U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 20, 2014

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Grassley:

This responds to your letters to the Attorney General dated May 10 and November 22, 2013, and July 31, 2014, which requested information about the Department of Justice's (the Department) compliance with the "anti-gag" provision in Section 115(a) of the Whistleblower Protection Enhancement Act (WPEA). You also requested forms, policies, and agreements that mention communications with Congress. In addition, your November 22, 2013 letter asked why a Federal Bureau of Investigation (FBI) Inspection Division form did not include language informing employees of their rights to share information with Congress or the Inspector General, pursuant to the WPEA. We apologize for our delay in responding to your letters.

The Department takes seriously and supports the efforts of whistleblowers who expose waste, fraud, and abuse in the federal government. We concur that whistleblowers sometimes make disclosures at great risk to their careers, often while providing an important service to the federal government. To that end, the Department's webpage includes a link informing current and former employees of their rights and responsibilities under Section 115(a): "Notice to DOJ Employees and Former Employees Regarding Whistleblower Protection and Non-Disclosure Policies, Forms, or Agreements" (http://www.justice.gov/employees/whistle-pro.html). The webpage also includes a list of the Controlling Executive Orders and statutory provisions. The same information, including the text of Section 115(a) is also publicly available on the Department's Office of Inspector General's public website (http://www.justice.gov/oig/hotline/whistleblower-protection.htm). In addition, some law enforcement components and litigating divisions have posted the statutory language on their public websites, and/or posted the information on internal component intranets, and/or a link to the language on the Department's webpage. With respect to your inquiry about language governing FBI disclosures, the FBI, as you are aware, remains exempt from 5 U.S.C. Sec. 2302 (a)(2)(c)(ii)(I) of the WPEA.

In response to your letter of July 31, 2014, regarding timing of the notice to employees, we want to advise you that the Assistant Attorney General for Administration sent a memorandum to all employees, dated September 16, 2013, informing them that the Section 115 (a) language applies to any non-disclosure policy, form, or agreement executed prior to the WPEA effective date. In addition, on August 22, 2013, an email message from the Department's Security Officer to all Security Program Managers and Executive Officers, included attachments of the revised SF-312 and an "Addendum to Sensitive Compartmented Information Nondisclosure Agreement IC Form 4414. All of these documents are enclosed here.

Regarding communications with Congress, the Attorney General sent two memoranda in May and August of 2009 to all component heads and United States Attorneys, both of which are enclosed here. Department components also have a variety of forms, policies and agreements, which address communications with Congress, such as guidance included in the US Attorneys' Manual and the pertinent portions of an Alcohol, Tobacco, Firearms and Explosives (ATF) directive that includes provisions about communicating with Congress, also enclosed here.

Also available on the Department's website is the No FEAR Act notice, found at http://www.justice.gov/jmd/eeos/nofearactnotice.htm, which requires agencies to inform Federal employees and applicants about the rights and protections available to them under Federal antidiscrimination and whistleblower protection laws.

We hope that this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Peter J. Kadzik
Assistant Attorney General

Enclosures

cc: The Honorable Patrick Leahy
Chairman

Office of the Attorney General
Washington, D. C. 20530

May 11, 2009

MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS
ALL UNITED STATES ATTORNEYS

FROM: THE ATTORNEY GENERAL

SUBJECT: Communications with the White House and Congress

The rule of law depends upon the evenhanded administration of justice. The legal judgments of the Department of Justice must be impartial and insulated from political influence. It is imperative that the Department's investigatory and prosecutorial powers be exercised free from partisan consideration. It is a fundamental duty of every employee of the Department to ensure that these principles are upheld in all of the Department's legal endeavors.

In order to promote the rule of law, therefore, this memorandum sets out guidelines to govern all communications between representatives of the Department, on the one hand, and representatives of the White House and Congress, on the other, and procedures intended to implement those guidelines. (The "White House," for the purposes of this Memorandum, means all components within the Executive Office of the President.) These guidelines have been developed in consultation with, and have the full support of, the Counsel to the President.

