



OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

June 1, 2016

MEMORANDUM FOR:


The Honorable Jeh C. Johnson
Secretary

The Honorable León Rodríguez
Director
U.S. Citizenship and Immigration Services

The Honorable Sarah Saldaña
Director
U.S. Immigration and Customs Enforcement

L. Eric Patterson
Director
Federal Protective Service

FROM:

John Roth 
Inspector General

SUBJECT:

December 3, 2015 – San Bernardino Incident

On March 16, 2016, Senator Ron Johnson, Chairman of the Homeland Security and Government Affairs Committee (HSGAC), requested that the Office of Inspector General review the events that took place at the U.S. Citizenship and Immigration Services (USCIS), San Bernardino, California, office on December 3, 2015. That referral is attached as appendix A. Our objective was: 1) to conduct a factual inquiry into the incident and 2) to determine if Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI) was attempting to identify and retaliate against an employee who originally reported information to the Senate. We have substantially completed our review.

We concluded that the USCIS Field Office Director at the San Bernardino office improperly delayed HSI agents from conducting a lawful and routine law enforcement action, but when the Field Office Director elevated the situation to her supervisors, the situation was corrected. We found that the contract security personnel improperly prevented HSI personnel from entering the building. Finally, we found that there was no attempt by ICE leadership or



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supervisory personnel within HSI to attempt to retaliate against the individuals who notified HSGAC of the situation. We have also concluded that the Field Office Director was not candid with OIG investigators during her interview.

We conducted this investigation from March 17, 2016 until April 8, 2016. We conducted approximately 23 interviews, reviewed HSI and USCIS policies, researched HSI authority to enter government buildings and conduct arrests, and obtained email, text, and phone records.

Background

On December 2, 2015, Syed Farook and Tashfeen Malik, dressed in tactical gear and armed with .223 assault rifles, semiautomatic handguns, and body armor, opened fire during a holiday party at Farook's place of employment and killed 14 people and injured 22. The pair fled the scene in a black SUV, but left behind three different explosive devices. It took authorities several hours to render the scene safe and account for the dead and wounded. The attack, and the fact that the couple had not yet been apprehended, paralyzed the surrounding area. Residents were advised to stay indoors and at least one school was placed in lockdown. Later that day, police responded to a tip and, in a shootout in which hundreds of rounds were fired, killed the couple. Police discovered over 1,600 unused rounds of ammunition in their vehicle. A broad federal terrorism investigation ensued, which is continuing. Immediately after the attack, authorities did not know the full identity of those involved or whether further attacks were planned.

It is in this context that the following events occurred.

Notification of Possible Location of Marquez and HSI Response

At approximately 12:20 p.m., December 3, 2015, less than 24 hours after the shooting, HSI was notified that the Joint Terrorism Task Force (JTTF), San Bernardino, CA, had developed information that Mariya Chernykh, a Russian national attempting to adjust her immigration status, was married to Enrique Marquez, an associate of Syed Rizwan Farook, and that she had an appointment at 12:30 p.m. on December 3, 2015, at the USCIS Office, San Bernardino, CA.¹ The JTTF believed that Marquez might accompany her to the

¹ Marquez was a childhood friend of Syed Rizwan Farook, one of the shooters, and was subsequently charged with providing assault rifles to Farook. Mariya Chernykh's sister, Tatiana Farook, is married to Syed Raheel Farook, brother of Syed Rizwan Farook. Mariya



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appointment. HSI dispatched a team to go to the USCIS office to prevent any possible further attacks as well as to detain Marquez and Chernykh for questioning.

HSI Arrives at USCIS and is Restricted from Entering the Building

Five HSI agents, dressed in tactical gear, arrived shortly after 12:30 and made contact with Federal Protective Service (FPS) contract security personnel stationed in the lobby of the building. They informed the guards they were there on an urgent matter, looking for Marquez, and advised that he may be traveling with a Russian female, and that they may have been connected to the shootings the prior day. The FPS guards advised the HSI agents that they had to stay in the lobby until the Field Office Director approved their entry. The guards did allow the HSI agents to view surveillance video from various areas around the building to see if anyone matching Marquez's description had already arrived. One of the guards told OIG investigators that he could see the look of urgency on the agents' faces, and they seemed "on edge" due to having to wait until the guards found the Field Office Director.

