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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
JENNIFER DUCK, *Democratic Chief Counsel and Staff Director*

June 5, 2018

The Honorable Christopher A. Wray
Director
Federal Bureau of Investigation
935 Pennsylvania Ave NW
Washington, D.C. 20535

Dear Director Wray:

On May 30, 2018, the Senate Judiciary Committee invited former FBI Deputy Director Andrew McCabe to testify at an upcoming committee hearing. The hearing will examine a report compiled by the Department's Inspector General, and likely will explore topics that Mr. McCabe is uniquely qualified to address, such as his work on the Clinton e-mail investigation and his recent termination from federal service. The Committee requested that Mr. McCabe provide documents in advance of the hearing that his attorney has claimed support his client's allegations that his termination was improper.

On June 4, 2018, Mr. McCabe's attorney informed the Committee that Mr. McCabe signed a nondisclosure agreement (NDA) with the FBI that prevents him from providing the requested document to the Committee. He further sought immunity in exchange for his testimony and asserted his intention to invoke his Fifth Amendment right against self-incrimination without it. The Committee requested, and Mr. McCabe's attorney provided, a copy of the NDA.

I have written to various Executive Branch agencies, including the FBI, over the years about their use of non-disclosure agreements.¹ As I have pointed out repeatedly, no appropriated funds may be used to enforce an NDA that does not specifically allow for lawful, protected disclosures using specific language required by the law in each Congressional appropriations bill signed by the President.² The NDA Mr. McCabe signed does not include the legally required language to recognize FBI employees' rights to disclose any matter to Congress which they

¹ Letter from Charles E. Grassley, Chairman, U.S. Sen. Comm. on the Judiciary to James B. Comey, Jr., Director, Federal Bureau of Investigation (Feb. 4, 2016); Letter from Charles E. Grassley, Chairman and Dianne Feinstein, Ranking Member, U.S. Sen. Comm. on the Judiciary to Donald F. McGahn, Counsel to the President and Gary M. Stern, General Counsel, National Archives and Records Administration (Apr. 27, 2018).

² Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 744, 131 Stat. 135, 389 (2017).

believe constitutes a violation of law, rule, or regulation, or gross mismanagement, a gross waste of funds, or a substantial danger to public health and safety.³ Accordingly, please:

1. Notify Mr. McCabe's attorney that, in accordance with federal law, the NDA cannot restrict disclosures to Congress.
2. Explain why the FBI continues to use federal funds in violation of the appropriations restrictions for the drafting, execution, and enforcement of nondisclosure agreements that do not comply with the law.
3. Describe what steps you plan to take to ensure that the FBI's General Counsel's Office, the Office of Professional Responsibility, and all other divisions comply with these important legal requirements going forward? If none, please explain.
4. Describe what steps you plan to take to hold officials accountable for violating these funding restrictions by drafting non-compliant agreements in an effort to muzzle FBI employees? If none, please explain.

Thank you for your attention to this important matter. Please contact DeLisa Lay of my staff with any questions at (202) 224-5225.

Sincerely,



Charles E. Grassley
Chairman
Committee on the Judiciary

cc: The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary

The Honorable Rod Rosenstein
Deputy Attorney General
U.S. Department of Justice

The Honorable Michael Horowitz
Inspector General
U.S. Department of Justice

³ 5 U.S.C. § 2303(a).



FBI DISCIPLINARY PROCESS: DISCLOSURE OF INFORMATION TO ATTORNEYS

The FBI recognizes that, for you to receive effective assistance of counsel during an administrative inquiry, it may be necessary for you to disclose to your attorney information or materials derived from FBI files or obtained by virtue of your employment with the Bureau. Because much FBI information is by its nature very sensitive, the FBI and its employees have an obligation to protect that information from unauthorized disclosure to persons outside the FBI, even to attorneys representing FBI employees.

You are therefore reminded that, during the course of this process, you continue to be bound by federal laws and regulations prohibiting the unauthorized disclosure of FBI information and by the terms of the agreement you signed when you became an FBI employee in which you agreed never to divulge, publish, reveal or otherwise disclose any information or material from or relating to FBI files or any other information acquired by virtue of your official employment, duties, or status, without the written permission of the Director.

The following is a list of the types of FBI information you may not disclose to your attorney without prior authorization and the procedures you should use to obtain the necessary authorization to release the information to your attorney.

1. Classified information, whether marked or unmarked, whether written or oral, that is classified pursuant to the provisions of the Executive Order 12958.
2. Information protected from disclosure by the Privacy Act, which includes information in FBI files retrievable by an individual's name or other identifying data, including information pertaining to other FBI employees.
3. Information that reveals sensitive law enforcement, intelligence, or counterintelligence techniques, sources or methods; or that reveals the sensitive, confidential or proprietary techniques, sources, or methods of other agencies or government entities.
4. Information that would reveal grand jury material protected from disclosure by Rule 6(e) of the Federal Rules of Criminal Procedure.
5. Information that would reveal the identity of a confidential source or informant.
6. Information that relates to any sensitive operational details or the substantive merits of any ongoing or open investigation, inquest, probe, prosecution, appeal or case.
7. Information consisting of the proprietary information of another entity, including trade secrets.
8. Information pertaining to wiretaps or intercepts protected or regulated by Title III (18 U.S.C. §§ 2510-2520).
9. Information pertaining to currency transaction reports regulated or protected by 31 U.S.C. §§ 5311-5319.
10. Tax return information regulated or protected by 26 U.S.C. § 6103.
11. Information, the disclosure of which is prohibited by any other Federal statute or regulation.
12. Information, the disclosure of which would divulge opinions, recommendations, and advice generated in the decision-making process of the federal government.

If you believe that your attorney will require access to classified information to assist you in this matter, you must first contact the Internal Investigations Section for guidance in securing the appropriate security clearance for your attorney. Classified information may not be disclosed either orally or in documentary form unless and until your attorney has received a security clearance from the Department of Justice. If your attorney has an appropriate security clearance, he or she will be permitted to review classified documents only in FBI workspace so as to ensure that classified documents are not compromised. All oral communications with your attorney regarding classified information must take place in person in FBI workspace with appropriate safeguards.

If you believe that your attorney will require access to any information other than classified information that is derived from FBI files or obtained by virtue of your employment, you must request from the Internal Investigations Section in writing, authority to disclose such information, whether you are seeking to disclose the information orally or in document form. Your request should specify the nature of the information and its location in FBI files, if known, and should state the reason why you believe it is necessary to disclose the information. The decision on whether disclosure will be authorized will be based upon the nature of the information requested and your need for it. If the Internal Investigations Section consents to the disclosure, your attorney will be required first to sign the attached agreement not to disclose the information further.

You should sign this form and submit it to the Division Head or his/her designee for transmittal to Internal Investigations Section/Inspection Division, Room 11865, FBIHQ. The division will retain a copy for its records.

I have read the above information regarding the restrictions on disclosing FBI information to my attorney. I understand that I am bound by the restrictions set forth in this notice.

Employee's Signature

Date

Printed Name

263-HQ-

File Number (from bottom of Notification Form)

Name, Address and Telephone Number of Attorney