U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 16, 2007

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

Dear Chairman Waxman:

This letter responds to concerns expressed in the January 9, 2006, Minority Staff Report, "Sandy Berger's Theft of Classified Documents: Unanswered Questions" ("the Report"). The Report alleges failures in the Department's handling of the Berger investigation. We have reviewed the Report and respectfully disagree with its characterization of the Department's investigation.

The Department's investigation began when we were first advised of Berger's actions by the National Archives and Records Administration Inspector General (IG) on October 15, 2003, almost two weeks after Archives staff and agents of the IG had begun their own investigation of the incident. The Department and the Federal Bureau of Investigation (FBI) devoted significant resources to the task, including prosecutors and FBI Special Agents trained in the investigation of national security cases. The FBI conducted over 50 interviews, made inspections of the Archives facilities, and reviewed thousands of pages of documents, in addition to other law enforcement efforts. We examined Mr. Berger's conduct during all four of his visits to the Archives.

The Report suggests that the Department did not inquire about Mr. Berger's first two visits to the Archives, citing the IG's recollection that the Department had informed the IG in April 2004 that the Department had not questioned Mr. Berger about his May 2002 and July 2003 visits. This suggestion appears to be based on a misunderstanding of the sequence of the Department's investigation. As of April 2004, the Department had not yet asked Mr. Berger any questions, as he had not yet agreed to an interview. When the Department did subsequently interview Mr. Berger, the Department questioned him regarding <u>all</u> of his visits. Furthermore, the Department questioned every witness with knowledge of Mr. Berger's visits about all of his visits. Neither Mr. Berger nor any other witness provided the Department with evidence that Mr. Berger had taken any documents beyond the five referenced in the plea agreement.

In this, as in all criminal investigations, the Department's obligation was to gather the available testimonial and documentary evidence and then rigorously put that evidence to the test – often pitting the memory of witnesses against the written record supplied by the documents – in order to determine as accurate a picture as possible of what transpired. In this case, as in others, some of the initial allegations did not withstand further analysis.

For example, the Report suggests that the Department did not give sufficient weight to the accounts of Mr. Berger's activities provided by Archives staff, most notably the e-mail sent on September 2, 2003, from Official A to Senior Official 1. In this e-mail, Official A described an encounter with Mr. Berger that day in which he saw Mr. Berger "fiddling with something white which looked to be a piece of paper or multiple pieces of paper" down by his ankle. The Department was fully aware of this e-mail, and knew that Berger had in fact removed his notes and a document on the visit of September 2, 2003. The e-mail was a significant piece of information that the Department appropriately investigated.

The account described in the e-mail was evaluated in conjunction with Official A's interview with the IG's agents on October 15, 2003, conducted before the Department was involved in the case. The recording and transcript of the interview with the IG's Agents were reviewed in full in the course of our investigation. According to the IG's recorded interview, Official A repeatedly stated that the interaction was "very quick" and he could not be certain what he saw. Further, Official A told the IG's Agents, "I could not, um, you know, swear that what I saw was documents, but it certainly unnerved me enough." Later, Official A was asked by the IG's agents how he was feeling and he responded, "very unsettled. I mean, it's, it's unsettled but at the same time I mean, not, not unsettled in the way that I'm a hundred percent sure of what I've seen and, and I'm sick, just like, did I see what, what I, you know possibly could ... There was a certain grey area in my mind and whether this was actually a document, a piece of paper."

When Official A was interviewed later by the FBI on October 17, 2003, he once again expressed uncertainty about what he saw, diminishing further the probative value of his e-mail. The e-mail, and Official A's interviews with the IG's agents and the FBI, had to be further weighed against the evidence that after the e-mail was sent and after Official A discussed with Senior Official 1 what he saw, Senior Official 1 contacted a supervisor, but the Archives staff did not confront Mr. Berger, did not search him, and did not contact any security or law enforcement officials. In light of these additional facts, the Report's suggestion that the Department somehow failed to consider the full import of the e-mail and related information is unfounded.

The Department's analysis of the other documentary and testimonial evidence in this case was similarly thorough. And at the conclusion of its extensive investigation, the Department secured a guilty plea from Mr. Berger, pursuant to which he admitted to "conceal[ing] and remov[ing]" five copies of classified documents from the Archives, concealing them at his office, and "cut[ting] three of the documents into small pieces and discard[ing] them" – all in violation of 18 U.S.C. § 1924. April 1, 2005 Factual Basis for Plea at 2. The Department stands by its

investigation and believes that this resolution was the best one possible in light of the available evidence.

The Report also suggests that, as a result of Mr. Berger's conduct, the 9-11 Commission may have been deprived of the information necessary to render its final report. The Department, however, has no evidence indicating that this suggestion is accurate. In the course of its investigation, the Department interviewed numerous witnesses who might have had knowledge of any missing items. None of these witnesses, however, provided the Department with evidence that Mr. Berger's conduct deprived the 9-11 Commission of information or documents. Nor has the IG ever advised us – either at the time of our investigation or at any time since – of any evidence that Mr. Berger had taken any documents other than the five referenced in the plea agreement.

Thus, not the Department, the FBI, or the Archives IG has found any evidence that Mr. Berger took any documents other than the five referenced in the plea agreement. The Department's public statements made after Mr. Berger's April 1, 2005, guilty plea reflected the results of its extensive investigation into this matter, and were based solely on the evidence gathered in that investigation and contained in the detailed factual statement – the contents of which Mr. Berger admitted as a condition of his plea agreement.

Under the terms of his plea agreement, Mr. Berger must cooperate with the Archives IG and make himself available for any cooperation with the government. Indeed, on July 8, 2005, after the plea and prior to sentencing, the IG, along with Department attorneys and FBI agents, also questioned Mr. Berger. At this meeting, Mr. Berger was again questioned about all of his visits to the Archives, including those that occurred in May 2002 and July 2003. Again, Mr. Berger's answers in this session were evaluated and compared to his previous answers and the vast amount of evidence collected in the investigation.

In light of Mr. Berger's disclosures during an extensive interview in March 2005 and his acceptance, as part of his guilty plea, of a detailed factual basis for the charges against him, the judgment of the Department and the FBI was not to administer a polygraph examination to Mr. Berger. The Department is aware of no new facts regarding the law enforcement aspects of this investigation to suggest that it should revisit that judgment.

In closing, I would like to emphasize that the Department's silence with respect to certain other factual assertions and conclusions in the Report should not be mistaken for agreement. Indeed, to cite but one additional example, the Department disagrees with both the manner in which certain of its employees were interviewed and the manner in which their statements to Committee staff were presented in the Report. We nevertheless hope that this letter provides you

assurance that the Department takes investigations regarding the mishandling of classified information and documents very seriously, and vigorously investigates and prosecutes those who endanger our national security. We appreciate your attention to this matter.

Sincerely,

Richard A. Heating
Acting Assistant Attorney General

cc: The Honorable Thomas Davis
Ranking Minority Member

Paul Brickfield
Inspector General
National Archives and Records Administration