

United States Senate
WASHINGTON, DC 20510

February 12, 2024

VIA ELECTRONIC TRANSMISSION

The Honorable Michael E. Horowitz
Inspector General
Department of Justice

Dear Inspector General Horowitz:

My office has been made aware of a memo transmitted by the ATF on October 20, 2023, to all ATF employees titled “Prohibited Disclosure of Unclassified, Sensitive Information Without Proper Authorization” which is enclosed.¹ That memo was transmitted to ATF employees *only two days after* I made public internal ATF records obtained from legally protected whistleblower disclosures on October 18, 2023. The memo threatens that unauthorized disclosure of unclassified information “may lead to disciplinary action, including suspension or removal from federal service.” It also threatens that the taking or disclosure of certain unclassified information “may lead to criminal charges.” The memo purports to remind “all ATF employees that the unauthorized disclosure of sensitive but unclassified (SBU) information is strictly prohibited.” However, the ATF memo fails to explicitly inform ATF employees of their Constitutional and statutory right to make protected disclosures of wrongdoing and misconduct to Congress, inspectors general (IG), and the Office of Special Counsel (OSC). It also fails to include the “anti-gag” provision which informs federal employees of their right to make protected disclosures. These failures inappropriately imply that disclosure of information to Congress, IGs, and the OSC is unauthorized. The ATF is in violation of the law and must immediately cure its defective memo.

This memo and its timing to my October 18 letter is an obvious non-disclosure policy and an unacceptable attempt by the ATF to chill speech and silence potential whistleblowers from reporting allegations of waste, fraud, abuse, and misconduct. The ATF memo clearly runs afoul of the statutory text and Congress’s intent in passing the Whistleblower Protection Act, its subsequent amendments, and the “anti-gag” provision.²

The Whistleblower Protection Act clearly and unequivocally states no adverse personnel action can be taken against a federal employee for “any disclosure to Congress (including any committee of Congress) by any employee of an agency or applicant for employment at an agency

¹ ATF, *Announcements: Prohibited Disclosure of Unclassified, Sensitive Information Without Proper Authorization*, (Oct. 20, 2023) (on file with Committee staff).

² 5 U.S. Code § 2302(b)(13); Pub. L. No. 117-328 (the “anti-gag” provision has been included in almost every appropriations bill since 1988 and prohibits federal funds from being used to enforce a non-disclosure policy, form, or agreement unless it contains specific language notifying the employee of their right to make protected disclosures to an Inspector General, Office of Special Counsel, and to Congress).

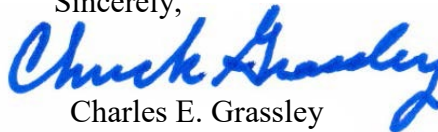
of information described in subparagraph (B) that is not classified.”³ The same applies to federal employees disclosing information to IGs and the OSC.⁴ Further, the anti-gag provision under 5 USC § 2302(b)(13) prohibits the implementation or enforcement of any non-disclosure policy, form, or agreement unless it contains specific language notifying the employee of their right to report waste, fraud, and abuse to Congress, an IG, and the OSC.⁵ In addition to the Whistleblower Protection Act, 5 U.S.C. § 7211 provides that the “right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.”⁶

The ATF memo transmitting the chilling non-disclosure policy makes no mention of these statutory rights, the anti-gag provision or the ability to report and provide information to Congress, IGs, and the OSC of alleged waste, fraud, and abuse. The importance of whistleblowers knowing their rights under the law cannot be stated enough, and federal agencies should encourage their employees to disclose allegations of waste, fraud, and abuse instead of threatening them with criminal charges. Federal agencies cannot conceal their wrongdoing behind illegal non-disclosure policies and related actions.

Accordingly, I urge you to fully review ATF’s failure to inform ATF employees of their Constitutional and statutory rights to make legally protected disclosures to Congress, IGs, and the OSC and ATF’s failure to include the anti-gag provision in the memo. Further, I request that you require ATF to transmit updated guidance consistent with all whistleblower rights to ATF employees and provide me with a copy of the message no later than February 26, 2024.

Thank you for your prompt review and responses. If you have any questions, please contact Brian Randolph on my Committee staff at (202) 224-0642.

Sincerely,



Charles E. Grassley
Ranking Member
Committee on the Budget

cc:

The Honorable Karen Gorman
Acting Special Counsel
Office of Special Counsel

Enclosure

³ 5 U.S.C § 2302(b)(8)(C).

⁴ 5 U.S.C § 2302(b)(8)(B).

⁵ 5 USC § 2302(b)(13).

⁶ 5 U.S.C. § 7211.

ANNOUNCEMENTS



Prohibited Disclosure of Unclassified, Sensitive Information Without Proper Authorization

October 20, 2023

Like classified national security information, all ATF employees have a duty to adequately protect and secure unclassified sensitive information. This announcement serves to remind all ATF employees that the unauthorized disclosure of sensitive but unclassified (SBU) information is strictly prohibited.

SBU is information that is **not** classified for national security reasons, **but** that warrants/ requires administrative control and protection from public or other unauthorized disclosure for other reasons. The loss or misuse of, or unauthorized access to, SBU information can adversely affect the agency's mission, the conduct of federal programs or the privacy to which individuals are entitled. SBU information may be designated in various ways, including but not limited to, "For Official Use Only" (FOUO), "Limited Official Use" (LOU), and "Law Enforcement Sensitive" (LES). SBU information may include investigative, proprietary, regulatory and tax information, as well as other sensitive information such as fiduciary and personally identifiable information (PII).

There have been multiple instances recently where employees have failed to adhere to unclassified sensitive information policies or procedures. Such failure may lead to disciplinary action, including suspension or removal from federal service. Additionally, the unauthorized taking or disclosure of certain classes of SBU information may lead to criminal charges. Within the past year, an ATF employee pleaded guilty and was criminally convicted in federal court of theft of government records related to SBU information. As a result, this employee is no longer with ATF. The impact of this employee's unauthorized disclosures directly affected ATF's mission and such actions will not be tolerated.

It is imperative that employees exercise good judgement and common sense when using, handling and storing SBU information. ATF and DOJ policies such as ATF Handbook 7250.1, Automated Information System Security Program (July 26, 2006), Rules of Behavior and Customer Agreement for Computing Devices (May 2, 2011), and DOJ

Memorandum: Safeguarding Sensitive and Other Forms of PII (Aug. 13, 2015), address the continuing obligations that employees have regarding SBU information.

Please direct any questions to Mark Riddle, Chief, Information Security Branch, at

[REDACTED].