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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

February 10, 2014

VIA ELECTRONIC TRANSMISSION

The Honorable Michael E. Horowitz
Inspector General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530

Dear Inspector General Horowitz:

In 1988, I introduced an amendment known as the “anti-gag” provision to the Treasury, Postal Service and General Government Appropriations Act. The provision was adopted, and the law as amended stated:

Sec. 619. No funds appropriated in this or any other Act for fiscal year 1989 may be used to implement or enforce the agreements in Standard Forms 189 and 4193 of the Government or any other nondisclosure policy, form or agreement if such policy, form or agreement:

(3) directly or indirectly obstructs, by requirement of prior written authorization, limitation of authorized disclosure, or otherwise, the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress;

(4) interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress¹

From 1988 until 2013, a version of this language was included in every appropriations bill signed into law,² most recently in March 2013 as part of the Consolidated and Further Continuing Appropriations Act of 2013.³

In 2012, working closely with Senator Akaka, I authored a provision of the Whistleblower Protection Enhancement Act (WPEA) to codify the “anti-gag” provision.

¹ Treasury, Postal Service and General Government Appropriations Act, 1989, Pub. L. No. 100-440, 102 Stat. 1756 (1988).

² See generally Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 932 (2011); Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 685 (2009).

³ Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, Div. F, Title I, Sec. 1105 (referencing back to Pub. L. No. 112-74, Div. C, Title VII, Sec. 715).

As amended by this provision, 5 U.S.C. § 2302, which governs prohibited personnel practices, now reads:

- (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

* * *

- (13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: “These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.”

On May 10, 2013, I wrote to the Attorney General asking him to provide information regarding what the Justice Department had done to implement this provision. I never received a response. On November 22, 2013, I copied you on a follow-up letter I wrote to the Attorney General notifying him that not only had I not received a reply to my May 10 letter, but it had also come to my attention that the Federal Bureau of Investigation (FBI) was potentially in violation of the anti-gag provision.⁴

Even if your office was not familiar with the law prior to my November letter, it certainly was by then. Moreover, on August 8, 2012, your office touted the appointment of Robert Storch as its whistleblower ombudsman, who should be responsible for ensuring that your office fully implements the WPEA. Thus it is alarming and disappointing to discover that your office is still using non-disclosure forms which do not comply with 5 U.S.C. § 2302. The attached form was executed within the last several weeks.⁵ It fails to include language regarding an employee’s right to communicate with Congress, much less the full language required by the WPEA. Moreover, it threatens adverse personnel action against the employee for violation of the non-disclosure agreement.

Although the Department of Justice Office of Inspector General (DOJ OIG) website outlines the requirements of the WPEA, many employees who have been required to sign nondisclosure forms without the language required by the WPEA may

⁴ Although the FBI has an exemption from the statutory language, they were not exempt from the language in the 2013 Consolidated and Further Continuing Appropriations Act.

⁵ See attachment.

not be aware of this language on the website. Even if they are, some may assume that the form they signed nevertheless takes precedence over the website. In reality, however, the failure to include the WPEA disclaimer makes the form unenforceable.

In order to help me understand the extent to which this provision of the WPEA has been followed, please answer the following questions:

- 1) Prior to my staff contacting your office on this issue, what steps, if any, had you taken to ensure that all nondisclosure forms used throughout the DOJ OIG comply with the WPEA?
- 2) How many other types of DOJ OIG nondisclosure forms that are not compliant with the WPEA have been used by the DOJ OIG at any time in 2014? How many of the non-WPEA compliant forms have been signed in 2014?
- 3) How many other types of DOJ OIG nondisclosure forms that are not compliant with the WPEA were used by the DOJ OIG at any time in 2013? How many of the non-WPEA compliant forms were signed in 2013?
- 4) How many personnel actions have been initiated against employees in connections with alleged violations of the terms of the non-WPEA compliant OIG nondisclosure forms? Please provide a summary of any such actions.
- 5) How do you intend to inform all individuals who have signed non-WPEA compliant nondisclosure forms of their rights under the WPEA?

Please provide your written answers to these questions by February 19, 2014. I would appreciate you numbering your responses in accordance with the question number you are answering. Should you have any questions regarding this letter, please contact [REDACTED] my Committee staff.

Sincerely,



Charles E. Grassley
Ranking Member

Attachment

Attachment

NON-DISCLOSURE AGREEMENT
OFFICE OF THE INSPECTOR GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

[REDACTED]

As a condition of being granted access to review the portions of the Draft Report relating to me, I agree that until the OIG's Final Report, or any redacted portion of the Final Report, is released to the public I will not discuss or disclose any information from or about the portion of the Draft Report I review to anyone other than the OIG; my attorney, if I have legal counsel who agrees to be subject to the conditions of this agreement; or, to the extent necessary for me to provide my comments about the portion of the Draft Report I review, others as specifically authorized by the OIG after any such person executes a non-disclosure agreement with terms similar to this agreement. I understand that I could be subject to discipline for breaching the terms of this agreement.

[REDACTED]