

Issue Date: 03/01/2003

COMMUNICATIONS WITH THE WHITE HOUSE REGARDING OPEN INVESTIGATIONS, ADJUDICATIONS, OR CIVIL AND CRIMINAL ENFORCEMENT ACTIONS

I. Purpose

This directive establishes Department of Homeland Security (DHS) policy for communications with the White House regarding open investigations, adjudications, or civil or criminal enforcement actions.

II. Scope

This directive applies to all DHS organizational elements.

III. Authority

The Homeland Security Act of 2002, codified in Title 6, U.S. Code.

IV. Definitions

Designated DHS Official: Senior DHS officials as designated by the Secretary, Deputy Secretary or Under Secretaries

V. Responsibilities

A. **General Counsel:** shall be responsible for reviewing potential communications with the White House and making determinations and recommendations concerning such communications in accordance with this directive, acting through the Associate General Counsel for General Law, and other Associate General Counsels as appropriate.

B. **All Under Secretaries and Designated DHS Officials:** shall be responsible for following the procedures below for alerting the General Counsel to the potential need for communications with the White House and coordinating those communications when deemed necessary.

VI. Policy & Procedures

A. **Policy:** In order to ensure the President's ability to perform his constitutional obligation to take care that the laws be faithfully executed, it is the policy of the DHS to provide the White House with information on open investigations, adjudications, and civil (including administrative or regulatory) or criminal enforcement actions pending before or within any regulatory or law enforcement agency within the Department, where important for the performance of the President's duties, where appropriate from a law enforcement and regulatory perspective, and where consistent with this directive.

B. **Procedures:** The below listed procedures are established to ensure the flow of appropriate information between the Department and the White House. Central to these procedures is the need for consultation with the Under Secretaries, Designated DHS Officials, and the General Counsel. The General Counsel is authorized to issue more detailed guidance should he or she determine it to be necessary.

1. **Initial Determination.** If a Department employee determines that a matter involving an open investigation, adjudication, or enforcement action under his or her jurisdiction should be communicated to the White House, he or she shall inform the appropriate Under Secretary or Designated DHS official. If the Under Secretary or Designated DHS Official agrees that White House communication should be pursued, he or she shall consult with the General Counsel.

2. **General Counsel Review and Final Determination.** The General Counsel shall provide the Under Secretary or Designated DHS Official with his or her recommendation concerning the advisability of disclosing the information to the White House. The General Counsel is authorized to preclude transmittal of the information on legal or ethical grounds. If the General Counsel believes that disclosure should not be made based on other than legal or ethical grounds, the General Counsel shall inform the appropriate senior policy official of this recommendation.

3. Other Final Determinations. Unless precluded on legal or ethical grounds by the General Counsel, the Under Secretary or Designated DHS Official shall make the final determination on whether the information should be communicated to the White House. If the Under Secretary or Designated DHS Official determines that such information should be communicated to the White House, he or she shall request that the General Counsel make the initial communication.

C. **Communications:**

1. Initial Contact with White House. Initial communications between the White House and the DHS regarding any pending Department investigation, adjudication, or criminal or civil enforcement action shall involve only the Counsel to the President or the Deputy Counsel and the DHS General Counsel or Deputy General Counsel. No DHS employee shall initiate communications on these matters with the White House other than as provided in paragraph VI.C. Any DHS employee in possession of information pertaining to any pending criminal referrals and criminal investigations shall keep the information in strict confidence and shall not disclose the information to any person except in accordance with applicable law, DHS policy, and this directive.

2. Continuing Contact. After the initial contact, further contact on a matter deemed appropriate for communications pursuant to this directive shall be directed to the White House Counsel's Office by the General Counsel, the Deputy General Counsel, the appropriate senior policy official (designated by the General Counsel), or any other lawyer in the Office of the General Counsel (as designated by the General Counsel).

D. **Written Requirements:** All proposals and decisions involving open Department investigations, adjudications, or enforcement actions discussed herein that either propose or result in communications with the White House shall be detailed in contemporaneous, written memoranda and retained by the Office of General Counsel.

1. Under Secretaries and Designated DHS Officials. All requests (a) from DHS employees to Under Secretaries and Designated DHS Officials and (b) from Under Secretaries and Designated DHS Officials to the General Counsel that request a communication to the White House concerning an open investigation, adjudication, or enforcement action shall be in writing. Such memoranda shall explain why the communication of information is important for the performance of the President's duties and appropriate from a law enforcement perspective.

