



U.S. Department of Justice

Office of the Inspector General

September 28, 2011

The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20515

Dear Congressman Issa and Senator Grassley:

I write in response to your letter dated September 20, 2011, in which you questioned the Department of Justice Office of the Inspector General's (OIG) decision to provide to the United States Attorney's Office for the District of Arizona (USAO) copies of certain audio recordings made by a witness.

As we explained to members of your staffs at a meeting on September 16, 2011, the OIG first learned of the existence of the recordings during an interview the OIG conducted of a witness. The witness, who was represented by counsel, told OIG investigators that he had recorded certain conversations between the witness and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) case agent for the Fast and Furious investigation.

Prior to making a formal request after the interview for the recordings, the OIG first determined that one-party consent recordings were legal in Arizona. In addition, because the OIG is a component of the Department of Justice, the investigative team and senior OIG management discussed whether OIG's obtaining the recordings would affect the USAO's disclosure obligations in the pending criminal cases arising from the Fast and Furious investigation. As you know, prosecutors are obligated under the U.S. Constitution, statutes, and rules of procedure to disclose certain information to defendants in criminal cases. Among other things, prosecutors must disclose to defendants information in the prosecutors' custody that may be

exculpatory, including material that may be used to impeach witness credibility, prior statements of witnesses relevant to their expected testimony, and any recorded statement of a defendant. Information known by any part of the Department of Justice, including the Office of the Inspector General, is deemed to be within the prosecutor's custody. Because the recordings involved interaction between two individuals who we understood were likely to be important witnesses in the pending criminal cases, and in one instance a discussion between a witness and a defendant in a criminal case, we determined that if the OIG obtained the recordings, we would be required to promptly provide them to the USAO so that it could appropriately consider them in the ongoing assessment of the criminal cases and satisfy its legal disclosure obligations to the defendants in those cases.

Subsequent to the interview, OIG investigators called the witness's counsel and formally asked for the recordings. During the telephone call the OIG investigators informed the witness's counsel that if the OIG received the recordings, we would have to give the recordings to the USAO because the prosecutors are required to review the material to satisfy their legal disclosure obligations in the pending prosecutions of defendants arrested as a result of the Fast and Furious investigation. In an e-mail to the witness's attorney on the same day, the OIG confirmed its request for the recordings and the condition that if the OIG received the recordings we would have to provide them to the USAO.

The next day, the OIG received from the witness's attorney a CD containing a total of 12 recordings: two in-person conversations between the witness and the ATF case agent; nine telephone calls between the witness and the ATF case agent; and one telephone call between the witness and a defendant in a criminal case resulting from the Fast and Furious investigation. Several days later, after members of the investigative team listened to the recordings, the OIG provided a copy of the recordings to the USAO with a memorandum stating how the OIG obtained the recordings and that we were providing them to the USAO so that the USAO could satisfy its legal disclosure obligations in the pending criminal cases. Because the USAO was the entity with the necessary information to assess the recordings in view of its disclosure obligations, the OIG believed it should provide the recording to it without delay.

Your September 20, 2011, letter requests that the OIG respond to five questions related to the OIG's decision to provide a copy of the recordings to the USAO. Each question is quoted below and followed by a response.

- 1) *"After obtaining the recordings and realizing that they contained information about misconduct at the USAO, why did you not reconsider your decision to provide them directly to the USAO?"*

The OIG investigative team listened to the recordings prior to providing the recordings to the USAO. Because they contained statements of the case agent, another anticipated trial witness, and a defendant in a pending criminal case, we believed the OIG had an obligation to provide a copy of the recordings to the USAO promptly so that it could consider them in connection with the government's legal disclosure obligations described above.

- 2) *"What steps, if any, did you take when you provided the recordings to the USAO to ensure that they wouldn't be further disseminated, either to ATF or to the press?"*

In our memorandum transmitting the recordings to the USAO, we explained that we believed the USAO should be aware of these recordings so that it could consider them in connection with the government's discovery obligations in the pending investigations and prosecutions. Because the USAO was responsible for the cases arising from the Fast and Furious investigation, we concluded that the USAO was the entity most capable of reviewing the recordings for discovery and evidentiary purposes in the pending criminal cases. We expected that in discharging this obligation, the USAO would disseminate the recordings responsibly and properly.

- 3) *"How would potential discovery obligations justify the USAO providing the tapes to the ATF case agent and numerous other ATF personnel?"*

We believe this question should be directed to the USAO as it is the entity with the necessary information to evaluate the government's discovery obligations in this instance.

- 4) *"Will you be examining the circumstances of how the recordings made their way from the USAO to the ATF to the press as part of your investigation?"*

We are still gathering preliminary information and evaluating whether any issues arising from dissemination of the recordings should be made part of the OIG's Fast and Furious review.

- 5) "Will the cooperating FFL's allegations of witness tampering or obstruction of the Congressional inquiry by USAO personnel be a part of your investigation?"

We take allegations of witness tampering and obstruction of an investigation very seriously. We will evaluate the information from the recordings and other sources as our review continues and will make a determination about how to address any such allegations at the appropriate time.

If you have any further questions, please feel free to contact me or Senior Counsel Jay Lerner at (202) 514-3435.

Sincerely,



Cynthia A. Schnedar
Acting Inspector General

cc: The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and Government Reform
United State House of Representatives

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate