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Report of the FBI General Counsel on The Dissemination of FBI File Information to the White House

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INTRODUCTION

The Federal Bureau of Investigation (FBI) has been providing sensitive background investigation (BI) reports and material to the White House and other executive agencies upon request for as long as anyone involved in the current process can remember. That historical memory, as well as available documentation, extends back to the Johnson Administration. The process has changed remarkably little over the intervening three decades, although it has become somewhat more rigorous and structured, and the FBI has kept pace with the expanding Federal workforce and the attendant expansion in the number of requests. Today, thirty-seven professional support employees, many of long tenure, handle hundreds of thousands of requests for information, name checks, and reports from the White House and other executive agencies. This cottage industry on the fourth floor of FBI Headquarters is a stunningly efficient operation, and has become an integral component of the Federal employment process.

As the events which prompted this inquiry reveal, however, while we have complied with all applicable law, we have failed to afford sufficient protection to the privacy interests of those whose files we maintain. There is, of necessity, a tradeoff between effectively serving the needs of the executive agencies for the prompt provision of reliable information and ensuring the vigilant protection of privacy. In our drive to maximize our productivity and responsiveness to client agencies, we have not been sufficiently attentive to our own responsibilities to safeguard our files against negligent or intentional misuse, nor have we been sufficiently exacting of the executive agencies we serve. We are, in some respects, fortunate that the recent discovery of the egregious violations of privacy which occurred here has focussed our attention upon an operation which has received far too little management or executive oversight.

In the report which follows, I set forth a brief explanation of the process, the legal and historical context in which it operates, and some observations regarding the White House's requests between December 1993 and February 1994 for nearly 500 previous BI reports. A series of recommendations for prospective changes is being forwarded under separate cover for your

consideration and the approval of the Attorney General.

This limited investigation was ordered in response to the discovery on or about June 5, 1996, that the White House had, in December 1993, sought copies of the background reports of Billy Ray Dale, several months after he had been fired from the White House amid great controversy and while a criminal investigation concerning his activities at the White House was pending. It has subsequently been admitted by the White House that Dale's file was one of many, in excess of four hundred, sought from the FBI and relating to employees, some quite prominent, of previous administrations. This inquiry did not attempt to provide definitive answers to all of the questions which naturally arise from these events. At the request of the Office of the Independent Counsel (IC), I have confined my inquiry to the FBI's conduct in the dissemination of these background files and, in deference to the IC's wishes, we have not interviewed any of the White House personnel involved either in the request for BI and name check information generally or in the specific requests which occasioned this inquiry. As a result, I have not reached any conclusions about the motivations of any White House employee. What little can be concluded based upon an examination of the requests themselves is set forth below. (1)

I. HISTORICAL AND LEGAL CONTEXT

In accordance with its investigative mission, the FBI has for many years compiled and maintained information on a variety of individuals for a number of reasons. Some of this information, for example, is used as a basis for making determinations about the suitability of applicants for Federal employment. Similarly, some is used to make decisions about the trustworthiness of individuals being considered for access to classified or sensitive information or to sensitive or secure areas, such as the White House complex. Information in FBI systems is also used for licensing or civil employment determinations under certain circumstances.

This information is gathered and disseminated under a variety of legal authorities. Pursuant to Section 534 of Title 28, United States Code, for example, the Attorney General is required to --

(1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records;

...

(4) exchange such records and information with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions. (2)

Other authorities under which the FBI collects and discloses information include: (1) Public Law 92-544, under which the FBI is authorized to exchange information with officials of federally chartered or insured banking institutions and to the States for employment and licensing determinations; (2) Section 2165 of Title 42, United States Code, authorizing the FBI to conduct "full field investigations" on certain employees, contractors, and others provided access to "restricted data" and to furnish the results to the Office of Personnel Management (OPM) or to the Nuclear Regulatory Commission; (3) Section 0.85 of Title 28, Code of Federal Regulations, authorizing the FBI to "[c]onduct personnel investigations requisite to the work of the Department of Justice and whenever required by statute or