According to the FPS contract guards, the Field Office Director did not answer her phone, so an FPS guard searched the building, subsequently found her, and advised her that HSI agents were looking to obtain information regarding a Russian female and Hispanic male who may have been connected to the shootings the previous day. (When interviewed by OIG agents, the Field Office Director stated that she was notified via phone that HSI agents had arrived at USCIS San Bernardino and wanted to detain and interview someone. She said in her interview that she was not told for whom they were looking, or why they were looking for the individual.)

Prior to giving permission for ICE to further enter the building, the Field Office Director contacted her superior, the District Director of USCIS in Los Angeles, for guidance. The District Director instructed the Field Office Director to bring the agents in to determine what they wanted. The District Director in turn notified her supervisor, the Regional Director, based in Laguna Niguel, CA.

Chernykh, Tatiana Farook, and Syed Raheel Farook have since been charged with immigration fraud relating to the marriage between Mariya Chernykh and Enrique Marquez.



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Initial Interaction with the Field Office Director

According to the HSI agents we interviewed, the agents were confined to the lobby for approximately 15 to 20 minutes. The agents were escorted to a USCIS conference room by FPS guards, where they met with the Field Office Director. According to the HSI agents' accounts, they waited approximately 10 additional minutes in the conference room before the Field Office Director met with them. The agents told her they were looking for Marquez because he was connected to the shootings and there was concern that he could be in the building. The Field Office Director told the agents they were not allowed to arrest, detain, or interview anyone in the building based on USCIS policy, and that she would need to obtain guidance from her superior before allowing them access. During this exchange, the agents also spoke by phone with the Acting Chief, Fraud Detection and National Security (FDNS), USCIS, Los Angeles. According to the HSI agents, he told the agents that it was USCIS policy not to arrest, detain, or interview on USCIS property.²

When interviewed by OIG, the Field Office Director denied telling the agents they were not allowed to arrest, detain, or interview anyone in the building. However, her account is contradicted by that of the other HSI agents present. Moreover, the Field Office Director herself reiterated to OIG agents during her interview her belief that it was against USCIS "procedure" for law enforcement to detain or interview individuals on USCIS property. She also gave inconsistent answers about when she discovered that the HSI agents were investigating the shootings from the day prior. She told OIG in her interview that she discovered the connection between Chernykh and the shootings while reviewing Chernykh's file. She also stated that she was only told by the agents that they were investigating the shootings after she gave them the photograph. In her written statement, however, the Field Office Director stated that the agent told her that they were investigating the shootings when she initially met with him in the conference room. Either version is contradicted by the building security officer, who said he told the Field Office Director of the purpose behind the agents' arrival when he first notified her.

² The FDNS Acting Chief denied telling HSI agents that it was USCIS policy not to arrest, detain, or interview anyone in the building. He stated he used to work for HSI and that he was well aware that USCIS could not supersede HSI law enforcement authority, nor could USCIS provide direction as to how HSI conducted law enforcement operations. He did request that HSI conduct any arrests discretely and discussed various methods of discreet arrests with HSI.



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After meeting with the agents, the Field Office Director again called the District Director in Los Angeles and notified her of the connection to the shootings the day prior. The District Director notified her supervisor, the Regional Director, who in turn notified the Associate Director – Field Operations, USCIS, in Washington, DC, who then met with USCIS counsel’s office.

USCIS Response to HSI’s Requests

The Field Office Director had her staff check to see if Chernykh had checked in for her appointment and it was determined that neither she nor Marquez were there. The conversation then switched from HSI access to the building to HSI access to USCIS information.

According to HSI, the agents then requested information from the USCIS file on Marquez’s wife, but the Field Office Director was not forthcoming with information and would not provide the file. She did provide them with a photo. Agents also asked for known addresses, but the Field Office Director would only confirm the address provided by the agents and did not offer any additional information.

HSI Departure, Return, and Eventual Access to Information

HSI believed that the Field Office Director was not going to cooperate in their effort to locate Marquez, so they left the building and regrouped in the parking lot.

Meanwhile, in Washington, DC, the USCIS Associate Director – Field Operations determined that it was permissible for HSI to have access to the file. He then contacted the Regional Director in California and told her to give HSI whatever they wanted. The Regional Director relayed this to District Director who relayed this to the Field Office Director. More than an hour after HSI arrived at the building, the Field Office Director called one of the HSI agent’s cell phone and told them that they could return to look through the file. HSI returned and viewed the file, hand-copying information they deemed relevant to the investigation. HSI then left USCIS.



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Conclusions

Was the 20-30 minute delay in allowing HSI access to the building appropriate?

