Description of document:	Department of Justice (DOJ) Office of Inspector General (OIG) Report on Unauthorized Disclosure of Nonpublic Information to the Media 2021
Requested date:	2022
Release date:	16-June-2022
Posted date:	11-March-2024
Source of document:	FOIA Request Supervisory Government Information Specialist Office of the Inspector General Office of General Counsel 950 Pennsylvania Ave., NW Room 4726 Washington, DC 20530 Fax: (202) 616-9152 Email: oigfoia@usdoj.gov

June 16, 2022

Subject: Freedom of Information/Privacy Act Request [22-OIG-193]

This is in response to your Freedom of Information Act request to the U.S. Department of Housing and Urban Development Office of Inspector General (HUD-OIG). HUD-OIG routed your request to the Office of the Inspector General where it was received on June 15, 2022. Specifically, your request seeks the report related to the Investigative Summary entitled: "Findings of Misconduct by a then Department of Justice (DOJ) Office of the Inspector General (OIG) Employee for Unauthorized Disclosure of Sensitive, Non-Public Information to the Media, including Information from a Draft DOJ OIG Report."

The responsive report, consisting of 50 pages, has been reviewed. It has been determined that certain portions of such report be excised pursuant to the Freedom of Information Act, 5 U.S.C. §552(b)(6) and (7)(C), as follows:

- 5 U.S.C. § 552(b)(6), protects personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; and
- 5 U.S.C. § 552(b)(7)(C), protects records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Please be advised that the OIG considered the foreseeable harm standard of the FOIA Improvement Act of 2016 when reviewing the responsive records and applying the appropriate FOIA exemptions. Consequently, please find enclosed that information which can be released pursuant to your request. We consider this response as closing your request with the OIG.

If you are not satisfied with OIG's determination in response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, 441 G Street, NW, 6th Floor, Washington, D.C. 20530, or you may submit an appeal through OIP's FOIA STAR portal by creating an account following the instructions on OIP's website: https://www.justice.gov/oip/submit-and-track-request-or-appeal. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552 (2012 & Supp. V 2017). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may contact our FOIA Public Liaison, Deborah Waller, at (202) 616-0646 for any further assistance with your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at (202) 741-5770; toll free at 1-877-684-6448.

Sincerely,

Kim Kochurka

Government Information Specialist
Office of General Counsel

Enclosure

CONTROLLED//SP-INV/LEI//DL ONLY

U.S. Department of Housing and Urban Development

Office of Inspector General

Office of Investigation

Investigation of Alleged Unauthorized Disclosures of Non-Public Information at Department of Justice Office of the Inspector General

Report No. 2021SI014603I

Table of Contents

Executive Summary

Investigation of Alleged Unauthorized Disclosures of Non-Public Information at Department of Justice Office of the Inspector General

Report Number: 2021SI0146031 May 9, 2022

Introduction

In January 2021, the U.S. Department of Housing and Urban Development Office of Inspector General (HUD OIG) received a request from the U.S. Department of Justice (DOJ) Office of the Inspector General (DOJ OIG) to conduct an independent investigation into allegations that one or more DOJ OIG employees had impermissibly disclosed non-public information relating to DOJ OIG's review of DOJ's "zero tolerance policy" (ZTP). The policy required U.S. Attorneys on the United States' southwest border to criminally prosecute all individuals who were referred by the Department of Homeland Security (DHS) for illegally crossing the border.

The leak allegations had arisen after various media outlets published ZTP-related articles prior to the review's (ZTP Review's) formal release on January 14, 2021, in a report titled *Review of the Department of Justice's Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services*. Several of these articles contained non-public information about the ZTP Review that was known to or in the possession of DOJ OIG employees who were involved in the review. Notably, these included two October 2020 articles in *The New York Times* and *NBC News* that discussed a draft version of the report that both outlets claimed to have reviewed.[1]

On October 6, 2020, the *New York Times* notified DOJ OIG about the impending publication of an article discussing a draft copy of the report. On the same day, DOJ OIG notified the Integrity Committee (IC) of the Council of the Inspectors General on Integrity and Efficiency (CIGIE) about the possible unauthorized disclosure of sensitive non-public information.[2] On December 16, 2020,

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[1] *See* Michael D. Shear et al., *'We Need to Take Away Children,' No Matter How Young, Justice Dept. Officials Said,* N.Y. Times (Oct. 6, 2020), https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html [hereinafter "*New York Times* article"]; *see also* Julia Ainsley, Jacob Soboroff, & Phil Helsel, *Justice Officials Drove Family Separation Policy, Draft Watchdog Report says,* NBC News (Oct. 7, 2020), https://www.nbcnews.com/news/us-news/justice-department-officials-drove-family-separation-policy-watchdog-report-says-n1242375 [hereinafter "Oct. 7 *NBC News* article"].

[2] Pursuant to Section 11 (d) of the Inspector General Act, Pub. L. 95–452, Oct. 12, 1978, 92 Stat. 1101, the Integrity Committee's mission is to receive, review and, if appropriate, refer for investigation allegations of wrongdoing made against, among others, Inspectors General or designated senior staff members of an Office of Inspector General. *See* CIGIE Integrity Committee web site, https://www.ignet.gov/cigie/committees/integrity-committee. In his e-mail to the IC, DOJ Inspector General Michael Horowitz stated that DOJ OIG was referring the matter not because of any information or knowledge that designated staff had made unauthorized disclosures, but rather because these officials were among those with access to the information that had apparently been disclosed.

the IC declined to open an investigation into the matter but offered to assist DOJ OIG in finding another Inspector General's office to conduct an independent investigation.[3] On January 7, 2021, following facilitation by the IC, HUD OIG agreed to conduct the investigation on DOJ OIG's behalf.

Pursuant to a Memorandum of Understanding (MOU) executed with DOJ OIG on February 28, 2021, HUD OIG opened an investigation into whether DOJ OIG employees made unauthorized disclosures, to media outlets or other entities, of information obtained in connection with the ZTP Review.

Based on the evidence obtained during the course of our investigation, HUD OIG concluded that [redacted], then Attorney-Advisor with DOJ OIG, provided sensitive, non-public information to various media outlets prior to the ZTP Review's January 2021 release, and that he did so without authorization from DOJ OIG. Notably, we concluded that [redacted] provided either the draft DOJ OIG ZTP Review report or information contained therein to the media. "Provided" as used in this report encompasses both the direct and indirect provision of information and documents by any means. HUD OIG found [redacted] actions violated 5 C.F.R. § 2635.703 (Use of Nonpublic Information), DOJ OIG policies governing contacts with media, and its employee Standards of Conduct.[4]

Although we did not find direct evidence that [redacted] provided ZTP Review-related information to the media, there is extensive circumstantial evidence of him doing so. HUD OIG's conclusion is based on phone records showing numerous and lengthy phone conversations with the media outlets in question during the time period in which the articles were published, evidence that [redacted] was privy to documents referenced in the various articles, and evidence of his frustration with the pace and substantive decision-making related to the review, which indicate a possible motive for him to have disclosed the information. Moreover, our conclusion is buttressed by the pattern and timing of [redacted] phone calls with the media, which in multiple instances occurred contemporaneously or in close temporal proximity to [redacted] accessing or possessing particular ZTP Review-related documents. For example, [redacted] participated in a phone call with a reporter at the same time he was viewing a document on his computer relevant to an article that the reporter subsequently authored. In another instance, two minutes after a text message exchange with a colleague confirming that [redacted] would be receiving a hard copy of the draft DOJ OIG ZTP report that he had requested, [redacted] called a reporter who subsequently published an article that described the contents of the draft report.

HUD OIG notes that [redacted] submitted his immediate resignation via e-mail shortly before midnight on December [redacted] 2020, soon after receiving a questionnaire from DOJ OIG that would have required him to affirm that he had not provided information about the ZTP Review to members of the media. [redacted], through counsel, declined two requests to be interviewed and

[3] The IC declined to investigate the matter because there was no allegation or information suggesting that any person covered under the IC's jurisdiction disclosed sensitive, non-public information to the media without authorization. The IC agreed, at DOJ OIG's request, to identify another Office of Inspector General of the IC's choosing to conduct an independent investigation of the alleged unauthorized disclosure(s).

[4] As discussed *infra* in this report's conclusion, HUD OIG also considered whether [redacted] disclosures could constitute protected disclosures under the Whistleblower Protection Enhancement Act of 2012 (WPEA).

subsequently made several denials of HUD OIG's findings. Notably, [redacted] contended that the finding "that documents, including the draft DOJ OIG report, obtained by [the] media came from [redacted] was "categorically false" and also "denie[d] in the strongest possible terms disclosing sensitive, non-public information on 'numerous and lengthy' or any other type of phone calls with members of the media."[5]

HUD OIG did not find that any other DOJ OIG personnel made unauthorized disclosures of documents or non-public information related to this matter.

HUD OIG referred this matter to the DOJ Public Integrity Section (PIN), who informed us that this was not a matter for which PIN would open a criminal investigation.

Scope and Methodology

HUD OIG's investigation focused solely on the actions of DOJ OIG employees, and not DOJ employees or others who may have been privy to the draft report or other non-public information related to the ZTP Review that was apparently disclosed. Under the terms of the MOU, HUD OIG applied DOJ OIG policies and procedures when assessing whether DOJ OIG personnel engaged in non-criminal misconduct, and thus utilized a preponderance of the evidence evidentiary standard.[6]

Pending a decision by the CIGIE IC as to whether it would investigate the matter, and if the IC determined it would not investigate the matter, pending an agreement with another Office of Inspector General to conduct an independent investigation, DOJ OIG personnel performed preliminary investigatory work related to the potential leak of information.[7] DOJ OIG provided all relevant materials to HUD OIG at the inception of our own investigation. These materials included a questionnaire that DOJ OIG had provided in December 2020 to 12 employees who were privy to the ZTP Review. The questionnaire queried the employees regarding their involvement in, or knowledge of, any unauthorized disclosures of information relating to this matter. DOJ OIG also obtained the work e-mails, government-issued hard drives, and government-issued mobile phone records of 19 DOJ OIG employees who were involved in the ZTP Review. Between October 9, 2020 and December 11, 2020, DOJ OIG agents also spoke with five witnesses regarding this matter. Finally, DOJ OIG obtained, via subpoena, the personal mobile phone call records of two of its employees, [redacted] and [redacted].

As part of our investigation, HUD OIG reviewed the work e-mails of 15 DOJ OIG employees and conducted a re-review of [redacted] work e-mails, which DOJ OIG had already reviewed. HUD OIG also independently analyzed the phone records provided to us by DOJ OIG. In addition, HUD OIG reviewed the government-issued mobile phone text messages of 15 DOJ OIG employees and

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[5] [redacted] through counsel, issued denials on three separate occasions—December [redacted] 2020; April 12, 2022; and April 19, 2022. The context and details of these denials are discussed in Chapter 3.

[6] DOJ OIG generally applies a preponderance of the evidence standard in assessing employee misconduct matters. *See, e.g.*, DOJ OIG Investigative Summary 21-114 (stating that "[u]nless otherwise noted, [DOJ OIG] applies the preponderance of evidence standard in determining whether DOJ personnel have committed misconduct."), https://oig.justice.gov/sites/default/files/reports/21-114.pdf.

[7] According to DOJ Deputy Inspector General William Blier, DOJ OIG performed this work in the interests of preserving evidence, and did so without personal involvement from DOJ OIG senior leadership.

interviewed 16 current and former DOJ OIG employees and two current DOJ employees. [redacted] and [redacted] members of the DOJ OIG ZTP Review "team" who were both no longer employed by DOJ OIG at the time of the interview requests, declined to be interviewed.

[redacted]

Chapter 1: Background

I. Zero Tolerance Policy

From April to June 2018, federal authorities, as directed by then-Attorney General Jeff Sessions, implemented a "zero tolerance policy" for prosecuting immigration offenses along the Southwest border under 8 U.S.C. § 1325(a).[8] Traditionally, the Department of Homeland Security (DHS) did not refer family unit adults for criminal prosecution of immigration offenses, often to avoid family separation.[9] On May 4, 2018, however, DHS began adhering to the zero tolerance policy and referring family unit adults who committed illegal entry violations, through the U.S. Attorney's Office (USAO), to the DOJ for criminal prosecution.[10] The DOJ agreed to prosecute these referrals.[11] Under this policy, over 3,000 children were separated from their parent or guardian.[12]

II. DOJ OIG ZTP Review

In July 2018, the DOJ OIG Evaluation and Inspections Division (E&I) began a review of the DOJ's role in creating and executing the zero tolerance policy.[13] E&I is a division of the DOJ OIG that evaluates DOJ programs and actions using alternative mechanisms, such as on-site inspections, other than audit and investigative disciplines.[14] E&I also performs special reviews upon request by the Inspector General or senior DOJ management on sudden matters.[15]

During the roughly two-and-a-half-year period in which DOJ OIG conducted its ZTP Review, the number and composition of DOJ OIG personnel directly involved in ZTP Review-related work

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[8] This statute states that any alien who unlawfully enters or unlawfully attempts to enter the United States shall be fined or imprisoned. *See* Jeff Sessions, Att'y Gen., *Memorandum for Federal Prosecutors Along the Southwest Border: Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a)* (Apr. 6, 2018); *see also* U.S. Dep't of Justice, Office of the Inspector Gen., Evaluation & Inspections Div., *Review of the Department of Justice's Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services,* Evaluation & Inspections Div. Rep. 21-028 1 (Jan. 2021), https://oig.justice.gov/sites/default/files/reports/21-028_0.pdf [hereinafter *Review of DOJ's ZTP and Coordination*].

[9] *See Review of DOJ's ZTP and Coordination* at 1–2 (Jan. 2021).

[10] *See id.* at 1.

[11] *See id.* at 1.

[12] *See id.* at 2.

[13] *See id.*at 2–3.

[14] *See About the Office*, U.S. Dep't of Justice, Office of the Inspector Gen., https://oig.justice.gov/about (last visited Sept. 15, 2021).

[15] *See id.*

(ZTP Review Team) varied. These personnel included E&I staff; [redacted] an Attorney-Advisor [redacted] who received approval to work with the ZTP Review Team beginning in August 2018; and Adam Miles, Senior Counsel to the Inspector General. [redacted]

In addition to the personnel directly involved in the ZTP Review, staff of other DOJ OIG components, including the Front Office and Office of the General Counsel, were privy to ZTP-related information and documents.

During its inquiry, the ZTP Review Team reviewed DOJ's coordination with DHS and the Department of Health and Human Services (HHS), conducted interviews, and analyzed e-mails and other documents obtained from multiple divisions within DOJ.[16]

On August 26, 2020, consistent with its standard practice, DOJ OIG transmitted a draft version of the ZTP report to DOJ and several senior DOJ officials for comment. The draft was marked, "Working Draft E&I Report – Limited Official Use," and also contained the following language on a cover page:

> This document is a WORKING DRAFT prepared by the U.S. Department of Justice Office of the Inspector General. It has not been fully reviewed within the Department and is, therefore, subject to revision. Recipients of this draft must not, under any circumstances, show or release its contents for purposes other than official review and comment. It must be safeguarded in accordance with Department of Justice Order 2620.7 to prevent publication or other improper disclosure of the information it contains.