otherwise"; (4) Executive Order 10450, which requires the appointment of each civilian employee of the Government to be "made subject to investigation" including at least a "national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation)"; (5) Executive Order 12968, which makes all employees "subject to investigation by an appropriate government authority prior to being granted access to classified information and at any time during the period of access to determine whether they continue to meet the requirements for access"; and, (6) Parts 732 and 736 of Title 5, Code of Federal Regulations, which sets forth OPM's investigative requirements and responsibilities for sensitive positions in the Government (OPM has, through long-standing practice, utilized FBI files and data to help it fulfill these responsibilities). Additionally, applicants for Federal positions requiring access to classified or sensitive information specifically authorize the FBI, OPM, and other authorized agencies to gather and disclose a wide range of personal information in connection with the application process. (4)

The information thus gathered is organized into various records systems, including the largest, the "FBI Central Records System." Procedures governing the disclosure of information from the Central Record System have evolved over the years. This evolution, for example, is reflected in procedures governing disclosures to the White House. Since the late 1950's, and undoubtedly earlier as well, the White House has routinely requested background investigations and checks to determine the suitability of applicants for Federal employment or the wisdom of allowing particular individuals to gain access to the President. Prior to 1974,⁵ the provision of information to the White House was considerably less formalized. Apparently, for example, it was not uncommon practice in the mid-sixties and early seventies for the President to call the Director (or a senior Bureau executive) personally to ask for a "name check" on a particular individual. ⁶ Internal records also reveal that prior to March 1, 1966, the Bureau would at times respond orally to requests for name checks or other information from White House staff. (7)

The Bureau's focus in responding to these requests was to process them as effectively and efficiently as possible. This is not to say that the Bureau employed no safeguards in protecting the privacy interests of the individuals about whom information was provided. Processing guidelines, for example, permitted only the results of its investigations to be released and required that the information disclosed "be pertinent to the inquiry." Information in the "rumor or gossip" category was not to be released absent "compelling reason[s]" and only with caveats that the information had not been verified by the FBI. Other steps to ensure accuracy were also built into the process, but it is fair to say that the FBI often relied on "good judgment" rather than any formalized protocols when assessing what to disclose and when. (8)

In 1965, approximately 4,700 names were processed for the White House. (9) By 1968, the volume of requests was estimated at 10,000 per year. (10) As the volume of White House requests increased, processing procedures became standardized. (11) In 1969, for example, a pre-printed unsigned form asking for an FBI "name check" investigation was used to facilitate Nixon Administration requests. (12) This form was modeled on one used in the previous administration. According to an internal FBI memorandum of April 3, 1969, "all requests [in the Nixon Administration were to be] handled in the same format as those previously sent to the Johnson Administration." The form showed that the request originated with the White House, the name of the official under whose authority the request was being submitted, the name of the individual actually making the request, the name and identifying

particulars of the subject, the type of information requested, (13) and why the information was being requested. (14)

II. THE PRIVACY ACT

In 1974, Congress instituted sweeping changes to the manner in which the entire Executive Branch collected, maintained, and disclosed personal information by enacting the Privacy Act.¹⁵ In passing this landmark legislation, Congress struck a balance between the Government's need to maintain and use information about individuals on the one hand and the rights of individuals to be protected against unwarranted invasions of privacy on the other. The historical context of the Act is important to an understanding of its remedial purposes. Congress, in 1974, was clearly concerned with curbing illegal surveillance and investigation of individuals by Federal agencies. It was also concerned about potential abuses presented by the Government's increasing use of computers to store and retrieve personal information. The result was a careful crafting of a comprehensive legislative scheme that permits Government agencies, including the FBI, to disclose information about individuals to other agencies or non-Governmental entities only in a controlled and careful way. After its passage, the Bureau implemented the Act and took steps to ensure compliance with its dictates.

Under the Privacy Act, the FBI's Central Records System is classified as a "Privacy Act System of Records" since information in the system is retrieved by the names or other personal identifiers of individuals in the system. This means that the maintenance of, and disclosures from, the Central Records System must be in compliance with the Privacy Act. In general, the Privacy Act prohibits disclosures of information from a Privacy Act System of Records without the written consent of the individual about whom the information pertains. This general rule, however, is subject to 12 exceptions.

