



**Homeland
Security**

July 18, 2012

INFORMATION MEMORANDUM

MEMORANDUM FOR: Jane Holl Lute
Deputy Secretary

FROM: Mary Ellen Callahan
Chief Privacy Officer 

SUBJECT: Investigation of Customs and Border Protection, Office of Internal
Affairs (CBP IA) Information-Sharing Pilot

This is to inform you of my office's investigation, and subsequent conclusions, of an initiative by CBP's Office of Internal Affairs (IA) to share certain information with the Federal Bureau of Investigation (FBI) in a project that came to be known as the SAR Exploitation Initiative Pilot (SAREX Pilot or Pilot). My investigation was prompted by the Office of Inspector General's (OIG) investigative referral pursuant to the Memorandum of Understanding between the Chief Privacy Officer and Inspector General (March 2008). After receiving the referral, I directed my staff to determine whether CBP IA's sharing of information with the FBI through the SAREX Pilot was in compliance with DHS privacy policy and applicable law. A letter detailing conclusions I have drawn from this investigation is attached.

I am prepared to discuss this investigation further with you at your convenience.

Attachment



Homeland Security

July 18, 2012

The Honorable Jane Holl Lute
Deputy Secretary
U.S. Department of Homeland Security
Washington DC 20528

Dear Deputy Secretary Lute:

RE: Investigation of Customs and Border Protection, Office of Internal Affairs (CBP IA)
Information-Sharing Pilot

On October 26, 2011, pursuant to my authority under Section 222 of the Homeland Security Act of 2002, as amended (codified at 6 U.S.C. § 142), my office initiated an investigation of an initiative by CBP's Office of Internal Affairs (IA) to share certain information with the Federal Bureau of Investigation (FBI) in a project that came to be known as the SAR Exploitation Initiative Pilot (SAREX Pilot or Pilot). My investigation was prompted by the Office of Inspector General's (OIG) investigative referral on September 29, 2011, pursuant to the Memorandum of Understanding between the Chief Privacy Officer and Inspector General (March 2008). After receiving the referral, I directed my staff to determine whether CBP IA's sharing of information with the FBI through the SAREX Pilot was in compliance with DHS privacy policy and applicable law. The purpose of this letter is to inform you of the conclusions I have drawn from this investigation.

My conclusions are based on several meetings and interviews by my staff and me with CBP IA staff, including Directors, Deputy Directors, and the Assistant Commissioner, and the review of more than 1,300 pages of documents provided by CBP IA. Determining what happened during the SAREX Pilot in terms of the information shared was complicated by the fact that witnesses including but not limited to the Assistant Commissioner provided my office with inconsistent statements throughout this investigation. Despite the lack of clarity presented by CBP IA concerning certain details of the information sharing, however, I have reached the following conclusions.

Factual Conclusions

CBP IA began a pilot with the FBI in March 2011 purportedly to enhance CBP IA's Background Investigation (BI)/Periodic Reinvestigation (PR) process by leveraging the FBI's supposed ability to conduct federated searches of law enforcement databases. The stated scope of the

SAREX Pilot was to enhance the BI/PR process specifically for CBP employees on the Southwest Border.

On 13 separate occasions beginning in March 2011 and continuing until at least December 2011, CBP IA provided personally identifiable information (PII), including Social Security numbers of CBP employees, directly to the FBI as part of the SAREX Pilot for “enhancement” of the employees’ PRs. The PII was sent as a password-protected Excel spreadsheet, not encrypted as required by DHS policy for handling Sensitive PII. By the time the Pilot was suspended, PII of approximately 3,000 employees had been sent directly to the FBI under the SAREX Pilot. Notwithstanding well-established Department privacy policy, CBP IA conducted the Pilot without executing a Memorandum of Understanding, Memorandum of Agreement, or other Information Sharing Access Agreement (ISAA) with the FBI, without ensuring that the information sharing was permissible under an applicable System of Records Notice (SORN), and without completing a Privacy Threshold Analysis (PTA). Moreover, there were no Standard Operating Procedures. Therefore, procedures changed during the Pilot, including the scope of impacted employees and how the employee information was compiled before being sent to the FBI. With the exception of information on 9 or 10 CBP employees provided informally by the FBI in April 2011, CBP IA neither sought nor received a response regarding any CBP employees from the FBI during the life of the Pilot.