1. Pending or Contemplated Criminal or Civil Investigations and Cases

The Assistant Attorneys General, the United States Attorneys, and the heads of the investigative agencies in the Department have the primary responsibility to initiate and supervise investigations and cases. These officials, like their superiors and their subordinates, must be insulated from influences that should not affect decisions in particular criminal or civil cases. As the Supreme Court said long ago with respect to United States Attorneys, so it is true of all those who exercise the Department's investigatory and prosecutorial powers: they are representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

a. In order to ensure the President's ability to perform his constitutional obligation to "take care that the laws be faithfully executed," the Justice Department will advise the White House concerning pending or contemplated criminal or civil investigations or cases when—but only when—it is important for the performance of the President's duties and appropriate from a law enforcement perspective.

b. Initial communications between the Department and the White House concerning pending or contemplated criminal investigations or cases will involve only the Attorney General or the Deputy Attorney General, from the side of the Department, and the Counsel to the President, the Principal Deputy Counsel to the President, the President or the Vice President, from the side of the White House. If the communications concern a pending or contemplated civil investigation or case, the Associate Attorney General may also be involved. If continuing contact between the Department and the White House on a particular matter is required, the officials who participated in the initial communication may designate subordinates from each side to carry on such contact. The designating officials must monitor subsequent contacts, and the designated subordinates must keep their superiors regularly informed of any such contacts. Communications about Justice Department personnel in reference to their handling of specific criminal or civil investigations or cases are expressly included within the requirements of this paragraph. This policy does not, however, prevent officials in the communications, public affairs, or press offices of the White House and the Department of Justice from communicating with each other to coordinate efforts.

c. In order to ensure that Congress may carry out its legitimate investigatory and oversight functions, the Department will respond as appropriate to inquiries from Congressional Committees consistent with policies, laws, regulations, or professional ethical obligations that may require confidentiality and consistent with the need to avoid publicity that may undermine a particular investigation or litigation. Outside the context of Congressional hearings or investigations, all inquiries from individual Senators and Members of Congress or their staffs concerning particular contemplated or pending criminal investigations or cases should be directed to the Attorney General or the Deputy Attorney General. In the case of particular civil investigations or cases, inquiries may also be directed to the Associate Attorney General.

d. These procedures are not intended to interfere with the normal communications between the Department and its client departments and agencies (including agencies within the Executive Office of the President when they are the Department's clients) and any meetings or communications necessary to the proper conduct of an investigation or litigation.

2. National Security Matters

It is critically important to have frequent and expeditious communications relating to national security matters, including counter-terrorism and counter-espionage issues. Therefore communications from (or to) the Deputy Counsel to the President for National Security Affairs, the staff of the National Security Council and the staff of the Homeland Security Council that relate to a national security matter are not subject to the limitations set out above. However, this exception for national security matters does not extend to pending adversary cases in litigation that may have national security implications. Communications related to such cases are subject to the guidelines for pending cases described above.

3. White House Requests for Legal Advice

All requests from the White House for formal legal opinions shall come from the President, the Counsel to the President, or one of the Deputy Counsels to the President, and shall be directed to the Attorney General and the Assistant Attorney General for the Office of Legal Counsel. The Assistant Attorney General for the Office of Legal Counsel shall report to the Attorney General and the Deputy Attorney General any communications that, in his or her view, constitute improper attempts to influence the Office of Legal Counsel's legal judgment.

4. Communications Involving the Solicitor General's Office.

Matters in which the Solicitor General's Office is involved often raise questions about which contact with the Office of the Counsel to the President is appropriate. Accordingly, the Attorney General and Deputy Attorney General may establish distinctive arrangements with the Office of the Counsel to govern such contacts.

5. Presidential Pardon Matters

The Office of the Pardon Attorney may communicate directly with the Counsel to the President and the Deputy Counsels to the President, concerning pardon matters. The Counsel to the President and the Deputy Counsels to the President may designate subordinates to carry on contact with the Office of the Pardon Attorney after the initial contact is made.

6. Personnel Decisions Concerning Positions in the Civil Service

All personnel decisions regarding career positions in the Department must be made without regard to the applicant's or occupant's partisan affiliation. Thus, while the Department regularly receives communications from the White House and from Senators, Members of Congress, and their staffs concerning political appointments, such communications regarding positions in the career service are not proper when they concern a job applicant's or a job holder's partisan affiliation. Efforts to influence personnel decisions concerning career positions on partisan grounds should be reported to the Deputy Attorney General.

7. Other Communications Not Relating to Pending Investigations or Criminal or Civil Cases

All communications between the Department and the White House or Congress that are limited to policy, legislation, budgeting, political appointments, public affairs, intergovernmental relations, or administrative matters that do not relate to a particular contemplated or pending investigation or case may be handled directly by the parties concerned. Such communications should take place with the knowledge of the Department's lead contact regarding the subject

under discussion. In the case of communications with Congress, the Office of the Deputy Attorney General and Office of the Assistant Attorney General for Legislative Affairs should be kept informed of all communications concerning legislation and the Office of the Associate Attorney General should be kept informed about important policy communications in its areas of responsibility.