The broadest exception is that provided by Section 552a(b)(3) of the Act "for a routine use," i.e., for a use which is compatible with the purposes for which the information was originally collected. By its terms, Section 552a(b)(3) sets forth two requirements for a proper routine-use disclosure: (1) Federal Register publication providing constructive notice to the public of the routine uses to which the information in question may be put by the agency collecting it; and, (2) compatibility with the purposes for which it was collected.

The routine uses for the FBI Central Records System were most recently published in the Federal Register on October 5, 1993. (16) This notice states that information in the Central Records System may be disclosed by the FBI, to, among others --

... any Federal agency where the purpose in making the disclosure is compatible with the law enforcement purpose for which it was collected, e.g., to assist the recipient agency in conducting a lawful criminal or intelligence investigation, to assist the recipient agency in making a determination concerning an individual's suitability for employment and/or trustworthiness for employment and/or trustworthiness for access clearance purposes, or to assist the recipient agency in the performance of any authorized function where access to records in this system is declared by the recipient agency to be relevant to that function. (17)

With one exception, this language adequately puts individuals on notice of "the categories of users and the purpose of such use" (18) concerning the information in the system. The exception is the last portion quoted: "to assist

the recipient agency in the performance of any authorized function where access to records in this system is declared by the recipient agency to be relevant to that function." This language is so encompassing that it hardly provides any useful information at all. Worse, it implies that information in the system may be disclosed whenever a Federal agency considers possession of the information to be relevant to any of its myriad functions. In our view, this provision is overbroad and should be eliminated. This will have the effect of requiring the FBI to determine, on a case-by-case basis, whether a proposed agency use that is not encompassed within the listed examples of suitability, trustworthiness, and access determinations is compatible with the purposes for which the information was originally gathered and whether disclosure falls within the parameters of our published routine uses.

This one specific problem notwithstanding, we have long construed the routine uses published in the Federal Register together with the authority reposed in the Bureau by the various legal authorities cited above as authority to provide information from the Central Records System to the White House and other executive agencies when requested to do so for a purpose ostensibly compatible with the purposes for which the information was compiled. (19) As noted above, we have, for example, responded to White House requests for information about individuals being considered for employment on the White House staff, for presidential appointments, and for access to classified or sensitive information or for access to the White House complex.

All such responses, however, fall within the scope of the routine uses published in the Federal Register for the FBI Central Records System. Providing such information to the White House assists the White House staff in determining whether particular individuals are sufficiently trustworthy to be provided access to classified or sensitive information or to the White House complex, or are suitable for White House employment or political appointment. It is equally clear that such uses are compatible with the purposes for which such information was collected. Background investigations, for example, are conducted for the very purpose of determining suitability, trustworthiness, or both.

Even though the Privacy Act made major changes in Federal information collection and dissemination practices, it had little discernable effect on the manner in which the Bureau processed White House requests for background investigations, name checks, and the like. This was so because the "routine use" exception generally authorized the FBI to provide information to the White House and other Federal agencies for the same reasons that we had provided such information to these agencies for several decades past.

The pre-printed forms which have been in use since the Johnson Administration meet all the conditions which our "routine use" require to be satisfied in order for the responding disclosure to be legally permissible under the Privacy Act. They identify the agency (the White House), the authorized official, the specific information requested, and the reason for which the information was desired. (20) As long as the forms were facially valid, the FBI was legally entitled to assume that their author was acting within the scope of his or her authority (21) and that the requests for information were properly presented to us in the everyday course of White House business, as such requests have been presented day in and day out for at least 30 years.

Even though we have acted in compliance with the Privacy Act, it is apparent that we have been institutionally inclined to process facially valid White House requests without reflection and without any effort to assess and balance

the inherently competing interests underlying the Privacy Act. Put simply, we have unduly relied on technical compliance with the law without questioning the need for or establishing additional safeguards.