The memorandum accompanying the draft also stated:

> Because this is a draft report, we request that the copies not be disseminated or discussed with anyone other than those employees who need to review the report to discuss it with you or to review it for purposes of factual accuracy and sensitivity. In this regard, we request that your office maintain a log that identifies the individuals who are provided access to the report and when access is provided. In addition, we request that your office emphasize to all individuals given access to the report or its contents the prohibition on discussing the report with anyone else, unless granted permission by you to do so.

Over the next six weeks, DOJ OIG received comments from various current and former DOJ officials regarding the report, including comments from officials in the Office of the Deputy Attorney General (ODAG). In its comments, ODAG suggested that DOJ OIG interview additional individuals. Following these interviews, E&I issued a report on its findings on January 14, 2021.

[16] *See Review of DOJ's ZTP and Coordination* at 72–73.

III. Media Coverage of ZTP and the DOJ OIG ZTP Review

The zero tolerance policy received significant media coverage during the period of DOJ OIG's review, and prior to the January 2021 release of the report. Several news articles published during this period either included or appeared to reference non-public information related to the review.

On January 17, 2019, an *NBC News* article by Julia Ainsley analyzed a "late 2017" draft of the zero tolerance policy document.[17] The article, which included a link to the policy, stated that the draft policy "was provided to NBC News by the office of Sen. Jeff Merkley, D.-Ore.," and further stated that the Senator's office had said the document "was leaked by a government whistleblower."[18] On January 17, 2019, Senator Merkley published a statement on his web site stating he "revealed a previously secret document that shows the Trump Administration deliberately plotting to create a crisis at the southern border."[19] The statement contained no further information about the circumstances under which the office had obtained the document.[20]

On July 23, 2020, *The Guardian* published an article by Stephanie Kirchgaessner that discussed comments allegedly made by Rod Rosenstein, the former Deputy Attorney General, in a ZTP-related conference call in May 2018.[21] Among other details about the call, the article stated that John Bash, former U.S. Attorney for the Western District of Texas, told other participants on the call that he had declined to prosecute several cases that had been referred to him by the Customs and Border Protection (CBP) that involved children under the age of five.[22] According to the article, Rosenstein responded by telling U.S. Attorneys "that they could not decline to prosecute cases based on the age of the children who would be separated from their parents because there was 'no categorical exemption' under the order."[23] *The Guardian* attributed its knowledge of the phone call to "sources familiar with the matter."[24] The article further stated that "[d]etails about Rosenstein's call with US attorneys have been shared with the inspector general's office of the DoJ, which is conducting a review of the 'planning and implementation' of the zero-tolerance policy by the department."[25]

On August 20, 2020, an *NBC News* article by Ainsley and Jacob Soboroff provided inside information about a May 2018 ZTP-related meeting, among senior presidential advisors, in the

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[17] *See* Julia Ainsley, *Trump Admin Weighed Targeting Migrant Families, Speeding Up Deportation of Children*, NBC News (Jan. 17, 2019), https://www.nbcnews.com/politics/immigration/trump-admin-weighed-targeting-migrant-families-speeding-deportation-children-n958811.

[18] *Id.*

[19] Press Release, *Merkley Reveals Secret Trump Administration Plan to Create Border Crisis*, Office of Sen. Jeff Merkley (D – Ore.) (Jan. 17, 2019), https://www.merkley.senate.gov/news/press-releases/in-bombshell-nbc-news-story-merkley-reveals-secret-trump-administration-plan-to-create-border-crisis_-?fbclid=IwAR1_n9TmJZSIS8aRyk5emEDy8DMCjwQ6rVakPEXaQgxZ-HfWL9qsgQy3YY8.

[20] *See id.*

[21] *See* Stephanie Kirchgaessner, *Revealed: Rod Rosenstein Advised There Was No Age Limit on Child Separations*, The Guardian (July 23, 2020), https://www.theguardian.com/us-news/2020/jul/23/child-separation-migrants-prosecutors-rod-rosenstein [hereinafter "July 23 *The Guardian* article"].

[22] *See id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

White House Situation Room.[26] According to the article, the authors learned details of the meeting from "two officials who were there," and also obtained, from an unspecified source, an invitation list of those expected to be in attendance at the meeting.[27]

On [redacted] authored [redacted] in [redacted] reporting that [redacted].[28] The article further claimed that [redacted], was apparently involved [redacted].[29] The article featured [redacted] and noted that [redacted] about the incident.[30] The article also attributed some information claiming that [redacted][31]

On October 6, 2020, a *New York Times* article by Michael D. Shear, Katie Benner, and Michael S. Schmidt detailed the findings of the ZTP Review, which at the time had not yet been publicly released and remained in draft form.[32] According to the article, the information contained therein was "based on a review of the 86-page draft report and interviews with three government officials who read it in recent months and described its conclusions and many of the details in it," and added that the officials only spoke with *The New York Times* "on the condition of anonymity because they had not been authorized to discuss [the report] publicly."[33] The article also noted that, "[b]efore publishing the findings of its investigations, [DOJ OIG] typically provides draft copies to Justice Department leaders and others mentioned in the reports to ensure that they are accurate."[34] The article did not specify the agency or agency component for whom the government officials in question worked.[35]

In the early morning hours the next day, on October 7, 2020, Ainsley, Soboroff, and Phil Helsel published an article in *NBC News* analyzing the contents of the draft ZTP report.[36] After noting that *The New York Times* had earlier reported on the issue, the article stated that "NBC News ha[d] reviewed the draft report, which has not been publicly released, and confirmed details in the Times story."[37]

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[26] *See* Julia Ainsley and Jacob Soboroff, *Trump Cabinet Officials Voted in 2018 White House Meeting to Separate Migrant Children, Say Officials*, NBC News (Aug. 20, 2020), https://www.nbcnews.com/politics/immigration/trump-cabinet-officials-voted-2018-white-house-meeting-separate-migrant-n1237416 [hereinafter Aug. 20 *NBC News* article].

[27] *Id.*

[28] *See* [redacted] article"].

[29] *See id.*

[30] *Id.*

[31] *Id.*

[32] *See New York Times* article.

[33] *Id.*

[34] *Id.*

[35] *See id.*

[36] *See* Oct. 7 *NBC News* article.

[37] *Id.*

In an interview by PBS NewsHour released on October 7, 2020, Benner discussed *The New York Times* article and the draft report.[38] Benner provided no details about the circumstances under which the draft report had been obtained, and stated that "[t]here were a lot of people who expected the report to be out already . . . [b]ut there's been a lot of pushback from the Department of Justice on this report. And so it has been delayed while the inspector general deals with some of the criticisms coming from the department and department officials."[39]

IV. [redacted]

[redacted] joining DOJ OIG [redacted] as an Attorney-Advisor.[41]

[redacted] resigned from DOJ OIG on December [redacted] 2020. [redacted][42]

Chapter 2: Applicable Legal and Policy Standards

The allegations in this matter, which involve unauthorized disclosures of sensitive non-classified information as well as unauthorized contacts with media outlets, are governed by the Standards of Ethical Conduct for Employees of the Executive Branch, codified in 5 C.F.R. Part 2635, and by DOJ OIG policies.

I. 5 C.F.R. § 2635.703: Use of Nonpublic Information

5 C.F.R. § 2635.703, which governs the use of nonpublic information by executive branch employees, states in relevant part: "An employee shall not . . . allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure."[43]

The same provision defines nonpublic information as "information that the employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public," and includes in this category information that an employee knows or reasonably should know "[i]s designated as confidential by an agency…or..[h]as not actually

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[38] *See New Report Suggests DOJ Was 'Driving Force' Behind Trumps Family Separations*, PBS News Hour (Oct. 7, 2020), https://www.pbs.org/newshour/show/new-report-suggests-doj-was-driving-force-behind-trumps-family-separations.

[39] *Id.*

[40] *See* [redacted]

[41] *See id.*

[42] *See* [redacted]

[43] 5 C.F.R. § 2635.703(a).

been disseminated to the general public and is not authorized to be made available to the public on request."[44]

II. DOJ OIG Policies

A. Limited Official Use Information

DOJ Order 2620.7 ("Control and Protection of Limited Official Use Information") defines "Limited Official Use Information" as "unclassified information of a sensitive, proprietary or personally private nature which must be protected against release to unauthorized individuals."[45] The Order delegates to the heads of Departmental organizations the responsibility to determine the specific types of information that are to be considered Limited Official Use (LOU), but lists as suggested illustrative examples of LOU "investigative material," and "[d]eliberative information relating to internal DOJ or Executive Branch policy and decision making."[46]

The DOJ OIG Inspector General Manual chapter pertaining to "Standards for Safeguarding Limited Official Use" further defines LOU as "any [non-classified] information of which the loss, misuse, or unauthorized access to or modification of could adversely affect the national interest or the conduct of OIG, DOJ, or federal programs, or the privacy to which individuals are entitled under [The Privacy Act]."[47] The chapter does not limit the specific types of documents that the Inspector General may designate as LOU but notes that "OIG material that contains information the IG or his designee has determined is LOU must be appropriately identified to ensure that all persons having access to the information outside of the OIG's control are aware of the protection requirement."[48]

Prior to November 2020, this chapter stated that "Personnel who have custody of LOU shall exercise care to ensure that the information is not available to individuals who have no legitimate business need for access to the information."[49] In November 2020, this sentence was revised as follows:

> "[p]ersonnel who have custody **or control** of LOU **information** shall exercise care to ensure that the information is not **made** available **in any form, including by oral disclosure**, to individuals **who do not have a need to know this** information."[50] (emphasis added for changes).

B. DOJ OIG Employee Standards of Conduct

Prior to November 2020, the chapter of the DOJ OIG Inspector General Manual pertaining to "Employee Standards of Conduct" stated:

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[44] *Id.* § 2635.703(b).
[45] U.S. Dep't of Justice Order 2620.7.
[46] *Id.*
[47] U.S. Dep't of Justice, Office of the Inspector Gen. Manual Vol. 1, Ch. 222 – Standards for Safeguarding Limited Official Use, 222.5 A.
[48] *Id.* at 222.6 A (1).
[49] *Id.* at 222.6 B (1) a.
[50] *Id.* at 222.6 B (1) a.

> OIG employees receive and have access to sensitive information and documents provided to the OIG in the course of audits, evaluations, reviews, and investigations. An employee may not take non-public work products, documents, records, information, or other materials received from DOJ components or other agencies in the course of the employee's work for personal use at any time, including at time of separation from the OIG. All such non-public material, including non-public work product is property of the OIG and subject to DOJ Order 2710.8C, Removal and Maintenance of, and Access to, Documents.[51]

In November 2020, DOJ OIG modified this section by appending the following sentence to the above paragraph: "OIG employees may not disclose limited official use (LOU) information in any form, including by oral disclosure, to anyone who does not have a need to know such information."[52]

C. Media Contacts

The DOJ OIG Inspector General Manual pertaining to "OIG Public Affairs" states that "[a]ll communications by OIG employees with the media shall be previously coordinated with the Immediate Office of the Inspector General (Immediate Office)."[53] The chapter further states:

> Providing information to the media that is prohibited by statute from disclosure, or that is provided for an unlawful purpose, for example, to obstruct justice, may result in criminal prosecution, civil penalties, or disciplinary action, including removal . . . the disclosure of information that is not prohibited by statute from disclosure, but is in contravention of these guidelines or referenced chapters, may result in disciplinary action, including removal. Such violations may include, but are not limited to, the unauthorized disclosure of information that: (1) is sensitive; (2) reflects the internal deliberations or operations of the OIG; (3) concerns other agencies, persons, or operations and was obtained by the OIG by virtue of its official duties; or (4) would negatively affect the right of any agency or person to an unbiased determination of culpability or innocence in any forum.[54]

Chapter 3: Factual Findings

I. Initial Investigative Work by DOJ OIG

On October 8, 2020, following an internal staff meeting with DOJ Inspector General Michael Horowitz about the leak of the draft report, [redacted] wrote to the lead DOJ OIG investigator stating he had "a few thoughts to share" about the "ZTP leak matter" and asking for an opportunity to speak with him. During a telephone call with the investigator the following day, [redacted] stated his belief that the ZTP Review, which was initially assigned to the E&I team as a programmatic review because no misconduct had been alleged, should have been transitioned to a misconduct

[51] U.S. Dep't of Justice, Office of the Inspector Gen. Manual Vol. 1, Ch. 30 – Standards of Conduct, 30.5 A (12).
[52] *Id.*
[53] U.S. Dep't of Justice, Office of the Inspector Gen. Manual Vol. 1, Ch. 32 – OIG Public Affairs, 032.4.
[54] *Id.* at 032.5(D).

investigation because the team discovered potential malfeasance and it did not have expertise in this area.

When asked during the same conversation about the recent leaking of the draft ZTP report, [redacted] stated he suspected that a certain DOJ official had been involved in the leak. [redacted] additionally told investigators that, around the time of the potential leak, the draft report was "frustrating to see in its current posture." This conversation with [redacted] was not recorded, and DOJ OIG's formal memorialization of it does not reflect whether [redacted] was directly asked if he was the source of the apparent media disclosures.

On December 8, 2020, DOJ OIG issued a written questionnaire to 12 DOJ OIG personnel who were privy to information related to the ZTP Review. The first three questions contained therein were: "(1) Did you have any communication or contact with a member of the media about E&I's ZTP review? (2) Do you know of any current or former OIG employee who had any communication or contact with a member of the media about E&I's ZTP review? (3) Did you provide any information or documentation (including email messages) about the ZTP review to a member of the media?" The memorandum accompanying the questionnaire stated that those receiving the questionnaire had "a duty to reply to the questions posed," and that anyone who refused to answer or failed to reply fully and truthfully could face disciplinary action, including dismissal, from DOJ OIG.[55] The memorandum further requested that the completed questionnaire be returned by December 11, 2020.

All employees who received the questionnaire responded to DOJ OIG answering "no" to the foregoing questions, with the following two exceptions: (1) [redacted] who, citing various personal and family reasons, submitted his immediate resignation via e-mail at 11:58 p.m. on December [redacted] 2020, without returning the questionnaire; and (2) [redacted] who appears to have cited technical difficulties related to the PDF form that prevented her from filling out the questionnaire. [redacted] during a subsequent interview with DOJ OIG investigators on December 11, 2020, was asked questions similar to those posed in the questionnaire and answered these questions in the negative.

On December [redacted] 2020, [redacted] declined, via an e-mail from his attorney, to be interviewed by DOJ OIG about this matter. His attorney noted [redacted] recent resignation and stated that he was no longer "under [any] obligation to participate in such inquiries."[56] She added, "[i]n the interest of comity, however, [redacted] did not give any documents to the media, and he has no knowledge of whether any OIG employees did."

DOJ OIG also obtained the work e-mails, government-issued hard drives, and government-issued mobile phone records of 19 DOJ OIG employees who were involved in the ZTP Review, and obtained, via administrative subpoena to a telecommunications company,[57] subscriber information

[55] The memorandum stated that those knowingly and willfully providing false statements or information may face criminal prosecution.

[56] Although Offices of Inspector General have the authority to compel testimony from current agency employees, they do not have the authority to compel or subpoena testimony from former agency employees, including those who retire or resign during an OIG investigation.