As Attorney General Benjamin Civiletti noted in issuing a similar memorandum during the Carter Administration, these guidelines and procedures are not intended to wall off the Department from legitimate communication. We welcome criticism and advice. What these procedures are intended to do is route communications to the proper officials so they can be adequately reviewed and considered, free from either the reality or the appearance of improper influence.

Decisions to initiate investigations and enforcement actions are frequently discretionary. That discretion must be exercised to the extent humanly possible without regard to partisanship or the social, political, or interest group position of either the individuals involved in the particular cases or those who may seek to intervene against them or on their behalf.

This memorandum supersedes the memorandum issued by Attorney General Mukasey on December 19, 2007, titled *Communications with the White House*.

Office of the Attorney General
Washington, D.C. 20530

August 17, 2009

MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS
ALL UNITED STATES ATTORNEYS

FROM: THE ATTORNEY GENERAL

SUBJECT: Communications with Congress

Following confirmation of Ronald Weich as the Assistant Attorney General for Legislative Affairs, I want to supplement and clarify my Memorandum of May 11, 2009, entitled "Communications with the White House and Congress" as it pertains to communications with Congress.

Consistent with the Department's long-standing policy and practice, all inquiries from Senators and Members of Congress, or congressional staff, concerning particular contemplated or pending criminal or civil investigations or cases should be directed in the first instance to the Office of Legislative of Affairs (OLA). Assistant Attorney General Weich and his staff will manage the Department's responses to these inquiries, coordinating with the appropriate offices, boards, divisions, and components.

Similarly, all communications between the Department and Congress, including those pertaining to policy, legislation, political appointments, intergovernmental relations, and administrative matters should be managed by OLA to ensure that relevant Department interests and other Executive Branch interests are protected. Offices, boards, divisions, and components should not communicate with Members, Committees, or congressional staff without advance coordination with OLA. Under the direction of the Attorney General and the Deputy Attorney General, Assistant Attorney General Weich and his staff will determine how best to proceed in particular legislative matters, including timing, presentation, the selection of Department witnesses and other details. Additionally, the Department's proposed positions on legislative matters must be cleared by the Office of Management and Budget, through the process managed by OLA attorneys.

Please contact OLA if you have questions about the application of these policies.

1-8.000 CONGRESSIONAL RELATIONS

1-8.001 Introduction

The Assistant Attorney General (AAG), Office of Legislative Affairs (OLA), is responsible for communications between Congress and the Department under the authority of the Attorney General and the direction of the Deputy Attorney General. *See* 28 C.F.R. Sec. 0.27. Communication between OLA and individual components of the Department are aided by designated Congressional Liaisons. The Director of the Executive Office for United States Attorneys (EOUSA) has designated the Counsel to the Director (CTD) as Congressional Liaison for the United States Attorneys' Offices (USAOs) and EOUSA.

[updated October 2009]

1-8.010 Reporting Congressional Contacts with USAOs

Except as otherwise provided in USAM 1-8.020 and 1-8.051, all Congressional member and staff contacts with USAOs or USAO staff, including in-person contacts and contacts by letter, email, phone call, or any other means, must be reported promptly to the United States Attorney (USA), First Assistant United States Attorney (FAUSA), or other senior staff designated by the USA. The USA, FAUSA, or other designated senior staff must then report the contact to OLA and CTD.

[updated October 2009]

1-8.020 Responding to Congressional Requests for Public Information

Except as noted below, United States Attorneys and designated senior staff may respond to Congressional requests without first contacting OLA or CTD when the request is for public information only. Congressional requests for public information only must be reported to OLA and CTD if: (1) the Congressional request is in letter form (including letters delivered by fax or email); (2) the Congressional member or staff expresses any opinion about the nature, status, or propriety of any government action or inaction; (3) the Congressional member or staff suggests any government action or inaction; or (4) the context or nature of the Congressional contact creates the appearance that the Congressional member or staff seeks any government action or inaction.

Public information includes:

- Administrative information, such as office locations, operational hours, public phone numbers, and hiring procedures.
- Documents that are already part of public court records and not under seal or otherwise restricted, such as filed indictments, briefs, etc.
- News releases or other materials meant for public distribution.
- The time and place for the next public court hearing, if already announced.

NOTE: Repeated requests for public information from the same Congressional member or staff, or from different Congressional members or staff in the same matter or case, should be reported to OLA and CTD. If you are unsure if certain information should be released, or whether it is proper to give certain assistance requested, please contact OLA and CTD.

