



U.S. Department of Justice

Office of the Inspector General

February 26, 2014

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Grassley:

I am writing in response to your letter dated February 10, 2014, in which you inquire about the efforts of the Department of Justice Office of the Inspector General (OIG) to effectuate a provision of the Whistleblower Protection Enhancement Act (WPEA) related to non-disclosure agreements in those instances where we allow a witness an opportunity to review a portion of a draft OIG report for factual accuracy before the report is made final and publicly released. I appreciate the opportunity to respond to the questions raised in your letter, particularly given my strong support for whistleblower rights and this particular provision, and also to outline for you the high priority that I have placed on whistleblower issues during my 22 months as Inspector General, as I had committed to do during my confirmation hearing.

As you are aware, the OIG has long played an important role in investigating allegations raised by whistleblowers at the Department of Justice (Department). Shortly after becoming Inspector General, I launched the Department's first Whistleblower Ombudsperson program in the summer of 2012, well before the creation of such positions was required by the WPEA. I assigned leadership of the program to a member of my senior staff, and I have been personally involved in it from the outset. I took this action because whistleblowers perform a vital public service when they come forward with information regarding waste, fraud, abuse, misconduct, or mismanagement, and they should never suffer reprisal for doing so. As I have seen in my brief tenure as Inspector General, the information whistleblowers provide is of critical importance to our work and has been the basis for a number of reviews and investigations by my office. As outlined in our most recent Semiannual Report to Congress, the OIG's Whistleblower Ombudsperson program emphasizes the importance of educating employees and supervisors about how to report wrongdoing and the rights and protections for whistleblowers under the *Whistleblower Protection Act* and related civil service laws.

The Whistleblower Ombudsperson program's recent accomplishments include:

- Continued leadership of the working group of federal Whistleblower Ombudspersons that we helped launch through the Council of Inspectors General on Integrity and Efficiency (CIGIE) in order to facilitate the sharing of information and best practices in this area and to support the establishment of strong and effective Whistleblower Ombudspersons throughout the Inspector General community.
- The preparation of a video entitled "Reporting Wrongdoing: Whistleblowers and their Rights and Protections," which was used in training programs for all OIG employees. We are working to provide this important training to employees of other Department components.
- The revision of the OIG's public website, www.justice.gov/oig, to add a designated "Hotline and Whistleblower Protection" page that provides employees and others with detailed information about how and where to report wrongdoing, and whistleblower rights and protections, including a full recitation of the provisions of the WPEA related to non-disclosure agreements referenced in your letter.
- Continued efforts to ensure that the OIG promptly reviews whistleblower submissions and communicates with whistleblowers about the resolution of those matters in a timely fashion, including enhancing our internal tracking mechanisms for such matters.

The OIG's efforts in this area were recognized in the fall of 2013 in our certification by the U.S. Office of Special Counsel pursuant to Section 2302(c) of Title 5, United States Code. I am proud of these accomplishments, and can assure you that we will continue to build on them as we work to ensure that the WPEA is fully implemented, that whistleblowers within the Department of Justice are encouraged to come forward, and that their rights and protections are scrupulously observed when they do so.

Your letter inquires about the OIG's efforts to effectuate Sections 104 and 115 of the WPEA, known as the "anti-gag" provisions, in the context of an agreement allowing a witness an opportunity to review a portion of a draft OIG report for factual accuracy, before the report is made final by the OIG and publicly released. I strongly support the WPEA's provisions ensuring that non-disclosure agreements are not used to improperly limit the rights of employees to blow the whistle on wrongdoing, whether to Congress, the OIG itself, or otherwise. As your letter notes, the OIG's revised Hotline and Whistleblower Protection page on our website, which we highlighted as part of the

whistleblower education programs that we conducted for all OIG employees last summer, includes a verbatim recitation of this WPEA provision.

The OIG does not use many non-disclosure agreements, and, in response to your question, we are unaware of any personnel actions being initiated against employees for violations of OIG non-disclosure forms since the passage of the WPEA. We do ask witnesses to execute an agreement when we voluntarily allow them to review portions of a draft OIG report that relate to them, so that they have an opportunity to provide comments to us prior to the report being made final. Although the witness has no right to see any portion of the draft report, in the interest of fairness and in order to ensure the accuracy of our final report, we provide this opportunity to witnesses, where appropriate, much like we do with the Department and its components. Since our report is still very much a work in progress, we ask that the witness not divulge information from or about our draft report until such time as the report is final. This helps prevent a portion of our draft report from being considered out of context,¹ and enables us to ensure that what is released in the final report is, in fact, accurate. Moreover, such an agreement applies, by its specific terms, only until the report is finalized and publicly released. At that point, the witness is perfectly free to discuss not only the underlying facts (about which there never were any restrictions placed on the witness), but also the content of the draft report that they were given an opportunity to review.

Any witness, including those who have signed a non-disclosure agreement, is always free to report any wrongdoing as provided under federal law and is protected from reprisal for doing so. We encourage such whistleblowing, and nothing in the agreement attached to your letter limits such rights. By contrast, divulging a portion of a draft report provided for internal review and comment before the report is final, particularly when the individual may be uninformed about the content of the full report, would not appear to be blowing the whistle. Indeed, a March 2013 memorandum from the Office of Special Counsel discussing the application of the provision of the WPEA referenced in your letter indicates that a confidentiality clause within a settlement agreement is generally not covered by the WPEA's notice requirement because it restricts disclosure regarding the terms of the agreement as opposed to the disclosure of other information. Much the same can be said of a provision that temporarily limits a witness from prematurely disclosing information about portions of an OIG draft report, but places no restrictions on disclosing the facts underlying the OIG's investigation and does not apply prospectively to information that may be acquired thereafter.

¹ For example, as you may recall, prior to the issuance of our Operation Fast and Furious report, certain individuals who had seen only small portions of our draft report made incorrect claims about the report's overall assignment of primary responsibility for the operation's failures.

Nevertheless, consistent with the leadership that I and my office have endeavored to show in this area, we intend to add the WPEA language to the specific agreement that was attached to your letter, and will do so on all such agreements going forward.² While such language may not necessarily be required by the WPEA, I want to ensure that Department employees are fully aware that the OIG strongly encourages them to come forward with evidence of wrongdoing and that we will work to ensure that their rights and protections are fully observed.

I appreciate your interest in this important issue, and I would, of course, be happy to discuss this further should you like.

Sincerely,



Michael E. Horowitz
Inspector General

cc: The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate

² We have for many years included what appears to be a broader version of the language contained in the prior Appropriations bills referenced in your letter in agreements with private counsel concerning information they may learn in the course of representing witnesses at OIG interviews. We are taking steps to ensure that the WPEA language is added to this and any other agreements with the OIG going forward even if not necessarily required under the WPEA.