

HUMAN RIGHTS INSTITUTE

COLUMBIA LAW SCHOOL

Mr. Michael Kortan
Assistant Director, FBI Office of Public Affairs
601 4th Street NW
Washington, DC 20535

Ms. Catherine Chen
Chief of Staff, FBI Office of General Counsel
601 4th Street NW
Washington, DC 20535

November 21, 2012

Dear Ms. Chen and Mr. Kortan,

Thank you for meeting with us recently regarding our project on human rights issues in federal civilian terrorism prosecutions, and for inviting us to request further information in writing detailing our specific questions and areas of interest regarding the Federal Bureau of Investigation's (FBI) role in investigating suspected terrorism offenses. We appreciate this opportunity to elaborate on our questions and topics of concern.

In our meeting you noted that the FBI, and your offices in particular, cannot provide information regarding investigation techniques and practices where they are classified or designated "law enforcement sensitive," or where disclosure would raise privacy concerns. Within these parameters, we would appreciate any information that your offices could provide to clarify and further our understanding of the issues we outline below. Where the answers to our questions are classified or designated "law enforcement sensitive," we would appreciate if you would indicate so when stating that you are unable to respond.

We have prepared the following questions to pinpoint our specific interests, although we would welcome any additional information concerning the topics we raise:

1. The Guidelines for Domestic FBI Operations promulgated in 2008 by Attorney General Michael B. Mukasey ("Mukasey Guidelines") provide for "assessments," an investigative stage that was not previously authorized.
 - a. What is the FBI's view regarding the role of assessments in identifying international terrorism activity?
 - b. The FBI released information pursuant to a Freedom of Information Act request by the New York Times detailing assessments conducted through March 30, 2011.¹ Approximately how many assessments has the FBI conducted since that date? How many assessments since 2008 have related to international terrorism? How many assessments conducted since 2008 have led to preliminary or full investigations related to international terrorism?
 - c. The Domestic Investigative and Operations Guide ("DIOG") revised in 2011 appears to permit the FBI to use informants, undercover FBI agents and FBI non-agent employees during the assessment stage. Beyond the requirements for periodic review that are generally applicable to assessments, are there particular FBI reviews or standards that would apply to the use of confidential informants, undercover FBI agents or undercover FBI non-agent employees during assessments?²

¹ The FBI's FOIA disclosures to the New York Times are available online at <http://www.documentcloud.org/documents/238254-fbi-assessment-data-2009-11.html> (last visited Nov. 20, 2012).

² By "periodic review," we are referring to the review described at §3.4.4 of the DIOG.

2. Many members of Muslim-American communities with whom we met expressed concern about the presence of informants with criminal backgrounds in mosques and Islamic schools. Can you comment on these concerns? What, if any, standards does the FBI apply concerning the use of informants in national security investigations generally? What standards or restrictions does the FBI use, in particular, regarding informants' activity at mosques, other religious institutions or cultural gatherings?
 - a. Please elaborate on statements by then-General Counsel Valerie Caproni, reported in the Associated Press, that use of informants in mosques is "reviewed for civil liberties concerns"?³
 - b. Does the FBI require evidence of a crime before an informant can be sent to a mosque, as has been reported in media?⁴
 - c. Do FBI standards generally preclude or disfavor the use of informants believed to be currently or recently engaged in criminal activity, as a general matter or under particular circumstances?

3. The DIOG states: "No investigative activity, including assessments, may be taken solely on the basis of activities that are protected by the First Amendment, or on the race, ethnicity, national origin or religion of the subject, or a combination of only such factors."⁵ The DIOG refers to the responsibility of agents for assessing the impact of investigative activity on fundamental rights.⁶ What is the role of the Office of General Counsel in reviewing activity or conducting oversight in this regard? What standards would the General Counsel's Office apply (or advise FBI employees to apply) in determining whether investigative activity is conducted "solely" on the basis of First Amendment-protected activity, or on the basis of the other enumerated factors? What standards would the General Counsel's Office use (or advise FBI employees to use) for determining whether activities are protected by the First Amendment?

