
From: Schmalzer, Tracy (SMO)
To: Axelrod, Matthew (ODAG); Wilkinson, Monty (OAG); Richardson, Margaret (SMO)
Sent: 4/11/2011 4:16:59 PM
Subject: FW: Comment on this? More ATF Whistleblowers, Questions about Guidance from HQ re: Congressional Inquiries

MJ picking this up. I'm going to provide the same comment gave to CBS last week on reviewing and responding appropriately.

From: andrew.ramonas@gmail.com [mailto:andrew.ramonas@gmail.com] **On Behalf Of** Andrew Ramonas
Sent: Monday, April 11, 2011 12:06 PM
To: Miller, Matthew A (SMO); Schmalzer, Tracy (SMO)
Subject: Comment on this? More ATF Whistleblowers, Questions about Guidance from HQ re: Congressional Inquiries

Hi Matt and Tracy,

I was working on a story about this. I wanted to know if you have a comment.

Thanks,
Andrew

----- Forwarded message -----

From: **Ranking Member Grassley (Judiciary-Rep)** <RankingMemberGrassley@judiciary-rep.senate.gov>
Date: Fri, Apr 8, 2011 at 4:44 PM
Subject: More ATF Whistleblowers, Questions about Guidance from HQ re: Congressional Inquiries
To: "Ranking Member Grassley (Judiciary-Rep)" <RankingMemberGrassley@judiciary-rep.senate.gov>

For Immediate Release

Friday, April 8, 2011

Grassley: More ATF Whistleblowers Come Forward;
Senator Seeks Information on Guidance from Headquarters

WASHINGTON – Senator Chuck Grassley today requested information from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) about guidance it may have given to agents in the field in responding to Grassley's requests.

Grassley's inquiry comes in response to documents that the ATF released through the Freedom of Information Act. Within those documents was an email to the Deputy Director of the ATF, Billy Hoover, regarding suggestions on how ATF agents should be directed to respond to congressional requests, like those from Grassley.

“Since our investigation began, I've continued to be contacted by agents and others within the ATF about wrongdoing regarding Fast and Furious at the ATF and the Justice Department. If people have concerns they should be able to express themselves without feeling pressure from their bosses,” Grassley said.

Grassley has been investigating a program led by the ATF where assault weapons were sold to straw buyers who then transported the weapons across the border to resell them to Mexican drug cartels. Grassley learned of the wrongdoing from courageous whistleblowers. He has sent letters and asked questions inquiring about the policy, but has yet to be provided a substantive response from the Departments of Justice and State and the ATF.

Grassley is a champion of whistleblowers and is the co-author of the first Whistleblower Protection Act in

1989. This week, Grassley introduced legislation with Senators Daniel Akaka of Hawaii, Susan Collins of Maine and Joe Lieberman of Connecticut to update the law.

“Whistleblowers stand up for truth and help to fight wrongdoing, injustice, and waste, fraud and abuse in government. They shouldn’t be subject to retaliation, from either higher ups or colleagues, for coming forward with important information,” Grassley said. “Without whistleblowers, we’d know a lot less about what goes on in government. They are key to unlocking secrets deep in the closets of the bureaucracy.”

Here’s a copy of Grassley’s letter sent today to the Acting Director of the ATF, Kenneth Melson. For copies of all of Grassley’s letters, please visit his website, Grassley.senate.gov and click on the Judiciary Committee link.

April 8, 2011

Kenneth E. Melson
Acting Director
Bureau of Alcohol, Tobacco, Firearms, and Explosives
99 New York Avenue, NE
Washington, DC 20226

Dear Acting Director Melson:

Attached is an email released through the Freedom of Information Act (FOIA).¹ It appears to contain proposed guidance to ATF employees about how to respond to contacts from my office. The guidance instructs ATF employees that they “are in no way obligated to respond” to questions from Congress. It also attempts to prevent direct communications with my office by instructing that ATF employees “should refer congressional staff who seek information from you to the ATF’s office of congressional affairs.” The guidance further attempts to prevent direct communications with my office by claiming that ATF employees “are not authorized to disclose non-public information.”

It is unclear from the email released through FOIA whether this guidance was actually communicated to ATF employees. However, it is of grave concern because, as you know, such attempts to prevent direct communications with Congress are not a lawfully authorized activity of any officer or employee of the United States whose salary is paid with appropriated funds.² Specifically, no officer or employee may attempt to prohibit or prevent “any other officer or employee of the Federal Government from having *direct* oral or written communication or *contact* with any Member, committee, or subcommittee of the Congress” about a matter related to his employment or the agency “in any way, *irrespective of whether such communication or contact is at the initiative*” of the employee or Congress (emphasis added).³

I wrote to you on January 31 to ensure you were aware of these provisions and to express concerns that without proper guidance, managers might inappropriately intimidate employees to discourage them from speaking with Congress and thus unlawfully interfere with a Congressional inquiry.⁴ In order for Congress to exercise its oversight authority and act as a check on Executive power, it is crucial that agency employees are free to communicate directly with Members and Committee staff. Direct contact means contacts that do not necessarily involve Congressional liaison or agency management. Without such direct, unfiltered communications, Congress would still be unaware of, and unable to inquire about, the serious allegations involving the death of Border Patrol Agent Brian Terry and the sales of weapons to known and suspected gun traffickers.

