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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

November 22, 2013

VIA ELECTRONIC TRANSMISSION

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Holder:

On May 10, 2013—over six months ago—I wrote to you regarding the Justice Department’s implementation of the anti-gag provision of the Whistleblower Protection Enhancement Act (WPEA).¹ My staff has repeatedly followed up with the Department to request a reply to this letter. However, I have yet to receive a formal response to my letter.

The WPEA codified a requirement that every U.S. Government nondisclosure policy, form, or agreement contain an explicit statement notifying employees that nondisclosure requirements do not supersede their rights and obligations created by existing statute or Executive Order relating to classified information, communications to Congress, reporting violations and/or misconduct to an Inspector General, or any other whistleblower protection.² I was the author of this rider and worked closely with Senator Akaka in drafting the provision. It mirrors an amendment I introduced in 1988 to the Treasury, Postal Service and General Government Appropriations Act.³ Known as the anti-gag provision, this language subsequently has been included in every appropriations bill signed into law since 1988.⁴

Nevertheless, despite the provision being codified into statute in 2012, it has come to my attention that components of the Department may be in violation of this law. The attached form of the Federal Bureau of Investigation’s (FBI’s) Inspection Division served to notify FBI employees that they are under investigation by the Inspection Division’s Internal Investigations Section (IIS). My office has received other

¹ Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 (2012).

² See *id.*, § 104(b)(1).

³ Treasury, Postal Service and General Government Appropriations Act, 1989, Pub. L. No. 100-440, 102 Stat. 1756 (1988).

⁴ See *generally* 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); 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).

examples of this document as well. Rather than informing employees of their right to communicate with Congress or the Inspector General, the document explicitly says:

The employee should be advised that:

- ...
(5) He/she is not to discuss this matter with anyone other than the Inspection Division's Internal Investigations Section (IIS), O[ffice of] P[rofessional] R[esponsibility], the Human Resources Division's Appellate Unit (APU), the FBI's E[mployee] A[ssistance] P[rogram], the FBI's Ombudsman, or an attorney who has signed the appropriate Nondisclosure Agreement.⁵

This language is in clear violation of the WPEA.

Please inform me as soon as possible what you intend to do to remedy this situation. Please also respond to my letter of May 10, 2013, include all documents requested, and explain why it has taken the Department over six months to respond to this request. Should you have questions regarding this letter, please contact [REDACTED] my Committee staff at (202) 224-5225.

I trust that the Department will do everything possible to comply with the law as passed by Congress.

Sincerely,



Charles E. Grassley
Ranking Member

ATTACHMENT

cc: The Honorable Carolyn Lerner, Special Counsel
U.S. Office of Special Counsel

The Honorable Michael E. Horowitz, Inspector General
U.S. Department of Justice

⁵ Attachment.

Attachment

**DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
INSPECTION DIVISION**

NOTIFICATION

TO:

FROM:

TITLE:

DATE: [REDACTED]/2013

Conduct no investigation until so requested by Internal Investigations Section (IIS)/TNSD.

On [REDACTED] /2013, an internal investigation was initiated [REDACTED]

— You are requested not to inform captioned employee of the initiation of this inquiry or provide him/her with the below described forms until requested to do so by IIS/INSD.

X You are requested to provide captioned employee with this notification of the initiation of this inquiry, along with the attached forms, "The FBI's Disciplinary Process," "FBI Disciplinary Process: Disclosure of Information to Attorneys," and "Nondisclosure Agreement." The employee should be advised that:

- (1) He/she will be interviewed regarding this matter.
- (2) He/she has the opportunity to have an attorney represent him/her in this matter subject to the limitations set forth in the above forms.
- (3) The Employee Assistance Program (EAP) is always available and provides free, confidential, professional assistance to employees and their family members. Employee should be provided an EAP informational brochure with the name(s) and contact number(s) of their division EAP Representative(s) listed.
- (4) He/she has the opportunity, prior to being interviewed or at any time during the course of the investigation, to voluntarily provide to IIS/INSD any documentation, information, names of witnesses, statements of admission, and/or explanation that may assist in the resolution of this inquiry.
- (5) He/she is not to discuss this matter with anyone other than the Inspection Division's Internal Investigations Section (IIS), OPR, the Human Resources Division's Appellate Unit (APU), the FBI's EAP, the FBI's Ombudsman, or an attorney who has signed the appropriate Nondisclosure Agreement. Neither the employee, his/her attorney, nor anyone acting on his/her behalf should contact any witness or potential witness about this inquiry without first obtaining approval from IIS, OPR, or APU. In addition, any redacted materials or other FBI documents he/she reviews in connection with this inquiry are the property of the FBI, and he/she is prohibited from photocopying or removing such documents from FBI space. He/she may take notes concerning the content of such material, but those notes may be used only to facilitate their participation in this disciplinary inquiry and for no other purpose.
- (6) The results of this administrative inquiry will be forwarded to the Security Division for review and evaluation of its effect, if any, on the employee's ability to maintain a security clearance.

— On [REDACTED], this matter was referred to the OPR for review and adjudication. You are requested to so inform captioned employee.

(Date)

Return this notice, signed and dated by the presenting official and employee, to IIS/INSD. Provide one original with attachments (as appropriate) to employee. Questions or concerns regarding this inquiry can be directed to the INSD Case Supervisor listed below.

ROUTE IN ENVELOPE