4. In a July 2011 letter to the New York Times, Mr. Kortan wrote: "[T]he FBI's operations manual establishes greater overall protections for privacy than the law and Justice Department policy require, and reflect the FBI's commitment to detecting and disrupting threats while safeguarding civil rights and civil liberties."⁷ Please provide examples of where the FBI's operations manual or standards are more restrictive of FBI authority or more protective of privacy or civil liberties than the law or Justice Department policy require. We would find references to particular rules, issues or practices most responsive, but we would also find a reference to common or hypothetical scenarios to be illustrative.

5. In meetings with us, community members and religious leaders have expressed concern that FBI investigations focused on Muslim-American youth, particularly teenage boys or young men, involve the use of informants and are overly focused on prosecution. They question why, once the FBI identifies a particular individual who the FBI believes has sought information (including on the Internet) about existing terrorist activity or ideological perspectives the FBI associates with potential terrorist activity, they do not approach the individual's family or local mosque officials or take approaches that are not oriented toward prosecution. Can you comment on these concerns? What approaches does the FBI consider once it identifies a particular individual as seeking information about existing terrorist activity or ideological perspectives the FBI associates with potential terrorist activity?

6. We are familiar with FBI documents describing the "Radicalization Process." Can you describe the FBI's view of the appropriate role of informants, FBI undercover agents or non-agent employees during what the FBI might term the "indoctrination" stage?⁸ Does the FBI's conception of the "Radicalization Process" apply to individuals outside of the context of international terrorism, i.e., in domestic terrorism?

³ See Matt Apuzzo & Adam Goldman, "With CIA help, NYPD moves covertly in Muslim areas," *Assoc. Press* (Aug. 24, 2011).

⁴ *Id.*

⁵ DIOG § 5.3.

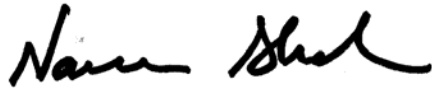
⁶ DIOG § 4.2.

⁷ Michael Kortan, "FBI Response to Recent Editorial Regarding DIOG Revisions" (Letter to the Editor), July 6, 2011, available at <http://www.fbi.gov/news/pressrel/press-releases/fbi-response-to-recent-editorial-regarding-diog-revisions> (last visited Nov. 20, 2012).

⁸ See, e.g., Carol Dyer et al., "Countering Violent Islamic Extremism," *FBI Law Enforcement Bulletin*, 5 (2007) available at <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2007-pdfs/dec07leb.pdf> (last visited Nov. 20, 2012).

Although we have provided specific questions to indicate our interests, we would greatly appreciate any information you can provide with regard to the topics raised here, including the use of informants, limitations on investigation activity due to civil liberties concerns, and the FBI's efforts to engage with communities regarding individuals identified as potential targets of prosecution. Moreover, we would be happy to further clarify our interest or provide further information at your convenience. Thank you for your time.

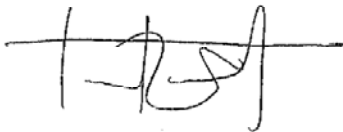
Sincerely,



Naureen Shah
Lecturer-in-Law and Acting Director, Human Rights Clinic
Associate Director, Counterterrorism & Human Rights Project, Human Rights Institute
Columbia Law School



Andrea J. Prasow
Senior Counterterrorism Counsel, US Program
Human Rights Watch



Tarek Z. Ismail
Counterterrorism & Human Rights Fellow, Human Rights Institute
Columbia Law School

HUMAN RIGHTS INSTITUTE

COLUMBIA LAW SCHOOL

Lisa Monaco
Assistant Attorney General for National Security
National Security Division
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

February 25, 2013

Dear Ms. Monaco,

Thank you for meeting with us recently regarding our project on human rights issues in federal civilian terrorism prosecutions, and for inviting us to request further information in writing regarding our specific questions and areas of interest in relation to the Department of Justice National Security Division's (NSD) role in prosecuting terrorism and terrorism-related offenses. We appreciate this opportunity to elaborate on our questions and topics of concern.

