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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

February 4, 2016

VIA ELECTRONIC TRANSMISSION

The Honorable James B. Comey, Jr.
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Dear Director Comey:

According to news reports, the FBI investigation into Secretary Clinton's mishandling of classified information has expanded and now involves potential public corruption, including a "possible intersection of Clinton Foundation donations, [and] the dispensation of State Department contracts and whether regular processes were followed."¹ In addition, news reports indicate that 100 special agents have been tasked to the investigation, with as many as 50 more agents on temporary assignment in support of the investigation. It has been reported that these agents were asked to sign non-disclosure agreements.²

However, the Department of Justice (Department) policies and regulations already prescribe rules for Department components—including the FBI—related to the release of information in ongoing civil and criminal cases. In fact, Department components cite those rules when refusing to provide information about ongoing investigations. Accordingly, it is unclear why enforcement of existing policies and procedures would be insufficient, and thus unclear why a separate non-disclosure agreement is needed. Agencies generally require non-disclosure agreements in the aftermath of personnel actions such as those that result in settlement. However, requiring agents to sign specific non-disclosure agreements in order to simply do their jobs and conduct a particular federal investigation appears to be a very different, and unusual procedure.

In any case, non-disclosure agreements employed by the federal government must comply with certain federal laws. As you are aware, the "anti-gag" rider prohibits federal funds

¹ Catherine Herridge and Pamela Browne, "FBI's Clinton probe expands to public corruption track," FoxNews (Jan. 11, 2016). Available at <http://www.foxnews.com/politics/2016/01/11/fbis-clinton-probe-expands-to-public-corruption-track.html>

² *Id.*

from being used to enforce any government non-disclosure policy, form, or agreement that runs afoul of a whistleblower's right to speak with Congress.³ In 2012, President Obama signed into law the Whistleblower Protection Enhancement Act (WPEA), which codified this language.⁴ A version of this rider had been included in every appropriations act since 1988, but it was inadvertently removed for FY 2014, without the intent of narrowing the provision's application.⁵

During that gap, the Department justified the FBI's use of a non-disclosure agreement that would have violated the rider by citing to the FBI's exemption from the WPEA.⁶ However, the rider was restored for FY 2015 and again included in the Consolidated Appropriations Act, 2016.⁷ Further, that Act prohibits an agency from paying the salary of any government employee that interferes with another government employee's right to blow the whistle through lawful channels.⁸ These provisions apply government-wide.

As such, *any* non-disclosure agreement, including those discussed in the news reports cited above, may not impose illegal restrictions on the right of government employees to make good faith disclosures of potential wrongdoing. In this case, the appearance of conflicts of interest or undue influence will be likely if political appointees at the Justice Department are involved in prosecutorial decisions related to former Secretary Clinton or her senior aides. Accordingly, in order for the public to have confidence in the integrity of the process, it is even more critical in this instance that employees know that they have the right to report any misconduct in the handling of the case, regardless of any special non-disclosure agreement.

If non-disclosure agreements are being used, they must conform with existing Department policies and regulations, and federal law. As such, it is imperative that the Committee review the text of any non-disclosure agreements in order to assess their compliance with federal whistleblowing law.

Accordingly, please answer the following:

1. Are agents working on the investigation into Secretary Clinton's email server, the potential mishandling of classified information and related matters ("Clinton investigation"), required to sign non-disclosure agreements? If so, who decided to impose that requirement and why?
2. Please provide a copy of the non-disclosure agreement FBI agents were required to sign.
3. Did any agents refuse to sign or raise objections to the agreement? And were any of them prevented from working on the Clinton investigation as a result?

³ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. E, Title VII, § 744 (2015).

⁴ Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 (2012).

⁵ *See generally* Consolidated Appropriations Act, 2014, Pub. L. No. 113-76 (2014).

⁶ 5 U.S.C. § 2302(a)(2)(c)(ii)(1); *see also* Letter from the Hon. Peter J. Kadzik, Assistant Attorney General, U.S. Department of Justice, to Sen. Charles E. Grassley, Ranking Member, Sen. Comm. on the Judiciary (Nov. 20, 2014).

⁷ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, Div. E, Title VII, § 747 (2014); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. E, Title VII, § 744 (2015).

⁸ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. E, Title VII, § 713 (2015).

4. Is it a general practice of the FBI to require its agents to sign non-disclosure agreements during the course of any investigation? If so, what types of investigations, and why?
5. During your tenure, in how many investigations have FBI agents been required to sign a non-disclosure agreement? Were any such non-disclosure agreements the same as the ones reportedly required in the Clinton investigation? Please provide a representative sample of such a non-disclosure agreement.
6. Does the FBI have a general policy on the use of non-disclosure agreements? If so, please provide a copy of the policy.

Thank you in advance for your cooperation with this request. Please number your responses according to their corresponding questions and respond no later than February 18, 2016. If you have questions, please contact Josh Flynn-Brown or DeLisa Lay of my Committee staff at (202) 224-5225.

Sincerely,



Charles E. Grassley
Chairman
Committee on the Judiciary