[57] The Inspector General Act of 1978 authorizes "each Inspector General" to "require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data... and documentary evidence

and call detail records for the personal mobile phones of [redacted] DOJ OIG issued this subpoena based on [redacted] abrupt resignation in December 2020, soon after his receipt of the above questionnaire, and his subsequent declination of a voluntary interview. DOJ OIG subsequently issued an administrative subpoena to a telecommunications company for the personal mobile phone records of [redacted] DOJ OIG issued this subpoena because [redacted] phone records showed evidence of significant telephonic contact between the two on dates immediately preceding and subsequent to published media articles, and because [redacted] acknowledged to speaking with [redacted] subsequent to the latter's resignation.

II. HUD OIG Investigation

A. Documentary Review and Witness Interviews

HUD OIG reviewed the e-mail accounts of 15 DOJ OIG employees who were generally privy to information and documents related to DOJ OIG's ZTP Review. HUD OIG found no direct evidence of any impermissible disclosures or contacts with media outlets in any of the e-mails we reviewed.

HUD OIG subsequently interviewed 15 current and former DOJ OIG employees who were identified as having been involved to some degree in the ZTP Review,[58] and specifically asked each interviewee whether they had provided any information or documentation about the ZTP Review to a member of the media; all responded that they had not. HUD OIG also asked each interviewee if they ever had any communication or contact with a member of the media about the ZTP Review; all responded that they had not, with the exception of three senior officials who were authorized to speak to the media and denied disclosing any nonpublic information at issue in this investigation.[59]

DOJ OIG officials told HUD OIG during interviews that, as a general matter, the only DOJ OIG personnel authorized to speak to the media were Front Office personnel, which included [redacted] (Assistant Director, Office of Communications/Spokesperson) and DOJ OIG Senior Counsel John Lavinsky. Inspector General Horowitz told HUD OIG investigators that no member of the ZTP Review Team outside of the Front Office had his permission to speak with the media about the matter.

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necessary in the performance of the functions assigned by [the Act]." 5 U.S.C. app. 3 §6(a)(4). The Inspector General Act solely authorizes subpoena duces tecum, or documentary requests.

[58] Inspector General Horowitz and other senior Front Office officials were interviewed, in addition to members of the ZTP Review Team.

[59] Inspector General Horowitz told HUD OIG that he may have fielded questions from reporters about the review's timeline but stated the conversations did not involve the review's substance. [redacted] Assistant Director of Communications, acknowledged that she did speak with the media about this review, but stated her communications were limited to her job duties and that she did not disclose any substantive matters within the review. John Lavinsky, DOJ OIG Senior Counsel and official media spokesperson, acknowledged some contacts with media members, within the scope of his duties, mentioning the existence of the ZTP Review, but represented to HUD OIG that he did not disclose any case-specific information. None of the media members with whom he apparently spoke authored the articles at issue in this matter.

During interviews with the OIG, several witnesses opined that [redacted] may have been a source of the media disclosures, and cited [redacted] statements and behavior as the basis for those beliefs. For example, Miles cited the timing of [redacted] resignation from DOJ OIG, certain text messages and other interactions with [redacted] (discussed in greater detail in sections 3B and 3C below) and the specifics found in the media articles about the ZTP Review as the basis for his belief that [redacted] was responsible for the media leaks. DOJ OIG General Counsel Jonathan Malis cited a conversation he had with [redacted] after an internal meeting about the investigation into the potential unauthorized disclosures during which [redacted] told him he had retained an attorney in connection with his work on the review. Malis, [redacted] also said his suspicions were heightened by the way [redacted] abruptly resigned from DOJ OIG soon after receiving the questionnaire.

[redacted] attributed her belief about [redacted] to the fact that one of the ZTP-related media articles discussed [redacted] and expressed viewpoints shared by [redacted] namely that [redacted]. [redacted] also said during her interview that [redacted] had included these viewpoints in a draft of the ZTP report, and that they had been removed during the editing process.

[redacted] said that her opinion about [redacted] came after a "process of elimination," noting that [redacted] was "deeply passionate" about the ZTP Review, disturbed by the events underlying the review, and frustrated with the manner in which the DOJ OIG Front Office was responding to the draft report.

[redacted][60]

On July 23, 2021, [redacted] declined, via his attorney, HUD OIG's request for a voluntary interview.

In April 2022, consistent with its standard practice with respect to subjects who decline to be interviewed in connection with an investigation into their alleged misconduct, DOJ OIG provided [redacted] and his attorney an opportunity to review a draft investigative summary, but not the report itself. Following this review, [redacted] via his attorney, again declined an opportunity to be interviewed in this matter. In an April 12, 2022 written response from his attorney concerning the draft summary, [redacted] reiterated his earlier representation to DOJ OIG that he "did not give any documents to the media, and [had] no knowledge of whether any OIG employees did," and stated that the assertion "that documents, including the draft DOJ OIG report, obtained by [the] media came from [redacted] was "categorically false." In the same statement from his attorney, [redacted] also "denie[d] in the strongest possible terms disclosing sensitive, non-public information on 'numerous and lengthy' or any other type of phone calls with members of the media." In response to a HUD OIG email to [redacted] attorney which noted, among other things, that the April 12 response did not disclaim a role for [redacted] in the indirect disclosure of

[60] [redacted]

documents or information to the media, [redacted] attorney reiterated in an e-mail to HUD OIG on April 19 that "[h]is response is a categorical denial of the allegations in that [draft investigative] summary."

[redacted] written responses are addressed in further detail in Chapters 5 and 6 of this report.

B. Analysis of [redacted] Phone Records

HUD OIG conducted a review of [redacted] personal phone records for evidence of communications with members of the media.[61] The evidence shows that, between September 14, 2018, and December 14, 2020, [redacted] participated in 347 phone calls,[62] with a collective duration of approximately 13 hours and 49 minutes, with numbers associated with *NBC News*, *The Guardian*, and *The New York Times*.[63] This includes 127 phone calls totaling approximately six hours in length with phone numbers identified as belonging to reporter Stephanie Kirchgaessner of *The Guardian*, and 126 phone calls totaling approximately 6 hours and 20 minutes in length with a phone number identified as belonging to *The Guardian* generally.[64]

The following sections present an analysis of [redacted] contacts with these journalists against the timeline of ZTP-related articles each of them authored. For each of the articles, we also present evidence that [redacted] was privy to the specific non-public information or documents referred to in those articles.

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[61] [redacted] document was identified by [redacted] as an important document and circulated to the rest of the ZTP Review Team, including [redacted] on December 13, 2018, and, as discussed later in Chapter 3, was among those sent by [redacted] to DOJ Deputy Inspector General William Blier in an e-mail later that day. [redacted]

[62] This figure includes a significant percentage of phone calls that were recorded as zero seconds in length or lasting only a few seconds.

[63] This figure includes nine calls, totaling approximately 25 minutes, with Jacob Soboroff between July 19 and July 27, 2020. Soboroff authored a ZTP-related article for *The Daily Beast* on August 2, 2020 and co-authored *NBC News* articles in August and October 2020 with Ainsley.

[64] The conclusion that certain phone numbers belonged to media outlets or their representatives is based on an analysis conducted by the DOJ OIG Cyber Investigations Office. According to documentation provided to HUD OIG, DOJ OIG employed a combination of open-source methods and law enforcement tools to ascertain this information. Specifically, DOJ OIG used open-source searching to identify possible reporter numbers appearing in [redacted] phone records, and then used law enforcement tools to identify numbers further. Finally, DOJ OIG issued an administrative subpoena to a telecommunications company for subscriber information to confirm that one specific telephone number belonged to *The Guardian*. This was the only instance in which DOJ OIG used a subpoena to identify a number as belonging to a news agency, and DOJ OIG asked for basic subscriber information (names, addresses, and length of service only), and not the contents of communications.

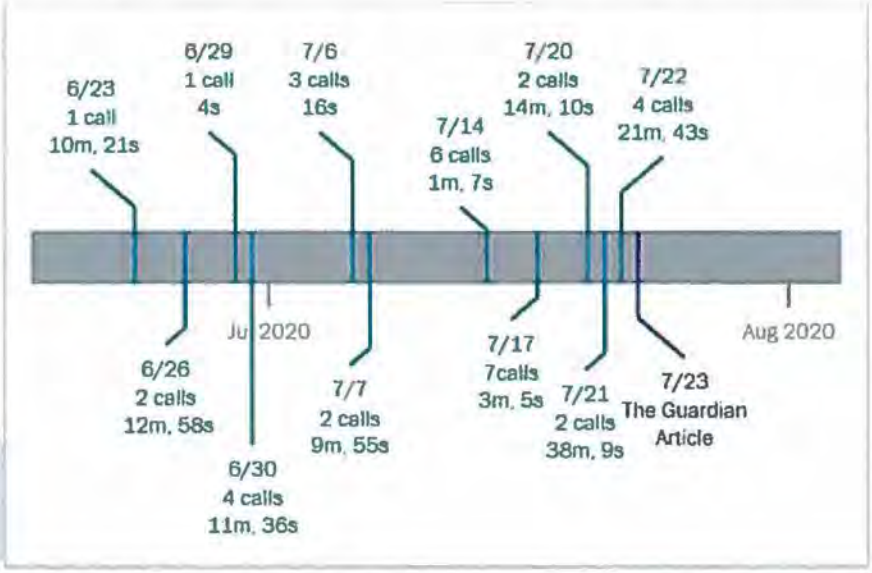
"Revealed: Rod Rosenstein Advised There was No Age Limit on Child Separations." written by Stephanie Kirchgaessner and published by *The Guardian* on July 23, 2020

On July 23, 2020, Stephanie Kirchgaessner published an article in *The Guardian* reporting that then Deputy Attorney General Rod Rosenstein had advised U.S. Attorneys during a conference call in May 2018 that there would be no blanket ban on prosecuting migrant parents who had children under the age of five, resulting in no child being too young to be separated from their parents under the ZTP.[65] According to the article, Rosenstein also instructed U.S. Attorneys that they could decline to prosecute matters, on a case-by-case basis, involving people who were unable to communicate in Spanish or English, or whose children had intellectual disabilities.[66] The article noted that details about the May 2018 call "have been shared with the Inspector General's office of the DoJ, which is conducting a review of the 'planning and implementation' of the zero-tolerance policy by the department."[67] Kirchgaessner attributed information regarding this conference call to "sources familiar with the matter."[68]

As depicted in the below graphic, a review of [redacted] personal phone records showed that in the month prior to the publication of the July 23, 2020 article, [redacted] participated in 34 phone calls totaling approximately two hours with a phone number identified as belonging to *The Guardian*. In the three days prior to the report's publication, [redacted] participated in eight calls with the number, totaling just over 70 minutes.

[65] *See* July 23 *The Guardian* Article.
[66] *See id.*
[67] *Id.*
[68] *Id.*

Graphic 1: [redacted] Telephone Contacts with *The Guardian* prior to July 23, 2020 Article



A review of [redacted] DOJ OIG e-mail account indicates that he was aware of the notes from the May 2018 meeting discussed in the article, as they were collected during the ZTP Review. Specifically, in an e-mail [redacted] sent to [redacted] on February 4, 2019, [redacted] referred to the handwritten notes of a U.S. Attorney collected as part of the investigation, including a direct quote from Rosenstein:

> "If referred then prosecute. The AG clear – prosecute parents if DHS decides to separate families." Use your prosecutorial discretion given illness and language issues.

Finally, a draft version of the ZTP report that was returned by the DOJ OIG Front Office to the ZTP Review Team on August 1, 2020, included a discussion of the May 2018 meeting where Rosenstein had purportedly made the above comments.

"Trump Cabinet Officials Voted in 2018 White House Meeting to Separate Migrant Children, Says Officials," written by Julia Ainsley and Jacob Soboroff and published by *NBC News* on August 20, 2020

On August 20, 2020, Ainsley and Jacob Soboroff authored an article for *NBC News* that provided inside information about a May 2018 ZTP-related meeting among senior presidential advisors in the White House Situation Room.[69] According to the article, the authors learned details of the meeting from "two officials who were there," and also obtained, from an unspecified source, an invitation list of those expected to be in attendance at the meeting, including Secretary of State

[69] *See* Aug. 20 *NBC News* article.

Mike Pompeo, Attorney General Jeff Sessions, HHS Secretary Alex Azar, and DHS Secretary Kirstjen Nielsen.[70]

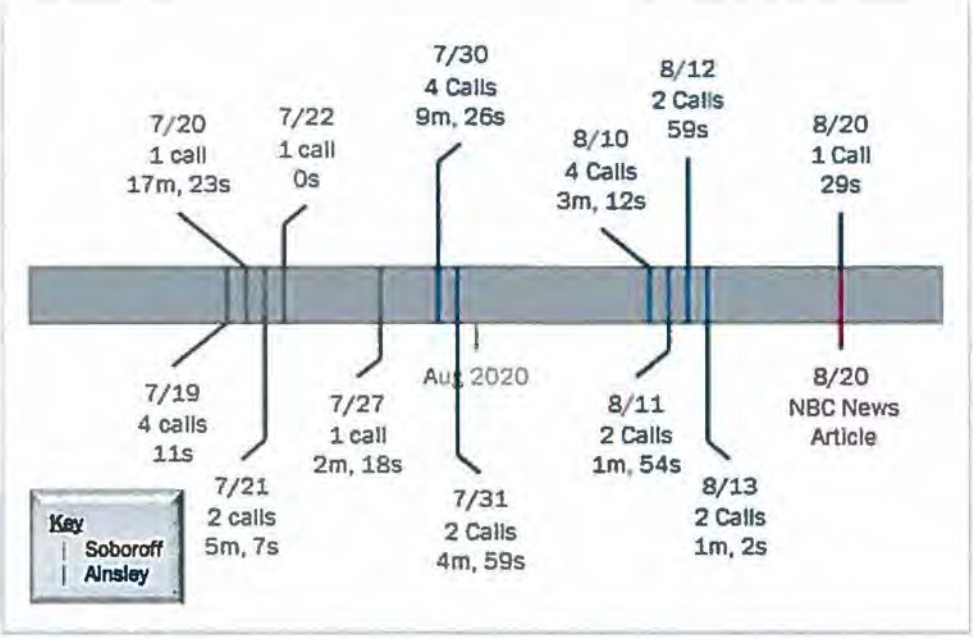
Additionally, the *NBC News* article stated that it had obtained a May 4, 2018 e-mail written by Gary Tomasulo, who was then a Senior Director on the National Security Council.[71] According to the article, Tomasulo wrote the e-mail informing subordinates that their supervisors had agreed to the new zero-tolerance prosecution and separation policy, and that they needed to develop plans to support it.[72]

The article directly quoted the Tomasulo e-mail, reporting that he told the recipients "that their bosses 'acknowledged that there are no easy solutions, but remained committed to collectively do everything possible to develop innovative solutions that leverage the full resources, capabilities, and authorities of the U.S. government.'"[73] In the e-mail, Tomasulo also reportedly said that "I ask that if you are unable to participate in these meetings, the message of commitment and resolve expressed by our principals is communicated and internalized by those that represent your departments and agencies."[74]

As depicted in the below graphic, a review of [redacted] personal phone records showed that, between July 19, 2020 and July 27, 2020, he participated in nine telephone calls with Jacob Soboroff,[75] one of the article's authors, totaling approximately 25 minutes. Moreover, between July 30, 2020, and the August 20, 2020 publication date, [redacted] participated in 17 calls with Ainsley, the article's other author, totaling about 22 minutes.

