



DEPARTMENT OF JUSTICE | OFFICE OF THE INSPECTOR GENERAL

MANAGEMENT ADVISORY MEMORANDUM

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Recommendation Concerning Potential Conflict Between Federal Bureau of Investigation (FBI) Post-Shooting Evidence Handling and Crime Scene Maintenance Procedures and FBI Hostage Rescue Team Practice of Identifying and Removing Sensitive Items

OVERSIGHT AND REVIEW DIVISION



DEPARTMENT OF JUSTICE | OFFICE OF THE INSPECTOR GENERAL

July 8, 2024

Memorandum For: Christopher A. Wray
Director
Federal Bureau of Investigation

From: Michael E. Horowitz
Inspector General 

Subject: Recommendation Concerning Potential Conflict Between Federal Bureau of Investigation (FBI) Post-Shooting Evidence Handling and Crime Scene Maintenance Procedures and FBI Hostage Rescue Team Practice of Identifying and Removing Sensitive Items

As part of our investigation of a law enforcement-involved shooting incident that occurred in January 2016, the Office of the Inspector General (OIG) identified several areas in which the FBI's Hostage Rescue Team (HRT) practice of identifying and removing sensitive items following a shooting either are not squarely addressed by or potentially conflict with the FBI's procedures for evidence handling, crime scene management, and agent-involved shooting incident investigations. The FBI's evidence handling and crime scene management procedures prohibit the removal of items from a shooting scene and require any items seized to be documented. However, by their terms, these procedures only contemplate an FBI investigation of the shooting and do not explicitly apply where the FBI coordinates with state and local law enforcement outside of an FBI-led task force, and where state or local law enforcement takes control of the scene and conducts the shooting investigation. Nor do FBI procedures provide guidance concerning whether and how FBI agents may identify and remove sensitive items, such as night vision goggles, weapons, or unexploded flash bang grenades, from a crime scene.

Background

In January 2016, an armed militia seized the Malheur National Wildlife Refuge near Burns, Oregon. Multiple law enforcement agencies were involved in the response to the occupation, including Oregon State Police (OSP) officers and FBI HRT operators. On January 26, 2016, one of the militia members, Robert "LaVoy" Finicum, was shot and killed when he left the refuge and drove at high speed toward a law enforcement roadblock. After crashing into a snowbank, Finicum exited his truck, reached inside his jacket several times, and ignored repeated law enforcement commands to get onto the ground.

Two OSP officers fired the shots that killed Finicum. In total, the OSP officers admitted to firing six shots: three shots as Finicum's truck approached the roadblock, and three that hit and killed Finicum as he reached inside his jacket. All of these were deemed justified. At the scene, all of the FBI HRT operators denied having shot. As a result, state and local law enforcement personnel—not the FBI—assumed control of the scene and conducted the shooting investigation.

In the days following the shooting, OSP ballistics examiners discovered a bullet strike in Finicum's truck that could not be attributed to the rounds fired by the two OSP officers. Based on the bullet trajectory, they determined that the bullet causing the strike originated from an area where two FBI HRT operators and an OSP officer had been standing. In addition, a video taken from inside the truck depicted "two loud popping noises" followed by "debris...from the inside roof area and the left rear side window shatter[ed]," which were determined to be consistent with gunshots. As a result, state and local law enforcement investigators determined that eight shots had been fired on January 26. However, only two shell casings were found at the scene, with both being discovered off the roadway in the snow using metal detectors in a location that corresponded to the position where one of the OSP troopers was standing when he shot Finicum. None of the casings from the six shots that were taken while law enforcement was standing in the roadway were recovered even though OSP troopers reported seeing expended ammunition casings in the roadway immediately after the shooting.

State and local law enforcement investigators also became aware of aerial surveillance video taken by an FBI plane shortly after the January 26 shooting, which depicted FBI HRT personnel moving around the scene in the dark, using flashlights to look under and around vehicles, examining the area near the roadblock, and appearing to pick up objects from the roadway. The FBI HRT agents denied searching for or picking up ammunition casings, and instead told OSP detectives that they were looking for sensitive items, including looking for canisters of the three flash bang grenades they used during the incident.¹ However, the FBI HRT agents did not recover any of the flash bang canisters; state and local law enforcement investigators subsequently found all three of those used flash bang canisters, two of which were found in plain sight on the roadway.

