

QUESTIONS AND ANSWERS



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 8, 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find responses to questions for the record posed to Federal Bureau of Investigation Director Robert Mueller following his appearance before the Committee at an oversight hearing on September 16, 2009.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of further assistance on other matters. The Office of Management and Budget has advised us that from the perspective of the Administration's program, they have no objection to submission of this letter.

Sincerely,

A handwritten signature in cursive script, appearing to read "R. Weich".

Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable Jeff Sessions
Ranking Minority Member

Questions Posed by Senator Whitehouse

4. The Office of the Director of National Intelligence (DNI) refers leaks of classified information to the Federal Bureau of Information (FBI) for additional investigation and, when appropriate, eventual prosecution. As a matter of national security and employment discipline, it is important that leakers face repercussions for improper disclosure of classified information. It is equally important that the FBI receive adequate information about each leak in order to initiate a meaningful investigation.

a. Please describe the process through which the DNI refers leak cases.

Response:

Executive Order 12333, as amended, requires agencies in the Intelligence Community to report possible violations of Federal law by their employees to DOJ, which includes violations of the statutes relating to the unauthorized disclosure of classified information. These crime reports identify, among other things, the classified information that was leaked and the level of classification of the leaked information. DOJ's National Security Division (NSD) then assesses whether an investigation should be opened as a result of the reported leak. As part of this assessment process, DOJ requires the reporting agency to answer a series of specific questions to help evaluate whether an investigation would be productive. Should an investigation be deemed necessary, these questions are useful in guiding the course of that investigation. For example, DOJ usually has the referring agency specify in its crime report whether it would like DOJ to investigate the leak. Although the FBI has the authority to investigate a leak regardless of whether the reporting agency desires such an investigation, eliciting the reporting agency's determination of which leaks are sufficiently damaging to warrant an investigation helps us assess how best to use limited investigative resources.

In addition to responding to referrals, the FBI opens investigations whenever we become aware of a leak that we believe is significant, even without a referral. Similarly, we occasionally open an investigation based solely on an oral request from a senior Intelligence Community official. These investigations are conducted by the FBI in consultation with the NSD, which oversees and coordinates all leak investigations. The FBI and NSD regularly brief the reporting agencies on the status of these investigations.

Despite the experience and cooperative approach of the investigating parties, leak investigations may not progress to the prosecutorial phase for a number of reasons. It is common, for example, for the information that was leaked to have been appropriately disseminated throughout the federal government for official use, making the identification of the leak's source very unlikely. Further

complicating investigations of unauthorized disclosures of classified information to the media is the fact that there are usually only two people who know how a leak occurred and the identity of the leaker – namely, the leaker and the reporter to whom the information was leaked. We have interpreted DOJ's formal policy on obtaining information from members of the news media, codified at 28 C.F.R. § 50.10, as requiring that such leak investigations focus on potential leakers rather than reporters. While this policy appropriately balances the importance of First Amendment freedoms with the strong national security interest in keeping classified information from disclosure, it necessarily limits the prosecutor's access to the reporter who received the sensitive information. In the rare case in which DOJ issues a subpoena to a reporter for information about the source of a leak, the information is not necessarily produced. There are often lengthy legal challenges to the subpoena, which on a rare occasion can entail a reporter electing to serve jail time for contempt rather than comply with the subpoena. In light of these limitations and the practical realities of leak investigations, the leaker often cannot be identified beyond a reasonable doubt, as is required for a successful prosecution.

When a prosecution cannot be undertaken or is not successful, administrative action by the leaker's agency may be an appropriate course of action to ensure that the leaker is prevented from again breaching the government's trust through additional leaks. While the FBI is not involved in pursuing these administrative actions, we are authorized to share with the referring agency the results of our investigations (with limited exceptions such as access to certain grand jury information).

b. Please provide the number of such referrals from the Intelligence Community for each of the last five years, and statistical information on dispositions of those matters.

Response:

While DOJ and the FBI receive numerous media leak referrals each year, the FBI opens only a limited number of investigations based on these referrals. As discussed in response to subpart c, below, in most instances the information included in the referral is not adequate to initiate an investigation. When this information is sufficient to open an investigation, the FBI has been able to identify suspects in approximately 50% of these cases over the past 5 years. Even when a suspect is identified, though, prosecution is extremely rare (none of the 14 suspects identified in the past 5 years has been prosecuted).

Following is the requested statistical information.

<u>Year</u>	<u>Referrals</u>	<u>Leak Investigations</u>	<u># of Suspects Identified</u>
2005	46	7	1
2006	29	9	5
2007	55	5	5
2008	23	3	1
2009	30	2	2

c. Is the information in the case files adequate to initiate investigations? What other material would be helpful to have? Are the cases generally meritorious?

Response:

In most cases, the information included in the referral is not adequate to initiate an investigation. The most typical information gap is a failure to identify all those with authorized access to the information, which is the necessary starting point for any leak investigation. In these cases, DOJ's NSD and the FBI work with the victim agency to obtain the additional information needed to make an informed decision as to whether investigation is appropriate.

As discussed in response to subpart a, above, while a majority of the cases are meritorious in the sense that they are based on an unauthorized dissemination of classified information, prosecution is often not pursued because the information was initially widely disseminated and, as a consequence, the leaker cannot be identified.

d. What recommendations do you have?

Response:

The FBI recommends that victim agencies continue to report possible violations of Federal criminal law regarding the unauthorized disclosures of classified information as required by Executive Order 12333 but, as is already the practice of the FBI, the CIA, and others, additionally consider providing this information to their internal security divisions for possible administrative action. Because indictments in media leak cases are so difficult to obtain, administrative action may be more suitable and may provide a better deterrent to leaks of classified information.