[70] *Id.*
[71] *See id.*
[72] *See id.*
[73] *Id.*
[74] *Id.*
[75] In instances where a telephone number was associated with a specific reporter, HUD OIG is assuming for the purposes of this report that the conversation was with that individual.

Graphic 2: [redacted] Contacts with Ainsley and Soboroff prior to August 20, 2020 *NBC News* Article



Additionally, e-mails showed that [redacted] had access to an agenda for the May 2018 meeting that was the subject of the *NBC News* article, including a list of invitees, as well as the Tomasulo e-mail referred to and directly quoted in the news report.

Specifically, an April 28, 2020 e-mail from [redacted] to another colleague working on the ZTP Review, [redacted] included as an attachment an e-mail invitation to the May 3, 2018 meeting at the White House. The forwarded invitation included an agenda for the meeting, which was entitled "Immigration Principals Discussion," and included an invitee list that included Pompeo, Sessions, Nielsen, Azar, and other officials also named in the *NBC News* article: Senior Adviser Stephen Miller; Undersecretary of Defense John Rood; White House Chief of Staff John Kelly; Deputy White House Chief of Staff Chris Liddell; White House Counsel Don McGahn; and Director of Legislative Affairs Marc Short.

[redacted] sent a separate e-mail to [redacted] on February 13, 2020, that included an attachment containing several e-mails. One of those e-mails was a message sent by Tomasulo to approximately 10 recipients which began by stating that he "wanted to follow-up on yesterday's Principals Discussion on Immigration." Tomasulo also said in the e-mail that border security and immigration enforcement "are the President's top domestic priority" and that "it is imperative that there be no disconnect between our leadership and their hardworking staff." The Tomasulo e-mail also contained the two direct quotes that were included in the August 20, 2020 *NBC News* article.

written by and published by

On authored an article in reporting that [76] The article further claimed that was apparently involved .[77] The article featured , and noted that had seen about the incident.[78] This article further reported that [79]

Among the documents cited in the article was [80]

According to the article, [81]

reported [82] reported [83]

Separately, article also reported that [84]

As depicted in the graphic below, a review of personal phone records showed that between July 26, 2020 and September 1, 2020, participated in 56 calls totaling just under four hours with a telephone number identified as belonging to . This included 13 calls totaling about 53 minutes that occurred between August 26, 2020 and September 1, 2020, before the article publication date.

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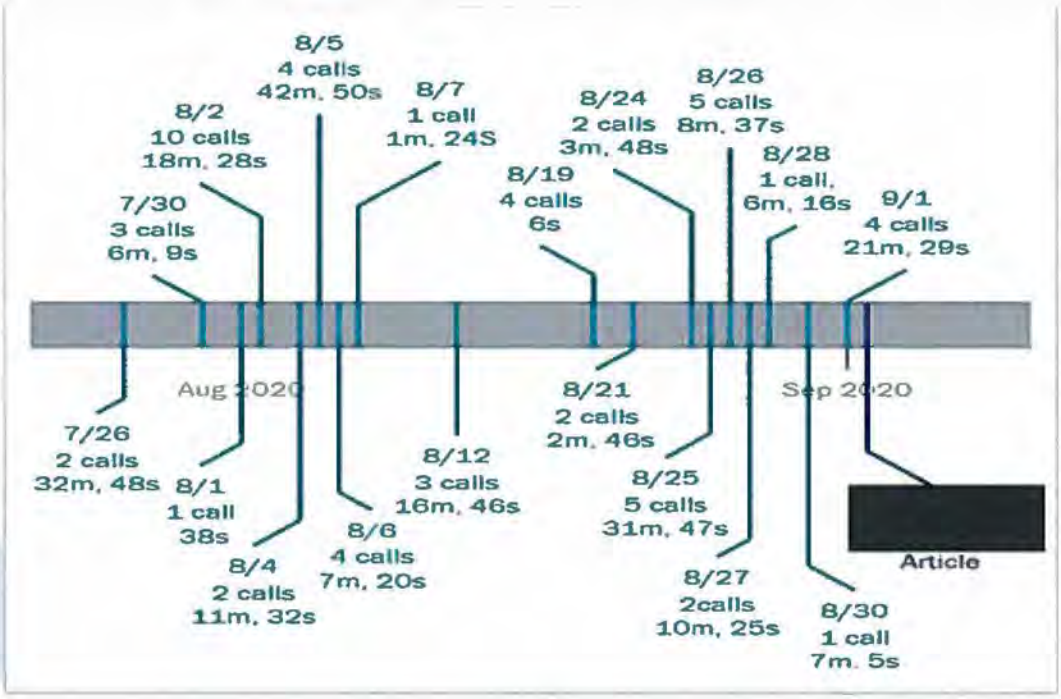
[76] *See* article.
[77] *See id.*
[78] *Id.*
[79] *Id.*
[80] *See id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*

Graphic 3: [redacted] Telephone Contacts with [redacted] before [redacted] Article



Additionally, the evidence shows that [redacted] had been working on the contents of this article since at least May 2020, and that she and [redacted] communicated extensively around the times she sought comments from [redacted] and DOJ Public Affairs. For example, on May 20, 2020, [redacted] sent an e-mail to [redacted] requesting a comment regarding ZTP. [redacted] and [redacted] spoke later that day for approximately 38 minutes. On May 28, 2020, [redacted] sent an e-mail to DOJ Public Affairs requesting a comment regarding her work on a story touching on [redacted]. Earlier that day, [redacted] and [redacted] had seven telephone calls totaling over seven minutes, and there were also two calls from the general [redacted] telephone number to [redacted] that appear to have gone unanswered.

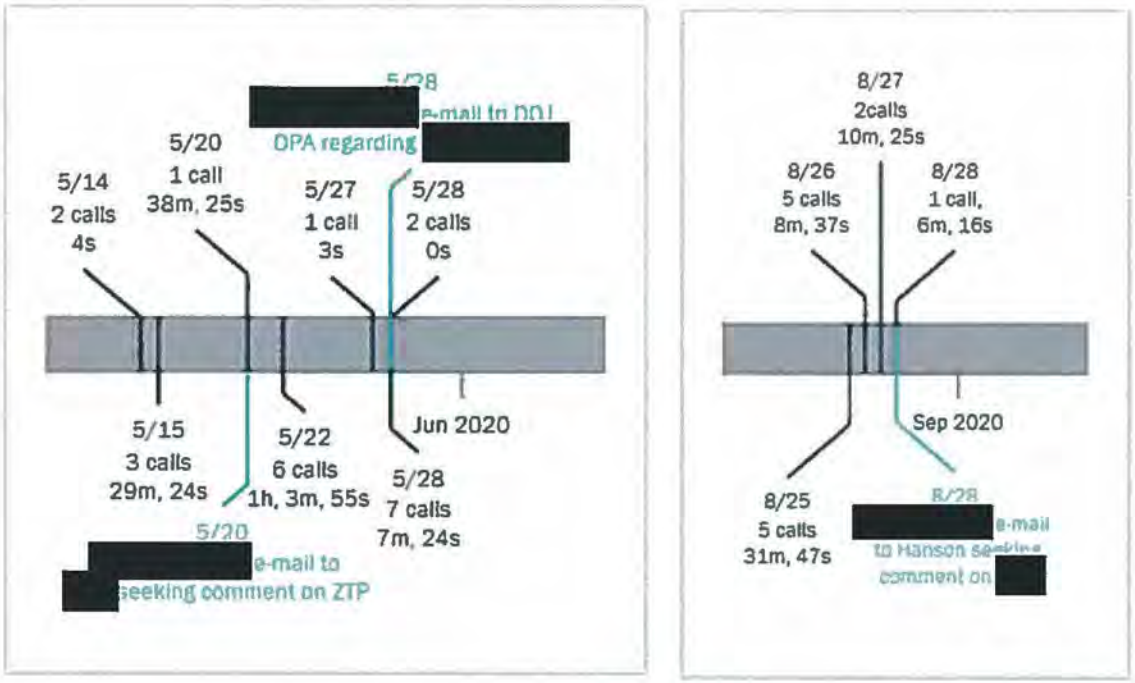
On August 28, 2020, [redacted] sent an email to Alan Hanson, Director of the DOJ Appropriations Liaison Office, who had previously served as the Acting Assistant Attorney General at the DOJ Office of Justice Programs (OJP), seeking comment on her upcoming story. In the e-mail, [redacted] asked Hanson [redacted][85]

[85] In an interview with HUD OIG, Hanson stated that the questions posed by [redacted] in this e-mail were similar to those that [redacted] and another DOJ OIG personnel member had posed to him during a ZTP-related interview about two and a half months earlier. Hanson stated that he did not respond to this e-mail or otherwise have any communications with [redacted].

Minutes before [redacted] sent this e-mail, phone records reflect a six-minute call between [redacted] and a phone number associated with [redacted].

[redacted] communications with [redacted] around the times she sought comments from [redacted] DOJ Public Affairs, and Alan Hanson are depicted in the below graphic:

Graphic 4: [redacted] May 2020 and late August 2020 Telephone Calls with [redacted]



In addition to the evidence of his phone calls with [redacted], a review of [redacted] e-mails showed that, as a member of the DOJ OIG ZTP Review Team, he was aware of and showed an interest in documents referred to in the [redacted] news article. Specifically, [redacted] sent an e-mail to colleagues on August 1, 2019 in which he forwarded an earlier e-mail where he had written to [redacted] "I may be late to this issue, but [redacted] See red texts in the documents attached." In the earlier e-mail, [redacted] had further written:

> Most relevantly, the email [redacted] Compare that to the letter [redacted]

This juxtaposition should be a text box in the final report. Tagged both relevant emails as hot docs.

One of the documents in the attachment is [redacted] The quote in [redacted] article about [redacted] was among excerpts bolded in red-colored font in the attachment found in [redacted] e-mail.

The attachment to [redacted] e-mail also contained [redacted] Finally, the attachment also includes [redacted]

A DOJ OIG analysis of [redacted] Relativity[86] access logs and work computer indicates that on August 23, 2020, he downloaded a document containing [redacted].

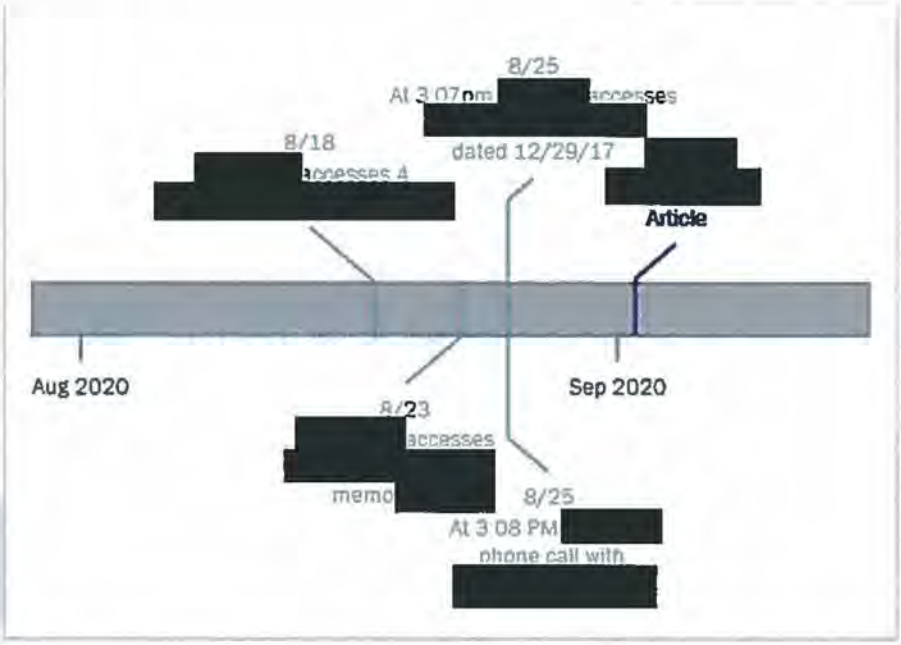
Moreover, the evidence shows that [redacted] accessed four [redacted] dated December 20, 2017; December 29, 2017; January 5, 2018; and one undated entry, for [redacted] for December 29, 2017, suggests that [redacted], as reported by [redacted]. The DOJ OIG analysis shows that he accessed these four [redacted] between 12:44 p.m. and 1:15 p.m. on August 18, 2020, [redacted] prior to the [redacted] publication of [redacted] article.

Finally, an analysis of [redacted] computer indicates that he accessed one of those documents at the same time as his participation in a phone call with [redacted] telephone number. According to the DOJ OIG analysis, [redacted] computer accessed the [redacted] dated December 29, 2017, at 3:07:53 p.m. on August 25, 2020. A review of [redacted] personal phone records indicated that at 3:08 p.m. on August 25, 2020, he participated in a call with [redacted] telephone number that lasted approximately 13 minutes.

[redacted] access of the foregoing documents is depicted in the below graphic:

[86] Relativity is an electronic document review platform that DOJ OIG utilizes to review electronically stored information obtained during investigations and reviews, including the ZTP Review.

Graphic 5: [redacted] August 2020 Access of Documents prior to [redacted] Article in [redacted]



An analysis of [redacted] text messages, as well as testimony from DOJ OIG colleagues, shows [redacted] strong interest in the information that was published in [redacted] article, his efforts to have it included in the DOJ OIG ZTP report, and his frustration with its removal during the editing process by Inspector General Horowitz. The evidence also shows that [redacted] communicated extensively with [redacted] contemporaneous to these expressed viewpoints.

On May 22, 2020, [redacted] sent a text message to ZTP Review Team member Adam Miles discussing [redacted] further stated, "We have an email with an OJP official that I presume is [redacted] asking what happened and she says they should talk by phone. A quick interview with that guy to see if he remembers what she told him about [redacted] would be fascinating." Later that day, [redacted] had six calls with [redacted] that totaled approximately one hour and four minutes.

In July 14, 2020 text messages with Miles, [redacted] stated that Inspector General Horowitz's edits, including removing the section on [redacted], "seem[ed] unsat[isfactory]," and that he would recommend to "fight … hard" on "the erasure of so much of the detail from times when info should have/did go up to DOJ HQ regarding El Paso. Eg, . . [redacted] . . " because to [redacted] "that is the real problem." [redacted] exchanged six calls with [redacted] that day totaling roughly one minute, and numerous additional calls through July 22, 2020, that totaled one hour and 17 minutes.

On July 25, 2020, [redacted] again commented to Miles on Inspector General Horowitz's editing of the report, stating that it "goes wrong [with] the loss of detail and demonstrative connections with OAG/ODAG from WDTX [Western District of Texas]" and that he wanted to "maintain the

details/accuracy of El Paso." Further, in response to a message from Miles that the DOJ OIG ZTP report could not compromise on the details of the El Paso initiative, including the [redacted] discussion, [redacted] concurred and added that this was the "bare minimum." [redacted] spoke with [redacted] for nearly 33 minutes on the next day, July 26, 2020.

On August 2, 2020, [redacted] opined to Miles that Inspector General Horowitz "need[ed] to revisit the cuts from El Paso [redacted] to show the info getting up to HQ," and that [redacted] That same day, [redacted] participated in 10 calls with [redacted] totaling over 18 minutes, and he continued to speak with [redacted] over the next several days, in discussions totaling over one hour.

