

United States Senate

WASHINGTON, DC 20510

October 17, 2013

The Honorable Eric Holder
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Holder:

We are writing to express our serious concern with the ongoing refusal of the Drug Enforcement Administration to provide necessary materials to the Government Accountability Office (GAO). On May 3, 2012, we wrote to the GAO to request that it study the extent to which DEA policies and regulations may contribute to shortages of certain pharmaceuticals containing controlled substances. In order for GAO to comply with our request, it must analyze certain information in the possession of DEA. However, despite having no clear statutory basis for doing so, DEA has withheld necessary records from GAO and delayed GAO's progress by several months.

According to GAO, DEA staff identified the Automation of Reports and Consolidated Orders System (ARCOS) and the Year-End Reports System (YERS) databases as containing relevant information. It is our understanding that, after lengthy discussions, DEA agreed to provide GAO with access to information in the ARCOS database. That data will satisfy GAO's request in part.

It is also our understanding that DEA has refused to provide GAO with the information in the YERS database. The YERS database contains information about manufacturers' quota applications and DEA's quota decisions, and thus also is necessary for GAO's investigation into the causes of drug shortages.

By statute, GAO has a broad right of access to agency records. Title 31, U.S.C., Section 716 provides:

Each agency shall give the Comptroller General information the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency. The Comptroller General may inspect an agency record to get the information.

Our understanding is that DEA has refused to provide GAO with the information in the YERS database because it includes proprietary and business sensitive information. According to GAO, it has met with Deputy Attorney General Cole who admitted that DEA has a legal obligation to comply with GAO's request for data. There is no statutory exception that allows DEA to withhold data from GAO on the basis that it is proprietary or business sensitive. In fact, while Congress permitted agencies to withhold certain specific categories of information from GAO

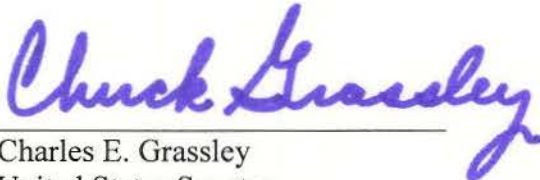
upon certification by the President or the Director of the Office of Management and Budget that the disclosure reasonably could be expected to impair substantially the operations of the Government, *see* 31 U.S.C. § 716(d)(1)(C); *see also* 5 U.S.C. § 552(b)(5) & (7), it did not grant agencies the authority to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential," *see* 5 U.S.C. § 552(b)(4). Rather, Congress ensured that such data would be protected from improper disclosure by providing that GAO "shall maintain the same level of confidentiality for a record made available ... as is required of the head of the agency from which it is obtained" and further subjecting GAO employees "to the same statutory penalties for unauthorized disclosure or use as officers or employees of the agency." 31 U.S.C. § 716(e)(1).

These provisions reflect the intent of Congress that agencies not be permitted to withhold materials from GAO on the ground that they contain information that is commercially sensitive or proprietary. In fact, GAO routinely receives highly sensitive materials from other agencies, and we are unaware of any instance in which GAO mishandled or improperly released such materials.

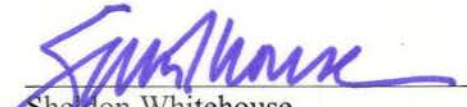
It is in the best interest of everyone involved to resolve this issue as quickly as possible. We accordingly ask that you direct DEA to provide GAO with the materials GAO has requested. If you have any questions, please do not hesitate to contact Erika Long with Senator Grassley at (202) 224-5225 or Rick Van Buren with Senator Whitehouse at (202) 228-6296.

Thank you for your cooperation and attention in this matter.

Sincerely,



Charles E. Grassley
United States Senator



Sheldon Whitehouse
United States Senator

cc: The Honorable Michele M. Leonhart