My office’s investigation revealed a lack of oversight by CBP IA leadership to ensure that DHS policies governing the sharing of PII were adhered to in conducting the SAREX Pilot. We also found an apparent blatant disregard for concerns raised by the OIG and CBP IA staff who questioned the legal authority for, and privacy implications of, the Pilot. Based on our review of the available documents, interviews, and meetings with CBP IA leadership and staff, I conclude that CBP IA did not comply with Department privacy policy or information sharing policy.

Specifically:

1. Despite sharing PII with the FBI through the SAREX Pilot beginning in March 2011, CBP IA failed to execute a Memorandum of Understanding, Memorandum of Agreement, or other ISAA with the FBI for the SAREX Pilot as required by the *DHS Information Sharing and Access Agreements Guidebook and Templates* (April 2010) and by *Under Secretary for Intelligence and Analysis Policy Guidance: Implementation of the One DHS Information Sharing Memorandum- Information Sharing Access Agreements* (February 6, 2008) (ISAA OneDHS Memorandum).
2. Prior to beginning the SAREX Pilot in March 2011, CBP IA (at the instruction of CBP IA leadership) failed to ascertain whether there was legal authority for the sharing of employee information in the Pilot or whether the sharing was permissible under an existing SORN, as required by the Privacy Act, the ISAA OneDHS Memorandum, and *DHS Management Directive 0470.2, Privacy Act Compliance* (superseded in July 2011 by *DHS Directive 047-01, Privacy Policy and Compliance*, which restates the same DHS privacy policy in more detail) (Directive 047-01)). CBP IA leadership participated in,

and authorized staff to participate in, discussions regarding the SAREX Pilot with the FBI in March 2011 without the advice of counsel or the knowledge of the CBP Privacy Officer.

3. CBP IA leadership disregarded privacy concerns raised repeatedly about the Pilot by the OIG and CBP IA staff, including concerns about whether there was legal authority for the Pilot, about the lack of an ISAA or Standard Operating Procedures, and concern that PII be properly safeguarded. This disregard for compliance with legal responsibilities is particularly surprising given that CBP IA leadership, as OIG Liaison, knew as of late March 2011 that the OIG was scheduled to conduct a regular audit of CBP's compliance with DHS privacy policy and applicable laws. Although the OIG audit was unrelated to the SAREX Pilot, the failure to address privacy and legal authority considerations despite knowledge of the audit demonstrates the Assistant Commissioner's consistent disregard for CBP IA's privacy stewardship responsibilities.
4. Whether the SAREX Pilot was operational between June and September 2011 is unclear. When CBP IA finally consulted the CBP Office of Chief Counsel and Privacy Officer in September 2011, both counsel and the Privacy Officer believed that the Pilot had been terminated. Nonetheless, the Privacy Officer identified a series of issues, concerns about compliance with the applicable SORN, and potential alternatives for implementing the Pilot if it again became operational. When CBP IA re-commenced the SAREX Pilot and sent employee PII to the FBI in October 2011, however, none of the issues raised in the September meeting was addressed, nor were any of the CBP Privacy Officer's ideas or alternatives implemented.

Furthermore, neither CBP counsel nor the CBP Privacy Officer was notified about the five transmittals of employee PII to the FBI in October or about subsequent transmittals on November 3, November 8, November 15, November 22, and December 1, 2011. I notified CBP IA on October 26, 2011 that my office had opened this investigation. That CBP IA continued to transmit data for over a month after this notification further demonstrates CBP IA leadership's disregard for compliance with DHS privacy policy and applicable laws.