[cited in USAM 1-8.010; 1-8.051; 1-8.070] [updated October 2009]

1-8.030 Responding to Congressional Requests for Other than Public Information

All Congressional requests for information (other than public information), meetings of any type, or assistance must immediately be referred to OLA and CTD. OLA and CTD will consult on an appropriate response and will coordinate with the USAO regarding the response. In most instances, OLA will respond to the Congressional members or staff on behalf of the USAOs. Except to provide public information, USAOs may not respond directly to Congressional members or staff without prior consultation with OLA and CTD. USAOs may inform the requestor that the Department's policy is to refer all Congressional requests to OLA. USAOs may also provide the requestor with information on how to contact OLA at (202) 514-2141.

Examples of congressional requests that must be referred to OLA and CTD include requests for non-public documents or information; discussion of or requests for briefings on case; requests for attendance at settlement conferences; suggestions or comments on case disposition or other treatment; discussions of or

requests for information on problems under existing law or suggestions for changes in existing law; requests for interviews or meetings of any kind; and requests for statements or appearances at hearings, meetings, or other events with congressional representatives or third parties.

USAOs should follow these standards in both open and closed cases and never provide information on (1) pending investigations; (2) closed investigations that did not become public; (3) matters that involve grand jury, tax, or other restricted information; (4) matters that would reveal the identity of confidential informants, sensitive investigative techniques, deliberative processes, the reasoning behind the exercise of prosecutorial discretion, or the identity of individuals who may have been investigated but not indicted. All requests for these types of information should be referred to OLA and CTD, as well as any congressional request that implicates Privacy Act considerations.

[cited in USAM 1-3.000; 1-8.051] [updated October 2009]

1-8.040 Congressional Questionnaires and Surveys, and General Accounting Office (GAO) Contacts

Congressional and GAO questionnaires and surveys must be approved in the same fashion as other surveys as provided in USAM 3-18.100. *See also* USAM 1-13.000. GAO is an oversight arm of Congress and is often tasked by Congressional committees to pursue specific oversight inquiries. These inquiries should be treated the same as any other Congressional inquiry. GAO contacts and inquiries made directly to a USAO without prior coordination with EOUSA should immediately be brought to the attention of CTD.

[cited in USAM 1-3.000] [updated August 2011]

1-8.050 Official Events with Congressional Members and Staff

United States Attorney's Office personnel must obtain United States Attorney approval to participate in their official capacity in official events with Congressional members or staff, including conferences, presentations, courtesy visits, tours, and similar activities. United States Attorneys must coordinate with OLA and CTD before authorizing invitations to or appearances at such official events. Please be aware that the Department has a long-standing policy that United States Attorneys and USAO personnel may not participate in media events with Congressional members or staff.

[cited in USAM 1-3.000] [updated October 2009]

1-8.051 Social Contacts with Congressional Members and Staff

Purely social contacts with Congressional members or staff need not be reported. However, if during such a contact there is a request for non-public information or a request for public information that otherwise requires reporting, the provisions of USAM 1-8.020 and 1-8.030 must be followed. In addition, USAO personnel are reminded that social contacts and relationships with Congressional members and staff, as well as attendance at or participation in political functions

and fund raising, are subject to the Department's policies, as well as legal standards, rules, and requirements. *See* USAM 1-4.400, *et seq*. EOUSA's Office of General Counsel should be consulted for guidance on these ethical and legal standards.

[cited in USAM 1-8.010] [added October 2009]

1-8.070 State and Local Legislative Requests

State and local legislative requests for public information should be handled in the manner described in USAM 1-8.020. Requests from state and local legislative officials for any other type of information, assistance, testimony, or meetings must be cleared by the Department through CTD. USAO personnel acting in their official capacities should not advocate passage or defeat of state or local legislation, including state or local referenda or ballot initiatives, or otherwise give an opinion on state or local legislation, without prior approval from the Department through CTD.

NOTE: The requirements incorporated in sections 1-8.070 and USAM 1-8.075 regarding state and local legislative and other matters do not apply to the U.S. Attorney's Office for the District of Columbia, which has unique jurisdictional obligations as the local prosecutor for the District of Columbia.

[cited in USAM 1-3.000; 1-8.070] [updated October 2009]

1-8.075 Comity Considerations

Whenever you make any public communication on criminal justice or other policy matters that touch on local or state concerns, regardless of whether you are required to seek approval under USAM 1-8.070, you should be sensitive to comity considerations. The substance and manner of such communications should be designed to enhance and not impede federal, state, and local law enforcement relations; be sensitive to the public appearance of the proper role and limits of federal prosecutors; and give due deference to the separate constitutional powers and responsibilities of state and local officials. The substance of any such communication should be consistent with Department policy in that area, be distributed in an appropriate fashion, be factual in nature, and be based on federal law enforcement concerns, views, and experience. For example, in testifying to a state legislative committee with Departmental approval on a pending state bill, the impact of the proposal on federal law enforcement considerations should be addressed without specifically urging the passage or defeat of the particular bill that may be under consideration. Please feel free to consult CTD on any questions you may have in this regard.

