



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 13, 2011

The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This responds to your letter to Kenneth Melson, Acting Director of the Department's Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), dated April 11, 2011, which states that you expect production of the documents today, which is the subpoena's return date, unless there is an assertion of executive privilege. Your subpoena calls for a wide ranging group of documents, and as we have previously advised you, our search for responsive documents is continuing and some of the subpoenaed documents relate to ongoing law enforcement investigations, including our investigation of the murder of a federal law enforcement agent. We trust that you will await the results of our continuing document search and appreciate the risks to our law enforcement efforts that are presented by demands for documents from pending criminal investigations. We are continuing to confer with your staff in an effort to accommodate your oversight needs for information, consistent with our law enforcement responsibilities. Indeed, we made available documents for review prior to today's return date.

Our letter of April 8th offered Committee staff access to law enforcement sensitive documents responsive to your letter, and they have now reviewed the documents we have located to date. As our letter further explained, we are not in a position to disclose non-public information or documents relating to on-going criminal investigations, based upon the Department's long-standing policy relating to such matters. This policy is essential to our law enforcement mission and based on our strong interest in protecting both the independence and effectiveness of our law enforcement efforts. The letter enclosed with our last response, from Attorney General Reno to Senator Hatch, then-Chairman of the Senate Judiciary Committee, provides a fuller statement of the rationale for our policy, as well as its lengthy and nonpartisan history. The letter reads, in part:

Providing *open* criminal investigative files to Congress would undermine public and judicial confidence in the criminal justice process and would be in complete contravention of the Department's policy of declining congressional requests for non-public information about pending investigations. This policy is

neither new nor partisan. It is based on the longstanding belief of top Department officials, both Democrat and Republican alike, that the Department's ability to discharge its responsibilities for the fair administration of justice would be compromised by the disclosure to Congress of open investigative files. . . .

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The rationale underlying this policy was further explicated in a 1986 published opinion of the Office of Legal Counsel ("OLC") issued by Charles J. Cooper, OLC's Assistant Attorney General during part of the Reagan Administration. See Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 76-77 (1986). Mr. Cooper noted in his opinion that providing a congressional committee with confidential information about active criminal investigations would place the Congress in a position to exert pressure or attempt to influence the prosecution of criminal cases. *Id.* at 76, citing Memorandum for Edward L. Morgan, Deputy Counsel to the President, from Thomas E. Kauper, Deputy Assistant Attorney General, OLC, Re: Submission of Open CID Investigation Files, at 2 (Dec. 19, 1969) ("[T]he Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation."). Moreover, providing open investigative files in response to a congressional subpoena could give rise to a claim, by defense counsel or others, of improper congressional influence over the criminal justice process should it turn out that an indictment was returned in the matter after Congress had obtained access to the files.

Letter from Attorney General Reno to Chairman Hatch, dated May 17, 2000.

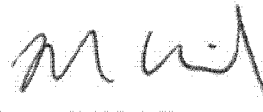
In addition to the foregoing concerns, we believe that the disclosure of non-public information about the pending investigations here presents risks to those specific law enforcement efforts and to individuals involved in them. Your subpoena encompasses records that would identify individuals who are assisting in the investigation and whose cooperation may never become public. The risk of their identification – even the knowledge that the information they provide may be disclosed – discourages cooperation by them and others whose assistance is important to the success of our law enforcement efforts. Similarly, records requested by you would identify sources and investigative techniques that have not yet been disclosed. Disclosure of these types of information may present risks to individual safety in the violent environment of firearms trafficking activities. Disclosure also may prematurely inform subjects and targets about our investigation in a manner that permits them to evade and obstruct our prosecutorial efforts. We realize that the Committee does not intend these results, but these are serious risks, and we have already observed effects on these investigations.

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Based upon conversations with Committee staff, we want to explore other options for accommodating your interests in strategic and policy decisions relating to our law enforcement efforts along the Southwest Border. While our search for responsive documents is continuing, we remain ready and willing to confer further with staff about possibilities for meeting your oversight needs, consistent with our law enforcement interests and long-standing policy. We request that you defer the issue of subpoena compliance while we explore these options and continue our search for documents.

Please do not hesitate to contact this office if we may provide additional assistance regarding this, or any other matter.

Sincerely,



Ronald Weich
Assistant Attorney General

cc: The Honorable Elijah E. Cummings
Ranking Minority Member