As discussed in Section II A, [redacted] attributed her belief that [redacted] may have disclosed nonpublic information about the ZTP Review to the fact that one of the articles discussed [redacted] According to [redacted] the viewpoints expressed in the article, based on what appeared to be leaked information, were ones that [redacted] had also expressed. [redacted] also said during her interview that [redacted] had included these viewpoints in a draft of the ZTP report, but that they were subsequently removed during the editing process.

> "'We Need To Take Away Children,' No Matter How Young, Justice Dept. Officials Said," written by Michael D. Shear, Katie Benner, and Michael S. Schmidt and published by *The New York Times* on October 6, 2020

On October 6, 2020, a *New York Times* article by Michael D. Shear, Katie Benner, and Michael S. Schmidt detailed the draft findings of the ZTP Review.[87] According to the article, the information contained therein was "based on a review of the 86-page draft report and interviews with three government officials who read it in recent months and described its conclusions and many of the details in it," and added that the officials spoke with *The New York Times* "on the condition of anonymity because they had not been authorized to discuss [the report] publicly."[88] The article also noted that, "[b]efore publishing the findings of its investigations, [DOJ OIG] typically provides draft copies to Justice Department leaders and others mentioned in the reports to ensure that they are accurate."[89] As discussed in Section II, DOJ OIG transmitted a draft version of the report to DOJ for comment on August 26, 2020.

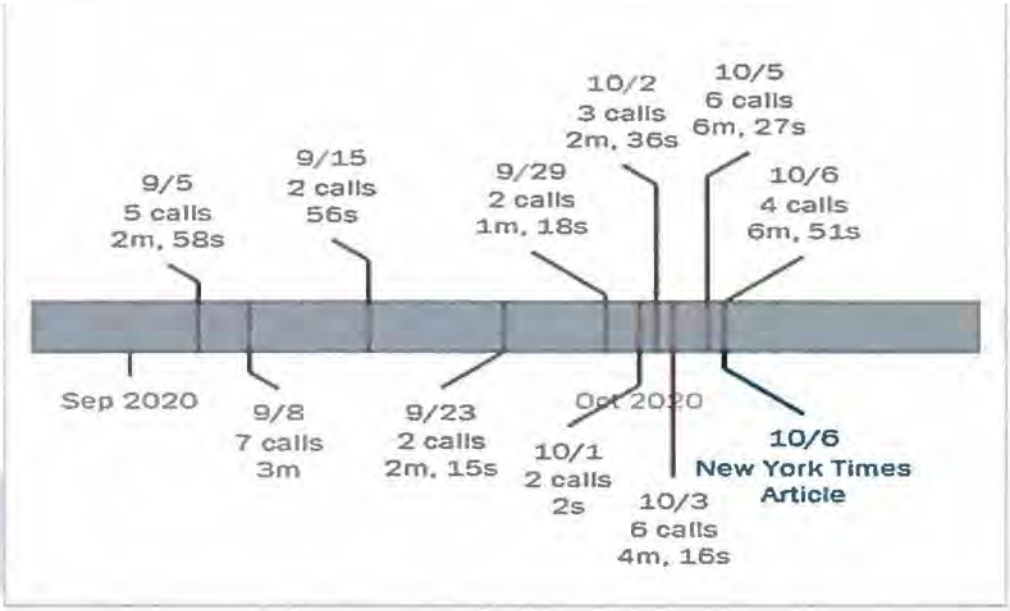
In addition to citing the number of pages in the draft report, the news article also reported other specific information about the ZTP Review, noting that the DOJ OIG had conducted interviews with more than 45 key officials and that two responses to the draft, from Counselor to the Attorney General Gene Hamilton and from the Office of the Deputy Attorney General (ODAG), comprised 32 pages and 64 pages, respectively.[90] The article contained several direct quotes from the draft report, including one that stated that DOJ officials were a "driving force" behind the policy and that "[t]he department's single-minded focus on increasing prosecutions came at the expense of careful and effective implementation of the policy, especially with regard to prosecutions of family-unit adults and the resulting child separations." The article also quoted from the draft

[87] *See New York Times* article.
[88] *Id.*
[89] *Id.*
[90] *See id.*

report's conclusion, noting that the DOJ OIG found that senior DOJ officials "were aware that full implementation of the zero-tolerance policy would result in criminal referrals by D.H.S. of adults who enter the country illegally with children and that the prosecution of these family-unit adults would result in children being separated from families."[91]

As detailed in the graphic below, a review of [redacted] personal phone records showed that, in the month prior to the October 6, 2020 publication of *The New York Times* article, [redacted] participated in approximately 39 telephone calls totaling 30 minutes and 39 seconds with Shear, one of the article's authors.

Graphic 6: [redacted] contacts with Michael Shear in month prior to October 6, 2020 *New York Times* article



Of these calls, 21 of them, totaling approximately 20 minutes, occurred during the week prior to the article's publication, including four calls totaling almost seven minutes on October 6, 2020, the day of publication.

Moreover, the evidence shows that [redacted] received the comments from ODAG and from Hamilton on September 28, 2020, and October 1, 2020, respectively. Both of these responses were referenced in the *New York Times* article, and, as noted above, [redacted] engaged in multiple telephone calls with Shear around this time. For example, after receiving the ODAG comments at 9:54 p.m. on September 28, [redacted] exchanged text messages with Miles about the response throughout the night. At midnight on September 29, [redacted] wrote "My overall thought: I came to do battle tonight, and found out the job is to help pick up bodies" and then concluded the exchange at 12:29 a.m. by stating the following: "One big tension of these comments: 1) odag

[91] *Id.*

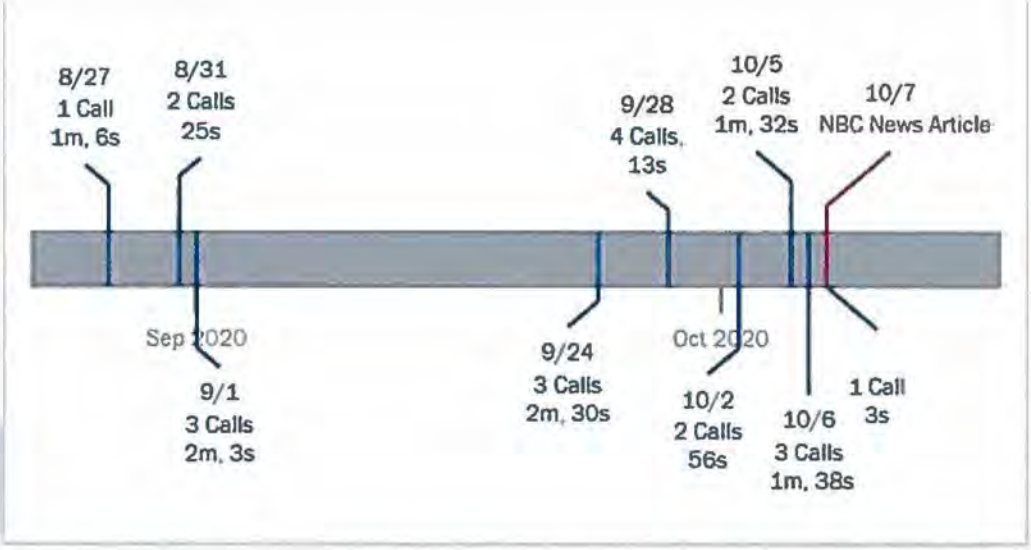
knows nothing and was not involved; 2) [redacted] because many other odag people were involved[.]" [redacted] called Shear at 9:05 a.m. that morning.

> "Justice Officials Drove Family Separation Policy, Draft Watchdog Report Says." written by Julia Ainsley, Jacob Soboroff and Phil Helsel and published by *NBC News* on October 7, 2020

Early in the morning of October 7, 2020, Ainsley, Soboroff, and Phil Helsel authored an article in *NBC News* analyzing the contents of the draft ZTP Review report.[92] After noting that *The New York Times* had earlier reported on the issue, the article stated that "NBC News ha[d] reviewed the draft report, which has not been publicly released, and confirmed details in the Times story."[93]

As depicted in the below graphic, a review of [redacted] personal phone records showed that, between August 27, 2020 and October 7, 2020, he participated in a total of 21 phone calls totaling approximately ten and a half minutes with Ainsley.

Graphic 7: [redacted] Telephone Contacts with Julia Ainsley prior to October 7, 2020 *NBC News* Article



The evidence shows that on Thursday, August 27, 2020, [redacted] requested that Miles print a copy of the draft ZTP report that [redacted] purported to want for proofreading purposes.[94] Miles printed the report and provided it to [redacted] on Tuesday, September 1, 2020.

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[92] *See* Oct. 7 *NBC News* article.

[93] *Id.*

[94] At the time, DOJ OIG was in a maximum telework posture due to the pandemic. According to DOJ OIG, [redacted] had requested, but not yet received, a DOJ OIG-issued printer that was required to be able to print work-related documents at home.

[redacted] and Miles communicated by text message using their DOJ OIG-issued mobile phones. The relevant texts exchanged between [redacted] and Miles are listed below:

- [redacted] text to Miles on August 27, 2020 at 11:20 a.m.:

  "Any chance I could ask you to print a copy of the PDF version that I pick up from you, so I can read it on paper? Already identified a glaring typo by reading on my phone"

Miles then responded to [redacted] and indicated that he would probably not be at the DOJ OIG office until Monday, August 31. Following other messages exchanged on Thursday, August 27, the text message thread between [redacted] and Miles resumed as follows on Monday, August 31, 2020:

- [redacted] text to Miles on August 31, 2020 at 8:35 a.m.:

  "You still in the office today?"

- Miles text to [redacted] on August 31, 2020 at 8:36 a.m.:

  "No not going in"

A review of [redacted] phone records shows that [redacted] called Ainsley 13 minutes later at 8:49 a.m., and that the call appears to have gone unanswered. At 8:51 a.m., Ainsley returned [redacted] call, in a call that lasted 25 seconds.

- [redacted] text to Miles on August 31, 2020 at 8:57 a.m.:

  "Copy. If/when you do, still hoping to employ your printing skills, if you're willing. No urgency, just have to coordinate the trip downtown with my wife. Happy Monday"

The below is a selection of messages exchanged between [redacted] and Miles on Tuesday, September 1, 2020.

- Miles text to [redacted] on September 1, 2020 at 9:00 a.m.:

  "Going in today actually"

  "Will print for you."

- [redacted] text to Miles on September 1, 2020 at 9:01 a.m.:

  "You rock. I'm actually on our family morning coffee run. I could be there in 45-60 mins … Or I could do this afternoon"

- Miles text to [redacted] on September 1, 2020 at 9:12 a.m.:

  "Which version do you want"

- [redacted] text to Miles on September 1, 2020 at 9:15 a.m.:

  "Just hoping for the final version, the one we sent to DOJ. So I can do a read on paper. No endnotes"

- Miles text to [redacted] on September 1, 2020 at 9:22 a.m.:

  "Will do"

- [redacted] text to Miles on September 1, 2020 at 9:36 a.m.:

  "Thanks much. Sorry to ask you to be a copy boy. But you're a great one!"

[redacted] first call to Ainsley that day was at 9:38 a.m., immediately following his text exchange with Miles confirming that [redacted] would obtain a copy of the draft report that day. At 3:32 p.m. on September 1, 2020, [redacted] sent an e-mail to Miles thanking him "for the print out." [redacted] exchanged three calls that day with Ainsley, totaling just over two minutes.

During his interview with HUD OIG, Miles confirmed that he printed out and delivered the draft report to [redacted] Miles said that he did not think anything of [redacted] requests at the time because, due to the pandemic, he was one of the only people regularly going into the office at that time and that [redacted] said he preferred a paper version of the draft for review. However, Miles said that, given the timing of [redacted] departure from DOJ and news articles about the draft report, he was concerned that the hard copy draft report may have been disseminated to the media.

C. [redacted] Expressed Frustrations and Potential Motivation for Unauthorized Disclosures

The evidence shows that [redacted] repeatedly exhibited to his DOJ OIG colleagues frustration and discontent with the pace and timeline of DOJ OIG's ZTP Review, the resources devoted to it, and substantive decisions regarding the review. [redacted] also referenced the need for facts uncovered during DOJ OIG's ZTP Review to be publicly known in order to inform pending litigation relating to ZTP. Moreover, he communicated strong personal feelings about ZTP and about the perceived involvement of certain individuals at DOJ.

[redacted] sentiments are reflected in text messages he sent to Miles on his government-issued mobile phone in July and August 2020, at the same time of his phone calls to media outlets.

On July 14, 2020, [redacted] wrote to Miles and stated, "Evidence/Testimony may be embarrassing to individuals or the system; it may even hurt reputation, but that is not the test for us leaving it out." On that same day, [redacted] called the *The Guardian* five times at 7:16 a.m., 7:55 a.m., 8:05

a.m., 8:13 a.m., and 8:42 a.m., before *The Guardian* returned his call at 8:42 a.m.; phone records indicate that the latter call was for one minute.

On August 1, 2020, [redacted] wrote to Miles expressing frustration with the ZTP Review's pace, stating "There is real litigation and people hurting that deserve to know the facts[.]" He further stated, "DHS and hhs oigs have had the guts to put out info, yet we just sit here. It's embarrassing." [redacted] followed up with messages adding "Especially since the DOJ story is the one that has been hidden/misrepresented," "What are IGs for?!," and "I waited patiently all through the AL primary, because that is the principled decision and Ivan [sic] respect that, but I can't just accept this unquestioningly on Aug 1."

Later that same morning, [redacted] wrote to Miles:

> [b]ut at some point, one of these team members is likely gonna come to you as the [whistleblower] coordinator, I have little doubt. This report gives a reasonable belief that unlawful decisions have been made/actions have been taken within DOJ. That is my belief and analysis as an attorney. I'm kind of amazed the two departed analysts haven't blown things up - there are some (justified) strong beliefs in the team. FWIW. I try to hold things together, but man, it's tough.

Later, on the afternoon of August 1, [redacted] wrote to Miles stating that DOJ leadership decisions regarding the ZTP were "at the level of the DOJ signing off on torture in 2002."

That evening, [redacted] wrote to Miles:

> The other thing I'd emphasize is that we need to get this to the Dept ASAP and the remaining two(!) E&I team members need to be pulled from whatever nonsense they are doing, consulted on edits, and then focused 100% on finishing the source checking, etc. If you could get him to suggest something similar to [redacted], I'd be personally grateful.

Also on the evening of August 1, 2020, [redacted] wrote to Miles via text and stated, "If this had been at O&R review with ten attorneys, we would have turned over OAG/ODAG and possibly had several 1001[95] referrals started." Earlier that same day, [redacted] referenced ongoing litigation by the American Civil Liberties Union (ACLU) related to the family separation. In a text message to Miles, he wrote "[T]he ACLU, et al. is before judges in litigation currently trying to reunite kids and has to prove US government causality to get the judges to order reunification measures and here we are sitting on it for months. It seems wrong to me[.]"

On August 2, 2020, the day after the above exchanges, [redacted] phone records reflect 10 calls totaling approximately 18 minutes and thirty seconds with [redacted].

As discussed in Section II A, [redacted] said that [redacted] was "deeply passionate" about the ZTP report, disturbed by the events underlying the review, and frustrated with the manner in which the DOJ OIG Front Office was responding to the draft report.

[95] 18 U.S.C. § 1001 is the general federal false statements statute.