As we explained in our meeting, our project is examining all aspects of federal terrorism prosecutions through the lens of international human rights law. We have prepared the following questions to pinpoint our specific interests, although we would welcome any additional information concerning the topics we raise. If you feel you are unable to answer our questions because the answers are classified, or for other reasons, we would appreciate if you would indicate so when stating that you are unable to respond.

1. Section 501.2 of Title 28 of the Code of Federal Regulations authorizes the Director of the Bureau of Prisons to impose special administrative measures (SAMs) reasonably necessary to prevent disclosure of classified information, at the direction of the Attorney General.
 - a. What Department of Justice divisions or offices are involved in the screening of individuals for potential SAMs, including newly indicted individuals or recently convicted individuals, and what is their division of responsibilities?
 - b. What is the division of responsibilities between the Department of Justice NSD or other subdivisions, the Attorney General, U.S. Attorneys Offices, the Federal Bureau of Investigation, and the Bureau of Prisons in determining the SAMs restrictions set out in the origination memorandum, the modification of SAMs and the renewal of SAMs.
2. We are particularly concerned by reports that post-conviction inmates currently under SAMs are often held in 23-hour, single-cell housing without the opportunity to physically interact with other inmates.
 - a. What factors does the Department of Justice consider in specifying, in a SAMs origination memorandum, that an inmate should not be allowed to share a cell with another inmate and that reasonable efforts should be made to prevent an inmate from communicating with any other inmates?
 - b. Please confirm the number of individuals under post-conviction SAMs for whom the Department of Justice has directed these measures or other measures that are likely to result in periods of 23-hour single-cell housing?
3. What, if any, role does the Department of Justice National Security Division have in providing advice or consultation for national security investigations involving the use of informants, which are conducted by the FBI or local law enforcement? What protocol or factors govern the NSD's involvement? In particular, does the NSD have a role in monitoring the behavior of informants involved in national security investigations?

Although we have provided specific questions to indicate our interests, we would greatly appreciate any information you can provide with regard to the topics raised here, including the use of informants, limitations on investigation activity due to civil liberties concerns, and the FBI's efforts to engage with communities regarding individuals identified as potential targets of prosecution. Moreover, we would be happy to further clarify our interest or provide further information at your convenience, whether in person or in writing. Thank you for your time.

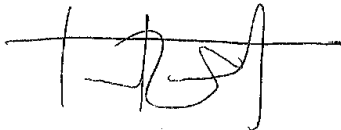
Sincerely,



Naureen Shah
Lecturer-in-Law and Acting Director, Human Rights Clinic
Associate Director, Counterterrorism & Human Rights Project, Human Rights Institute
Columbia Law School



Andrea J. Prasow
Senior Counterterrorism Counsel, US Program
Human Rights Watch



Tarek Z. Ismail
Counterterrorism & Human Rights Fellow, Human Rights Institute
Columbia Law School

(05/23/2013)

Human Rights Watch Questions to the National Security Division

Question 1: Section 501.2 of Title 28 of the Code of Federal Regulations authorizes the Director of the Bureau of Prisons to impose special administrative measures (SAMs) reasonably necessary to prevent disclosure of classified information, at the direction of the Attorney General.

- **What Department of Justice divisions or offices are involved in the screening of individuals for potential SAMs, including newly indicted individuals or recently convicted individuals, and what is their division of responsibilities?**
- **What is the division of responsibilities between the Department of Justice NSD or other subdivisions, the Attorney General, U.S. Attorneys Offices, the Federal Bureau of Investigation, and the Bureau of Prisons in determining the SAMs restrictions set out in the origination memorandum, the modification of SAMs and the renewal of SAMs.**

Justice Department Response:

Under Section 501.2 of Title 28 of the CFR, the Attorney General may authorize the Director of the Bureau of Prisons (BOP) to impose special administrative measures (SAMs) reasonably necessary to prevent disclosure of classified information. Special measures to prevent the disclosure of classified information may only be implemented upon written certification to the Attorney General by the head of a member agency of the U.S. intelligence community that the unauthorized disclosure of such information would pose a threat to national security, and that there is a danger that the inmate will disclose such information. Under this section, only the Attorney General can direct the BOP to initiate SAMs with respect to an inmate.