The Field Office Director asserted both to OIG during her interview and to HSI agents on the scene that day that she had the authority to determine who could enter the building, including law enforcement. That is incorrect. The contract security personnel at the facility should have immediately permitted entry to the HSI agents once they identified themselves and explained their official purpose.

USCIS facilities are operated by the General Services Administration (GSA) and security for the building is provided by FPS. FPS (and its contract security guards) are required to follow FPS directives. Specifically, they are required to follow FPS Directive Number 15.9.3.1, which addresses access to federal buildings, and pertains to law enforcement access during an emergency. Paragraph VI.F.2 states that non-FPS armed law enforcement officers “without recurring facility access, but who are responding to emergencies at the facility, shall access the facility without further delay once they have been identified and the nature of the emergency has been determined.”³

The Field Office Director was the “Designated Official” for the building. As such, she chairs a committee that develops procedures and policies for exemptions to the general access rules. However, FPS has the right to overrule the committee’s policies. In any event, there is no authority – in law, regulation or policy – to support the Field Office Director’s claim that she has the right to dictate who enters a federal building, particularly federal law enforcement on official business.

Here, the agents were justifiably concerned that Marquez and Chernykh may pose a threat to the occupants and visitors of the USCIS facility. Less than 24 hours before, individuals associated with the couple had committed an atrocity on an unthinkable scale against unarmed innocents; at the time of HSI’s visit to USCIS, Marquez and Chernykh’s intentions were unknown. In fact, HSI’s suspicions were ultimately shown to have merit: Marquez was subsequently

³ The Directive is specific as to armed state and local personnel, but can be fairly read to apply to federal agents responding to an emergency. Additionally, every building has a set of “post orders,” which are instructions specific to the building at issue. FPS provided the post orders for the USCIS building located in San Bernardino, CA. These post orders did not add any further clarification to the directive.



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charged with a number of terrorism-related offenses, including having plotted with Syed Rizwan Farook to conduct other attacks, and was later ordered detained by a federal magistrate pending trial as a danger to the community.

While the contract security personnel at the scene exercised appropriate diligence in locating the Field Office Director, the better procedure, once the guards verified the agents' identity and understood the necessity for immediate action, would have been to allow the agents' access to the building. In theory, HSI could have also contacted either FPS or USCIS' FDNS to expedite their entry into the building, but the exigency of the situation, such an option may not have been viable.

What is the policy concerning making arrests or detentions at USCIS facilities?

Contrary to the Field Office Director's assertion, there is no USCIS policy, written procedure, or documented standard operating procedures pertaining to arrests, detentions, or interviews by DHS law enforcement personnel in USCIS facilities. USCIS, HSI, and FPS personnel all recall that historically, HSI and FPS have made arrests at USCIS facilities.

Pursuant to Title 19, United States Code, section 1589a, HSI agents have general federal law enforcement authorities, which include the ability to arrest or detain individuals if the agents have reasonable grounds to believe that the person to be arrested has committed or is committing a felony offense. Prohibiting access to federal facilities needed to effectuate such arrests would render the authorities established in section 1589a ineffective. Contrary to the Field Office Director's statement to agents at the time, and to OIG during her interview, there is no "safe harbor" against arrest at USCIS or any other federal facility.

Did HSI agents have a right to access the immigration file in question?

HSI should have been granted access to the immigration file in question. HSI is, and always has been, able to obtain USCIS immigration files without approval by any particular authority. The Field Office Director or District Director does not need to approve release of information to HSI. Under DHS practice and policy, HSI agents either request the file through a computer system, through administrative support staff, or simply sign out the physical file at USCIS (although this generally only occurs in locations where HSI and USCIS are co-located).



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There was no Privacy Act prohibition in sharing the file with HSI. Such law enforcement sharing has been declared a “routine use” by USCIS, and thus sharing was permitted by Title 5, United States Code, section 552a(b)(7). As a result, any HSI request for information from USCIS could have been complied with immediately.

In this particular instance, USCIS headquarters had emailed some supervisory personnel in the field and directed that all files pertaining to the San Bernardino incident be managed at headquarters and not by the field. However, the Field Office Director never stated that she was withholding information because of this directive, and appeared to be unaware of it at the time. The Field Office Director’s supervisor, the District Director, told us that she was aware of this directive, which is why she contacted her headquarters when she was notified by the Field Office Director that this incident was connected to the San Bernardino shootings.⁴

The Field Office Director stated during her interview with OIG that she was fully forthcoming and complied with all of the HSI agents’ requests, but each of the HSI agents interviewed, and at least one USCIS employee, told OIG she was being difficult and non-cooperative.