With respect to [redacted] apparent references to false statements or other misconduct on the part of DOJ officials involved in the implementation of the zero tolerance policy, Miles told HUD OIG that he and [redacted] briefly discussed some of [redacted] concerns, but that [redacted] never made assertions to him that were more specific than those found in the text messages. Miles further stated that his own assessment of [redacted] concerns was that they were not reasonable or credible enough to have warranted further attention.

HUD OIG also became aware that, on December 13 and December 15, 2018, [redacted] sent e-mails to Deputy Inspector General William Blier stating that he believed certain documents the ZTP Review Team had discovered potentially called into question the truthfulness of representations made to Congress and/or other unspecified "testimony" by DOJ officials about the agency's role in the development of ZTP.[96] The e-mails and attached documents did not identify any particular misrepresentations to Congress or other potentially false testimony offered by DOJ officials. Blier told HUD OIG that he had not recalled the e-mails from [redacted] until they were presented to him, but that his own subsequent assessment of [redacted] concerns was that they lacked specificity and contained insufficient information to evaluate. Although he responded to one of [redacted] e-mails by stating he would review his concerns, Blier did not recall any follow up conversations about the matter. Blier further stated that he did not recall having received similar concerns from anyone else on the ZTP Review Team, and did not recall any other instances in which concerns were raised about misconduct on the part of DOJ officials involved in the implementation of ZTP.

D. Phone Records of [redacted]

On January 29, 2021, DOJ OIG issued a subpoena for [redacted] personal phone records. A review of these records showed that, between May 3, 2018 and December 11, 2020, [redacted] and [redacted] made 363 calls to each other. The review did not reveal any evidence of phone contacts between [redacted] and members of the media.

Of note, [redacted] and [redacted] spoke in the time periods immediately surrounding the publication of the articles at issue in this report, even though [redacted]. For example, on both August 17 and August 19, 2020, just prior to the August 20, 2020 article by Ainsley and Soboroff for *NBC News*, [redacted] and [redacted] exchanged 12 phone calls. The longest of these calls was 12 minutes in length. On [redacted], several days before [redacted] article in [redacted] phone records show that [redacted] and [redacted] spoke two times for a total of roughly 18 minutes and 30 seconds.

On September 5, 2020, [redacted] and [redacted] appear to have spoken once for a total of nearly six minutes. Approximately 90 minutes later, a call took place between [redacted] and Shear at *The New York Times.*

On October 1 and October 4, 2020, several days before *The New York Times* and *NBC News* published their respective articles about the draft ZTP report, [redacted] and [redacted] spoke for approximately 16 minutes and 8 minutes, respectively.

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[96] In these emails, [redacted] also referenced potential misrepresentations to Congress made by personnel "elsewhere" and "testimony DHS may have offered."

On October 7 and October 8, 2020, just after the publication of the articles, [redacted] and [redacted] spoke to each other three times in calls that lasted approximately 23 minutes, 25 minutes, and 15 minutes each.

During both of her interviews in this matter, first on December 11, 2020, conducted by the DOJ OIG, and her second by HUD OIG on August 25, 2021, [redacted] denied having any communication or contact with the media about the ZTP Review or having knowledge of anyone else making such disclosures. During the latter interview, [redacted] specifically denied having any knowledge that [redacted] was communicating with the media and said that it never came up during her personal phone conversations with him or during any other time.

In response to the evidence of phone calls between herself and [redacted] during the time period at issue, [redacted] told HUD OIG in a statement via her attorney that she and [redacted] "had a friendly working relationship" during that time. [redacted] further stated that, as [redacted], she "remained in contact with the ZTP team, including [redacted]. In the same statement, [redacted] again denied "assist[ing] anyone in leaking any documents or information [about the ZTP Review] to the media or any other third parties," or any previous knowledge that [redacted] or anyone else had done so.

Chapter 4: Factual Analysis

HUD OIG concludes, based on a preponderance of the evidence, that [redacted] made unauthorized disclosures to members of the media by providing confidential, non-public information related to the ZTP Review. Although our investigation did not reveal direct evidence of specific disclosures or affirmatively rule out that other DOJ OIG or DOJ employees also made unauthorized disclosures, we find that the extensive circumstantial evidence of his numerous and lengthy contacts with reporters, access to the documents and information that were disclosed, as well as a motive for him to release the information supports a conclusion [redacted] made the unauthorized disclosures. HUD OIG also notes that [redacted] abruptly resigned from DOJ OIG in December 2020, without returning a questionnaire that would have required him to affirm that he was not the source of the media disclosures.

I. [redacted] Phone Contacts with Media Reporters

Our review of [redacted] personal mobile phone records revealed that between September 14, 2018 and December 14, 2020, [redacted] was involved in 347 phone calls, totaling over 13 hours, with numbers associated with journalists from three different media outlets that published ZTP-related articles during this time period. Although the contents of the phone calls cannot be ascertained, the volume and length of the phone calls, coupled with his activities contemporaneous to these phone calls (*e.g.*, text messages, computer usage), and the fact that [redacted] was not authorized by DOJ OIG to speak with the media, leads to the conclusion that [redacted] was providing ZTP Review-related information to the media. [redacted] contacts with reporters are summarized below:

Contacts Between [redacted] and Media Surrounding ZTP-related Articles					
Media Contact	**Media Outlet**	**Article Date**	**Article Title**	**Number of Calls[97]**	**Total Length of Calls**
Stephanie Kirchgaessner	*The Guardian*	7/23/2020	Revealed: Rod Rosenstein Advised There was No Age Limit on Child Separations	179	8h, 26m, 29s[98]
Julia Ainsley & Jacob Soboroff	*NBC News*	8/20/2020	Trump Cabinet Officials Voted in 2018 White House Meeting to Separate Migrant Children, Says Officials	26	47m
[redacted]				74	3h, 50m, 52s
Michael Shear	*New York Times*	10/6/2020	We Need to Take Away Children,' No Matter How Young, Justice Dept. Officials Said	39	30m, 39s
Julia Ainsley	*NBC News*	10/7/2020	Justice Officials Drove Family Separation Policy, Draft Watchdog Report Says	29	14m, 36s
			Totals:	**347**	**13h, 49m**

Because [redacted] declined requests for an interview, HUD OIG was not able to present evidence of these phone calls to him or otherwise obtain a response from him about the allegations beyond his attorney's written representations that [redacted] "did not give any documents to the media, and [had] no knowledge of whether any OIG employees did," and his attorney's denial, in an April 12, 2022 written response to this report's investigative summary, "in the strongest possible terms [that [redacted] disclos[ed] sensitive, non-public information on 'numerous and lengthy' or any other type of phone calls with members of the media." Further, in response to a HUD OIG email to [redacted] attorney which noted, among other things, that the April 12 response did not disclaim a role for [redacted] in the indirect disclosure of documents or information to the media, [redacted] attorney reiterated in an e-mail to HUD OIG on April 19 that "[h]is response is a categorical denial of the allegations in that [draft investigative] summary."

[97] The number and total length of calls was calculated based on the dates of communications with the reporter/media outlet the day of and prior to a given article but subsequent to the previous article listed. The number and total length of calls attributed to the [redacted] article in [redacted] and the October 7, 2020 *NBC News* article also include communications after the articles were published; the number of phone calls to Ainsley and Soboroff includes calls to Soboroff that predate the July 23, 2020 article in *The Guardian.*

[98] Phone records indicate that the last calls to a number associated specifically with Kirchgaessner took place on May 28, 2020, and that calls to a number associated generally with *The Guardian* began that same day. This figure includes calls with both those numbers.

In the April 12, 2022 written response, [redacted] attorney also made several general assertions about [redacted] relationships with members of the media that we address in Chapter 5.

II. Evidence that [redacted] Was Privy to Information Contained in the Media Reports

For all of the published articles at issue, the evidence shows that [redacted] was privy to the specific information and/or documents that were disclosed in the articles.

With respect to the July 23, 2020 article by Kirchgaessner of *The Guardian*, a review of [redacted] DOJ OIG e-mail account indicates that he had access to notes from a May 2018 meeting discussed in the article. Furthermore, a draft version of the ZTP report that was returned by the DOJ OIG Front Office to the ZTP Review Team on August 1, 2020, included a discussion of the meeting.

With respect to the August 20, 2020 *NBC News* article by Ainsley and Soboroff, e-mails showed that [redacted] had access to an agenda for a May 2018 meeting that was the subject of the article, a list of invitees, as well as an e-mail referred to in the news report.

With respect to the [redacted] article by [redacted] of [redacted], the evidence shows that [redacted] sent colleagues on the ZTP Review Team an e-mail on August 1, 2019, with an attachment comprising several documents referred to in [redacted] article. Additionally, a DOJ OIG analysis of [redacted] Relativity access logs and work computer indicated that he downloaded a document on August 23, 2020, containing a memorandum that was discussed in the article.

The evidence also shows that [redacted] accessed four [redacted] that contained information reported by [redacted]. The DOJ OIG analysis shows that he accessed these four [redacted] between 12:56 p.m. and 1:15 p.m. on August 18, 2020, abou[redacted] prior to the [redacted] publication of [redacted] article.

Notably, an analysis of [redacted] computer indicates that he also accessed one of those documents while on a phone call with [redacted]. According to the DOJ OIG analysis, [redacted] computer accessed the [redacted] dated December 29, 2017, at 3:07:53 p.m. on August 25, 2020. A review of [redacted] personal phone records indicated that at 3:08 p.m. on August 25, 2020, he concurrently participated in a call with a telephone number from [redacted] that lasted approximately 13 minutes.

With respect to the publication of articles by *The New York Times* and *NBC News* on October 6 and 7, 2020, both of which referenced an unreleased version of the draft ZTP report, the evidence shows that [redacted] requested a printed copy of the report from Miles on August 27, 2020, and ultimately obtained it on September 1, 2020. [redacted] exchanged three phone calls with Ainsley of *NBC News* on September 1, 2020, including one immediately after a text message exchange with Miles confirming that [redacted] would be obtaining a copy of the draft report that day. Moreover, on August 31, 2020, minutes after learning that he would not be obtaining a printed copy of the draft report that day, [redacted] had also called Ainsley.

The evidence also shows that on September 28, 2020, and October 1, 2020, [redacted] reviewed technical comments from the ODAG and from Gene Hamilton, both of which were referenced in the *New York Times* article. Notably, upon receiving the ODAG comments, [redacted] engaged in

a text message conversation with Miles where [redacted] expressed strong opinions about the ODAG comments the night of September 28, 2020 and into the early morning hours of September 29. [redacted] called Shear at 9:05 a.m. that morning.

III. Limitations on HUD OIG's Conclusions

HUD OIG notes that, while the scope of our investigation was limited to the conduct of DOJ OIG employees, the ZTP Review-related documents and information apparently provided to the media were not solely in the possession of DOJ OIG employees, and there is nothing in the articles explicitly stating that DOJ OIG employee(s) were a source or the sole source of information. On August 26, 2020, several weeks prior to the early October articles in *NBC News* and *The New York Times* discussing the leaked report draft, the DOJ OIG transmitted a draft version of the report to current and former DOJ officials for review, ostensibly increasing the universe of individuals outside of DOJ OIG who had access to it. [redacted] was also one of many DOJ OIG employees who had access to ZTP Review-related material, though our investigation did not uncover evidence that any other DOJ OIG employees provided unauthorized non-public information to the media.

HUD OIG also uncovered no direct evidence establishing that [redacted] provided draft reports or other ZTP Review-related documents or information to the media. As discussed above, there is extensive circumstantial evidence that [redacted] communicated with the reporters who authored the articles at issue, was privy to documents explicitly referenced and from which non-public information in the articles was drawn, and exhibited a pattern regarding the timing of his calls with reporters in relation to his text messages and other relevant events. However, what [redacted] specifically said on these calls with reporters remains unknown, because there are no recordings or other evidence of the contents of these calls. There is also no direct evidence of [redacted] transmitting documents to reporters. HUD OIG notes, however, that such evidence would only have been available to us if [redacted] had sent the documents electronically using his government e-mail account, and that [redacted] written responses to this report's investigative summary, while "categorical[ly]" denying the allegations as described therein, did not explicitly deny providing documents to the media via a third-party intermediary or in another indirect manner.[99]

Similarly, HUD OIG has no way of definitively establishing whether the draft report [redacted] obtained from Miles on September 1, 2020 was the one whose contents were shared with the media. HUD OIG notes, however, that the version of the report transmitted to DOJ on August 26, 2020, was clearly marked as "Limited Official Use," and contained warnings prohibiting its unauthorized disclosure. Moreover, as noted above, there is sufficient evidence to conclude, by a preponderance of the evidence, that he provided the draft report or information contained therein to members of the media.

IV. Other DOJ OIG Employees

HUD OIG found no evidence that other DOJ OIG employees made unauthorized disclosures of non-public information related to the ZTP Review.

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[99] Because of the nature of this investigation, HUD OIG was unable to obtain records relating to personal e-mail accounts or other third-party electronic file sharing means or applications (*i.e.*, apps).

With respect to [redacted] an analysis of phone records shows that she and [redacted] communicated by phone several times during the time period in which many of the articles at issue in this report were published, and during which time [redacted] was communicating with media outlets. During this time, [redacted]. HUD OIG did not, however, uncover any evidence to refute [redacted] assertion that she did not discuss with [redacted] whether he was communicating with the media, and her overall assertion that she was unaware of any disclosures to the media by any other current or former DOJ OIG employees.

Chapter 5: Legal Analysis

I. Contacts with Media

The DOJ OIG Inspector General Manual chapter pertaining to "OIG Public Affairs" states that "All communications by OIG employees with the media shall be previously coordinated with the Immediate Office of the Inspector General (Immediate Office)."[100] The chapter further states:

> Providing information to the media that is prohibited by statute from disclosure, or that is provided for an unlawful purpose, for example, to obstruct justice, may result in criminal prosecution, civil penalties, or disciplinary action, including removal . . . the disclosure of information that is not prohibited by statute from disclosure, but is in contravention of these guidelines or referenced chapters, may result in disciplinary action, including removal. Such violations may include, but are not limited to, the unauthorized disclosure of information that: (1) is sensitive; (2) reflects the internal deliberations or operations of the OIG; (3) concerns other agencies, persons, or operations and was obtained by the OIG by virtue of its official duties; or (4) would negatively affect the right of any agency or person to an unbiased determination of culpability or innocence in any forum.[101]

The evidence shows that [redacted] engaged in extensive telephone conversations with the media outlets who published ZTP- related articles in the period in question, and that many of these phone calls took place in the periods of time immediately preceding the publication of the articles. Although the specific contents of the phone calls cannot be ascertained, HUD OIG concludes the only plausible explanation for these phone calls was that [redacted] provided information about, or obtained during, the DOJ OIG ZTP Review to the media for use in their reporting.

