

APPENDIX 1.2

Memorandum of understanding between the Department of Justice and presidential candidate Barack Obama regarding the 2008 Presidential Transition Clearance Adjudication Plan

Source: Obama-Biden Transition Project documents
October 1, 2008

I. BACKGROUND

(IRTPA), Presidential candidates from the major parties may submit clearance requests for transition team members prior to the general election in order to expedite the transition process.* Previously, only the President-Elect could submit these requests to the Federal Bureau of Investigations (FBI) and only after the general election. This Memorandum of Understanding (MOU) covers the investigations for security clearances of the prospective transition team members for major party Presidential candidates only. As defined by statute**, the "major party" Presidential candidates for the 2008 Presidential Election are Senators John McCain and Barack Obama (hereafter "Presidential Candidate").

II. PURPOSE

- a. In order to assist the Department of Justice (DOJ) in implementing IRTPA and to promote orderly transitions in the office of the President, the FBI will conduct investigations at the request of the Presidential Candidate or his designated representative. Such investigations may be requested for applicants, employees, or any other persons engaged by contract or otherwise to perform services for the Presidential Candidate in connection with preparation for a transition to the Office of the President. (Hereafter the individual on whom an investigation is conducted shall be referred to as the "Appointee").
- b. Pursuant to this agreement, these investigations shall be conducted to determine the Appointee's trustworthiness for clearance to access information classified under the provisions of Executive Order 12958, as amended by Executive Order 13292, and Executive Order 12968 (or any successor Executive Orders) and their implementing directives. The results of these investigations will permit adjudication of the Appointee for appropriate clearance, to include access to Sensitive Compartmented Information, in accordance with the standards set forth in Director of Central Intelligence (DCI) Directive 6/4, and by any modifying policy memorandum or successor directive issued by the Office of the Director of National Intelligence (ODNI).

III. INVESTIGATIVE PROCEDURES

- a. Requests for FBI investigations of Appointees shall be made in writing from the Presidential Candidate or his designated representative to the Director of the FBI and shall include: 1) a completed Standard Form 86 (SF-86) (Questionnaire for National Security Positions); 2) a set of the Appointee's fingerprints on a standardized fingerprint card or electronically submitted prints; and, 3) a statement signed by the Appointee acknowledging his or her consent to be investigated and acknowledging that facts or information gathered shall be retained consistent with applicable FBI Privacy Act Records Systems Notices, Records Retention Plan, and Disposition Schedule. See Section (e)(3) of the Federal Privacy Act of 1974.
- b. In addition, the following requirements shall apply:
 - i. All investigation requests must be on the form provided by the FBI and must contain the original signature of the Presidential Candidate or the official acting for the Presidential Candidate in initiating the request (hereafter "Requesting Official"). The Requesting Official must certify, subject to the criminal penalties for making a

*Specifically IRTPA states that "[e]ach major party candidate for President may submit, before the date of the general election, requests for security clearances for prospective transition team members who will have a need for access to classified information to carry out their responsibilities as members of the President-Elect's transition team." These investigations and eligibility determinations should be completed, "to the fullest extent practicable, by the day after the date of the general election."

**IRTPA refers to Section 9002(6) of the Internal Revenue Code of 1986 to define the term "major party" as the political party whose candidate received "25 percent or more of the total number of popular votes" in the preceding election.