III. THE PROCESS TODAY

The White House initiates requests for information from FBI files by submitting one of four forms currently in use. (Attached as Exhibits 1, 2, 3, and 4.) These forms correspond with requests from the Office of Personnel Security (OPS) under D. Craig Livingstone (Ex 1); those relating to presidential appointments submitted by Clifford Mauton, a paralegal in the White House Counsel's Office (Ex 2); from the Executive Office of the President, Office of Administration (EOP-OA) (Ex 3); and, from the National Security Council (NSC) (Ex 4). The latter two forms, from EOP-OA and the NSC are signed by their respective security officers. The forms sent by Messrs. Livingstone and Mauton are sent under the typed name of the White House Counsel, now John M. Quinn, without the signature or any other indication of the actual requestor. Form 1 from OPS accounts for the vast majority of requests (e.g., 82% of those submitted in 1995).

The White House form presently in use by OPS has remained substantially unchanged since it was first used in 1965. It has been identical for more than five years, other than the substitution of the various Clinton Administration White House Counsel for Bush Administration Counsel C. Boyden Gray. (Earlier versions of Form 1 now in use are appended as Exhibits 5-13.) Available records, and the recollections of FBI personnel involved in the process, establish that these forms have been submitted without signature on the authority of the typed name of the designated White House official for the more than 30 years they have been in use. FBI staff have long understood the name on the form was typically not the actual requestor of the information. Indeed, the White House contacts with whom FBI personnel discussed procedures or raised any question and to whom the responses were provided were generally not the people whose names are reflected on the forms.

Once completed, the requests submitted by OPS22 are picked up from the White House by FBI couriers and delivered each working day, between approximately 2:30 pm and 3:00 pm, to the Special Inquiry and General Background Investigations Unit (SIGBIU) of the FBI's Personnel Division. There the forms are preliminarily examined, generally by the senior security assistant, who ascertains what each form is requesting. If the request will require the mobilization and coordination of FBI field resources in order to conduct a full field investigation, a limited update or an expanded name check, the forms are retained by SIGBIU and a background investigation is initiated. If, instead, the form requests information from FBI files, such as copies of previous reports or a name check, the Executive Agencies Sub-Unit (EASU) of the Executive Agencies, Personnel and Administrative Support Unit of the Information Resources Division of the FBI, is notified to pick up the request for processing. (23)

The EASU is headed by Peggy J. Larson, a Supervisory Research Analyst, who entered on duty with the FBI in 1956, and has been working in EASU (or its predecessors) since 1964. Ms. Larson oversees a staff of 36, comprised of 18 research analysts, 11 file assistants, and seven clerks or typists. EASU handles requests for file information from all Executive Branch agencies. Including the 76-80% of all requests received on magnetic computer tape and

handled electronically, EASU processes close to (and last year in excess of) two million name check requests each year. Each agency has its own form to request record checks from the FBI and each has an established liaison. EASU will only provide FBI file information to a known liaison contact through established channels. Of the total number of requests, the White House accounts for only a small portion, even of the paper requests, ranging from 3,025 to 10,197 annually over the past six years. (24)

Despite its relative insignificance in size, because of the importance and sensitivity of requests emanating from the White House, the White House desk of EASU is staffed by two of the most senior research analysts, supported by a file assistant. The senior research analyst assigned to the White House desk has been working in EASU (or its predecessors) since 1966. The more junior analyst on the White House desk (until March 1996) began her Bureau career in EASU in 1968.

Each of these analysts was interviewed in connection with this inquiry. They advise that the policies and procedures for processing White House record requests, like the forms themselves, have changed relatively little since the 1960s. Some minor changes have occurred. For example, in previous administrations, three White House offices requested information from the FBI: OPS; EOP; and, NSC. The Clinton Administration was the first to have a separate entity requesting checks on presidential appointments. As far as FBI staff can determine, the Security Office requests checks on White House staff, as well as on visitors, award recipients, interns and contractors needing White House access. Checks on potential presidential appointees are handled by a paralegal in the Counsel's Office.

The White House form (Ex. 1) also provides an explanation for the request, indicating that the subject is being considered for either a White House staff position, a presidential appointment, (25) or for another specified reason, usually access or award. The FBI analysts advise that in the case of requests based upon "access," the White House adds another letter parenthetically, reflecting an internal code. (26)

On occasion, the analysts have called the White House Security Office to ask questions about the reason for access when the record check reflects the individual is the subject of a pending case or when a sensitive issue is involved. Generally however, no inquiries are made by the EASU regarding the White House requests, as the analysts apparently believe that such inquiries are outside the scope of their employment. It appears that over time a tradition of considerable deference to the White House has developed.