In April 2022, after reviewing a draft investigative summary of this report, [redacted] counsel provided DOJ OIG a statement that purported to provide alternative explanations for his media contacts.[102] His attorney stated that:

> ... [T]he report's conclusion appears to be based on entirely circumstantial evidence of coincidentally timed phone calls, apparently between [redacted] and

[100] U.S. Dep't of Justice, Office of the Inspector Gen. Manual Vol. 1, Ch. 32 – OIG Public Affairs, 032.4.
[101] *Id.* at 032.5 D.
[102] As noted above, DOJ OIG provided [redacted] and his attorney an opportunity to review a draft investigative summary, but not the report itself, consistent with its standard practice with respect to subjects who decline to be interviewed in connection with an investigation into their alleged misconduct.

members of the media. Presumably, investigators were not able to confirm who spoke or what was discussed on those calls. We cannot address the alleged calls at issue, as the details of the calls (dates, times, and parties) were not provided for review, but [redacted] (1) regularly worked with members of the media from [redacted], (2) has had reporters call him without invitation, and (3) has personal friends who work in the media. Further, [redacted] disclosed such relationships to OIG supervisors on multiple occasions and was told that those relationships were expected in a place as professionally interconnected as Washington, D.C., and did not pose a problem so long as he was cautious about what he discussed with such acquaintances. [redacted] scrupulously followed that guidance. [redacted] denies in the strongest possible terms disclosing sensitive, non-public information on "numerous and lengthy" or any other type of phone calls with members of the media.

HUD OIG finds this explanation neither persuasive nor credible. First, we note that [redacted] is well aware of the specific journalists he spoke to and when, as he personally participated in these conversations and his own personal phone records are readily available to him. Despite this, counsel's statement provides no specific information or evidence to support the generalized assertions about [redacted] personal friendships with media members or about his communications duties [redacted], nor demonstrates why they would have any relevance to the specific members of the media and communications at issue in this matter. This statement is also undermined, and in parts directly refuted, by the evidence in this case.

In follow-up interviews conducted after receipt of [redacted] written response to this report's investigative summary, both of [redacted] supervisors during his tenure with DOJ OIG, [redacted] told HUD OIG that they did not recall [redacted] disclosing to them personal relationships with media members, or stating that he received unsolicited calls from members of the media. Both also denied providing to [redacted] the media-related guidance referred to in the response. [redacted] who provides ethics-related advice to DOJ OIG personnel, also could not recall any such disclosures from [redacted] or any instances in which [redacted] sought ethics guidance from her about relationships with members of the media. The evidentiary record is also clear that, in the months preceding [redacted] abrupt resignation, the articles at issue and the possibility of a leak within DOJ OIG were discussed extensively, and that [redacted] participated in those discussions both orally and over email. There is no evidence that [redacted] ever disclosed any relationship with any of the journalists at issue during those discussions.

Second, despite the intense focus within DOJ OIG on these articles and a possible unauthorized source at DOJ OIG, there is no evidence that [redacted] ever disclosed to DOJ OIG that any of these "reporters call[ed] him without invitation[.]" Moreover, [redacted] telephone records reflect numerous, lengthy telephone calls with the reporters at issue that were frequently initiated by [redacted] and belies the notion that these were incidents of "reporters call[ing] him without

invitation[.]" His personal phone records also show that with respect to Ainsley, Kirchgaessner, Shear, and Soboroff, the initial contact was an outgoing call made by [redacted] to the reporters.[103]

Third, counsel's statement that "our conclusion appears to be based on entirely circumstantial evidence of coincidentally timed phone calls" is without merit. As described in detail above, our conclusion is supported not only by the voluminous, lengthy telephone calls with the same set of reporters who authored articles about ZTP during the time period leading up to the publication of the articles, but also the timing of these calls with respect to other events. In totality, the laws of probability refute the notion that [redacted] communications with the media were merely "coincidentally timed phone calls." Several examples of [redacted] activities and other events in relation to his phone calls with reporters include the following:

- Within seconds of him accessing in Relativity a [redacted] initiated a phone call with [redacted] telephone number that lasted approximately 13 minutes. [redacted] also accessed several other [redacted] and downloaded a document, all of which were relevant to the [redacted] article in [redacted], and participated in numerous phone calls with [redacted] during the time period leading up to the article's publication.

- [redacted] had phone calls with [redacted] on the same days that [redacted] sought comment from DOJ Public Affairs, [redacted] and Hanson. In one instance, [redacted] emailed Hanson for comment several minutes after concluding a phone call with [redacted], and, according to Hanson, asked Hanson questions similar to those [redacted] had posed to him during an earlier interview for the DOJ OIG ZTP Review.

- [redacted] called Ainsley two minutes after a text message exchange with Miles confirming that [redacted] would be receiving a hard copy of the draft ZTP report that day that he had requested. Ainsley later authored an article stating that "NBC News ha[d] reviewed the draft report, which has not been publicly released[.]"

- [redacted] engaged in extensive phone calls with reporters in close temporal proximity to his text messages with Miles expressing his frustrations about the contents and timing of the ZTP report. In one instance, [redacted] wrote to Miles that "Evidence/Testimony may be embarrassing to individuals or the system; it may even hurt reputation, but that is not the test for us leaving it out." That same day, [redacted] called *The Guardian* five times at 7:16 a.m., 7:55 a.m., 8:05 a.m., 8:13 a.m., and 8:42 a.m., before *The Guardian* returned his call at 8:42 a.m.

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[103] For example, on July 6, 2020, [redacted] texted Miles a link to a story about Soboroff's book related to the zero tolerance policy. In the text exchange, [redacted] stated that "Soboroff interviews so far indicate he had good sources in DHS and HHS but not at DOJ." On July 9, 2020, [redacted] emailed [redacted] stating that he had finished Soboroff's book and that "[h]e seemed to have no DOJ sources," and further noted, in an e-mail on July 13, 2020, that Soboroff's discussion of the El Paso pilot project was "interesting... and without any mention of DOJ parties." The first record of a phone call between [redacted] and Soboroff is six days later on July 19, 2020, in an outgoing call initiated by [redacted]

Based on interviews with senior DOJ OIG officials, it is clear that [redacted] was not authorized by DOJ OIG to speak with the media about the ZTP Review. Consequently, HUD OIG finds that [redacted] violated the foregoing policy.[104]

II. Unauthorized Disclosure of Sensitive Nonpublic Information

A. 5 C.F.R. § 2635.703

5 C.F.R. § 2635.703, which governs the use of nonpublic information by executive branch employees, states in relevant part: "An employee shall not . . . allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure."[105]

The same provision defines nonpublic information as "information that the employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public," and includes in this category information that an employee knows or reasonably should know "[i]s designated as confidential by an agency . . . [or h]as not actually been disseminated to the general public and is not authorized to be made available to the public on request."[106]

As discussed above, HUD OIG concluded that [redacted] was sharing information about the ZTP Review with the media outlets in question, and that the media outlets relied on this information, at least in part, in publishing the various articles discussed above. Further, the publication of articles is inherently "in the private interest" of media outlets whose business is dependent on reporting news.

[redacted] would not have had information about the ZTP Review, or the documents and information DOJ OIG obtained from DOJ during the course of the review, but for his position at DOJ OIG. Because the ZTP report had not yet been made public at the time the articles were published, draft copies of the report had been clearly marked as confidential and Limited Official Use, and DOJ OIG policies prohibit unauthorized contacts with the media, HUD OIG finds that [redacted] at minimum, reasonably should have known that any ZTP Review-related information was prohibited from disclosure.

HUD OIG thus concludes that [redacted] violated 5 C.F.R. § 2635.703.

B. DOJ OIG Limited Official Use Information Policies

DOJ Order 2620.7 ("Control and Protection of Limited Official Use Information") defines "Limited Official Use Information" as "unclassified information of a sensitive, proprietary or personally private nature which must be protected against release to unauthorized individuals."[107] The Order delegates to the heads of Departmental organizations the responsibility to determine the specific types of information that are to be considered Limited Official Use, but lists as suggested

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[104] To the extent [redacted] provided information to the media that would have been prohibited from disclosure by the Privacy Act of 1974, he would potentially be subject to the penalties set forth in this provision.
[105] 5 C.F.R. § 2635.703(a).
[106] *Id.* § 2635.703(b).
[107] U.S. Dep't of Justice Order 2620.7.

illustrative examples of LOU "investigative material," and "[d]eliberative information relating to internal DOJ or Executive Branch policy and decision making."[108]

The DOJ OIG Inspector General Manual chapter pertaining to "Standards for Safeguarding Limited Official Use" further defines LOU as "any [non-classified] information of which the loss, misuse, or unauthorized access to or modification of could adversely affect the national interest or the conduct of OIG, DOJ, or federal programs, or the privacy to which individuals are entitled under [The Privacy Act]."[109] The chapter does not limit the specific types of documents that the Inspector General may designate as LOU but notes that "OIG material that contains information the IG or his designee has determined is LOU must be appropriately identified to ensure that all persons having access to the information outside of the OIG's control are aware of the protection requirement. The identification of sensitive information may be accomplished by a marking of "LOU" in one of several manners.[110]

Prior to November 2020, this chapter stated that "Personnel who have custody of LOU shall exercise care to ensure that the information is not available to individuals who have no legitimate business need for access to the information."[111] In November 2020, this sentence was revised as follows:

> "[p]ersonnel who have custody **or control** of LOU **information** shall exercise care to ensure that the information is not **made** available **in any form, including by oral disclosure**, to individuals **who do not have a need to know this** information."[112] (emphasis added for revised text).

In this case, [redacted] conduct at issue took place in October 2020 or prior. Therefore, DOJ OIG's LOU policy in place at the time is the prevailing standard.

As discussed above, the draft version of the ZTP report that was transmitted to main DOJ on August 26, 2020 and subsequently featured in two media reports in October 2020, was marked as "Limited Official Use," and would clearly have been covered by DOJ OIG policy at that time. As discussed above, the investigation found that [redacted] possessed the draft ZTP report and engaged in contemporaneous communications with reporters, and therefore HUD OIG concluded that [redacted] provided the draft report or information contained therein to the media.[113] There is insufficient evidence, however, to make a finding that he directly provided this specific document labeled LOU to the media.

The DOJ OIG LOU policy, on its face, only covers materials that are "appropriately identified" as LOU, and further describes that this "may" be accomplished by a marking of LOU. Other nonpublic documents and information that [redacted] was privy to and were included in the various

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[108] *Id.*
[109] U.S. Dep't of Justice, Office of the Inspector Gen. Manual Vol. 1, Ch. 222 – Standards for Safeguarding Limited Official Use, 222.5 A.
[110] *Id.* at 222.6 A (1).
[111] *Id.* at 222.6 B (1) a.
[112] *Id.*
[113] As noted above, both the media outlets indicated that they had "reviewed" the draft report, not that they had received a copy of it.

media articles at issue do not appear to have been marked as LOU. We also did not find evidence that these materials were "appropriately identified" in a way other than marking. According to DOJ OIG, there was no banner or warning in the Relativity system informing the ZTP Review Team users that the information contained therein is LOU. Moreover, documents provided to HUD OIG by Rene Lee, Assistant Inspector General for Evaluations and Inspections, indicate that E&I-specific guidance did not develop the definition of LOU beyond what is stipulated in the broader DOJ OIG Inspector General Manual.[114]

We did not therefore conclude, based on the information available to us, that [redacted] unauthorized disclosures violated the DOJ OIG's LOU policy, but ultimately defer to DOJ OIG as to whether the documents and information at issue were appropriately identified as LOU.[115]

C. DOJ OIG Standards of Conduct

Prior to November 2020, the chapter of the DOJ OIG Inspector General Manual pertaining to "Employee Standards of Conduct" stated:

> OIG employees receive and have access to sensitive information and documents provided to the OIG in the course of audits, evaluations, reviews, and investigations. An employee may not take non-public work products, documents, records, information, or other materials received from DOJ components or other agencies in the course of the employee's work for personal use at any time, including at time of separation from the OIG. All such non-public material, including non-public work product is property of the OIG and subject to DOJ Order 2710.8C, Removal and Maintenance of, and Access to, Documents.[116]

In November 2020, DOJ OIG modified this section to more explicitly prohibit oral disclosures, appending the following sentence to the above paragraph: "OIG employees may not disclose limited official use (LOU) information in any form, including by oral disclosure, to anyone who does not have a need to know such information."[117]

The prevailing standard is the DOJ OIG policy in effect as of October 6, 2020. HUD OIG concludes that [redacted] violated this Standard of Conduct. As discussed in detail above, the evidence shows that [redacted] (1) had "access to sensitive information and documents provided to the OIG in the course of [the ZTP Review];" (2) that he took "non-public work products, documents, records, information or other materials received from DOJ . . . in the course of [his] work for personal use;" (3) by providing "non-public material" to reporters that was "property of the OIG."

HUD OIG thus concludes that [redacted] violated the foregoing DOJ OIG Standard of Conduct.

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[114] *See* DOJ OIG Evaluation and Inspections Division Operations Manual sec. 5-3, "Controlled Unclassified Information" (2019).

[115] Moreover, the only available evidence of [redacted] contacts with reporters are his telephone records, and not evidence showing transmission of documentary materials. HUD OIG notes that the post-November 2020 versions of these policies more clearly proscribed the unauthorized oral disclosure of LOU information.

[116] U.S. Dep't of Justice, Office of the Inspector Gen. Manual Vol. 1, Ch. 30 – Standards of Conduct, 30.5 A (12).

[117] *Id.*

Chapter 6: Conclusion

Based on the evidence obtained during the course of our investigation, HUD OIG concluded that [redacted] provided sensitive, non-public information, including the draft ZTP Review report or information contained therein, to various media outlets prior to the ZTP report's January 2021 public release, and that he did so without authorization from DOJ OIG. HUD OIG found [redacted] actions violated 5 C.F.R. § 2635.703, DOJ OIG policies governing contacts with media, and its Employee Standards of Conduct. HUD OIG did not find that any other DOJ OIG personnel made unauthorized disclosures of documents or non-public information related to this matter.

HUD OIG considered whether [redacted] disclosures could constitute protected disclosures under the Whistleblower Protection Enhancement Act of 2012 (WPEA). The WPEA protects federal employees from retaliation for disclosing information that the employee reasonably believes evidences a violation of any law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety, provided any such disclosure is not "specifically prohibited by law," for example, by the Privacy Act of 1974.[118]

In an April 12, 2022 written response to a draft of this report's investigative summary, [redacted] attorney stated that "to the extent that any disclosures were made, this conduct would be squarely protected whistleblower activity" under the WPEA. The response further stated that "[w]ithout making any admissions and reserving all rights, this is a protection that [redacted] hereby asserts and claims for any and all of his alleged disclosure activities related to the DOJ OIG's [ZTP Review]."

Although [redacted] response asserted the applicability of the federal whistleblower protection laws, it provided HUD OIG no factual basis to assess that assertion. Indeed, rather than providing that factual basis, [redacted] attorney asserted that [redacted] "denie[d] in the strongest possible terms disclosing sensitive, non-public information on 'numerous and lengthy' or any other type of phone calls with members of the media." In order to assess a whistleblower claim meaningfully, HUD OIG would need information about what specific disclosures, if any, [redacted] made, and then would need to evaluate the basis for his reasonable belief that such disclosures revealed any violation of law, rule, or regulation, or a substantial and specific danger to public health or safety, or other issues protected by the statute. Because [redacted] response denied making any disclosures to the media, and does not provide any basis whatsoever for assessing his belief that the unidentified disclosures fall within the protection of the WPEA, HUD OIG has no factual basis conclude that any of [redacted] disclosures were WPEA-protected.