Local law enforcement investigators brought these findings to the FBI's attention, and the OIG subsequently launched a criminal investigation. Working with a forensic expert—and based on other factors including the results of two compelled polygraphs—the OIG and the U.S. Attorney's Office (USAO) in Portland, Oregon determined that an FBI HRT operator was the source of the two unaccounted for shots and his statements to OSP detectives and FBI supervisors that he had not shot were inaccurate. The FBI HRT operator was indicted and tried on false statements and obstruction of justice charges stemming from his statements that he had not fired shots at the scene. In August 2018, a jury acquitted the FBI HRT operator on all counts. Following the acquittal, the OIG assigned a different team to conduct a *de novo* examination of the investigative and trial record, as well as to research any relevant policy issues, with minimal input from the original investigative team. The OIG provided the results of this *de novo* examination to the FBI in May 2024. In the course of our *de novo* examination, we identified a policy issue concerning the maintenance of a crime scene where state or local law enforcement handles a shooting investigation, which we address below in this memorandum.

The OIG encountered a significant issue regarding its access to information in this matter. During the course of the original criminal investigation, the OIG obtained FBI approval to conduct compelled polygraph examinations of two FBI HRT operators who were present at the scene of the shooting. Following the conclusion of criminal proceedings, and as part of this *de novo* examination, the OIG sought FBI approval to conduct a compelled polygraph examination of a third FBI HRT operator. The FBI routinely uses polygraph examinations in its administrative misconduct investigations, and the OIG's request was identical to the polygraph requests that the FBI had previously approved for the first two FBI HRT operators. Nonetheless, the FBI denied that request following its receipt of a memorandum from then Attorney General William Barr

¹ A flash bang grenade is a handheld explosive device that produces a flash of light and a loud noise to stun and disorient a target. To deploy a flash bang grenade, the user pulls a pin from the flash bang body, which releases a spoon that makes a loud noise.

stating that the FBI should deny the OIG's request because of his belief that compelling the polygraph would not be consistent with FBI policy or appropriate under the circumstances. The FBI adopted Barr's position in denying the OIG's request. As the OIG noted in our report to the FBI following our *de novo* examination, the FBI's denial of the OIG's request was inconsistent with its usual practice and deprived the OIG of information relevant to our oversight responsibilities.

Policy Issue

FBI Post-Shooting Evidence Handling and Crime Scene Management Procedures

FBI Policy Directive 0782D, Shooting Incident Response Procedures, and the Shooting Incident Guide detail the policies and procedures for the management of an agent-involved shooting scene and the responsibilities of the agent. In particular, the Shooting Incident Guide requires an agent involved in a shooting to notify his chain of command and follow procedures to facilitate collection of shooting-related evidence, including photographing the agent in his clothes and gear and collecting his weapon.

The Shooting Incident Guide requires a shooting scene to be treated as a crime scene for forensic collection purposes. The Shooting Incident Guide outlines normal crime scene procedures to be implemented after an agent-involved shooting, including the following:

- Establishing a perimeter to protect the incident scene and evidence once any remaining threats have been addressed;
- Locating and identifying all personnel and witnesses at the scene;
- Documenting the identities of law enforcement personnel and witnesses present or entering the scene;
- Beginning a log of pertinent events; and
- Ensuring that agents do not discuss the shooting with other agents, the news media, or outside law enforcement.

In addition, the ranking FBI official at the scene must arrange to collect weapons and ammunition from the involved agent and conduct a round count of the agent's firearm and magazine. The Shooting Incident Guide also states that it is "considered a best practice to conduct a round count on all weapons of agents in close proximity of the shooting to help verify who fired." Further, the Shooting Incident Guide requires an Evidence Response Team (ERT) to handle the collection of evidence at the scene and specifies that personnel should not "remove projectiles from surfaces" nor move any objects with potential bullet holes or impacts until a shooting reconstruction team arrives. If items must be moved, FBI personnel must first measure and document their position within the scene.