The first step taken by EASU to process a request depends upon what information is requested. In the case of a request for copies of previous reports, an FBI file number relating to the subject of the request is obtained either from SIGBIU through a query of their separate BI database or from a check of FBI central indices. In either case, the relevant BI files are obtained from FBI files, and the summary memoranda which are prepared in connection with each FBI BI are copied, as are any previous transmittal letters. These documents are attached to the original request form, which is stamped to indicate the number of attachments, and returned to the White House in a sealed envelope by the next outgoing FBI courier. Any document in FBI files which is copied for transmittal to the White House is stamped on the back showing the identity of the agency requesting the record, the date the request was received, the date of the dissemination, and the initials of both the analyst and the person retrieving records. At no time are original, complete

files or raw data provided. Instead, summaries of relevant information are provided. Prior to 1994, copies of the White House request forms were only retained for six months. However, as FBI personnel noticed a high number of duplicate requests, they began retaining copies of all request forms in January 1994.

The name check process is somewhat more involved. When a request for a name check is received, the file assistant makes four copies of the request form and distributes copies to three other FBI units. These units, together with EASU, check the name against four different computer databases and the FBI central indices. These databases provide information on criminal histories, arrest records, and outstanding warrants, as well as specialized information relating to organized crime, terrorism, and foreign counterintelligence. The central indices search indicates all FBI files in which the subject has been indexed. The file assistant gathers the relevant files and computer printouts and forwards the information to the research analyst assigned to the case.

The research analyst reviews the material and determines whether any dissemination should be made. Summary memoranda contained in files may be copied for direct dissemination. Other information may be culled from the various files and reports and is summarized in memorandum form. All outgoing memoranda prepared by EASU research analysts are reviewed and approved by Supervisory Research Analyst Larson prior to dissemination and a copy of any memoranda prepared by the research analysts is retained in file. When the documents are gathered and/or prepared, they are attached to the original request form, which is stamped to indicate the number of attachments, and are returned by courier to the White House.

In the event that a check of indices reveals that the individual is the subject of a pending FBI investigation, the analyst contacts the FBI Headquarters Supervisory Special Agent (SSA) assigned to the case to determine what may be disseminated. In addition, EASU personnel estimate they may call FBI field office agents five or six times per year when clarification is needed on the subject of a closed case of a serious nature, such as an organized crime case. It is important to note that if the request seeks only copies of previous reports, as opposed to a name check, no effort is made to ascertain whether there is a pending investigation prior to returning copies of the reports to the White House. (27)

From March 1991 until August 1995, retired SA Vernon Thornton was Chief of the Executive Agencies, Personnel and Administrative Support Unit and, therefore, Ms. Larson's nominal supervisor. Thornton advises that while he was generally aware of the volume of requests received by EASU, he was not involved in the name check process except in extraordinary circumstances which, he further advises, never arose during his tenure as Unit Chief. Ms. Larson and her research analysts confirm Agent Thornton's account of his non-involvement.

Ms. Larson herself indicated that she had plenary authority to manage her sub-unit, and would only raise issues with the Unit Chief or Section Chief if she were aware of a complaint about to be made to the FBI by an official in another agency or where she was considering dissemination of information about a controversial pending case and the Headquarters SSA was uncomfortable with the dissemination. She recalls raising such issues on two occasions with John Harting, who was Chief of the relevant section in the Information Resources Division from November 1993 until February 1996.

Neither occasion related to matters associated with White House requests.

Internal recordkeeping has improved in recent years. Since 1990, a computer database has been maintained in EASU to record all White House requests and the corresponding responses. Although that data base has been regularly purged, hard copies of its contents are retained.

IV. THE DECEMBER 1993-JANUARY 1994 REQUESTS

It is the collective experience of those FBI personnel with the responsibility for conducting name checks and background investigations that transitions between administrations tend to be chaotic and unpredictable. This is especially true, we have learned, when a different political party is taking control of the White House. In these cases, the outgoing administration typically removes all of its records, leaving the incoming administration to totally reconstitute the entire collection of personnel records for all White House personnel, including the non-political staff who have remained. The three analysts with responsibility for the White House desk at the time of the Clinton transition had each been in EASU through six different presidential administrations and were experiencing their third change in party (Ford-Carter; Carter-Reagan; Bush-Clinton). Accordingly, the increased volume of requests received from the White House was not unexpected.

