. that such contacts were unauthorized.
- In October 2009, the BOP reported to OEO that J.S. was again making contacts with unauthorized individuals in violation of the MOU. Specifically, J.S. had identified a law enforcement officer on his social contacts list and described the agent as a "friend," and used a Post Office box instead of an actual street address. BOP verbally advised J.S. that such actions circumvented security procedures regarding unauthorized contacts, and constituted clear violations of both BOP and Program guidelines.
- On October 22, 2009, J.S. signed an acknowledgement that he was served with a formal warning letter from OEO (dated October 9, 2009) that specifically directed J.S. not to have contacts with unauthorized individuals, and warning him that future violations would form the basis for removal from the Program: *"We want to reinforce to you that we take the unauthorized contact rule very seriously. Therefore this letter serves to strongly caution you against such contacts in the future, and to put you on notice that if you have further such actions, your case will be reviewed for removal from the Witness Security Program."*
- On October 26, 2009 – just four days after acknowledging receipt of the formal OEO warning letter, J.S. sent an unauthorized letter to the BOP Office of Internal Affairs (OIA). In the letter, J.S. describes his previous work as a confidential informant and revealed specific information that compromised his security. Further, J.S. wrote, "Please do not contact [BOP] or OEO, as they are on my a__ about breach of security already."
- On January 27, 2010, an Assistant United States Attorney sent a memorandum to OEO stating that, "Agent [name redacted for security] and I cautioned [J.S.] on multiple occasions to stop all contact with unauthorized persons including an in-person warning at the time he appeared for sentencing."
- On March 11, 2010, J.S. signed an acknowledgement that he was served with a notice of termination from the Program. The notice specifically advised J.S. that he had, "violated Program rules, specifically paragraph 2(b) of [the MOU] to which [he] previously agreed to abide, by [his] signature on December 7, 2007, and by [his] signature on a warning letter from [OEO] dated October 20, 2009, by continuing to establish contact or attempt to establish contact with uncleared individuals or entities." The termination letter further outlined the procedures for appeal of the termination decision: "...you will be removed from the program within 15 calendar days after your receipt of this letter unless, during that time, you appeal this decision by writing to the Office of Enforcement Operations at the



U.S. Department of Justice

Criminal Division

Office of Enforcement Operations

Washington, D.C. 20530

above address, providing any information in support of your appeal of this decision. Any appeal will be resolved by a person not previously involved in the case. You will remain [protected] as a Program participant during this appeal process and must adhere to Program rules during this time. If no appeal is received from you within this time frame, you will be [removed...].”

Conclusion

The Criminal Division believes that J.S. received adequate notice of the reasons for his proposed termination and was informed of the appeals process available to him in the termination letter that he received. Nevertheless, the Criminal Division agrees with OIG’s recommendation that all future termination letters should more clearly notify the Program participant of the “reasons for the termination,” and the MOU should set forth the appeals process. OEO already has taken corrective actions that fully address both concerns. The Criminal Division concurs with OIG’s recommendation that current Program participants be presented with an addendum to their MOU that specifies the appeals procedure. OEO has provided BOP with the addendums to be executed by Program participants.

APPENDIX IV: OIG ANALYSIS OF THE CRIMINAL DIVISION'S RESPONSE

The Office of the Inspector General provided a draft of this report to the Criminal Division for its comment. The Criminal Division provided general comments on the report findings and its response to the report's recommendation. The Criminal Division's response is included in Appendix III of this report. The OIG's analysis of the Criminal Division's response and the actions necessary to close the recommendation is discussed below.

OIG'S ANALYSIS OF THE CRIMINAL DIVISION'S RESPONSE TO THE RECOMMENDATION

Recommendation 1: The Office of Enforcement Operations require all current inmate participants in the Witness Security Program sign the new memorandum of understanding or an addendum to their previously executed memorandum of understanding. The addendum should include language such as that contained in the August 20, 2013, memorandum of understanding used for newly authorized inmate participants.

Status: Resolved.

Summary of Criminal Division Response: The Criminal Division concurs with the recommendation. OEO has provided BOP with the addendums to be executed by Program participants.

OIG Analysis: The action that the Criminal Division plans is responsive to our recommendation. Please provide documentation of the signed addendums or the status of your progress, by October 31, 2014.