Was there retaliation or attempted retaliation as a result of the disclosure to Congress?

We have found no evidence that anyone in ICE or HSI attempted to retaliate against anyone for contacting the Senate. We found one instance in which an HSI supervisor in the field asked the four recipients of an emailed executive summary whether they had forwarded it on to others. We have determined, however, that this inquiry was to gain an understanding of the situation rather than to identify potential whistleblowers. This individual has since been informed that retaliation or attempted retaliation for such disclosures is a

⁴ Separately, part IV-01 of the USCIS Records Operation Handbook (ROH) lays out an intricate series of steps to take in order to share USCIS files during a national security event. HSI has a concurrent memorandum explaining the process laid out in the USCIS ROH. However, in the case of the San Bernardino shootings, these steps were not completed until eight days after the shootings, after the immediate threat had passed. Neither HSI San Bernardino nor USCIS San Bernardino knew about this process at the time of the shooting. HSI stated that once they initiated the process, it took a significant amount of time to check all of the required blocks and it would have been difficult for them to accomplish the steps in the middle of a fluid situation. As a result of this process, it was not until December 14, 2015, that HSI received the remainder of the files they requested (with the exception of one file that had been lost in July 2015 and has not been recovered).



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prohibited personnel practice, and would constitute misconduct on the part of those who retaliate.

Aftermath

- In San Bernardino, the parties have apparently agreed that all future HSI operations involving USCIS would be run through USCIS Fraud Detection and National Security Section (FDNS). There are other similar arrangements around the country where FDNS is the primary point of contact for HSI activities. We believe that this will assist in minimizing the delays encountered here and would encourage USCIS to continue this outreach across the country.

However, it should be made clear that USCIS has no authority to prohibit legitimate law enforcement operations and that in fast-developing or emergency situations, federal law enforcement must have the latitude, with or without FDNS coordination, to operate as they see fit (within the bounds of federal law and policy).

- We understand that USCIS is developing a new, joint policy to allow HSI more expedient access to USCIS facilities and records during an emergency situation. A more streamlined policy is necessary to prevent the delays that existed here in gaining access to the paper files that USCIS maintains.
- FPS should clarify its existing policies and ensure that its contract security force understands FPS policies regarding law enforcement access to federal facilities during emergencies. A delay such as the one that occurred here could have disastrous consequences under different circumstances.

Attachments

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March 16, 2016

The Honorable John Roth
 Inspector General
 Department of Homeland Security
 245 Murray Lane SW
 Washington, DC 20528-0305

Dear Inspector General Roth:

Thank you for your testimony at the Committee's March 15, 2016 hearing entitled *The Security of U.S. Visa Programs*.¹ The Department of Homeland Security Office of Inspector General (DHS OIG) plays an important role in providing oversight and identifying areas for improvement within the Department. At the hearing, I discussed an incident on December 3, 2015 that revealed troubling lack of coordination between two DHS components in the wake of the San Bernardino terrorist attack. My staff has since learned that Immigration and Customs Enforcement (ICE) supervisors are actively seeking what employee(s) spoke with the Committee and may be looking to retaliate against those individuals. Accordingly, I write to request that your office take two courses of action. First, I ask that the DHS OIG investigate the December 3, 2015 incident I highlighted at the hearing. Second, I request that your office make all appropriate efforts to ensure that the individuals that provided the information to the Committee do not face retaliation for exercising their right to speak with their elected representatives.

On December 2, 2015, Sayed Farook and his wife, Tashfeen Malik, carried out an ISIS-inspired terrorist attack at the Inland Regional Center in San Bernardino, California that left 14 civilians dead and 22 injured. Shortly after the attack, law-enforcement personnel identified Farook's friend, Enrique Marquez, as the individual who purchased the two rifles used in the attack. Mr. Marquez has subsequently been charged with conspiring to provide material support to terrorists, straw purchasing of a firearm, and marriage fraud.²

As I explained at yesterday's hearing, Mr. Marquez and his wife, Mariya Chernykh, were scheduled to meet with U.S. Citizenship and Immigration Services (USCIS) in San Bernardino at 12:00 pm on December 3, 2015.³ The FBI notified Homeland Security Investigations (HSI) of this scheduled meeting and requested that HSI dispatch a team of armed agents to the USCIS San

¹ *The Security of U.S. Visa Programs: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs* 114th Cong., (2016).