The increase was substantial, and it is clearly discernable from the computer records. In 1990, 1991 and 1992, the White House requested, on average, between 252 and 290 name checks each month. In 1993, as the Clinton Administration took office, the average dramatically increased to 850 per month (total 10,197 for the year) and has since subsided somewhat to averages of 501 per month in 1994 and 355 per month in 1995 (see Charts - Tab 16). As always, the bulk of the requests continue to come from OPS: 92% in 1993; 86% in 1994; and, 82% in 1995.

Although the increase in the overall volume of requests was not unexpected, the analysts did notice that an unusually large number of requests were arriving for copies of previous reports only. They recall that someone contacted the White House Security Office to ensure that its relatively new occupants understood that when such requests were made, the FBI did not conduct a complete name check. They are unable to recall who from the FBI made this call, and our brief inquiry has not yet succeeded in identifying that individual. They do recall learning that personnel in the White House Security Office understood the procedure and expressed no concern about it.

The analysts with responsibility for the White House recall quite clearly, however, that in late 1993 a large number of such requests seeking copies of previous reports were received from the Office of Personnel Security. One analyst in particular bore the brunt of the increased volume, and was compelled to work a significant amount of overtime to keep up with the incoming requests. That analyst remembers being surprised by the volume of such requests, all of which, she notes, covered names in the first several letters of the alphabet and were sought for purposes of "access." To assist in processing these requests, SIGBIU was enlisted to check their separate database to ascertain the file numbers for the previous background investigations.

Despite the mass of requests, they were all apparently handled in routine

fashion and no particular inquiry was made of the White House. There was nothing on any of the forms (or in available FBI databases) to indicate whether the individuals about whom information was sought were new employees, holdovers from the previous administration, or persons in need of only temporary access. There was no reason to suspect and no means to readily determine whether any of these requests related to individuals not actually seeking access to the White House. Both Ms. Larson and Unit Chief Thornton say that they were made aware of the significant influx in requests but did not consider them particularly noteworthy. Ms. Larson recalls further that she was told that the White House was simply updating their files.

An analysis of EASU's computer records confirms the recollections of the analysts regarding the influx of requests. Between December 6, 1993, and February 3, 1994, amid all of the other requests flowing in from the White House, EASU received no fewer than 481 requests which bear the characteristics of a single series. These requests, when parsed out from the normal traffic of requests, arrived in nearly perfect alphabetical order -- from Aa to Go -- all seeking copies of previous reports and all providing the same justification -- "ACCESS (S)." In addition, although constituting only a small proportion of the total White House requests, this series constituted 88% of the requests for "previous reports only" received during December 1993 and January and February 1994. (28)

We now know that many of these 481 requests, while facially valid, were without justification and served no official purpose. In recognition of this fact, the White House Counsel's Office has voluntarily surrendered to the FBI more than 400 folders containing FBI records since June 6, 1996. Folders relating to three hundred and thirty-three individuals were returned on June 6, 1996. Apparently, these were folders that had already been segregated and shipped to the White House archives because an employee of OPS had determined, over time, that these materials had been inappropriately gathered. One file of FBI material was returned separately on Monday, June 10, 1996. Another had previously been provided to the IC. In response to a further query from the FBI, folders relating to 71 additional individuals were identified as having been improperly sought and were turned over to the FBI on June 13, 1996. Two more were identified as having been improperly obtained but were retained as now relevant to present needs for access. As of June 14, 1996, then, requests relating to 408 individuals have been identified by the White House as having been sought without justification.