[cited in USAM 1-8.070] [updated October 2009]

1-8.080 Legislative Requests or Proposals

All official requests for legislative action, changes to existing laws, or proposals for new laws must be submitted to the Department through CTD for review and approval. If USAO personnel wish to make purely personal proposals or offer

personal views on legislative proposals or referenda to Congress, a state legislature, local legislative body, or the public, that could appear to reflect on their official duties or Department responsibilities, they should contact CTD for applicable considerations. For instance, it should be made clear that they are speaking in their personal capacities and not on behalf of the Department. In addition, they are prohibited from using their official titles except as one of several biographical details, and they must comply with rules for the protection of confidential information.

[cited in USAM 1-3.000] [updated October 2009]

CHAPTER A. GENERAL

1. DISCUSSION.

a. As a publicly funded agency, ATF has a responsibility to inform the public, elected representatives, and other Government agency officials of its mission, policies, and activities. It is ATF's policy that every ATF employee be as courteous and helpful as possible when responding to outside inquiries, and that the Bureau actively initiate direct contact with the public, media, and Government representatives regarding ATF's mission, policies, and activities. However, there are sometimes legal restrictions on an employee's ability to disclose agency information, and therefore employees must comply with the guidance and authorizations in this order.

b. The Bureau and the public directly benefit from ATF making available accurate and concise information and publicizing its mission, policies, and activities, to the extent possible, taking into account law enforcement and privacy concerns. Public knowledge of ATF's mission, policies, and activities promotes understanding and compliance with the laws and regulations enforced by the Bureau, and enables others to identify the Bureau as the appropriate source for needed services.

c. The Bureau's efforts in maintaining a high level of communication with law enforcement, industry, and governmental representatives directly impact the Bureau's ability to fulfill its mission both domestically and internationally. Liaison with these representatives helps to promote mutually beneficial cooperation and relationships.

d. Provisions of this policy are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information; (2) communications to Congress; (3) the reporting to an inspector general of a violation of any law, rule or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions and liabilities created by controlling Executive orders and statutory provisions are incorporated into this policy and are controlling.

2. HEADQUARTERS COMPOSITION AND EXECUTIVE LEVEL RESPONSIBILITIES.

a. The Office of Public and Governmental Affairs (PGA) consists of the Intergovernmental Affairs Division, Public Affairs Division, the Legislative Affairs Division, and the Disclosure Division. PGA also is responsible for the Executive Secretariat function and the ATF library, archive, and historical programs.

b. The Director is responsible for; Setting overall policy and goals for liaison, media, disclosure and congressional activities.

(1) Delegating responsibilities at all levels to maintain the Bureau's objectives in each of these areas.

(2) Ensuring that all Bureau personnel are aware of and carry out their responsibilities, adhering to all restrictions in these program areas.

(3) Advising the Attorney General and other Federal agency officials on liaison, media, and disclosure issues that may impact legislative, judicial, or other executive branch agencies.

THE UNITED STATES DEPARTMENT of JUSTICE

THE COMMON LAW IS THE WILL OF Mankind ISSUING FROM THE Life OF THE People

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WHISTLEBLOWER PROTECTION AND NON-DISCLOSURE POLICIES, FORMS, OR AGREEMENTS

Notice to DOJ Employees and Former Employees Regarding Whistleblower Protection and Non-Disclosure Policies, Forms, or Agreements

The Whistleblower Protection Enhancement Act of 2012 (WPEA) was signed into law by President Obama on November 27, 2012. The law strengthens the protections for federal employees who disclose evidence of waste, fraud, or abuse. The WPEA also requires that any non-disclosure policy, form, or agreement (NDA) include the statement below, and provides that NDAs executed without the language may be enforced as long as agencies give employees notice of the statement. As an employee/former employee of the Department of Justice, you may have been required to sign an NDA to access classified or other information. You should read the statement below as if it were incorporated into any non-disclosure policy, form, or agreement you have signed.

"These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling."

Employees/former employees are reminded that reporting evidence of waste, fraud, or abuse involving classified information or classified programs must continue to be made consistent with established rules and procedures designed to protect classified information.