Separately, under Section 501.3 of Title 28 of the CFR, the Attorney General may authorize the Director of BOP to implement SAMs upon written notification to BOP that there is substantial risk that a prisoner's communications or contacts with persons (whether inside or outside a BOP facility) could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons. While authorization of SAMs must be by the Attorney General, in the case of SAMs relating to the prevention of violence or terrorism (Section 501.3), the actual *notification* to the BOP of the SAMs may, at the Attorney General's discretion, be made by the head of a federal law enforcement agency, or the head of a member agency of the intelligence community.

The specific procedures that must be followed whenever a federal law enforcement agency (including a U.S. Attorney's Office (USAO)) or a member of the intelligence community believes that SAMs are necessary under Section 501.3 are spelled out in the U.S. Attorneys Manual at: http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/24mcrm.htm

All requests for SAMs are processed by the Office of Enforcement Operations (OEO) in the Justice Department's Criminal Division. Consultation with the National Security Division's

Counterterrorism Section is recommended prior to submission of a SAMs request to OEO in a terrorism or terrorism-related case.

Question 2: We are particularly concerned by reports that post-conviction inmates currently under SAMs are often held in 23-hour, single-cell housing without the opportunity to physically interact with other inmates.

- **What factors does the Department of Justice consider in specifying, in a SAMs origination memorandum, that an inmate should not be allowed to share a cell with another inmate and that reasonable efforts should be made to prevent an inmate from communicating with any other inmates?**
- **Please confirm the number of individuals under post-conviction SAMs for whom the Department of Justice has directed these measures or other measures that are likely to result in periods of 23-hour single-cell housing?**

Justice Department Response:

Conditions of confinement for all persons in Bureau of Prisons (BOP) custody, including whether inmates are held in single-cell housing or segregated from the general population, are set in accordance with various BOP policies. All decisions to house an inmate in single-cell status, regardless of the institution where they are housed, are made on a case-by-case basis to ensure the safety and security of staff and inmates, or are necessitated by the requirements of a particular SAM. All inmates in single-cell status have daily interaction with staff including correctional officers, medical and religious staff.

Any additional restrictions imposed pursuant to Section 501.3 of Title 28 do not affect the implementation of BOP policies unless specifically set forth in the memorandum from the Attorney General directing the implementation of SAMs. The BOP has the authority to take any other measures with respect to an inmate subject to SAMs deemed necessary to maintain the order, safety, security and discipline of any BOP institution.

As stated above, under Section 501.3 of Title 28, the Attorney General may authorize the Director of BOP to implement SAMs upon written notification to BOP that *there is substantial risk that a prisoner's communications or contacts with persons (whether inside or outside a BOP facility) could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons*. These SAMs ordinarily may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism -- while still maintaining the inmate's attorney/client privilege.

As of May 16, 2013, there were a total of 55 federal inmates under SAMs -- 31 of whom were terrorism-related inmates, 16 of whom were violent-crime related inmates, and 8 of whom were national security inmates (such as espionage). The number of post-conviction SAMs restricting the inmate from communicating with all other inmates is not readily available.

Question 3: What, if any, role does the Department of Justice National Security Division have in providing advice or consultation for national security investigations involving the use of informants, which are conducted by the FBI or local law enforcement? What protocol or factors govern the NSD's involvement? In particular, does the NSD have a role in monitoring the behavior of informants involved in national security investigations?

Justice Department Response:

The FBI maintains direct responsibility for the vetting, supervision and monitoring of its confidential human sources pursuant to established policies and procedures. The Justice Department's National Security Division and U.S. Attorney's Offices around the country necessarily consult with the FBI and other law enforcement agencies during national security investigations that utilize FBI confidential human sources or sources from other agencies and that may result in a federal criminal prosecution.