

Congress of the United States
Washington, DC 20510

August 16, 2011

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:

We received your letter of July 21, 2011,¹ which responded to our letter of July 18, 2011. In your letter, you ask that we provide both the Justice Department and the Office of Inspector General (OIG) the transcript of the July 4, 2011 interview of Acting Director Kenneth Melson conducted by Committee staff. Since the OIG is supposed to be conducting an independent inquiry, it seems odd that the Department would make a document request on behalf of that office. We presume that if the OIG would like to make such a request, it is capable of doing so on its own initiative. However, we have not received any such request from the OIG.

As you know, your agreement with Senator Grassley on proceeding with voluntary interviews of Department personnel stipulated you would not seek “immediate possession of interview transcripts.”² One of the many goals served by this provision of our agreement was to accommodate the Department’s concerns about our inquiry providing defense counsel with specious arguments regarding discovery obligations under *Brady*.³ Additionally, given that Mr. Melson chose to appear outside the presence of Department lawyers, we intend to respect his decision and would hope that you would as well.

We all have mutual interests in facilitating successful criminal prosecutions, maintaining the integrity of our inquiry, guarding the independence of the OIG’s inquiry, and fostering candid, direct communications with Congress. Therefore, we respectfully request that you abide by your previous commitment not to seek possession of interview transcripts at this time, including the transcript of Mr. Melson’s interview as well as the transcripts of future interviews.

¹ Letter from Asst. Att’y Gen. Ronald Weich, Dep’t of Justice, to Chairman Darrell Issa & Ranking Member Charles Grassley (July 21, 2011).

² “Good Faith First Steps,” term sheet used during negotiations between Attorney General Holder and Senator Grassley (June 7, 2011).

³ *Brady v. Maryland*, 373 U.S. 83 (1963). Prosecutors have a duty to disclose exculpatory material in the custody of other prosecuting agencies. *U.S. v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989). However, Congress is not a prosecuting agency, and we are not in possession of any exculpatory material. *U.S. v. Trie*, 21 F. Supp. 2d 7, 25 n.17 (D.D.C. 2005) (“The Congress is not an ‘agency’ and the DOJ has no obligation under *Brady* to disclose information in the possession of Congress that is not also in the possession of the DOJ or [another executive branch agency].”).

Your agreement with Senator Grassley also stipulated that “*responsive*, written answers to *each subpart of each question* for the record related to the ATF controversy submitted by Senator Grassley” would be provided on an expedited basis.⁴ While we received a reply to that request on July 22, it did not contain answers to each subpart of each question. Moreover, many of the answers were non-responsive. For example, Question 37(a) asked whether you had read the ATF briefing paper which states, “Currently, our strategy is to *allow the transfer of firearms to continue to take place*.” There is no response enumerated specifically to subpart (a) of Question 37. Rather, the first sentence of what purports to respond to subparts (a) through (d) of Question 37 says, “The Department is aware of the briefing paper.” Simply put, that does not answer the question.

Moreover, there is no enumerated response to subpart (b) of Question 37, which asked whether the briefing paper was “ever provided to the Deputy Attorney General’s Office or any other component of the Justice Department other than ATF” and if so to describe the circumstances in detail. The second sentence of the response to subparts (a) through (d) is presumably meant to reply to subpart (b). However, it is so vague and incomplete as to be non-responsive to the question. It says merely that “based on information presently available, Justice Department officials outside of ATF became aware of the briefing paper in connection with” the House Committee investigation. That may be true and somewhat related to the question, but it falls far short of being responsive. Whether *some* unnamed DOJ officials may have learned of the briefing paper during the Congressional investigation in 2011 tells us nothing about which other officials at Department components outside ATF may have received the briefing paper in 2010.

Subpart (g) of question 37 asked for the names of *each official* who reviewed a draft of the February 4, 2011 letter to Senator Grassley. The reply failed to answer the question, stating only that the Department “followed its standard practice” in drafting the letter and seeking input from other components. Moreover, the replies to questions 43, 44(a-b), and 45(a-b) merely refer back to responses from earlier questions that are non-responsive and merely indicate that the Department is producing documents that “may relate to this matter.”

Perhaps the most troubling reply is to question 49(a), which asked how many Fast and Furious weapons have been recovered in connection with violent crimes in the United States, other than the guns recovered from the Brian Terry murder scene. The question specifically asked you to “describe the date and circumstances of each recovery in detail.” However, the reply fails to do so. It indicated that there are 11 instances of Fast and Furious guns recovered in the United States in connection with violent crimes. However, the reply also claimed that “ATF does not have complete information available to respond to the question.” Regardless of whether “complete information” is available, it seems clear that much more information could easily have been provided.

⁴ “Good Faith First Steps,” term sheet used during negotiations between Attorney General Holder and Senator Grassley (June 7, 2011) (emphasis added).

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The answer states that “when a law enforcement agency submits a trace request, the information provided by the law enforcement agency does not indicate if the firearm recovered has been *used* in connection with a violent crime” (emphasis added). However the question was not phrased in terms of firearms used in connection with a violent crime. It was phrased in terms of firearms recovered in connection with a violent crime. Yet the answer leads the reader to believe that there is no additional information available from the trace request. At a minimum, the date of the request, the jurisdiction submitting the request, the make and model of the weapon, and the serial number of the weapon could have been provided, since all of that information is available from the trace request.

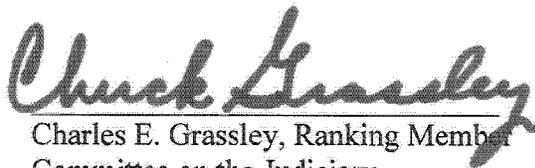
More troubling than the failure to provide those requested details, however, is that the answer adds the element of whether the firearm was “used” even though that was not an element of the question. That addition serves to obscure key information about the content of trace requests. Contrary to the implication in the reply, law enforcement agencies actually do indicate as part of a trace request whether the firearm was recovered in connection with a violent crime. One of the required data elements of a trace request is the National Crime Information Center (NCIC) crime code. The NCIC crime code indicates whether the weapon was recovered in connection with a “homicide” or other specific violent crimes. Yet, the Department’s reply to question 49(a) leads the reader to believe that such information is unavailable.

We are disappointed that the Department has chosen to play word games rather than simply responding with as much detail as possible about these additional 11 cases. Our staff inquired about this matter on July 27, and it is our understanding that the Department is working on a correction to the answer provided to Question 49(a). However, it has been nearly three-and-a-half months since the initial inquiry and nearly three weeks since the follow-up inquiry. Accordingly, as our staff previously requested, please provide unredacted copies of all records related to these 11 trace requests.

Sincerely,



Darrell Issa, Chairman
Committee on Oversight and
Government Reform
U.S. House of Representatives



Charles E. Grassley, Ranking Member
Committee on the Judiciary
U.S. Senate

cc: The Honorable Elijah E. Cummings, Ranking Member
U.S. House of Representatives, Committee on Oversight and Government Reform

The Honorable Patrick Leahy, Chairman
U.S. Senate, Committee on the Judiciary



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 22, 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy:

Please find enclosed responses to questions for the record, numbers 37 through 53, arising from the appearance of Attorney General Eric Holder before the Committee on May 4, 2011, at an oversight hearing of the Department of Justice. These responses have been provided to the Committee on an expedited basis pursuant to our agreement with Ranking Minority Member Grassley. We will forward the responses to the remaining questions to you as soon as possible.

Please do not hesitate to call upon us if we may be of additional assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "R Weich".

Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable Charles Grassley
Ranking Member

DP

DP