Controlling Executive Orders and statutory provisions are as follows:

- Executive Order No. 13526;
- Section 7211 of Title 5, United States Code (governing disclosures to Congress);
- Section 1034 of Title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military);
- Section 2302(b)(8) of Title 5, United States Code, as amended by the Whistleblower Protection Act of 1989 (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats);
- Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents);
- The statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code; and
- Section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. 783(b)).

Last Updated: August 27, 2013

SMART ON CRIME

JUSTICE.GOV en ESPAÑOL

DEPARTMENT of JUSTICE
ACTION CENTER

Report a Crime
Get a Job
Locate a Prison, Inmate, or Sex Offender
Apply for a Grant
Submit a Complaint
Report Waste, Fraud, Abuse or Misconduct to the Inspector General
Find Sales of Seized Property
Find Help and Information for Crime Victims
Register, Apply for Permits, or Request Records
Identify Our Most Wanted Fugitives
Find a Form
Report and Identify Missing Persons
Contact Us

OFFICES of THE UNITED STATES ATTORNEYS

U.S. Department of Justice

Washington, D.C. 20530

SEP 16 2013

MEMORANDUM FOR ALL DOJ EMPLOYEES

FROM: Lee J. Lofthus
Assistant Attorney General
for Administration

SUBJECT: Notice Regarding Whistleblower Protection and Non-Disclosure Policies, Forms, or Agreements

The Whistleblower Protection Enhancement Act of 2012 (WPEA) was signed into law by President Obama on November 27, 2012. The law strengthens the protections for federal employees who disclose evidence of waste, fraud, or abuse. The WPEA also requires that any non-disclosure policy, form, or agreement (NDA) include the statement below, and provides that NDAs executed without the language may be enforced as long as agencies give employees notice of the statement. This memorandum serves as that notice to Department of Justice employees.

As an employee of the Department of Justice, you may have been required to sign an NDA to access classified or other information. You should read the statement below as if it were incorporated into any non-disclosure policy, form, or agreement you have signed.

> "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling."

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- Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents);
- The statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code; and
- Section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. 783(b)).

If you have questions about this matter, you may contact your component's executive officer.

[redacted]

To: [redacted]
Subject: FW: Immediate Action Required: Revision of Non-Disclosure Agreements to Conform with the Whistleblower Protection Enhancement Act of 2012
Attachments: SF312-Revised.pdf; ADDENDUM TO SENSITIVE COMPARTMENTED INFORMATION.pdf

Importance: High

Sent: Thursday, August 22, 2013 10:50 AM
To: SPM (JMD); Exec/Admin Officers OBDs
Subject: Immediate Action Required: Revision of Non-Disclosure Agreements to Conform with the Whistleblower Protection Enhancement Act of 2012
Importance: High

Security Programs Managers/Executive Officers,

This message is being sent on behalf of James L. Dunlap, Department Security Officer, Security and Emergency Planning Staff, and contains important information regarding changes to non-disclosure agreements.

The "Classified Information Non-disclosure Agreement, Standard Form 312" (SF 312) was revised by the Director, National Intelligence (DNI) to conform with two new federal statutes: the Financial Services and General Government Appropriations Act (Public Law 112-74); and the Whistleblower Protection Enhancement Act (WPEA) (Public Law 112-199). The WPEA was enacted into law on November 27, 2012, and strengthens protections for federal employees who disclose evidence of waste, fraud, or abuse. The WEPA also modifies rules on the use of non-disclosure policies, forms, or agreements (NDAs) by government agencies.

Also, as a result of the new statutes, the DNI is updating the IC Form 4414, Sensitive Compartmented Information (SCI) Non-disclosure Agreement (NDA), to reflect the new language. Once complete, IC Form 4414 will be distributed throughout the Department.

The WPEA requires that each agreement contained in an SF 312, IC Form 4414, and any other Government NDA provide the following statement:

> ***"These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling."***

In the case of SF 312 and IC Form 4414 agreements in effect before the WPEA's effective date (27 November 2012), the law allows agencies to continue to enforce a policy, form, or agreement that does not contain the statement if the agency gives an employee notice of the above required statement.

Therefore, effective immediately, and due to the WEPA requirements and revisions to the NDAs, Component Security Programs Managers (SPMs) are required to do the following:

1) All Components that have authority to execute the SF 312 must use the revised form dated July 2013. Use of earlier editions of the SF 312 are not permitted. The revised SF 312 dated July, 2013 is posted in the General Services Administration (GSA) forms library on its website and can be directly downloaded at: http://www.gsa.gov/portal/forms/download/116218. The form is also attached below and is posted on the Security and Emergency Planning Staff's website: http://dojnet.doj.gov/jmd/seps/index.html

2) For Components authorized to execute the IC Form 4414, please ensure that an addendum to that form is provided to individuals that will require access to SCI. We have attached an addendum for the IC Form 4414, **which should be used immediately**. Have the individual sign and date the IC Form 4414, as well as the addendum when executing the 4414.