Others in the series were apparently properly requested. The White House Counsel's Office reports that their "records confirm that 47 of the individuals [out of 138 queried] were employed by the White House or otherwise in need of access at the time the FBI received the requests for reports." (29) In addition, the status of an additional seventeen requests has not yet been resolved. The FBI does not have access to information, other than through a time-consuming and painstaking reference to public sources or individual inquiries, which could independently determine which of these individuals was a member of the White House staff (or otherwise seeking access to the President in a manner that would justify the obtaining of prior background reports) at the time that the requests were made. It is noteworthy that the United States Secret Service also lacks any ability "to verify an individual's continued need for a [White House] pass." According to a report of the General Accounting Office in October 1995, "Secret Service officials stated that they rely on the White House to notify them when an individual leaves or a pass should be terminated." (30)

Among the unquestionably unjustified acquisitions were reports relating to discharged Travel Office employees Billy Ray Dale and Barnaby Brasseux. (31) The request for Dale's previous reports was received by the FBI on December 28, 1993, and a response enclosing 11 letters and 11 memoranda was returned to the White House OPS on January 6, 1994. The request for Brasseux's records request was received on December 16, 1993. It too sought copies of previous reports, and four letters and memoranda were provided to OPS on December 27, 1993.

Nothing on the face of either request stood out to either of the experienced research analysts who were involved in the processing, nor did the documents collected for return to the White House in any way attract attention. Because these requests were for previous reports only, general FBI indices were not queried, so a pending criminal case involving or relating to either of these men was not, and in the general course of business would not have been, discovered. In short, given the procedures in place at the time, other than by recognizing one of these names and associating it with news reports about the Travel Office firings, there was no information available to the FBI research analysts which would have revealed that the requests for these men's previous reports were without foundation. As nothing brought these requests to the particular attention of EASU, they were processed routinely and the information sought was provided.

V. CONCLUSION

Other than the sheer volume, nothing about the nearly 500 requests for copies of previous background reports appeared noteworthy to the research analysts processing the files and, accordingly, no one at the FBI questioned the propriety of the requests. (32) Instead, those assigned to the White House desk of EASU redoubled their efforts to meet the increased demand, sought limited assistance in identifying file numbers from SIGBIU, and devoted the necessary overtime hours to complete the required tasks without undue delay. It would be unconscionable to now fault these employees for not having somehow discerned that these facially-valid requests from the White House were made without justification.

Indeed, the FBI personnel who work in the EASU perform a valuable service in providing reports and memoranda to the White House and other executive agencies necessary to make informed judgments regarding, for example, a person's suitability and trustworthiness for employment in sensitive positions, access to classified information or to secure areas or admission to the United States. In doing so, they accomplish the Herculean feat of responding to roughly two million requests for such information each year. Although much of the process has been automated, several hundred thousand requests are handled by the research analysts and other personnel each year. These requests typically require not only the identification of the relevant files, but a careful analysis of the file contents and, quite frequently, the preparation of memoranda summarizing the information contained within the files.

With minor modifications, the process of providing FBI information to the rest of the government has functioned in the same manner for more than three decades. Certainly this is true of the relationship between the FBI and the White House. The forms used to request FBI information have evolved but little since the prototype dating from 1965. Likewise, the manner in which the information is transmitted back to the White House has remained essentially

unchanged. Research analysts today follow the same, largely unwritten, rules and policies as did their predecessors during the Johnson and Nixon Administrations. Indeed, the last detailed set of instructions was issued in 1973. (33)

But if, as I would maintain, these employees have in no way failed the FBI, the FBI has surely failed them, and has failed in a larger sense to institute sufficient protections to effectively safeguard the very real privacy interests that we, as custodians of so many people's files, are responsible for protecting. While Ms. Larson and her subordinates have worked tirelessly and with admirable success in managing the constant dam-burst of incoming requests, this inquiry has revealed a complete abdication of management responsibility at the level of her immediate superior, the Unit Chief and the executive level management above him.

A policy of benign neglect cannot be tolerated in an area as sensitive as the dissemination of information from FBI files. Although the natural instinct to defer to the great experience of the employees of EASU is understandable, it is ultimately unfair to them and inappropriate to make the analysts responsible for simultaneously handling the massive flow of requests and policing the process. The active involvement of the Unit Chief, as well as the conscious engagement, support, and oversight by the Section Chief -- which has also been lacking in recent years -- is necessary for the process to be not merely efficient, but properly balanced as well between the needs of the consumer agencies and the interests of those whose privacy we are charged with safeguarding.