I have a long experience of witnessing retaliation against whistleblowers. Sometimes it is explicit and immediate. Often it is subtle and delayed until after public scrutiny has faded. Unfortunately, it is so frequent that employees fear that even truthful answers to direct factual questions from Congress will get them in trouble. That is why I am committed to maintaining the confidentiality of those employees who wish to cooperate with a Congressional inquiry or report problems anonymously. Direct contact with Congress of the sort protected by the law serves as an extra level of protection against retaliation and is obviously essential where an employee seeks confidentiality.

However, in some cases, agency employees choose to disclose their direct contacts with Congress, despite the potential consequences. As I explained in my January 31 letter, one employee chose to disclose his protected contacts with my staff and was immediately questioned about the content of those communications. I was concerned about that because forcing an employee to reveal the details of such communications would intrude on the integrity of the Congressional inquiry and offend the comity between the Branches that flows from the separation of powers under the Constitution.

Now, a second agency employee has chosen to disclose that he has had protected contacts with Congress. George Gillett, through and in conjunction with his legal counsel, is cooperating with this investigation. Mr. Gillett is the Assistant Special Agent in Charge of the ATF's Phoenix field division, and Committee staff's direct contacts with him are an essential component of our inquiry. He has participated in two preliminary meetings jointly with Senate Judiciary Committee staff and House Oversight and Government Reform Committee staff. As you know, retaliation for such communications is prohibited by law.

On one previous occasion when an agency sought to compel an individual to disclose the content of his communications with Congress, I was prepared to introduce a resolution authorizing the Senate Legal Counsel to seek legal remedy in the courts. Fortunately, in light of that draft resolution, the Executive Branch withdrew its attempt to compel discovery of communications between a whistleblower and Congress.⁵

In this current inquiry, a similar attempt was also abandoned. The first ATF agent to disclose that he had direct contacts with Congress was ordered to describe the content of his communications in writing. However, shortly after my January 31 letter, I was pleased to learn that the order was withdrawn. I appreciate the agency's willingness to respect Congressional prerogatives and avoid interfering with a Congressional inquiry. Similarly, the agency should avoid intruding into our investigative process by seeking to learn the content of ASAC Gillett's communications with Congress.

In light of the attached email, I have renewed concerns that the guidance being given to employees may be inconsistent with the law.⁶ Therefore, please provide written answers to the following questions:

1. Was the attached guidance distributed, either in writing or otherwise, to ATF field offices or other ATF personnel?
2. Was any guidance on contacts with Congress distributed, either in writing or otherwise, to ATF field offices or other ATF personnel? If so, please provide a copy.
3. What steps have you taken or do you plan to take to ensure that employees are aware of their right to communicate directly with Congress if they so choose?

Please reply no later than April 14, 2011. If you have any questions about this request, please contact (202) 225-5225. Thank you for your cooperation.

Sincerely,

Charles E. Grassley
Ranking Member

Attachments

cc: Chairman Patrick Leahy, Senate Committee on the Judiciary
Chairman Darrell Issa, House Committee on Oversight and Government Reform

¹ Attachment 1.

² Consolidated Appropriations Act, 2010, P.L. 111-117, 123 Stat. 3034, § 714 (2010), as continued by §101 of continuing resolutions P.L. 111-242, 124 Stat. 2607 (2010) and P.L. 112-6, 125 Stat. 23 (2011)—which extends the funding levels in the 2010 appropriations bills, as well as “the authority and conditions provided in such Acts,” through April 8, 2011.

³ *Id.*

⁴ 18 U.S.C. § 1505 (providing criminal penalties for obstructing or impeding the power of Congressional inquiry).

⁵ See S. PRT. 110-28, § VIII.D.2 “Attempt to Compel Disclosure of Confidential Communications with Congress,” p. 103, 641, 652 (“Nothing in this agreement shall require [the production of] any communications with, or documents that were created for, any Senate Committees (or the staff or members thereof”). See also S. HRG. 109-898, at 39-41, 470-471, responses to questions for the record to Dec. 5, 2006, Senate Judiciary Committee hearing at 8.

⁶ See generally, Government Accountability Office, “Department of Health and Human Services—Chief Actuary’s Communications with Congress,” B-302911 (Sep. 7, 2004) (discussing the history and background in support of the government-wide prohibition on attempts to prevent direct communications with Congress) (Attachment 2).

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