Consistent with these requirements, the ERT Policy Guide prohibits the removal of non-evidentiary items from a crime scene and requires documentation of any items seized. An October 18, 2004 Electronic Communication (EC) similarly states that employees "shall not knowingly remove or possess any item removed from a crime or search scene, except items seized for evidentiary purposes and properly documented as such consistent with applicable policy[.]"

These procedures, however, apply only where an FBI agent is responsible for the shooting or the shooting occurs under the auspices of an FBI task force, such that the FBI takes control of the scene and conducts the shooting investigation. They do not explicitly apply where, as here, the FBI partners in a law enforcement operation with state or local law enforcement outside an FBI-led task force and no FBI agent is believed at

the time of the shooting to have fired their weapon. While FBI agents receive training in—and are expected to follow—commonly accepted crime scene and evidence processing standards, including ensuring the integrity of a crime scene, FBI policies do not explicitly govern FBI agents’ conduct under these circumstances.

FBI HRT Practice of Removing Sensitive Items

The OIG learned that FBI HRT members routinely identify and remove sensitive items after an operation that does not involve an FBI agent-involved shooting. We were told that FBI HRT considers sensitive items to include equipment brought to or used during the operation or items that could hurt someone if left at the scene, such as weapons, night vision goggles; flash bang grenades, handheld explosive devices that produce a flash of light and loud noise to stun and disorient a target; or RAM (breaching) rounds, shells specifically designed to allow law enforcement to breach doors without the risk of a bullet ricocheting.

We were told that, as a general matter, HRT agents will only identify and remove sensitive items once the scene is secure and if there has not been a critical incident, such as an FBI agent-involved shooting. We also were advised that, in the event of a shooting involving FBI personnel, FBI HRT agents must secure the scene and wait for ERT personnel to arrive. Additionally, we were told that agents may remove dangerous or sensitive items if needed to protect other personnel arriving at the scene, and that they should call attention to any other potentially dangerous items, but that they are required to document everything they do in order to support a shooting investigation and subsequent crime scene reconstruction.

In response to a request by the OIG, the FBI identified only a single reference to identifying and removing sensitive items in FBI procedures. Section 4.7 of the FBI HRT Policy Guide, added in March 2019, states that after an FBI agent-involved shooting, agents involved in breaching operations (*i.e.*, forcing open a door using force) must leave expended RAM cartridges where they are dropped until FBI ERT personnel arrive “if safe and practicable.” The OIG found no procedures, guidance, or best practices for identifying and removing sensitive items while maintaining the integrity of a crime scene. Moreover, as with the FBI’s shooting investigation and evidence handling procedures discussed above, this statement applies by its express terms to an FBI agent-involved shooting, not to any shooting in which FBI HRT agents are present and participate in partnership with state or local law enforcement.

Conclusion and Recommendation

We recognize that there may be instances where FBI agents must remove dangerous items from a crime scene, including following an agent- or officer-involved shooting where there is an ongoing threat, and that there might be tension under these circumstances between maintaining the crime scene and the practice of identifying and removing sensitive item. We therefore recommend the FBI take the following actions:

1. Update its shooting incident policies to account for circumstances where the FBI participates in a law enforcement operation that results in a shooting that does not involve an FBI agent using their firearm, even where cooperation takes place outside an FBI-led task force;
2. Analyze whether and under what circumstances its policies permit identifying and removing sensitive items from a crime scene, whether the crime scene is managed by the FBI or another law enforcement agency, particularly following an agent- or officer-involved shooting;
3. Develop guidelines for identifying and removing sensitive items, including appropriate documentation requirements and standards for involvement by agents involved in or witnesses to a shooting; and

4. Conduct training of FBI HRT and SWAT units to ensure that these standards are consistently implemented and followed.

Please advise us within 60 days of the date of this memorandum on what actions the FBI has taken or intends to take with regard to these issues. If you have any questions, please contact Assistant Inspector General Sean O'Neill at (202) 514-9539.

CC: Bradley Weinsheimer
Associate Deputy Attorney General
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