2. General Counsel. The General Counsel shall also issue in writing his or her legal or ethical recommendation to the appropriate Under Secretary or Designated DHS Official in response to such request for communication with the White House.

3. Emergency Situations. If an emergency situation is present, the memoranda requested by paragraph VI.D may be prepared as soon as practicable thereafter.

E. **Information Requests by the White House**: Requests by the White House for information concerning open Department investigations, adjudications, or civil or criminal enforcement actions shall be referred in all cases to the General Counsel. The General Counsel shall ensure that such requests are processed consistent with the provisions of this directive and any applicable White House guidance.

F. **Open Investigations, Adjudications, or Enforcement Actions Directly Involving the White House**:

1. Contacts Directly Involving the White House. If the President, the Vice-President, a member of their families, a senior advisor or an employee of an office which the Chief of Staff (or any similar successor position) directly supervises, is an actual or potential subject, target or witness of an open investigation, adjudication, or enforcement action under the jurisdiction of the DHS, the determination of whether it is appropriate to disclose this information to the White House shall be made in accordance with this directive, taking into consideration numerous factors, such as the following:

a. Whether disclosure would detrimentally affect the fundamental operation of an agency or other organization in the executive branch of the Federal Government;

b. Whether disclosure of the information would promote or reduce the public confidence and trust in the integrity of elected officials and public servants or the Department's regulatory and law enforcement activities;

c. Whether there exists an immediate threat of harm or injury to White House persons or property which disclosure will help to avoid;

d. Whether the matter involves any sensitive or urgent national security or foreign policy concern that should be brought to the White House's attention;

e. Whether disclosure of the information would interfere or assist with the Department's law enforcement and regulatory mission or an ongoing law enforcement or regulatory activity; and

f. Whether non-disclosure could cause the White House to convey inaccurate or misleading information to the public.

2. Secretary/Deputy Secretary Consultation. The Deputy Secretary shall be informed prior to any Department communications with the White House involving the matters subject to paragraph VI.F.1. The Deputy Secretary, in turn, may consult with the Secretary. The Secretary or Deputy Secretary may consult with the Attorney General or any other appropriate senior government official concerning the advisability of such disclosure or non-disclosure.

3. Procedures. The procedures described in paragraphs VI.B-VI.D herein shall apply to contacts directly with the White House (see paragraph VI.F.1).

G. **Exclusions:** In the day-to-day functioning of the DHS, there exist activities necessary to carry out the Department's law enforcement and regulatory mission. These may include routine law enforcement contacts, including administrative and regulatory contacts, designed to collect information through document requests, interviews, depositions, or otherwise. Nothing in this directive shall be construed to amend the Department's current process with respect to its handling of these routine activities.

In addition, the procedures set forth in this directive do not apply to the following:

1. Any communication subject to a specific statutory provision prohibiting or governing the disclosure of the information.

2. Communications between the Secret Service and the White House concerning the Service's protective responsibilities.

3. Communications between the DHS and the National Security Council concerning open investigations or cases, if such disclosure is necessary for the conduct, determination, or coordination of national security or foreign policy issues.

4. Communications between the Department and the White House appropriate to properly respond to inquiries or requests for information or documents in the form of (a) civil and criminal discovery requests; (b) subpoenas, including but not limited to, grand jury and congressional; (c) other congressional requests for documents and information; and (d) any other requests for information and documents authorized by law; provided that the exception created by paragraph VI.G.4 shall not apply to requests for information pertaining to those officials and individuals identified in paragraph VI.F who are the subject, target or witness in an open investigation, adjudication, or enforcement action.

5. Communications between the Department and the White House appropriate to formulate an Administration position with respect to judicial review or settlement of pending litigation.

6. Tax, security, and background checks on prospective Federal employees and appointees, including Executive and Judicial Branch appointments under consideration by the President or the Department.

7. Communications between the Inspector General or his or her authorized officials and the White House in furtherance of the duties and responsibilities of the Inspector General undertaken pursuant to the Inspector General Act of 1978, 5 U.S.C.A. App. 3.

H. **Questions or Concerns regarding the Process**: Any questions or concerns regarding this directive should be addressed to the Office of the General Counsel.