² Complaint, *United States v. Enrique Marquez*, No. 5:15MJ498 (C.D. Cal. Dec. 17, 2015), <https://www.justice.gov/opa/file/800606/download>

³ *The Security of U.S. Visa Programs: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs* 114th Cong., (2016) (statement Sen. Ron Johnson, Chairman, S. Comm. on Homeland Security and Gov't Affairs).

Bernardino office to apprehend Mr. Marquez.⁴ When HSI agents arrived at the USCIS offices, the Officer in Charge of USCIS would not let the HSI agents into the building.⁵ In addition, USCIS officials denied the HSI agents' request for Ms. Chernykh's A-file and instead allowed HSI agents to take a picture of Ms. Chernykh's picture in the A-file.⁶ Mr. Marquez and Ms. Chernykh failed to appear for their scheduled meeting with USCIS.⁷ According to information obtained by the Committee, HSI did not receive Ms. Chernykh's full A-file until December 10, 2015—one week after this incident.

If accurate, these accounts reveal an alarming lack of coordination between DHS components in the wake of the deadliest terrorist attack on American soil since 9/11. A complete and thorough investigation of this incident is warranted to identify failures in coordination and to implement procedures that allow for the free flow of information in the wake of potential future terrorist attacks.

Following the hearing, I am also concerned by reports to my office that ICE supervisors are seeking to identify what individual(s) furnished information to the Committee. I worry that management is seeking this information to eventually retaliate against those employees. Federal law expressly states that “the right . . . to furnish information to either House of Congress, or to a committee of Member thereof, may not be interfered with or denied.”⁸ In addition, under federal law, any officials who interfere with an employee's right to furnish information to Congress may not have their salaries paid by taxpayer dollars.⁹

As a founding member of the Senate Whistleblower Caucus, I take the prospect of whistleblower retaliation very seriously. As a whistleblower advocate told the Committee last year, retaliation against federal whistleblowers is most severe when they communicate with Congress.¹⁰ Moving forward, I hope we can work together to ensure that all DHS whistleblowers are properly protected, especially when they are exercising their right to speak with Congress.

In light of these concerns, I request that you take the following course of action:

1. Please investigate the incident of December 3, 2015, in which USCIS officials allegedly refused to allow HSI agents into the USCIS building or provide any information on Mr. Marquez or Ms. Chernykh in the wake of the San Bernardino terrorist attack. In particular, please answer the following questions:
 - a. Why did USCIS personnel not allow HSI agents to initially enter the building on December 3, 2015?

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ 5 U.S.C. § 7211.

⁹ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 713 (2015).

¹⁰ *Blowing the Whistle on Retaliation: Accounts of Current and Former Federal Agency Whistleblowers: Hearing before the S. Comm. on Homeland Security and Governmental Affairs 114th Cong., (2015)* (statement of Thomas Devine, Legal Director, Government Accountability Project).

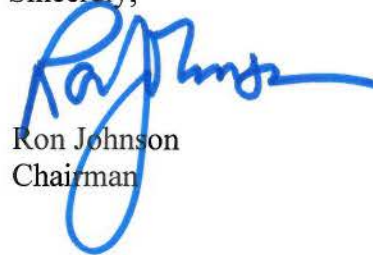
- b. Why did USCIS personnel initially deny HSI agents access to Ms. Chernykh's A-file?
- c. Please confirm when HSI received all relevant immigration materials from USCIS referring or relating to Mr. Marquez and Ms. Chernykh.
- d. When did USCIS and HSI agents become aware that Mr. Marquez was not going to appear for his 12:00 pm appointment with USCIS?
- e. Were any DHS coordination protocols violated in this incident?
- f. What implications did this incident have on the apprehension or subsequent criminal proceedings of Mr. Marquez and the advancement of the investigation into the San Bernardino attack?

In addition, I ask that you please provide appropriate recommendations on how DHS, ICE, and USCIS can improve their operations to prevent a reoccurrence of this incident.

2. Please ensure that all individuals involved in the December 3, 2016, incident, or who have provided information to the Committee about it, are not retaliated against by agency management. If necessary, I ask that you work with the Office of Special Counsel to take appropriate remedial actions.

If you have any questions about this request, please contact Kyle Brosnan or Brian Downey of the Committee staff at (202) 224-4751. Thank you for your attention to this important matter.

Sincerely,



Ron Johnson
Chairman

cc: The Honorable Thomas R. Carper
Ranking Member

The Honorable Carolyn N. Lerner
Special Counsel
U.S. Office of Special Counsel