3) Components authorized to execute the SF 312 and IC Form 4414 must post the above required statement on their website, accompanied by the specific list of controlling Executive Orders and statutory provisions, which are listed below.

4) Each SPM and/or designee, whether authorized to execute non-disclosure agreements or not, shall provide a notice to all employees within your Component who possess a security clearance of the above required statement. Additionally, cleared individuals who have previously executed 312's and 4414's DO NOT need to re-sign a new NDA. This communication can serve as that notice to employees.

The following is a list of "Executive Orders and statutory provisions," which are controlling in the case of any conflict with an NDA:

- Executive Order No. 13526;

- Section 7211 of Title 5, United States Code (governing disclosures to Congress);

- Section 1034 of Title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military);

- Section 2302(b)(8) of Title 5, United States Code, as amended by the Whistleblower Protection Act of 1989 (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats);

- Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents);

- The statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code; and

- Section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. 783(b)).

CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT

AN AGREEMENT BETWEEN AND THE UNITED STATES

(Name of Individual - Printed or typed)

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to classified information. As used in this Agreement, classified information is marked or unmarked classified information, including oral communications, that is classified under the standards of Executive Order 13526, or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security; and unclassified information that meets the standards for classification and is in the process of a classification determination as provided in sections 1.1, 1.2, 1.3 and 1.4(e) of Executive Order 13526, or under any other Executive order or statute that requires protection for such information in the interest of national security. I understand and accept that by being granted access to classified information, special confidence and trust shall be placed in me by the United States Government.

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of classified information, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information have been approved for access to it, and that I understand these procedures.

3. I have been advised that the unauthorized disclosure, unauthorized retention, or negligent handling of classified information by me could cause damage or irreparable injury to the United States or could be used to advantage by a foreign nation. I hereby agree that I will never divulge classified information to anyone unless: (a) I have officially verified that the recipient has been properly authorized by the United States Government to receive it; or (b) I have been given prior written notice of authorization from the United States Government Department or Agency (hereinafter Department or Agency) responsible for the classification of information or last granting me a security clearance that such disclosure is permitted. I understand that if I am uncertain about the classification status of information, I am required to confirm from an authorized official that the information is unclassified before I may disclose it, except to a person as provided in (a) or (b), above. I further understand that I am obligated to comply with laws and regulations that prohibit the unauthorized disclosure of classified information.

4. I have been advised that any breach of this Agreement may result in the termination of any security clearances I hold; removal from any position of special confidence and trust requiring such clearances; or termination of my employment or other relationships with the Departments or Agencies that granted my security clearance or clearances. In addition, I have been advised that any unauthorized disclosure of classified information by me may constitute a violation, or violations, of United States criminal laws, including the provisions of sections 641, 793, 794, 798, *952 and 1924, title 18, United States Code; *the provisions of section 783(b), title 50, United States Code; and the provisions of the Intelligence Identities Protection Act of 1982. I recognize that nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

5. I hereby assign to the United States Government all royalties, remunerations, and emoluments that have resulted, will result or may result from any disclosure, publication, or revelation of classified information not consistent with the terms of this Agreement.

6. I understand that the United States Government may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement.

7. I understand that all classified information to which I have access or may obtain access by signing this Agreement is now and will remain the property of, or under the control of the United States Government unless and until otherwise determined by an authorized official or final ruling of a court of law. I agree that I shall return all classified materials which have, or may come into my possession or for which I am responsible because of such access: (a) upon demand by an authorized representative of the United States Government; (b) upon the conclusion of my employment or other relationship with the Department or Agency that last granted me a security clearance or that provided me access to classified information; or (c) upon the conclusion of my employment or other relationship that requires access to classified information. If I do not return such materials upon request, I understand that this may be a violation of sections 793 and/or 1924, title 18, United States Code, a United States criminal law.

8. Unless and until I am released in writing by an authorized representative of the United States Government, I understand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to classified information, and at all times thereafter.

9. Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be unenforceable, all other provisions of this Agreement shall remain in full force and effect.

10. These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.

(Continue on reverse.)