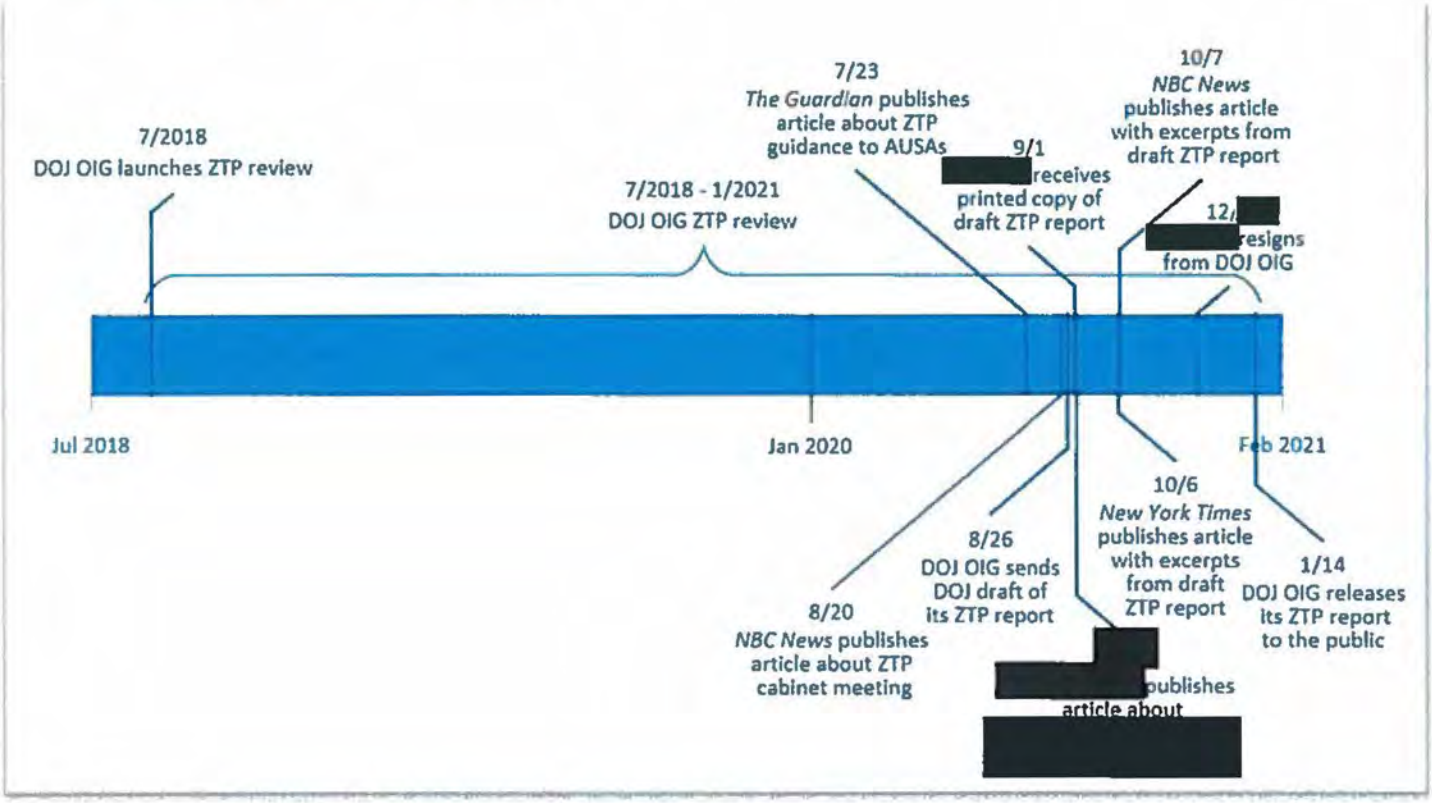
On April 13, 2022, HUD OIG conveyed to [redacted] attorney that we wanted to ensure that any whistleblower concern was carefully addressed, but, for the above reasons, we were unable to assess his WPEA-related assertions. In an April 19, 2022 response to HUD OIG, [redacted] attorney again "categorical[ly]" denied the allegations as they were described in the investigative summary, and stated that [redacted] legal argument "with respect to whistleblower protections was presented in the alternative—that is, taking the disputed allegations in the draft investigative

[118] 5 U.S.C. § 2302(b)(8)(A).

summary as true for the sake of argument, the described conduct would be protected whistleblower activity." [redacted] attorney added that "[t]he government should not make factual inferences from that legal argument." Again, [redacted] attorney provided no factual basis for HUD OIG to assess the whistleblower assertion while also continuing to deny making any unauthorized disclosures.

Pursuant to the MOU, we are transmitting this report to DOJ OIG and to the DOJ Office of Professional Responsibility for any action they deem appropriate.

Appendix - Timeline of Events



The Office of Inspector General is an independent and objective oversight agency within the U.S. Department of Housing and Urban Development. We conduct and supervise audits, evaluations, and investigations relating to the Department's programs and operations. Our mission is to promote economy, efficiency, and effectiveness in these programs, while preventing and detecting fraud, abuse, and mismanagement.

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May 6, 2022

The Honorable Rae Oliver Davis
Inspector General
U.S. Department of Housing and Urban Development

Dear Inspector General Oliver Davis:

Thank you for agreeing, at the request of the Integrity Committee of the Council of the Inspectors General on Integrity and Efficiency (CIGIE), to conduct this investigation into the unauthorized disclosure to the media of a draft report of the Department of Justice Office of the Inspector General's (DOJ OIG) *Review of the Department of Justice's Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services* (Zero Tolerance Policy report or review), and related unauthorized disclosures. I appreciate the Department of Housing and Urban Development Office of Inspector General's (HUD OIG) diligence, thoroughness, and independence in conducting its work and in the preparation of this investigative report. The DOJ OIG fully accepts the investigation's findings and conclusions.

At the outset, I note that it was necessary to seek an independent investigation of the unauthorized disclosure of our draft Zero Tolerance Policy report for several reasons. At the time of the unauthorized disclosure, our accuracy review process related to the Zero Tolerance Policy report was ongoing. As you know from your own quality assurance processes, an OIG's review process is critical to ensuring that our reports are accurate, objective, and complete. The process entails our providing DOJ officials and other witnesses the opportunity to review portions of the draft report. By these reviews, we seek any additional context or information that might be material to the accuracy and completeness of our report. It also involves considering, as the law requires us to do, the privacy interests of individuals who were involved in the events under review and whether those individuals should be identified by name in the final report. The unauthorized disclosure of a draft report, therefore, undermines this process and risks placing incomplete or inaccurate information, as well as information that may be protected from disclosure such as witness names and identifying information, into the public domain.

Further, in cooperating with DOJ OIG reviews, witnesses and the agency rely on our adherence to our accuracy review process and our ability to protect witness and agency information from unauthorized release. Following the unauthorized disclosures that occurred here, witnesses in the Zero Tolerance Policy review, as well as witnesses in unrelated DOJ OIG reviews, questioned the DOJ OIG's ability to protect witness and agency information, and because of this, some expressed reluctance to providing DOJ OIG with sensitive information. Accordingly, your office's investigation was an important step in demonstrating to these witnesses, future witnesses, and our other stakeholders our commitment to organizational integrity and that the DOJ OIG holds itself to the same standards of accountability to which we hold the agency we oversee.

As noted in your office's report, upon my receiving a message from The New York Times indicating that it had reviewed a draft of our Zero Tolerance Policy report, I immediately referred this matter to the CIGIE Integrity Committee, consistent with the requirements of the Inspector General Act. At that time, I did not know who had provided the OIG's draft report to The New York Times, including whether the source was a DOJ OIG employee or a Department of Justice (DOJ) employee who had been provided with access to the draft report as part of our regular and then ongoing agency review process. I only knew that the universe of persons who had access to or had received the draft report was limited, and that it included myself and several members of my senior staff, thereby obligating me under the Inspector General Act to refer the potential misconduct to the CIGIE Integrity Committee.

Your report also details several investigative steps my office took while we were awaiting identification by the CIGIE Integrity Committee of an independent investigator to handle the matter, which steps were designed to collect and preserve evidence. A senior investigator and senior attorney from the DOJ OIG, neither of whom had prior involvement in the Zero Tolerance Policy review, led those efforts. Upon the CIGIE Integrity Committee identifying your office as the OIG to conduct the independent investigation and execution of a memorandum of understanding between our offices, the DOJ OIG provided to HUD OIG the evidence it had gathered following these investigative steps. The DOJ OIG has been pleased to be able to provide its full cooperation and assistance to HUD OIG whenever requested by your investigators.

With regard to your office's findings, I was deeply disappointed to read the substantial evidence detailed in your investigative report finding that one of our then employees was responsible for sensitive, non-public information being provided to the media, including information from the draft DOJ OIG report, which your investigators concluded violated 5 C.F.R. § 2635.703 (Use of Nonpublic Information), DOJ OIG policies governing contacts with media, and our employee Standards of Conduct.[1] Such conduct is unprecedented in the 34-year history of the DOJ OIG. The events described in this report will cause similar distress for DOJ OIG employees past and present who have respected the trust placed in them to handle information appropriately, thereby earning the confidence of our many stakeholders.

In requesting this investigation from CIGIE, I also was acutely aware, as I know your office was as well, of the protections afforded to whistleblowers under the Whistleblower Protection Enhancement Act of 2012 (WPEA). Your investigators found that they did not have a factual basis to conclude that the wholesale disclosure of the draft OIG Zero Tolerance report and other unauthorized disclosures to the media were protected whistleblower disclosures. Your report noted that the then DOJ OIG employee never claimed to be acting as a whistleblower, declined multiple requests for a voluntary interview after he resigned from the DOJ OIG, and never provided any explanation for the disclosures your investigators found that he made. I note additionally (as referenced in your report) that, before he resigned, the then DOJ OIG employee identified to the DOJ OIG's senior investigator a DOJ official that the then DOJ OIG employee said he suspected of making the unauthorized disclosure.

Moreover, your report describes that after reviewing the draft investigative summary of the report's findings in April 2022, the former DOJ OIG employee's counsel stated that the "ultimate factual finding of the report—that documents, including a draft DOJ OIG report, obtained by media came from [the employee]—is categorically false." Yet, counsel also asserted the general applicability of federal whistleblower protection laws. In response, your office informed counsel that it wanted to ensure that any whistleblower claim was

[1] Your report states that the word "provided," as used in your report, encompasses both the direct and indirect provision of information by any means.

carefully addressed and requested that counsel specify what disclosures had been made, and the basis for any reasonable belief that such disclosures were evidence of a violation of law, rule, or regulation, or a substantial and specific danger to public health or safety. Counsel did not identify any specific protected disclosures that were made and provided no additional information in support of the generalized claim of whistleblower protection. I would like to express my appreciation for the amount of thought and care that your office put into this important issue to ensure that all whistleblower issues were carefully considered and that all investigative steps to identify the source of the unauthorized disclosures were consistent with the WPEA.

Your investigation identified text messages and emails sent by the then DOJ OIG employee while he was working on the review in which he stated his belief that "unlawful decisions" had been made by DOJ leadership in the implementation of the zero tolerance policy, and that certain DOJ officials had made false statements. For example, your investigation identified emails from the then DOJ OIG employee asserting that certain documents potentially called into question the truthfulness of representations made to Congress and/or other unspecified "testimony" by DOJ officials about DOJ's role in the development of the zero tolerance policy. However, your investigation reviewed those emails and attached documents and concluded that they did not identify any particular misrepresentations to Congress or other potentially false testimony offered by DOJ officials. If our review had identified evidence that DOJ officials acted unlawfully in the development and implementation of the policy, or that they made false statements, we would have, consistent with our obligations under the Inspector General Act and our usual practice, referred such conduct to a prosecutor and included our findings in the report. While our Zero Tolerance Policy report identified serious failures with DOJ's implementation of the policy, we did not find evidence to warrant such a referral. Further, we did not find evidence that warranted making misconduct findings against any current or former DOJ employees.

As described in your report, the then DOJ OIG employee's text messages also reflected various concerns about the pace of the OIG's review and the resources devoted to it by the OIG. Like many of the review team members, I too was frustrated with the pace of our editing and accuracy review process, as I have been from time to time in connection with other reviews during my tenure as Inspector General. However, our comprehensive review and editing process is critical to ensuring that any and all findings, including those that are critical of the Department and its officials, are fully accurate and supported by evidence. Our accuracy review process also ensures that the privacy interests of witnesses and whistleblowers are protected in the final version of the report that is officially released to the public. I take my office's obligation to protect such sensitive information extremely seriously, so I was particularly troubled by your report's description of how certain disclosures by the then DOJ OIG employee led to news reporting that identified by name two DOJ employees whose identities were not disclosed by the DOJ OIG in its final report.

I will close by making three final points.

First, the disclosure of the draft report in October 2020 had no impact on the DOJ OIG's process for completing and releasing our final report. My office followed our usual and normal processes for completing the *Zero Tolerance Policy* review, which included ensuring that the report was accurate, objective, and complete. As I described earlier, such routine and ordinary process included providing DOJ officials and other witnesses the opportunity to review portions of the report for accuracy and completeness. By these reviews, we sought any additional context or information that might be material to the accuracy and completeness of our report. After receiving comments, we took the necessary time to review, follow up on, and, where appropriate, integrate such information into our report prior to

completion. My office also reviewed the draft report for legal sufficiency and to assess privacy interests to determine whether specific witnesses should be identified by name, or whether the balancing of public interest with individual privacy weighed in favor of not disclosing their identities in the final report. These processes, which my office has followed in every review under my supervision, were performed as we completed the *Zero Tolerance Policy* report. We did not alter our process as a result of the disclosures because it was critical to us that we adhere to these standard processes, in the interest of ensuring accuracy, completeness, and adherence to law.

Second, when it became clear to me because of your office's investigative work that the source of the unauthorized disclosures likely was a then DOJ OIG employee, I asked the Inspector General of the Department of Veterans Affairs (VA) to conduct a thorough independent referencing review of our final *Zero Tolerance Policy* report. While I was confident in our report, I viewed it as important for an independent entity to assess whether the report's findings, conclusions, and recommendations were supported by adequate evidence. As you are aware, the VA OIG is one of the largest OIGs in the CIGIE community and is a leader in the community's quality assurance efforts. The VA OIG's detailed review identified instances in our report where it found the report language should be edited to align more closely with our underlying work papers. We have made every change suggested by the VA OIG. Importantly, however, the VA OIG concluded that none of the changes was material or affected the report's findings, conclusions, or recommendations. My office will post on our public web site a revised version of our *Zero Tolerance Policy* report that identifies those edits. We will also publicly post the VA OIG's memorandum reporting the results of its review.

Lastly, we are undertaking steps to strengthen our quality assurance efforts. While these steps were initially proposed to me by my senior staff independent of the VA OIG's report, the VA OIG's findings underscore the importance of investing in a strong quality control program. We recently completed a successful pilot of a Quality Assurance Unit, and we are now in the process of recruiting for a permanent Quality Assurance Program Manager to ensure even more robust quality control processes are in place than those that currently exist in our report review process. In my view, the creation of this position represents another important step in enhancing the accuracy and objectivity of our work, and it will advance our effort to be accountable by helping to ensure that we continue to hold ourselves to the high standards that our stakeholders rightfully expect from the DOJ OIG.

Thank you again for your office's willingness to handle this important matter, and for its professionalism and outstanding work in conducting the independent investigation.

With deep appreciation,

Michael E. Horowitz
Inspector General