- false statement, that information is sought only for purposes related to transition preparations and that he or she understands that unauthorized disclosure of any information obtained may violate the Federal Privacy Act of 1974.
- ii. As indicated on the form provided by the FBI, all investigation requests must also contain the original signature of an official designated by the Presidential Candidate to review and approve all requests prior to their transition to the FBI (hereafter “Approving Official”).
 - iii. The Presidential Candidate will provide the FBI via official correspondence with the title(s), name(s), and specimen signature(s) of the person(s) designated to be Requesting Official(s) and Approving Official(s), and will apprise the FBI by official correspondence of any changes in approval authority.
- c. The FBI’s point of contact for processing investigation requests is the Special Inquiry and General Background Investigations Unit (SIGBIU) [REDACTED].
 - d. The DOJ Security and Emergency Planning Staff will consult with the Presidential Candidate or his designated representative if any suitability or noteworthy information is developed during the investigation. The Presidential Candidate or his designated representative may request that the clearance process be suspended at that point.
 - e. If, during the period in which the FBI is conducting its investigation, the Presidential Candidate or his designated representative determines the Appointee no longer needs a security clearance, the Presidential Candidate or his designated official will notify SIGBIU within two (2) business days of the determination so the investigation can be discontinued.
 - f. Whenever the FBI’s investigation reveals a pending Federal civil or criminal investigation involving the Appointee, dissemination of any information relating to the pending investigation will be halted. The FBI General Counsel (or his/her designee) will consult with cognizant FBI Headquarters officials to determine what information can be disseminated without harm to the pending investigation. The FBI General Counsel will then refer the matter to the Deputy Attorney General (or his/her designee), who will determine what information will be disseminated to the Presidential Candidate or his designee.

IV. USE AND DISCLOSURE OF INFORMATION

- a. The FBI will furnish summary memoranda and/or supporting materials (hereafter referred to as reports) containing the results of its investigations to the DOJ.
- b. The DOJ, or other appropriate agency to which the DOJ refers the matter, will make a determination whether to grant the Appointee appropriate security clearance as well as access to sensitive information (e.g., law enforcement matters, personal information about individuals, privileged commercial or financial information) or classified information.
- c. Information obtained during an investigation will be retained at FBI Headquarters and FBI field offices in accordance with FBI Privacy Act records systems notices, Records Retention Plan, and Disposition Schedule. As provided above, certain information relating to pending Federal civil or criminal matters will be disseminated on a need-to-know basis to other officials of the DOJ or other appropriate agency to which the DOJ refers the matter. No further dissemination shall be made of information obtained during any investigation conducted pursuant to this agreement, except as part of an investigation of a violation of law, or otherwise as permitted or required by Federal statute, FBI/DOJ regulation or policy, or Presidential directive or Executive Order.
- d. No person employed by the Presidential Candidate shall be given access to any sensitive or classified information or material until appropriate clearance for access to sensitive or classified information and materials has been granted by the DOJ or other appropriate agency. The DOJ will maintain a list of persons cleared for access to sensitive or classified information, and the Presidential Candidate will advise the DOJ when an individual granted a clearance terminates employment with the Presidential Candidate or otherwise no longer requires access to classified material.

V. EFFECT OF THIS AGREEMENT

- a. The procedures set forth in this MOU shall remain in effect until a subsequent MOU between the President-Elect and the Department of Justice is executed. The FBI General Counsel ("GC"), subject to the authority of the Director of the FBI and of the Attorney General, may resolve issues involving interpretation of these procedures, including their applicability to situations not anticipated in their formulation. In so doing the FBI GC will give due consideration to applicable statutes and regulations, the policy considerations underlying these procedures, along with a "rule of reason". The FBI GC may delegate this authority to an FBI Deputy GC.
- b. This MOU is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law or otherwise by any third party against any of the parties, their parent entities, the United States, or the officers, employees, agents, or other associated personnel thereof. The parties will seek to resolve any disputes regarding this MOU by mutual consultation.
- c. This MOU is not an obligation or commitment of funds, nor a basis for transfer of funds, but rather is a basic statement of the understanding between the parties of the matters described herein. Expenditures by each party will be subject to its budgetary processes and to the availability of funds and resources pursuant to applicable laws, regulations, and policies. The parties expressly acknowledge that the language in this MOU in no way implies that funds will be made available for such expenditures.
- d. This MOU does not constitute an agreement for any party to assume or waive any liability or claim under any applicable law.
- e. This MOU will be effective upon signatures by the Presidential Candidate or his representative and the Department of Justice and will remain in effect until any subsequent MOUs are executed or until the date of the Presidential inauguration, whichever comes first. This MOU may be amended only by a written document signed by both the Department of Justice and the Presidential Candidate or his representative.

Signed by:

Lee J. Lofthus
Assistant Attorney General for Administration
U.S. Department of Justice

Signed by:

Christopher P. Lu
Executive Director,
Obama Transition Project

Date: October 1, 2008