We have been on notice for some time now that the exchange of information between the FBI and the White House is both necessary and fraught with peril. In the Summer of 1993, after questions arose concerning the involvement of the FBI in matters relating to the discharge of several employees from the White House Travel Office, Attorney General Janet Reno and then- White House Counsel Bernard W. Nussbaum enunciated a new policy regarding contacts with investigative agencies, in particular, the FBI. (34) The new policy placed both the Counsel to the President and senior DOJ officials between the White House and the FBI in matters relating to pending criminal investigations. While that policy had no direct bearing on the type of requests we have examined here -- an exception was made, and properly so I believe, for communications regarding "background investigations and clearances of governmental officials," in which cases direct contact between the White House Counsel and "appropriate FBI officials" is permitted -- we should have matched our scrupulous adherence to that policy in matters relating to pending investigations, with greater attention to this area of direct engagement. Our failure until now to have done so needs to be promptly remedied.

In conclusion, our examination of the process of providing background and other file information to the White House and other executive agencies revealed a channel which flows, if anything, too smoothly. It is incumbent upon us to recapture, or perhaps more accurately, acquire for the first time, the proper balance between the very real and significant needs of the government for the information contained in our files and our profound obligation to ensure that the information only be disseminated in appropriate circumstances.

As noted above, specific recommendations are being separately forwarded for your consideration and, upon approval, for transmittal to the Attorney General

for her concurrence.

[End of Transcript]

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Investigation of FBI file-gathering dropped

Friday, March 17, 2000

By PETE YOST
 THE ASSOCIATED PRESS

WASHINGTON -- Independent Counsel Robert Ray said yesterday there is no credible evidence of criminal activity in the White House's improper gathering of hundreds of FBI background files of former Republican appointees.

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There is also no credible evidence that former White House counsel Bernard Nussbaum lied to Congress regarding the controversy in 1996, Ray said, adding that his office was ending both investigations with no prosecutions.

The prosecutor's office determined that "there was no substantial and credible evidence that any senior White House official, or first lady Hillary Rodham Clinton, was involved in seeking confidential Federal Bureau of Investigation background reports of former White House staff from the prior administrations of President Bush and President Reagan."

Ray's announcement angered a conservative group and some of the former Republican appointees, who have filed a lawsuit accusing the Clinton administration of invading their privacy.

Closing out the investigation without any prosecutions is "a travesty," former Bush White House speechwriter Joseph Duggan said in a statement. "These 'raw' investigative files invariably contain material that is not necessarily true, but almost certainly is negative and embarrassing. . . . The FBI improperly gave our files to unauthorized and politically hostile individuals."

Ray said he could not investigate violations of the Privacy Act of 1974, which are misdemeanors and therefore outside the independent counsel's jurisdiction.

Duggan is a plaintiff in a lawsuit filed by Judicial Watch, a conservative group that has sued the Clinton administration on a wide range of issues.

White House officials have said an Army detailee, Anthony Marceca, made a bureaucratic blunder in collecting the FBI files based on an outdated Secret Service list of White House passholders.

Marceca's boss, former White House security office chief Craig Livingstone, resigned after a congressional committee's investigation.

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Livingstone, resigned after a congressional committee's investigation.

An FBI interview summary from early in the Clinton administration quoted Nussbaum as saying that Hillary Clinton had highly recommended Livingstone for his post.

However, Nussbaum said he'd been misquoted in the FBI summary, and the first lady denied recommending Livingstone, saying she didn't even know who he was until late in his tenure at the White House.

Ray said he found "no substantial and credible evidence that Mr. Nussbaum lied to the House Committee on Government Reform and Oversight about his discussions with Mrs. Clinton" regarding Livingstone's hiring "or about his knowledge regarding the circumstances of Mr. Livingstone's appointment."

The prosecutor is sending a report on the FBI files investigation to three federal appeals judges, who will give the people named in it 90 days to respond before releasing the report along with any responses.

The report is to be followed by two others -- one on Hillary Clinton's role in the purge of the White House travel office and another on the Clintons' Whitewater land dealings in Arkansas. That third report also will deal with the first lady's legal work for her Whitewater partners' failing savings and loan.

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