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DATE 03-12-2009 BY 65179 DMH/lsc

FOGLE, TONI M. (INSD) (FBI)

From: FOGLE, TONI M. (INSD) (FBI)
Sent: Tuesday, October 05, 2004 1:23 PM
To: [redacted] (INSD) (FBI); [redacted] (INSD) (FBI)
Subject: FW: More Military requests coming your way

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NON-RECORD

Please include his additional info in our precautions provided to interviewees. Let me know when the request comes in. T>

-----Original Message-----

From: FOGLE, TONI M. (INSD) (FBI)
Sent: Tuesday, October 05, 2004 1:22 PM
To: [redacted] (OGC) (FBI)
Cc: MERSHON, MARK J. (SF)(FBI); THORNTON, CHARLENE B. (PX) (FBI); GRANT, ROBERT D. (INSD) (FBI)
Subject: RE: More Military requests coming your way

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NON-RECORD

[redacted] - You certainly don't need to apologize for misreading, your insight was very helpful. Thanks for the heads up and thanks again for the additional insight. I'm sharing your analysis with others in my division who have an interest in these matters. T>

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-----Original Message-----

From: [redacted] (OGC) (FBI)
Sent: Tuesday, October 05, 2004 11:22 AM
To: FOGLE, TONI M. (INSD) (FBI)
Subject: More Military requests coming your way

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You should be getting an email from [redacted] in my office because Army CID is requesting us to identify any FBI personnel who were present at Abu Garib Prison in Iraq. I also realized that I didn't actually answer your question appropriately about the difference between a request to interview FBI personnel from the military or a civilian or foreign law enforcement agency. I apologize for misreading your email having you read stuff you weren't asking for.

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Anytime we get a request from another agency to interview FBI personnel, even a subpoena from local prosecutors or defense, we feel that we are authorized by prior court decisions to determine exactly what the other agency wants to speak to the Agent about. Under the Touhy case, a U.S. Supreme Court case from the 1950's, an agent cannot be held in contempt for not answering a question on the stand when the FBI has not authorized the Agent to respond. This occurs if the other agency is touching upon informant information or classified information or sensitive techniques, etc . . . The Code of Federal Regulations also describes this process for obtaining info. from the FBI even with a subpoena. (And it even limits what info. Federal Prosecutors can release) So, we insist that the other agency brief us on what the agent is going to be asked (not question by question, but issue by issue) and put it in writing. If we have any objections, we then tell the other agency. The agent is also advised of those issues and the agent is authorized to respond or not. We also insist on being present when the agent is interviewed or testifies. If the other agency goes outside those issues, we instruct the agent not to answer until we get the appropriate authorization. (including in Court and the judge is warned beforehand) By going through this process, we

get a clear picture of whether the other agency is investigating our employee and what the employee should be advised of. Ultimately, any interview (not testimony) with another agency is voluntary and the agent can decline or set whatever conditions the agent feels comfortable with.

At a minimum, any FBI policy about responding to such requests should include this process. Its justified not only because it benefits the agents but because the FBI has the opportunity to object to releasing any sensitive information. I don't know what to tell you about the representation issue. DOJ is being shortsighted because civil liability is a real possibility in any abuse situation, even for the witnesses, far more likely than any criminal charges. As such, they should be having civil attorneys speaking to the agents and reviewing the contingencies so that everyone is forewarned.

[redacted]
NSLB - CTLU 1
LX 1 room 5S 217
Outside #: [redacted]
Pager: [redacted]

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