11. These restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 13526 (75 Fed. Reg. 707), or any successor thereto section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military); section 2302(b) (8) of title 5, United States Code, as amended by the Whistleblower Protection Act of 1989 (governing disclosures of illegality, waste, fraud , abuse or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents); sections 7(c) and 8H of the Inspector General Act of 1978 (5 U.S.C. App.) (relating to disclosures to an inspector general, the inspectors general of the Intelligence Community. and Congress); section 103H(g)(3) of the National Security Act of 1947 (50 U.S.C. 403-3h(g)(3) (relating to disclosures to the inspector general of the Intelligence Community); sections 17(d)(5) and 17(e)(3) of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403g(d)(5) and 403q(e)(3)) (relating to disclosures to the Inspector General of the Central Intelligence Agency and Congress); and the statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, *952 and 1924 of title 18, United States Code, and *section 4 (b) of the Subversive Activities Control Act of 1950 (50 U.S.C. section 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by said Executive Order and listed statutes are incorporated into this agreement and are controlling.

12. I have read this Agreement carefully and my questions, if any, have been answered. I acknowledge that the briefing officer has made available to me the Executive Order and statutes referenced in this agreement and its implementing regulation (32 CFR Part 2001 , section 2001 .80(d)(2)) so that I may read them at this time, if I so choose.

* NOT APPLICABLE TO NON-GOVERNMENT PERSONNEL SIGNING THIS AGREEMENT.

SIGNATURE	DATE	SOCIAL SECURITY NUMBER *(See Notice below)*

ORGANIZATION (IF CONTRACTOR, LICENSEE, GRANTEE OR AGENT, PROVIDE: NAME, ADDRESS, AND, IF APPLICABLE, FEDERAL SUPPLY CODE NUMBER) *(Type or print)*

WITNESS		**ACCEPTANCE**	
THE EXECUTION OF THIS AGREEMENT WAS WITNESSED BY THE UNDERSIGNED.		**THE UNDERSIGNED ACCEPTED THIS AGREEMENT ON BEHALF OF THE UNITED STATES GOVERNMENT.**	
SIGNATURE	DATE	SIGNATURE	DATE
NAME AND ADDRESS *(Type or print)*		NAME AND ADDRESS *(Type or print)*	

SECURITY DEBRIEFING ACKNOWLEDGEMENT

I reaffirm that the provisions of the espionage laws, other federal criminal laws and executive orders applicable to the safeguarding of classified information have been made available to me; that I have returned all classified information in my custody; that I will not communicate or transmit classified information to any unauthorized person or organization; that I will promptly report to the Federal Bureau of Investigation any attempt by an unauthorized person to solicit classified information, and that I (have) (have not) (strike out inappropriate word or words) received a security debriefing.

SIGNATURE OF EMPLOYEE	DATE

NAME OF WITNESS *(Type or print)*	SIGNATURE OF WITNESS

NOTICE: The Privacy Act, 5 U.S.C. 552a, requires that federal agencies inform individuals, at the time information is solicited from them, whether the disclosure is mandatory or voluntary, by what authority such information is solicited, and what uses will be made of the information. You are hereby advised that authority for soliciting your Social Security Number (SSN) is Public Law 104-134 (April 26, 1996). Your SSN will be used to identify you precisely when it is necessary to certify that you have access to the information indicated above or to determine that your access to the information indicated has been terminated. Furnishing your Social Security Number, as well as other data, is voluntary, but failure to do so may delay or prevent you being granted access to classified information.

ADDENDUM TO SENSITIVE COMPARTMENTED INFORMATION
NONDISCLOSURE AGREEMENT IC FORM 4414

This addendum is required by the Office of the Director of National Intelligence to conform with two new federal statutes: the Financial Services and General Government Appropriations Act (Public Law 112-74); and the Whistleblower Protection Enhancement Act (WPEA) (Public Law 112-199). The WPEA was enacted into law on November 27, 2012, and strengthens protections for federal employees who disclose evidence of waste, fraud, or abuse. The WPEA modifies rules on the use of non-disclosure policies, forms, or agreements (NDAs) by government agencies. Until the IC Form 4414 is revised, WPEA requires each agreement to contain the following **statement**:

> ***"These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling."***

Controlling Executive Orders and statutory provisions are as follows:

- Executive Order No. 13526;
- Section 7211 of Title 5, United States Code (governing disclosures to Congress);
- Section 1034 of Title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military);
- Section 2302(b)(8) of Title 5, United States Code, as amended by the Whistleblower Protection Act of 1989 (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats);
- Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents);
- The statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code; and
- Section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. 783(b)).

_____ _____

Signature Date

_____

Print Name

The execution of this Addendum was witnessed by the undersigned who accepted it on behalf of the Department of Justice as a prior condition of access, or continued access, to Sensitive Compartmented Information.

WITNESS AND ACCEPTANCE: _____ _____

Signature Date

_____

Print Name