5. CBP IA demonstrated poor stewardship of employee PII during the Pilot by:
 - a. providing PII (including Social Security numbers) to the FBI for 929 individuals (over 30 % of the individuals sent to the FBI) who had not provided consent for a PR by signing their Electronic Questionnaires for Investigations Processing (e-QIP) Investigation Request forms;
 - b. extracting PII from the Integrated Security Management System (ISMS), a database that they have acknowledged contains inaccurate information, and sending it to the FBI without conducting internal audits of the information to ascertain its accuracy and appropriateness for sharing with the FBI;

- c. failing to encrypt the PII sent to the FBI during the Pilot, as required by DHS privacy policy set forth in the DHS *Handbook for Safeguarding Personally Identifiable Information* (revised March 2012) for Social Security numbers; and
- d. failing to ensure the employee information transmitted to the FBI was limited to the Southwest Border, the designated scope of the Pilot. Batches of employee information transmitted from October through December 2011 contained a large number of employees whose location was not adjacent to the Southwest Border.

I also note that CBP IA has questioned my Office's analysis and interpretation of CBP IA data concerning 883 employees whose PII was sent to the FBI although they were not even due for a PR. I attended meetings on April 18, April 26, May 10, and June 5, 2012 during which CBP IA staff provided differing explanations for how the data were compiled and why my assessment of their data was inaccurate. In three of those meetings (two of which the Assistant Commissioner attended), I requested a thorough review by CBP IA of the employees in question, and a copy of the revised data for my Office to use to conduct an independent analysis to determine if my initial assessment of the number of "outside-the-scope" employees had been correct. My office finally received the revised data on June 28. It now appears that 639, rather than 883, employees were likely affected, i.e., 22% of the employees whose PII was sent to the FBI were not even due for a PR. The precise number cannot be determined, however, because there continue to be discrepancies in the data that call into question CBP IA's data stewardship.

In short, based on the facts before me, I have serious concerns about how the SAREX Pilot was conducted and specifically about the attitude of CBP IA leadership, including but not limited to the Assistant Commissioner, toward the privacy considerations that should have been addressed before engaging in the Pilot. CBP IA had no documentation, no Standard Operating Procedures, no processes, and exceeded the stated scope of the pilot both in terms of impacted employees and location of impacted employees. Of the individuals who were sent to the FBI purportedly for a PR, 31% had not yet signed their e-QIP Investigation Request forms, 22% were not due a PR, and an additional 30% were not stationed adjacent to the Southwest Border. Furthermore CBP IA never sought feedback from the FBI, and with the exception of information on 9 or 10 employees informally presented to CBP IA in April 2011, received no feedback from the FBI on these individuals. Given the sensitivity of the information CBP IA handles every day, I feel it is incumbent upon me to bring this matter to your attention.

I want to emphasize that the Pilot should not resume until these concerns are addressed. Even if the Pilot never recommences, however, the issues I have identified above, coupled with CBP IA leadership's response to questions concerning the compliance issues noted above concerning the SAREX Pilot, causes me great concern. During my meeting with the Assistant Commissioner on April 26, 2012, the Assistant Commissioner seemed to believe that CBP IA's mission exempts it from following applicable privacy law and DHS privacy policy. I believe this attitude is likely to result in a culture of non-compliance in CBP IA. On April 26, 2012, the Assistant Commissioner expressed his intention to engage in future information-sharing activities with law enforcement entities. On May 10, 2012, the Assistant Commissioner told me that CBP IA is

The Honorable Jane Holl Lute
Investigation of Customs and Border Protection, Office of Internal Affairs (CBP IA)
Information-Sharing Pilot
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already engaging in such activities outside the Pilot. It is critical, therefore, that steps be taken now to ensure that any current or future sharing of PII by CBP IA complies with applicable law and DHS policy, and that CBP counsel and the CBP Privacy Officer are consulted prior to implementation of any such projects. My office stands ready to assist CBP in these efforts.

I am prepared to discuss this investigation further with you at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary Ellen Callahan". The signature is fluid and cursive, with a long horizontal stroke at the end.

Mary Ellen Callahan
Chief Privacy Officer

cc: David Aguilar, Acting Commissioner, CBP
James F. Tomsheck, Assistant Commissioner, CBP Internal Affairs