Congress of the United States
Washington, DC 20515

March 5, 2012

The Honorable Jeffrey D. Zients
Acting Director
Office of Management and Budget
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, N.W.
Washington, D.C. 20503

Dear Mr. Zients:

Documents published in the *Washington Post* show that over the course of two years, the Food and Drug Administration (FDA) secretly monitored the personal e-mail accounts of a group of employees known as the "FDA nine."[1] The "FDA nine" consisted of scientists and doctors who raised concerns – first to FDA management and then to President Obama's transition team and Congress – about the effectiveness of FDA's process for approving medical devices. In a lawsuit filed in U.S. District Court in Washington, D.C., on January 25, 2012, six of the "FDA nine" alleged that the FDA relied on the information it gleaned through secret surveillance to fire, harass, or pass them over for promotion.[2]

In 2009, the Office of Legal Counsel (OLC) in the Department of Justice issued an opinion concluding that a government agency may monitor employees' computers in pursuit of a lawful purpose.[3] In this case, however, the FDA's purpose for conducting surveillance was not lawful. To the extent that it monitored communications with the Congress and the Office of Special Counsel, the FDA was not legitimately investigating wrongdoing or tracing a security breach. Disclosures to OSC and Congress are authorized and protected by law.[4] In fact, after reviewing the FDA's allegations that the "FDA nine" released unauthorized information, the Department of Health and Human Services Office of the Inspector General found the allegations to be unsubstantiated. The FDA specifically targeted these employees for monitoring after they contacted the Presidential transition team and Congress to blow the whistle. Therefore, the FDA's purpose for conducting surveillance was unlawful, because retaliation against individuals who engaged in protected forms of whistleblowing is illegal.[5]

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[1] Ellen Nakashima and Lisa Rein, *FDA staffers sue agency over surveillance of personal e-mail*, WASH. POST, Jan. 29, 2012.
[2] *Id.*
[3] *See* Memorandum for Fred F. Fielding, Counsel to the President, from Steven G. Bradbury, Principal Deputy Ass't Att'y General, Office of Legal Counsel, U.S. Dep't of Justice, *Re: Legal Issues Relating to the Testing, Use, and Deployment of an Intrusion-Detection System (EINSTEIN 2.0) to Protect Unclassified Computer Networks in the Executive Branch* (Jan. 9, 2009).
[4] For example, even trade secret information may be legally disclosed to the OSC. U.S. Merit Systems Protection Board, Docket No. DC07529010241, Mar. 8, 1993.
[5] The Whistleblower Protection Act prohibits agencies from taking adverse personnel actions against individuals who make protected disclosures to OSC and Congress. 5 U.S.C. § 2302(b)(8).

The current policy of the U.S. Office of Personnel Management (OPM) makes clear that employees do not have the right to privacy when using government equipment and that such use may be monitored or recorded.[6] However, FDA obtained e-mails not only from employees' work accounts, but also from their private, personal e-mail accounts. While such monitoring may be lawful for personal e-mails sent or received on government equipment, OSC is investigating a fact pattern that leaves open the possibility that FDA obtained access to personal e-mails that may have been transmitted from home computers or cell phones. In fact, FDA may have intercepted passwords to the personal e-mail accounts of its employees for the purpose of logging in to search for archived messages to and from Congress and OSC. In the absence of a subpoena, such activity would violate the Stored Communications Act.[7]

Our investigation of FDA's surveillance of whistleblowers has given rise to a broader question about the policies and practices for electronic surveillance at other federal agencies. In the interest of evaluating whether those policies and practices are consistent with the guidance contained in OLC's 2009 opinion and recent court decisions, we request the Office of Management and Budget's (OMB) assistance in collecting information from all federal agencies about their respective e-mail monitoring policies.

Specifically, we request that OMB conduct a comprehensive survey of all federal agencies to determine agencies' policies with respect to monitoring federal employees' personal e-mail accounts. The survey should gather information such as:

- Whether the agency has an official policy for monitoring employee e-mail.
- Whether the policy allows for *de minimis* personal use of government computers to access personal e-mail.
- Whether the policy defines protected disclosures to OSC and/or Congress to be official, authorized use of government computers and devices, and if not, why.
- A description of any such policy, including whether and to what extent the agency distinguishes between personal e-mails and official e-mails.
- Whether agencies perform authorized monitoring in such a way as to collect the usernames and passwords to personal accounts that may be accessed by employees on government computers, and if so, what safeguards prevent the use of that information to monitor communications that do not occur on government computers and devices.
- The titles of officials who are authorized to order or conduct surveillance.

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[6] See 5 U.S.C. § 7501 et seq.; OPM Personal Use of Government Office Equipment Policy (June 2000).
[7] 18 U.S.C. §§ 2701 – 2712. Additionally, in *U.S. v. Warshak*, the 6th Circuit held that when government agents compel an Internet Service Provider (ISP) to disclose its user's stored emails, they invade the user's reasonable expectation of privacy, which constitutes a search under the Fourth Amendment and requires a warrant or an applicable exception.

- Statistics sufficient to show how frequently agencies conduct surveillance and use the information as the basis for an adverse personnel action.

Thank you for your prompt attention to this matter. Please contact Jonathan Skladany of the House Committee on Oversight and Government Reform at (202) 225-5074 or Erika Smith of the Senate Committee on the Judiciary at (202) 224-5225 with any questions about this request.

Sincerely,

Darrell Issa
Chairman
Committee on Oversight and
Government Reform
United States House of Representatives

Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate

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

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